

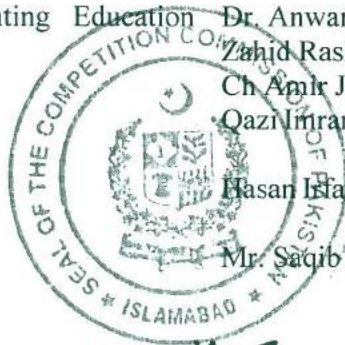


BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

THE MATTER OF SHOW CAUSE NOTICE ISSUED TO M/S SOCIETY OF
ACCOUNTING EDUCATION FOR DECEPTIVE MARKETING PRACTICES

(FILE No.185/OFT/CFA/CCP/2015)

Date(s) of Hearing	June 02, 2015 June 21, 2016
Adjudicating Members	Ms. Vadiyya Khalil Chairperson Dr. Shahzad Ansar Member Mr. Ikram Ul Haque Qureshi Member
M/s Society of Accounting Education	Dr. Anwar Ali, President Zahid Rasheed, Advocate Ch Amir Javed Warraich Qazi Imran Zahid, Advocate Supreme Court
M/s Irfan & Irfan	Hasan Irfan Khan, Advocate Supreme Court
M/s CFA Institute	Mr. Saqib Baig, Advocate



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Registrar

Competition Commission of Pakistan
Government of Pakistan
Islamabad.

ORDER

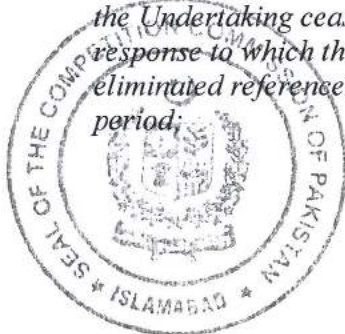
1. This order shall dispose of the proceedings initiated pursuant to the Show Cause Notice No. 1/2015 dated 14 May 2015 (the 'SCN'). The SCN was issued pursuant to the complaint filed with Competition Commission of Pakistan (the 'Commission') by Chartered Financial Analyst (CFA) institute (the "Complainant") for prima facie violations of Section 10 of the Competition Act 2010 (the 'Act') by M/s Society of Accounting Education (the 'Respondent').

FACTUAL BACKGROUND

2. The Complainant is a non-stock corporation organized under the laws of Virginia, United States of America. The company is engaged in imparting education and training to students and professionals in the field of investment and financial analysis and has gradually extended its operations around the world, including Pakistan. The Respondent is a society registered under the Societies Registration Act, 1860 of Pakistan and is engaged in the provision of educational services in the field of finance and accounting. Both are undertaking in terms of Section 2 (1) (q) of the Act.
3. The Complainant has alleged that the Respondent has been using the Complainant's registered Trademark 'CFA' to deceive public and promote its business. It further alleged that the Respondent had resorted to the dissemination of false or misleading information, which is capable of harming the business interest of the Complainant. Moreover, it alleged that the Respondent had been distributing false or misleading information by unauthorized use of imitated marks as CFA, ACFA, FCFA, DCFA, as if the Respondent was authorized / permitted by the Complainant to use the mark 'CFA' by the Complainant as such.
4. An enquiry in terms of Section 37 (2) of the Act was initiated in the matter, which was concluded *vide* an enquiry report dated 04 March 2015 (the '**Enquiry Report**').
5. After considering the Enquiry Report, the Commission issued the SCN to the Respondent, wherein it was required to respond in writing within fourteen (14) days as well as to appear before Commission on 02 June 2015. The relevant parts of the SCN are reproduced herein below:

"5. AND WHEREAS, in terms of the Enquiry Report in general and paragraph 6 in particular, it appears that the Undertaking began using the Impugned Mark, and variations of it, in relation to its own educational enterprise in 2010, without the Complainant's authorization;

6. AND WHEREAS, in terms of the Enquiry Report in general and paragraph 19 in particular, the Complainant sent the Undertaking cease and desist letters in February 2011, in response to which the Respondent modified its website and eliminated references to the Impugned Mark for a certain time period;



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7. **AND WHEREAS**, in terms of the Enquiry Report in general and paragraph 6 in particular, the Undertaking resumed its use of the Impugned Mark and its variations in 2012 which continued until the time of the complaint in 2013;

8. **AND WHEREAS**, in terms of the Enquiry Report in general and paragraphs 6, 22 and 23 in particular, while it appears that the Undertaking has now modified the mark depicted on its website, it remains misleadingly similar to the Impugned Mark;

9. **AND WHEREAS**, it appears that through the use of the Impugned Mark and deceptively similar variations of the same, the Undertaking is prima facie distributing false and misleading information that is capable of harming the business interests of the Complainant, which constitutes a violation of Section 10 (2) (a) of the Act;

10. **AND WHEREAS**, the Undertaking is involved in providing and advertising its services through the use of the Impugned Mark which prima facie amounts to distributing 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, which constitutes a prima facie violation of Section 10 (2) (b) of the Act;

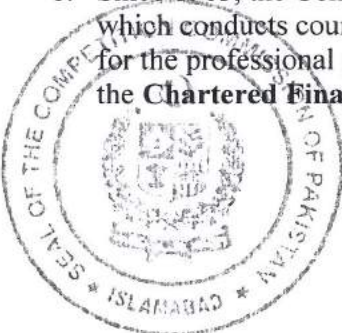
11. **AND WHEREAS**, it appears that the Undertaking's use of the Complainant's Impugned Mark prima facie amounts to fraudulent use of another's trademark, which constitutes a violation of Section 10 (2) (d) of the Act;"

SUBMISSIONS

A. The Complainant

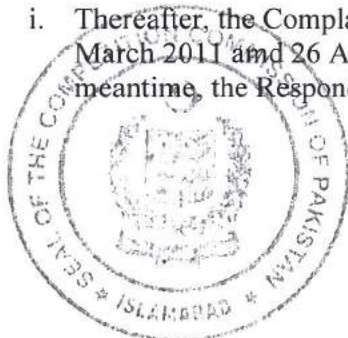
6. The submission of the Complainant are summarized as under:

- a. The Complainant was originally established under the name of "**Institute of Chartered Financial Analysts**" in the year 1962 as not-for-profit Corporation for the purpose of imparting education and training to the students and professionals in the field of investment and financial analysis and has gradually extended its operation around the world, including in Pakistan.
- b. Since 1963, the Complainant has been the sole international renowned body, which conducts courses and degree program and designates the successful persons for the professional practice of financial analysis with professional designation of the **Chartered Financial Analyst**, commonly referred to as **CFA**.



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- c. In the year 1990, the Financial Analyst Federation (FAF) and Institute of Chartered Financial Analyst (ICFA) merged to form the Association of Investment Management and Research (AIMR). In May 2004, the corporate name was changed from Association of Investment Management and Research (AIMR) to CFA Institute.
- d. Over the past 50 years, the CFA program has gradually grown to become known as the '**gold standard**' for investment and finance professionals. Presently, the Complainant has over 117,000 members in 138 nations. Over 146,000 candidates worldwide registered to take Complainant's June 2013 CFA exam, including 1,688 candidates from Pakistan.
- e. The Complainant has extensively been advertising its CFA program in media internationally. The Complainant's CFA program and its associated goods and services using CFA as trade/service mark are well known and popular among the Pakistani students and professionals. The first examination of Complainant's CFA program in Pakistan was held in 1991, while the first membership of Pakistani national of Complainant's Association dates back to 1989. Since then, the Complainant has been regularly conducting the CFA examination in Pakistan. The estimated media, advertising and promotional expenses worldwide by the Complainant from 2005 to-date is \$ 47,541,000 (US dollars forty seven million five hundred and forty one thousand only).
- f. In order to protect the Complainant's trade/service mark, 'CFA' the Complainant has registered and/or applied for its registration of its trademark in nearly all the major jurisdictions. In Pakistan, the trade/service mark i.e., Chartered Financial Analyst and its abbreviation CFA was registered with the Trade Mark Registry under TR No's: 196401, 196402, 136436 and a964000.
- g. On 20th September 2010, the Complainant came to know that the Respondent's unauthorized use of CFA mark in connection with its program for investment and finance professionals. The Respondent used the word Chartered Financial Accountants and its abbreviation CFA in its advertisement. According to the Respondent's website, '*member of the society are to describe themselves as Certified Financial Accountants and use the designation CFA, ACFA (for Associates) and FCFA (for fellows) for their services and programs*'. The Respondent has also established LinkedIn and Facebook profiles, whereby they promote their program. The copies of the Advertisement were provided by the Complainant as Annexure M-1 to M-2.
- h. On 11 February 2011, the Complainant sent a cease and desist letter dated to the Respondent. On 23 February 2011, the Respondent replied *via* email denying that they were claiming use or suggesting an affiliation with the Complainant. The copies of the letters and email response of the Respondent were provided to the Commission as Annexure M-3.
- i. Thereafter, the Complainant sent four (04) cease and desist letters between 21 March 2011 and 26 April 2011, but were not received by Respondent. In the meantime, the Respondent modified its website to eliminate any reference to the




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mark 'CFA'. On 23 July 2012, the Complainant discovered again that the Respondent had resumed the use of CFA mark to refer its program and services.

- j. The Respondent maintains a website www.soae.edu.pk which claims to offer Certified Financial Accountants/CFA program and Service. The Respondent has made various claims on its Website and in advertisements, which include:
- i. CFA Program (Internationally Recognized)
 - ii. CFA Pakistan
 - iii. CFA has 17 reciprocal agreements in the world.
 - iv. SOAE has international office in the UK, Saudi Arabia, Afghanistan, USA/Canada
 - v. The SOAE's CFA program has numerous affiliations with international professional bodies in USA, UK, Canada, Malaysia, South Africa etc.
- k. According to the Complainant, all of these advertisement/ claims imply that the Respondent have an affiliation with an International Organization and offering Complainant's CFA program and services. The Complainant provided Annexure M-5 to substantiate its claim.
- l. The Complainant submitted that the Respondent had been using Complainant's CFA mark, indistinguishable variations and colorable imitations such as ACFA, DCFA and FCFA. The Respondent's mark CFA, ACFA, DCFA, DCFA and FCFA are identical to the Complainant's CFA mark, which has been used by the Complainant since as early as 1963 and used in Pakistan since 1991. Therefore, any use by Respondents of the marks CFA, ACFA, DCFA and FCFA creates distortion in the fair and free competition in the market.
- m. Furthermore, the candidates who complete the Respondent's program will identify themselves as holding 'CFA' designation and will be indistinguishable in the marketplace from the candidates who have completed Complainant's 'CFA' program. Such unauthorized, fraudulent use and mala fide on the part of the Respondent constitute 'Deceptive Marketing Practices' within the meaning and scope of Section 10 of the Act.
- n. More specifically, the Complainant alleged that the Respondent's unauthorized use of Mark CFA and imitation constitute a violation of Section 10 (2) (a) and are capable of harming the business interest of the Complainant. In addition, the Respondent is distributing false or misleading information to the consumers and public, especially in financial and investment sector, which constitutes a violation of Section 10 (2) (b) of the Act. Besides, the Respondent's act constitutes a violation of Section 10 (2) (d) of the Act.
- o. The Complainant prayed for an appropriate order to be passed under Section 31 of the Act and to impose a penalty of such sums as may be determined by the Commission in the circumstances of the case.



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B. BY RESPONDENT

7. On 26 May 2015, the Respondent responded to the SCN contending that the Complainant has concealed the fact that a suit for 'Grant of Permanent Injunction restraining defendant perpetually from infringing the plaintiff's trademark....' was pending adjudication in the Court of Mr. Zulfiqar Ali Noon, Learned Additional District and Session Judge, Lahore. Therefore the Complainant has not approached to the Commission with clean hands. Therefore, the Complaint was liable to be dismissed.
8. The Respondent further denied having any correlation with the Complainant's and submitted that it offers 13 courses and CFAc was one of them. While explaining the difference between the courses offered by the Respondent and that of Complainant, the Respondent highlighted that CFAc stood for Certified Financial Accountants, whereas CFA stood for Chartered Financial Analyst. Furthermore, it further submitted that Respondent had issued a disclaimer on its website that the Respondent had no connection in any manner with the Complainant's CFA program.
9. The Respondent argued that Para 6 of Enquiry Report was false and frivolous and had no concern whatsoever with it. And Para 13 clearly showed the difference between the logo and trademark of the Respondent and the CFA institute and maintained that the Complaint and SCN were liable to be set aside.

ISSUES

10. The following issues have been identified for deliberation and decision:
 - a) Whether or not the presence of a suit for permanent injunction against infringement of trademarks bars the jurisdiction of the Commission under the Act and hence the proceedings?
 - b) Whether or not the alleged advertisements, marketing material, and trademarks used by the Respondent constitute deceptive marketing practices in terms of section 10 of the Act?

ANALYSIS/DECISION

11. With respect to the first issue, it is clarified that the subject proceedings before the Commission do not have any nexus with the suit proceedings pending before the learned Additional District and Session Judge as highlighted by the Respondent. It has been observed by Commission in its Order in the Matter of Show Cause Notice issued to M/s Tara Crop Sciences (Private) Limited for Deceptive Marketing Practices¹ that the pendency of a civil suit or principle of "res sub judice" as enunciated in Section 10 of Code of Civil Procedure 1908, (the 'CPC') has no relevance to Commission's proceedings under the Act. The relevant part of the order is as follow:

http://www.cc.gov.pk/images/Downloads/show_cause%20notice_issued_to_ms_tara_crop_order.pdf



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"15....Section 10 of the CPC does indeed prohibit the generation of multiple claims pertaining to the same subject matter before different forums, and enunciates the principle of 'res sub judice'. The purpose behind the provision, as explained through case-law, has been to avoid conflicting judgments and wastage of resources. Section 10 is however, limited by its language to be of application only to 'suits' pending in 'courts'.

16. Section 33 of the Act prescribes the powers of the Commission in relation to its proceedings. The relevant portion is reproduced below for convenience:

Any proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Pakistan Penal Code. (Act XLV of 1860), and the Commission shall be deemed to be a civil court for the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (Act V of 1898).

17. The judicial nature of proceedings carried out by the Commission is therefore limited to the situations demarcated above. In all other situations, the Commission performs quasi-judicial functions and may not be deemed a 'court' for the purposes of Section 10 of the CPC. Proceedings before the Commission are therefore not equivalent to suits before a civil court. Furthermore, the settled interpretation of Section 10 of the CPC provides that for the section to be applicable, the two suits must be pending before courts of competent jurisdiction. **In Industrial Development Bank of Pakistan Versus Messrs Azeem Food Industries (Pvt.) Ltd.**² for example, it was held by the Sindh High Court that where proceedings are not in the nature of a civil suit and are instead special proceedings provided for under special law, the provisions of Section 10 of the CPC would not be attracted."

12. Based on the above, a suit for a permanent injunction regarding infringement of trademarks is a different subject than the one being considered by the Commission i.e. whether or not the Respondent has engaged in deceptive marketing practices by using the Complainant's trademark for the purpose of misleading consumers and distorting competition.

13. With respect to the second issue the Complainant has submitted documentary evidence of its 'applications of registration' and 'registration of Trade Mark' in the Trademark under TR No's: 196401, 196402, 136436 and 964000 which establishes the Complainant's exclusive right to mark CFA denoting Chartered Financial Analyst.



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The Respondent has used different advertising schemes by using the mark CFA for the promotion of its institute/courses, which has never been contested by the Respondent, both during the enquiry and the proceedings.

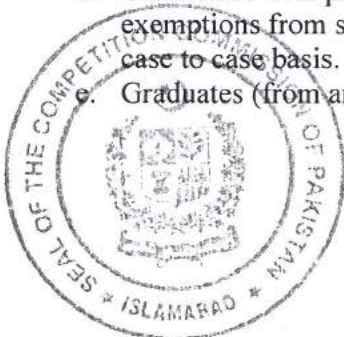
14. The claims by the Respondent in those advertisements and documentary evidence submitted by Complainant are summarized as following:
- CFA has 17 reciprocal agreements in world,
 - CFA Program (internationally Recognized)
 - affiliation with international professional bodies from USA, UK, Canada, Malaysia, South Africa, West Africa/Nigeria, Hong Kong, UAE, Saudi Arabia, Oman, Afghanistan, India, France,
 - CFA Pakistan, Golden opportunity for DCFA (D stands for Diploma), DCFA qualified can get admission to Certified Financial Accountants (CFA) Program without any entry test and will get four (4) subjects exemptions under the exemption policy.
 - Society of Accounting and Education (SOAE) as professional accountancy body enables members through its examination and associated experience and training requirement, to qualify as CFA.
 - SOAE offers Associate and fellow Membership for CFA program.
 - Members of the Society are to describe themselves as Certified Financial Accountants and to use the designator letter CFA, ACFA (Associate) and FCFA (fellow).
 - CFA and DCFA syllabus/ Course outline.
 - Admission/ Enrolment form of Certified Financial Accountants (CFA).

15. While introducing its institution the Respondent has made the following claim:

“The Society of Accounting and Education is launching its first program “Certified Financial Accountants (CFA), for the on-going education and setting of qualifying standards to ensure professional competence of its members in practice of accountancy.”

16. Furthermore, while introducing their educational program the Respondent claimed:

- The Society will award the Membership as CFA, and its associate fellow membership.
- A person may be admitted as an Associate Member if he fulfills the condition laid down in the bye-laws of the institute, shall be entitled to use the designatory letters “Associate of Certified Financial Accountants (ACFA).
- An associate member of the institute who has attained the practical experience described in the bye-laws of the institute, aggregating to at least five years or more, shall be entitled to use the designatory letters “Fellow of Certified Financial Accountants (FCFA)”.
- Candidates with prior professional qualification are eligible to get waivers/ exemptions from subjects of Certified Financial Accountant (CFA) program on case to case basis.
- Graduates (from any disciplines) are eligible to enroll into CFA program.



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17. Apart from the above advertisements/claims, the Respondent on its website advertised statement:

“Golden opportunity for CFA members: Certified Financial Accountant-CFA is an internationally recognized program and serves as a gateway to the Worlds Renowned Institutes.”

18. The Commission directed the Respondent in hearing on 2 June 2015 to submit its Memorandum and Article of Association. Upon analyzing the Memorandum and Article of Association, the following references relevant to the matter at hand were found:

- a. The clause (i) of Section 4 of Memorandum of Association of the Respondent states, “the Society will award the membership as Certified Financial Accountants (CFA) and its associates and fellowship”.
- b. The interpretation clause (I) of section 1 of Article of Association states, “Profession means the profession of the business of Certified Financial Accountants (CFA)”.

19. It is also pertinent to mention here that Respondent on receiving the cease and desist letters on 21 March 2011 from Complainant, changed the designatory letters from CFA to CFAc in August 2013 for its Certified Financial Accountants program.

20. The above claims and the evidence available on the record clearly establish that the Respondent used the registered trademark of the Complainant i.e., CFA in its marketing and other materials. The images retrieved from the Respondent’s website, the advertisements in newspapers, the evidence or record substantiate Complainant’s assertions.

21. With regard to contravention of Section 10 of the Act, it is noted that the Commission in its Order *In The Matter Of Show Cause Notices Issued to Paint Manufacturers*³ ('Paint Order') has observed that:

“...for the purposes of deceptive Marketing, actual deception need not be shown to carry the burden of proof it is sufficient to establish that the advertisement has the tendency to deceive and capacity to mislead.”

22. Furthermore, the Commission has observed in its Order *In The Matter Of Complaint Filed By M/S. DHL Pakistan (Pvt.) Ltd.*⁴

“It is a cardinal principle of law and fair commercial trading, that deceptive measures should not be adopted to adversely affect goodwill and recognition earned by other organization. The only reason for such conduct is to gain an advantage on the goodwill attached to the Complainant’s trademark, which

³ <http://www.cc.gov.pk/images/Downloads/token-paints-order.pdf>
⁴ http://www.cc.gov.pk/images/Downloads/dhl_pakistan.pdf



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is indeed capable of harming Complainant's business interest..."

23. For the above reasons, in order to constitute a violation of Section 10, the marketing and advertising must have the ability to deceive. It is clear that the use of the trade/service mark by the Respondent has the ability to deceive the ordinary consumer (such as students) by giving them false or misleading impression that the Respondent is affiliated with, or has expressly been authorized by the Complainant, to carry out its programs in Pakistan or that it is otherwise offering a similar qualification as the Complainant.
24. On the one hand, such usage of the trade/service mark has the ability to deceive the students who may well believe that they are undertaking the CFA program and qualification which is offered by the Complainant. Apart from misleading the consumer, these practices have the ability to harm the business interests of the Complainant as well.
25. In view of the above, the usage of the Complaints trademark 'CFA' amounts to the dissemination of false and misleading information by the Respondent capable of harming the business interest of the Complainant in violation of Section 10(1) read with Section 10(2)(a) of the Act. At the same time, as discussed above, the usage of the trademark also amounts to the dissemination of false and misleading information to consumers in violation of Section 10(1) read with Section 10(2)(b) of the Act.
26. Furthermore, in relation to Section 10(2)(d) of the Act, the principle, the Commission has established the fraudulent use is not the "subjective intent" but the "objective manifestation" of that intent. In this regard, reference is made to the Commission's Order *In The Matter Of Complaint Filed By M/S. DHL Pakistan (Pvt.) Ltd*, wherein it has been held that:

"...while interpreting Section 10 of the Act; one needs to be conscious that the interpretation of the fraudulent use of trade mark has to be in the context of deceptive marketing and would thus have a broader scope. Rather than making it too complex by focusing on subjective "intentions" of the Respondents, in our considered view, it is best if we adopt simplistic approach i.e. if it can be demonstrated that the Respondents by use of the trade mark, intended to deceive the customer/consumer to gain an advantage. Keeping in view the nature of contravention, it is not the subjective intent but the objective manifestation of that intent that will establish the fraudulent use."

27. In view of the foregoing, Respondent's conduct and the evidence on record the Respondent would most certainly have known that its unauthorized use of the Complainant's trademark 'CFA' would deceive consumers and that it would gain a business advantage. With regard to the unauthorized use of the 'CFA' trademark, the Commission is of the considered opinion that the Respondent's representation are material and hence constitute a violation of Section 10(1) read with Section 10(2)(d) of the Act.



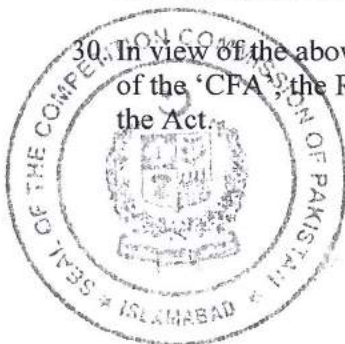
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28. With respect the imitated trademarks FCFA, DCFA, ACFA and the new trademark CFAc are distinguishable from the registered trademark of the Complainant i.e., CFA, it is pertinent to mention that the Commission has the mandate to protect the consumer from anti-competitive behavior in the market. In the backdrop of deceptive similarity or imitation in the eye of an ordinary consumer, it should be noted that ordinary consumer should not be confused with the concept of “man of ordinary prudence “or the man on the Clapham Omnibus”. In this regard reliance is placed on the Commission’s Order *In Case of Show Cause Notices Issued To M/S China Mobile Pak Limited* that explicate the concept ordinary consumer for the purposes of section 10 of the Act and distinguishes it from the notion of “ordinary prudent man” as is found under the law of contract. The relevant portion of the said order is reproduced as under:

“in order to implement the law in its true letter and spirit, the scope of the term “consumer” must be construed most liberally and in its widest amplitude. In my considered view, restricting its interpretation with the use of the words “average”, “reasonable” or “prudent” will not only narrow down and put constraints in the effective implementation of the provision it would, rather be contrary to the intent of law. It would result in shifting the onus from the Undertaking to the consumer and is likely to result in providing an easy exit for Undertakings from the application of Section 10 of the Ordinance. Accordingly, the term “consumer” under Section 10 of the Ordinance is to be construed as an “ordinary consumer” but need not necessarily be restricted to the end consumer of the goods or service”unlike the “ordinary prudent man” the thrust on ordinary diligence, caution/duty of care and ability to mitigate (possible inquiries) on the part of the consumer would not be considered relevant factors” when looking at a deceptive commercial practice”.

29. The marks used by the Respondent FCFA, DCFA, ACFA and CFAc, containing the words “F”, “D”, “A” and “Ac” stand respectively for Fellow, Diploma, Associate, and Accountants. Therefore the words “F”, “D” and “A” used in the Complainant’s trademark ‘CFA’ connote the idea that these courses are offered by the Complainant. An ordinary consumer i.e., the students of accounting and finance who would join the world renowned institute of complainant i.e., CFA, would likely be misled by these words and connotations and is highly likely to consider the Respondents institute as authorized by the Complainant. This is based on fact and the Commission’s earlier decisions quoted above that the ordinary consumer normally perceives a mark as a whole and does not proceed to analyze it minutely. In similar vein, the use of the letter ‘c’ in minuscule form with the registered trademark of the Complainant is capable of misleading the ordinary consumer.

30. In view of the above, the Commission holds that by using the above-noted variation of the ‘CFA’, the Respondent has violated Section 10(1) read with Section 10(2)(d) of the Act.



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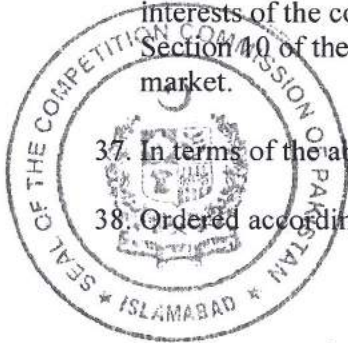
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REMEDY/ PENALTY

31. The Commission hereby directs the Respondent to immediately cease the use of the mark 'CFA' in any form whatsoever.
32. The Respondent is further directed to cease the use of terms 'DCFA, ACFA, FCFA, and CFAC, or any other similar acronyms and terms, in any form and to amend its promotional and marketing material accordingly.
33. Furthermore, the Respondent is directed to amend its Article and Memorandum of Association to remove any reference to the abovementioned terms.
34. For each of the four violations stated above, a penalty of PKR 0.5 million is imposed on the Respondent for a total of PKR 2 million.
35. The Respondent is also directed to file a compliance report with the Registrar to the Commission within a period of thirty (30) days from the date of issuance of this order and is reprimanded from indulging in deceptive marketing practices in future as at the risk of severe penal consequences.
36. The penalties and direction hereinabove have been imposed after taking into account the seriousness and length of the violations and its impact on the consumers and the interests of the competing undertakings, and are proportionate to the contraventions of Section 40 of the Act and necessary to restore the fair competition in the relevant market.

37. In terms of the above, SCN No.01/2015 is hereby disposed of.

38. Ordered accordingly.



Vadiya Khalil

Vadiya Khalil
Chairperson

Shahzad Ansar

Shahzad Ansar
Member

Ikram Ul Haque Qureshi

Ikram Ul Haque Qureshi
Member

ISLAMABAD 14 December, 2016

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