BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF
SHOW CAUSE NOTICES ISSUED TO

Askari Bank Ltd, United Bank Ltd
My Bank Ltd & Habib Bank ltd

(No. 2(9)/DIR(L)/CCP/2008)

Date(s) of hearing:	February 17, 2009 February 18, 2009
Date(s) of commitments: by the undertakings	HBL- 28.04.2009, UBL 18.04.2009 Askari- 17.04.2009 & Mybank- 09.04.2009
Present:	Ms. Rahat Kaunain Hassan **Member (Legal/OFT)**

ON BEHALF OF

Askari Bank Ltd:	Hassan Ali Rana, SVP Syed Nasik Ijaz, AVP
United Bank Ltd:	Tahseen Yousaf, VP/Legal Advisor M. Nasim Bhatti, OG-I Shapur Ahmed, Head of Liabilities, Networking, Planning & Retail Banking
My Bank Ltd:	Muhammad Bilal Sheikh, President
Habib Bank Ltd:	Ali Almani, Advocate of Fazl-e-Ghani Advocates

ORDER

1. This is an Order disposing of proceedings arising pursuant to the Show Cause Notices: No. 32/2008-09 issued to Habib Bank Limited (hereinafter '**HBL**'); No. 29/2008-09 issued to Askari Bank Limited (hereinafter '**Askari**'); No. 30/2008-09 issued to United Bank Limited (hereinafter '**UBL**') and No. 31/2008-09 issued to MyBank Limited (hereinafter '**MyBank'**), respectively, for *prima facie*, deceptive marketing practices in violation of Section 10 (1) in terms of Section 10 (2) (a) and (b) of the Competition Ordinance 2007 (hereinafter 'the **Ordinance**').

BRIEF FACTS

2. Askari, HBL, UBL and MyBank (hereinafter collectively referred to as 'the **Undertakings**') are banking companies within the meaning of section 5 (c) of the Banking Companies Ordinance, 1962, and are undertakings as defined under clause (p) of sub-section (1) of Section 2 of the Ordinance.

3. The Competition Commission of Pakistan (hereinafter 'the **Commission**') took *suo moto* notice of advertisements issued by the Undertakings in the print media advertising deposits accounts along with the associated profit rates for such accounts. The Commission took cognizance of the matter when the Mutual Funds Association of Pakistan (hereinafter '**MUFAP**') sent a letter to the State Bank of Pakistan (hereinafter the '**SBP**'), a copy of which was also sent to the Commission, alleging that the profit rates being advertised by the Undertakings in the print and electronic media were being calculated using a flawed formula which did not reflect the actual returns earned by the depositor. An enquiry under section 37 of the Ordinance was initiated to assess whether the rate of return advertised by the Undertakings is deceptive and as to whether the advertisements by the Undertakings are disseminating misleading information and hence *prima facie* in violation of the Ordinance.

4. The accounts that were being offered were:

(a) HBL's *Advantage Account* which advertised a profit rate of 17% on ten year maturity. Its features included,

- varying tenors;
- "14% profit on 5 years and 13% on 3 years deposit"; and
- "Multiple options for profit payout and tenures".

(b) UBL's *Profit Certificates of Deposits* advertised the "The Best Deal in Town" with an Expected Rate of Return of 16.25% with profit disbursement on maturity. Features of the account included,

- "a variety of tenors from 3 months to 10 years;
- premature encashment facility; and
- monthly profit payout option available at applicable rates".

(c) MyBanks's *Super Saving Certificates* wanted the consumer to "Earn highest profit!". The features of advertisement included,

- an Expected Rate of Maturity of 18.5% payable on maturity.
- a minimum variety of tenors from one year to 10 years.

The different Expected Rates of Return for varying tenors were clearly stated, for example it is mentioned that for a 5 year term deposit the Expected Rate of Return is 14% and for a 3 year term deposit the Expected Rate of Return is 13.25% etc.

(d) Askari's *Deposit Multiplier Account* offered a rate (it is unspecified whether that is the Expected Rate of Return, or Profit rate, or otherwise) of 16.5% on a term deposit certificates for 10 years. The

advertisement however, does simplify matters for the consumer because it clearly states the exact return the consumer will get; "value of initial investment of Rs. 100,000 will increase to Rs. 265,000 at maturity".

5. The Commission sought clarifications from the Undertakings about how they had formulated the advertised profit rates/expected rates of return and how the profits had been calculated. Briefly, the clarifications offered by the Undertakings were as under:

(a) HBL: HBL denied that its advertisements were deceptive. Claiming the lack of any directive from the SBP, HBL submitted that it was not in violation of any SBP Rules and Regulations. HBL stated that it was their standard policy to advertise the 'indicative rate of return' rather than the *effective* rate of return [emphasis added] and the advertisement does not claim that the rate offered is the effective rate of return. In its written submissions before the Bench, HBL submitted that the advertisements were only published for a fortnight between 19-08-08 to 30-08-08 and that upon receipt of the letter from the Commission, HBL immediately suspended the campaign.

(b) UBL: UBL denied that it had engaged in deceptive marketing practices of any sort. UBL claimed that it uses the formula prescribed in the Prudential Regulations for Consumer Financing, framed by the SPB. UBL stressed that their activities were compliant with SBP's requirements and that the main applicable features of their deposit scheme such as annualized rate of expected return, tenure of the deposits, etc are prominently displaced in the advertisement.

(c) MyBank: MyBank claimed to have modeled its scheme on Defense Saving Certificates issued by the Government of Pakistan. MyBank

submitted that its scheme was not deceptive because it clearly disclosed the tenor of the respective deposits, and also specified the amount payable on completion of the term on the deposit receipt. Furthermore, MyBank stopped the media campaign upon receiving the letter from the Commission.

(d) Askari: In its reply Askari simply stated that the method being applied for the computation of return is the "accumulation of returns (normally referred to as compounding of profit) over the period of profit."

6. The Commission did not find the clarification offered by the Undertakings satisfactory as the purported clarification did not clearly provide the formula or basis on which the high profit rates (as advertised) had been calculated. Therefore on January 28, 2009 Show Cause Notices were issued to the Undertakings under Section 30 of the Ordinance for, prima facie, engaging in deceptive marketing practices in violation of Section 10 (1) in terms of Section 10 (2)(a)&(b).

7. The main findings pertaining to all the advertisements in the Enquiry Report (the '**Enquiry Report**') as stated in the Show Cause Notice can be summarized as follows:

- The advertised Profit Rate is deceptive in that the deposit/ investment is not being cushioned for the decreasing real value of money for the time period of the deposit as is generally done in term deposits;

- The advertised Profit Rate is deceptive and misleading in that it does not duly disclose that the rate advertised for the term shall further vary depending as to when payments are received by the consumer (i.e. on monthly, quarterly or half yearly basis);

- No due disclosure is made to the depositor that interest paid annually can not be added to the principal as may otherwise be done in term deposits;

- That the Profit Rate is only applicable when there is disbursement on maturity, while the condition is stated on the advertisement in small print it is hardly legible and is likely to mislead the consumer as to the true terms and conditions of the scheme.

- Additionally with reference to the Show Cause Notice issued to Askari, it was also stated that "*the amount payable on a principal of Rs. 100,000 with an effective rate of return of 16.5% should be Rs. 460,537 and not Rs. 265,000 as is stated on the advertisement which indicates that either the effective rate of return as stated on the advertisement is incorrect or the advertised amount payable on maturity is incorrect;*

- In the Show Cause Notice issued to HBL in addition to the main findings summarized above, it was stated that "*No due disclosure is made to the depositor that interest paid annually can not be added to the principal as may be otherwise done in term deposits;*"

8. For the disposal of the aforementioned Show Cause Notice, the matter was fixed for hearing on February 17, 2009 and February 18, 2009. All the respondents appeared before the Bench separately and explained their advertisements. Mr. Hassan Rana, SVP and Syed Nasik Ijaz, AVP appeared on behalf of Askari and submitted that they did not have an intention to deceive and they had immediately

stopped the advertisements when they received the Show Cause Notice on January 29, 2009. Furthermore Askari argued that its advertisements were less deceptive than other advertisements because they mentioned the exact amount that would be payable on maturity which showed that there was no intention to mislead on the part of Askari.

9. Similarly, Mr. Mohammad Bilal Shaikh, President, appeared on behalf of MyBank, and stated that MyBank had no intention to mislead. Furthermore, they also claimed that there advertisements were less deceptive than other banks because they have clearly specified the tenure and associated profit rates of the schemes; and the deposit receipt had a saving schedule printed on them as is done on the defense saving certificates.

10. Mr. Tahseen Yousaf, VP and Legal Advisor, M. Nasim Bhatti, and Shahpur Ahmed, Head of Liabilities appeared on behalf of UBL and submitted that the intention of the advertisements was not to deceive the consumer or falsify information. The rate of return being advertised by UBL is the Annualized Rate of Return and in practice the Effective Rate of Return on an annual basis comes to be higher than the Annualized Expected Rate of Return. UBL defended its usage of the incorrect formula as stated in the Enquiry Report by adding that because of a lack of guidance on the part of the SBP, on what formula to use meant that UBL had been forced to use the formula stated in the Consumer Finance guidelines. Nevertheless, UBL claimed that it has stopped the advertisements and the media campaign. As far back as September, the SBP, in its follow up to the Commission's concerns, had asked UBL to stop the scheme. UBL further added that they had already addressed one of the concerns of the Commission in that the projected profit sheet which is provided to depositors had been modified and the statement that profits would be determined on simple interest rate had been incorporated.

11. HBL filed written submissions which analyzed the framework for deceptive marketing practices in the different jurisdictions. However, this issue was not pressed at the hearing. HBL maintained that its advertisements were not false or misleading nor were they in violation of Section 10 of the Ordinance.

12. Notwithstanding the submissions during the hearing, all the Undertakings submitted an undertaking whereunder, it was assured on behalf of each bank concerned that; " *henceforth, our advertisements, promotional material or instructional manuals, in print or communicated through the electronic medium or otherwise in relation to the Product shall clearly specify the rate of profit or rate of return offered to the customers in clear legible font in a manner comprehendible by an ordinary/average consumer disclosing (i) that the return being offered is calculated on simple interest rate or as the case may be; (ii) that the rate of profit varies depending on maturity tenure and/or pay out periods; (iii) that the terms and conditions apply, which will be reasonably accessible to a potential customer; and (iv) disclaimers (if any) therein shall also be stated in clear terms which are understandable, readable and/or audible, as the case may be, for an ordinary consumer*.

    That, we shall comply with any and/or all directions of the Commission in the subject proceedings and shall ensure compliance with the provision of Section 10 of the Competition Ordinance, 2007, in letter and spirit in relation to any distribution of information or making any future advertisement in relation to the Product."

13. After having received these undertakings and commitments on behalf of the parties, while it may not be necessary to address all the arguments made during the hearings none the less for the sake of completeness, I deem it appropriate to address the following core issues:

Whether section 10 is applicable to the deceptive marketing of services in addition to that of goods?

Are the subject advertisements deceptive in that they provide false and misleading information?

Analysis and Discussion

The scope and applicability of section 10 of the Ordinance to goods and/or services:

14. In its written submissions, HBL has argued that section 10 (2) (b) of the Ordinance is inapplicable in this instance, because the language of the said section specifically mentions information regarding the price, property and other characteristics of a 'good'. As per the arguments of its Counsel HBL is providing a 'service'. And as per Counsel's submissions, omission of the word 'service' from section 10 (2) (b) implies that the Ordinance did not envisage Section 10 (2) (b) to apply to services. If the legislature had intended this clause to apply to both goods and services it would have mentioned so as it has done in Section 4 (2) and Section 3 (3).

15. This contention raises two issues; firstly there is the general question of whether indeed Section 10 (2) (b) has a narrow and limited scope in that it applies only to goods; and secondly, whether a bank account can be viewed as good or a service. For convenience the language of section 10 (1) is reproduced below,

"*No undertaking shall enter into deceptive marketing practices.*"

And section 10 (2) states:

"*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 of use, or quality of goods.

16. Firstly, at the outset it must be highlighted that Section 10 (1) is a broadly worded provision and applies to all undertakings without making a distinction between provision of goods and/or services. It prohibits all undertakings from entering into deceptive marketing practices. The definition of an Undertaking in section 2 (p) of the Ordinance is instructive and leaves no doubt that both goods and services are covered. The said definition in its relevant part reads; " ***'Undertaking' means any natural or legal person… in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services.***"

17. Secondly, section 10 (2) lists when deceptive marketing practices shall be *deemed* to have been resorted to or continued by an Undertaking. Section 10 (2) read with 10 (2) (b) illustrates this deeming provision and is to be understood in two parts: the first part states that deceptive marketing practices shall be deemed to have been resorted to or continued by an *undertaking* through distribution of false or misleading information to consumers. Therefore again the use of the word 'undertaking' makes it amply clear that distribution of false or misleading information to consumers by an undertaking (be it engaged in the provision of goods or services) is prohibited.

18. The latter half of section 10 (2) (b) goes on to give a few illustrative examples of what this false or misleading information to consumer could be: "including the distribution of information lacking a reasonable basis related to the:

    - Price,
    - Character,
    - Method or place of production,
    - Properties,
    - Suitability of use, or
    - Quality of goods; "

    However, this illustrative list of examples of false or misleading information to consumers is by no means exhaustive and does not preclude the possibility of a violation of Section 10 in instances other than those stated.

    According to HBL, the word 'good' needs to be read conjunctively with every illustration, i.e. lacking a reasonable basis related to the price [of goods], character [of goods], etc. As a result, the counsel for HBL argues that Section 10 (2) (b) is applicable only to the deceptive marketing of goods.

    In my considered view I do not find myself aligned with such an interpretation of this provision. Moreover, had the intention been to read the term 'goods' with each of the items stated above, it should have been worded as follows, "*the distribution of false or misleading information to consumer, including the distribution of information lacking a reasonable basis, related to the price character, method or place of production, properties, suitability of use, or quality, of goods" (a comma placed after the word 'quality').*

19. Precisely speaking accepting such an argument would mean section 10 only prohibits deceptive marketing pertaining to goods but not services. It is also pertinent to mention that a statute must be so construed as to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pereat* i.e. that the thing may rather have effect than be destroyed. The ambit of

the law should not be restricted or narrowly construed, and a wide interpretation be given to the law, especially one which has as its aims the protection of consumers. The law will be given full effect if deceptive marketing practices pertaining to both goods and services are stopped. If the scope of Section 10 was limited only to goods then that would defeat the purpose of the law.

Furthermore, when interpreting Section 10 it is important to bear in mind the purpose and scheme of the law. The Ordinance prohibits anti competitive behavior in every sector of the economy and a reading of Section 3 (Abuse of Dominance) and Section 4 (Prohibited Agreements) evidences that the Ordinance extends to the service sector as well as goods. The scheme of the law is such because anti competitive activities in the services sector are as detrimental to consumer interests and economic efficiency as any other sector.

20. Additionally, it is my considered view that all bank accounts, be it saving accounts, term deposit accounts, current accounts etc, are considered banking products and are advertised as such. The websites of several banks bear witness to this fact. Since bank accounts (including deposit accounts) are 'products', they fall within the definition of goods under the Ordinance. Under Section 2 (1) (f) of the Ordinance the term good is defined as "*any item, raw material, product or by-product which is sold for consideration*." The consideration that the consumer pays for the banking product is the minimum balance requirement with which he opens the account. While there are ancillary services attached to a banking product, primarily the service of managing of the account by the bank (and other services such as investments made on behalf of the consumer to earn a return, diversifying those investments to ensure reduction of systemic risk to the expected return, providing details of the account from time to time etc.), the banking product essentially remains a good. As a result even under a plain reading of the law, Section 10 (2) (b) would be applicable.

21. The argument was also raised on the application and scope of Section 10 (2) (b) claiming that its actions are not harming the business interests of other undertakings. It has been submitted that a lack of guidance on how banks are to calculate the rates of return on their deposit accounts has resulted in every bank devising its own method of calculating profit rates/ rates of return. Hence, it can not be claimed that the subject banks are harming the business interests of its competitor banks because every bank has its own methodology of calculating rates of return. Furthermore, it was argued that the business and customer base of MUFAP and banks are completely different. The Net Asset Value on mutual funds can not be equated or compared to the Rate of Profit or Annual Effective Rate (hereinafter '**AER**') available on deposit accounts held with banks. There is no evidence to suggest that the mutual funds industry or any other business has suffered any direct harm as a result of the advertisements. If indirect harm is alleged in that other businesses have suffered because the subject advertisements drew consumers towards deposit accounts and away from other investment opportunities, then this would make clause (a) of the Section 10 merely a subset of clause (b). Clause (a) could only then be violated if clause (b) were violated which would essentially make clause (a) redundant.

22. In my considered view, the Ordinance does not specify whether the harm to the interest to other business undertakings has to be direct or indirect. Neither does it make clause (a) of section 10 a subset of clause (b) of section 10 as has been argued; the import and scope of clause (a) of section 10 is different than clause (b) and can stand with out the support of clause (b). So far, the advertisements of the Undertakings raise a concern capable of causing harm to the business interests of the mutual funds industry as well other businesses trying to attract money for investment purposes from potential customers, the actual harm need not be established. The amount of investment that potential consumers can make is limited and investing with one business over another carries an opportunity cost. In order to convince potential consumers that this opportunity cost is worth the bargain, advertising assumes high importance and value. Hence true and full

disclosures should be made onerous for the banks and perhaps for all undertakings.

23. Now turning to the issue of:

Whether the subject advertisements are deceptive in that they provide false and misleading information?

24. Before discussing the deceptiveness of the advertisements, I would like to reiterate the salient features of the advertisements in question. These advertisements have the following common features :

- Basis of expected rate of return is not mentioned
- Important information is displayed in small print.
- Consequences of early withdrawal were not clearly listed.

25. Currently, Pakistan does not have any guidelines or best practices on deceptive marketing in any sector, be it banking or otherwise. However, HBL has referred to deceptive marketing/advertisement guidelines found in other jurisdictions in its written submissions even though these were not pressed in the hearing. HBL has looked at American and European jurisdictions for guidance on the matter. I will examine them one by one.

26. In the United States, the Federal Trade Commission Act prohibits unfair or deceptive acts and practices. This was reinforced by issuing the Unfairness Policy Statement in 1980 which articulated a three prong test to determine whether the practice or act causes or is likely to cause an injury which can be termed 'unfair'. The test determines whether

(i) the practice or act must cause or be likely to cause substantial consumer injury

(ii) it must not be outweighed by countervailing benefits to consumers or competition that the practice produces; and

(iii) *it must be an injury that consumer themselves could not have reasonably have avoided*.

The Unfairness Policy Statement was followed by the Deception Policy Statement in 1984 also issued by the FTC. Under that framework a practice, representation or omission is deceptive if

(i) the representation or omission is likely to mislead consumers acting reasonably and

(ii) if that representation is material to consumers.

Using this test as a benchmark, HBL has argued that its advertisements fail the test laid out by the FTC and hence can not be considered deceptive. While I find this effort appreciable, I must reiterate that we are governed by the provisions of the Ordinance and that the guidance gained from any international law or precedent only has a persuasive value and is not enforceable. Even so, I will examine the arguments made by HBL in this regard.

27. Before I commence on a discussion of the FTC test, I find it pertinent to point out that the definition of consumer as understood for the purposes of Section 10 of the Ordinance is different than that of the FTC or even the ECJ. I will not indulge in a detailed discussion of how the OFT defines a 'consumer' as this matter has been extensively and decisively examined in the *Zong* order. The *Zong* Order held that, "*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 service" [emphasis added]. Furthermore, the order also clarified that the ordinary consumer defined for the purposes of section 10 was distinguished from the concept of 'ordinary prudent man' as has evolved under contract law. The *Zong* order states 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*".

28. The first limb of the FTC's test required a determination of what a consumer 'acting reasonably' would deduce from an advertisement. However as has been discussed above, when interpreting the term consumer for the purposes of section 10, no subjective standard of 'reasonableness' is thrust upon the consumer. Instead the focus is not on how much diligence or caution a consumer should exercise but rather the efforts made by the undertaking to ensure that its advisement is clear, unambiguous and truthful. In contradistinction to the FTC test, under the Ordinance, the greater burden is on the undertaking to ensure that its advertisements do not deceive or mislead consumers. Under section 10 (2) (b) it is the undertaking which must have a 'reasonable basis' for making any claims in an advertisement. Hence, in that sense, the first limb of the test which requires the determination of the 'reasonableness' of a consumer would not apply in the context of section 10.

29. The second limb of the test laid out in the FTC Deception Policy Statement is whether claim being made in the advertisement is material to the consumer's decision to consume that product. In the United States, the concept of material representation has been greatly expounded in case law. It was held in **Kraft, Inc v. Federal Trade Commission, 970 F.2d 311**, that a claim is considered material

if it "*involves information that is important for consumers and is likely to affect their choice of, or conduct regarding a product*". In Kraft, the court found that the representation made by Kraft that its product was healthier than similar products found on the market was a material representation. Likewise in **Federal Trade Commission v. Tashman, 318 F.3d 1273** it was held that the claim made by the respondent, that his franchisee business had a fool proof business plan and guaranteed success was also a material representation. In Kraft, the Court held that "*The Commission is entitled to apply, within reason, a presumption of materiality and it does so with three types of claims*

(1) Express claims;

(2) Implied claims where there is evidence that the seller intended to make the claim; and

(3) Claims that significantly involve health, safety or other areas with which reasonable consumers would be concerned.

Absent one of these situations, the Commission examines the record and makes a finding of materiality or immateriality"

30. According to HBL, the FTC divides all claims into two categories- express claims and implied claims. The FTC takes a holistic view and looks at the overall net impression of what consumers take away based on all the elements of the advertisements. The FTC also looks at consumer surveys for evidence on the impact of the advertisement on consumer behavior. Once the FTC has determined whether the claim made is implied or express, it then has the burden of proving that claim in the advertisements as false, ("falsity" theory) or it must prove that the advertiser lacks a reasonable basis for making the claim (" reasonable basis" theory).

31. While HBL's submissions are correct, they do not paint the complete picture. In Kraft, the court held that while extrinsic evidence such as consumer surveys consumer testimony, expert opinion, and copy tests of ads can have a persuasive value, the FTC is not required by law to collect such data; the court stated that,

"*In determining what claims are conveyed by a challenged advertisement, the Commission relies on two sources of information: its own viewing of the ad and extrinsic evidence. Its practice is to view the ad first and, <u>if it is unable on its own to determine with confidence what claims are conveyed in a challenged ad, to turn to</u> extrinsic evidence*. [Emphasis Added]

32. American jurisprudence on this subject as developed through the courts, stresses the need to evaluate the 'net general impression' that an advertisement propounds, and the since this 'impression' will vary from advertisement to advertisement, depending on the nature of the product, its uses and the context of the advertisement, American courts have realized the difficulties in evaluating deceptive behavior. The FTC has been given the discretion to determine what is deceptive; in **<u>Federal Trade Commission v. Colgate-Palmolive Co (1965)</u>** the court held; "*as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act. This Court has frequently stated that the Commission's judgment is to be given great weight by reviewing court. This admonition is especially true with respect to allegedly deceptive advertising since the finding of a s 5 violation in this field rests so heavily on inference and pragmatic judgment."*

33. The distinction between implied and express claims which HBL has tried to highlight does not hold under the Ordinance. The Ordinance does not distinguish between the two and there is no varying standard for implied and express claims. Any advertisement which falsely asserts a claim, whether that claim is made up front or is implied, is deceptive and misleading. Even in the American jurisdiction, the distinction between express and implied claims is opaque; in Kraft, the court held that implied claims "*fall on a continuum, ranging from the obvious to the barely discernible*"; the court found that irrespective of the classification of the claim, common sense and administrative experience were adequate tools to judge deceptive advertisement.

34. There is little doubt in my mind that the advertisements made a representation which was material to consumer. The impugned advertisements ask the consumer to make important economic decisions promising-in the case of HBL- "Highest Profit. Security. Convenience"; and make claims which would govern the financial future of consumers. Such matters which affect their financial future will always be material to consumers, especially in the current climate of economic uncertainty.

35. According to HBL's Counsel, in the European Union, Article 5 of the EU's Directive Concerning Unfair Business-to-Consumer Commercial Practices [2005/29/EC] (hereinafter referred to as '**EU Directive**') deems a practice to be unfair if, it is contrary to professional diligence; and if it materially distorts (or is likely to distort) the economic behavior of the average consumer with regard to a product. HBL submits that under this test, for a practice to constitute an unfair practice, it must be likely to cause the consumer to under take a transactional decision that he would not otherwise do. HBL argues that a consumer would not "simply assume that the rate of expected return is an AER especially when the subject advertisement states that 17% is the Rate of Profit" and that a consumer would not open an account before meeting the account managers or open the account without making basic inquiries as to how the account operates. The thrust of HBL's submissions is that the merely viewing the advertisements a consumer will not "influence the consumer to such an extent that they would make a transaction decision that they would otherwise not have made."

36. I have studied the scheme of the law as laid out in the EU Directive; Article 5 of the EU Directive defines an unfair commercial practice, Article 6 further defines commercial practices which are 'misleading actions' while Article 7 defines commercial practices which are 'misleading omissions'. A key component of the test for the determination of an unfair commercial practice is whether it "*causes or is likely to cause him* [the consumer] *to take a transactional decision that he would not have taken otherwise*"; i.e. whether the representation made in the

advertisement was such as to effect the economic decision taken by an ordinary consumer. This would entail that an examination of the effects of the advertisement must be undertaken in order to establish how it has influenced the decision making of a consumer. My understanding of this is bolstered by the fact that Annexure A of the EU Directive lists 'those commercial practices which shall in all circumstances be regarded as unfair', i.e. commercial practices which are considered unfair regardless of the effect that they have had on the consumer. This approach is markedly different from the scheme of law as envisaged under section 10 of the Ordinance. The language of section 10 does not require a finding to be made regarding the alleged effect of the advertisement on the decision making of the consumer. All that is necessary is whether false and misleading information was disseminated through the advertisements. This has also been the view taken in the *Zong Order*, wherein it was stated that, "*for the purposes of deceptive marketing, actual deception need not be shown to carry the burden of proof. It is sufficient to establish that the advertisement has the tendency to deceive and capacity to mislead.* " While there is nothing to preclude the Commission from conducting an inquiry into the effect that an advertisement has on consumer behavior, there is no obligation under law to make such a determination.

37. An argument that has consistently been put forward is that a consumer does not decide to open an account simply because he sees the advertisement. It also involves a consultation with the account manager who informs him of the relevant details and only then is an informed decision made. However, this does not seem like a satisfactory precaution. I can not accept that just because a consumer will consult with a salesperson (in this instance a bank manager), this reduces the responsibility of information displayed on advertisements There is no way of ascertaining the exact information that is provided to ordinary consumers in the numerous branches around the country, some of whom might have a very rudimentary understanding of how banks actually work. Furthermore, the fact that

consumers are briefed does not in any way decrease the necessity of ensuring that advertisements are above board and do not mislead consumers.

38. While examining international legislation in this area, I also find it pertinent to look at a US legislation that was referred to by MUFAP and the Inquiry Report. Advertisements which promote financial products need to include certain information. Part 230 of the American legislation Truth in Savings Act, Sub-section 230.8 list six factors which need to be stated in an advertisement pertaining to financial goods or services. These are

    (a) Variable rates
    (b) Time annual percentage yield is offered
    (c) Minimum balance
    (d) Minimum opening deposits
    (e) Effect of fees (if any)
    (f) Any additional features of Time Accounts such as time requirements; early withdrawal penalties and required interest payouts.

39. I find that if any international standard is to be made a bench mark of truthful advertisement in the financial services sector then it should be this. The impugned advertisements do provide some of the information deemed mandatory by this legislation such as variable rates, but omit important information such as the minimum balance required, the effect of fees and early withdrawal penalties etc.

40. Having examined the international precedents referred to in the Inquiry Report and by the undertakings, I now turn to analyze whether the impugned advertisements are deceptive in terms of Section 10 of the Competition Ordinance.

41. In the *Zong* Order, the Bench found that, "*False information' can be said to include: oral or written statements or representations that are; (a) contrary to*

truth or fact and not in accordance with the reality or actuality; (b) usually implies either conscious wrong or culpable negligence, (c) has a stricter and stronger connotation, and (d) is not readily open to interpretation. Whereas 'misleading information' may essentially include oral or written statements or representations that are; (a) capable of giving wrong impression or idea, (b) likely to lead into error of conduct, thought, or judgment, (c) tends to misinform or misguide owing to vagueness or any omission, (d) may or may not be deliberate or conscious and (e) in contrast to false information, it has less onerous connotation and is somewhat open to interpretation as the circumstances and conduct of a party may be treated as relevant to a certain extent."

42. The most problematic feature of the advertisements is the lack of clarity regarding the rates that are being offered. There is no standard term which is used by the undertakings when referring to the rate of return that they are offering; the terms 'profit rate', 'yield', 'rate of return' are used interchangeable (while Askari does not mention what sort of rate it gives). This can be very confusing for an average ordinary consumer who wants to make a comparison between the products offered in the advertisements. In most countries the term Annual Percentage Rate (hereinafter '**APR**') is used. APR is an interest rate that that reflects the real cost of acquiring a loan and the same methodology can be used for calculating the real rate of return on investments or deposits. In virtually all countries for deposits held for more than a year, returns are calculated on the accumulated value of the deposit i.e. returns are based on the initial deposit amount and on any amount earned on it subsequently. The terms APR, nominal APR and effective APR can seem confusing as the definitions can vary between national locations, indeed, occasionally even between different institutions. An early meaning of the term APR referred only to the simple interest rate applicable to the loan or deposit; this is currently considered to be equivalent to nominal APR. The newer AER brings in the concept of an annualized rate in which the interest rate paid on a deposit is compounded and is thus considered to be more accurate descriptions of the returns available on the deposit.

43. However in Pakistan since there is no compounding of interest and the banking system works on a profit and loss basis; hence the usage of the term 'Profit Rate'. The Profit Rate is similar to the simple interest rate or the nominal APR; the simple interest rate does not involve compounding. However, the Undertakings fail to use the more universally understood term of simple interest, which would bring clarity and ease of understanding for the consumer. In its written statements, HBL argues that given that the compounding of interest is not allowed in Pakistan, there seems to be no reason why the consumer should expect that compounding will take place under this scheme. However whether these profit rates include compounding or not is an irrelevant assumption. The Inquiry Reports list various modalities developed by banks whereby the consumer can have their interest payments accumulated and added to the principal amount. When questioned about this in the hearing, the Undertakings acknowledged that such modalities do exist. Hence, even though term deposits do not take into account the time value of money, they have developed modalities and it is reasonable to assume that a consumer might expect such modalities to be a part of this scheme also. If there are no such modalities in this scheme then the consumer should be made aware of these clearly. Hence in this regard I find that the advertisements should have clearly mentioned that the rates being advertised were based on simple interest rate (or nominal APR).

44. Furthermore, the simple interest rate does not account for the depreciating value of money because it does not factor in the inflation rate. The significance of informing the consumer of the depreciating time value of money, as has been expressed by the Inquiry Report, is in providing the consumer with the most accurate information regarding the rate of return. HBL has provided us with a chart detailing the Indicative and Annualized Rates of Profits on HBL Advantage Accounts for the Period 19-08-2008 to 31-12-2008. There is a marked difference between the indicative rate of profit and annualized rate of expected return; the advertised 17% p.a. in fact becomes 10.44% p.a. after the time value of money

has been accounted for (i.e. after the inflation rate has been taken into account). This then begs the question that if the Annualized Rate of Expected Return provides a more accurate picture of the returns that a consumer can earn then why isn't this rate advertised rather than the more sensational, yet potentially- in fact essentially- misleading 17%?

45. It was submitted that commonly advertised rates of return do not take into account the time value of money because the time value of money is a complicated concept that customers do not completely understand. But I find this contention problematic. It is incorrect to suggest that just because the time value of money is a complicated concept, consumers might not grasp it and it can be omitted.

46. An assertion which has constantly been made by the undertakings is that they can not be reasonably expected to state all the terms and conditions surrounding its scheme or product in one advertisement; nevertheless it is important to ensure that the material features of the product that are significant to the consumer in making his decision should be displayed clearly, prominently, and in terminology that can easily understood by a lay person. The lack of space in advertisements has never been and was never meant to be a platform for facilitating distortion of information. Nothing can justify provision of misleading information to consumers. Accuracy and reliability of material representations made about the product are critical because distortion of material information impairs the consumer's ability to make an informed decision.

47. In the impugned advertisements, the rates being advertised were the main feature of the advertisement. And while the percentage was displayed prominently, it was unclear whether this was the profit rate, the AER or the APR. Further more, there is not sufficient disclosure to the consumer that the term may vary depending on the pay out periods and tenure of the product. The variety of tenures and pay out options are material features which should be clearly and explicitly mentioned in the advertisement; if money is put in for shorter periods of time then the rate will

be substantially lower and if monthly, quarterly or bi annual payments are taken then, the rate will be still lower. This important information should not be relegated to small print disclaimers. I find that this critical information was not adequately explained or highlighted in the said advertisements. However, I find the advertisements by MyBank more comprehensive and less liable to mislead consumers in this regard.

48. In sum, all material features and conditions should be prominently displayed in clear and unambiguous language.

49. I am of the view that without the necessary clarifications the advertisements constitute a deceptive marketing practice with which depositors are being furnished misleading information aimed at inciting them to entrust their savings with the Undertakings. Individuals seeking to increase the value of their savings through investment will of course be attracted by high profit rates being advertised. A misleading advertisement regarding high return on original deposit moneys is very capable of affecting the choices and conduct of people. It is therefore important that such practices be stopped and the Undertakings be obliged to provide more accurate information in their advertisements regarding their deposit schemes. The underlying principle in these arrangements is not an issue. In fact, attracting longer term deposits into the banking system is a laudable marketing strategy designed to enable banks to offer a wide array of financial products to their consumers. What is at issue is how these schemes are advertised.

50. The objective of the Commission's concern is not to seek to intervene in the voluntary bank consumer relationships that underpin the integrity of the financial system, nor to alter/modify them in any way. The Commission's concern is that all the banks must use terms in their marketing efforts or campaigns that conform to their meanings as generally understood. In the case of the subject advertisements, as discussed; I hold the impugned advertisements as deceptive and misleading, in that the characters/features of the product e.g. the rate of returns offered by the banks are based on simple or nominal rates, and this has not been clarified, the consequences of early withdrawal from the deposit accounts

are not specified also, important information is given in very small prints. Such advertisements are, therefore, misleading to consumers lacking a reasonable basis related to the character of goods/services apart from capable of harming other businesses interests in terms of section 10 (2) (a) & (b) of the Ordinance. Hence, in violation of section 10(1) of the Ordinance.

51. Since the Undertakings stopped the subject advertisements upon initiation of proceedings and have expressed willingness to comply with the provisions of section 10, as evidenced by the written commitments made by them, I am inclined to take a lenient view and no penalty is being imposed on them. This leniency has been shown because of the earnest desire of the Undertakings to seek compliance of the Ordinance which is at its nascent stage. The parties are; however, warned that in future, if, similar violations are found to be committed it may give rise to serious consequences under the Competition Ordinance.

52. In terms of the written commitments submitted by the Undertakings, the Undertakings are directed to follow the guidelines laid down in this Order in respect of future advertisements and to ensure compliance with not only the provisions of section 10 of the Competition Ordinance, 2007 but also Competition Ordinance, 2009 or any subsequent promulgation of legislation in this regard. This order should also serve as a guideline for all banks and other undertakings concerned. I would like to record appreciation for SBP for its timely endorsement of the action taken by the Commission in this regard.

53. In terms of what has been held above both the Show Cause Notice No. 32/2008-09 issued to HBL, Show Cause Notice No. 29/2008-09 issued to Askari, Show Cause Notice No. 30/2008-09 issued to UBL and Show Cause Notice No. 31/2008-09 issued to MyBank are hereby disposed of.

RAHAT KAUNAIN HASSAN
Member (Legal/OFT)

Islamabad the January 14, 2010