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 M/S SQUARES DISTRIBUTION & MARKETING SYSTEM (PVT) LTD. AGAINST M/S RECKITT BENCKISER PAKISTAN LIMITED FOR DECEPTIVE MARKETING PRACTICES

BY

Marryum Pervaiz, Riaz Hussain

Dated: June 29, 2019

1. BACKGROUND

1.1 M/s Squares Distribution & Marketing System (Pvt) Ltd. (the '**Complainant**') through its authorized representative, i.e. LEXIUM Attorneys at Law filed a complaint on December 04, 2018, before the Competition Commission of Pakistan (the **'Commission**') u/s 37(2) of the Competition Act, 2010 (the **'Act'**) against M/s Reckitt Benckiser Pakistan Limited (the '**Respondent**').

1.2 It was alleged in the complaint that the Respondent through its marketing campaign has been consistently disseminating false and misleading information to the consumers related to its product, Strepsils (the '**Product**'). It was alleged in the complaint that the Respondent a few years ago discontinued the use of medicinal ingredient, whereas, the Respondent has made no concerted effort to educate and inform the consumers regarding the discontinuance of the use of medicinal ingredient in the Product. In fact, the Respondent continues to represent, pack, advertise, market, distribute and sell the Product in the same manner as if it was a drug, whereas, it can only be characterized as a sweet/candy. It was, therefore, submitted that such conduct of the Respondent was capable of harming the business interest of the Complainant, which amounts to, *prima facie,* violation of Section 10 of the Act, i.e. Deceptive Marketing Practices.

1.3 Keeping in view of the above, the Commission initiated an enquiry in accordance with sub-section (2) of Section 37 of the Act by appointing Ms. Marryum Pervaiz, Joint Director (OFT) and Mr. Riaz Hussain, Assistant Director (OFT) as the enquiry officers (the '**Enquiry Committee**'). The Enquiry Committee was directed to conduct the enquiry on the issues raised in the complaint and to submit the enquiry report by giving its findings and recommendations, *inter alia*, on the following;

Whether the allegations leveled in the complaint constitute a, prima facie, violation of Section 10 of the Act?

2. COMPLAINT

2.1 The Complainant in its complaint made the following submissions:

2.2 That it is a company registered under the law of Pakistan. It is solely engaged in the distribution of medical products. The Distribution network of the Complainant extends to the entire territory of Pakistan. The instant complaint on behalf of the Complainant has been filed through Mr. Saami Ahmed Siddiqui, Director of the Complainant Company.

2.3 The instant complaint has been filed by the Complainant to prevent the Respondent from employing the deceptive marketing practices in the course of marketing and sale of its Product, which is subject matter of the instant complaint. The matter, being otherwise, of general public interest requires immediate action by the Commission.

2.4 The Respondent is a company registered under the Companies Act, 2017 and is principally engaged in the manufacturing and marketing of consumer and other allied products.

2.5 The Respondent carries out, *inter alia*, the business of manufacturing and marketing of the Product. To the extent of the Product as manufactured and marketed by the Respondent, the Complainant is engaged in the distribution of competing products in the relevant market of product used in relieving sore throats and coughs. The Competing products distributed by the Complainant, amongst others, include Dr. Koff syrup and Dr. Koff syrup (Honey). The said products are duly enlisted with the Drug Regulatory Authority of Pakistan (DRAP).

2.6 That the Respondent acquired the Product along with other over-the-counter medicines from an undertaking, Boots in the year 2005, while it was registered as pharmaceutical product with the DRAP. (Copy of the pharmacopeia guide evidencing registration of the Product with DRAP is attached as Annex-A).

2.7 It has submitted that upon acquisition of the Product, the Respondent deregistered the Product from the DRAP pharmaceutical drug and relaunched the Product under the same brand name "Strepsils".

2.8 The Complainant alleged that while manufacturing the Product, the Respondent initially include the medicinal ingredient and continued to manufacture, market and sell the Product as a drug. However, it has recently come to the notice of the Complainant that the Respondent a few years ago discontinued the use of the medicinal ingredient, whereas, the Respondent has made no concerted efforts to educate and inform the consumers regarding such discontinuance of the use of the medicinal ingredient in the Product. In fact, the Respondent continues to represent, pack, advertise, market, distribute and sell the Product in the same manner as if it was a drug, whereas, it can only be characterized as a sweet/candy.

2.9 It has further submitted that the efficacy of the Product being able to cure sore throats and coughs without the main medicinal ingredient is questionable. However, the Respondent continues to market the Product as an authentic cure for throat ailments. Hence, the Respondent has engaged itself in disseminating misleading information that is harmful to the public as well as business interest of the competitors in violation of Section 10 of the Act.

2.10 Since the Respondent has discontinued the use of medicinal ingredient in the manufacturing of its Product, it should consequently be barred from using the same brand name "Strepsils". This is due to the fact that for decades 'Strepsils' has been a well-known trademark in Pakistan as a drug for curing throat ailments. As long as the Respondent is allowed to continue to use the trademark 'Strepsils' for its non-medicated sweet/candy, it is highly likely that consumers will continue to associate it with drug for curing throat ailment. It may be noted that internationally the Respondent's parent company, Reckitt Benckiser Healthcare International Limited, in the sale of the

Product's counterpart internationally continues to add the medicinal ingredient in the manufacturing thereof. However, the Respondent was allowed to continue use of the brand name 'Strepsils', which carries a global reputation of effectively aiding in curing sore throat ailments and coughs. This would enable the Respondent to wrongly induced consumers into believing that the Product contains the medicinal ingredient and is resultantly just as effective in curing sore throat ailments as its internationally counterpart.

2.11 The Respondent is engaged in 'Deceptive Marketing Practices' by distributing false and misleading information to the consumers. The distribution of such information is also capable of harming the business interests of competing undertakings in violation of Section 10 of the Act by way of making the following false/deceptive claims on the packaging and other social media platforms of its Product such as:

i. *"Karain gallay the khich khich door" (From an television advertisement);*
ii. *"Instant relief – No itching, No scratching while you sing";*
iii. *"Quick relief, Melodious Voice!";*
iv. *"Suffering during cold and flu? Use Strepsils to provide effective relief from a sore throat";*
v. *"Having a sore throat and still wanna have ice cream? Try this";*
vi. *"Soothes in less than 10 seconds";*
vii. *"Searching for a solution for your sore throat? Search no more";*
viii. *"Ab gally ke kharish ko kero Bye Bye!".*

2.12 It was further submitted that the Respondent gets the Product manufactured and packaged from a confectionary brand, "Candy Land" belonging to Ismail Industries Limited thereby, the Respondent has failed to disclose the change in the formulation and the new status of the Product that, it is no more a pharmaceutical drug but rather a form of candy being manufactured by a third party. Furthermore, this leads to likelihood that the Product is not manufactured in a regulated environment fit for the production of a pharmaceutical drug. Hence, the Respondent is deceiving the ordinary consumer and its competitors by omitting to disclose its production methods. This in effect puts the competitors at a disadvantage where they have to comply with health standards prescribed by the DRAP while manufacturing pharmaceutical products.

2.13 It was further alleged that the Respondent has omitted to mention the sale tax on the packaging thereby representing that the Product is in fact a medicinal preparation with in meaning of Drug Act, 1976, and accordingly exempt from sale tax payment.

2.14 The Complainant submitted that the Product is placed with alternate medicines in all major pharmacies giving the impression that the pharmacists as well as the ordinary consumer are deceived by the marketing and packaging of the Product as pharmaceutical drug.

2.15 In view of the above, the Complainant submitted that Section 10 of the Act prohibits undertaking from entering into deceptive marketing practices and in term of Section 10(2) (a) & (b) deceptive marketing practices shall deemed to have been resorted to or continued if an undertaking resorts to:

(a) the distribution of false or misleading information that is capable of harming the business interests of another undertaking;
(b) *the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods.*

2.16 The Respondent has resorted to distribute misleading information and withholding material information that is capable of harming the business interest of the competitors. The distribution of misleading information or withholding of material information also tends to mislead consumers as to method or place of production, properties and quality of goods and as such lacks reasonable basis. It was further submitted that the Respondent has reached the acme of deception as it has deregistered itself from the DRAP, remove the medicinal ingredient from the Product and omitted to announce the changes in the formulation of the Product to the public at large whilst, falsely representing and marketing the Product as medicinal drug. It is, therefore, *prima facie*, obvious that the Respondent is involved in breach of the provisions of Section 10(2) (a) & (b) of the Act.

2.17 The mala fide intent of the Respondent can also be gleaned from the fact that the Respondent has intentionally omitted the source production of the Product from the consumers and its competitors. The evidence of such omission of manufacturing details can be seen from the packaging of the Product. The Complainant alleged that the omission on the part of the Respondent to provide material information to any ordinary consumer amounts to deceptive marketing on the part of the Respondent.

2.18 The Commission in the case of Proctor and Gamble Pakistan (Pvt.) Limited (2010CLD 1695) has noted that misleading information includes any information which is capable of giving wrong impression or idea, or is likely to lead to an error of conduct, thought of judgment, or which tends to misinform or misguide the consumer. It is an established view that it is not necessary that the deceptive information may cause actual deception, it is sufficient that the misleading information tends to cause deception amongst the ordinary consumer.

2.19 It was further submitted by the Respondent that the examination of the express and implied claims made in the advertisement by the Respondent and the overall net general impression created by such advertisements, marketing practices and positioning of the Product in the market by the Respondent in the mind of an ordinary consumer is that the Product is a medicinal Product capable of providing instant relief against throat ailments. Whereas, in fact, the Product is not a medicinal Product. Hence, the Respondent's aforesaid practices amount to deceptive marketing, which is in violation of Section 10 of the Act.

2.20 The Respondent submitted that despite removing the medicinal ingredient and deregistering the Product from DRAP, the continued use by the Respondent of the same brand name 'Strepsils' in a similar manner in its advertisement and marketing practices and claiming the same efficacy without publicizing the fact that the Product does not contain the medicinal ingredient any further is deceptive omission on the part of the Respondent. It tends to gravitate the consumers into believing that the Product still contain the same medicinal ingredient and efficacy as was introduced initially in the Pakistani market. This omission is willful on part of the Respondent, which constitutes deceptive marketing within the scope of Section 10 of the Act.

2.21 It has been submitted that the Commission in the Zong Order has held that the term consumer has referred to in Section 10 of the Act has to be constructed liberally in the widest sense so as to refer to ordinary consumer, which was distinguished from the concept of 'ordinary prudent man' as has evolved under contact law. It has further been held in the Zong Order that *"unlike the "ordinary prudent man" the thrust on ordinary diligence, cation duty of care and ability to mitigate on the part of the consumer would not be considered relevant factors" when looking at a deceptive commercial practice"*.

2.22 Furthermore, in PSO Order, the undertaking in that instance failed to publicize the fact that it had removed an essential additive from its products under question in the said Order. It was held by this Commission that such practices would greatly increase the likelihood of consumers to be deceived as they would be duped into believing that the concerned products still carried the added benefit and efficacy that they would if the additive was still present in the concerned products.

2.23 It has submitted that the marketing and packaging by the Respondent is a deceiving and fraudulent act that is surly bound to create confusion amongst the ordinary consumers. The said deceptive use not only lacks reasonable basis but is also fraudulent therefore these are not sustainable and/or justifiable.

2.24 In view of the above stated facts and circumstances, the Complainant respectfully prayed the Honorable Commission for the following reliefs:

i. Proceedings may please be initiated against the Respondent for contravention of Section 10 of the Act, in particular, Section 10(2) (a) & (b) of the Act;
ii. To restrains the Respondent from manufacturing, marketing and selling the Product under the brand name 'Strepsils';
iii. To Orders the Respondent, its agents, distributors, servants, dealers, affiliates, employees, any and all representatives requiring them to immediately remove from the market the Product its publications and material whatsoever;
iv. To restrains the Respondent, its agents, distributors, servants, dealers, affiliates, employees, any and all representatives permanently from indulging in deceptive marketing practices through marketing and selling its lozenges as a pharmaceutical drug;

v. Any other relief deemed fit and proper in the circumstances of the case may also be granted.

3. COMMENTS OF THE RESPONDENT

3.1 The complaint along with its annexures was forwarded to the Respondent for comments vide letter dated December 31, 2018. The Respondent through its legal counsel, Haroon Dugal Law Chambers, vide his letter dated January 12, 2019, requested for an extension in time of fifteen (15) days to file the comments. The Respondent was given an extension till January 31, 2019.

3.2 The Respondent filed its reply which is summarized as under:

3.3 It was submitted that the Complainant has no *locus standi* to file the complaint before the Commission as the Complainant is not a competitor of the Respondent in term of Section 10(2) (a) of the Act and cannot be effected by the alleged deceptive marketing practices employed by the Respondent. The Respondent submitted that for institution of a complaint under the aforesaid sub-section of the Act, it is essential to established that the Respondent has *indulged in the distribution of false and misleading information that is capable of harming the business interest of another undertaking.* The Complainant has no locus standi/grievance to make a complaint in its own right or on behalf of Himont Laboratories (Pvt.) Limited, who, to the best of its knowledge, are the proprietor, Intellectual Property mark holder and license holder of Dr. Koff products. The business of the Complainant and the Respondent are inherently different as the Complainant is a distributor and the Respondent is involved in manufacturing, marketing and sale of pharmaceutical and healthcare products.

3.4 The Respondent submitted that the Product is not a competing product of Dr. Koff syrup as the same is prescription medicine/therapeutic product whereas the Strepsils are over-the-counter lozenges used to sooth the sore throat. Therefore, the subject complaint is not maintainable under Section 10(2) (a) of the Act as the Complainant has failed to establish that its business interests are being prejudiced or affected by the Product.

3.5 The complaint is based on false and misleading facts and assertions and has been filed for ulterior motives just to harass the Respondent by attempting to draw a comparison between two totally different set of products. Dr. Koff syrups are therapeutic products which fall within the regulatory ambit of the DRAP and have to be mandatorily enlisted with DRAP. On the other hand, the Product being non-medicated lozenges are outside the regulatory ambit of DRAP.

3.6 The Respondent further submitted that the Complainant has failed to disclose necessary facts and information to the Commission which is itself a proof of the mala fide intention on part of the Complainant. The Complainant, through this complaint, tried to curtail the advancement of business of the Respondent and has attempted to drive it out of the market in order to capture its market share.

3.7 The Respondent submitted that the introduction of the Product in the market by it is fully in accordance with the law. Even after the promulgation of the DRAP Act, 2012 and the formation of DRAP and the subsequent changes in the regulatory framework of therapeutic goods in the country, the Product has continued to remain deregulated by virtue of being a non-medicated product.

3.8 It was submitted that the Product and all its variants clearly indicates in a legible font that the same are non-medicated lozenges effective for soothing and refreshing sore throat and it does not make any unsubstantiated claim that the Product is an effective cure for sore throat or cough.

3.9 The Respondent has not been engaged in the distribution of false and misleading information that could adversely impact the business of the Complainant in term of Section 10(2) (a) of the Act nor has same marketed the Product to the consumers by employing deceptive/misleading information lacking a reasonable basis under Section 10(2) (b) of the Act.

3.10 The Respondent submitted that Menthol lozenges are widely marketed for the relief of common cold symptoms and although they may have a soothing effect on sore throat, its main action is improvement of nasal airflow. Therefore, the Menthol is commonly added to cough syrups and lozenges, presumably to suppress coughing and not to cure the underlying causes. Various studies conducted on subjects suffering from nasal congestion associated with the common cold demonstrated that oral administration of menthol lozenges caused a sensation of improved airflow. Similarly, studies have also been undertaken to provide empirical evidence that sweet taste can suppress cough sensitivity and support the previously established position that menthol is enough on stand –alone basis to suppress cough sensitivity.

3.11 The particular variants of the Product marketed by the Respondent contains honey which has historically been used as a relaxant for sore throat. The sweet tasting Product of the Respondent is excellent for the suppression of cough providing symptomatic relief but is not a medicinal product as evident from its packaging that can cure cough. Accordingly, the Complainant has wrongly concluded that the Product claims to cure sore throat or that any conduct of the Respondent is capable or likely to deceive the consumers/public at large into believing that the Product is a cough relieving medicine.

3.12 The Respondent submitted that as evident from the scientific data and the pack of the Product, it has not employed any deceptive marketing practices or used a false statement of fact to market and sell its Product in the market to unknowing consumers. The claims as initiated by it have no rational basis.

3.13 The Respondent in its reply submitted that it is duly incorporated in Pakistan and the connection to Reckitt Benckiser Healthcare International Limited has wrongly been drawn. The Complainant has falsely and deliberately tried to create confusion between different products of different countries and accused the Respondent of deceiving the consumers by using the international reputation of 'Strepsils'.

3.14 The Respondent submitted that the entire complaint is based on baseless claims that have no legal standing. The Complainant has miserably failed to prove that it has contravened the provisions of Section 10 of the Act.

3.15 The Respondent submitted that since the Complainant has no legal or equitable right over the title of the product, Dr. Koff, it is reiterated that the Complainant has no legal authority and *locus standi* to institute the subjected complaint.

3.16 That it has not indulged in any deceptive marketing practices. The contents of Preliminary Objections & Submissions has reiterated here. Further, it has denied that the subject matter of the complaint is of general public interest or importance.

3.17 The Respondent clarified that it is principally engaged in manufacturing, import, marketing and sale of health, home care and hygiene product. The Respondent is also licensed and authorized to manufacture pharmaceutical grade products. The Respondent denied that Dr. Koff is a competing product of Strepsils.

3.18 The Respondent denied that the pharmacopeia extract which is applicable on pharmaceutical grade products is also applicable on the Product which contain no active pharmaceutical ingredients as is clearly evidenced by the ingredients stated on each pack.

3.19 It was submitted that de-registration was allowed to the Respondent after fulfillment of all codal formalities and satisfaction of the regulatory authorities.

3.20 The Respondent vehemently denied the allegation that it had initially added a pharmaceutical ingredient in the Product and marketed it as a drug which can cure sore throat ailments. The Respondent only claims that the Product provides symptomatic relief. It was also denied the Respondent that it has increased the price of the Product manifolds. The Product is sold from PKR 5 to PKR 9 per tablet whereas Dr. Koff is sold at PKR 10 per tablet.

3.21 The Respondent submitted that the manufacturing of the Product is taking place in lawful manners. The Respondent denied the allegation and submitted that no violation of any taxation law has taken place.

3.22 It was submitted by the Respondent that selling and placement of the Product at pharmacies does not tantamount to misrepresentation on part of the Respondent at all. Pharmacies sell a wide range of items including Soaps, OTC medications, herbal medicines, non-medicated products and personal care items. Hence, the generalized statement made by the Complainant holds no weight in the eyes of law.

3.23 The Respondent humbly prayed that the complaint made against it may be dismissed with exemplary costs and requested for any other relief that the Commission may deem fit to be extended to the Respondent

3.24 The Respondent's reply was forwarded to the Complainant for its rejoinder vide letter dated February 22, 2019. The Complainant, vide letter dated March 05, 2019, requested for an extension till 15th of March 2019 for submission of its rejoinder. Accordingly, the extension was granted to the Complainant.

3.25 The Respondent was asked to submit a copy of board resolution passed by the board of directors of the Respondent wherein, Mr. Zara Khalid was appointed and authorized to act as its true and lawful attorney vide latter dated March 28, 2019. The Respondent was also requested to submit original packaging of the Product used by it since its acquisition.

3.26 The Respondent vide its letter dated April 10, 2019 submitted copy of Minutes of the Meeting of the Board of Directors authorizing Ms. Zara Khalid to act as the lawful attorney of the company in the subject complaint. The Respondent also submitted original packaging of the Product.

3.27 After analyzing the comments/reply, a meeting was arranged with the Respondent for clarification of certain facts of the reply. Therefore, the Respondent was asked to send its authorized representative to attend a meeting on May 28, 2019 at the Commission's office along with the following documents:

- *Documentary evidence substantiating the claim **soothes in less than 10 seconds*** (Third party research report or any other document, reference or record)*
- *Trade Mark Search Report of "Strepsils" since 2006 to 2019.*
- *TVC advertisement of the product "Strepsils" since 2006 to 2019.*
- *Packaging material of "Strepsils" since its acquisition from M/s Boots.*

3.28 The Respondent vide letter dated May 27, 2019 requested to reschedule the meeting on any other convenient date preferably to a date in the second week of June, 2019. Accordingly, the meeting was rescheduled and the Respondent was asked to attend meeting on June 12, 2019.

3.29 A meeting was held with the representatives of the Respondent on June 12, 2019 wherein, the Respondent submitted the required documents mentioned in para 3.27 *ibid*.

4. REJOINDER BY THE COMPLAINANT

4.1 The Complainant's rejoinder to the Respondent's reply was received through letter dated March 14, 2019. The rejoinder contained para-wise comments to the reply as summarized below:

4.2 The Complainant denied the assertions made by the Respondent in its reply. In the first instance, the Complainant reiterated the submissions made by the Respondent. It was submitted that the Respondent has provided vague reply, ostensibly intentionally, to

certain specific statements made by the Complainant in the complaint. The Respondent has provided vague replies to the following specific averments:

(i) In paragraph 2.12 *ibid*, the Complainant avers that the Respondent gets the Product manufactured from a confectionary brand Candyland. The Respondent has not provided any specific reply to the said statement.

(ii) In paragraph 2.13 *ibid*, the Complainant avers that the Respondent has intentionally omitted to mention the sales tax on packaging thereby representing that Product was, in facts, a drug and exempted from the payment of sales tax. The Respondent has not provided any specific response to the said statement.

4.3 The Complainant submitted that in addition to the above contention, the Respondent has set-up its defense through an unauthorized person, hence, the same should be dismissed forthwith. It was submitted that the General Power of Attorney dated June 06, 2018 is defective as it is not duly stamped. Furthermore, the stamp paper does not describe the purpose of its issuance and the description of the attorney in whose favor it was to be issued. Particularly, and more importantly, the stamp paper used for the General Power of Attorney predates the date of resolution passed by the Board of Directors of the Respondent on May, 23, 2018. Moreover, the extract of the resolution dated May 23, 2018 has not been placed on record, which casts doubts on the authority of the person executing the General Power of Attorney dated May 23, 2018. The defense submitted in purported exercise of power granted through the said attorney is unlawful and is, accordingly, liable to be dismissed.

4.4 The Complainant submitted that the Respondent has expressly admitted that it was engaged in the sales and marketing of the Product. The activities of sales and marketing are in direct competition with marketing and distribution activities undertaken by the Complainant. The Complainant submitted that without prejudice to the forgoing contention, the Complainant is also in direct competition with the Respondent in relation to the market in question, i.e., product meant to relieve sore throats and cough. Even otherwise this Honorable Commission has the power to independently proceed with the instant complaint if is of the opinion that the activities, undertaken by the Respondent, were in breach of the provisions of Section 10 of the Act.

4.5 It was further submitted that Dr. Koff is a herbal product meant to cure cough. The Respondent in its reply had admitted that the ingredients used in the Product are used to suppress cough. In fact, the Respondent has supported this statement with research papers which were annexed with reply. In view thereof, the objection raised by the Respondent in paragraph under reply was incomprehensible.

4.6 The Complainant submitted that the Product consist of extracts like peppermint oil and menthol that can only be obtained through a pharmacopial process in a controlled environment. Whereas, the Respondent has apparently manufactured the Product using these extracts in an undisclosed production environment thereby misleading the consumers as to the place of production, properties and quality of the Product.

4.7 The Complainant pointed out that the Commission should take notice of the Respondent's tacit admission that it is in competition with the Complainant in so far as a reduction in Respondent's market share would lead to enhancement in share of the competing product being marketed and sold by the Complainant.

4.8 The Complainant submitted that the production, marketing and sales of the Product by the Respondent was in contradiction of Section 10(2) (a) and (b) of the Act. The Complainant has specifically denied that the Respondent has not made any unsubstantiated claim with respect to the Product. It was submitted that the word 'non-medicated lozenges' appear in a very fine print on the box of the Product only. Considering the market of the Product, it is highly unlikely that the consumers purchases the entire box of the Product at any given point in time. Even otherwise, the overall marketing and sale methods adopted by the Respondent constitute deceptive marketing practices on the part of the Respondent.

4.9 Furthermore, the Complainant highlighted that the statement made by the Respondent in para 3.18 *ibid*, contradicts the Respondents alleged claims that the Product only soothes and refreshes sore throat. The Respondent stated that the Product does not affect sore throat but it only causes a sensation of improved nasal airflow. The Respondent supported this alleged claim with a research paper, however, the consumers cannot be deemed to have knowledge of such medical research. It was submitted that after removal of medicinal ingredient from the Product, the Respondent was obliged to educate the consumers qua the material changes in the composition, quality, method or place of production of the Product and the consequent results thereof, whereas, Respondent had failed to provide any material in support thereof. This demonstrate that the Respondent is engaged in distribution of false and misleading information in breach of Section 10(2) (a) and (b) of the Act. The Complainant reiterated that the manner in which the Product is marketed and sold to the consumer is deceptive as stated in the contents of the complaint.

4.10 The Complainant pointed out that the alleged research paper submitted by the Respondent with its reply pertains to a research conducted to assess the results of honey as a cough cure in children aged between 2 and 15 years as opposed to a certain medicinal ingredient usually administrated to children to cure cough. The research does not reveal as to how honey can cure sore throat, in particular, when honey is mixed with pharmacopial ingredients like menthol, peppermint and lemon oil. In any case, failure on Respondent's part to educate and inform the consumers as to the efficacy of the Product after removal of the medicinal ingredient from the Product is at the core of deception caused by the Respondent.

4.11 The Complainant again highlighted that the Respondent, has not ceased use of the trademark 'Strepsils' after altering its composition, quality, method and place of production and converting it into a non-medicated product. It was submitted that the trademark of Strepsils has a worldwide reputation as throat curing lozenges. In fact, in Pakistan as well for over (3) decades, the Product was marketed and sold as medicinal product. The Complainant has also submitted search report of the trademark (Strepsils),

reveals the different packaging used by the Respondent and its predecessor –in interest in Pakistan since 1975. The Complainant submitted that the reputation of the Product in Pakistan and elsewhere was deep-rooted in the minds of the consumers as to cure sore throat and cough. The Respondent has not taken any steps to remove this impression from the minds of the ordinary consumers after the removal of the medicinal ingredient after altering its composition, quality, method and place of production and converting it in to a non-medicated product. Thus, the Respondent is engaged in distribution of false and misleading information in violation of Section 10 (2) (a) and (b) of the Act.

4.12 The Complainant submitted a reference to the Respondent's webpage (www.rb.com/about-us/rb-pakistan) which clearly reveals that the Respondent is registered in Pakistan as a subsidiary of Reckitt Benckiser plc, UK, which is part of the Reckitt Benckiser Group, plc, UK.

4.13 The Complainant submitted that the reply of the Respondent on merits to the contents of the complaint appears to be repetition of the frivolous objections raised by it under the heading ''Preliminary Objections and 'Preliminary Submissions' in its reply, which has vehemently denied in terms of submissions made by the Complainant.

4.14 Prayers of the Respondent were also requested to be rejected based on being unreasonable.

4.15 Finally, the Complainant vehemently denied the submissions made by the Respondent and reiterated its prayers.

5. ANALYSIS

5.1. Prior to carrying out the analysis, it is important to recall the issues at hand. The undersigned enquiry officers were given the mandate to conduct an enquiry about 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 conduct of the Respondent is capable of harming the business interests of other undertakings in, *prima facie,* violation of Section 10(1) in general, and in particular, Section 10(2)(a) of the Act.

(ii) Whether the Respondent is disseminating false and misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, properties, suitability for use and quality that are subject matter of this enquiry report in, *prima facie,* violation of Section 10(1) in general and in particular, Section 10(2)(b) of the Act.

5.2. Furthermore, it is important to define various terms used in the pharmaceutical industry, such as drug, alternative medicine/drug and health & over-the-counter (OTC) products. The first Drugs Act was passed in Pakistan in 1976 with the aim of regulating the manufacture, storage, distribution, sale, import and export of drugs.

5.3. The Drugs Act, 1976 defines drug[1] as:

i. *any substance or mixture of substances that is manufactured, sold, stored, offered for sale or represented for internal or external use in the treatment, mitigation, prevention or diagnosis of disease, an abnormal physical state, or the symptoms thereof in human beings or animals or the restoration, correction, or modification of organic functions in human beings or animals, not being a substance exclusively used or prepared for use in accordance with the ayurvedic, unani, homoeopathic or biochemic system of treatment except those substances and in accordance with such conditions as may be prescribed;*
ii. *abortive and contraceptive substances, agents and devices, surgical ligatures, sutures, bandages, absorbent cotton, disinfectants, bacteriophages, adhesive plasters, gelatin capsules and antiseptic solutions;*
iii. *such substances intended to be used for the destruction or repulsion of such vermin, insects, rodents and other organism as cause, carry or transmit disease in human beings or animals or for disinfection in residential areas or in premises in which food is manufactured, prepared or kept or stored;*
iv. *such pesticides as may cause health hazard to the public;*
v. *any substance mentioned as monograph or as a preparation in the Pakistan Pharmacopoeia or the Pakistan National Formulary or the International Pharmacopoeia or the British Pharmacopoeia or the British Pharmaceutical Codex or the United States Pharmacopoeia or the National Formulary of the United States, whether alone or in combination with any substance exclusively used in the unani, ayurvedic, homoeopathic or biochemic system of treatment, and intended to be used for any of the purposes mentioned in sub-clauses (i), (ii) and (iii).*

5.4. Furthermore, Section 23(1)(h) of the Drug Act, 1976 defines import, manufacture and sale of drug[2] as:

(1) No person shall himself or by any other person on his behalf-
"import, manufacture for sale, or sell any substance, or mixture of substances, which is not a drug but is presented in a form or a manner which is intended or likely to cause the public to believe it to be a drug;"

5.5. Further legislation took place and a new law was passed in November 2012 for the establishment of the Drug Regulatory Authority of Pakistan (DRAP) which is known as DRAP Act, 2012 (the **"D-Act").** The aim of this D-Act is to provide for effective coordination and enforcement of the Drugs Act, 1976 and to bring harmony in inter-provincial trade and commerce of therapeutic goods.

5.6. The DRAP Act, 2012 defines Alternative Medicine/Drug[3] as:

[1] http://www.dra.gov.pk/docs/TheDrugsAct1976111115F.pdf
[2] http://www.dra.gov.pk/docs/TheDrugsAct1976111115F.pdf
[3] http://www.dra.gov.pk/docs/DRAP%20Act.pdf

"a product used exclusively in Homeopathic, Unani, Ayurvedic, Biochemic, Chinese or other traditional system of treatment"

5.7. According to the DRAP Act, 2012, Health & OTC[4] Products (non-drugs) include and are defined as:

"probiotics and disinfectant, nutritional products, food supplements, baby milk and foods, medicated cosmetics, medicated soaps and medicated shampoos; and
OTC mean over-the-counter non-prescription products."

5.8. After review of the definitions given in Drugs Act, 1976 and DRAP Act, 2012, let us recall Section 10 of the (Competition) Act which prohibits deceptive marketing practices:

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

(2) The deceptive marketing practices shall be deemed to have been resorted to or continued if an Undertaking resorts to—

(a) the distribution of false or misleading information that is capable of harming the business interests of another undertaking;
(b) the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;
(c) false or misleading comparison of goods in the process of advertising; or
(d) fraudulent use of another's trademark, firm name, or product labelling or packaging.

I. Maintainability of the Complaint:

5.9. One of the objections raised by the Respondent pertinent to the complaint was its maintainability under provisions of the Act. The complaint was submitted by M/s Squares Distribution and Marketing System (Pvt.) Limited which is a private limited company and working in the field of distribution of various pharmaceutical products. It was submitted by the Respondent that the Complainant had no *locus standi* to file a complaint with the Commission as it is not a competitor of the Respondent in term of Section 10 (2) (a) of the Act and cannot be affected by the alleged 'deceptive marketing practices'.

5.10. It was further submitted that complainant has no *locus standi*/grievance to make a complaint in its own right or on behalf of Himont Laboratories (Pvt.) Limited, who, to its best knowledge, are the proprietor, intellectual property mark holder and also license

[4] http://www.dra.gov.pk/docs/DRAP%20Act.pdf

holder of Dr. Koff. The Respondent further submitted that the business of the Complainant and the Respondent are inherently different as the Complainant is a distributor whereas the Respondent is involved in the manufacturing, marketing and sales of pharmaceutical and health care products.

5.11. It is presented in this regard that as per Section 37(2) of the Act, read with Regulation 16 of the Competition Commission (General Enforcement) Regulations, 2007 (the '**GER**'), the Commission may initiate an inquiry *"on receipt of a complaint from an undertaking or a registered association of consumers under regulation 17"*. Whereas the term "*undertaking*" has been defined by Section 2(q) of the Act in the following words:

> *"any natural person or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust, or other entity in any way engaged,* ***directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association or undertakings****."*

5.12. Therefore, it can safely be established that as per the aforementioned provisions of the Act, the Complainant falls in the category of an "*undertaking*" and hence, can file a complaint with the Commission against an undertaking. Furthermore, the Complaint also fulfilled all the requirements laid down under Regulations 18 and 19 of the GER. Consequently, it is hereby concluded that the complaint was legally justified and could be pursued for the purpose of initiation of the inquiry. Since the Respondent is engaged in sales and marketing of the Product and these activities are in direct competition with distribution and marketing activities undertaken by the Complainant.

II Overall Net Impression of the Respondent's Marketing Campaign:

5.13. In the subsequent sections, we will deliberate on the merits of the complaint.

5.14. In order to determine instance of deception in any marketing material, the main focus of the Enquiry Committee, as per the general practice, is to evaluate its "net general impression". The Canadian Competition Commission, according to its Competition Act, states *"To determine whether a representation is false or misleading, the courts consider the "general impression" it conveys, as well as its literal meanings"*

5.15. The Complainant in the instant matter has primarily alleged, the continued use of the brand name 'Strepsils' is deceptive and causes consumers to be misled as the Respondent has discontinued the use of medicinal ingredient in the Product which was initially presented in the Product. Consumers are under the impression that the Product is sold with the medicinal ingredient and therefore will have the benefits which are associated with it. Also, the Complainant has submitted that the discontinuance of the medicinal ingredient was concealed and intentional.

5.16. It has also alleged that the Respondent acquired the Product along with other (OTC) medicines from the Company Boots in year 2005, while it was registered as pharmaceutical product. Upon its acquisition, the Respondent deregistered the Product

with the DRAP as pharmaceutical product and relaunched the Product under the same brand name 'Strepsils'.

5.17. The Complainant further alleged that the Respondent initially included the medicinal ingredient and continued to manufacture, market and sell the product as drug. However, later on it has discontinued the use of medicinal ingredient, whereas no concreted efforts has been made by the Respondent to educate the consumers that the Product is no more effective for curing the throat ailments.

5.18. The Complainant also alleged that the Respondent's parent company, in the sale of the Product's counterpart internationally continues to add the medicinal ingredient in the manufacturing thereof. Allowing the Respondent to continue to use the brand name 'Strepsils', which carries a global reputation of effectively aiding in curing throat ailments and coughs, would enable the Respondent to wrongly induce consumers into believing that the Product contains the medicinal ingredient and is resultantly just as effective in curing throat ailments as its internationally counterpart.

5.19. The Complainant submitted that the Product is placed with alternate medicines in all major pharmacies giving the impression that the pharmacists as well as the ordinary consumer are deceived by the marketing and packaging of the Product as pharmaceutical drug.

5.20. Based on the above mentioned allegations the Complainant alleged that the Respondent engaged in 'deceptive marketing practices' by distributing false and misleading information to the consumers such information is also capable of harming the business interests of competing undertakings in violation of Section 10 of the Act by way of making the following false/deceptive claims on the packaging and other social media platforms of its Product:

i. *"Karain gallay the khich khich door" (From an television advertisement);*
ii. *"Instant relief – No itching, No scratching while you sing";*
iii. *"Quick relief, Melodious Voice!";*
iv. *"Suffering during cold and flu? Use Strepsils to provide effective relief from a sore throat";*
v. *"Having a sore throat and still wanna have ice cream? Try this";*
vi. *"Soothes in less than 10 seconds";*
vii. *"Searching for a solution for your sore throat? Search no more";*
viii. *"Ab gally ke kharish ko kero Bye Bye!".*

5.21. In response to the aforesaid allegations, the Respondent denied the allegations made in the complaint. It was submitted by the Respondent that the Complainant has failed to make any case against it on account of 'deceptive marketing practices' under Section 10 of the Act, whether through distribution of false or misleading information to consumers or through information lacking reasonable basis relation to method or place of production, properties and suitability for use or quality of goods being sold by it.

5.22. The Respondent stated that they acquired the Product from M/s Boots by end of year 2006 and at the time of acquisition the Product was being sold as pharmaceutical drug under the regulatory ambit of DRAP. Soon after the acquisition, they have applied for change of proprietorship of the trademark 'Strepsils' with the Trade Mark Registry. The Trade Mark Registry upon a request on November 04, 2006 has registered it as subsequent proprietor of the trademark 'Strepsils' on February 26, 2007. (**Copy of the Trademark certificate is attached as Annexure-A**).

5.23. The Respondent further submitted that they have applied for deregistration of the Product with the DRAP soon after its acquisition and on April 10, 2007 the Product was deregistered by the DRAP and allowed it to use the brand name Strepsils for the food products as confectionary manufactured and marketed under the Pure Food Act. The DRAP allowed deregistration of the Product with certain conditions that;

i. No therapeutic claim for treatment, prevention, mitigation, symptoms or cure of diseases shall be made.
ii. The words, expressions, form and manner of presentation shall not violate section 23(1) (h) of Drug Act, 1976.
iii. A disclaimer that the Product is non-medicated shall be printed in Urdu and English versions for the awareness of general public.
iv. No pharmacopoeial ingredient shall be added in the food product.

5.24. It was submitted by the Respondent that the Product and all its variants clearly indicate in a legible font that the same are non-medicated lozenges effective for soothing and refreshing sore throat and it does not make any unsubstantiated claim that the Product is an effective cure for sore throat or cough.

5.25. The Respondent stated that menthol lozenges are widely marketed for the relief of cold symptoms and although they may have a soothing effect on sore throat, its main action is improvement of nasal flow. Therefore, menthol is commonly added to cough syrups and lozenges, presumably to suppress coughing and not to cure the underlying causes.

5.26. The Respondent submitted that particular variant of the Product marketed by it contains honey which has historically been used as relaxant for sore throat. The sweet tasting Product of the Respondent is excellent for the suppression of cough providing symptomatic relief but is not a medicinal product as evident from its packaging. The Complainant wrongly concluded that the Product claims to cure sore throat.

5.27. The Respondent submitted that as evident from the scientific data and the pack of the Product, it has not employed any deceptive marketing practices or used a false statement of fact to market and sell its Product in the market to unknowing consumers. The claims as initiated by it have no rational basis.

5.28. In pursuit of the above, we will examine the varied portions of marketing material of the Respondent on its product packaging, website and on other social media forums.

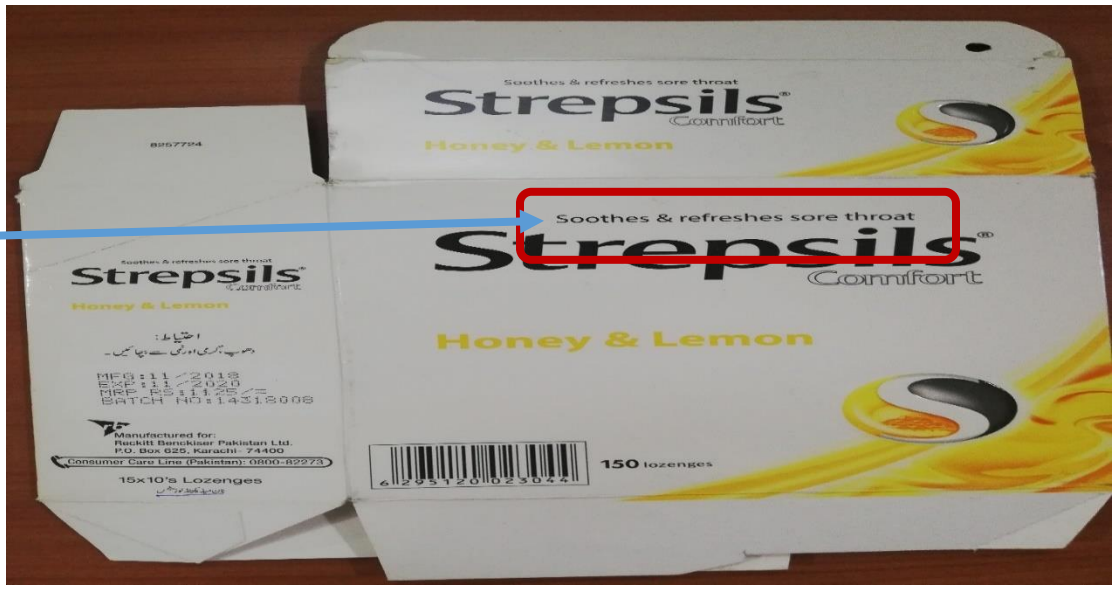
5.29. In this regard, it is also pertinent to know the formation of the subjected Product 'Strepsils'.

5.30. The Product contains menthol, which commonly used in cough syrups and lozenges, presumably to suppress coughing and not to cure the underlying causes. The main action of menthol is improvement of nasal flow. The Respondent submitted a study report which was conducted on subjects suffering from nasal congestion associated with the common cold, demonstrated that oral administration of menthol lozenge caused a sensation of improved airflow[5]. Similarly, studies have also been undertaken to provide empirical evidence that sweet taste can suppress cough sensitivity and support the previously established position that menthol is enough on stand-alone basis to suppress cough sensitivity.

5.31. The particular variant of the Product marketed by the Respondent contains Honey which has historically been used as a relaxant for sore throat. The sweet tasting products are excellent for suppression of cough providing symptomatic relief[6]. The ingredients used in the Product is given in the below table:

Ingredients	Quantity/Lozenge (mg)
Menthol	2.00
Terpene less Lemon Oil	2.36
Peppermint Oil	0.59
Tartaric Acid	23.00
Honey	100.89
Edicol Tartrazine	0.019
Ascorbic Acid	6.91
Sodium Ascorbate	3.09

5.32. Images of the Product packaging are given below:



[5] https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.2042-7158.1994.tb03871.x
[6] https://jamanetwork.com/journals/jamapediatrics/fullarticle/571638

5.33. If we look into the packaging of the Product, it can be clearly viewed that the Respondent made the following claims on its product packaging:

(i). *Soothes and refresh sore throats*
*(ii) Soothes in less than 10 seconds**

5.34. The Complainant submitted that the Respondent marketed its Product as authentic cure for throat ailments and without medicinal ingredient, the efficacy of the Product being able to cure sore throats and cough is questionable. However, the Respondent never used the word '**cure**' on its product packaging. The Respondent only claimed that the Product has an ability to soothes and refresh sore throat. The medical dictionary defines the term 'sore throat'[7] as;

> *Sore throat, also called pharyngitis, is a painful inflammation of the mucous membranes lining the pharynx. It is a symptom of many conditions, but most oftenis associated with colds or **influenza**. Sore throat may be caused by either viral or bacterial infections or environmental conditions. Most sore throats heal without complications, but they should not be ignored because some develop into serious illnesses.*

5.35. It is clear from the definition that sore throat is a symptom of many conditions, but most often is associated with colds or influenza. The common remedies used for the treatment of sore throat are gargling with a salt water, the use of throat sprays or lozenges and humidifiers. The free dictionary defines the term 'soothes'[8] as;

> ***1.*** *To ease or relieve (pain, for example).*
> ***2.*** *To bring comfort, composure, or relief*

5.36. The Respondent submitted that its Product contains menthol which is widely marketed for the relief of common cold symptoms and although they may have soothing effect on sore throat, the main action of menthol is improvement of nasal flow. The Respondent further submitted that the particular variant contains honey which has historically been used historically as relaxant for sore throat, however, the research papers submitted by the Respondent reveals that the study was conducted to assess the effects of honey as a cough relaxant in children aged between 2 to 18 years only.

5.37. Furthermore, the DRAP, after deregistration of the Product, clearly directed the Respondent that the *Product shall not be marketed with any therapeutic claim for treatment, prevention, **mitigation**, symptoms or cure of diseases*. The DRAP further directed the Respondent to put a disclaimer on product packaging that the Product is non-medicated.

5.38. The medical dictionary defines the term 'mitigation'[9] as;

> *"To reduce the intensity of an effect; alleviate."*

5.39. The Respondent has made a claim that the Product soothes the sore throat, which means that the Product mitigates or in another words 'reduce the intensity of an effect' which is a therapeutic claim prohibited under section 23 (1) (h) of Drugs Act, 1976 for non-drug products.

[7] https://medical-dictionary.thefreedictionary.com/sore+throat
[8] https://www.thefreedictionary.com/soothes
[9] https://medical-dictionary.thefreedictionary.com/sore+throat

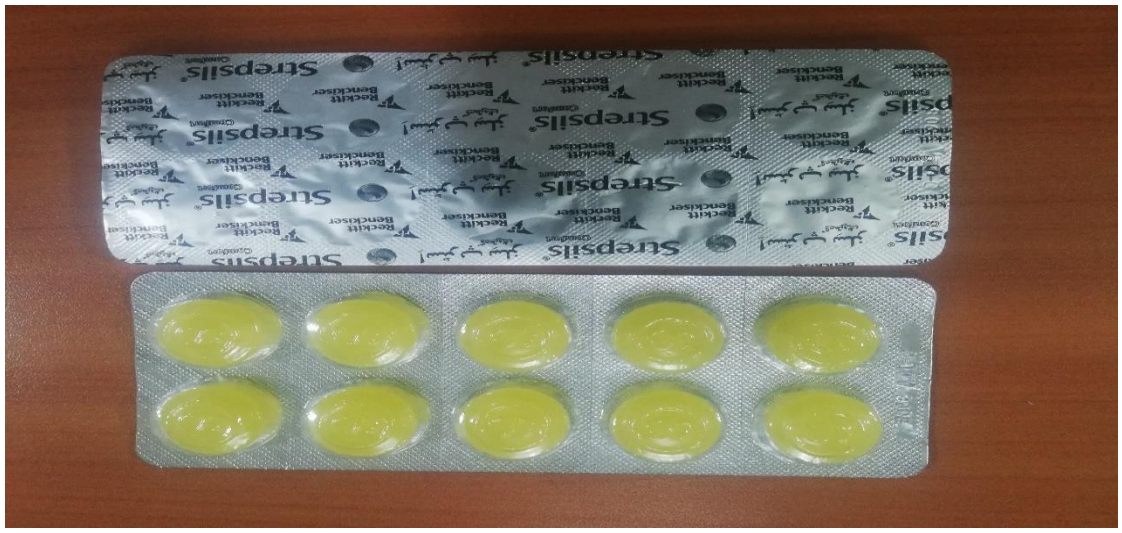
5.40. In view of above, it is clear that the claim 'soothes and refresh sore throat' is actually a therapeutic claim made by the Respondent in its marketing campaign. However, in the absence of a medicinal ingredient in the Product, the use of such kind of therapeutic claim mislead the consumers into believing that the Product is still a drug and effective in curing throat ailments.

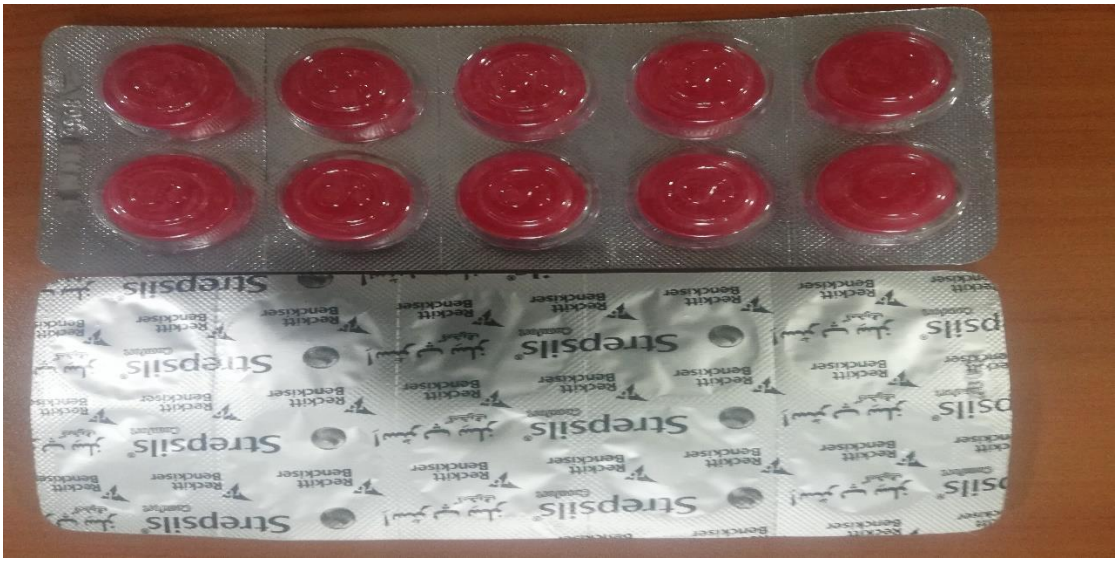
5.41. The Complainant submitted that the Respondent acquired the product along with other Over-the-counter medicines from the company, boots in the year 2005, while it was registered as pharmaceutical product. However, the Respondent submitted that it had acquired the Product on November, 2006 and deregistered it with the DRAP on April, 2007. From the submission of the Respondent, it is clear and obvious that the Product was initially registered as drug/medicine with the DRAP and a medicinal ingredient was used for its composition.

5.42. The Respondent submitted that it has made efforts to inform the general public that the Product is no more a medicine/drug by reshaping its product packaging also placed a fine print both in Urdu and English language, with a legible font size, that the Product is non-medicated. The Respondent has also submitted that after deregistration of the Product, no therapeutic claim was made in any of its marketing campaign. However, it has been observed that the fine print/disclosure, given on its product packaging, is negligible in term of font size.

5.43. It is pertinent to mention here that the word 'non-medicated lozenges' appear in very small fine print on the box of the Product instead of each strip packed inside the box. Moreover, it is highly unlikely that the consumer purchases the entire box of the Product at any given point and time. The Product is available in a box of 12 strips and usually, the consumer purchases single strip of the Product at any given point and time. It is also important to note that these strips are available in sub-packaging. The snapshots of the Product placement at pharmacies are given below:

5.44. The relevant images of the Product strips without required disclosures are given below:





5.45. Therefore, in light the above, it can be concluded that the Respondent has not made concrete efforts to inform/educate the consumers regarding the discontinuation of medicinal ingredient in the Product.

5.46. The Respondent has also made a claim, "*soothes in less than 10 seconds**", on its Product packaging. The Respondent was asked to provide documentary evidence to substantiate the claim as it was mentioned that the claim was based on third party research report. The Respondent submitted a copy of the third party research report which was conducted by M/s Nielsen Pakistan on May 31, 2016.

5.47. The core purpose of the study was to evaluate the overall product acceptability of one of the newly launched variant of the Product namely, Strepsils Vitamin-C with Honey & Lemon. The new Honey & Lemon has been reformulated by dialing up the menthol content, and adding Vitamin-C, so as to strengthen medicinal equity and launch a quantifiable claim on the variant that it soothes throat better/faster than the current Honey and Lemon formulation.

5.48. In the study report two different formulation of the Product with 2.0mg & 3.0mg menthol content were tested. During the study face to face interviews were conducted and a designed question was asked to the participants to evaluate the soothing or cooling effect of the new variant. The study results revealed that the average time recorded for the 2.0mg formulation was 7.83 seconds. Thus, the claim of the Respondent, based on the third party research report, found true, hence no deception on part of the Respondent specifically to the claim "*soothes in less than 10 seconds*".

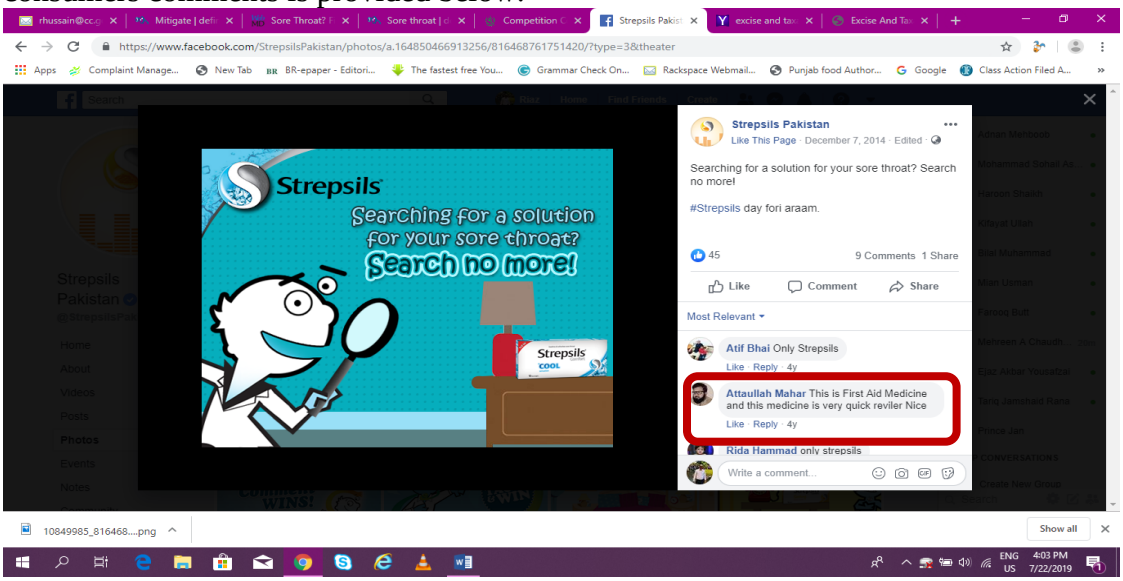
5.49. Moreover, the Complainant has submitted various other advertisement contents pertains to the social media campaign of the Respondent. The Enquiry Committee conducted an online research to find out the social media pages of the Respondent. During the research a Facebook page was found with the name of https://www.facebook.com/StrepsilsPakistan/. The Respondent was asked to authenticate/verify the above mentioned link that either it belongs to the Respondent or not. The Respondent, on July 26, 2019 via email, confirmed that the above mentioned

link has been managed by it through its designated agency namely, Adcom Zenith Optimedia.

5.50. Therefore, the Enquiry Committee decided to assess the contents of advertisement shared on the Respondent's Facebook page. The Respondent created its Facebook Page on May 04, 2011 and started advertising its Product. A timeline photo was shared by the Respondent on its Facebook page, https://www.facebook.com/StrepsilsPakistan/, by stating that if you are 'searching for a solution for your sore throat? Search no more'

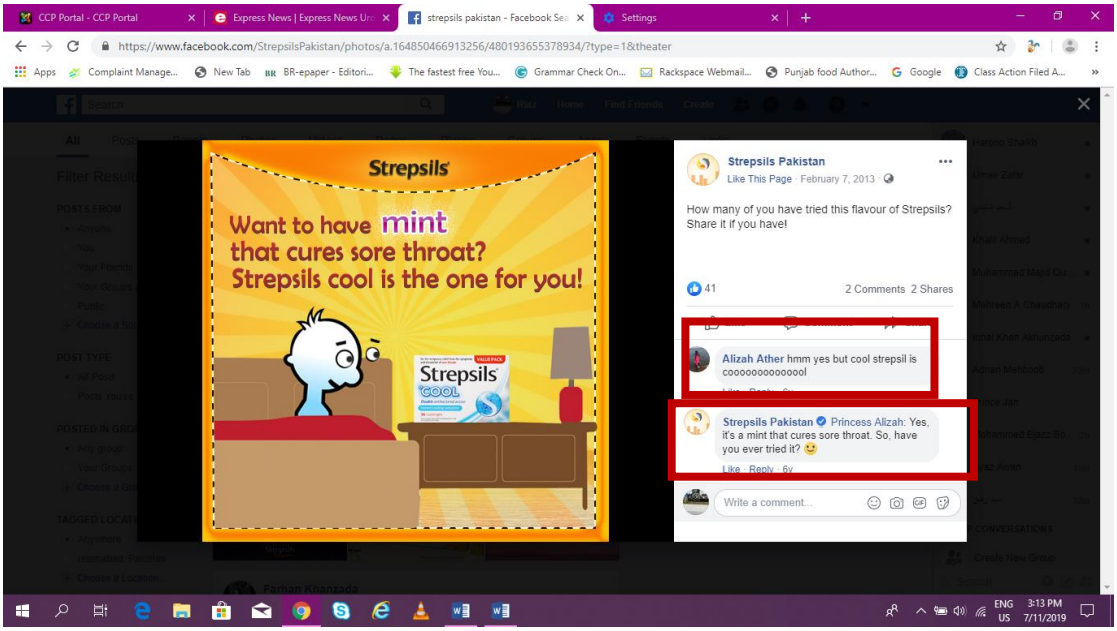
However, the Respondent, in its reply, submitted that the Product provides only symptomatic relief for sore throat rather than its solution. Therefore, the claim of the Respondent on its marketing material that the Product provides **solution** for sore throat is deceptive in nature.

5.51. The same post was shared on December 07, 2014, which stated *"Searching for a solution for you sore throat? Search no more!*" The relevant image along with consumers comments is provided below:



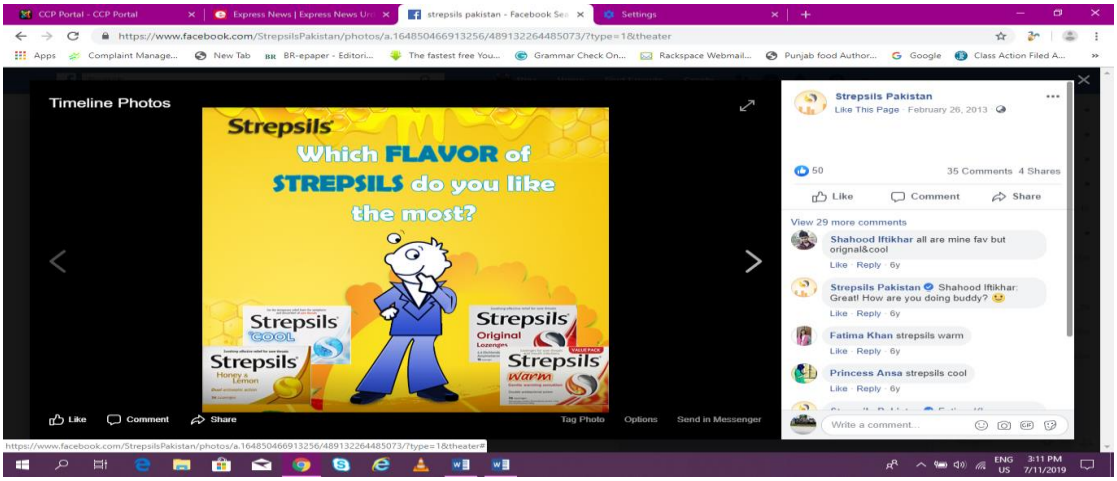
5.52. On response to the Respondent post Mr. Attaullah Mahar commented and stated that "*This is first aid medicine and this medicine is very quick reliever Nice*". It is clear from the post that the ordinary consumer is not aware that the Product is no more medicine/drug to provide solution or to cure sore throat. The Complainant, in its complaint, also submitted that after discontinuation of medicinal ingredient in the Product, the Respondent has not made concerted efforts to educate and inform the consumers regarding such discontinuance of the use of medicinal ingredient. It is clear from this post that the ordinary consumer was not informed/educate by the Respondent regarding such discontinuance of medicinal ingredient in the Product.

5.53. Another post was shared on February 07, 2013, which stated, "*Want to have mint that **cures** sore throat? Strepsils cool is the one for you!"*. The relevant image is provided below:



In this post the Respondent asked a question to its followers that *"How many of you have tried this flavor of Strepsils? Share it if you have!"*. On of the follower respond over that *"hmm yes but cool Strepsils is cooooool"*. The Respondent again respond to the follower that *"Yes, it's a mint that cures sore throat, so, have you ever tried it?"*.

5.54. On February 26, 2013, another post was shared by the Respondent by asking a question to its followers by saying that *"which flavor of Strepsils do you like the most?"*. The Respondent shared the images of various variants of its Product including Strepsils Original, Strepsils Warm, Strepsils Cool and Strepsils Honey & Lemon which were initially available in the market. However, only two variants of the Product are currently available in the market. The Relevant timeline image shared by the Respondent on its Facebook page is given below:

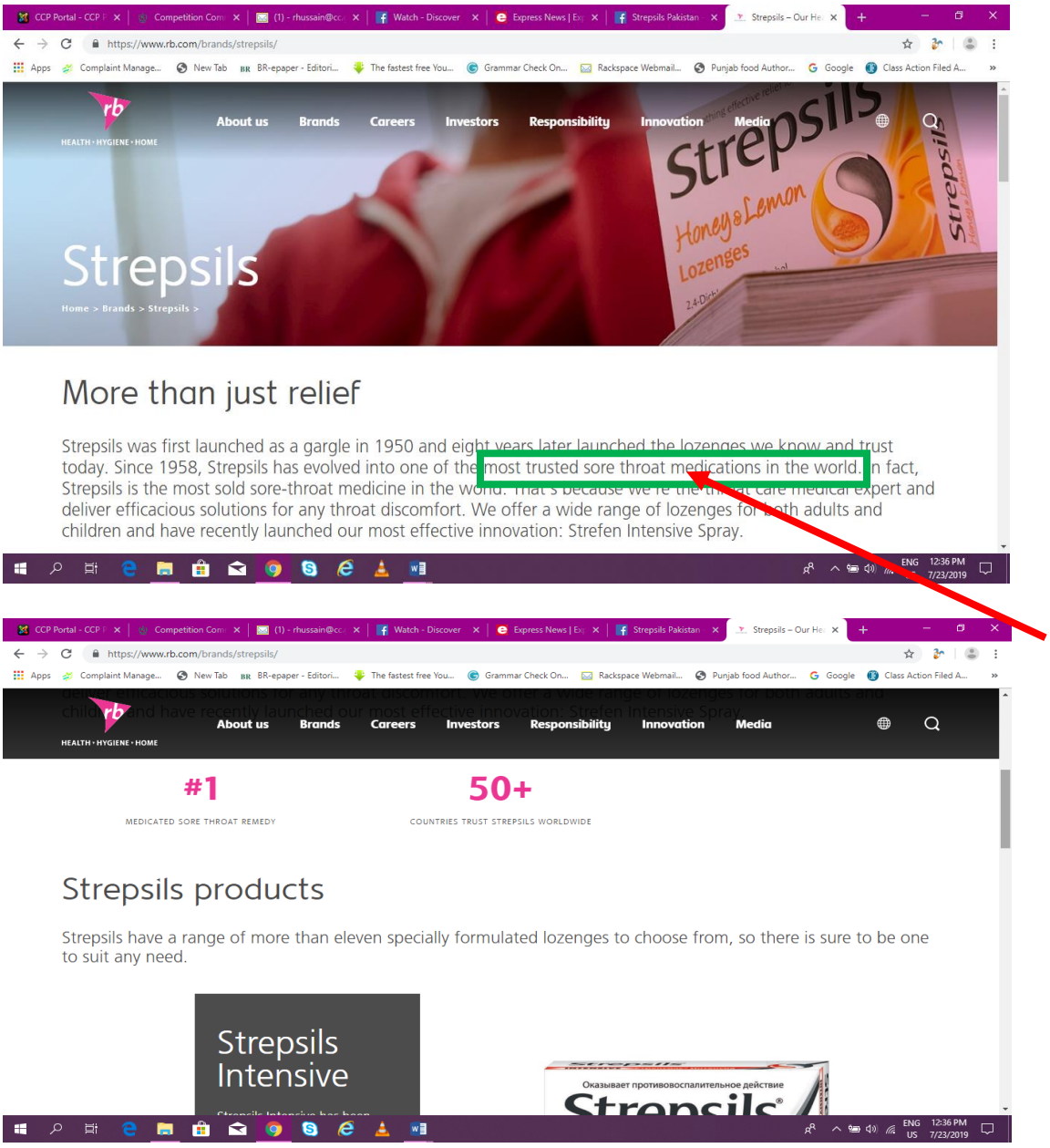


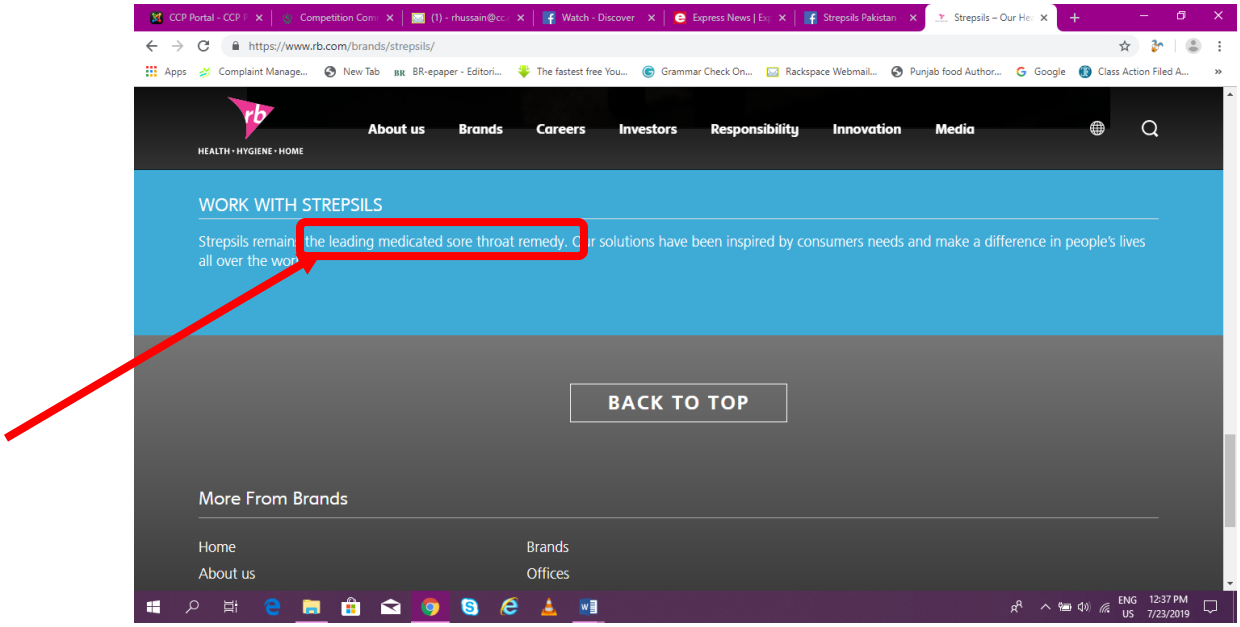
If we look into the packaging of one of the variants, Strepsils Honey & Lemon, it has been mentioned that the Product has a dual antiseptic action which means that the Product contains some sort of medicinal ingredient which is capable of curing the sore throat. Moreover, it should be noted that the packaging of one of the variants, Strepsils Original, displays that the Product contains an active pharmaceutical ingredient namely, 2,4 Dichlorobenzyl, Amylmetacresol, which was initially added in the Product prior to its deregistration from DRAP in year 2007. However, it is pertinent to mention that the current packaging of the said Product is different from the one displayed in the Facebook images. The current Product does not contain and display any medicinal ingredient on the packaging of the Product. This also assures the *mala fide* intention of the Respondent to still portray its Product as a drug.

5.55. The Complainant submitted that the particular variant of the Product has also been sold in international market and its counterpart added medicinal ingredient in the product. It has also been observed from the packaging of the Product being sold in international market that the Product contains medicinal ingredient namely, 2,4 Dichlorobenzyl, Amylmetacresol. Copy of the product packaging, being sold internationally, is given below:

5.56. It is important to mention here that before acquisition of the Product by the Respondent, the Product was infact marketed as medicated sore throat remedy. The trademark 'Strepsils' was also registered with the Trademark Registry, Govt of Pakistan, in class-5 which deals with respect to pharmaceutical preparations and substances.

5.57. Moreover, if we go through the website of the Respondent namely, www.rb.com/pakistan/ it is clearly mentioned that the Respondent is subsidiary of Reckitt Benckiser Plc, UK who is the subsequent proprietor of the trademark Strepsils through its subsidiary in Pakistan. If we find out the product list of the Respondent and opt 'Strepsils' the webpage displays the history of the Product along with its key features. The relevant website extracts are given below:





5.58. It has been observed that the Product has been marketed as medicine and it is clearly mentioned on website that it's a medicated remedy for sore throat. In the intro para of the Product it is clearly mentioned "*Strepsils was first launched as a gargle in 1950 and eight years later launched the lozenges we know and trust today. Since 1958, Strepsils has evolved into one of the most trusted sore throat medications in the world. In fact, Strepsils is the most sold sore-throat medicine in the world. That's because we're the throat care medical expert and deliver efficacious solutions for any throat discomfort. We offer a wide range of lozenges for both adults and children and have recently launched our most effective innovation: Strefen Intensive Spray.*"

5.59. The above mentioned statement on the website of the Respondent, suggests for an ordinary consumer that Product is still sold as medicated sore throat remedy around the world including in Pakistan. However, the Respondent has discontinued the use of medicinal ingredient in its Product since after the acquisition. The Complainant has also submitted that the Respondent has not made adequate efforts to educate/inform the consumer regarding the discontinuance of medicinal ingredient in the Product.

5.60. Moreover, the Facebook page of the Respondent being a "Public" page can be accessed by anyone at any time, without having to "like" it, as was done by the Enquiry Committee. Hence, viewer of the marketing campaign was not limited to the Respondent's customers, rather all consumers of the Product in general. Moreover, it is a known fact that the purpose of marketing is, *inter alias*, increase sales and the relevant market share which requires targeting new customers.

5.61. In addition to the above, it was also held in the Commission's ZONG Order dated September 29, 2009 "*the approach of the Commission is to evaluate complete advertisements and an opinion regarding deception is to be formulated on the basis of net general impression conveyed by them and not on isolated excerpts.*"

5.62. Notwithstanding the standards set by any other law or forum with respect to the aptitude of a consumer, the scope of this enquiry is to determine whether there has been a, *prima*

facie, violation of the Section 10 of the Act, by the Respondent. Where the precedent set in this regard is clear that while determining deception, we have to take into consideration the "ordinary consumer", who has been defined by the Commission, as rightly highlighted by the Complainant, in the following manner:

> *"Here it may be relevant to point out that 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. It must be borne in mind that one of the objectives of the Ordinance is to protect consumers from anti-competitive practices; hence, the beneficiary of the law is the consumer. Therefore, in order to implement the law in its true letter and spirit, the scope of the term 'consumer' must be construed most liberally and in its widest amplitude. In my considered view, restricting its interpretation with the use of the words 'average', 'reasonable' or 'prudent' will not only narrow down and put constraints in the effective implementation of the provision it would, rather be contrary to the intent of law. It would result in shifting the onus from the Undertaking to the consumer and is likely to result in providing an easy exit for Undertakings from the application of Section 10 of the Ordinance. Accordingly, the term 'consumer' under Section 10 of the Ordinance is to be construed as an 'ordinary consumer' but need not necessarily be restricted to the end consumer of the goods or services."*

5.63. In view of the above, it is clear that while evaluating the instance of deception, we must view a marketing campaign from the perspective of an ordinary consumer. Furthermore, the Act does not require us to gather proof of actual deception, rather it requires us to determine whether there is a "probability/intent" of deception involved in a marketing campaign.

5.64. Based on the facts available with us, it can be concluded that the Respondent concealed its discontinuance in such that ordinary consumer through ordinary and reasonable diligence could not have discovered wrongdoing.

5.65. The Respondent got deregistration certificate from the DRAP and informed the Authority regarding the discontinuance of the medicinal ingredient but the Respondent never brought this fact to the knowledge of the consumer of the Product.

5.66. In fact, the Respondent, through a massive campaign on its Facebook page, impart the ordinary consumer to believe that the Product is still a medical product which can cure sore throat.

5.67. The above discussion clearly establishes that the marketing campaign of the Respondent appears to be, *prima facie,* deceptive in terms of Section 10(1) of the Act in general, read with sub-Section 10(2)(b) of the Act which prohibits distribution of false and misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, properties, quality and suitability for use of a product.

5.68. Moreover, various comments were made underneath on different posts of the Respondent also demonstrate that the public was actually deceived into perceiving that the Respondent's product was still a medicated sore throat remedy. Therefore, the Respondent's misleading campaign is also capable of harming the business interests of other undertakings in, *prima facie,* violation of Section 10(1) in general, and in particular, Section 10(2)(a) of the Act.

6. CONCLUSION AND RECOMMENDATIONS

6.1. The information supplied by the Complainant and the claims made by the Respondent while marketing its product were thoroughly examined and we are of the opinion that the Respondent is involved in distribution of false and misleading information that lacks a reasonable basis related to the character, properties, suitability for use and quality of its product which is also capable of harming the business interests of other undertakings. Such deceptive conduct of the Respondent amounts to a, *prima facie,* violation of Section 10 of the Act.

6.2. Provided that this is a matter which has a direct impact on the public at large, the Respondent should also be restrained from advertising its product in an unfair and deceptive manner. Furthermore, *prima facie,* violations under the Act, as highlighted in the findings of the enquiry report, warrant initiation of immediate proceedings against the Respondent under Section 30 of the Act.

Marryum Pervaiz	Riaz Hussain
Joint Director	Assistant Director
Enquiry Officer	Enquiry Officer