



**BEFORE THE  
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF**

**M/S PROCTOR AND GAMBLE PAKISTAN (PRIVATE) LIMITED  
(HEAD & SHOULDERS SHAMPOO)**

**(File No. 3(1)/DIR(L)/CCP/2009)**

Dates of hearing:

June 02, 2009 &  
February 02, 2010

Present:

Ms. Rahat Kaunain Hassan  
**Member (Legal/OFT)**

Present for  
**M/S Procter and Gamble Pakistan  
(Private) Limited:**

Mr. Mehmood Y. Mandviwalla

Mr. Taimur Ali Mirza

Mr. Usman Muneer

Mr. Qaiser Shareef

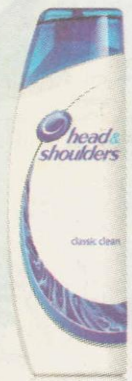
## **ORDER**

1. This Order shall dispose of the proceedings arising out of Show Cause Notice No. 54/2008-09 issued to M/s Proctor and Gamble Pakistan (Private) Limited (hereinafter referred to as '**P&G**') for *prima facie* violation of Section 10 of the Competition Ordinance, 2009 (hereinafter referred to as the '**Ordinance**') which prohibits deceptive marketing practices.

## **FACTUAL BACKGROUND**

2. P&G is an undertaking as defined under clause (p) of sub-section (1) of Section 2 of the Ordinance. It is engaged in the business of manufacturing of beauty, household and health care products for the consumers in Pakistan. Head & Shoulders Shampoo (herein after referred to as the '**Product**'), is the anti-dandruff brand shampoo of P&G, and is very popular among the consumers.
3. The Competition Commission of Pakistan (hereinafter referred to as the '**Commission**') took *suo motto* notice of the advertisements of the Product of P&G, wherein, it has been advertised that, the Product is '*World's No. 1 anti-dandruff shampoo*' suggesting that its use renders the hair '*100% dandruff free*' (hereinafter referred to as the '**Advertisements**'). The advertisement appearing in the news paper is as follows:

100% dandruff\* free  
100% free to get close



Shahid Afridi's choice for 100% confidence  
World's No.1\* antidandruff shampoo  
Head & Shoulders with acti-zinc formula keeps  
your scalp balanced and gives you 100% dandruff\*  
free beautiful hair. So you can have 100%  
freedom to get close with confidence.



**NEW**  
**FOR MEN**

**hair endurance**

stay **100%\*** dandruff free  
and **slow down** hairloss



**head & shoulders**

**Suffering from hairloss? Not anymore**  
Introducing new head & shoulders hair endurance - created especially for men.  
It gets rid of 100%\* dandruff and slows down hairloss, helping you keep your hair for longer.



\*Up to 100% visible flake reduction with regular usage †Due to keratinase  
improves the condition of your scalp

4. P&G was asked vide letter dated March 06, 2009 to provide information along with necessary documents explaining the basis of making such claims. P&G vide letter dated March 25, 2009 of its counsel *Mandviwalla and Zafar* stated that:

- a. *“The claim of being ‘World’s No.1 anti-dandruff shampoo’ has been made by Proctor & Gamble reasonably based on the date and information made available to it by Nielsen Company;*
- b. *The claim ‘100% dandruff free’ appears in conjunction with the phrase ‘up to 100% visible flakes with regular use’ in the advertisement;*
- c. *The claim 100% dandruff free has been made by the Proctor & Gamble reasonably based on the data and information made available by internal research and development department of Proctor & Gamble external institutes and dermatologists that show that Head and Shoulders shampoo removes 100% of visible flakes.”*

5. P&G did not supply any supporting document, to which reference was made in the reply dated March 25, 2009 of their Counsel. Therefore, P&G was again requested vide letter dated March 26, 2009 to provide the documentary evidence, forming reasonable basis of its claims made in the subject Advertisements within (7) seven days. P&G responded to the letter dated March 26, 2009 vide letter dated April 01, 2009 of their Counsel *Mandviwalla and Zafar* submitted the reports of Neilson Company, USA (hereinafter referred to as Nielson) dated April 29, 2008 and November 19, 2008 and, a Scientific Test Study conducted by P&G

itself, stating therein that both of its claims i.e., ‘*World’s No. 1 anti-dandruff shampoo*’ and ‘*100% dandruff free*’ have been properly substantiated;

6. The Commission upon receipt of the said reports analyzed the Advertisements of the Product as a whole and the claims made therein by taking into account the reports submitted by P&G. The Commission being unsatisfied from the explanation afforded by P&G issued a Show Cause Notice to P&G on April 30, 2009 (hereinafter referred to as the ‘SCN’). For ease of reference the contents of the SCN in its relevant parts read as under:

06.           **WHEREAS**, *the Advertisements prima facie appear to be distributing false or misleading information to customers/consumers lacking a reasonable basis related to the character of the Product, in terms of clause (b) sub-section (2) of Section 10 of the Ordinance as it appears from the contents of the reports by Neilson submitted by the Undertaking itself, stating that:*

*a.           “...[T]he data represents 56 markets that P & G subscribed to out of the 60 markets, the Nielsen Company currently offers data for anti-dandruff shampoo...;*

*b.           ...[T]he data represents that Head & Shoulders was the top selling, and No. 1 share brand, in this aggregate of 56 Nielsen reported markets licensed by P & G in FY 2007/08 based on both value and volume share...;*

*c.           ...[P]lease note that the reported data do not take into consideration different levels of market coverage that depend on the particular retail structure of each market...;*

*d. ...[I]t is also possible that that Head & Shoulders is available in more markets than are reported and the Nielson is not confirming whether Head & Shoulders is the leading worldwide anti-dandruff shampoo brand..."(emphasis added)*

07. **WHEREAS**, in contrast to the purported claim of '100% dandruff free' Product, the scientific test study report of the Undertaking reveals that regular use of the Product provides the benefit of removing 100% of visible dandruff flakes 'as seen by other people from a distance of two feet';

08. **WHEREAS**, the Undertaking through its Advertisement of the Product is disseminating information/claims which lacks reasonable basis regarding the character, suitability of use and/or properties of the Product;

09. **WHEREAS**, it is the responsibility and obligation of the Commission under the Ordinance to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behavior including deceptive marketing practices;

10. **WHEREAS**, in view of the foregoing the Commission is satisfied that there has been or is likely to be a violation of sub-section (1) of Section 10 of the Ordinance in terms of clause (b) of sub-section (2) of Section 10 of the Ordinance.

7. Upon receipt of the SCN, Counsel of P&G made a request for an extension of time to file the reply by May 22, 2009 and to adjourn the hearing on May 22,

2009 for a later date, for the reasons that P&G is a part of global business of Procter and Gamble and in order for P&G to effectively respond to the SCN it needs to co-ordinate with, receive information from Procter and Gamble's International business. The request being reasonable was acceded to and the Undertaking was given extension to file the reply and was also directed to appear before the Commission on June 02, 2009 and avail the opportunity of being heard. P&G through letter dated May 21, 2009 filed the written reply to the SCN.

8. For the purposes of disposal of the SCN hearing was convened on June 02, 2009 at 11:00 a.m. and the representatives of P&G namely Mr. Mehmood Mandviwalla and Mr. Taimur Ali Mirza of *Mandviwalla and Zafar* and Mr. Usman Muneer and Mr. Qaiser Shareef, officials of P&G attended the hearing. They argued the matter at length and made the following submissions:

- (a) The products of P&G touched 3 billion times everyday the lives of people and this fact in itself is very unique in addition to the fact that P&G exists in 83 countries and is in business since 1837;
- (b) The Product is a worldwide product and is so popular among the consumers that it has achieved a distinct status apart from the name and brand of P&G; keeping in view this, it is of significance to point out that P&G has no need to use any baseless claims or resort to the deceptive marketing practice in order to achieve popularity and increase the sales;



- (c) That the Commission has not specified the advertisement nor has the Commission supplied the copy of the advertisement along with the SCN, therefore, P&G has been deprived the opportunity to effectively reply to the allegations made in the SCN and this has made the SCN invalid and void under the law being contrary to the principles of natural justice;
- (d) Moreover, as required under clause (a) of subsection (2) of Section 30 of the Ordinance the grounds on which the Commission intends to pass an order are missing in the SCN, therefore, the SCN is also in contravention of the provision of Section 30 (2) (a) of the Ordinance and the non-compliance of the provisions of Section 30 (2) (a) of the Ordinance has made the SCN void under the law therefore, SCN is not in accordance with law. It the right of P&G under Article 4 of the Constitution of Islamic Republic of Pakistan to be dealt in accordance with law;
- (e) Under the provisions of the Section 10 (2) (b) of the Ordinance, the Undertaking is not required to provide reasonable basis for the claims in the advertisement, however, if at all, there is any requirement, it can be said that, the Undertaking is only required to show and establish before the Commission that the claims made are properly substantiated and do possess reasonable basis;
- (f) The advertisement has to be reviewed as a whole and no focus should be made to excerpts of the advertisement in isolation, and when the advertisement is viewed as a whole, no deceptive element is present in the advertisement;

- (g) The claim of being '*World's No. 1 anti-dandruff shampoo*' is fully supported by the Reports of Neilson submitted earlier by P&G vide their letter dated April 01, 2009, which shows that the Product is no. 1 in terms of value and volume of shares;
  - (h) The claim '*100% dandruff free*', which suggests that the regular use of the Product would render the hairs 100% free of dandruff, is reasonably based on the report titled "*Proof of support for advertisement Claim-AAF*" submitted earlier vide letter date April 01, 2009, which clearly provides that by regular use of the Product, 100% visible flakes are removed;
  - (i) The Counsel of the Undertaking also relied upon the judgments in the cases of *2000 CLC 1583*, *PLD 2002 Lahore 369*, *2001 YLR 1293* and *PLD 1997 Lahore 499* regarding the definition of reasonableness, moreover, reliance was also placed on Article 10 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the '**Constitution**');
  - (j) No where in the world the said claims have been challenged by any one and nowhere in the world have these claims come under scrutiny by any authority, and in many countries it has been advertised in the very similar manner.
9. P&G was directed to submit the advertisements of other countries to which reference was made by their counsel within (7) seven days from the date of hearing. P&G vide letter dated June 08, 2009 of their counsel filed the advertisements of the Product published in Turkey, Russia, Ukraine, Russia, Central Eastern Europe, Latin America and France.

10. Second hearing in the matter was scheduled for January 08, 2010 vide letter dated December 21, 2009. However, in response to the request for adjournment made by the Counsel of P&G vide letter dated December 31, 2009, the matter was adjourned and re-scheduled for hearing on February 02, 2010.
  
11. The representatives of P&G namely Mr. Mehmood Mandviwalla and Mr. Taimur Ali Mirza of *Mandviwalla and Zafar* and Mr. Usman Muneer and Mr. Qaiser Shareef, officials of P&G attended the hearing. They submitted the matter was heard in detail on the last date of hearing and they were under the impression that the matter stands closed; however, taking this opportunity they would like to make some new submissions in addition to the submissions made at the previous hearing. They also submitted that subsequent to the hearing, in order to resolve the concerns raised by the Commission they have amended the Advertisement and submitted the amended version of the Advertisement. The modified advertisement is placed below:

**NEW  
FOR MEN**

**hair endurance**

stay **100%\*** dandruff free  
and **slow down hairloss<sup>†</sup>**



**head & shoulders**  
for men  
hair endurance

**head & shoulders**

**Suffering from hairloss? Not anymore**  
Introducing new head & shoulders hair endurance-  
created especially for men.  
It gets rid of 100%<sup>\*</sup> dandruff and slows down hairloss<sup>†</sup>,  
helping you keep your hair for longer.<sup>‡</sup>

© 2005 P&G

\*Up to 100% visible flakes with regular usage  
†Improves the Condition of your Scalp  
‡Due to breakage

12. The main submissions and objections made by the P&G representatives during the hearing were as follows:

- (a) In terms of the Judgment of Honourable Supreme Court of Pakistan dated July 31, 2009, the Ordinance ceased to be a law with effect from November 26, 2009 when the national assembly failed to pass the Ordinance as an Act;
- (b) The re-promulgation of the Ordinance is in contravention of Honourable Supreme Court's judgment and its re-promulgation on November 26, 2009 with retrospective effect is also in contravention of the of the Supreme Court's Judgment and the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred to as the 'Constitution') which protects against retrospective punishment;
- (c) Since the Ordinance has lapsed and its re-promulgations is *ultra vires* the Constitution as well as the Honourable Supreme Court's decision, therefore, on this basis alone the SCN and the proceedings initiated pursuant to the same are also liable to be withdrawn;
- (d) The President of Pakistan does not have any requisite power under Article 89 of the Constitution to promulgate an Ordinance when the National Assembly is in session therefore, the Commission is without lawful authority and void under law.
- (e) Since the validity of the Ordinance is pending before the Honourable Supreme Court of Pakistan therefore, any Notice issued by the Commission or any orders passed by it pursuant to that Notice cannot be enforced;
- (f) The Commission has failed to abide by its duty to state the reasons based upon which it has issued the Notice and based upon which it intends to make an order against P&G. Such



failure has made the Notice invalid as it does not fulfill the requirement of Section 30(2) (a) of the Ordinance;

(g) The Commission has erred in law by misunderstanding the principles in relation to deceptive marketing practices and on this basis alone the Notice and the proceedings initiated pursuant to the same are also liable to be withdrawn;

(h) The Notice cannot be deemed to be lawful when the employees of the Commission have not been appointed under the Ordinance. On this basis alone the Notice and the proceedings initiated pursuant to the same are also liable to be withdrawn;

(i) The Commission had heard this matter on June 1, 2009 and all requisite information had been provided to the Commission. The Commission's issuance of a notice for hearing after more than five months and holding a hearing pursuant to the Notice after more than approximately six months is vocative of the principles of natural justice as the matter and proceedings have been deemed to have ceased against P&G as a result of passage of a period of more than six months since the date of the last hearing. Any action taken by the Commission pursuant to the Notice or the hearing dated February 2, 2010 will be without lawful authority and void under law. On this basis alone the Notice and the proceedings initiated pursuant to the same are also liable to be withdrawn.

(j) The claim "*100% dandruff free*" appears in conjunction with the phrase "*up to 100% visible flakes with regular use*" in the Advertisement and keeping in view this along with the "*Proof of support for advertisement Claim-AAI*" submitted earlier vide

letter date April 01, 2009 the claim “100% dandruff free” is reasonable.

### **ISSUES**

13. In view of the submissions made before me in the subject proceedings, although the main issue is that, ‘Whether the advertisement is deceptive or not?’; e the following issues have been raised in the submissions:

#### **CONSTITUTIONAL ISSUES**

- (i) Whether the Ordinance has lapsed in terms of the Honourable Supreme Court’s Judgment dated 31-07-2009?
- (ii) Whether the re-promulgation of the Ordinance is in violation of the provisions of the Constitution and the Honourable Supreme Court’s Judgment dated 31-07-2009?
- (iii) Whether retrospective re-promulgation of the Ordinance is *ultra vires* the Honourable Supreme Court’s Judgment dated 31-07-2010 and the Constitution?
- (iv) Whether the Commission has not been properly established?

## PROCEDURAL ISSUES

- (v) Whether the SCN is not in compliance with the provisions of Section 30(2)(a) of the Ordinance?
- (vi) Whether P&G was provided a copy of the advertisement referred to in the SCN and the principles of natural justice has been complied with?
- (vii) Whether lapse of five months period after the first hearing renders the proceedings or the show cause notice unlawful

## LEGAL ISSUES

- (viii) Whether the advertisement is deceptive, as the information disseminated through the advertisement lacks reasonable basis, related to the character, properties and suitability for use of the Product?

## **DELIBERATIONS & ANALYSIS**

14. With respect to Issues (i) to (iv) above, I find myself in agreement with the view taken in *Banks' cartelization* case and in the *Stock Exchanges case* regarding placing/fixing a price floor for securities, which were subsequently followed in the matter of Karachi Stock Exchange (G) Ltd. *abuse of dominance case* and in the Jamshoro Joint Venture Limited case. Wherein while relying on the judgments

of Pir Sabir Shah v. Shad Muhammad Khan, Member Provincial Assembly N.W.F.P. (P.L.D 1995 Supreme Court 66) and Akhtar Ali Parvez v. Altafur Rehman reported at (PLD 1963 (W.P.) Lahore 390) it was held that, “it is not for the Commission to address the objections raised as to the constitutionality and validity of the Ordinance or the appointment of its members. Hence, we must proceed on the assumption that the existence of the Commission is legal and valid until a court of competent jurisdiction determines otherwise.”

15. It may also be added that in Mehr Dad v. Settlement and Rehabilitation Commissions (P.L.D. 1974 SC 193), the Supreme Court of Pakistan held that “it is true that a Tribunal cannot go into the *vires* of the enactment under which it has been created and in Chempak (Pvt) Ltd. v Sindh Employees’ Social Security Institution (Sessi) reported in 2003 PLC 380, the Court held that “ as observed by the Full Bench of Hon’ able Supreme Court, comprising 12 judges, in Federation of Pakistan v. Aitzaz Ahsan (PLD 1989 SC 61) it is a well-settled principle of Constitutional interpretation that until a law is finally held to be *ultra vires* for any reason it should have its normal operation”.

16. Therefore, in view of the above, I am of the considered view that, it is not for the Commission to address the objections raised as to the constitutionality and validity of the Ordinance or the establishment of the Commission. Hence, I must proceed on the assumption that the existence of the Commission is legal and valid until a court of competent jurisdiction determines otherwise.”

**Issue No. (v) Whether the SCN is not in compliance with the provisions of Section 30(2)(a) of the Ordinance?**

17. The Learned Counsel for P&G has asserted that the grounds on which the Commission intends to pass the Order has not been provided in the SCN, which are mandatory under the provisions of Section 30 (2) (a) of the Ordinance. It would be significant to reproduce the relevant provision of the Ordinance, which reads as follows:

*30. Proceedings in cases of contravention.- (1) Where the Commission is satisfied that there has been or is likely to be, a contravention of any provision of Chapter II, it may make one or more of such orders specified in section 31 as it may deem appropriate. The Commission may also impose a penalty at rates prescribed in section 38, in all cases of contravention of the provisions of Chapter II.*

*(2) Before making an order under sub-section (1), the Commission shall:*

*(a) give notice of its intention to make such order stating the reasons therefore to such undertaking as may appear to it to be in contravention; and*

*(b) give the undertaking an opportunity of being heard on such date as may be specified in the notice and of placing before the Commission facts and material in support of its contention:*



*Provided that in case the undertaking does not avail the opportunity of being heard, the Commission may decide the case ex-parte.*

18. Bare perusal of the aforesaid provision makes it abundantly clear that the legal requirement is to provide notice of intention for making any order for contravention of the provisions of the Ordinance and give the Undertaking an opportunity of being heard. In accordance with the well settled principle the SCN clearly specifies and particularizes the alleged violations.

19. The record and perusal of the SCN makes it abundantly clear that, the reasons and the alleged violation of the provisions of Section 10 (2) (b) of the Ordinance and the clarifications sought are clearly mentioned in the SCN, which clearly meet the requirement laid down in Section 30 (2) (a) of the Ordinance. Hence I do not find any merit in P& G's stance on this account.

**Issue No. (vi) Whether P&G was provided a copy of the advertisement referred to in the SCN and the principles of natural justice has been complied with?**

20. The Learned Counsel of P&G referred to the Para (2) of the SCN and argued that, the Commission has neither specified the advertisement nor has the Commission supplied the copy of the advertisement along with the SCN, therefore, P&G has been deprived the opportunity to effectively reply to the allegations made in the

SCN and this has made the SCN invalid and void under the law being contrary to the principles of natural justice.

21. During the course of hearing the Learned Counsel for P&G was confronted with the letters dated March 06, 2009, March 11, 2009 and March 26, 2009 by the Commission; through which information regarding the advertisement in question was required from P&G and a copy of the said advertisement was also provided to the, with all the three letters mentioned above. The Learned Counsel replied that, although the advertisement was provided along with all the three aforementioned letters of the Commission, however, the Commission was under an obligation to provide the copy of the advertisement again along with the SCN, and failure of doing so has made the SCN void under the law being contrary to the principles of natural justice. The counsel was even offered during the hearing whether it would suffice to furnish another copy of advertisements at the hearing stage but the counsel preferred to maintain his objections in this regard.

22. It is a matter of record that P&G was provided a copy of the advertisement three times prior to the issuance of SCN and P&G in the latter part of their written reply it has also replied in detail to the allegations of the non-substantiation of the claims made in the advertisement. Having gone through the record and the after giving due consideration to the arguments made by the Learned Counsel for P&G, I am of the considered view that the arguments regarding not supplying of copy of the advertisement are not tenable and hold no merit.

**Issue No. (vii) Whether lapse of five months period after the first hearing renders the proceedings or the show cause notice unlawful?**

23. With regard to the delay in passing of the Order nothing has been placed on the record as to how P&G could construe and deem the subject proceedings as having ceased against P&G and/or dropped or withdrawn by the Commission. As for the hearing being held after one month of notice of hearing, which was issued five months after the first hearing; it is a matter of record that request for adjournment came from P&G's Counsel, therefore, the sixth month of delay can only be attributed to P&G's account. As for the remaining five months it needs to be appreciated that concepts under competition law are new and the law is at its nascent stage in Pakistan. Commission's efforts are not directed at mere disposal of matters but to ensure careful consideration of the issues raised in order to ensure fair adjudication of the matter. Moreover, in view of the principle laid down by the superior courts, delay by itself does not annul or scrap the validity of the Order. There is no such concept attached to the judicial and the quasi-judicial proceedings unless provided in the statute (**PLD 2006 SC 209**).

**Issue No. (viii) Whether the advertisement is deceptive, as the information disseminated through the advertisement lacks reasonable basis, related to the character, properties and suitability for use of the Product?**

24. Coming now to addressing the core issue, whether the advertisement was deceptive in terms of Section 10 of the Ordinance. According to the Counsel of P&G all that is required to be proved at P&G's end is whether there is;

- (a) reasonable basis for the claim '*World's No. 1 anti-dandruff shampoo*'
- (b) reasonable basis for the claim '*100% dandruff free*'

25. With reference to reasonable basis for the claim '*World's No. 1 anti-dandruff shampoo*', the Learned Counsel for P&G has argued that, the claim of '*World's No. 1 anti-dandruff shampoo*' is primarily based on the reports of the Neilson Company submitted through letter dated April 01, 2009. It is argued that the Neilson report states that the Product had 41.7% value share and 35.7% volume share in the 56 reported markets out of the 60 total markets. The Shampoo with second highest market share was Unilever's All Clear Anti Dandruff Shampoo which had a 8.6% value share and a 9% volume share. Also, the report covers 83% of the Worlds Shampoo sales (which includes all types of shampoos including anti-dandruff shampoos) this means that 17% of the world's shampoo sales data is not reported. This 17% includes countries that have small overall shampoo volumes (e.g. Somalia, Burundi, Belize. etc.) where Nielson does not have agencies or systems in place to collect information at a brand level. Even if we assume that the second highest selling shampoo Unilever's 'All Clear Anti Dandruff Shampoo' occupies 100% of the remaining market shares, something which is practically impossible in reality – All Clear Anti Dandruff Shampoo would have a value share of 22.6%, which is still significantly lower than Head and Shoulders value share of 41.7%. In view of the above, the Product would still be world's highest selling anti-dandruff shampoo irrespective of the market share composition of the unreported markets.

26. Although it was pointed out to the representatives of P&G that the cover letter of the reports provides that:

...[I]t is also possible that that Head & Shoulders is available in more markets than are reported and the Nielson is not confirming whether Head & Shoulders is the leading worldwide anti-dandruff shampoo brand...

However, as per the arguments made and the reports submitted, the shares of the remaining markets which are not included in the report is substantially low and cannot change the leading position of the Product in the world, even if the shampoo with no. 2 position i.e., Unilever's All Clear takes 100% of the shares in the remaining market. Having heard the arguments of the counsel and in view of the foregoing I am of the considered view that the submissions made on behalf of P&G have some merit and P & G 's claim of being 'World's No. 1 anti-dandruff shampoo' is reasonably substantiated on the basis of the report by Neilson.

27. With reference to the reasonable basis for the claim '100% dandruff free', Learned Counsel for P&G submitted that, the advertisement has to be read in its entirety and the claim of '100% dandruff' is reasonably based on the Report titled "Proof of support for advertisement Claim-AAP". It was further submitted that the advertisement does not claim to remove all dandruff from the scalp but to remove 100% of visible flakes with regular use. He further added that the phrase "up to 100% visible flakes with regular use" appeared in conjunction with the claim



“100% dandruff free” in the advertisement. The claim “100% dandruff free” is therefore, qualified by the phrase “up to 100% visible flakes with regular use” which means that through regular use of the Product the consumer’s scalp/hair loss becomes 100% free from visible dandruff flakes. It was argued that the findings of the report titled “*Proof of Support for Advertisement Claim-AAI*” submitted earlier to the Commission is conclusive evidence of the fact that up to 100% visible flakes of dandruff are removed. It was further added that the claim had to be taken in context of the results of their scientific studies and consumer satisfaction with the Product. He emphasized that the advertisement did not claim to remove visible flakes within a specific time frame and a fixed distance of two feet was chosen as the distance to observe visible flakes as this simulated a realistic personal distance which people would choose when speaking to each other adding that any closer was likely to be perceived as an invasion of personal space.

28. In order to address this issue, P&G was also specifically asked what dandruff is?

The response was that, it is a common skin condition resulting in scalp flaking and itching. I would like to refer to, Dr. James Schwartz’s definition of dandruff, one of the Research Fellow at Procter & Gamble, who has defined dandruff as follows:

*"Dandruff is not just flaking. It manifests as a multitude of symptoms that include itchiness, scalp tightness, dry feel, irritation, and flakes<sup>1</sup>*

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<sup>1</sup> <http://www.cosmeticsdesign-europe.com/content/view/print/21437>

29. The representative of P&G further submitted that the term ‘dandruff’ has to be looked at and interpreted from the point of view of a reasonable consumer, rather than looking at the scientific definition of dandruff. In this regard, reference has to be made to the ZONG Order, wherein it was 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”*.

30. Keeping in mind the above view, the Commission's approach is to analyze the advertisement and claims from the perspective of an *'ordinary consumer'*, therefore even if we assume that the ordinary consumer's understanding is restricted to flaking and itching and even if it is also assumed as emphasized on behalf of the undertaking that only a reasonable basis for the claim has to be established; I am still not convinced that the undertaking had a reasonable basis to make such claim. It has been argued that the gist of the advertisement is 100% free to get close.
31. The overall net impression of the advertisement is not that regular use of the Product removes *'up to 100% of the visible flakes'*, the said disclosure appears in the advertisement on the left in very fine print which is not legible or readable to any consumer (be it average, reasonable or ordinary). In my considered view the message and the claim from the original advertisement is simple and clear and an ordinary consumer is likely to infer only that, the Product renders the hair 100% dandruff free. As for the basis of the claim, that a fixed distance of two feet was chosen as the distance to observe visible flakes as this simulated a realistic personal distance which people would choose when speaking to each other and that any closer (distance) was likely to be perceived as an invasion of personal space. In my view, if this stance is correct the distance shown in the advertisement is much less than two (2) feet. These two aspects i.e., i) dandruff being restricted to visible flakes, and ii) visibility of flakes is adjudged from a distance of two

feet, in my considered view are significant and ought to have been communicated/disclosed to the consumer while marketing the Product.

32. As mentioned in Para 28 above, as per P&G's own research fellow, dandruff includes five conditions i.e., i) itchiness, ii) scalp tightness, iii) dry feel, iv) irritation, and v) flakes therefore to say that by removing of visible flakes dandruff is removed, would not be correct. Even from the point of view of 'ordinary consumer', even if the definition of dandruff is restricted to itchiness and flakes, the claim based on the cited document cannot be construed to have a reasonable basis.

33. The concept of having a reasonable basis is an established concept in USA and was introduced after much deliberations and public comments through *Policy Statement Regarding Advertising Substantiation*<sup>2</sup>. It provides that, the advertiser must have had some recognizable substantiation for the claims made prior to making it in an advertisement.

34. As was held in the ZONG Order, '*the approach of the Commission is to evaluate complete advertisements and an opinion regarding deception is to be formulated on the basis of the net general impression conveyed by them and not on isolated excerpts.*' This approach of the Commission is not only inline with the standard

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<sup>2</sup> Appended to Thompson Medical Co., 104 F.T.C. 648, 839 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987)

used by the Federal Trade Commission of USA but of the European Commission as well<sup>3</sup>.

35. The representatives of P&G submitted the advertisements of the Product running in Ukraine, Russia, Central Eastern Europe, Latin America, Turkey and France. It is pertinent to mention here that for all these jurisdictions it has not been shown as to whether there is a law which prevents deceptive marketing practices corresponding to Section 10 of the Ordinance. Even if assuming that such laws exist and for some reason these have been overlooked, this cannot justify the contravention under the Ordinance.

36. Moreover, it is relevant to point out that, P&G was categorically asked to respond whether the claim '*100% dandruff free*', has ever been challenged anywhere in the world as deceptive? Their response was in the negative. Whereas, , contrary to such claim it is found that following claims regarding the Product were challenged and were declared misleading:

(a) The claim of **100% dandruff free** and **removes 100% of visible flakes** was challenged by a consumer in United Kingdom before the Advertising Standards Agency (ASA) which vide its order dated April 05, 2006 held that, ads were misleading and

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<sup>3</sup> FTC Policy Statement on Deception 1983; Standard Oil of Calif, 84 F.T.C 1401 (1974); Beneficial Corp v. FTC, 542 F. 2d 611 (3<sup>rd</sup> Circuit. 1976); American Home Products Corporation, A Delaware Corporation, v. Federal Trade Commission, 695 F.2d 681 (1982-83 Trade Cases 65,081); Warner Lambert, 86 F.T.C. 1398 (1975); Cliffdale Associates, Inc., 103 F.T.C. 110, (1984); Federal Trade Commission v. Direct Marketing Concepts, Inc., 569 F.Supp.2d 285 (2008); Federal Trade Commission v. Cyber Space.com LLC 453 F.3d 1196 (2006); Article 3 of the DIRECTIVE 2006/114/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 concerning misleading and comparative advertising

recommended that, because they were significant conditions, the measurement of two feet and the fact that the visibility of flakes was being judged by someone other than the consumer should be made clear if “gets rid of X% of visible flakes” claims were included in future ads;

- (b) The statements about Head & Shoulders Shampoo that: “**It not only eliminates 100 % of the visible dandruff, but in the case of continuous use, it creates a protective layer, helping prevent the reappearance of dandruff. That’s why there is no other dandruff shampoo more effective than Head & Shoulders! Ultra thin ZPT, the most popular formula against dandruff**”, were questioned before the Competition Commission of Hungary and vide their Order dated May 22, 2003, the said statements were declared to be misleading and deceptive for the reason that, Procter & Gamble was not able to show scientific evidence of the statements. Therefore, the Council concluded that the statements made were able to mislead consumers, imposing a fine of 5.000.000 HUF on Procter & Gamble.

37. Since the phrase *‘up to 100% of visible dandruff flakes’* that appears in the original advertisement is not readable to the naked eye in view of the well established principle that, fine-print disclosures are inadequate to correct the deceptive impression. Moreover, there is another well settled principle laid down in **Federal Trade Commission vs. Bronson Partners, LLC, [564 F.Supp.2d 119 (2008)]** that *‘one true statement in the presence of a mass of false and misleading statements does not render an otherwise misleading advertisement non-misleading’*.

38. In view of the above, I am of the considered view that the claim of P&G in the advertisement of the Product suggesting that the use of Product renders hair '*100% dandruff free*' is deceptive and is tantamount to disseminating misleading information in terms of clause (b) of Sub-section (2) of Section 10 of the Ordinance as it lacks reasonable basis regarding the character, suitability of use and/or properties of the Product in question.
39. Although I appreciate the fact that P&G on its own accord after the first hearing modified the advertisement by increasing the font size of the statement at the bottom of the advertisement '*up to 100% visible flakes with regular use*' and also added the word "**stay**" before the claim "*100% dandruff free*", however, I am of the considered view that the claim is still potentially misleading and deceptive and lacks a reasonable basis as the advertisement on the whole still gives an impression that the regular use of Product would render the hair 100% dandruff free.
40. Notwithstanding the fact that, P&G attempted to improve upon the initial advertisement, it cannot be overlooked that for P&G it was not the first time that the said claim of '*100% dandruff free*' was challenged as being misleading on the basis of lacking reasonable basis - *albeit* in other jurisdictions. Also, an undertaking of P&G stature, which maintains that it exists in 83 countries and has been in business since 1837, and further claims that "*the products of P&G*

*touched 3 billion times everyday to the lives of people”* needed to exhibit a higher degree of caution and a better sense of responsibility towards consumers.

41. Keeping in view all the facts and circumstances of the matter in hand, I hereby direct P&G to comply with the following, within a period of two (2) weeks from date of issuance of this Order;

- a) stop advertising the subject advertisement (which has been modified by P&G) in its current form in all segments of media and in future P&G shall not use the phrase **‘100% dandruff free’** in their advertisement of the Product, unless it is properly substantiated by a cogent evidence providing it a reasonable basis for such claim; and/or
- b) modify its claim of **‘100% dandruff free’** to include significant conditions that it *‘removes 100% of visible dandruff flakes’* and *‘the claim is based on the visibility of flakes at two feet distance when used regularly’*, in line with what has been approved by ClearCast for broadcast on TV in UK.
- c) file compliance report with the Commission forthwith after implementing the aforementioned directions.



In the event P&G fails to comply with the above directions within the specified time period and continues with the contravention of Section 10 of the Ordinance, it shall be liable under Section 38 of the Ordinance to pay a penalty amounting to Rs. 25,000,000/- (Rupees Twenty Five Million) million and an additional penalty of Rs. 2,50,000/- (Rupees Two Hundred and Fifty Thousand Only) per day from the date of passing of this Order.

42. The SCN is disposed of accordingly.

(RAHAT KAUNAIN HASSAN)  
MEMBER (LEGAL/OFT)

**Islamabad the February 23, 2010**