



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF SHOW CAUSE NOTICE ISSUED TO M/S COLGATE-
PALMOLIVE FOR DECEPTIVE MARKETING PRACTICES**

(FILE No. 173/OFT/COLGATE/CCP/2014)

Dates of Hearing

17 May 2016
11 April 2017

Adjudicating Members

Ms. Vadiyya Khalil
Chairperson

Mr. Ikram Ul Haque Qureshi
Member

On behalf of Colgate Palmolive Pakistan
Limited

Mr. Agha Shah Waliullah
Mr. Khurram Vohra
Mr. Azam Khan
Nazakat Hussain

On behalf of M/sReckitt Benckiser Pakistan
Limited

Hasan Mandviwala
Mandviwala & Zafar- Advocates & Legal
Consultants
Mr. Feroz Ahmed
Mr. Hasan Paliwalla
Mr. Zaki Muhammad



ORDER

1. This Order shall dispose of the proceedings initiated pursuant to show cause notice No.15/2016 dated 8 March 2016 (the "SCN"), issued to M/s Colgate Palmolive Pakistan Limited (the "Respondent") for *prima facie* violations of Section 10 of the Competition Act, 2010 (the "Act"). The SCN was issued pursuant to an enquiry carried out by the Competition Commission of Pakistan (the "Commission"). The enquiry which was concluded vide Enquiry Report dated 20 January 2016 was initiated as a result of a Complaint filed by M/s Reckitt Benckiser Pakistan Limited (the "Complainant") in pursuance of Section 37(2) of the Act.
2. The main issue under consideration in this matter is whether the Respondent has engaged in deceptive marketing practices in violation of Section 10 (1), read with Section 10 (2) (a), (b) and/ or (c) of the Act.

FACTUAL BACKGROUND

3. The Complainant is a company registered under the Companies Ordinance, 1984 and is principally engaged in the manufacturing and marketing of consumer household, antiseptic, and pharmaceutical products. The Respondent is also a company registered under the Companies Ordinance, 1984 and is primarily engaged in the manufacturing and sale of detergents, personal hygiene and care and other related products.
4. To the extent of the product under consideration, i.e. "*Max All Purpose Cleaner*" (Max APC) as manufactured and marketed by the Respondent, the Complainant and the Respondent are competitors in the relevant market comprising of household surface cleaning products used to sanitize and disinfect surfaces and floors. The Complainant's competing product is "*Dettol Surface Cleaner*" (Dettol SC).



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5. The Complainant vide its Complaint dated 7 November 2014 and correspondence dated 15 October 2014, 3 December 2014 and 27 May 2015 alleged that the Respondent is making the following false/ deceptive claims on the packaging of its product, Max APC:
- i. 24 hours Long-Lasting Freshness (front packaging of bottle)
 - ii. 99.9% Bacteria Free(front packaging of the bottle)
 - iii. Protects against: Cold and Flu; Skin Infections; Food Poisoning (bottle neck tag)
 - iv. Disclaimer: Based on laboratory testing with concentrate usage
6. The Complainant alleged that the Respondent claims that Max APC is the ultimate sparkling cleaner. Furthermore, according to the Complainant no study or statistical quantification has been provided by the Respondent to substantiate its claims relating to protection against cold and flu, skin infections and food poisoning. The Complainant also submitted a Poland Laboratory test report wherein Max APC was tested according to international testing standard EN 1276 and it failed in respect of its claim relating to 99.9% bacteria free, as being ineffective in eliminating the micro-organisms it claimed to destroy.
7. The Complainant has further alleged that by omitting to substantiate through supporting evidence, the formulation of Max APC being based on laboratory tests, while making such serious consumer protection claims to the public for efficacy against life-threatening diseases, the Respondent is disseminating misleading information which is harmful to the public as well as harmful to the business interest of competitors in violation of Section 10 of the Act.
8. In addition, the Complainant submitted that the Respondent issued a trade letter which states that Max APC offers for a lesser price, a quantity of 50ml more than Dettol SC. It was alleged that the trade letter is discrediting the properties and use of Dettol, and its contents are suggestive that Max APC is a more effective product than Dettol, without any result based testing to substantiate the same in contravention of Section 10 of the Act.



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9. A copy of the Complaint was thereafter forwarded to the Respondent for its reply and comments. The Respondent vide its Letter dated 19 November 2016 submitted that the Complaint contains inaccurate statements, has no basis in law and fact and is liable to be discharged. With regard to the trade letter it was further submitted that in preparation for the launch of Max APC, the Respondent prepared and printed 200 copies of the manual for internal use of its distributor sales force which was provided to them only a day before the launch itself for educational and guidance purposes. It was also contended that the comparisons made in the manual with Dettol SC were based on an internal research conducted by a credible research agency which was attached with the Respondent's letter.
10. On the basis of the said Complaint and an initial inspection of the product Max APC, the following representations made by the Respondents on its packaging, were observed by the Commission (the "Advertising Claims"):
- i. Advertising Claim No. 1: "*Eliminates 99.9% Bacteria*" (front packaging of bottle);
 - ii. Advertising Claim No. 2: "*It kills 99.9%* bacteria from surfaces, leaving floors and household surfaces, clean, shiny and germ-free*"; followed by the disclaimer: "**Based on lab test with concentrated usage*" (backside of bottle packaging);
 - iii. Advertising Claim No. 3: "*Protects against*: Cold and Flu; Skin Infections; Food Poisoning*"; followed by the disclaimer: "*Based on laboratory test with concentrated usage*" (bottle neck tag);
 - iv. Advertising Claim No. 4: "*24 hours Long-Lasting Freshness*" (front packaging of the bottle).

The following are the images of the Respondent's promotional material and packaging as depicted below:





11. The Commission further observed, during its initial probe into the matter, that the trade letter complaint also contains the following statements about Dettol SC as to the harms and problems emanating from it (translate into English below) (the "Comparative Claims"):

- i. *If you move the bottle from one place to the other, the bottle leaks or becomes defective;*
- ii. *Minimal shelf life as it expires quickly;*
- iii. *Quite expensive for everyday use.*



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Undertaking has made claims regarding the efficacy of the Product, i.e. that it is (i) '99.9% Bacteria Free', (ii) that it offers '24 Hours Long Lasting Freshness' and (iii) 'Protection Against Cold and Flu, Skin Infection and Food Poisoning' which appear to be unsubstantiated and thus prima facie constitute the distribution of false and misleading information that is capable of harming the business interests of another undertaking, within the meaning and scope of Section 10(2) (a) of the Act, in violation of Section 10(1) of the Act;

6. **AND WHEREAS**, *in terms of the Enquiry Report in general and paragraphs 20-27 and 34 in particular, it appears that the Undertaking has made claims regarding the efficacy of the Product, i.e. that it is (i) '99.9% Bacteria Free', (ii) that it offers '24 Hours Long Lasting Freshness' and (iii) 'Protection Against Cold and Flu, Skin Infection and Food Poisoning' which appear to be unsubstantiated and thus prima facie constitute the distribution of false and misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods within the meaning and scope of Section 10(2) (b) of the Act, in violation of Section 10(1) of the Act;*

7. **AND WHEREAS**, *in terms of the Enquiry Report in general and paragraphs 19,33 and 34 in particular, the Undertaking has issued a trade letter which appears to contain an unsubstantiated comparison of the Product with one of the Respondent's competing products, and thus prima facie constitutes the distribution of false or misleading information that is capable of harming the business*



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interests of another undertaking, within the meaning and scope of Section 10(2) (a) of the Act, in violation of Section 10(1) of the Act;

8. *AND WHEREAS, in terms of the Enquiry Report in general and paragraphs 19,33 and 34 in particular, the Undertaking has issued a trade letter which appears to contain an unsubstantiated comparison of the Product with one of the Respondent's competing products, and thus prima facie constitutes a false or misleading comparison of goods in the process of advertising, within the meaning and scope of Section 10(2) (c) of the Act, in violation of Section 10(1) of the Act;"*

SUBMISSIONS OF THE PARTIES

13. The Respondent filed its written reply to the SCN on 28 March 2016. Thereafter, it made further submissions during the course of the hearing before the Commission held on 17 May 2016 and through its Letter dated 19 May 2016. A combined summary of its submissions are as follows:

a. The Respondent submitted that all of its products are always subjected to rigorous evaluations long before they ever reach the store shelf. All ingredients, their interactions and their effects for both intended use and accidental misuse are assessed to assure that the product is safe, fit for use and can deliver the benefits. Thereafter, the relevant scientists examine everything about the product, including its efficacy and any potential adverse effects of usage. It is only then that the Respondent develops the appropriate claims, disclosures, and instructions for use on the label of its finished product.

b. It was submitted that the base formula of its product Max APC was developed by Colgate's regional research laboratories (Global Technology Centers). This



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disinfecting/eliminating efficacy of microorganisms was measured by applying the product directly to an inanimate object (surface) to destroy or irreversibly inactivate most pathogenic microorganisms.

- c. It was submitted that the accurate antibacterial efficacy claim that appears on Max APC is "Eliminates 99.9% Bacteria" and not "99.9% bacteria free". It was further submitted that the disinfecting efficacy of the product was mainly achieved through the formulation techniques. The anti-bacterial property of the product is due to the synergistic effect of the Active Ingredient (AI) and the surfactant blend of the formulation. The AI in Max APC is Glutaraldehyde. It is a known and proven antibacterial agent. Glutaraldehyde-based disinfectants are effective against bacteria, fungi, and viruses. The detergent mix of Max APC serves to disperse and remove soil and organic material from the surface allowing the AI to reach and destroy microbes within or beneath the dirt. The detergent blend reduces the surface tension and increases the penetrating ability of water, thereby allowing the more organic matter to be removed from the surface.
- d. Furthermore, test results were submitted by the Respondent as carried out in the laboratories of Colgate-Palmolive Pakistan as well as Colgate-Palmolive India. The test results of the anti-bacterial efficacy reports are as follows:

ANTI-BACTERIAL EFFICACY REPORT 1 (India):

PRODUCT: All Purpose Cleaner (Base Formula used in Max All Purpose Cleaner)

COMPANY: Colgate-Palmolive Co.

TEST METHOD: Short Intervals Kill Time (SIKT)

TESTING LABORATORY: Global Technology Center, Colgate-Palmolive, Mumbai India

TEST DATE: 18th June 2008

PRINCIPLE: This product was mixed with bacterial inoculums for selected time intervals, after which the test system is neutralized and surviving bacteria are enumerated. Bacterial count reduction compared against the time zero control, are used as the basis of expressing activity.

TEST ORGANISMS USED: Escherichia Coli ATCC 8739, KlebsiellaPneumoniae PLS 113, StaphylococcusWarneni ATCC 17917, Staphylococcus Aureus ATCC 6538, StaphylococcusEnteridis ATCC 12228, StaphylococcusMarcesscens, CorynebacteriumMinitissimum ATCC 23348, CorynebacteriumXerosis ATCC 373

TEST RESULTS:



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Bacteria	APC 1	APC 2	APC 3	APC 4	APC 5	APC 6
After 5 min	% Reduction	% Reduction	% Reduction	% Reduction	% Reduction	% Reduction
E. Coli	100	100	100	100	100	100
S. Aureus	100	100	100	100	100	100
S. Warneni	100	100	100	100	100	100
S. Marcesscens	100	100	100	100	100	100
S. Enteridis	100	100	100	100	100	100
C. Minitissimum	100	100	100	100	100	100
C. Xerosis	100	100	100	100	100	100
K. Pneumoniae	100	100	100	100	100	100

CONCLUSION: Under laboratory conditions, APC formula is anti-bacterial with the potential of 100% elimination of above bacterial colonies.

ANTI-BACTERIAL EFFICACY REPORT 2 (Pakistan):

PRODUCT: Max All Purpose Cleaner

COMPANY: Colgate-Palmolive (Pakistan) Ltd.

TEST METHOD: Short Intervals Kill Time (SIKT)

TESTING LABORATORY: Colgate-Palmolive Microbiology Laboratory Kotri, Pakistan

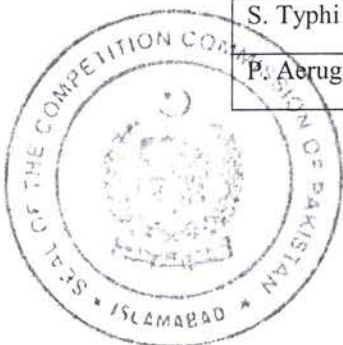
TEST DATE: 25th August 2012

PRINCIPLE: This product was mixed with bacterial inoculums for selected time intervals, after which the test system is neutralized and surviving bacteria are enumerated. Bacterial count reduction compared against the time zero control, are used as the basis of expressing activity.

TEST ORGANISMS USED: Escherichia Coli ATCC 8739, Staphylococcus Aureus ATCC 6538, Salmonella Typhi, Pseudomonas Aeruginosa

TEST RESULTS:

Bacteria Species	% Reduction after 5 min
E. Coli	100
S. Aureus	100
S. Typhi	100
P. Aeruginosa	100



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CONCLUSION: Under laboratory conditions, Colgate-Palmolive Pakistan Max All Purpose Cleaner formula is anti-bacterial with the potential of 100% elimination of aforementioned microorganisms.

ANTI-BACTERIAL EFFICACY REPORT 3 (Pakistan):

PRODUCT: Max All Purpose Cleaner
COMPANY: Colgate-Palmolive (Pakistan) Ltd.
TEST METHOD: Short Intervals Kill Time (SIKT)
TESTING LABORATORY: Colgate-Palmolive Microbiology Laboratory Kotri, Pakistan
TEST DATE: 25th August 2014
PRINCIPLE: This product was mixed with bacterial inoculums for selected time intervals, after which the test system is neutralized and surviving bacteria are enumerated. Bacterial count reduction compared against the time zero control, are used as the basis of expressing activity.
TEST ORGANISMS USED: Klebsiella pneumonia ATCC 1003, Pseudomonas Aeruginosa, Staphylococcus Epidermis ATC12228, Staphylococcus Aureus ATCC 6538, Streptococcus Pyogenes ATCC 19615

TEST RESULTS:

Bacteria Species	% Reduction after 5 min
Klebsiella Pneumonia ATCC 1003	100
Staphylococcus Epidermis ATC12228	100
Staphylococcus Aureus ATCC 6538	100
Pseudomonas Aeruginosa	100
Streptococcus Pyogenes ATCC 19615	100

CONCLUSION: Under laboratory conditions, Colgate-Palmolive Pakistan Max All Purpose Cleaner formula is anti-bacterial with the potential of 100% elimination of aforementioned microorganisms.

- e. With regard to the [?] disclaimer appearing at the back side of the product packaging, it was submitted that it was in the same font size as the claim relating to elimination of 99.9% bacteria and had been placed exactly below it.
- f. With regard to the claim as seen on the bottle neck tag, the Respondent stated that the neck tag was only used at the time of launch of Max APC and has long been discontinued since November 2014, even though it has supporting antibacterial efficacy tests that support the claim using industry protocol.



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- g. As regards the 24-hour long lasting freshness claim, it was stated that a long-lasting survey was conducted by a credible market research agency to study fragrance likeliness and fragrance strength of Max APC formula on various households.
- h. In response to the allegation regarding the issuance of the trade letter depicting a false and misleading comparison of Complainant's product Dettol SC with Max APC, the Respondent submitted that for the preparation of the launch of its product MAX APC on 14 October 2014, it printed 200 copies of the said manual for internal use of its distributor sales force. The objective of the manual was to educate the distributor sales force about Max APC on how to pitch the product to retailers and display the product on the shelf.
- i. It was further submitted that the life of such manuals is not more than three to four weeks from the date of issue and it remains a confidential document only for internal use and not intended for circulation among consumers. It also stated that such a manual cannot be termed as a trade letter which is used to disseminate trade related information among retailers and wholesalers. It was alleged that the Complainant had committed an unlawful act by obtaining the said internal manual which was a confidential document belonging to the Respondent.
- j. The Respondent claimed that the internal manual states that in some attributes its product is better than that of the Complainant's product, which includes fragrance as established by research as well as a seal which prevents pilferage and tampering. Such fact-based comparison ensures free competition in all spheres of commercial and economic activity to enhance economic efficiency and protect consumers from anti-competitive behaviour and in no manner can be termed or treated as a misleading comparison of goods within the meaning of the Act.
- k. Lastly, it was questioned by the Respondent that since the product Max APC was launched on 14 October 2014 and the Complaint was filed one day later on 15 October 2015, how it was possible that the Complainant was in possession of a



copy of the internal manual which was first distributed among the distributor sales force of the Respondent a day before the launch of the product. A further question was raised as to the presence of an ex-employee of the Respondent at the hearing before the Commission appearing on behalf of the Complainant. It was submitted that the Complainant having approached the Commission with unclean hands, the Complaint should not be entertained.

14. Moreover, during the course of the hearing before the Commission held on 17 May 2016, the Complainant further alleged that the trade letter circulated by the Respondent which contains a section titled "*Dettol Surface Cleaner ki khamiyaan kya hain?*" discrediting Dettol SC, has been widely circulated to distributors, which is a means to reach consumers and cause harm to the business of the Complainant. Furthermore, the said trade letter does not state anywhere that it is an internal memo. As regards the disclaimer to the 99.9% bacteria elimination claim on the Max APC packaging, the Complainant submitted that it is a tall claim which is misleading as the testing carried out is inadequate and the packaging does not list the types of bacteria against which Max APC's efficacy tests have been conducted. Moreover, it was alleged that the product has not been tested according to European testing standards against EU-mandated bacterial types. Reference was also made to and reliance placed on the Commission's earlier Order In The Matter Of M/S China Mobile Pak Limited & M/S Pakistan Telecom Mobile Limited (2010 CLD 1478) (the "Zong Order"). It was also alleged that the Respondent had provided no recognizable substantiation for its claim relating to 24 hours freshness as seen on the Max APC packaging.
15. In response, the Respondent submitted at the hearing that it had introduced in the market an easy cheaper alternative to Dettol SC. It was stated that they were still in the test marketing phase and that Max APC was only available in the Karachi market. Moreover, there was no TVC or media advertising for the said product either. The remaining arguments and submissions of the Respondent were the same as those that were previously placed on record in writing.



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ISSUES

16. The issues identified are as follows:
- A. Whether the Advertising Claims No. 1, 2 & 3 constitute a violation of Section 10(1) in terms of Section 10(2)(b) of the Act;
 - B. Whether the Advertising Claim No. 4 constitutes a violation of Section 10(1) in terms of Section 10(2)(b) of the Act;
 - C. Whether the Comparative Claims constitute a violation of Section 10(1) in terms of Section 10(2)(c) of the Act;
 - D. Whether the Advertising Claims and the Comparative Claims constitute a violation of Section 10(1) in terms of Section 10(2)(a) of the Act.

ANALYSIS AND DECISION

17. The factual and legal analysis herein below shall be structured according to the sequence and order of the four pertinent issues demarcated above as Issue A, B, C and D. To this extent, the Commission has taken into account and perused the entire record before it including submissions and supporting documents of both the parties.
18. Section 10 of the Act prohibits 'deceptive marketing practices', and as such encompasses the protection of both consumer and competition interests. With respect to the matter at hand, we will discuss each alleged violation in light of and in the order of the issues identified above.

19. Section 10 of the Act provides as follows:



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"10. Deceptive Marketing Practices

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

(2) The deceptive marketing practices shall be deemed to have been resorted to or continued is an undertaking resort to—

(a) the distribution of false or misleading information that is capable of harming business interests of another undertaking;

(b) the distribution of false or misleading information to consumers, including the distribution of information lacking reasonable basis, related to the price, character, method, or place of production, properties, suitability for use, or quality of goods;

(c) false or misleading comparison of goods in the process of advertising; or

(d) fraudulent use of another's trademark, firm name, or product's labelling or packaging."

20. In its Zong Order, the Commission has outlined its approach for the examination of an advertisement in determining whether it amounts to a deceptive marketing practice, falling within the ambit and scope of a Section 10 violation, as follows:

"...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".

ISSUE A

Whether the Advertising Claims No. 1, 2 & 3 constitute a violation of Section 10(1) in terms of Section 10(2)(b) of the Act;

21. Section 10(2)(b) of the Act prohibits the distribution of false or misleading information to consumers, including the dissemination of information that lacks a reasonable basis. False



or misleading information has been interpreted by the Commission in its Zong Order 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".

22. In the same Order, the Commission has also held that the term 'consumer' as envisaged by Section 10 of the Act is to be construed as an " 'ordinary consumer' but need not necessarily be restricted to the end consumer of the goods or services." The rationale provided by the Commission was that "restricting its interpretation with the use of the words "average", "reasonable" or "prudent" will not only narrow down and put constraints on 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".

23. Furthermore, as stated above, the Commission examines the net general impression of the advertisement, which may contain both express or implied claims and absolute or qualified claims. The advertiser itself is responsible for material substantiation of all such claims.



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Neither proof of intent to disseminate a deceptive claim nor evidence that the consumers have actually been misled is required for a violation under Section 10(2)(b) of the Act to be made out. This approach is also consistent with that of the Fair Trade Commission (FTC) USA.

24. In terms of substantiation of claims to ensure that the information distributed does not lack a reasonable basis, the Commission in its Order dated 23 February 2010 in the matter of M/s Procter and Gamble Pakistan (Private) Limited (the "Procter and Gamble Order"), observed that "the advertiser must have some recognizable substantiation for the claims made prior to making it in an advertisement". This doctrine has been borrowed from US jurisprudence on the subject (Pfizer, Inc., 81 F.T.C. 23 (1972)) advertisers must possess the level of substantiation expressly or impliedly claimed in the advertisement. Where no specific level of substantiation is claimed, what constitutes a 'reasonable basis' is to be determined on a case-by-case basis, by analyzing six "Pfizer factors", which are as follows:
- the type of claim;
 - the benefits if the claim is true;
 - the consequences if the claim is false;
 - the ease and cost of developing substantiation for the claims;
 - the type of product; and
 - the level of substantiation experts in the field would agree is reasonable.

Advertising Claim No. 1: "Eliminates 99.9% Bacteria" (front packaging of bottle)

25. With regards to the claim 'Eliminates 99.9% Bacteria', it must first be clarified that the same was incorrectly reproduced as '99.9% Bacteria Free' in the SCN, Enquiry Report and the Complaint. The Commission's findings below will consider whether the claim of elimination of 99.9% bacteria through the use of Max APC amounts to a violation of Section 10(2)(b) of the Act.



26. Advertising Claim No. 1, as it appears on the front packaging of the Max APC bottle, is considered to be an "absolute" claim as it has not been qualified or limited through the use of a disclaimer or otherwise. There is also an absence of any asterisk which is used to draw the attention of the consumers to a qualifying statement or disclosure. The targeted audience in this matter is the ordinary consumer as stated above, and from whom there is no extra level of caution expected as opposed to a reasonable or prudent consumer. This Claim gives the ordinary consumer the net general impression that it is an absolute representation and that Max APC will in fact in all circumstances eliminate 99.9% bacteria upon use for household purposes. In fact, this claim would lead to the conclusion that the assertion purports to rid bacteria in its entirety, being the dominant message appearing on the front packaging of the bottle. While a reasonable or prudent customer may flip the bottle to read the disclaimer which appears on the back packaging, the same has not been linked to Advertising Claim No. 1. In fact it only becomes visible and evident when Advertising Claim No. 2 is read.
27. Advertising Claim No. 1 is in fact a false statement, as without even questioning the accuracy of the disclaimer on the back side of the packaging, it is not disputed that the claim only stands true, if at all, when there is concentrated usage without dilution in a laboratory environment. An ordinary consumer would not be aware of this qualifying representation at first glance in the isle of a retail shop. Therefore, the Commission holds that Advertising Claim No. 1 amounts to the distribution of false information, causing harm to consumers, in violation of Section 10(2)(b) of the Act.

Advertising Claim No. 2: *"It kills 99.9%* bacteria from surfaces, leaving floors and household surfaces, clean, shiny and germ-free"*

*"*Based on lab test with concentrated usage"*

(backside of bottle packaging)



28. Advertising Claim No. 2 is a similar claim to Advertising Claim No. 1. However, the former serves as an explanation to the later and has in fact been qualified through the disclaimer as seen above.
29. In its Zong Order, the Commission observed that "it is a settled principle that 'fine print disclaimer, are inadequate to correct the deceptive impressions'. In fact, such disclaimers are, in themselves, a deceptive measure." Furthermore, in its Order dated 8 January 2015 in the matter of Complaint filed by M/s Wyeth Pakistan Limited against Reckitt Benckiser Pakistan Ltd. (the "Wyeth" Order), the Commission's examination of the advertisement in question lead to the observation that "the present case involved a wide and sweeping claim, whereas the qualifier was not legible (being in blue on black background). Such a qualifier did nothing to take away from the claim, and such a claim should be followed by a more legible disclaimer to clarify the contents of the marketing campaign."
30. Moreover, to be effective, disclosures must be clear and conspicuous. In evaluating the effectiveness of disclosures, the Commission considers factors such as prominence, presentation, placement and proximity between the claim and its associated disclaimer.
31. The disclaimer in Advertising Claim No. 2 does not appear in the same font size as the Claim itself, even though it is in close proximity to it. In the absence of this disclaimer, the prominent claim of "...kills 99.9% of bacteria..." would be a patently false statement as the consumers would be unaware that those results are only possible, if at all, through concentrated usage. Therefore, the Commission is of the considered view that the disclaimer was required to be much more prominent with better presentation to attract the immediate attention of a potential buyer. The Commission is not satisfied that the standards of being "clear and conspicuous" have been satisfied, in so far as the proper acceptable use of a disclaimer is concerned.
32. Now turning our attention to the substantive content of the disclaimer itself, the 99.9% of bacteria elimination claim has been substantiated on the basis of laboratory test with concentrated usage.

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33. It may be noted that when an express claim has been represented to have been made on the basis of laboratory tests, studies, doctor recommendations etc., the Commission expects that in the least the advertised level of substantiation or reasonable basis exists prior to marketing and advertising to the consumer.

34. The substantiation provided by the Respondent in this regard is specifically as follows:

a. Max APC formulation was developed by its regional research laboratories (Global Technology Centres). The disinfecting/eliminating efficacy of microorganisms was measured by applying the product directly to an inanimate object (surface) to destroy or irreversibly inactivate most pathogenic microorganisms. The tests were carried out in the laboratories of the Respondent's set up in Pakistan as well as India.

b. The disinfecting efficacy of the product was mainly achieved through the anti-bacterial property of the product which is due to the synergistic effect of the Active Ingredient (AI) and the surfactant blend of the formulation. The AI in Max APC is Glutaraldehyde which is a known and proven antibacterial agent. Glutaraldehyde-based disinfectants are effective against bacteria, fungi, and viruses. The detergent mix of Max APC serves to disperse and remove soil and organic material from the surface allowing the AI to reach and destroy microbes within or beneath the dirt. The detergent blend reduces the surface tension and increases the penetrating ability of water, thereby allowing the more organic matter to be removed from the surface.

35. It is noteworthy that the tests used to substantiate Advertising Claim No. 2 have been carried out at the Respondent's own laboratories. The Respondent while making such a tall claim should have in the least had an independent third party conduct the same test for verification purposes before such information was disseminated to consumers. The third party test results of Max APC efficacy as placed on record by the Complainant are contradictory to the internal test results relied upon by the Respondent.



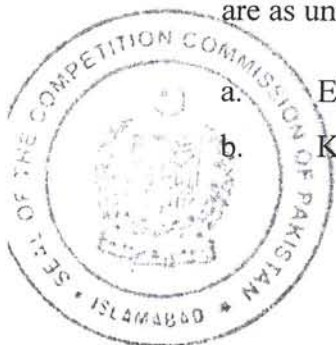
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36. Even otherwise, it is pertinent to mention that an ordinary consumer, while purchasing a well marketed and advertised product like Max APC, will be unaware of or least concerned about investigating about the kinds of laboratory tests that have been conducted to prove the material claims represented on the product. At the first glance, consumers would be attracted to the product because of the advertising claims that are displayed and would rely on the description labelled on the packaging. Therefore, it is crucial to qualify or include a disclaimer which fulfils the purpose of justifying the claim as such. Advertising Claim No. 2 also makes use of the words "germ-free" and the trade letter contains the qualified representation "99.9% Germ Protection" as the dominant message at the top of each page. The Commission is not satisfied that the Respondent has succeeded in providing the minimum level of substantiation for such material claims which would directly affect the transaction decision of the ordinary consumer.
37. Moreover, complete reliance on laboratory test results would result in a skewed decision regarding the claims made. For example, laboratory tests often do not include all germs and do not represent the imperfections of real-world usage. Ideal conditions of a laboratory are incomparable to that of household circumstances. Since laboratory conditions are appreciably different from those found in common households, special steps are required to achieve 99.9% efficacy against bacteria in a normal, everyday settings where cleaning takes place. Short of these special steps, like letting a particular quantity of undiluted phenyl stand on the surface for a specific duration of time, achieving 99.9% efficacy against bacteria is not possible. This is not made clear to the consumers during marketing/advertising as well as on the packaging of Max APC, leading them to reasonably believe that any sort of cleaning with the product would achieve the same result.
38. Furthermore, the 8 sample strains of Bacteria used for testing efficacy of all purpose cleaners, as have been extracted from within the test reports provided by the Respondent, are as under:

- a. Escherichia Coli ATCC 8739
- b. Klebsiella Pneumoniae ATCC 10031

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- c. Salmonella Cholerasuis ATCC 10708
- d. Staphylococcus Aureus ATCC 6538
- e. Staphylococcus Epidermis ATCC 12228
- f. Streptococcus Pyogenes ATCC 19615
- g. Pseudomonas Aeruginosa ATCC 15442
- h. Enterobacter Cloacae ATCC 13047

39. However, the sample of Bacterial strains used in tests conducted by the Respondent on Max APC does not include Salmonella Cholerasuis ATCC 10708 and Enterobacter Cloacae ATCC 13047. This means that the efficacy of Max APC against these two strains of Bacteria has not been tested and is unsubstantiated, hence, using a claim such as "Eliminates 99.9% Free" is even otherwise not reliable.
40. Moreover, the disclaimer does not serve to negate the misleading nature of the claim itself, as the instructions direct for dilution of the product on a daily basis. The efficacy of the Active Agent, i.e. Glutaraldehyde, gets greatly reduced as the concentration of the Active Agent is decreased in the disinfectant solution, showing a linear relation between the concentration and the efficacy.
41. In light of the above, we are inclined to find that Advertising Claim No. 2 constitutes a violation of Section 10 (1) in terms of Section 10(2)(b) of the Act.

Advertising Claim No. 3: "*Protects against*: Cold and Flu; Skin Infections; Food Poisoning*"
*"*Based on lab test with concentrated usage"*
 (bottle neck tag)

42. Advertising Claim No. 3 is a health and safety claim which has been qualified by a disclaimer. The Respondent has submitted that the use of the neck tag has been discontinued. However, the Commission will consider whether the Respondent had a



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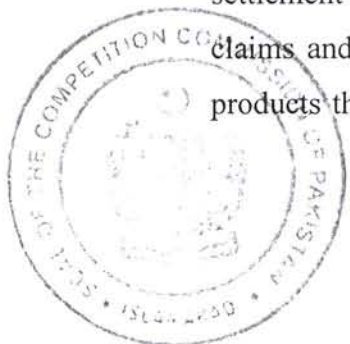
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reasonable basis and has provided prior recognizable substantiation for making this claim based on competent and reliable scientific evidence, while the neck tag was still in use. For such purpose, the current state of science becomes relevant.

43. The FTC published requirements for "Competent and Reliable Scientific Evidence" provide as follows:

The evidence-based ranking system presupposes that FTC's requirement of "competent and reliable scientific evidence" to substantiate an advertising claim related to health or safety has been met. FTC defines "competent and reliable scientific evidence" as "tests, analyses, research, studies, or other evidence" based on the expertise of professionals in the relevant area, that has been "conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted" in the profession to "yield accurate and reliable results." In Re: Great Earth International, Inc., 110 F.T.C. 188 (1988). The Task Force recommends that FDA considers the scientific evidence only if it is competent and reliable."

44. A similar matter to the instant one was also investigated by the Federal Trade Commission in 2011 involving a vacuum cleaner manufacturer called Oreck (**Oreck Ruling**). The manufacturer Oreck came under FTC scrutiny after they allegedly deceived consumers when making health claims about their leading products; the 'Oreck Halo' vacuum cleaner and the 'Oreck ProShield Plus' portable air cleaner. Oreck claimed that these products would kill germs, prevent flu, eliminate all airborne particles, kill up to 99.9% of common germs and pathogens like E. Coli and MRSA, and many more statements which were said to be backed by independent research by top scientists. According to an Oreck settlement report released by the Federal Trade Commission, Oreck exaggerated these claims and provided misleading information to consumers. Oreck advertised these two products through infomercials, traditional television ads, print ads, in-store displays and



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ads online. During the 2009 holiday season, online ads pictured the Halo and the ProShield Plus side by side under the headline “Introducing the Oreck Flu Fighters, Help Reduce the Flu on Virtually any Surface and in the Air in Your Home” and claimed that the ProShield Plus “captures and destroys many airborneviruses like the flu.” An infomercial for the Oreck Halo claimed, “The Oreck Halo has killed up to 99.9% of bacteria exposed to its light in one second or less,” and that the vacuum’s light chamber “has been tested and shown to kill up to 99.9% of certain common germs, plus dangerous pathogens like E. Coli and MRSA”. The FTC charged Oreck Corporation with making these allegedly false and deceptive claims about the Halo vacuum cleaner.

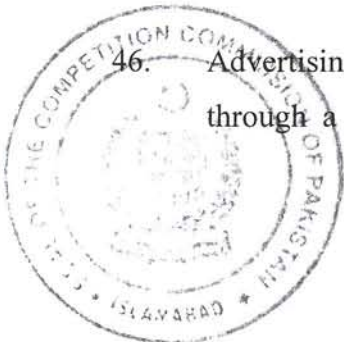
45. With regard to Advertising Claim No. 3 as made by the Respondent, the Commission holds that, since no no scientific backing or evidence for disseminating such information to the consumers was relied upon or placed on record by the Respondent, it has failed the test of prior recognizable substantiation. Such a claim which purports to provide ample protection from infections and viruses, even in the presence of its disclaimer which the Commission believes is illegible and not clear and conspicuous, , must be based on competent scientific evidence for it to be acceptable. In the absence of the same, the Commission finds the said claim to be deceptive under Section 10(1) in terms of Section 10(2)(b) of the Act.

ISSUE B

Whether the Advertising Claim No. 4 constitutes a violation of Section 10(1) in terms of Section 10(2)(b) of the Act;

Advertising Claim No. 4: "24 hours Long-Lasting Freshness"
(front packaging of the bottle)

46. Advertising Claim No. 4 is an express absolute claim as it has not been limited or qualified through a disclaimer or otherwise. For every such claim made and addressed to the



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consumer, the Commission assumes that consumers expect a "reasonable basis" for making the same in accordance with Section 10(2)(b) of the Act.

47. The 24-hour long lasting freshness claim depicted on the front of the packaging of Max APC is also accompanied by the following information on the backside:

"New MAX Antibacterial All Purpose Cleaner has been formulated to neutralize odors and cut through grease more quickly and effectively while leaving behind 24 hours long-lasting freshness."

48. It may be noted, however, that no details have been provided as to how long the surface will remain clean and disinfected by the product and when the consumer needs to reapply Max APC on the surface to maintain sterility/disinfection and freshness.

49. While the Respondent has placed reliance on a long-lasting survey that was conducted by a market research agency to study fragrance likeliness and freshness of Max APC formula, the Commission is of the considered view that no recognizable substantiation has been provided by the Respondent which is conclusive as to the 24 hours long lasting freshness. The Respondent has made Advertising Claim No. 4 in an absolute manner with no disclaimer, disclosure or qualifier for the knowledge, awareness, and consumption of consumers. Such an absolute claim relating to the long lastingness of fragrance of a household cleaning product is highly effective in drawing the attention of an ordinary consumer when making a transaction decision to purchase. The Respondent having failed to provide a recognizable substantiation or reasonable basis as to the character, properties, and suitability for use of Max APC through the aforesaid material sweeping claim of long lasting freshness, the said Advertising Claim No. 4 is in clear violation of Section 10(1) in terms of Section 10(2)(b) of the Act.



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ISSUE C

Whether the Comparative Claims constitute a violation of Section 10(1) in terms of Section 10(2)(c) of the Act:

50. The Comparative Claims complained of are contained in the trade letter issued and circulated by the Respondent. The following statements have been made about Dettol SC as to the harms and problems emanating from it:
- i. *If you move the bottle from one place to the other, the bottle leaks or becomes defective;*
 - ii. *Minimal shelf life as it expires quickly;*
 - iii. *Quite expensive for everyday use.*
51. Section 10(2)(c) of the Act prohibits the ‘*false or misleading comparison of goods in the process of advertising*’ and also constitutes a deceptive marketing practice in terms of Section 10(1) of the Act. Similar to the preceding sub-section, a comparison of goods lacking a reasonable basis will be considered to be false and misleading in terms of this provision. A comparison is made whenever the qualities of two or more products or services are judged against each other.
52. The FTC has developed the Statement of Policy Regarding Comparative Advertising, (comparing a product to another company’s product in an advertisement) which provides that comparative advertising is appropriate where the comparisons are clearly identified, truthful, and non-deceptive. The Commission is of the opinion that in addition to the above the comparison must be analyzed and held to the highest level of scrutiny in order to ensure that the statements made are accurate and narrowly drawn. It is only when comparative advertising compares material, relevant, verifiable and representative features and is not misleading, may there be a legitimate means of informing consumers of their advantage.



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53. With regard to the Comparative Claims, the Respondent contends that its trade letter is an internal manual which states that in some attributes, Max APC is better than Dettol SC. To this extent, it has placed reliance on a presentation by Marketmatics, which it claims is based on the internal research conducted by a credible agency. A perusal of the presentation shows that there is no mention of which cross section of society the surveys and figures are based on. Reference therein has been made to terms such as "consumer's desire", "sounds good for the consumers", "product rating". The presentation cannot be considered as evidence by the Commission as it is vague and ambiguous and does not make reference to any source of data collection whatsoever. Even otherwise, the presentation does not highlight any flaws or defectiveness of Dettol SC or its packaging for it to be relied on by the Respondent when making the Comparative Claims. Therefore, the Commission is of the considered view that the Comparative Claims relating to price, expiry of the product and leakage and defective packaging - lack a reasonable basis and are hence deceptive within the meaning and scope of Section 10(1) in terms of Section 10(2)(c) of the Act.

54. As regards the Respondents submission that the trade letter was an internal confidential memo only meant for the viewing and training of its employed staff being the distributors, reference is made to the Oreck Ruling, wherein the FTC has observed that deceptive information provided to franchised stores for their use in marketing the product was itself a means and instrumentality to its distributors to deceive consumers. The fact and admission on part of the Respondent that the trade letter was circulated among persons responsible for marketing Max APC is sufficient for the Commission to conclude that a violation has in fact been made out due to the inclusion of deceptive comparisons therein. Even if the trade letter was meant solely for the viewing and consumption of its distributors, the deceptive comparisons have no doubt created an impression in their minds as to the harmful effects of Dettol SC, which impression is eventually passed onto the consumer by the sales force marketing Max APC, especially at the promotional stage of launch of the product.

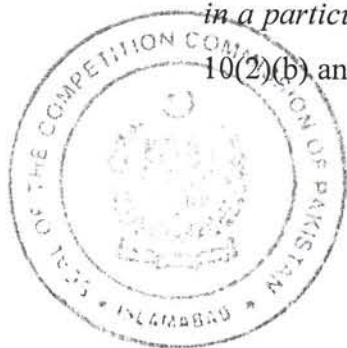



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ISSUE D

Whether the Advertising Claims and the Comparative Claims constitute a violation of Section 10(1) in terms of Section 10(2)(a) of the Act.

55. 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, the Commission. **In The Matter of M/S. DHL Pakistan (Pvt.) Ltd**, the Commission 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'. In its **Order In The Matter Of M/S Jotun Pakistan (Pvt) Limited**, the Commission 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'.
56. It is also pertinent to mention that in the event that there exists a contravention of Section 10(2)(b), (c) and/ or (d) of the Act, a concurrent violation of Section 10(2)(a) is also made out. The consequence of 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 in the Matter of Show Cause Notice issued to M/s A. Rahim Foods (Private) Limited** 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) and (c) of the Act, as it is to Section 10(2)(d).



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57. Based on the above, the Commission is of the concurring opinion that:

i) Advertising Claim No. 1 and No. 2 being false and misleading, are in fact capable of harming the business interests 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 Complainant's brand identity and goodwill which it has built over the years, as well as other competing undertakings who do not indulge in such deceptive marketing practices. The effect of engaging in such practices is the diversion of customers to the Respondent's product, thereby inflicting financial losses to competitors. Hence, the Respondent has acted in violation of Section 10(2)(a) of the Act with regard to Advertising Claim No. 1 and No. 2.

ii) With regard to Advertising Claim No. 3, it has already been held that the same is materially false and misleading due to the absence of scientific backing or evidence substantiating it. Therefore, this claim too is capable of harming the business interests of the Complainant as well as its other competitors, being in violation of Section 10(2)(a) of the Act.

iii) Advertising Claim No. 4, being a false and misleading claim in the absence of prior substantiation, and one which is highly relevant to a consumer when purchasing a household multi-surface cleaning product, is highly capable of harming the business interests of competitors of the Respondent, including the Complainant. It therefore, constitutes a violation of Section 10(2)(a) of the Act.

iv) The Comparative Claims as contained in the trade letter and lacking a reasonable basis, no doubt cause direct harm to the business of the Complainant as already held above.

Hence, the Comparative Claims amount to a further violation of Section 10(2)(a) of the



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PENALTIES AND DIRECTIONS

58. In view of the Respondent’s violations of Section 10 of the Act, the Commission hereby imposes on it a penalty of:

(a) Pakistani Rupees One Million for each of the four counts of the contravention of Section 10(1) read with Section 10(2)(b) of the Act (PKR Four Million in total);

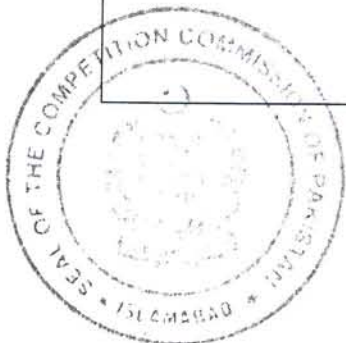
(b) Pakistani Rupees One Million for one count of a contravention of Section 10(1) read with Section 10(2)(c) of the Act (PKR One Million in total);

(c) Pakistani Rupees One Million for each of the five counts of the contravention of Section 10(1) read with Section 10(2)(a) of the Act (PKR Five Million in total).

59. The Respondent is therefore liable to pay a sum of Pakistani Rupees Ten Million in total. The penalty has been imposed keeping in view the seriousness of the violations, their impact on competition and consumers in the market.

60. The Commission further directs the Respondent to modify its claims as laid out in the following table within thirty (30) days of this Order. The Respondent is also directed to only advertise those claims relating to Max APC for which it has prior substantiation and does not lack a reasonable basis.

Claim by Max APC	Direction
Advertising Claim No. 1 (a) ‘Eliminates 99.9% Bacteria’ (Front packaging of the bottle)	Modify the claim to prominently disclose in a way that is instantly visible to the potential buyer the types of bacteria for which the claim is substantiated. The font size of the disclaimer and the claim must also be similar and come up to the ‘clear and conspicuous’ standard.



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<p>Advertising Claim No. 2</p> <p>(b) <i>'It kills 99.9%* bacteria from surfaces, leaving floors and household surfaces, clean, shiny and germ free'</i> ; followed by the disclaimer: <i>'*based on lab test with concentrated usage'</i></p> <p>(Backside of the bottle packaging)</p>	<p>The disclaimer with the claim should be much more prominent with better presentation, so that it is instantly visible to the potential buyer. The font size of the disclaimer and the claim must also be similar and come up to the 'clear and conspicuous' standard. In addition, the term 'germ' should be replaced with the term 'bacteria'.</p>
<p>Advertising Claim No. 3</p> <p>(c) <i>'Protects against*: Cold and Flu; Skin Infections; Food poisoning;'</i> followed by the disclaimer: <i>'Based on Laboratory test with concentrated usage'</i></p> <p>(Bottle neck tag)</p>	<p>As the claim has been discontinued, the same or a similar claim must not be used again.</p>
<p>Advertising Claim No. 4</p> <p>(d) <i>'24 hours Long-Lasting Freshness'</i></p> <p>(Front packaging of the bottle)</p>	<p>Modify the claim to prominently disclose the limitation of the claim so that it is instantly and prominently visible to the potential buyer. The font size of the disclaimer and the claim must also be similar and come up to the 'clear and conspicuous' standard.</p>
<p>Comparative Claims (comparison with Dettol SC)</p> <p>(e) <i>'If you move the bottle from one place to the other, the bottle leaks or becomes defective';</i></p> <p>(f) <i>'Minimal shelf life as it expires quickly';</i></p> <p>(g) <i>'Quite expensive for everyday use'.</i></p> <p>(Appearing in the trade letter)</p>	<p>These Comparative Claims must be omitted in totality from the trade letter and must not be used again.</p>

61. The Respondent is also directed to file a compliance report with the Registrar of the Commission within a period of thirty (30) days from the date of issuance of this order.



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62. The Respondent is reprimanded not to indulge in deceptive marketing practices as well as other prohibition contained in Chapter II of the Act in the future, as it shall entail stricter penal consequences.
63. In terms of the above, SCN No. 15/2016 is hereby disposed of.
64. Ordered accordingly.



Ms. Vadiyya Khalil
Chairperson



Mr. Ikram Ul Haque Qureshi
Member

Islamabad the August 10, 2017

