



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF
SHOW CAUSE NOTICE ISSUED TO

M/S AT-TAHUR (PVT.) LIMITED
ON COMPLAINT FILED BY
M/S PAKISTAN DAIRY ASSOCIATION

(F. NO: 291/OFT/PDA/CCP/17)

Date(s) of hearing:

21-05-2019
08-08-2019

Commission:

Dr. Muhammad Saleem
Member

Dr. Shahzad Ansar
Member

Present

Mr. Noman A. Farooqi

Assisted:

Ms. Aish K. Khan
Management Executive

Present on behalf of:

M/s Pakistan Dairy Association

Babar Sattar,
Advocate Supreme Court, Ajuris

Ms. Zainab Mehdi,
Advocate, Ajuris

M/s At-Tahur (Pvt.) Limited

Barrister Syed Reza Ali,
Advocate, Ali & Ali

Syed Shahzeb Kirmani
Head of Admin & HR



ORDER

1. This Order shall disposed of the proceedings initiated *vide* Show Cause Notice No. 07/2019 dated 27 February 2019 (the ‘SCN’), issued to M/s *At-Tahur* (Pvt) Limited (the ‘Respondent’) by the Competition Commission of Pakistan (the ‘Commission’) for, *prima facie*, contravention of Sections 10(2)(a), 10(2)(b) and 10(2)(c) read with Section 10(1) of the Competition Act, 2010 (the ‘Act’).

FACTUAL BACKGROUND

A. Complaint, Enquiry and Show Cause Notice:

2. The Commission received a complaint from M/s Pakistan Dairy Association (hereinafter the ‘Complainant’) wherein it was alleged that the Respondent soon after the pronouncement of the Order by the Honourable Supreme Court dated 08 December 2016 started disseminating false and misleading information through its Facebook page by the name of ‘*Prema Milk*’ with the ulterior motive of making inroads into the market share of other milk brands, which amounts to deceptive marketing practices.
3. The main allegations made in the Complainant in its complaint alleged that

(a). the Respondents has resorted to, and continue to undertake, deceptive marketing practices by distributing false and misleading information by coating the few part of the order of the Honourable Court by stating that “*AlhumdulilAllah “Except Prema Milk, all other samples are found to be unfit for human consumption”*: source *Supreme Court*”.

(b). The Undertaking has advertised a post on its page which stated that “*The report on pasteurized milk said all samples, except Prema Milk, were found to be unfit for human consumption.*”: Source: *Dawn.com*” and this quote was hash tag such as “#BringPurityBack #SayNotoUHT #ChoosePasteurizedMilk...”

(c). It has further advertised through a video posted on 19 August 2017 along with a caption stating “Don’t compromise your child’s health, follow nature’s way of Health, hygiene and purity only buy fresh pure milk for your



family. At Prema we care for your family's well-being and are committed to provide you quality fresh pasteurized milk which is **why we the only milk observed to be fit for human consumption** by the Honourable Court #powdermilk #milk #premamilk”.

(d). The Respondent has also issued an undated trade letter which states as follows: Except Prema Milk, all other samples are found to be unfit for human consumption-As per report presented to apex law authority by Pakistan Council and Industrial Research (PC SIR), University of Veterinary & Animal Sciences (UVAS) and University of Agriculture Faisalabad (UAF).

4. The Commission upon receipt of the Complaint and after carrying out the preliminary assessment in the matter, initiated a formal enquiry into the matter which was concluded vide Enquiry Report dated 15 November 2018 (the ‘**Enquiry Report**’). The conclusions and findings of the Enquiry Report, for ease of reference, are reproduced herein below:

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 along with making false comparisons 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(1), in terms of Section 10(2)(a), (b) and (c) 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*



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initiation of immediate proceedings against the Respondent under Section 30 of the Act.

5. The Commission after review of the Enquiry Report and the conclusions and recommendations made therein, and in the public interest deemed it appropriate under Section 37(4) of the Act to initiate proceedings under Section 30 of the Act by issuing the SCN to the Respondent. The SCN in its relevant parts is reproduced hereunder:

“4. WHEREAS, in terms of the Enquiry Report in general and paragraphs 2.21 to 2.30, it has been alleged by the Complainant that the Undertaking soon after the pronouncement of order dated 08-12-2016 passed by Honorable Supreme Court of Pakistan started to disseminate false and misleading information through its Facebook page with ulterior motive of marking inroad into the market share of other milk brands. Dissemination of false and misleading information eventually lead to the ordinary consumer to believe that (a) Prima Milk is the only milk brand safe for consumption by humans in Pakistan; (b) Tea whiteners are harmful to the health; and (c) Powder milk is unsafe for children and cause malnutrition in children, which appears to be dissemination of false and misleading information. Furthermore, the Undertaking involved in false and unsubstantiated comparisons of goods with the Complainant’s products, and thus prima facie constitutes violation of Section 10(1) of the Act; and

5. WHEREAS, in terms of the Enquiry Report in general and paragraph 5.63 in particular, it appears that the marketing campaign of the Undertaking 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; and

6. WHEREAS, in terms of the Enquiry Report in general and paragraph 5.64 in particular, it appears that the Undertaking tried to mislead the public by unsubstantiated comparisons of



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competitors products which appears to be prima facie, violation of Section 10(1) of the Act in general, read with sub-Section 10(2)(c) of the Act; and;

7. WHEREAS, in terms of the Enquiry Report in general and paragraph 5.65 in particular, it appears that the Undertaking's misleading campaign is also capable of harming the business interest of other undertakings in, prima facie, violation of Section 10(1) of the Act in general, read with sub-Section 10(2)(a) of the Act; and;"

B. Written Reply to the SCN, Hearings, and Rejoinder:

6. The Respondent, vide SCN was called upon to show cause in writing and file its written reply within fourteen (14) days from the date of receipt thereof and also to avail the opportunity of hearing on 12 March 2019. The Respondent requested for re-scheduling of hearing and accordingly the hearing in the matter was rescheduled for 21 May 2019.

7. The written reply to the SCN was filed on 12 March 2019 and the succinct presentation thereof is as follows:

(a). The vires of the Act is under challenge before the Honourable Lahore High Court, Lahore in a slew of writ petitions including WP No. **22154/2018**, wherein show cause notices issued by the Commission and enquiry proceedings initiated/completed remain suspended by the Honourable Court. Without prejudice to above, the show cause notice does not reveal the correct factual position and the company denies each and every allegation, assertion and/or insinuation made in the notice.

Preliminary Objections/Maintainability:

(b). The Complainant has no *locus standi* to file the complaint, as there does not appear to be any power invested in the Memorandum and Articles of Association of the Complainant to file any such action before the Hon'ble Commission. **Abdul Rahim v/s United Bank**



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Limited of Pakistan (cited as PLD 1997 Karachi 62). It is settled law that the business and affairs of a company are only to be conducted strictly in consonance with the Articles of Association, which include, inter alia, the power, competence and authority to institute legal action. It is quite evident that the, ulterior motive in filing the Complaint is to damage the good will and reputation of the Respondent as the leader in pasteurized milk and directly purporting to damage the Respondent's business interest.

- (c). The Complainant does not provide commercial services or manufacturing of goods, thus, is incompetent to file this Complaint as it patently fails the test of an 'undertaking' under the Act. By distinguishing an "ordinary consumer" for an "average" or reasonable consumer", the Hon'ble Commission has adopted a very unusual, restrictive and limited interpretation of the said term in deep contrast to the one adopted by courts and authorities all over the world. While the term "ordinary consumer" as defined in **M/s China Mobile Pak Limited vs M/s Pakistan Telecom Limited** may be relevant to the market of cellular services, it cannot be applied to food products that are consumed on a daily basis. The standard and test for "average consumer" that the Commission should have applied in the present case is that of an "average internet consumer". In a judgment of the Supreme Court reported as **Jamia Industries Limited vs Caltex Oil PLD 1984 SC 8**, the court held that the Pakistani consumer's intelligence in assessing deception and confusion shall be judged from the perspective of the average intelligent persons with reasonable apprehension and proper eye sight. The superior courts of Pakistan also further explained that the probable purchase or customer is a person of average intelligence who takes care to at least "observe prima facie facts, floating on the surface and those not those who do not take care even to look at them".



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Reply on Merits of the Enquiry Report and SCN

- (d). The Complainant has no locus standi to file the complaint, as there does not appear to be any power invested in the Memorandum and Articles of Association of the Complainant to file any such action before the Hon'ble Commission.
- (e). It is specifically denied that the Company initiated its market campaign on the basis of the Supreme Court, as the Company has always been very active in marketing and advertising its products on social media. The company rightfully discharged its duty to adequately inform the consumers about the SC Order by providing a clear hyperlink under the statement/headline. The Company clearly provided adequate disclosure of the context of the SC Order or Report Results and there was no probability of a wrong impression being created in the minds of the consumers. The hyperlink provided clarity with respect to the Facebook statement.
- (f). It is specifically denied that consumers tends to mainly focus on the main headline or the overall impression given in an advertisement. An ordinary and/or average consumer reasonably want to know about the status of other milk brands and why the same were rendered unfit by the Supreme Court since milk is a food product consumed on a daily basis by both children and adults.
- (g). It is specifically denied that the act of deception occurred due to the hashtags, such as “#BringPurityBack #SayNotoUHT #ChoosePasteurizedMilk...” Followed by the headline “The report on pasteurized milk said all samples, except Prema Milk, was found to be unfit for human consumption. Source: Dawn. Com”. This statement cannot be regarded as a statement of fact, but merely as ‘trade puffery’. The United States Federal Trade Commission (the “FTC”) has defined puffery, in the case of **Better Living, Inc. et al, 54 F.T.C. 648**, as a “term frequently used to denote the exaggeration reasonable to be expected of a seller as to the degree of his quality of

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his product, the truth or falsity of which cannot be precisely determined”. That in case of **Re the Boston Beer Co. Ltd Partnership 98 F.3d 1970 (Fed. Circ. 1999)**, a case concerning the application of registration of a trademark “The Best Beer in America”, it was held that the proposed market is to be merely descriptive because it is only laudatory and “a simply a claim of superiority, i.e. trade puffery”. Furthermore, the test for determining if a statement is puffery was laid down in case of **Am. Italian Pasta C o. v/s New World Pasta Co., 371 F.3d, 387, 391 (8th Cir. 2004)**, wherein the Eighth Circuit explained that if [a] statement is not specific and measurable, and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained, the statement constitutes puffery.” That the phrase used by the Company does not mention the territory of “Pakistan” and therefore does not provide a benchmark by which the veracity of the statement can be ascertained.

- (h). Furthermore, since the company does not market any powder milk or tea whiteners, any statement on tea-whiteners and/or powdered milk are statements of opinion. (**Bisset v/s Wilkinson [1927] AC 177**) and (**Spiller v Joseph [2010] UKSC 53**)
- (i). The statement being a statement of opinion/puffery, is commercial speech and is protected as freedom of speech under Article 19 of the Constitution of Pakistan, 1973.
- (j). On a reading of the Complaint and/or Rejoinder filed by the Complainant as well as the Enquiry Report, it is shockingly clear that the not even an iota of evidence or other material information/documents/data were furnished by the Complainant to substitute its claim that the statements posted on the social media accounts of the Company were in any way harming the business interest of the its members. Article 117 of the Qanun-e-Shahadat Order 1984 the burden of proof is on he who asserts.



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(k). The Complainant is abusing its dominant position and acting as a cartel on the following grounds:

(i). The Complainant was made for the purpose of, inter alia, “promoting and undertaking dairy and livestock sector related development activities and to promote and oppose any measures affecting the business of its members and their trade”. It is averred that Section 2(e) and Section 2(q) of the Act stipulates that it is to be presumed that an undertaking which includes an “association” has a dominant position if its market share exceeds forty percent. The complainant comprises of some of the biggest market players in the territory of Pakistan. The European commission has previously held that a joint dominant position can exist between a numbers of undertakings because of the connection between them. **[C-396/96P Compagnie Maritime Belge and others v Commission [2000] ECR I-1365.**

(ii). With dominance comes a responsibility; as it has been observed in the previous case of **Michelin v Commission (1983) ECR 3461** where it was stated that the particular dominant undertaking has a special responsibility not to allow its conduct to impair genuine undistorted competition on its common market . Section 3(3) of the Act has specifically laid down various scenarios which are to be presumed as an abuse of dominant position unless the complainant, shall have the burden of proof that such practices are not in fact taking place.

(iii). The Aims and objectives of the complainant noted on their website include *inter alia*, the aims and objectives which show an abuse of dominant position by applying dissimilar conditions which place the company at a competitive



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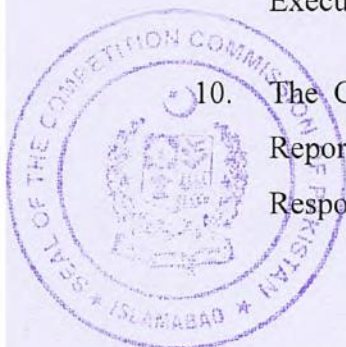
disadvantage than other members of the complainants association.

- (iv). Under section 3(2) of the Act the abuse of dominant position is only satisfied if it is shown that the abuse of dominant position has prevented, restricted, reduced or distorted competition. This was also seen in the earlier case of Hoffmann-La Roche where the ECJ stressed upon the abuse of dominant position and keeping that in view the behaviour of the complainant is similar to that of a cartel.
- (v). Prevention of unfair competition was also seen in the case of **U. S .v/s. National Lead Co. et al 332, U.S 319, 340, 67 St. S. Ct. 1634**. The aims and objectives of the Complainant also has the effect of reducing competition by preventing smaller marker players from gaining any new marker shares.
- (vi). It is specifically denied that the marketing campaign of the company was designed to target the overall market of milk including consumers of UHT and powdered milk. Customers of Prema Milk and UHT have fundamentally different budgets, tastes and interest with respect to their products.

8. On 12 March 2019 written reply of the Respondent was forwarded to the Complainant to file rejoinder, if any, however, despite reminder no rejoinder was filed by the Complainant.

9. Hearings in the matter were held on 21 May 2019 and 8 August 2019. The Complainant and the Respondent were represented by their authorized representatives and the Director General (Legal) along with the Management Executive were present for the assistance.

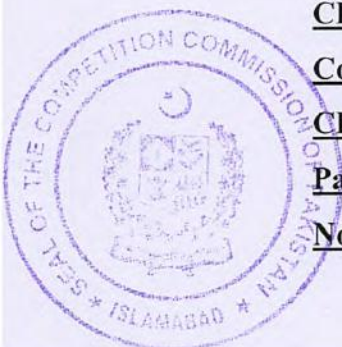
10. The Counsel appearing on behalf of the Complainant supported the Enquiry Report and asserted for imposition of strong and deterrent penalty on the Respondent along with the strict directions to the Respondent for not resorting to



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deceptive marketing practices in future. The submissions made are summarised as follows:

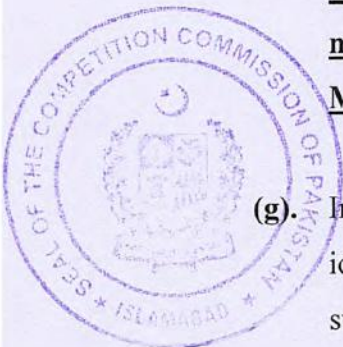
- (a). The instant proceeding is maintainable since Complainant is an undertaking for the purposes of Competition Act, 2010 and the impugned advertisement is capable of giving misleading or false information. He also argued that the Complainant is in the business of providing the services and referred to the reported judgement of the Commission in **Utility Stores Corporation 2018 CLD 292 & NFC Employees Cooperative Housing Society reported as 2019 CLD 164, in the matter of Show Cause Notice issued to Dairy Companies Order for deceptive marketing practices reported as 2017 CLD 789, in the matter of Show Cause Notice issued to Vision Developers reported as 2018 CLD 350.**
- (b). It was submitted that the Respondent through various marketing campaigns has deliberately disseminated the information i.e. *“Except PREMA milk, all other samples are found to be unfit for human consumption- As per report presented to apex law authority by Pakistan Council of Scientific and Industrial Research (PC SIR), University of Veterinary & Animal Sciences (UVAS) and University of Agriculture Faisalabad (UAF)”* in the public through social media and newspapers concealing relevant information which could lead the ordinary consumer into believing that (i) the Product is the only milk brand safe for the consumption for humans in Pakistan (ii) tea whiteners are harmful for the health and (iii) powder milk is unsafe for children and can cause malnutrition in children.
- (c). In determining complaints against deceptive marketing, the Commission will look at the overall impression conveyed by the advertisement, reference and reliance was placed on Orders **in the Matter of Show Cause Notice issued to China Mobile and Pakistan Telecom Mobile reported as 2010 CLD 1478, in the matter of Show Cause Notice issued to Dairy Companies Order for deceptive marketing practices reported as 2017 CLD 789, In the matter of Show Cause Notice issued to Colgate Palmolive reported as 2017 CLD 1550, In the matter of Show Cause Notice issued to Vision Developers reported as 2018 CLD 350, in the**



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matter of Show Cause Notice issued to Dry Acid-Lead Batteries Manufacturers reported as 2018 CLD 844, in the matter of Show Cause Notice issued to Kitchen Stone Foods reported 2018 CLD 778, KRAFT Inc. v/s F. T. C. United States Court of Appeals Seventh Circuit Jul 31, 1992 970 F. 2d 311 (7th Cir. 1992).

- (d). The Complainant with reference to the onus to proof placed reliance on Orders in the matter of Show Cause Notice issued to PSO reported as 2017 CLD 932 and In the matter of Show Cause Notice issued to Vision Developers reported as 2018 CLD 350.
- (e). The Complainant submitted that in Pakistan the ‘consumer’ is an ordinary consumer and placed reliance on Orders in the Matter of Show Cause Notice issued to China Mobile and Pakistan Telecom Mobile reported as 2010 CLD 1478, In the matter of Show Cause Notice issued to Colgate Palmolive reported as 2017 CLD 1550, in the matter of Show Cause Notice issued to Dry Acid-Lead Batteries Manufacturers reported as 208 CLD 844, FTC vs Freecom Communication United States Court of Appeals, Tenth Circuit Mar 21, 2005, 401 F.3d 1192 (10 Cir. 2005)
- (f). It was submitted on behalf of the Complainant that the marketing campaign launched by the Respondent is material in nature as false and misleading assertions have been made therein in order to induce the consumers in preferring the products of the Respondent against the products of any other undertakings. Reliance was placed on the Orders in the Matter of Show Cause Notice issued to China Mobile and Pakistan Telecom Mobile reported as 2010 CLD 1478 and in the matter of Show Cause Notice issued to 2010 CLD 1454, in the matter of Show Cause Notice issued to Reckitt Benckiser Pakistan Ltd., reported as 2016 CLD 40, in the matter of Show Cause Notice issued to Dry Acid-Lead Batteries Manufacturers reported as 2018 CLD 844.
- (g). In cases of comparative marketing the comparisons must be clearly identified, truthful, and non-deceptive. The claims made must have prior substantiation and reasonable basis backed by ‘competent and reliable’



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scientific evidence, reference and reliance was placed on In the matter of Show Cause Notice issued to Askari Bank Ltd, UBL, Mybank Ltd and HBL reported as 2010 CLD 1454, In the matter of Show Cause Notice issued to M/s. Jotun Pakistan (Pvt.) Limited reported as 2015 CLD 1638, In the matter of Show Cause Notice issued to M/s. Proctor and Gamble Pakistan (Pvt.) Limited reported as 2017 CLD 1609, In the matter of Show Cause Notice issued to Colgate Palmolive for deceptive marketing practices reported as 2017 CLD 1550, In the matter of Show Cause Notice issued to Dairy Companies Order for deceptive marketing practices reported as 2017 CLD 789, In the matter of Show Cause Notice issued to Kitchen Stone Foods reported as 2018 CLD 778, In the matter of Show Cause Notice issued to M/s. Green Field Developers (Pvt.) Limited reported as 2018 CLD 404, In the matter of Show Cause Notice issued to M/s. Proctor and Gamble Pakistan (Pvt.) Limited reported as 2017 CLD 1609 and In the matter of Show Cause Notice issued to M/s Vision Developers (Pvt.) Limited reported as 2018 CLD 350.

- (h). The Complainant's counsel referred to the language used on Section 10(2)(a) of the Act and stressed that actual harm to business interest of other undertakings not necessary, if the advertisement had the potential to deceive the consumers the advertisement is termed deceptive. In this regard reference and reliance was placed on Orders in the matter Of Show Cause Notice issued to Askari Bank Ltd, UBL, Mybank Ltd and HBL reported as 2010 CLD 1454, In the matter of Show Cause Notice issued to M/s. Proctor and Gamble Pakistan (Pvt.) Limited reported as 2017 CLD 1609, In the matter of Show Cause Notice issued to Colgate Palmolive for deceptive marketing practices reported as 2017 CLD 1550 and In the matter of Show Cause Notice issued to M/s Vision Developers (Pvt.) Limited reported as 2018 CLD 350.

- (i). It was submitted that the Commission in various Orders has held that the disclaimers made in an advertisement will be adequate if they appear in such a way that they eliminate the advertisement's tendency to mislead in its



overall effect, however, the Respondent in the advertisements which are subject matter of the instant matter has not placed any disclaimers which may eliminate the false and misleading aspects of the marketing campaign, reliance was placed on the **Orders in the matter of show cause notice issued to China Mobile and Pakistan Telecom Mobile (Zong/Ufone) reported as 2010 CLD 1478, In the matter of show cause notice issued to M/s. Proctor and Gamble Pakistan (Pvt.) Limited reported as 2017 CLD 1609 and in the matter of show cause notice issued to Colgate Palmolive for deceptive marketing practices reported as 2017 CLD 1550.**

- (j). The Complainant has also alleged that the wrongful comparison of milk in various forms by the Respondent in its marketing campaign is false and misleading information in violation of Section 10(2)(c) of the Act, reliance was placed on the **Order in the matter of show cause notice issued to Dairy Companies reported as 2017 CLD 789.**
- (k). In the end the Counsel for the Complainant submitted that strict action may be taken against the Respondent and a heavy penalty may be imposed in the circumstances.

11. The Counsel appearing on behalf of the Respondent opposed the findings of the Enquiry Report and submitted that the SCN may be withdrawn. While, main submissions made by the Respondent's Counsel are same as the one made through written reply filed and summarized in Para 7 above, however, certain new submissions made during the hearing are summarised as follows:

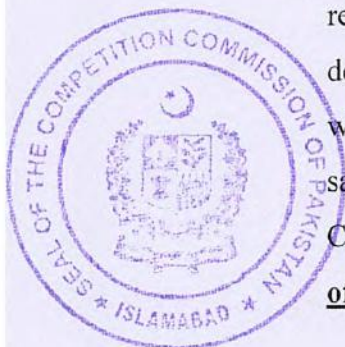
- (a). The Counsel for the Respondent alleged that the Complainant does not provide commercial services or manufacturing of goods, thus, is incompetent to file this Complaint as it patently fails the test of an 'undertaking' under the Act. In this regard reliance was placed on the **Orders in the matter of show cause notice issued to NFC Employees Co-operative Housing Society, 2019 CLD 164, In the matter of show cause notice issued to M/s Utility Stores Corporation of Pakistan (Pvt.) Limited, 2018 CLD 292 and In the matter of show cause notice issued**



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to M/s Pakistan Automobile Manufacturers Authorized Dealers Association (PAMADA), 2016 CLD 289.

- (b). The Association is not an aggrieved party independent of its Members as the grievance must entail a direct injury to the Association. In the instant matter no grievance is highlighted by the Association or any action which has caused any prejudice to the rights of the Complainant, hence, the complaint is not maintainable. Reliance is placed on **Pakistan Steel Re-rolling Mills Association Vs. Province of West Pakistan, PLD 1964 (W.P.) Lahore 138, Democrativ Workers Union C.B.A. vs. State Bank of Pakistan, 2002 PLC (C.S.) 614 and 2010 PLC (C.S.) 306.**
- (c). With reference to the 'consumer' and its interpretation with special reference to Section 10 of the Act, it was submitted that, in order to determine whether the description, or statement in question was liable to mislead the purchaser the court must took into account the presumes expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect. Reference was made to **Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung, Case C-210/96, ECR 1998 I-04657.**
- (d). With reference to the claims and statements alleged to have violated Section 10 of the Act, the Counsel for the Respondent submitted that the statements made are opinions of the Respondent and not a statement of fact, hence, the same is not actionable under Section 10 of the Act. Reliance was placed on **Pizza Hut, Inc. v. Papa John's Int'l - 227 F.3d 489 (5th Cir. 2000).**
- (e). It was submitted by the Counsel for the Respondent that recording of reasons in support of a decision by a quasi-judicial authority ensures that the decision is reached in accordance with the law and is not result of caprice, whim or fancy or reached on grounds of policy or expediency. Hence, the same may be recorded in line with the guidelines provided by the August Court. Reliance was placed on **Guranga Mohan Sikandar vs. Controller of Import and Export, PLD 1970 SC 158.**



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(f). In the end, the Counsel for the Respondent submitted that the SCN may please be withdrawn and the proceedings against the Respondent be set-aside.

12. The Director General (Legal) in attendance, made the following submissions for our assistance:

(a). While making reference to the conclusions of the Enquiry Report and the SCN, it was submitted by the Director General that various concepts *vis-à-vis* Section 10 of the Act have been clarified by the Commission in its Orders since 2010 and those aspects must be considered while dealing with the case in hand, they are as follows:

(i). **Net general impression**: The Commission as far back as in 2010 while deciding the first case of Section 10 in determining whether an advertisement or marketing material amount to deceptive marketing practices in its **Order in the matter of China Mobile Pak Limited and Pakistan Telecom Mobile Limited reported as 2010 CLD 1478**, held that:

"...evaluate complete advertisement and make an opinion regarding deception [...] on the basis of net general impression conveyed by them and not an isolated script".

(ii). **False or misleading statement**: Similarly, the concept of false or misleading information was also clarified in 2010 CLD 1478, in the following terms:

False information: "oral or written statements or representations that are: (a) contrary to the truth or fact and not in accordance with reality or actuality; (b) usually implied either conscious wrong or culpable negligence, (c) has a stricter and stronger connotation, and (d) is not readily open to interpretation...."



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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, though or judgement, (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 erroneous connotation and is somewhat open to interpretation as the circumstances and conduct of a party may be treated as relevant to a certain extent".

(iii). **Material information:** With reference to the materiality of the representation, reference can be made to the **FTC Policy Statement on Deception dated 14.10.1983 appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984)**, wherein it is provided that the omission, or practice must be a 'material' one which is likely to affect the consumer's conduct or decision with regard to a product or service. This was also endorsed by the Commission in **2010 CLD 1478**.

(iv). **Consumer vis-à-vis the Section 10 of the Act:** The Commission also discussed the concept of 'consumer' with reference to Section 10 of the Act in **2010 CLD 1478**, in the following terms:

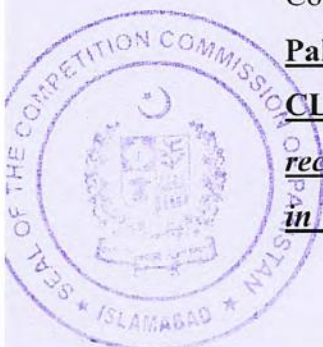
32. *Taking the above into account, I am of the considered view, that if in Pakistan, we want to encourage a compliance oriented approach viz a viz Section 10 of the Ordinance we must place a higher onus on the Undertakings in relation to the marketing practices. Therefore, from OFT's perspective, the consumer to whom such information is disseminated has to be the 'ordinary consumer' who is the usual, common or foreseeable user or buyer of the product. Such a consumer need not necessarily be restricted to the end user. Here it may be relevant to point out that the 'ordinary consumer' is not the same as the 'ordinary*



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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.

- (v). **Reasonable basis for a claim**: With reference to substantiation of claims to ensure that the information distributed by any undertaking in the process of marketing does not lack a reasonable basis, the Commission in its **Order in the matter of Proctor and Gamble Pakistan (Private) Limited (Head and Shoulder Shampoo), 2010 CLD 1695**, observed that **"the advertiser must have some recognizable substantiation for the claims made prior to making it in an advertisement"**. This doctrine was enunciated in the case of



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Pfizer, Inc., 81 F.T.C. 23 (1972), wherein the Federal Trade Commission (FTC) held that advertisers must possess the level of substantiation expressly or impliedly claimed in the advertisement.

(vi). **Defence of Puffery:** The Commission in one of its Orders i.e. in the matter of Show Cause Notice issued to M/s S.C. Johnsons and Sons, held that ‘puffery’ is intended to base on an expression of opinion not made as a representation of fact. ‘Puffing’ statements are, while factually inaccurate; so grossly exaggerated that no ordinary consumer would rely on them. Hence ‘puffing’ is generally vague and unquantifiable. Whereas, any statement of fact which is quantifiable and specific in characteristic is not ‘puffery’.

(vii). **Disclaimers:** The Commission with reference to the disclaimers has held in 2010 CLD 1478 that ‘*fine print disclaimer, are inadequate to correct the deceptive impressions*’. In fact, such disclaimers are, in themselves, a deceptive measure.

The aforesaid principles have been referred and relied upon by the Commission in the cases which were dealt with up until now and provides for a general and broader guidelines for the framework of the Commission in determining the deceptiveness of any marketing practice.

(b). With reference to the status/*locus standi* of the Complainant, it was submitted that bare perusal of Section 2(1)(q) of the Act, one realizes that the legislature has carefully crafted the definition so as to include almost all type of legal entities in it which are in any way engaged in provisions of goods or services or in control of services and any ‘*association of undertakings*’ is de-jure an undertaking without fulfilling the criteria for other entities. He stressed that the words ‘association’ and association of undertaking’ used in Section 2(1)(q) of the Act have different connotations and cannot be used interchangeably in this regard he placed reliance on East and West Steamship Co. v. Queensland Insurance Co., PLD 1963 SC 663, wherein it was held that “It is not permissible for us whilst interpreting a statute to hold that any part thereof or any word therein is surplusage.



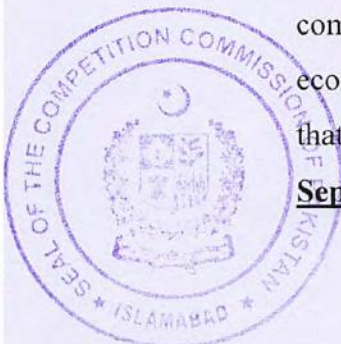
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Every word has to be taken into account and a meaning given to it.” And **University of Punjab v. Mst. Samea Zafar Cheema**, reported as **2001 SCMR 1506**.

(c). The Director General (Legal) stressed that the Complainant is an association of almost 26 dairy products manufactures and suppliers, who are admittedly engaged in the business of manufacturing / producing dairy products. The Respondent has not raised any object vis-à-vis the business of the Complainant’s Members, all the Members on the face of it and by virtue of the functions performed by it fall within the purview of Section 2(1)(q) of the Act and are undertaking. The Complainant is an association of said twenty six (26) members and hence is an association of undertaking. By taking the plain and ordinary language used in Section 2(1)(q) of the Act, undertaking means and include ‘association of undertaking’. Further, in pursuance of Section 37(2) of the Act, an ‘undertaking’ or ‘registered association of consumers’ can file a complaint with the Commission. Since, the Complainant is an ‘undertaking’ within the meaning of Section 2(1)(q) of the Act, therefore, the complaint is validly filed. Reliance was placed on **Order dated 15 December 2017, in the matter of Show Cause Notice issued to Utility Stores Corporation of Pakistan (Pvt.) Ltd., reported as 2018 CLD 292**.

(d). With reference to the actual proof of grievance and injury to the Complainant, the Director General (Legal) highlighted that the Bench needs to appreciate the nature of proceeding before the Commission and the allegations which is made. In this regard, it was submitted that in the matters of deceptive marketing practices i.e. Section 10 violations, the Complainant is considered an informer; this is in line with the mandate of the Commission under the provisions of the Act i.e. the Commission is entrusted with the responsibility of looking after the interest of general public vis-à-vis anti-competitive conduct and to create a level playing field in order to enhance economic efficiency in all spheres of commercial and economic activity and that too in the public interest. He placed reliance on **Order dated 14 September 2018, in the matter Show Cause Notice issued to Pakistan**

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Telecommunication Company Ltd., 2018 CLD 984. He also placed reliance on 2010 CLD 1478, wherein the Commission has held that

“28. ...[w]e should not “favour a return to unregulated laissez-faire marketing that would transfer the burden of evidence from the seller, who has the advantage of intimate knowledge of the product, to the buyer, who of necessity must make many, often instantaneous choices in the course of a day.”

...

32. Taking the above into account, I am of the considered view, that if in Pakistan, we want to encourage a compliance oriented approach viz a viz Section 10 of the Ordinance we must place a higher onus on the Undertakings in relation to the marketing practices. Therefore, from OFT's perspective, the consumer to whom such information is disseminated has to be the 'ordinary consumer' who is the usual, common or foreseeable user or buyer of the product. Such a consumer need not necessarily be restricted to the end user. 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



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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."

- (e). The Director General (Legal) concluded by submitting that no irregularity has been committed during the enquiry or the proceedings before the Commission and the Commission has proceeded in the matter in accordance with law.

13. Arguments heard and record perused.

ANALYSIS & DECISION

14. Based on the findings of the Enquiry Report, the SCN, the written reply filed by the Respondent and the submissions made before us during the hearings, following issues emerge which require determination:

- (a). *Whether the Complainant is an 'undertaking' in terms of the provisions of Section 2(1)(q) of the Act?*
- (b). *Whether the Complainant is duly authorized to file the complaint with the Commission under Section 37 of the Act?*
- (c). *Whether the Respondent has violated the provisions of Section 10 of the Act?*

15. Before we start addressing the issues in seriatim, we deem it appropriate to address one preliminary submission made by the Respondent. The counsel for the Respondent has argued that the *vires* of the Act is under challenge before the Honourable Lahore High Court, Lahore in a slew of writ petitions including WP No. 22154/2018, wherein show cause notices issued by the Commission and enquiry proceedings



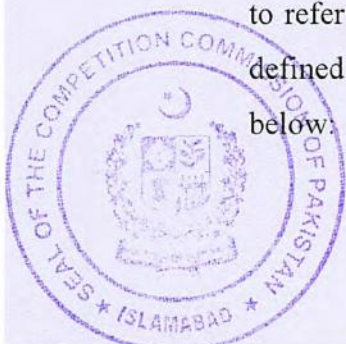
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initiated/completed remain suspended by the Honourable Court. The August Supreme Court in **Mehr Dad v. Settlement and Rehabilitation Commissions**, PLD 1974 SC 193, held that *“it is true that a Tribunal cannot go into the vires of the enactment under which it has been created”* and in **Chempak (Pvt) Ltd. v Sindh Employees Social Security Institution (Sessi), 2003 PLC 380**, the Court held that *“as observed by the Full Bench of Honourable 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. Foregoing in view, we are of the considered view that, it is not for the Commission to address the objections raised as to the vires of the Act. 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. In the subsequent paragraphs, we will now proceed to analyse the aforesaid issues in terms of the evidence available on record along with the submissions made before us.

Issue (a): Whether the Complainant is an ‘undertaking’ in terms of the provisions of Section 2(1)(q) of the Act?

17. The Respondent has stressed that the Complainant is no an undertaking in terms of Section 2(1)(q) of the Act; as it is not engaged in manufacturing or production or provision or control of any services and is not performing any economic activity, hence, the Complainant has no locus standi to file the instant complaint in terms of Section 37(2) of the Act. We appreciate that in pursuance of Section 1(3) of the Act, the law i.e. Competition Act is applicable on all the ‘undertakings’ and in terms of the provisions of Section 37(2) of the Act, only an ‘undertaking’ or ‘registered association of consumers’ can file a complaint with the Commission. From the foregoing, it is clear that in order to resolve the controversy, it is important to address as to who is an undertaking under the Act? In order to address this objection, we deem it appropriate to refer to the provisions of Section 2(1)(q) of the Act, whereby the legislature has defined the term ‘undertaking’, which for ease of reference is reproduced herein below.



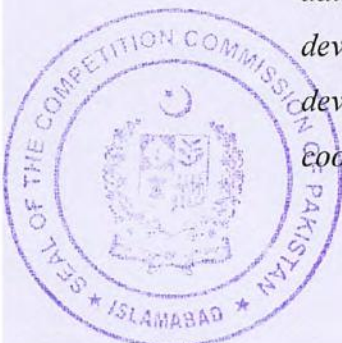
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*“undertaking” **means any natural or legal person** (emphasis added), governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services **and shall include an association of undertakings (emphasis added)**;*

18. Bare perusal of the definition of ‘undertaking’ reveals that the legislature has imposed a condition on legal and natural person mentioned in Section 2(1)(q) of the Act which is that they must be engaged in provision of goods or services in any manner. Whereas, for ‘association of undertakings’ no such condition is imposed by the legislature. In fact the plain and ordinary language of the afore-referred provision unambiguously provides that it should be an association of ‘undertakings’ i.e. where the members are ‘undertakings’ within the meaning of Section 2(1)(q) of the Act, it will be deemed to be an association of undertakings. Further, the words ‘association’ and ‘association of undertaking’ used in Section 2(1)(q) of the Act cannot be used interchangeably and have different meanings. In this regard we are in agreement with the submissions made by the Director General (Legal).
19. The Complainant i.e. Pakistan Dairy Association was incorporated under Section 42 of the Companies Ordinance, 1984 under CUIN 0094490 vide certificate of incorporation dated 27 July 2015. Earlier, the Complainant also procured the license i.e. License No. 150 dated 09 February 2011 by Director General Trade Organization, Ministry of Commerce, Government of Pakistan under the Trade Organization Act, 2013 read with Trade Organization Rules, 2013. The prime objective of the Complainant as provided under the Memorandum of Association is as follows:

“To promote & undertake dairy and livestock sector related development activities including but not restricted to farmers training, provision of infrastructure for farmers support, farm equipment, financial assistance, dairy animals, dairy farms or other assistance as may be required to develop the sector. Pakistan Dairy Association may engage in these development activities directly, indirectly or in a facilitator or coordination role with the Dairy Industry, Public or Private Institutions,



NGS's, National or international donors or development agencies, individuals and or organizations and to receive grants, donations, loans or other assistance as may apply for the stipulated terms of such engagements or partnerships."

20. As has been highlighted and even admitted by the Respondent that the Complainant is an association of 26 dairy products manufacturers and suppliers i.e. the Members are engaged in production and distribution of dairy products, thereby fulfilling the condition precedent of Section 2(1)(q) of the Act to fall within the scope of 'undertaking'. The list of Members of the Complainant, for ease of reference and to remove any ambiguity is reproduced herein below:

Sr. No.	Name of Member of Complaint	Brand Name	Functions Performed
01.	Nestle Pakistan Limited	Nestle water Nestle coffee	It is a company engaged in the production and distribution of dairy, confectionery, coffee, beverages infant and drinking water products.
02.	Millac Foods Pvt. Limited	Milk Powder Yogurt	It is engaged in the production of various dairy and milk products.
03.	Fauji Foods Limited	Nurpur Must fruit drink	It is engaged in the production of various dairy and food products.
04.	Haleeb Foods Limited	Tea max Haleeb milk	It is engaged in the production of various dairy, milk, juices and ghee products.
05.	Unilever Pakistan Limited	Lifebuoy soap Lipton tea closeUp paste	It is a global company engaged in the production and selling of fast moving consumer goods.
06	Malmo Foods Pvt. Limited	Anmol milk powder Tazadum tea creamer	It is engaged in the production of dry milk powder and dairy products.



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07.	Shakarganj Foods Products Limited	Good milk Chaika	It is a company engaged in the production and distribution of dairy and juice products.
08.	FrieslandCampina Engro Pakistan Limited	Friso gold Dutch Lady	It is a company engaged in the production and distribution of dairy Products.
09.	Pakola Products Limited	Pakola Lychee Pakola fresh lime	It is a Pakistani corporation, manufacturer and retailer of carbonated beverages, syrups and juices.
10	Gourmet Foods	Bon Vivant <u>Gourmet</u> <u>Sharbat-e-</u> <u>Jaan</u>	It is a company engaged in the production and distribution of food products.
11.	Tetra Pak Pakistan Limited	Tetra Pak- PlantMa ster Tetra Wedge Aseptic	It is a company engaged in the packaging and distribution of liquid products.
12.	Everfresh Farms Pvt. Limited	N/A	It is a company engaged in the production of milk.
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	Dairy Land Pvt. Limited	Dayfresh mango flavored milk Dayfresh lactose free milk	It is a company engaged in the production and distribution of dairy and milk products.
14.	Dada Dairies Pvt. Limited	N/A	It is engaged in dairy farm business.
15.	Sapphire Dairies Pvt. Limited	Unipure	It is engaged in supplying raw milk to the corporate societies in Pakistan.
16.	JK. Dairies Pvt. Limited	Whole Milk Forage	It is a company engaged in the production and distribution of milk.
17.	Sharif Milk Products Pvt. Limited	Full Cream Milk Flavored Yogurt	It is engaged in the processing and marketing of pasteurized milk and milk products
18.	Eastern Dairies Pvt. Limited	N/A	It is a company engaged in the production and distribution of organic milk and food products.
19.	Accha Foods Pvt. Limited	Accha Milk Acha Yogurt	It is a company engaged in the production and distribution of cheese.



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20.	Minha Farms Pvt. Limited	N/A	It is a company engaged in the production of milk for domestic market.
21	Dalda Foods Pvt. Limited	Dalda Cooking Oil	It is a company engaged in manufacture and sale of edible oils and fats, snacks and tea whiteners
22.	Adam Milk Foods Pvt. Limited	Cheddar cheese Pizza cheese	It is a company engaged in the production and distribution Cheese and dairy products.
23.	Premier Industrial Chemical Manufacturing Company Pvt. Limited	N/A	It is a company engaged in the production and distribution of milk.
24.	Matrix Dairy Farms	N/A	It is a company engaged in the production and distribution of milk.
25.	Popular Juice Industries Pvt. Limited	So-Fruit Fruitila Real Fruit	It is a company engaged in the production of fruit Juices with brand name "MAZA".
26.	CitroPak Limited	Citrus Juice concentrate Purees and pulp	It is a company engaged in the production and distribution of different fruit concentrates, purees and specialized products.

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21. From the above discussion on the functions performed by each Member of the Complainant it is clear that the all the Members of the Complainant are undertakings. Here, we deem it appropriate to refer to one of our fairly recent Order i.e. **Order dated 13th December 2019 in the matter of Show Cause Notice issued to Pakistan Flour Mills Association**, wherein the larger bench of the Commission after taking into account all the factors and language used in Section 2(1)(q) of the Act and the previous case laws on the subject has held as follows:

32. *We have observed that the word 'association' is used only once independently in the Act in Section 2(1)(q). However, in all other instances it is used in conjunction with the other words giving a different meaning. In Section 4(1) the word association is used in conjunction with 'of undertakings'. In Section 30 (4) the word is used with 'articles of', in Section 37(2) the word is used with 'of consumers'. From this and being guided by the afore-referred judgments of the August Court i.e. **PLD 1992 SC 409 and 1999 SCMR 2799**, we are of the considered view that the words 'association' or 'association of undertakings' used in Section 2(1)(q) of the Act, ex facie, are capable of different connotations and the intentions of the legislature is not to put them in one bucket.*

33. *Bare perusal of the definition of 'undertaking' reveals that the legislature has imposed a condition on legal and natural person mentioned in Section 2(1)(q) of the Act which is that they must be engaged in provision of goods or services in any manner. Whereas, for 'association of undertakings' no such condition is imposed by the legislature. At this juncture we deem it appropriate to reproduce the provision in its relevant part:*

(q) "undertaking" means any natural 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



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control of services and shall include an association of undertakings (emphasis added); and,

34. *The 'association' can be of natural or legal persons for social cause or economic purpose, however, for an 'association' to be an undertaking, it must be performing economic function i.e. it is engaged in provision of goods or services. Whereas, for an 'association of the undertakings' the legislature has not prescribed any condition, rather, the plain and ordinary language of the afore-referred provision unambiguously provides that it should be an association of 'undertakings' i.e. where the members are 'undertakings' within the meaning of Section 2(1)(q) of the Act, it will be deemed to be an association of undertakings.*

22. Based on the discussions in the preceding paragraphs, we are of the firm view that Pakistan Dairy Association i.e. the Complainant is an association of entities, who are undertakings i.e. engaged in the production, distribution and supply of producers and distributors of Dairy Products and ancillary food items. Hence, the Complainant is an 'association of undertakings' and is therefore, an undertaking in terms of Section 2(1)(q) of the Act.

Issue (b). Whether the Complainant is duly authorized to file the complaint with the Commission under Section 37 of the Act?

23. Another objection which has been raised by the Respondent is that the Complainant is not filed by the authorized person and under the Articles of Association no specific authority has been bestowed upon the Complainant to institute any legal proceedings. In fact it has been argued before us that the Board Resolution holds no value as there is no power available under the Memorandum and Articles of Association to institute legal proceedings before any forum.

24. Here, at the outset, it needs to be clarified that the Company is an artificial legal entity and the kind of operations and functions it can perform are outlined in the Memorandum of Association and the Articles of Association. The Memorandum and Articles of Association of a Company are its constitution documents providing and



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prescribing the objectives and purposes for which the Company had been established or created. It is by now well settled that when a Company is instituting the legal proceedings it had to establish the proceedings has been instituted competently and authorisedly.

25. In the case **Abdul Rahim and 2 others vs. Messrs United Bank Limited, PLD 1997 Karachi 62**, the Honourable High Court, while dilating upon a similar kind of objection laid down the following test:

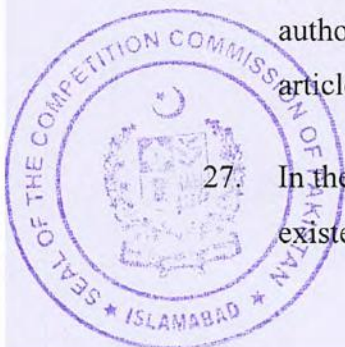
“(ii). For suit to be valid it had to be shown that firstly, it was verified and signed by the proper person in terms of Order 29, Rule 1 of C.P.C., and secondly, it was instituted by a competent person having the power and authority to do so:

(iii). In case there is default in compliance of Order 29 Rule 1 the same is not a fatal defect and can be cured even after the suit has been instituted (See All India Reporter Limited vs. Ram Chandar Dhondo Datar AIR 1961Born. 292);

(iv). However, in case there is any defect in institution of the suit i.e. it is instituted unauthorisedly and incompetently the said defect remains incurable even by a subsequent ratification (See Punjab Livestock and Saleh Hayat, referred supra).”

26. The upshot of the above discussion is that for the objects and functions reference had to be made to the Memorandum of Association and to address the objections regarding the competence to file the suit or institute any legal proceedings, the same has to be resolved after referencing to the Articles of Association from where it is had to be seen as to whether the person delegating powers was competent to delegate such powers to the person(s) instituting the said legal proceedings. Even in the presence of power of attorney and the resolution in their favour have to prove that they are duly authorized to institute the proceedings and this can be only be done by referring to the articles of association.

27. In the instant matter, the complaint was filed by Pakistan Dairy Association the legal existence and incorporation of the Complainant is discussed in Para 18 above. Further,



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the Power of Attorney in favour of is signed by Mr. Farrukh Shahzad Mughal, Secretary General of the Complainant and it also bears the stamp of the Complainant. In support of the Powers of Attorney in Favour of Mr. Babar Sattar, Anique Salman Malik, Zainab Janjua, Umer Rehman and Rabi Bin Tariq to be counsels for the Complainant in instituting and pleading the complaint before the Commission. Along with the Power of Attorney the certified true extract of the Resolution of the Board of Directors/ Executive Body dated 27 October 2016 is filed, wherein Mr. Farrukh Shahzad Mughal, Secretary General of the Complainant is authorized to appoint counsels and institute or defend any legal proceedings for and on behalf of the Complainant before any legal forum. It is relevant to highlight that the Board Resolution and the Power of Attorney is not challenged rather a unique argument is made that the power to institute legal proceedings are not provided for in the constitution i.e. the Memorandum and Articles of Association of the Complainant. Bare perusal of the above satisfy the first condition as highlighted in *Abdul Rahim Case supra*.

28. Despite the above, we now proceed to analyse the Memorandum and Articles of Association of the Complainant in order to address the condition nos. (ii) & (iii) of the tests laid down in Abdul Rahim Case. In terms of the Clause 4 (i) of the Articles of Association, the Complainant is a representative body of firms or companies being eligible to undertake production, processing of milk or milk products and or provision of any ancillary services in respect of producing and or processing milk or milk products. In the Memorandum of Association of the Complainant, in particular Clause 4(v) thereof, the Complainant is authorized:

To consider and take legitimate steps necessary for starting, promoting, supporting and opposing any measures affecting the business of its members and the trade in general.

29. In addition to the above under Clause 5(xiii) of the Memorandum of Association, the Complainant may take such actions as are necessary to raise the status or to promote the efficiency of the Association. Further, under the Articles of Association, the Executive Committee is authorized under Clause 26 (b) thereof to appoint representatives and conduct all other activities aimed at advancing the objects of the Complainant. The Executive Committee is a body of persons elected by the members



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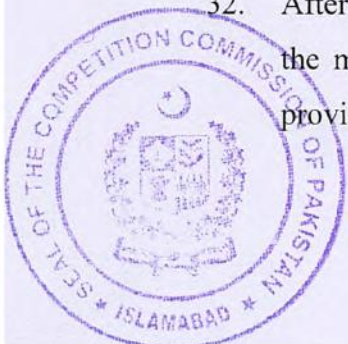
of the general body of the Association from amongst its members. In fact, the Executive Committee is the Board of Directors of the Complainant. Further, in pursuance of Cause 28 (a) of the Articles of Association, the Executive Committee is the main governing body which is authorized to exercise overall control and to manage and administer all the affairs of the Complainant on behalf of the General Body.

30. Perusal of the Complaint reveals that the Complaint is filed against the alleged deceptive marketing practices of the Respondent. The gist of the Complaint is that by alleged false and misleading marketing campaign by the Respondent, the business interest of the Members of the Association i.e. the Complainant is affected and the Respondent is trying to capitalize and take an unfair advantage by maligning the members of the Complainant in general and every other entity engaged in the business of production and supply of dairy products in Pakistan.
31. In fact, the Memorandum and Articles of Association of the Complainant, based on the test highlighted in Abdul Rahim Supra, gave ample powers to the Executive Body to take appropriate action inter alia institution of legal proceedings before the Commission for alleged violation of the Act. It also empowers the Executive Board to nominate any representative to carry out such other function as may be authorized and to safeguard the business interest of the members. Hence, we are of the considered and firm opinion that the arguments and objection of the Respondent vis-à-vis the power to institute legal proceedings before the Commission is duly backed by the Memorandum and Articles of Association and the power is duly delegated by the Board of Directors/Executive Committee to the Secretary General to institute legal proceedings in accordance with law. We were unable to find any lacuna/defect in institution of the current proceedings and the authorization given by the Executive Board. Therefore, the objection being meritless is turned down.

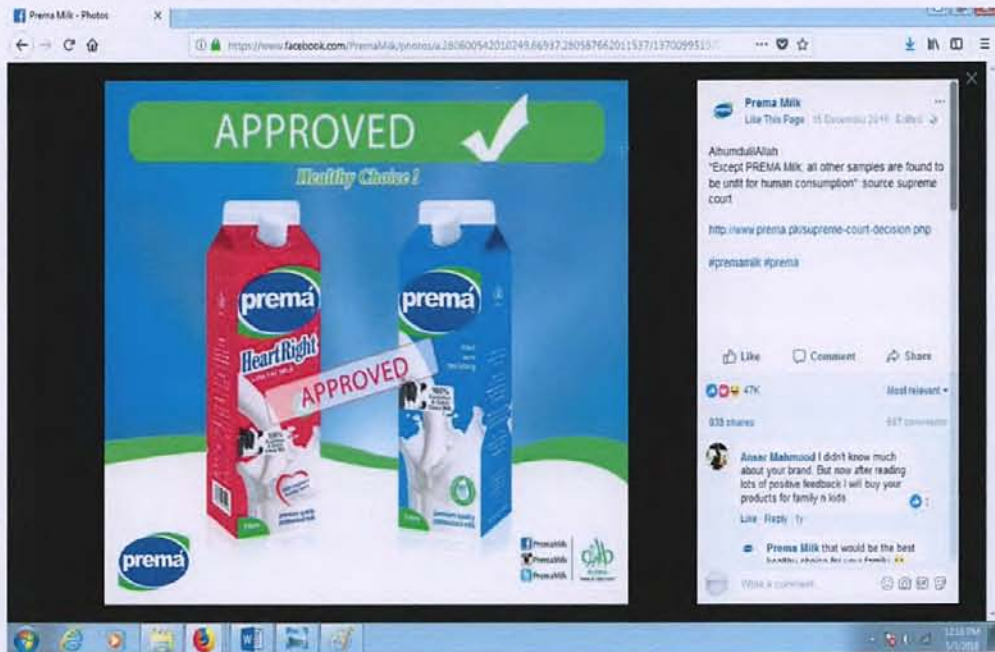
Issue (c): Whether the Respondent has violated the provisions of Section 10 of the Act?

32. After addressing the objections raised by the Respondent, we now proceed to address the main issue in the instant matter i.e. whether the Respondent has violated the provisions of Section 10 of the Act by resorting to false or misleading marketing

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practices. The images of the marketing campaign of the Respondent as advertised in various media platforms is depicted below:



33. The above image carries the tagline that except 'PREMA' all other samples were found to be unfit for human consumption. This is circulated on the Facebook page of the Respondent. In the above image, one comment is visible which clearly states that after reading the positive feedback with reference to the campaign the consumer may buy the products of the Respondents. Another post of the Facebook page of the Respondent is as follows:



34. In the aforesaid marketing, it has been claimed by the Respondent that the report on pasteurized milk said all samples except Prema Milk were found to be unfit for human consumption. In addition to the above posts, on 16 January 2017, a 32 second video was posted in which Hamid Mir (a senior journalist) states that chemical tests were conducted by PCSIR on **different samples of milk** pursuant to the order of the Supreme Court and that except Prema, none of the samples managed to qualify through the tests. The screenshot of the above video is as follows:



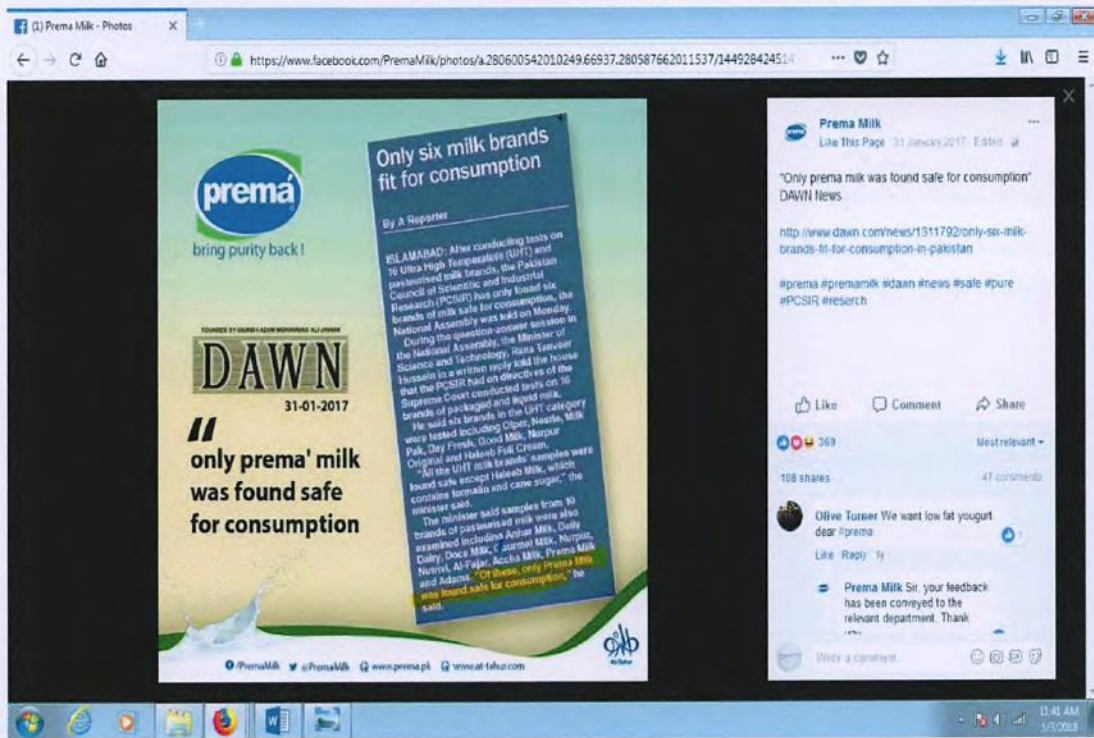
35. Above is an image of the said video. This video suggests that amongst all milk samples, only Prema milk managed to qualify the test, which is a false message. Once again, this post should also be taken in connection with the previous posts of the Respondent as there is a high probability that the previous posts would have already misled the viewers and created a wrong impression in their minds regarding the true nature of the report results.

36. In another post shared on 31 January 2017, an image with an article of Dawn News was posted. In the said, the Respondent provided a significant portion of the article in legible font size. The title of the article states, “*Only six milk brands fit for consumption*”. The Respondent also used a selective statement from the article in a much larger font size and in bold letters stating that “*only Prema’ milk was found safe for consumption*”. The same words were the main content of the posts as well. This

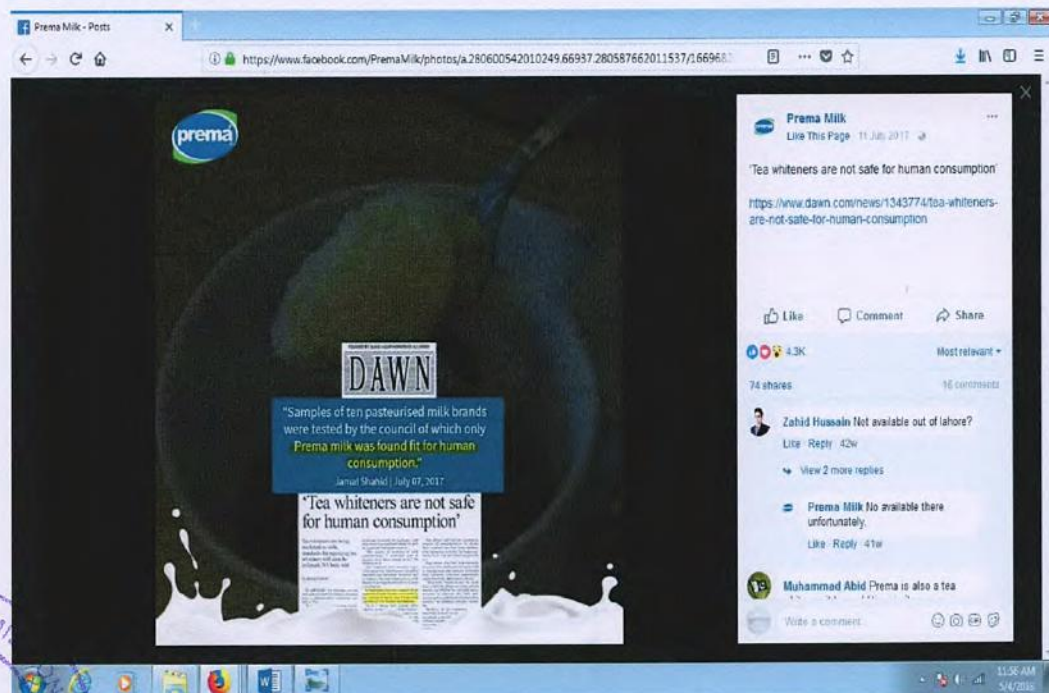


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statement of the article has also been highlighted by the Respondent from which the link can be made by the viewers. In addition, the hashtags in this post are more truthful as they provide the true source of this conclusion, i.e., #PCSIR. The post is as follows:

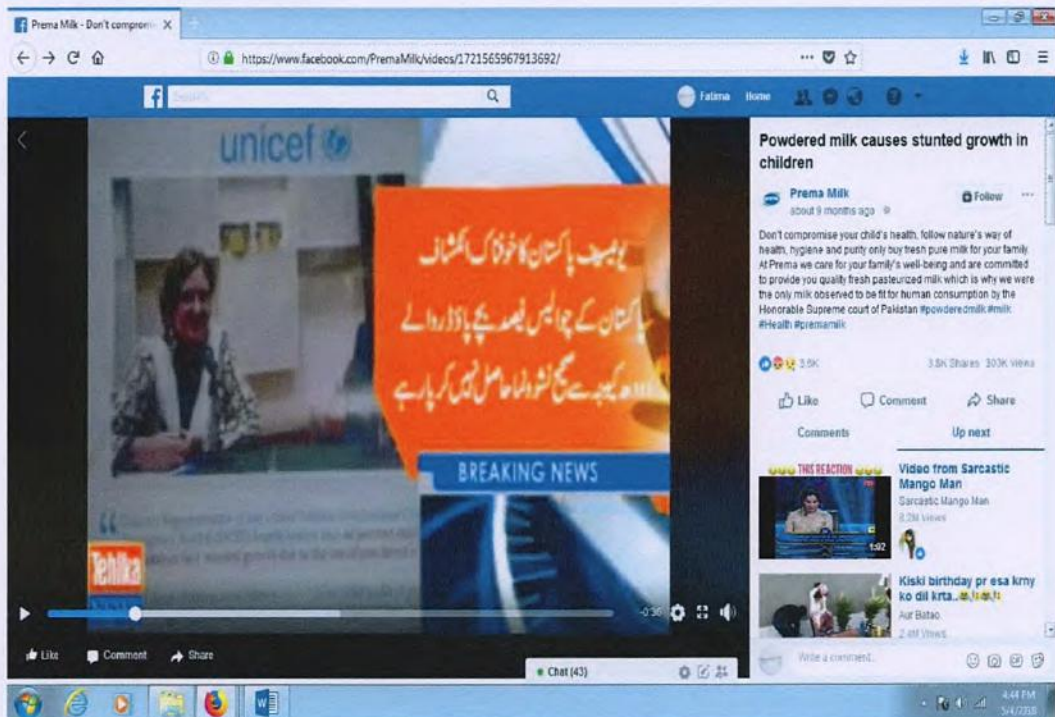


37. On 11 July 2017 another post was made by the Respondent on its Facebook Page which is as follows:



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38. The article suggests that DG PSQCA – Mohammad Khalid Siddique presented that *tea whiteners were being marketed as milk and hence, unsafe for human consumption*. Where the headline of the article has been reproduced correctly, it is necessary to note that the headline of the article itself is quite misleading. Upon reading the article, it can be understood clearly that tea whiteners on their own have not been declared unfit, rather them being marketed as milk could be injurious for health. Therefore, the onus of the misstatement not only falls on the news agency, but also on the Respondent who should have read, understood and spread the correct message of the article.
39. On 19 August 2017, a video was posted along with a caption stating, *“Powdered milk causes stunted growth in children – Don’t compromise your child’s health, follow nature’s way of health, hygiene and purity only buy fresh pure milk for your family. At Prema we care for your family’s well-being and are committed to provide you quality fresh pasteurized milk which is why we were the only milk observed to be fit for human consumption by the Honorable Supreme court of Pakistan #powderedmilk #milk #health #premamilk”*.



40. An undated trade letter was also issued by the Respondent and published on the twitter which claimed: *“Except PREMA milk, all other samples are found to be unfit for*

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human consumption- As per report presented to apex law authority by Pakistan Council of Scientific and Industrial Research (PC SIR), University of Veterinary & Animal Sciences (UVAS) and University of Agriculture Faisalabad (UAF).” The post vis-à-vis the afore-referred trade letter is as follows:

The screenshot shows a Twitter thread on a Windows desktop. The top tweet is from **Prema Milk @PremaMilk** dated 28 Dec 2016, replying to **@SabiBaba** with the text: "As you can see from Supreme Courts orders PREMA is the only milk fit for human consumption." Below it is a reply from **Punjabi Baba @SabiBaba** asking "Is Milk you're drinking safe?" and mentioning a report from SC about hazardous ingredients like formalin and fungus. The browser window below shows the full text of the Supreme Court order, which states that PREMA milk is the only one found fit for human consumption, while other brands like Halzeb and M/s Doce Foods Limited are not.

Limited (Doce Milk), Gourmet Foods Limited (Gourmet Milk), Fauji Foods Limited

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Prema Milk @PremaMilk · 28 Dec 2016
@SabiBaba As you can see from Supreme Courts orders PREMA is the only milk fit for human consumption.

Punjabi Baba @SabiBaba
Is Milk you're drinking safe?
Report in SC reveals hazardous ingredients in milk like formalin (Chemical for preserving dead bodies), fungus

Prema Milk (@PremaMilk) | T X

Twitter, Inc. (US) | https://twitter.com/premamilk?lang=en

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Prema Milk @PremaMilk · 28 Dec 2016
Supreme Courts orders proving PREEMA milk is the only milk fit for human consumption.

VC ORDER TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS
regarding the deficiencies highlighted in the said report and copy thereof along with the photographs be sent to them. The Director General, PFA shall also file a concise statement in this regard within one week.

Reports submitted by Pakistan Council of Scientific and Industrial Research (PC SIR)

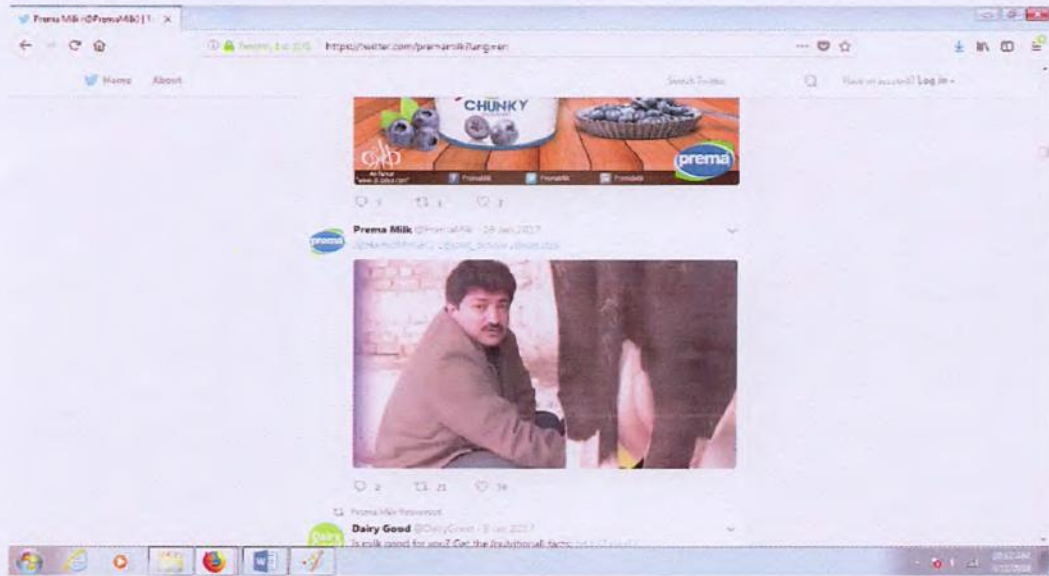
Pursuant to the orders dated 15.9.2016 and 16.9.2016, PC SIR has filed two sets of sealed reports about the analysis, which have been opened in the Court. However, the standards/guidelines have also been provided by the PC SIR on the basis of which analysis have been made. One report pertains to UHT standardized milk samples which are six in numbers. Except Halzeb Milk, all samples of UHT milk tested by the said laboratory were found fit for human consumption. Let a notice be issued to Halzeb Foods Limited to respond to the report submitted by the PC SIR.

Ten reports have also been submitted with regard to pasteurized milk. Except PREMA milk, all other samples are found to be unfit for human consumption. Let a notice be issued to M/s Doce Foods Limited (Doce Milk), Gourmet Foods Limited (Gourmet Milk), Fauji Foods



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41. Another image was also posted on the twitter account of the Respondent wherein a renowned journalist is shown to be promoting Prema Milk and implying that it's the purest form of milk available in the market. The image is as follows:



(i). **Overall net general impression from the perspective of ordinary consumer:**

42. We deem it appropriate to analyse the above marketing campaign in light of the evidence, the submissions and applicable law. In one of our earlier Orders i.e. **2010 CLD 1478**, the Commission has outlined its approach for the examination of an advertisement in determining whether it amounts to deceptive marketing practice, in the following terms:

"[...] evaluate complete advertisement and make an opinion regarding deception is to be formulated on the basis of net general impression conveyed by them and not on isolated scripts".

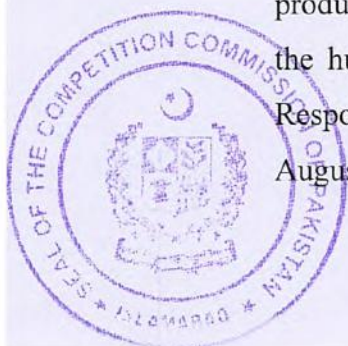
43. It is also relevant to highlight that the advertisement has to be construed from the perspective of 'ordinary consumer'. The term 'ordinary consumer' was defined in The Commission also discussed the concept of 'consumer' with reference to Section 10 of the Act in **2010 CLD 1478**, in the following terms:

32. *Taking the above into account, I am of the considered view, that if in Pakistan, we want to encourage a compliance oriented approach viz a viz Section 10 of the Ordinance we must place a higher onus on*



the Undertakings in relation to the marketing practices. Therefore, from OFT's perspective, the consumer to whom such information is disseminated has to be the 'ordinary consumer' who is the usual, common or foreseeable user or buyer of the product. Such a consumer need not necessarily be restricted to the end user. 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.

44. Foregoing in view, after taking into account the holistic view about the marketing campaign of the Respondent, any 'ordinary consumer' would gather the net impression that except 'PREMA' the product/brand of the Respondent all other milk products *inter alia* the products of the Members of the Complainant are harmful for the human consumption be it the liquid milk or the powdered milk. Further, the Respondent has made stress on various laboratories reports submitted before the August Supreme Court and baldly claimed that the only PREMA has been approved



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by the August Supreme Court based on the reports submitted by various laboratories. Based on the foregoing discussion, the overall net general impression of the marketing campaign of the Respondent from the perspective of an 'ordinary consumer' is that "Prema Milk is the only pasteurized milk of Pakistan which is manufactured according to international health standards and was found by the Supreme Court to be the only healthy and hygienic pasteurized milk for human consumption".

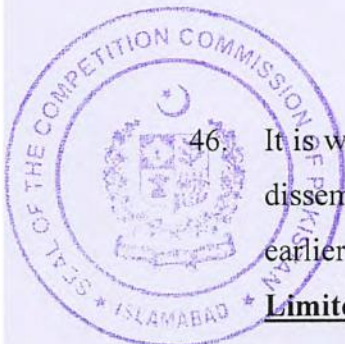
(ii). **Reasonable basis for the claim made by the Respondent in its marketing campaign:**

45. We are cognizant of the fact that earlier, while interpreting the provisions of Section 10(2)(b) of the Act, deliberated that it is prohibited under the said provision to disseminate information to the consumers in the process of marketing that lacks a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods. False or misleading information has been interpreted by the Commission in **2010 CLD 1478**, to include:

False information: "oral or written statements or representations that are: (a) contrary to the truth or fact and not in accordance with reality or actuality; (b) usually implied either conscious wrong or culpable negligence, (c) has a stricter and stronger connotation, and (d) is not readily open to interpretation...."

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, though or judgement, (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 erroneous connotation and is somewhat open to interpretation as the circumstances and conduct of a party may be treated as relevant to a certain extent".

46. It is well settled by now that in the process of the marketing any information/claims disseminated to the public must have some reasonable basis, the Commission in of its earlier it Orders i.e. **In the matter of Proctor and Gamble Pakistan (Private) Limited (Head and Shoulder Shampoo), 2010 CLD 1695**, observed that "the



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advertiser must have some recognizable substantiation for the claims made prior to making it in an advertisement”.

47. Since, the Respondent has emphasised on the proceeding before the August Supreme Court, therefore, we deem it appropriate to highlight the proceedings before the August Supreme Court with reference to the milk products. In the Enquiry Report the proceedings before the August Supreme Court in case titled **Watan Party vs. Government of Punjab in C.P. No. 2374-L of 2016** have been discussed in detail in the following terms:

“5.10. The matter of Watan Party versus Government of Punjab, etc. (Civil Petition No. 2374 – L/2016, based on which this marketing campaign was initiated, was pending adjudication before the Supreme Court of Pakistan at the time of initiation of this inquiry. The said matter, inter alia, was in reference to the safety and quality standards of various brands of packaged milk products being sold in Pakistan.

5.11. Various safety and quality standard assurance agencies of Pakistan were directed by the Court to conduct tests pertaining to the quality of samples of different categories of milk and milk based products of various brands, which included brands of the two categories of milk, i.e., Ultra-High Temperature (UHT) and pasteurized milk.

5.12. As per the Complainant’s website, there are currently twenty-four (24) members of the Complainant. The list of members of the Complainant, who were also part of the said petition, is provided below with some of their relevant product details.

	Undertaking	Milk Products	Tea Whiteners	Dairy Based Formulae
1	Nestlé Pakistan Limited	Nestlé MILKPAK and Nestlé NESVITA	Nestlé EVERYDAY	Nestlé NIDO and Nestlé BUNYAD
2	Fauji Foods Limited	Nurpur	-	-



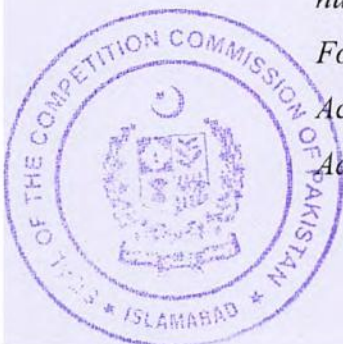
3	Haleeb Foods Limited	Haleeb	-	-
4	Shakarganj Food Products Limited	Good Milk	-	-
5	Engro Foods Limited	Olpers, Olpers lite, Dairy Omung and Dayfresh	Tarang	
6	Gourmet Foods	Gourmet Milk	-	-
7	Dairy Land Pvt. Limited	Day Fresh UHT Milk	-	-
8	Sharif Milk Products Pvt. Limited	Anhaar and Daily Dairy	-	-
9	Achha Foods Pvt. Ltd.	Achha Milk	-	-
10	Adam Milk Foods (Pvt) Limited	Adam's Milk	-	-

5.1 In the order dated 08.12.2016, reports of three safety and quality assurance agencies were discussed.

Reports Submitted by Pakistan Council of Scientific and Industrial Research (PCSIR)

5.2 As per the PCSIR report, pursuant to the Supreme Court's orders dated 19.09.2016 and 16.09.2016, PCSIR had filed two sets of sealed reports regarding the analysis. One report was related to the UHT standardized milk which were six in numbers. "Except Haleeb Milk, all samples of UHT milk tested by the said laboratory were found fit for human consumption." The Court directed to issue a notice to M/s Haleeb Foods Limited to respond to the report submitted by PCSIR.

5.3 With respect to pasteurized milk, the Court order stated, "Ten reports have also been submitted with regards to the pasteurized milk. Except Prema Milk all other samples are found to be unfit for human consumption." The Court directed to issue a notice to Doce Foods Limited (Doce Milk), Gourmet Foods, Fauji Foods Limited, Achha Foods Private Limited, Sharif Dairies Private Limited, Adam's Foods Private Limited, Cakes and Bakes (Nutrivo Milk) and

Al-Fajar Dairy and Foods Private Limited (Al-Fajar Milk) to respond to the reports submitted by PCSIR.

5.4 Therefore, as per the report submitted by PCSIR, in the UHT category, only Haleeb milk of M/s Haleeb Foods Limited was found unfit for human consumption out of the other five brands. Haleeb Foods Limited is a member of the Complainant. Whereas in the pasteurized milk category, only Prema Milk was deemed as fit for human consumption. Five out of nine undertakings whose milk products were deemed unfit for human consumption, are members of the Complainant. Therefore, in the overall packed milk category which includes both UHT and pasteurized milk, milk brands of the six out of the ten above listed members were found unfit for human consumption.

Report Submitted by University of Veterinary & Animal Sciences (UVAS)

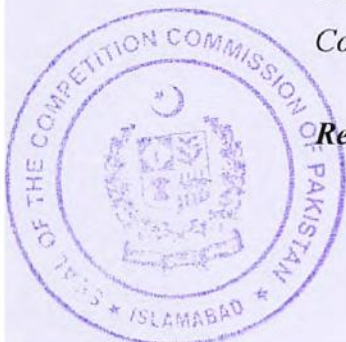
5.5 Pursuant to the orders dated 15.09.2016 and 16.09.2016, a report by UVAS was also submitted to the Court. According to this report, traces of sugarcane were present in Haleeb Milk (UHT) as well as Achha Milk, Anhaar Milk and Adam's Milk, whereas the latter three brands belong to the category of pasteurized milk.

5.6 Furthermore, heavy metal components were found in UHT standardized milk samples of Day Fresh, Good Milk, Haleeb Milk, MilkPak and Nurpur. Sample of pasteurized milk; Daily Dairy, Doce, Gourmet and Nurpur were found to contain heavy metal components.

5.7 As a result, ten (10) undertakings were called to respond to the UVAS report, out of which, nine (09) are members of the Complainant. UVAS, in its report, cleared the Respondent.

Report Submitted by University of Agriculture Faisalabad (UAF)

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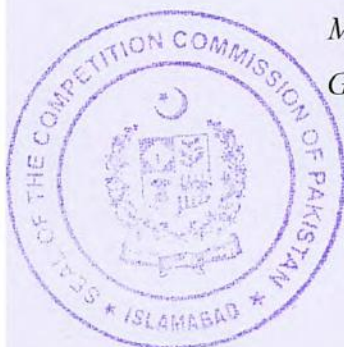


5.13. *In its report before the Court, UAF submitted that out of seven UHT samples, all were found fit for human consumption. Whereas two samples of pasteurized milk brands, i.e., Adam's Milk and Achha Milk, were found unfit for human consumption. Hence, two members of the Complainant were notified to submit their response.*

5.14. *In view of the reports submitted by the three safety and quality standard assurance agencies, as per the order of the Supreme Court dated 08.12.16, twelve (12) undertakings were found below safety and quality standards and hence, were called to clarify their position. Out of the twelve (12) undertakings, nine (09) are members of the Complainant. The Respondent was cleared as per all reports.*

5.15. *The matter was again heard on 27.12.2016. On the pretext of deficiencies found in certain brands and requirement of inspection of their respective premises by PFA, the abovementioned twelve (12) undertakings were re-listed for further hearing.*

5.16. *Subsequent to further proceedings, according to another order dated 09.03.2017, reports submitted by PFA cleared Gourmet Milk, Nurpur Milk, Achha Milk, Anhaar and Daily Dairy, Nestlé MilkPak, Adam's Milk, Haleeb Milk, and Good Milk. However, based on various other concerns/deficiencies noted pertinent to the milk samples, PFA was further directed to test the said product samples by other testing laboratories/agencies, including SGS, UVAS, etc. The twelve (12) brands that were re-listed for further testing, including those otherwise cleared by PFA, were Doce Milk, Nurpur Milk, Achha Milk, Anhaar, Daily Dairy, Nestlé MilkPak, Adam's Milk, Al-Fajar Milk, Nutrivo Milk, Haleeb Milk, Good Milk, and Day Fresh.*



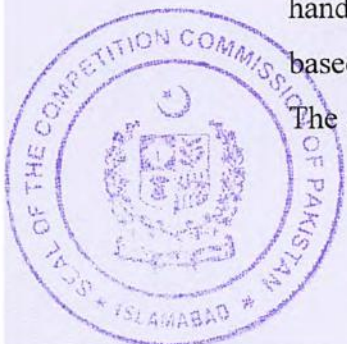
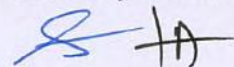
5.17. *The brands against which legal proceedings were suspended include Gourmet Foods, Engro Food Pvt. Ltd. and Prema Dairies Pvt. Ltd. (At-Tahur Private Limited).*

5.18. *Additionally, PFA conducted further tests on samples of various UHT and pasteurized brands of milk. A grace period of three months was granted by PFA to the undertakings, who had failed to meet the required standards, for compliance. The grace period ended on 15.03.2017 after which all the aforementioned brands, excluding Al-Fajar Milk, were deemed as fit for human consumption.*

5.19. *After the abovementioned exercise, the matter pertinent to safety and quality of packaged milk was disposed of by the Supreme Court after vide order dated 03.03.2018 with the direction to PFA to continue with the testing of such products for maintenance of quality and safety standards at all times.*

48. From the above, it is clear that in the first Order the August Supreme Court carried out the tests and some samples were found to be unfit, however, subsequently, the products of almost all the undertakings became compliant on the reports of the Punjab Food Authority (the 'PFA'). The matter was finally disposed of by the August Supreme Court vide its Order dated 03 March 2018 with the direction to PFA to continue with the testing of such products for maintenance of quality and safety standards at all time. At the conclusion of the proceedings except *Al-Fajar Milk*, all other UHT and pasteurized brands of milk were found to be fit for human consumption.

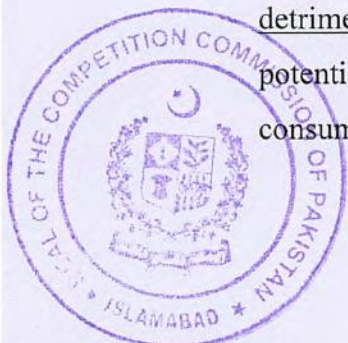
49. With reference to the above, the Respondent was asked to provide the basis of the claims made by them on the social media posts. The only argument made by the Respondent with reference to the basis of the claim is that they have done nothing wrong and only highlighted the decision of the August Supreme Court. On the other hand, the Complainant has argued, the Respondent has based its marketing campaign based on insufficient and incomplete facts which is not substantiated by any evidence. The August Supreme Court in its final Order has only declared *Al-Fajar Milk* to be



harmful and no other milk product, particularly, the milk products of the Members of the Complainant was declared unfit for human consumption.

50. We have reviewed the proceedings before the August Supreme Court, even if it is assumed that Respondent took advantage of the interim proceedings and advertised its claims. Even then the claims made by the Respondent through its marketing campaign i.e. *“Prema Milk is the only pasteurized milk of Pakistan which is manufactured according to international health standards and was found by the Supreme Court to be the only healthy and hygienic pasteurized milk for human consumption”*. Foregoing for the simple reason that the process of testing various samples of milk for fitness resulted in findings of the initial reports submitted to the August Supreme Court by the three agencies, namely PCSIR, UVAS and UAF. Based on the initial samples, clear and final results were submitted pertinent to the fitness of the samples by each agency. Where different agencies contained different conclusions related to the matter, taking all the tests into consideration, only one UHT milk brand – Olpers of M/s Engro Foods Limited and one pasteurized milk brand – Prema was cleared in the initial stages. Hence, omitting to mention ‘Olpers’ as another brand found to be compliant at the initial and interim stage is also not justifiable. Further, we are also of the firm view that no final order was passed by the August Supreme Court at the time of the marketing campaign of the Respondent. Rather, an interim assessment was being carried out which was concluded vide its Order dated 03 March 2018 with the direction to PFA to continue with the testing of such products for maintenance of quality and safety standards at all time.

51. The Commission in its earlier Order i.e. **2010 CLD 1478** endorsed the policy of **Deception Policy Statement of FTC, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984)** and has followed the approach since then *vis-à-vis* Section 10 violations that an advertisement is deceptive; if it contains a misrepresentation or omission that is material to consumer’s decisions to buy or use the products/services likely to mislead consumers acting reasonably under the circumstances to their detriment (emphasis added). Where it is established that such representation has the potential to mislead, there is no legal requirement to prove the actual injury to consumers.



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52. Careful perusal of the marketing campaign of the Respondent reveal that it has been claimed that except the product under the brand name 'PREMA' no other product is found to be fit for human consumption. This claim in itself, is sufficient for the consumers to make a transactional decision and is also visible in one of the Facebook posts of the Respondent highlighted in Para 32 and 33 above. One consumer has with the name 'Ansar Mahmood' commented that after reading a lot of positive feedback, he will now purchase Respondents' products for his family. Another consumer in the post, which is visible in the image, has commented that, "... ..a lot of people don't know that olpers and milkpack are only milk collectors and their milk totally not reliable, its just a tea whitener kind of thing that they are selling". This shows that omission of mentioning the name of Olpers, which along with PREMA, was also found fit in the first round caused potential loss in the eyes of consumers and the marketing campaign facilitated the sale of Respondents' products. So, based on the analysis and the impact, the otherwise false information and omission of material information by the Respondent has the tendency to mislead the consumers.

(iii). **Disclaimers:**

53. The Respondent, in addition to making submissions with reference to the overall net impression, ordinary consumer and reasonable basis has also submitted that the presence of a conspicuous disclaimers in form of hyperlinks of the August Supreme Court's order was sufficient to provide for the basis of the Order. Any consumer looking at the Facebook Post would also see the Order of the August Supreme Court by pressing on the hyperlink. The Respondent asserted that the disclaimer in itself is sufficient to dispel any misleading impression and is also in accordance with the requirements of the Act.

54. The guidelines provided by the Commission as early as in the year 2010 vide its Order reported as **2010 CLD 1478**, are as follows:

'[...] it is settled principle that fine print disclaimer [or disclosures] are inadequate to correct the deceptive impression. In fact, such disclaimers [or disclosures] are, in themselves, a deceptive measure.'



55. While evaluating the effectiveness of disclaimer/disclosure, the Commission considers factors such as prominence, presentation, placement and proximity between the advertising claim and the associated disclaimer/disclosure. The principle regarding disclaimer/disclosure is that they must be '*clear and conspicuous*' and placed '*as close as possible*' to the advertising claim. While explaining '*clear and conspicuous*' disclosures, the FTC in the matter of **Epad, Inc. And Ayman A. Difrawi 2016, Case No: 6:16-cv-714-Orl-41TBS** has made it clear that:

- (i). *In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication that includes a representation requiring a disclosure and is made through both visual and audible mean, such as a television advertisement, the disclosure must be made through the same means through which the representation is made;*
- (ii). *A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from accompanying text or other visual elements so that it is easily noticed, read and understood;*
- (iii). *An audible disclosure, including the telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it;*
- (iv). *In any communication using an interactive electronic medium such as the internet or software, the disclosure must be unavoidable.*
- (v). *The disclosure must use the diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears;*
- (vi). *the disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications;*

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(vii). *The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication; and*

(viii). *When representation or sales practices target a specific audience, such as children or elderly or the terminally ill, “ordinary consumer” includes reasonable members of that group.’*

56. From the above, we are of the view that the purpose of a disclaimer is only to provide additional information and clarity regarding a claim, instead of completely altering the meaning of its overall message. That is, the meaning of the message conveyed in the main claim and the overall advertisement should not be significantly changed when read with information given in the disclaimers.

57. In the Enquiry Report, the Enquiry Committee has referred to guidelines of the FTC with reference to the online marketing/advertising, and we endorse the said point of view and reproduce the same for ease of reference:

“.....It’s unwise to bury material information behind vaguely-labeled hyperlinks or on dense “Terms and Conditions” pages that are more snooze-inducing.....”.

58. When we apply the above guidelines in juxtaposition with the principles itemized in Para 55 above, we have no doubt in reaching to the conclusion that the Respondent though has used exact verbatim of the August Supreme Court’s order with reference to the PCSIR report, however, the Respondent omitted material information pertaining to its overall context, clearly do not fulfill the standard of ‘*clear and conspicuous*’ and making the claims in the marketing material as misleading. Providing a hyperlink to the Order of the August Court is also not sufficient to correct the overall impression disseminated by the post through its main headline. To depict its superior quality with contrast to its competitor’s products, the Respondent should not have termed the source as “Supreme Court”, rather it should have been labelled as PCSIR. Moreover, in order to avoid deception, the context of that statement, i.e., the said statement was made in reference to pasteurized milk, should also have been provided clearly and conspicuously.


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59. From the above, we are of the firm view that the Respondent was unable to provide any reasonable basis substantiating the claims made in the marketing campaign launched by it in comparison with other products and the information which was omitted i.e. interim order and the fitness of Olpers and other aspects discussed above. Hence, the Respondent through the dissemination of false and misleading information to the consumers lacking a reasonable basis with reference to character, method of production, properties, suitability for use and quality of PREMA in comparison to other milk brands has violated the provisions of Section 10(1) read with Section 10(2)(b) of the Act.

(iv). **Defence of Puffery:**

60. The Respondent during the submissions and through the written statements has also taken the defence that the statements made in the marketing/advertisement campaigns on the Facebook page are merely opinions and not statements of fact and falls within the purview of puffery. The counsel for the Respondent has further clarified they don't market any powder milk or tea whiteners, any statement on tea-whiteners and/or powdered milk are statements of opinion. He stressed that in case of **Re the Boston Beer Co. Ltd Partnership 98 F.3d 1970 (Fed. Circ. 1999)**, a case concerning the application of registration of a trademark "The Best Beer in America", it was held that the proposed market is to be merely descriptive because it is only laudatory and "a simply a claim of superiority, i.e. trade puffery". Furthermore, the test for determining if a statement is puffery was laid down in case of **Am. Italian Pasta C o. v/s New World Pasta Co., 371 F.3d, 387, 391 (8th Cir. 2004)**, wherein the Eighth Circuit explained that if [a] statement is not specific and measurable, and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained, the statement constitutes puffery." That the phrase used by the Company does not mention the territory of "Pakistan" and therefore does not provide a benchmark by which the veracity of the statement can be ascertained.

61. In order to address this particular defence we deem it appropriate to first refer to the claims made by the Respondent and see whether they would fall within the purview of puffery or not, they are as follows: 



- (i). **Claim No. I:** “Alhumdulillah “Except Prema Milk, all other samples are found to be unfit for human consumption”: source Supreme Court”.
- (ii). **Claim No. II:** “The report on pasteurized milk said all samples, except Prema Milk, were found to be unfit for human consumption.”: Source: Dawn.com” and this quote was hash tag such as “#BringPurityBack #SayNotoUHT #ChoosePasteurizedMilk...”
- (iii). **Claim No. III:** The Respondent advertised through a video posted on 19 August 2017 along with a caption stating “Don’t compromise your child’s health, follow nature’s way of Health, hygiene and purity only buy fresh pure milk for your family. At Prema we care for your family’s well-being and are committed to provide you quality fresh pasteurized milk which is why we the only milk observed to be fit for human consumption by the Honourable Court #powdermilk #milk #premamilk”.
- (iv). **Claim No. IV:** Except Prema Milk, all other samples are found to be unfit for human consumption-As per report presented to apex law authority by Pakistan Council and Industrial Research (PC SIR), University of Veterinary & Animal Sciences (UVAS) and University of Agriculture Faisalabad (UAF).

62. Before we start analysing the above statements with reference to the defence taken by the Respondent, we deem it appropriate to refer to one of our earlier orders, where the concept of puffery in advertisement/marketing was discussed after taking into account the cases from other jurisdictions i.e. **in the matter of Show Cause Notice issued to M/s S.C. Johnsons and Sons (the ‘S.C. Johnsons & Sons Case’)**, wherein following was observed:

17. We have reviewed the cases cited above, and deem it important to clarify the concept of a “puffery” statement. The term “puffery” also termed as “puffing” is defined in Black’s Law Dictionary 8th Edn., as “the expression of an exaggerated opinion – as opposed to a factual misrepresentation – with the intent to sell a good or service.” The Federal Trade Commission (the “FTC”) as early as in 1957 **in the matter of Better Living, Inc., et al., 54 F.T.C. 648 (1957)** defined “puffery” as a “term frequently used to denote the exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined.” This definition was affirmed by the **United States Court of Appeals third circuit in 259 F.2d 271 (1958)**. The

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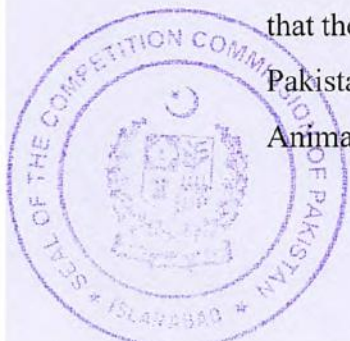
United States Court of Appeals in the matter of Newcal Industries v. Ikon Office Solution 513 F.3d 1038 (2008) held that:

“A statement is considered puffery if the claim is extremely unlikely to induce consumer reliance. Ultimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim. Id. at 246. “The common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions.” Id. Thus, a statement that is quantifiable, that makes a claim as to the “specific or absolute characteristics of a product,” may be an actionable statement of fact while a general, subjective claim about a product is nonactionable puffery. Id.”

63. With reference to the exaggeration in *puffery* the Respondent has also placed reliance on **Re the Boston Beer Co. Ltd Partnership 98 F.3d 1970 (Fed. Circ. 1999)**, wherein the claim “*The Best Beer in America*” was termed puffery. He also placed reliance on **American Italian Pasta C o. v/s New World Pasta Co., 371 F.3d, 387, 391 (8th Cir. 2004)**, wherein the phrase “*America’s Favourite Pasta*” was under consideration. In both the cases the claims were termed as puffery.


64. From the above, we are of the considered view that generally “puffery” is intended to base on an expression of opinion not made as a representation of fact. “Puffing” statements are, while factually inaccurate; so grossly exaggerated that no ordinary consumer would rely on them. Hence “puffing” is generally vague and unquantifiable. Whereas, any statement of fact which is quantifiable and specific in characteristic is not ‘*puffery*’.

65. With reference to the claims made by the Respondent, it needs to be highlighted here that the Respondent made these claims based on the reports of Punjab Food Authority, Pakistan Council and Industrial Research (PC SIR), University of Veterinary & Animal Sciences (UVAS) and University of Agriculture Faisalabad (UAF). Although,



the true perspective emanating from the complete process has not been disseminated to the consumers which has been addressed in the preceding paragraphs. The principal characteristic of any statement qualifying for “puffery” is that the “statement by no means can be quantified”. Whereas, from the claims made by the Respondent and the wordings used therein, the Respondent itself is claiming that the claims made are quantifiable or in fact the claims are used after using some quantifiable techniques by the PFA, PCSIR, UVAS etc. The Respondent is not using any term for exaggeration i.e. *‘Best in Pakistan’* or *‘Best of the Best’* or *‘Pakistan’s Favourite’* or *‘Pakistan’s Preferred’*. Further, careful perusal of the claims made also reveal that the claims are not opinions of the Respondent. In fact these all are statements which are quantifiable; whether any product is fit for human consumption or not can be determined through scientific methods and in the proceedings before the August Supreme Court almost all brands became compliance and except *Al-Fajar Milk* all milk brands were considered fit for human consumption based on the laboratories reports. Further, the case law cited by the Respondent in fact goes against them and further strengthens the case of Complainant.

66. With reference to the arguments that the claims made by them falls within the purview of speech and is protected as freedom of speech under Article 19 of the Constitution of Pakistan, 1973, we note that the fundamental rights in Part II of Chapter I of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter the ‘**Constitution**’) are applicable to ‘Persons’ and ‘citizens’. A company i.e. a corporate entity is an *Artificial Person* which is created by operation of law it cannot hold citizenship of any Country. So the corporate entities can take benefit of fundamental rights applicable on the ‘Persons’, however, they cannot benefit from the fundamental rights available to the ‘citizens’. Further, the fundamental rights are not absolute and are always subject to reasonable restrictions imposed under law reference is placed on **Nawabzada Nasrullah Khan vs. The District Magistrate, Lahore & the Government of West Pakistan, PLD 1965 Lahore 642.**

67. Based on the above discussion, we hereby conclude that the claims of the Respondent do not fall within the purview of puffery and are statements of facts which can be quantified and are actionable under the provisions of the Act. 



(v). **False or misleading Comparison of goods:**

68. The overall net general impression of the Respondents' marketing campaign is that "Prema Milk is the only pasteurized milk of Pakistan which is manufactured according to international health standards and was found by the Supreme Court to be the only healthy and hygienic pasteurized milk for human consumption". Further, the Respondent has used the hashtags such as "**#BringPurityBack**", "**#SayNotoUHT**", "**#ChoosePasteurizedMilk...**", "**#powdermilk**" and "**#milk #premamilk**".

69. If we read all the above in juxtaposition with each other, there remains no doubt that the Respondent is comparing its pasteurized milk with the products of other pasteurized milk manufacturers, products of UHT milk manufacturers, powdered milk manufacturers and tea whitener manufacturers. Further, the comparison vis-à-vis the superiority over other brands is also made by the Respondent i.e. PREMA Milk is the only healthy and hygienic pasteurized milk for human consumption. Whereas, upon conclusion of the proceedings before the August Supreme Court except *Al-Fajar Milk* all other products of the Milk were found compliant and fit for human consumption. We would like to refer to few cases from U.S. where certain comparison was declared illegal, they are:

(a). **KFC Corp., 138 F.T.C. 442 (2004)**: In the said case FTC declared that KFC's claims that eating KFC fried chicken, specifically two Original Recipe fried chicken breasts, is better for a consumer's health than eating a Burger King Whopper is false.

(b). **Novartis Corp. v. FTC, 223 F.3d 783 (D.C. Cir. 2000)**: It was held that Novartis misrepresented that their product i.e. Doan's back pain pills is superior to other analgesics for treating back pain.

(c). **London International Group, 125 F.T.C. 726 (1998)**: It was held that Ramses condoms are 30% strong than competing products.

(d). **Kraft, Inc., 114 F.T.C. 40 (1991), aff'd, 970 F.2d 311 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993)**: It was held that ads for Kraft Singles cheese

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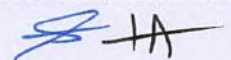
slices is deceptive because the ads implied that product contained more calcium than imitation cheese slices, when that generally was not the case.

70. In response to the false and misleading comparison of PREMA Milk with other brands and superiority claims the Respondent had mainly relied upon the preliminary reports submitted before the August Supreme Court. As has been discussed in the previous paragraphs, the Respondent omitted that in the preliminary assessment the product of Engro Foods i.e 'Olpers' was also declared hygienic and fit for human consumption. Further, till the conclusion of the proceedings the products of all other manufacturers were cleared except Al-Fajar Milk. This particular aspect was never clarified by the Respondent. In fact, even if we assume that the Respondent is still capitalizing on their earlier campaign through which they have marketed that their product is superior than other products and perhaps the only hygienic product consumable for humans will not be false.

71. Further, comparing the pasteurized milk with other products such as UHT Milk, Powdered Milk and Tea Whitener through hashtags is also not justified. By making a misleading comparison with other type of products, in fact the Respondent has influenced the choices of the consumers and this particular aspect cannot be ignored. Hence, we are of the conclusive view that by making false and misleading comparison, the Respondent has violated the provisions of Section 10(1) read with Section 10(2)(c) of the Act.

(vi). **Capability to harm the business interest of other undertakings:**

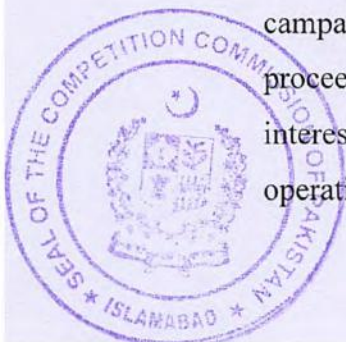
72. Now turning to Section 10(2)(a) of the Act according to which 'the distribution of false or misleading information that is capable of harming the business interests of another undertaking' constitutes a deceptive marketing practice. WE are guided by one of Commission's earlier Order i.e. **Order dated 21 December 2012 in the matter of M/S. DHL Pakistan (Pvt.) Ltd, 2013 CLD 1014**, the Commission had observed that "it is important to recognize that part of any business' identity is the goodwill it has established with consumers, while part of a product's identity is the reputation it has earned for quality and value". And, **Order dated 17 March 2015 in the matter of M/S Jotun Pakistan (Pvt) Limited, 2015 CLD 1638**, the Commission had held that "To prove conduct under Section 10(2) (a) of the Act, it is not necessary to show





actual harm to competitors. It is sufficient to show the existence of a deceptive marketing practice that has the potential to harm the business interests of the competitors.” (emphasis added)

73. It is also pertinent to mention that in the event that there exists a contravention of Section 10(1) of the Act read with 10(2)(b) or (c) or (d) of the Act, a concurrent violation of Section 10(2)(a) is also made out. The consequence of the distribution of information to the public that is false or misleading is that it is capable of harming the business interests of and resulting in fatal consequences for the competitors of the undertaking making such deceptive claims. It may also be clarified at this point that the scope of Section 10(2)(a) is much wider and far reaching than the other sub-sections of section 10(2). It was observed by the Commission in its **Order dated 08 February 2016 in the matter of Show Cause Notice issued to M/s A. Rahim Foods (Private) Limited, 2016 CLD 1128**, that “While there are innumerable instances of misleading information that an undertaking may distribute to the targeted potential consumer and hence be culpable under Section 10(2)(a), a contravention of Section 10(2)(d) will almost in every circumstance lead to a consequent contravention of Section 10(2)(a) of the Act, unless there exist exceptional circumstances in a particular case that warrant otherwise”. The same rationale is applicable to Section 10(2)(b) of the Act, as it is to Section 10(2)(d) of the Act.
74. In the instant matter the Respondent has made a claim in the process of marketing where not just one but perhaps the entire milk producing industry is affected. Foregoing is because of the reason that the Respondent through various marketing materials has claimed that it's only their product i.e. PREMA Milk which is considered hygienic and fit for human consumption. Further, a misleading comparison of milk products is also made. Their claims in the preceding paragraphs are found to be deceptive in terms of Section 10(1) of the Act read with Section 10(2)(b) & (c) of the Act.
75. Based on the above, we are of the conclusive opinion that the marketing campaign campaign/advertisements of the Respondent, which are subject matter of the instant proceedings, being false and misleading, are, in fact, capable of harming the business interests of the Members of the Complainant as well as other competing undertakings operating in the relevant market. Furthermore, such claims are likely to cause eventual

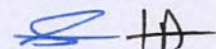


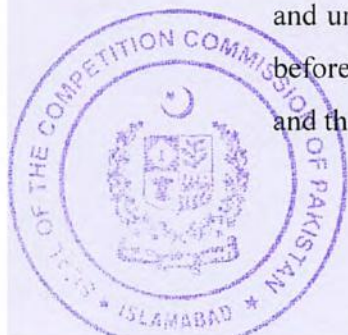
dilution of the brand identity and goodwill of the Members of the Complainant as well as other competing undertakings, which might have been built over the years. The effect of engaging in such practices is the diversion of customers to the Respondent's product, thereby inflicting financial and reputational losses to competitors. Moreover, these deceptive claims are capable of influencing consumer purchasing decisions. Therefore, the claims under review in the instant proceedings are capable of harming the business interests of other competitors, being in violation of Section 10(2)(a) of the Act. Accordingly, the Respondent is found to have also violated the provisions of Section 10(1) of the Act read with Section 10(2)(a) of the Act.

76. The upshot of the above discussion is that the Respondent has failed to substantiate the claims made in the advertisement for the PREMA Milk and its comparison with other Milk Products and has resultantly engaged itself in deceptive marketing practices in violation of Section 10 (1) of the Act.

REMEDIES, ORDER AND DIRECTIONS

77. At the very outset, we note that in today's increasingly health-conscious environment, consumers are getting more attuned to the health related claims made by the marketers, especially those marketed to children and parents. Each year, millions of rupees are spent on marketing of the products to elderly, adults, youth, children and adolescents. By virtue of this order, the Commission, hereby deems it appropriate to highlight the importance of truthful advertising. The business undertakings need to pay special care that their advertising and promotional material, irrespective of the medium, must truthfully demonstrate the pricing, character, method or place of production, properties, suitability for use and quality of their products and services.
78. As noted in the preceding paragraphs, it is established that the Respondent has engaged in deceptive marketing practices prohibited under Section 10 (1) of the Act read with Section 10(2) (a), (b) & (c) of the Act. Further, the conduct of the Respondent cannot be taken leniently as the Respondent deliberately withheld the information from the consumers and on its own declared the products of all other competitors to be unhygienic and unhealthy for human consumption. Further, after the conclusion of the proceedings before the August Supreme Court no clarification was issued. Even during the enquiry and the proceedings before us, no such effort was made by the Respondent. Somehow we



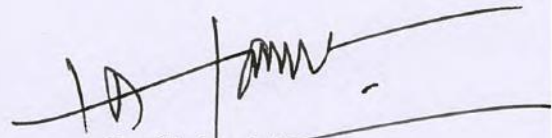


have been given an impression by the Respondent that the claims made by the Respondent which are under review are industry norm and are made by almost every other undertaking in the process of marketing being their commercial right. The disregard of the applicable law and the consumer welfare is alarming and we must ensure that such conducts are dealt with iron hands and are not ignored. Hence, we are constrained to impose a penalty of Rs. 35,000,000/- (Rupees Thirty Five Million Only) on the Respondent for violation of Section 10 of the Act. The Respondent is directed to deposit the penalty imposed within sixty (60) days of this Order with the Registrar of the Commission, without fail.

79. The Respondent is also directed to make public announcement, similar to the ones under review, clarifying that the marketing campaign under review was false and misleading, failing to issue clarification and file a compliance report within sixty (60) days from the date of receipt of this Order, may entail a further penalty of Rs. 250,000/- (Rupees Two Hundred Thousand Only) per day from the date of issuance of this Order. In addition to the foregoing, upon failure to comply, the Chief Prosecutor General of the Commission is also directed to initiation appropriate proceedings under Section 38(5) of the Act, which may *inter alia* include criminal prosecution.
80. The Respondent is hereby reprimanded to ensure responsible behavior in future with respect to the marketing of their business and is directed to cease and desist from making any claim with reference to its products in future without any proper and concrete basis. The Respondent is further restrained from using any of the claim under review in the instant proceedings with reference to PREMA Milk unless appropriately substantiated.
81. In terms of the above, Show Cause Notice No. 07 of 2019 dated 27 February 2019, is hereby disposed of.



Dr. Muhammad Saleem
Member



Dr. Shahzad Ansar
Member

ISLAMABAD THE 27th DAY OF DECEMBER 2019.

