



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF SHOW CAUSE NOTICE ISSUED TO
M/S RECKITT BENCKISER PAKISTAN LTD
FOR DECEPTIVE MARKETING PRACTICES
ON COMPLAINT FILED BY
M/S UNILEVER PAKISTAN LTD.

(FILE No. 186/OFT/UNILEVER/CCP/2015)

Dates of Hearing

27 September 2017
22 March 2018
17 December 2019

Adjudicating Members

Dr. Muhammad Saleem
Member

Dr. Shahzad Ansar
Member

Present:

Mr. Noman A. Farooqi

Assisted by:
Ms. Shazia Ashraf
Sr. Joint Director (Exemption)

Mr. Amir Zaman
Deputy Director (Legal)

Mr. Arsal Ikram
Assistant Director (Legal)

On behalf of:

Unilever Pakistan Limited

Barrister Abdullah Munshi
Advocate Supreme Court

Mr. Aman Ghanchi
Director & Company Secretary

Ms. Madeeha A. Chaudhry
Legal Manager

Mr. Muhammad Muzaffar
Advocate, M. Muzaffar & Associates



M/s Reckitt Benckiser Pakistan
Limited



Mr. Siraj Hassan
Assistant Manager, Legal

Mr. Hasan Mandviwala, Advocate
Mr. Shajee Hanfi, Advocate
Mr. Raheel Hashmi, Advocate
Mandviwala & Zafar

Ms. Zara Khalid,
Head of Legal

Mr. Humayun Farooq
Director Marketing

Mr. Mohsin Hameed
R&D Associate

Ms. Zermina Naveed
Assistant Manager (Legal)

ORDER

1. This order shall dispose of the proceedings initiated pursuant to Show Cause Notice No.05 of 2017 dated 17 August 2017 (hereinafter the 'SCN') issued to M/s Reckitt Benckiser Pakistan Limited (hereinafter the '**Respondent**') for *prima facie* violations of Section 10 of the Competition Act, 2010 (the '**Act**').
2. The Competition Commission of Pakistan (the '**Commission**') received a complaint from M/s Unilever Pakistan Limited (hereinafter the '**Complainant**') alleging that the Respondent has indulged itself into deceptive marketing practices in violation of Section 10 of the Act by making various claims with reference to Dettol Soap which are not substantiated.

FACTUAL BACKGROUND

A. Complaint, Enquiry and Show Cause Notice:

3. Complainant is a company registered under the Companies Ordinance, 1984 (now Companies Act, 2017) having its registered office at Karachi. The Complainant is involved in the manufacturing of Personal Care, Food and Hygiene Products. Respondent 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. Both the Complainant and the Respondent squarely fall within the purview of an '*undertaking*' as provided under clause (q) of subsection (1) of Section 2 of the Act.
4. It was alleged in the complaint that the Respondent is airing and releasing in print and electronic media a misleading, deceptive, unsubstantiated and unethical advertisement campaign with respect to its product "Dettol Soap".
5. On the basis of the Complaint and an initial inspection of the advertisement of Dettol Soap, following representations were made by the Respondents in its television commercial (hereinafter the '**TVC**'):

- (i). Advertising Claim No. 1: "*Dettol Soap kills germs like flu virus up to 99.9%*" (TVC audio from 11-16 seconds);



- (ii). Advertising Claim No. 2: "24 hours constant protection from germs"(TVC audio from 16-19 seconds) followed by the disclaimer "as per Lab Testing, prevents germs (E.Coli and S. Aureus) from increasing up to 24 hours" (appears in writing on the bottom right corner of the TVC);
- (iii). Advertising Claim No. 3: "24 hours protection from germs that spread in winters" (TVC audio from 20-23 seconds); followed by the disclaimer: "e.g. Staphylococcus Aureus" (appears in writing on the bottom right corner of the TVC);
- (iv). Advertising Claim No. 4: "24 hour germ protection from cold and flu" (appears in writing on the center of the screen at 28 seconds) followed by the disclaimer "as per Lab Testing, prevents germs (E.Coli and S. Aureus) from increasing up to 24 hours" (appears in writing on the bottom right corner of the TVC).

6. The following are the script and images of the Respondent's TVC as depicted below:

Urdu Script

ہر سال چار کروڑ پاکستانی فلو وائرس کا شکار ہوتے ہیں،
فکر نہ کریں، ڈیٹول سوپ کرے فلو وائرس جیسے 99.9 فیصد تک جراثیم کا خاتمہ
اور دے جراثیم سے 24 گھنٹے لگاتار حفاظت
سرديوں ميں پھيلنے والے جراثيموں سے 24 گھنٹے حفاظت
ڈیٹول سو فیصد یقینی

Har saal chaar crore Pakistani flu virus ka shikar hotay hain'
Fiker na karain, Dettol Soap karay flu virus jaisay 99.9 % tak germs ka khatma
Aur day jaraseem say 24 ghanay Lagatar Hifazat
Sardion me phalnay wallay jaraseem 24 ghanay lagatar hifazat
Dettol Be 100 % Sure'

English Script

Every year Forty Million Pakistanis fall victim to the flu virus
Don't worry, Dettol soap kills germs like flu virus up to 99.9 %
And gives 24 hours constant protection from germs
24 hours protection from germs that spread in winters
Dettol be 100 % sure.



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7. The Commission, after reviewing the contents of the complaint along with the advertisements and the claims made therein, deemed it appropriate to initiate an enquiry under Section 37(2) of the Act. The enquiry in the matter was concluded vide enquiry report dated 15 November 2016 (hereinafter the '**Enquiry Report**'). The conclusions of the Enquiry Report are as under:

"52. The Respondent has submitted two test reports to substantiate its claims made through advertisements. First report marked as ASTM E1874-97 is an absolute method of testing which cannot be relied upon. The method was suspended and subsequently replaced by ASTM E1874-14 during the year 2014.

53. The other test report submitted by the Respondent marked as ASTM E-1052 also shows the results against Panda Swine Flu. Both the reports were found insufficient to substantiate the claims made by the Respondent in its advertisement campaign. It has also been observed that the Respondent has made wider claims through the advertisements in contrast to actual facts placed before the enquiry officers.

54. Keeping in view the aforementioned facts it is quite evident that the Respondent by making high sounded claims in their advertisements released from time to time has, prima facie, entered into deceptive marketing practices in terms of the provisions of section 10(1) of the Act. Moreover, it has been involved in distributing false and misleading information that is capable of harming the business interests of other undertakings in terms of section 10(2)(a) and also distributing information to consumers that lacks reasonable basis related to characters, properties and quality of its product in terms of section 10(2)(b) of the Act.

55. Therefore, it is recommended that in the interest of the public at large, proceedings may be initiated against the Respondent under



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the provisions of Section 30 of the Act for, prima facie, violation of Section 10(1) in terms of Section 10(2)(a) and (b) of the Act.”

8. After, considering the conclusions and recommendations of the Enquiry Report, the competent authority, in pursuance of Section 37(4) of the Act, directed the initiation of proceedings in the public interest under Section 30 of the Act by issuing the SCN to the Respondent, wherein the Respondent was required to respond in writing within fourteen (14) days as well as to appear before the Commission on 22 March 2016 to place facts and material in support of its contention by availing the opportunity of hearing. The SCN in its relevant parts is reproduced below:

5. **WHEREAS**, in terms of the Enquiry Report in general and paragraphs 33 to 37 in particular, the Undertaking's claim in their TVC that "Dettol Soap karay flu jaisay 99.9% tak germs ka khatma" ('Dettol soap kills flu virus like 99.9% germs') (**Claim A**) gives the impression that Dettol kills not just the flu virus but several other germs as well, and is unsubstantiated as the test report submitted by the Undertaking is based on a method ASTM E-1052 (against Pand Swine Flu caused by Influenza A H1N1 in particular) has been declared obsolete since 2006; and

6. **WHEREAS**, in terms of the Enquiry Report in general and paragraphs 38 to 45 in particular, the Undertaking's claim that 'Dettol day jaraseem say 24 ghanay lagatar hifazat, sardion me phalnay walay jaraseem... 24 ghanay lagatar hifazat' ('Dettol gives 24 hours constant protection from germs, 24 hours protection from germs that spread in winters') (**Claim B**), is unsubstantiated as the test method ASTM E1874-97, submitted by the Undertaking is only effective against bacteria E.Coli and S. Aureus which is insufficient to cover the wider term of 'germs' which is recurrently used in the TVC and other print/media advertising materials; and

7. **WHEREAS**, in terms of the Enquiry Report in general and paragraphs 46 to 49 in particular, the Undertaking's claim that Dettol provides 24 hours germ protection from Cold and Flu (**Claim**



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C) is unsubstantiated as the test submitted in support of the said statement by the Undertaking is specifically against the Swine flu caused by influenza A- H1N1 virus and not all flu and cold viruses; and

8. *WHEREAS, in terms of the Enquiry Report in general and paragraphs 50 and 51 in particular, the Undertaking's claim that Dettol prevents germs (E.coli & S. Aureus) from increasing for up to 24 hours (Claim D) is unsubstantiated as the test method submitted by the Undertaking is obsolete and does not reflect 24 hours protection against said bacteria; and*

9. *WHEREAS, in terms of the Enquiry Report in general and paragraphs 37, 45, 49, 51 & 54 in particular, it appears that the Undertaking by making unsubstantiated claims (Claims A, B, C & D) is involved in disseminating false and/or misleading information to the consumers, that lacks a reasonable basis, related to character, properties, and quality of its products in prima facie violation of Section 10 (1) read with Section 10(2) (b) of the Act; and*

10. *WHEREAS, in terms of the Enquiry Report in general and paragraphs 37, 45, 49, 51 and 54 in particular, it appears that by making unsubstantiated claims (Claims A, B, C & D), the Undertaking is involved in disseminating false and misleading information capable of harming the business interests of its competitors including the Complainant, in prima facie violation of Section 10 (1) read with Section 10 (2) (a) of the Act; and"*

B. Written Reply to SCN and Hearings in the Matter:

9. The first hearing in the matter was held on 27 September 2017. The Respondent was required to file the Written Reply to the Show Cause Notice, which was still awaited. The Respondent committed that the written reply will be filed within couple of days.



10. The written reply to the SCN on was filed on 28 September 2017. A summary of the written submissions made are as follows:

- (a). The Respondent stated that, the complaint is baseless and has been filed without any reason and the same is liable to be rejected. No reason or evidence whatsoever has been filed by the Complainant in trying to disprove any of the Respondent's substantiated claims.
- (b). The Respondent, in relation to the deceptive marketing practices, vehemently denied all allegations raised in the SCN as well as the Enquiry Report. The Respondent submitted that the TVC which was aired as part of the Dettol soap advertising campaign consists of multiple disclaimers in the ad.
- (c). In relation to the claim "*Dettol Soap kills germs like flu virus up to 99.9%*" the Respondent contended that the disclaimer appearing on the screen from 16-19 seconds which reads "*As per standard lab testing, prevents germs (E.Coli & S. Aureus) from increasing up to 24 hours*" clearly indicates the claim is being made in relation to germs, which cause flu virus, for which standard testing has been submitted to the Commission.
- (d). The Respondent asserted that the claim "*24 hours protection from germs that spread in winters*" has been appropriately disclaimed in the TVC at 20-23 seconds. The disclaimer gives the example of S. Aureus which, as described above, has been tested against by laboratory experts.
- (e). As per the Respondent, the claim "*24 hour germ protection from cold and flu*" also comes with a disclaimer "*As per standard lab testing, prevents germs (E.Coli & S. Aureus) from increasing up to 24 hours*", which appears with a visual of a child in between a full body wash. This visual indicates the importance of maintenance of hygiene by virtue of hand and body wash. Moreover, the respondent submitted that the disclaimer mentioned above contains a disclaimer with in a disclaimer by the use of the words "*up to*" clarifying that Dettol Soap is effective against increasing germs up to 24 hours.



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- (f). The Respondent in connection to 24 hours clock logo on top left of TVC, 24 hours shield depicted around the child/family during the TVC, and 24 hours logo during the last minute of TVC, further stated that, along with the number “24”, the disclaimer “*As per standard lab testing, prevents germs (E.Coli & S. Aureus) from increasing up to 24 hours*” also unequivocally appears, containing the words “*up to*” and the 24 hour claim should not be read without consideration given to the words “*up to*” in relation to Dettol’s efficacy against germs, specifically in relation to winter germs such as S. aureus, which has been tested against.
- (g). The Respondent reiterated that necessary due diligence has been undertaken with regards to its advertising campaign. The relevant disclaimers appear at all necessary stages of the TVC and the complaint filed against the Respondent is without any substantial basis.
- (h). The Respondent rejoined that a discrepancy has been presented before the Commission with respect to the claim “*Dettol Soap kills germs like flu virus up to 99.9%*”. The words “*up to*” need to be taken cognizance of, as they indicate that Dettol can potentially kill up to 99.9% germs at any given instance. This does not imply that Dettol will necessarily kill 99.9% germs at all times.
- (i). The Respondent further submitted that ASTM International is a globally recognized leader in the development and delivery of voluntary consensus standards. The Respondent stated that the E1874-97 Standard test Method adopted by ASTM International is updated and not become obsolete as has been mentioned in ASTM’s website. The Respondent claimed that the Enquiry Report fails to provide any official information on behalf of ATSM in support of its claim that the test has in fact become obsolete.
- (j). The Respondent contented that the Enquiry Officers have malafidely attached the reports dated 03rd January 2012 (against E.Coli and S. Aureus) and 02nd December 2011 (against influenza A H1 N1) as part of the Enquiry Report. This action has breached the Respondent’s privileged communication with its lawyer and the formulations have been made



available to the Complainant. The Respondent had communicated this to the Commission vide its letter dated 10th March 2015; therefore, the Enquiry Officers are in violation of the obligation of confidentiality under the Act for making available sensitive information to the Complainant.

(k). The Respondent submitted three (3) lab tests and contented that its reports, testing and findings have been conducted in thorough and comprehensive manner.

(i). The Respondent submitted a Test Report dated January 3, 2012, titled "Day long Protection from germs using a Modified Cup Scrub Method on Porcine (Pig) Skin Substrate as a Surrogate for Human Skin" which was conducted as per ASTM E1874-97 Standard Test Method for Evaluation of Anti-bacterial Washes by cup Scrub Technique. The results of the test show that Dettol Bar Soap exhibited 24- hour anti-bacterial residual activity against E.coli and S. Aureus as opposed to the Dove beauty Soap.

(ii). The Respondent further submitted Test Report dated December 2, 2011, titled "Project Connie, Dettol Malaysia Skincare Bar Soap with 0.2% TCC Formula 1824-035 Inactivation of Influenza A-H1N1". The test demonstrated complete inactivation against influenza A-H1N1, with in a one minute contact time by achieving a greater than 4.0 log reduction, which exceeded the success criteria for the study.

(iii). That in the tests conducted jointly by the Team of researchers regarding Dettol Soap it was confirmed and substantiated, via a report dated April 18, 2017 titled 'the Research and Development Claim Support Document Hygiene, Personal Care', that Dettol Soap protects up to 100 illness causing germs, including germs causing respiratory illness and diseasing resulting in flu. Dettol Soap is also capable of achieving a minimum of 1 log kill against majority of the same. This is a reasonable representation by the Respondent in relation to bacteria as well as flue related germs. Moreover, this



test is confidential in nature and only for the Commission's informative purposes.

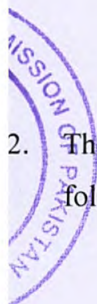
- (iv). The Respondent submitted that the formulations of Dettol Soap in Malaysia and Dettol Soap in Pakistan are consistent and representative of one another from a micro-efficacy perspective. Since the formulations are determined to be identical in antimicrobial efficacy and as the testing was conducted at a GLP certified laboratory in New York in standardized conditions, thus the allegation that there are different conditions in Pakistan and Malaysia is not tenable.
- (v). In view of the aforementioned points, the Respondent submitted in its reply to the Show Cause Notice that the Complainant does not have any case against the Respondent and that there is no violation of Section 10 of the Act. The Respondent has rightly provided all the needed disclaimers in the TVC and has submitted all the laboratory test reports which objectively support the claims of the Respondent. On the other hand, the Respondent has been unsuccessful in providing any documentary evidence of an independent and impartial laboratory which could refute the Respondent's claims. The Complainant lacks any objective and legal criteria for its allegations against the Respondent and thus, there is no violation of Section 10 of the Act. Hence, the Respondent submitted that the Show Cause issued to it is liable to be dismissed.

11. The counsel for the Complainant in the course of the hearings argued that the absolute claims made by the Respondent in its advertisement are in violation of Section 10 of the Act. He further submitted that the tests relied upon by the Respondent are obsolete. The counsel for the complainant further submitted that Respondent while referring to the disclaimers in the advertisement has conceded that the Test Reports don't substantiate the claims made in the TVC. The submissions made in the last date of hearing are summarized as follows:



- (a). The Complaint arises out of the misleading public advertising campaign of the Respondent, who since November 2014 had aired and advertised a misleading, deceptive and unsubstantiated and unethical advertising campaign in various public media forums in respect of its soap product under the brand name of “Dettol”.
- (b). The contents of parawise reply/comments filed are baseless and denied. The Respondent is blatantly deceiving the consumers and public at large by claiming that Dettol soap provides consumers 24-hours protection against germ and flu without no accurate and substantive support/evidence. The disclaimer in advertisement and the supporting evidence pertains to **Staphylococcus Aureus** (“S. Aureus”) and **Escherichia coli** (Ē. Coli”), which are not the causes of cold and flu/influenza as claimed by the Respondent.
- (c). ASTM E1874-97 is an obsolete method since the year 2006 and it was withdrawn by ASTM with no replacement being issued. There have been two version issued in 2009 and 2014. Therefore, earlier purported support against the organisms, i.e. E. Coli and S. Aureus become further baseless.
- (d). The claims made by Respondent its advertisements that Dettol kills 99.9% flu virus germs, which clearly implies to an ordinary man that Dettol alone can kill germs upto 99.9% and then displays a KV asserting that Dettol provides 24 hours constant protection from “Cold and flu”, which is unsubstantiated.
- (e). The Cup Scrub technique (ASTM E 1847-97) conducted in this regard confirmed that Dettol soap exhibited antibacterial activity against E. Coli and S. Aureus, which germs are not the causes of cold and flu viruses.
- (f). The Respondent’s claim of 24 hours germ protection in TVC contradicts the claim on Dettol’s website (UK) where they have listed that frequent handwashing can prevent against illness like cold and flu.

2. The Director General (Legal) in attendance, for assistance of the Bench made the following submissions:



- (a). With reference to the Privileged communications, he submitted that the proceedings before the Commission under the Act are not adversarial proceedings and are not initiated for violation of any individual right of a company/firm or business. Rather, the legislature in all its wisdom has provided that the proceedings under the Act can only be initiated where it is in the public interest. Reference and reliance in this regard was placed on **Order dated 14 September 2018, in the matter Show Cause Notice issued to Pakistan Telecommunication Company Ltd., reported as 2018 CLD 984.**
- (b). He further submitted that the Enquiry Committee has not breached the confidentiality requirements. He referred to the case cited as **Order dated 29 September 2009 in the matter of Show Cause Notice issued to China Mobile Pakistan Ltd (Zong) and Pakistan Telecom Mobile Ltd (Ufone)** reported as **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 vis-à-vis 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."

- He further referred to the provisions of Section 51 of the Act, and stressed that any disclosure of information as part of performance of official duties by Chairman, Member, Officer, Employee, Consultant or Advisor of the Commission shall not be considered breach of confidentiality obligations. Further, in pursuance of the Section 52 of the Act, producing a document in course of any proceedings under the Act is declared a permitted disclosure by the legislature in all its wisdom which should not be doubted. In any event, in terms of the provisions of Article 9-12 of the *Qanoon-e-Shahdat Order, 1984*; the Tests Reports provided by the Respondent were tagged "Attorney-Client" privileged communication. If any disclosure is made by the Attorney in violation of the instructions made by the Respondent, in the course of proceedings, then, the person under obligation and in breach should be held responsible.



(d). With reference to the Laboratory Tests, he submitted that absolute claims made must be substantiated and must bear some reasonable basis and in the absence thereof, the claim so made in the process of marketing or in the advertisement is considered false or misleading. He stressed that none of the claim can be substantiated based on the Tests provided by the Respondent; as the E. Coli and S. Aureus are not primary cause of cold & flu. Further, the tests are conducted in the controlled environment, whereas, the real world conditions are different. He further stressed that presence of disclaimer is sufficient on its own to make the claims in the advertisement baseless. The disclaimers made are not sufficient as the Commission in various decisions has held that the disclaimers must be legible to the naked eye and should not be in fine prints. In this regard reference is made to the cases cited as **In the matter of Proctor and Gamble Pakistan Pvt. Limited (Head and Shoulder Shampoo), 2010 CLD 1695, In The Matter Of Show Cause Notices Issued To Askari Bank Ltd, United Bank Ltd. Mv Bank Ltd & Habib Bank Ltd. ('Banks Order'), In the matter of Show Cause Notice issued to RITS Incorporation Order dated 11 May 2011, In the matter of Show Cause Notice issued to Al-Hilal Industries, 2012 CLD 1861, In the matter of Show Cause Notice issued to Reckitt & Benckiser, 2016 CLD 40, In the matter of Show Cause Notice issued to Colgate Palmolive (Max All Purpose Cleaner), 2017 CLD 1550, In the matter of Show Cause Notice issued to Proctor & Gamble (Safeguard Soap), 2017 CLD 1609, Colgate Palmolive vs. CCP, 2019 CLD 254.**

ANALYSIS & DECISION

13. 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:

(i) *Whether the Enquiry Committee has acted with mala fide by forwarding the privileged documents to the Complainant for their comments and making the Test reports part of the Enquiry Report?*



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(ii). *Whether the Respondent has violated the provisions of Section 10 of the Act through its marketing campaign vis-à-vis the Dettol Soap?*

14. In the subsequent paragraphs, we will now proceed to analyze the aforesaid issues in terms of the evidence available on record along with the submissions made before us.

Whether the Enquiry Committee has acted with mala fide by forwarding the privileged documents to the Complainant for their comments and making the Test reports part of the Enquiry Report?

15. At the outset, we would like to refer to the provisions of Section 48 of the Act, which for ease of reference is reproduced herein below:

48. Indemnity .— *Subject to sub-section (3) of section 35, no suit, prosecution or other legal proceeding shall lie against the Commission or any Member, officer or servant of the Commission for anything in good faith done or intended to be done under this Act or any regulations or order made there under.*

16. Given the above provision, unless *mala fide* is proved through an independent and cogent evidence, the presumption of *bona fide* is attached to actions of the Commission, Member or Officer or Servant of the Commission. In the instant matter, the Respondent has alleged that the Enquiry Officers, by forwarding the Tests Report provided by Respondent to the Complainant, acted with *mala fide*. We have perused the record and the submissions made before us. We note that under the provisions of the Act, the proceedings are initiated in the public interest and not for the protection of any individual rights.

17. While, taking into account the submissions made by the Director General (Legal) before us, we also deem it appropriate to refer to **Order dated 16th December 2019, in the matter of Complaint filed by M/s Catkin Engineering Sale & Services (Private) Limited Against KPK Directorate of Agriculture Engineering**, wherein it was held as follows:

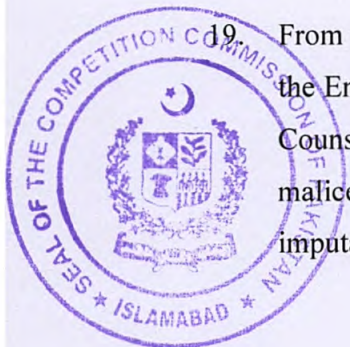
(iii). *Notwithstanding the above, in the cases of deceptive marketing practices i.e. Section 10 of the Act, and keeping in view the concept elucidated in 2010 CLD*



1478: the burden of proof is on the undertaking concerned i.e. the manufacturer/seller of goods or provider of services that the claims made by them in the process of marketing about their product and/or services is appropriately substantiated, the Complainant in such like matters 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.

18. Taking guidance from the above, under the provisions of Section 10 of the Act, the onus to prove and provide reasonable basis for any claim made is on the seller / manufacturer and not on the consumer or any third party. We are also in agreement with the submissions made by the Director General (Legal) vis-à-vis the provisions of Section 51 & 52 of the Act. There is no doubt that the Respondent has provided the tests report to substantiate the claims made in the advertisement in question. Further, the reports are forwarded to the Complainant for the purposes of carrying out the function under the Act i.e. protecting the consumers from anti-competitive behaviors which include Section 10 of the Act. It is clearly provided in clause (a) of Section 52 of the Act, that producing a document in the course of any proceedings is permitted disclosure by the legislature in all its wisdom. Further, under the provisions of Section 51 (1) (c), it also clearly provided therein that where the information so provided is used in course of performance of public function, the mischief clause of Section 51 of the Act are not applicable.

19. From the above, it seems that the Respondent has attempted to create an illusion that the Enquiry Committee, lack *bona fide* or suffer from malice. However, the Learned Counsel for the Respondent has failed to substantiate these allegations of *mala fide* or malice on part of Enquiry Committee through independent and cogent evidence. Mere imputation of *mala fide* or malice against the Officers of the Commission is not



tenable, in circumstances. The Commission finds these arguments put up by the Respondent's counsel to be completely unfounded and unjustified, in presence of statutory protection under Section 48 of the Act. In this regard reference and reliance is placed on the case reported as **2017 SCMR 1249, titled Said Zaman Khan vs. Federation of Pakistan**, wherein the August Court held that mere levelling allegations is not sufficient to establish *mala fide* of fact, rather the party levelling such allegations must prove the allegations of mala fide through independent and cogent evidence. The Respondent's counsel has put nothing on the record even. Rather, the above objections have been raised to by the Respondent's counsel to delay the proceedings before the Commission and avoid the scrutiny of its actions under the Act by the Commission.

20. In view of the foregoing, we are of the opinion that the Respondent has failed to substantiate the objection raised *vis-à-vis* the provision of Test Reports and its use in the Enquiry Report and the mala fide on part of the Enquiry Committee. Hence, we are constrained to turn it down.

Whether the Respondent has violated the provisions of Section 10 of the Act through its marketing campaign vis-à-vis the Dettol Soap?

21. After addressing the objection raised by the Respondent, we now proceed to the address the main issue in the matter i.e. the alleged deceptive marketing practices by the Respondent *vis-à-vis* Dettol Soap. Following representations were made by the Respondents in its television commercial (hereinafter the 'TVC'):

- (i). Advertising Claim No. 1: "*Dettol Soap kills germs like flu virus up to 99.9%*" (TVC audio from 11-16 seconds);
- (ii). Advertising Claim No. 2: "*24 hours constant protection from germs*"(TVC audio from 16-19 seconds) followed by the disclaimer "*as per Lab Testing, prevents germs (E.Coli and S. Aureus) from increasing up to 24 hours*" (appears in writing on the bottom right corner of the TVC);
- (iii). Advertising Claim No. 3: "*24 hours protection from germs that spread in winters*" (TVC audio from 20-23 seconds); followed by the disclaimer: "*e.g.*



Staphylococcus Aureus" (appears in writing on the bottom right corner of the TVC);

- (iv). Advertising Claim No. 4: "24 hour germ protection from cold and flu" (appears in writing on the center of the screen at 28 seconds) followed by the disclaimer ""as per Lab Testing, prevents germs (*E.Coli* and *S. Aureus*) from increasing up to 24 hours" (appears in writing on the bottom right corner of the TVC).

22. The following are the script and images of the Respondent's TVC as depicted below:

Urdu Script

ہر سال چار کروڑ پاکستانی فلو وائرس کا شکار ہوتے ہیں،
فکر نہ کریں، ڈیٹول سوپ کرے فلو وائرس جیسے 99.9 فیصد تک جراثیم کا خاتمہ
اور دے جراثیم سے 24 گھنٹے لگاتار حفاظت
سردیوں میں پھیلنے والے جراثیموں سے 24 گھنٹے حفاظت
ڈیٹول سو فیصد یقینی

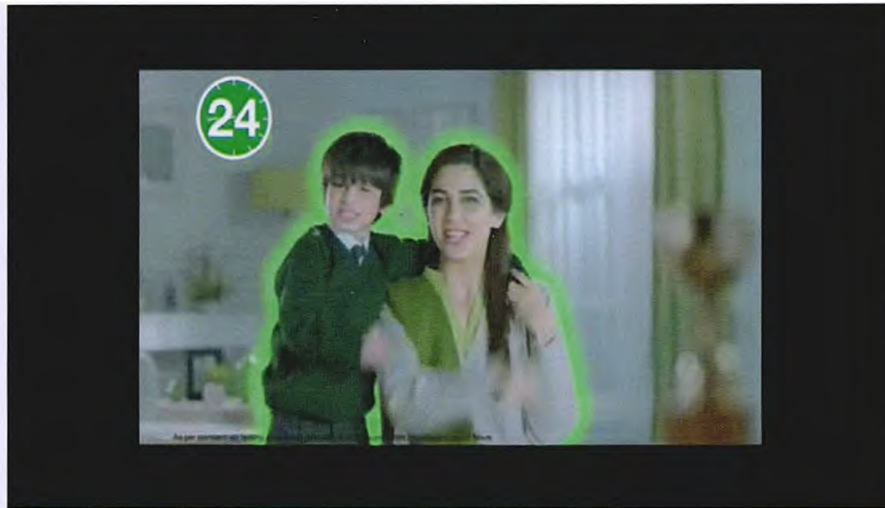
Har saal chaar crore Pakistani flu virus ka shikar hotay hain'
Fiker na karain, Dettol Soap karay flu virus jaisay 99.9 % tak germs ka khatma
Aur day jaraseem say 24 ghantay Lagatar Hifazat
Sardion me phalnay wallay jaraseem 24 ghantay lagatar hifazat
Dettol Be 100 % Sure'

English Script

Every year Forty Million Pakistanis fall victim to the flu virus
Don't worry, Dettol soap kills germs like flu virus up to 99.9 %
And gives 24 hours constant protection from germs
24 hours protection from germs that spread in winters
Dettol be 100 % sure.



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Before addressing the principle issue in question, we deem it appropriate to highlight certain principles for determination of the advertisement in question. In one of our earlier Orders i.e. **Order dated 29 September 2009 in the matter of Show Cause**

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Notice issued to China Mobile Pakistan Ltd (Zong) and Pakistan Telecom Mobile Ltd (Ufone) reported as **2010 CLD 1478**, the Commission has outlined its approach for the examination of an advertisement in determining whether it amounts to deceptive marketing practice, 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".

24. 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, 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 **Order dated 29 September 2009 in the matter of Show Cause Notice issued to China Mobile Pakistan Ltd (Zong) and Pakistan Telecom Mobile Ltd (Ufone)** reported as **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".



25. In the Order dated 29 September 2009 in the matter of Show Cause Notice issued to China Mobile Pakistan Ltd (Zong) and Pakistan Telecom Mobile Ltd (Ufone) reported as 2010 CLD 1478, 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”.

26. Relying on Standard Oil of Calif 84 FTC 1401 (1974), p. 1471, the Commission in 2010 CLD 1478, has elaborated the concept of advertising representation as follows:

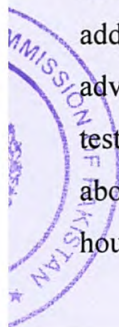
“35. [i]n evaluating advertising representation, we are required to look at the complete advertisement and formulate our opinions on them on the basis of the net general impression conveyed by them and not on isolated scripts. As a rule, the above-stated view was upheld by the U.S. Court of Appeals in Beneficiary Corp v FTC, 542 F. 2d 611 (3rd Circuit, 1976) in the following words ‘the tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context (p.617).”

27. In terms of substantiation of claims to ensure that the information distributed 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 Pfizer, Inc., 81 F.T.C. 23 (1972), wherein the FTC held that advertisers must possess the level of substantiation expressly or impliedly claimed in the advertisement.



28. The Respondent in the instant matter has placed reliance on the reports marked as ASTM E1874-97, ASTM E1874-14 during the year 2014 and ASTM E-1052 also shows the results against Panda Swine Flu. The Enquiry Report, with reference to the aforesaid Tests observed that the reports submitted by the Respondent were found insufficient to substantiate the claims made by the Respondent in its advertisement campaign. It has also been observed that the Respondent has made wider claims through the advertisements in contrast to actual facts placed before the enquiry officers. The Complainant, while making submissions, submitted that Respondent is blatantly deceiving the consumers and public at large by claiming that Dettol soap provides consumers 24-hours protection against germ and flu without no accurate and substantive support/evidence. The disclaimer in advertisement and the supporting evidence pertains to S .Aureus and E.Coli, which are not the causes of cold and flu/influenza as claimed by the Respondent. The Complainant further submitted that ASTM E1874-97 is an obsolete method since the year 2006 and it was withdrawn by ASTM with o replacement issued. There have been two version issued in 2009 and 2014. Therefore, earlier purported support against the organisms, i.e. E. Coli and S. Aureus become further baseless. Complainant alleged that the claims made by Respondent its advertisements that Dettol kills 99.9% flu virus germs, which clearly implies to an ordinary man that Dettol alone can kill germs upto 99.9% and then displays a KV asserting that Dettol provides 24 hours constant protection from “Cold and flu”, remained unsubstantiated. It was also submitted before us that the Cup Scrub technique (ASTM E 1847-97) conducted in this regard confirmed that Dettol soap exhibited antibacterial activity against E. Coli and S. Aureus, which germs are not the causes of cold and flu viruses. Further, the Respondent’s claim of 24 hours germ protection in TVC contradicts the claim on Dettol’s website (UK) where they have listed that frequent handwashing can prevent against illness like cold and flu.

29. We note that while the test reports submitted by the Respondent has taken into account the antibacterial activity against E.Coli and S. Aureus, however, the reports have not addressed the most common virus causing the flu i.e. “*influenza virus*”. The advertisement in question starts with a claim with reference to flu virus, however, the test reports provided are completely silent about it. Further, the Reports are also silent about providing basis for the strong claim of 99.9% protection against germs and 24 hours protection. In this regard, we would like to place reliance on Colgate Palmolive



Pakistan (Pvt.) Limited vs. Competition Commission of Pakistan, reported as 2019 CLD 254, where the Competition Appellate Tribunal, while dealing with similar kind of claims, categorically observed/held that in the absence of the categorical and visible disclaimer the reports don't cater for the claims made in the advertisement. Hence, the appeal was dismissed. It is also relevant to highlight that during the arguments the Counsel for the Respondent claimed that the earlier Order of the Commission in the matter of Show Cause Notice issued to the Respondent with reference to one of its product i.e. 'Dettol Surface Cleaner', the Competition Appellate Tribunal has set aside the Order of the Commission and the claim "Kills 99.9% of germs" was upheld. We have reviewed the unreported decision of the Competition Appellate Tribunal in **Reckitt Benckiser Pakistan Limited vs. Competition Commission of Pakistan, dated 26 November 2015**, unfortunately, the Respondent has tried to mislead with reference to the findings thereon. In fact, it was owing to the statement made by the Respondent *vis-à-vis* clearly mentioning the efficacy of Dettol Surface Cleaner against Bacteria, the Competition Appellate Tribunal set-aside the Order of the Commission. The Competition Appellate Tribunal also cautioned the Respondent that in case of non-compliance with the statement made and the conditions imposed for disposing off the appeal, the Respondent would be liable to a fine of PKR 5 Million Only, in addition to facing non-compliance proceedings and further penalties under the Act. We are conscious of the fact that earlier, the Commission has taken action against the Respondent for violation of Section 10 of the Act, which are as follows:

- (a). *In the Matter of Show Cause Notice issued to Reckitt & Benckiser (for the marketing claims of Dettol Surface Cleaner), reported as **2015 CLD 1864**.*
- (b). *In the Matter of Show Cause Notice Issued to Reckitt & Benckiser (for the marketing campaign of one of its depilatory product/hair removing cream i.e. Veet claiming that "9/10 Women prefer Veet for smooth glowing skin", reported as **2016 CLD 40**.*

30. Apart from the above, the Respondent has also filed complaint on two different occasions, which are as follows:



(a). *In the matter of Complaint filed by Reckitt Benckiser Pakistan Ltd. against M/S S.C. Johnson & Son Pakistan Limited Order dated 20 January 2012.*

(b). *In the matter of Show Cause Notice issued to Proctor & Gamble Pakistan (Pvt.) Limited, for various claims in lieu of Safeguard Soap, 2017 CLD 1609.*

31. From the above, it can be clearly understood that the Respondent is well aware about the legal framework of the Commission, in particular, Section 10 of Act. However, from the material available on the record, it seems that with reference to the disclaimers, the guidelines provided by the Commission through various order was not followed. Considering now the appropriateness of the disclaimer/disclosure printed on the Respondent marketing and advertising material reproduced above, it is apparent that the same is in fine print footnotes or in significantly smaller print and have been to in an attempt to offset and/or limit the liability or to qualify the advertising claim. In 2010 CLD 1478, the Commission has observed that:

'[...] 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.'

32. 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 Eband, Inc. And Ayman A. Difrawi 2016, Case

No: 6:16-cv-714-Orl-41TBS has made it clear that:

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;*
- (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.'*

33. For considering the above in entirety we are of the firm view that the Respondent has failed to substantiate the claims made in the advertisement of Dettol Soap with reference to character, properties, suitability for use and/or quality of use and infact has disseminated false and misleading information to the consumers through its televised advertisement in violation of Section 10(2)(b) of the Act.

34. 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 its **Order dated 21 December 2012 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*



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*product's identity is the reputation it has earned for quality and value". Furthermore, in its **Order dated 17 March 2015 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." (emphasis added)*

35. 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 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** 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.
36. Based on the above, we are of the conclusive opinion that the Advertising Claim No. 1, No. 2, No. 3 and No. 4 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 deceptive marketing practices. 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, these claim are capable of harming the



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business interests of the Complainant as well as its other competitors, being in violation of Section 10(2)(a) of the Act.

37. The upshot of the above discussion is that the Respondent has failed to substantiate the claims made in the advertisement for the Dettol Soap and in fact has resultantly engaged itself in deceptive marketing practices in violation of Section 10 (1) of the Act.

PENALTIES AND DIRECTIONS

38. 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 Fast Moving Consumer Goods, especially those marketed to children and parents. Each year, the Fast Moving Consumer Goods Manufacturers spend millions of rupees marketing their 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 involved in this sector 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.
39. As noted in the preceding paragraphs, it is established that the Respondent has engaged in deceptive marketing practices prohibited under Section 10(2) (a) & 10(2) (b) read with Section 10(1) of the Act. Further, the conduct of the Respondent cannot be taken leniently as the Respondent in the past has filed complaints against other undertakings for similar nature of claims and have also been show caused by the Commission for resorting to deceptive marketing practices. Hence, we are constrained to impose a penalty of Rs. 30,000,000/- (Rupees Thirty 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.

40. 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. The Respondent is further



restrained from using any of the claim under review in the instant proceedings with reference to Dettol Soap unless appropriately substantiated.

41. In terms of the above, Show Cause Notice No.05 of 2017 dated 17 August 2017, is hereby disposed of.

M. Jaleel

(Dr. Muhammad Saleem)
Member

[Signature]

(Dr. Shahzad Ansar)
Member

ISLAMABAD THE 26TH DAY OF DECEMBER 2019

