



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF

SHOW CAUSE NOTICE ISSUED TO
M/S PROCTOR & GAMBLE PAKISTAN (PVT.) LIMITED
FOR DECEPTIVE MARKETING PRACTICES

(F. NO: 174/OFT/P&G/CCP/2014)

Date of hearing: 17-05-2016
11-04-2017

Commission: Ms. Vadiyya Khalil
Chairperson

Mr. Ikram Ul Haque Qureshi
Member

Present on behalf of:

**M/s Proctor & Gamble Pakistan
(Pvt.) Limited**

Ms. Amar Abbasi, Legal Counsel
Mr. Ahmed Rizvi, Brand Manager
Skin & Personal Care
Mr. Saqib Zia, Marketing Director

M/s Reckitt Benckiser Pakistan Ltd

Mr. Feroz Ahmed, Legal Counsel
Mr. Hasan Paliwalla, Brand Manager
Mr. Zaki Muhammad, R&D Manager
Mr. Saad Hashmi, Advocate
Ms. Sana Khan, R&D



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ORDER

Background:

1. This Order shall dispose of the proceedings initiated under Section 30 of the Competition Act 2010 (the 'Act') *vide* Show Cause Notice No. 14/2016 dated 08.03.2016 (the 'SCN') issued to M/s Proctor & Gamble Pakistan (Private) Limited (the '**Respondent**') pursuant the complaint filed by M/s Reckitt Benckiser Pakistan Limited (the '**Complainant**') and the Enquiry Report dated 26.01.2016 for *prima facie* violations of Section 10(2)(a), (b) and (c) read with Section 10(1) of the Act.

Complaint:

2. On 21.11.2014, the Complainant filed the complaint alleging that the Respondent in its marketing and advertising claims has represented Safeguard as '**Pakistan's No. 1 rated Anti-bacterial Soap***' along with a disclaimer/disclosure in fine prints '****based on product in use test by AC Nielsen in April 14 amongst 600+ consumers***' which tantamount to dissemination of false or misleading information to consumers and competitors' detriment in violation of Section 10 of the Act.
3. The Complainant alleged that the Respondent's marketing material and advertising claim representing Safeguard as '**Pakistan's no.1 rated Antibacterial Soap**' lacks a reasonable basis to substantiate the claim and submitted the Safeguard's ad, which is reproduced herein below:



[Exhibit A]

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4. The Complainant also submitted the Television Commercial (the 'TVC') of Safeguard, which contains the following statements and depictions:

The TVC depicts two children entering the home, where the mother of one of the children receives them. It is winter. As the children enter the home, the mother takes their gloves and muffler off, while the child whose home it is says:

- کتنی ٹھنڈ ہے۔ -

To which the mother asks?

- اور سردیوں میں حفاظت کیسے کرتے ہیں۔ -

The child replies:

- میری ماما گرم دودھ پلاتی ہیں۔ -

In reply, the friend rubs his nose and sneezes:

The first child utters:

- میری ماما کہتی ہے نزلہ زکام سے بچنے کے لئے مجھے سیف گارڈ سے باقاعدگی سے ہاتھ دھونے چاہیے۔ -

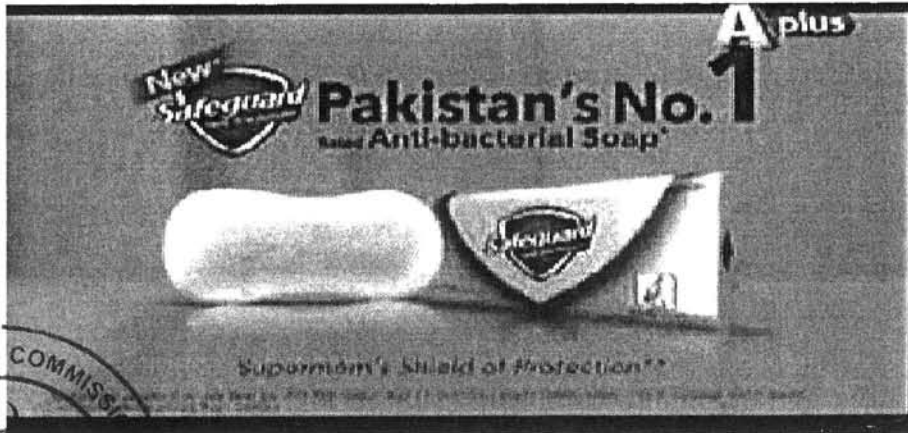
After this, the TVC shows a doctor presenting the following views:

- سردیوں میں نزلہ آسانی سے پھیلتا ہے۔ -

- پیش ہے پاکستان کا نمبر امانا ہوا اینٹی بیکٹیریل صابن، سیف گارڈ جو نزلہ زکام کے جراثیم سے حفاظت کر سکتا ہے۔ -

The TVC ends with the following image with background vocals displayed and written disclaimer/disclosure.

- پاکستان کا نمبر امانا ہوا اینٹی بیکٹیریل صابن سیف گارڈ۔ -



[Exhibit B]

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5. The message reproduced hereinabove flashes on the TV screen momentarily. The TVC portrays a typical household scene in which two children and (their) mother are talking about how flu and cold (influenza) are epidemics in winters. The conversation between the three characters suggests that the use of 'Safeguard' can protect them from germs causing influenza, among other things. It is then endorsed and further explained by a doctor, who states that the spread of flu and cold is rampant in winters. He then goes on to state that **Safeguard is Pakistan's No.1 antibacterial soap**, which provides protection against germs causing flu and cold. The TVC ends on this note with set vocals and image (a shield badge) claiming that Safeguard is a well recognized No.1 antibacterial soap in Pakistan.
6. To support its case, the Complainant submitted *AC Nielson's* (hereinafter '**Nielson**') data reflecting the market share in terms of value share and volume share of the leading antibacterial soaps in Pakistan, which is reproduced as under:

Antibacterial Bar Soaps Category	Year-to-Date MJ '14	
	Value Share	Volume Share
Dettol (R&B)	9.3%	7.4%
Safeguard (P&G)	14.3%	12.6%
Lifebuoy (Unilever)	21.6%	24.5%

[Exhibit C]

7. The Complainant stated that the Nielsen's data reflects the falsity of the Respondent's claim whether taken in value share or volume share. Rather, this position is held by a competitor's brand 'Lifebuoy'. The difference in the value share and volume share between the two brands reflects the popularity and premium quality of Lifebuoy. Hence, the Respondent's claim that Safeguard is No. 1 rated antibacterial soap in Pakistan is not substantiated by Neilson's data.
8. Furthermore, the Respondent has been marketing Safeguard by distributing false or misleading information to consumers without having a reasonable basis as to the product's character, properties, quality and suitability for use, among other things. The Respondent lacks *any substantial proof or reliable scientific healthcare related evidence in support of its claim*. The only disclaimer/disclosure made by the Respondent in its marketing and advertising campaigns is the above-mentioned study carried out by Nielson.



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9. The Complainant also referred to the Commission Public Notice '**Business Be Aware Before You Advertise**' dated 23.09.2013 published in the daily Dawn, wherein the Commission has warned the businesses to ensure that their marketing and advertising campaigns do not violate Section 10 of the Act. The notice is reproduced herein below:



COMPETITION COMMISSION OF PAKISTAN

BUSINESSES BE AWARE! BEFORE YOU ADVERTISE

Make sure that your advertisement does not violate Section 10 of the Competition Act, 2010 which prohibits **DECEPTIVE MARKETING PRACTICES**

SECTION 10 PROHIBITS BUSINESSES FROM:

- Engaging in marketing practices which could mislead or deceive consumers.
- The distribution of false or misleading information that can harm consumers or the business interests of another undertaking.
- False or misleading comparison of goods in the process of advertising.
- Fraudulent use of another's trademark, firm name, or product labeling /packaging.

Businesses should avoid making absolute claims without any reasonable justifications, such as:

- No. 1 in Pakistan/world
- No. 1 selling brand
- 100% pure
- Consumers No. 1 choice
- 100% protection

Businesses should avoid the non-disclosure of information, which may affect the decision of a consumer.

For any information please contact: Noman Lalq, Joint Director (OFT)
Ph: +92 51 9100260-3 Fax: +92 51 9100297 email: nlalq@cc.gov.pk

facebook/Competition.Commission.Pakistan www.cc.gov.pk

[Exhibit D]

10. The Complainant asserted that the Safeguard's TVC aired on various TV channels clearly show that the Respondent had disregarded the Commission's warning in violation of Section 10(2) (b), (a) and (c) of the Act.
11. On 04.12.2014, the Office of Fair Trade (OFT) of the Commission sent a copy of the Complaint to the Respondent seeking clarification as to the alleged violation of Section 10 of the Act with specific reference to the claims Safeguard to be **Pakistan No. 1 rated Antibacterial Soap**'. The Respondent was advised to substantiate the aforementioned claims by 11.12.2014. In response, the



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Respondent's Counsel filed a request for an extension until 18.12.2014 to collect the necessary information and prepare the response.

Respondent's Submissions:

12. On 17.12.2014, the Respondent submitted that it is not engaged in the distribution of false or misleading information to consumers lacking a reasonable basis in relation to the Product's character, properties, and quality. Their claim of being '**Pakistan's No. 1 rated Antibacterial Soap**' is based on a number of reliable market surveys, which are reproduced as follows:

- i. **Neilson's In-Market Usage Test:** in April 2014, Neilson carried out an in *market usage test* to validate the performance of Safeguard's new formula and to identify *consumer preference* in the antibacterial soaps category. *Testing with 600+ consumers*, the results showed that Safeguard is rated *significantly better* than other antibacterial soaps in Pakistan.
- ii. **GfK Brand Health Tracker (BHT):** an *attitude and habit study* conducted between February 2013 and August 2014 showed that Safeguard brand rating is significantly higher than the key antibacterial soaps i.e. Dettol and Lifebuoy.
- iii. **IPSOS Equity Study:** a study conducted to track the *equity* of competing brands by taking into account how *the consumers react to the brand, what they feel, or think about the brand*. According to the Respondents, the results of the equity studies carried out by IPSOS in 2007, 2008, 2009 and 2014 established that Safeguard has been *the equity leader* among antibacterial soaps for the last seven years.
- iv. **IPSOS Doctor's No. 1 Choice:** a *questionnaire-based survey* conducted by IPSOS in 2013, which identified doctor's preference in antibacterial soaps among a *representative sample of general practitioners and pediatricians*. Survey results showed that Safeguard is No. 1 choice of doctors in Pakistan.



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- ii. In Paragraph 3.1 of the submissions, the Respondent contended that Safeguard is not claiming to be 'Pakistan's No 1 Antibacterial Soap' rather it has been marketing and advertising it to be 'Pakistan's No. 1 rated Antibacterial Soap'. The term 'rated' has been used to clarify and inform consumers about the Product's brand rating position in Pakistan, as conducted by the Nielsen on 600+ consumer and BHT study. Furthermore, it was stated that the Commission in its Order **in the Matter of Proctor & Gamble Pakistan (Private) Limited** dated 23.02.2010 (**Head & Shoulder Order**) has recognized the validity of the claim of being No.1 as reasonably substantiated by a Nielson report in the following words:

"...I am of the considered view that the submissions made on behalf of P&G have some merit and P&G's claim of being World No. 1 anti-dandruff shampoo is reasonably substantiated on the basis of a report by Nielson".

13. The Respondent reiterated that the advertising claim is inclusive of a **disclaimer** i.e. 'based on a product in use test by AC Nielsen in April 2014 amongst 600+ consumers'. The qualification is written on the advertisement and displayed in the TVC, which is very obvious to a reasonable consumer. The Respondent submitted the disclaimer satisfies all tests and thresholds necessary for a reasonable consumer viewing. There is no ambiguity in the text that appears as part of the same.
14. Finally, the Respondent submitted that the Commission has validated Nielson Reports as authentic market data for the purposes of reasonable substantiation (as noted in paragraph 12(ii) above). Therefore, the Respondent is in full compliance with the Commission Notice of 2013 [Exhibit C] and therefore its claim is by no means an absolute one, rather it is **qualified by a limited sample** conducted by Nielson and confined to the category of antibacterial soaps in Pakistan.

15. On 23.01.2015, the OFT authorized an Enquiry Committee (the 'Enquiry Committee') to further probe into the issue and present its finding as to whether



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the Respondent's marketing and advertising campaigns are in violation of Section 10(2)(a) and 10(2)(b) of the Act.

Rejoinder:

16. On 29.01.2015, the Enquiry Committee forwarded the Respondent's submissions to the Complainant seeking their comments. On 06.02.2016, the Complainant submitted a request for rejoinder followed by comments on the Respondent's submission, which are summarized herein below:

- a. first, none of the reports submitted by the Respondent support the claim that '**Safeguard is Pakistan's No. 1 rated Antibacterial Soap**'. The claim of the Respondent is not supported by any **actual sales data** i.e. Nielsen retail audit where it is apparent that Unilever's product '**Lifebuoy**' ranks the highest in antibacterial soap category in Pakistan. Therefore, the claim of the Respondent is false and misleading the consumers' as well as the competitors to their detriment.
- b. Second, if the Respondent's claim is based on **BHT** (a total base of 1370 respondents), it is anomalous and not mentioned in the disclaimer. Moreover, the sample size is less than one percent of Pakistan's population in both studies. The rating/ranking of the products has a direct bearing on the market share of the product. Both the claim and the rating of Safeguard in the advertisement are false and misleading in violation of Section 10 of the Act.
- c. Apart from the market share and rating, the claim appearing on the advertisement that Safeguard is '**Pakistan's No. 1 rated Antibacterial Soap**' the word '**rated**' is too small as compared to other words in the advertising claim, which reflects the Respondent's intention to showcase and market safeguard just as '**No.1**' antibacterial soap in Pakistan. Even according to Nielsen's report, it is clear that in the leading antibacterial soaps category, Safeguard is not of the highest in the volume of sale or value.



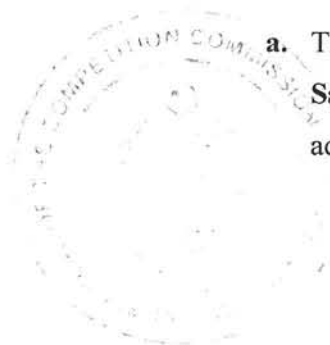
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d. As regards the disclaimer in the advertisement, its placement remains in the periphery of consumer's perception as they are rarely noticed or understood. Mere presence of a disclaimer in an advertisement does not suffice as the purpose of disclaimer is its likelihood to be read and that it is also likely to alter the general impression of the overall advertisement. The existence of a disclaimer cannot change the general impression of a false or misleading advertising claim. Hence, the consumers will always notice the prominent part of the advertisement, which contains **the claim** and will most likely disregard the disclaimer/disclosure. Even if the same is read, the question is what is the overall impression of the advertising claim without the disclaimer? Whether the 'main message' is strong enough that it allows disclaimer to alter the same? Since the advertising claim and disclaimer/disclosure in question have been placed in a perfunctory manner, it does not reflect the essence and spirit in which disclaimers are required to be placed. The main advertising message overshadows the statement in the disclaimer. Hence, the reliance upon Neilson's survey to make the advertising claim and the disclaimers/disclosures by the Respondent are flagrant disregard of Section 10 of the Act. Additionally, the Complainant highlighted that since Commission's notice, the Respondent has removed all hoardings carrying the advertisement.

Enquiry Report:

17. On 26.01.2016, the Enquiry Committee submitted its Report (the '**Enquiry Report**') pursuant to Section 37(2) of the Act recommending that the claim Safeguard is '**Pakistan No.1 rated Antibacterial Soap**' by the Respondent in its marketing and advertising campaigns, *prima facie*, amounts to a violation of Section 10 (1), within the meaning and scope of Section 10(2)(a), 10(2)(b) and 10(2)(c) of the Act. The findings of the Enquiry Report are summarized herein below:

a. The overall net impression of the Safeguard advertisement is that **Safeguard is 'Pakistan's No. 1 Antibacterial Soap'**. Whether advertised *via* hoardings or TVCs, the word '**rated**' is written in a



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significantly smaller font when compared to advertising claim or the main message. Hence, the disclaimer/disclosure can be easily disregarded by consumers. The dominant message disseminated by the Respondent is that safeguard is 'No. 1' antibacterial soap and the most effective formulation to kill germs and the highest selling brand in antibacterial soap category.

- b. The disclaimer/disclosure at the bottom of advertisement is not '**clear and conspicuous**' enough for an ordinary consumer to notice, read, and comprehend. The advertisement in question has been tailored in a manner that gives an overall impression that Safeguard is **Pakistan's No. 1 Antibacterial Soap**.
- c. The studies and surveys and reports submitted by the Respondent do not qualify the test of reasonable basis to substantiate the claim that Safeguard is '**Pakistan's No. 1 rated Antibacterial Soap**'.
- d. The Enquiry Report concluded that the Respondent's claim and marketing practices have a direct impact on the general public, specifically, when the product has the ability to influence the decision of consumers pertaining to their health and hygiene. Every market player is obligated to take necessary measures to ensure that no false or misleading information is distributed to the consumers as these products might have a direct impact on their health. It has been observed that marketing activities of these products increase in seasons prone to the quick spread of diseases. Accordingly, the consumers take precautionary measures to avoid infections and ailments. Hence, distribution of false or misleading information by any market player of any magnitude is highly likely to impact the consumer's decisions keeping in view their sensitivity towards such information during such vulnerable circumstances.



In light of the Commission's public notice in the newspapers [aimed to warn businesses making claims such as Pakistan No.1, World No. 1, No.1 Selling Brand, 100% pure, Customer's No. 1 Choice, 100%

protection, without having reasonable basis], the Enquiry Report concluded that the Respondent's claim is, *prima facie*, in violation of Section 10 of the Act. Therefore, in the interests of consumers/ public at large, the Commission may consider initiating proceedings under Section 30 of the Act.

Show Cause Notice:

18. On 04.02.2016, the Commission authorized proceedings against the Respondent under Section 30 of the Act for, *prima facie*, violation of Section 10 of the Act. The relevant parts of the SCN are reproduced herein below:

"4. AND WHEREAS, in terms of the Enquiry Report, the Undertaking is engaged in the production and marketing of antibacterial soap known by the brand name 'Safeguard' (hereinafter the 'Product');

5. AND WHEREAS, in term of the Enquiry Report in general and paragraph 50 and 51 in particular, the Undertaking has made a claim stating that the Product is 'Pakistan's No. 1 rated Antibacterial Soap' which appears to be unsubstantiated and thus prima facie constitutes the distribution of false and misleading information that is capable of harming the business interests of another undertaking within the 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 29 to 47, 50 and 51 in particular, the Undertaking has made a claim stating that the Product is 'Pakistan's No. 1 rated Antibacterial Soap' which appears to be unsubstantiated and thus prima facie constitutes the distribution of false and 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



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within the meaning and scope of Section 10(2)(b) of the Act, in violation of Section 10(1) of the Act;”

Hearings:

19. On 17.05.2016 and 11-04-2017 the hearings were held in the matter. Mr. Feroz Ahmed and Mr. Hassan (Legal Counsels), Mr. Hasan Paliwalla (Brand Manager) and Mr. Zaki Muhammad (R&D Manager) represented the Complainant. While Ms. Amar Abbasi (Legal Counsel), Mr. Ahmed Rizvi (Brand Manager) and Mr. Saqib Raza (Marketing Director) represented the Respondent. The arguments by the parties and queries raised by the Bench are summarized as under:

- a. On behalf of the Respondent, their legal counsel argued that they set the highest benchmark of ethical and legal compliance. The Bench sought clarification as to why the Respondent has stopped the advertisement if the claim was based on accurate and credible data surveys or scientific evidence? The counsel submitted that the claim i.e. **‘Pakistan’s No. 1 rated Antibacterial Soap’** was dropped by the Respondent in January 2015 following the guidance by another neutral forum of dispute resolution, namely the Pakistan Advertiser’s Society (the “PAS”).
- b. The Respondent’s counsel submitted that the survey was conducted by Nielsen on 600+ female participants in Lahore (north) and Karachi (south) taken as two representative cities. The survey was paid for by the Respondent. However, Nielsen is an independent third party surveyor. The Bench questioned on how a sample of 600+ participants and their response could justify that **Safeguard is Pakistan’s No. 1 rated Antibacterial Soap?** The counsel submitted that the retail audit of a survey by Nielsen was on the basis of market sales in terms of value share and volume share.
- c. The Bench further enquired as to why the advertisement and multimedia campaign deployed by the Respondent displayed prominently that **Safeguard is “Pakistan’s No. 1 rated Antibacterial Soap,”** but in the same phrase **‘rated’** is written in much less prominent manner.



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Furthermore, clarification as to why the disclaimer/disclosure is not written in a **'clear and conspicuous manner'** so as to enable the consumers to clearly read and easily understand it with the dominant message disseminated through the advertising claim. The counsel stated that the Commission does not have specific guidelines as to what constitutes a deceptive marketing practice. The Commission may take into account that the Respondent is a multinational company (MNC) which adheres to principles and values of always doing right by the book. As an MNC, the Respondent consistently endeavours to bring the best version of its products to consumers in Pakistan and abroad.

- d. In contrast, the Complainant's Counsel submitted that since the Respondent realized its advertising claim is in violation of Section 10 of the Act, it withdrew its marketing and advertising campaign shortly after the Complaint was lodged. The Complainant emphasized that the Respondent has disseminated false and misleading information, which have not only misled the consumers but have also harmed the interest of its competitors. The period of violation might not have been too long, but the violation was significant. Furthermore, the Commission has clearly provided guidance to businesses through the aforementioned public notice that the businesses should not make claims unless they have a reasonable basis to stand on, in particular, with reference to 'No.1 in Pakistan'.
- e. Finally, the Respondent's Counsel submitted that they respect and are ready to follow the Commission's guidance. Since the advertisement has already been withdrawn, the Commission may as well vacate the SCN and drop the proceedings thereon.

Issues:

Whether or not the advertising claim **'Pakistan's No. 1 rated Antibacterial Soap'** and materials submitted by the Respondent have a reasonable basis related to the product's character, properties and suitability for use?



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- II. Whether or not the disclaimer/disclosure '**based on a product in use test by AC Nielsen in April 2014 amongst 600+ consumers**' is easily noticeable and easily understandable by consumers to qualify the claim and/or offset the liability arising out the claim?

Analysis:

20. With reference to the claim '**Pakistan's No. 1 rated Antibacterial Soap**' and the disclaimer/disclosure '**based on product in use test by AC Nielsen in April 14 amongst 600+ consumers**', it is observed that Section 10(2)(b) of the Act requires that the marketing and advertising campaign and the claim(s) made by an undertaking must have a *reasonable basis related to product's price, character, method or place of production, properties, suitability for use or the quality of goods*. In case the product involves health and safety claim(s), the advertising claim must have prior substantiation or reasonable basis in terms of '**competent and reliable' scientific evidence**'.
21. Besides, the disclaimer/disclosure associated with the claims must be 'clear and conspicuous' enough that the targeted consumers could easily notice and easily understand them along with the advertising claims. The Respondent's counsel has argued that the claim pertaining to the rating of Safeguard is primarily based on Nielsen's report conducted in April 2014 and the same is printed as disclaimer/disclosure on the Respondent's ads [exhibit A] and also aired on TV. Hence, the Commission will primarily take into account the merits of Nielsen survey and whether or not it provides a reasonable basis and prior substantiation to make the advertising claim as such.
22. Section 10 of the Act prohibits 'deceptive marketing practices', which encompasses protection of consumers and competitors from harm caused by the distribution of false and/or misleading information in the process of marketing and advertising campaigns by another undertaking. The Commission now examines the Respondent's advertising claim that Safeguard is '**Pakistan's No. 1 rated Antibacterial Soap**' and the disclaimer/disclosure '**based on product in use test by AC Nielsen in April 14 amongst 600+ consumers**' in the light of relevant provisions of Section 10 of the Act.



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Issue No.I:

23. It is noted that the concept of ‘reasonable basis’ is provided under Section 10 (2)(b) of the Act, which reads as under:

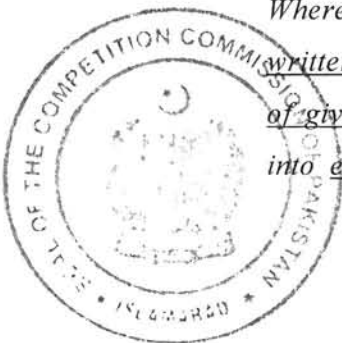
10(2). ‘the deceptive marketing practices shall be deemed to have been resorted to or continued if an Undertaking resorts to—(b) the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use or quality of goods’.

24. A bare perusal of the above provisions suggest that since its inception, Section 10(2) is applicable to practices whether they occurred and/or discontinued in the past or continue in the market. Section 10(2)(b) essentially envisages the concepts of advertisement and marking campaigns in terms of ‘the distribution of false or misleading information’, to ‘consumers’, ‘reasonable basis’ related to the product, which are described in the following paragraphs.

25. In the matter of M/s **China Mobile Pak Limited** dated 29.09.2009 (the ‘**Zong Order**’), the Commission has discerned that for the purpose of Section 10 of the Act and keeping in view the advertised product, the concepts of ‘false information’ and ‘misleading information’ to consumers has the following connotations:

“23 [...] ‘false information’ can be said to include: oral or written statements or representations that are: (a) contrary to the truth or facts 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.”

Whereas, ‘misleading information’ may include oral or written statements or representations that are: (a) capable of giving the wrong impression or idea, (b) likely to lead into error of conduct, thought or judgement, (c) tends to



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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.”

26. Thus all representations, whether intentional or unintentional which are not easily noticeable or easily understandable to consumers but could influence consumers' purchasing decision are materially false. All representations, whether intentional or unintentional, that can give false impression or idea, or have the likelihood to induce one's conduct, thought or judgment, or have the potential to misinform or misguide due to vagueness, or omission, are materially misleading.
27. With regard to the concept of 'consumer', in the **Zong Order** (subsequently adhered to in various Orders), the Commission has held that the term 'consumer' for the purposes of Section 10 of the Act shall be construed as follows:

“32. [...] ‘the term ‘consumer’ under Section 10 is to be construed an ‘ordinary consumer’ but not necessarily be restricted to the end consumers of the goods or services.’ The ‘ordinary consumer’ is the usual, common or foreseeable user or buyer of the products.’ The ‘ordinary consumers’ 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 [Act] is to protect consumers from anti-competitive practices; hence, the beneficiary of 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 in most liberally and in its widest amplitude. [...] Restricting its



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interpretation with the use of the word '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 of the [Act]. Accordingly the term 'consumers' under 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."

28. Based on the above connotation of 'consumers' and given the nature of the product in question i.e. an antibacterial bar soap (a daily-use product) whose targeted consumers are general public, in particular, children and mothers in the instant matter, the Commission holds the Respondent's contention that its advertising claim and the disclaimer/disclosure thereof are 'obvious to the reasonable consumers' as noted in paragraph [13] is not sustainable. Given the nature and use of the product, the Commission is of the considered opinion that the concept of 'ordinary consumer' is applicable in the matter at hand.
29. The Commission now considers as to what principles govern a "reasonable basis" for claims made in an advertisement. The doctrine of reasonable basis for the advertising claim (prior to making an advertisement) is well-founded in the Commission's earlier Orders and other jurisdictions. It was first enunciated in *Pfizer, Inc., 81 FTC 23 (1976)*, wherein the Federal Trade Commission of the United States (the 'FTC') enumerated six factors to determine whether or not an advertising claim has a reasonable basis. These are as under:
- i. the type of claim;
 - ii. the benefit if the claim is true;
 - iii. the consequences if the claim is false;
 - iv. the ease and cost of developing substantiation for the claim;
- the type of the product; and
the level of substantiation experts in the field would agree is reasonable.



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30. The Pfizer factors were later formally adopted in the FTC's 'Policy Statement Regarding Advertising Substantiation' of 1983 that required prior substantiation or reasonable basis before making an advertisement. The advertisers may violate Section 10 of the Act by making an affirmative product representation unless they have a reasonable basis in support of their representation. The rationale behind the concept is that the consumers expect the product advertisers to have a reasonable basis or substantiation of support of such representation.
31. Relying on *Standard Oil of Calif 84 FTC 1401 (1974), p. 1471*, the Commission in its *Zong Order* 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)."

32. In the similar vein, the Commission, in its *Zong Order* and in the matter of *M/s Procter & Gamble Pakistan (Private) Limited Order* dated 23.02.2010 (the '*Head & Shoulders Order*'), has observed that:

"the concept of reasonable basis [...] provides that the advertiser must have had some recognizable substantiation for the claims made prior to making it in an advertisement. Moreover, in order to determine the general net impression of the claim, the claim cannot be evaluated as an isolated script."



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33. With regard to the qualified health and safety claims as have been made by the Respondent, the FTC's 1983 Policy Statement Regarding Substantiation state that 'competent and reliable scientific evidence' means:

"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."

34. In its submissions, the Respondent has submitted that its advertising claim was 'based on product in use test by AC Nielsen in April 14 amongst 600+ consumers' and BHT studies/consumer surveys. As is noted in paragraph 11 above, the Respondent has stated that the Commission has in its **Head & Shoulders Order** endorsed one of the studies conducted by Nielsen. In this regard it has to be noted that the Commission has passed positive remarks on Nielsen's reports, however, not as a binding rule or precedent on what shall always prove sufficient whilst dealing with a claim. Furthermore, Nielsen's study presented in the **Head & Shoulders Order** is markedly different than the one alluded to by the Respondent. Nevertheless, the Commission now considers whether or not the studies/surveys provided a reasonable basis to make the advertising claim as such:

- a. First, Nielsen's report produced by the Respondent in the Head & Shoulders Order was based on 56 reported markets out of 60 total markets across the world.
- b. Second, the report stated that the Head & Shoulder shampoo had 41.7% value share and 35.7% volume share. While the shampoo with second highest market share was Unilever's All Clear Dandruff Shampoo, which had an 8.6% value share and a 9% volume share. Also, the report covered 83% of the world's shampoo sales (which included all types of shampoos and antidandruff shampoos) which means that 17% of the world's shampoo sales data was not covered. Those countries included,



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among others, Somalia, Burundi, Belize, etc., where Nielsen does not have any presence.

- c. Third, the Nielsen report clarified that "...it is possible that Head & Shoulders is available in more markets than are reported and Nielsen is not confirming whether Head & Shoulders is the leading worldwide anti-dandruff shampoo brand..."
- d. Fourth, in paragraph 26 of the Head & Shoulders Order, the Respondent has referred to the statement "In view of the foregoing, I am of the considered view that the submissions made on behalf of P&G have some merit and P&G's claim of being World's No. 1 anti-dandruff shampoo is reasonably substantiated." This statement is obiter dictum and not part of the ratio decidendi, because the Commission has not relied upon the Nielsen's study in the operative part of its order, including the imposition of remedies and financial remedies. Therefore, any Nielsen study cannot be taken as a benchmark to determine the validity of an advertising claim, nor can the Commission be bound to it as precedent.
- e. Fifth, Nielsen study does not provide any reasonable basis to make the claim that Safeguard is Pakistan's No. 1 rated antibacterial soap for the following reasons: (i) Pakistan Bar Soap Market consists of 55% Normal Bar Soap and 45% Antibacterial Soap. The study was conducted on a total of 600+ consumer of only two selected locations i.e. Karachi (South) and Lahore (North). Hence, neither does it provide a substantial consumer base nor does it represent significant geographic coverage of Pakistan, (ii) Nielsen's statistical analysis and representation of facts are flawed because the number of consumers selected to test the post usage response significantly varies for each product. That is, the respondents for Old Safeguard Formula are 200; for New Safeguard Formula are 208, for Dettol Soap are 199, and for Lifebuoy are 177. Hence, the outcome varies significantly. Nonetheless, Lifebuoy has overall higher ranking than the competing brands.



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f. Lastly, the Nielsen report (Appendix A: Nielsen In-Market Usage Test) in the first paragraph reports that "Based on the key consumer needs highlighted via this research, a new and improved formula was developed which retains antibacterial efficacy while offering a significantly superior proposition to the consumer". Therefore, the Nielsen study does not suggest that the new antibacterial formula is a significant improvement over the old one; rather the new formula retains the anti-bacterial efficacy. However, it offers significantly superior proposition, which includes several others factors to consider overall rating, which include, inter alia, mileage/melting, lather performance, bar characteristics, germ protection, ingredients, skin benefits, cleansing and refreshing, rinse, value, package, equity, and esteem.

35. In addition, the Respondent has submitted that it has relied on BHT (based on brand and customer experience) and IPSOS Equity Study (to track equity of the competing brands) and IPSOS Doctor No. 1 Choice (a questionnaire based survey), which are reproduced in paragraphs 10 above. None of these studies provide an extensive, comprehensive, and uniform nationwide study or survey.

36. The Respondent's advertising claim, either implicitly or explicitly, involves its product's antibacterial efficacy and hence health and safety of its consumers, which needs to be backed up by any 'competent and reliable' scientific evidence (as is stated in paragraph 33 above). Therefore, the Respondent's advertising claim lacks the quality of substantiation associated with health and safety benefits. The Commission is of the considered opinion that given the characteristics and use of the product i.e. an antibacterial soap and associated health and safety claims, the studies and survey reports relied upon by the Respondent are inadequate to remedy the false or misleading characterization of the advertising claim. Reference is also made to the FTC's Order in the matter of Oreck Corporation (Oreck), wherein Oreck claimed that its vacuum cleaner reduces the risk of or prevents the flu, illness or ailment caused by bacteria, virus, moulds, or allergens such as common cold, diarrhoea, upset stomachs, asthma, among other things. The FTC observed that Oreck cannot make representations that are misleading,



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when considered in the light of the entire body of relevant and reliable scientific evidence, to substantiate that representation is true.

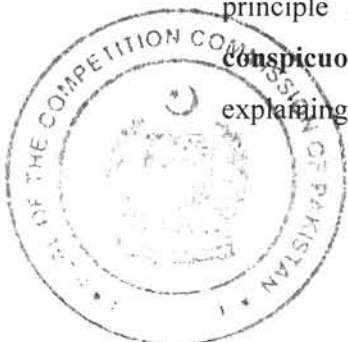
37. In light of the foregoing, the Commission conducts a holistic assessment of the marketing and advertising claims made by an undertaking and the overall net impression or dominant message that is conveyed to the ordinary consumers. Correspondingly, the concept of reasonable basis necessitates that before disseminating information, the advertiser must have a certain level of prior substantiation for the claims.
38. Based on the above, the Commission is of the considered opinion that the claim Safeguard is '**Pakistan's No. 1 rated Antibacterial Soap**' in which the word 'rated' is written or displayed in significantly smaller font at the bottom of the ad/TVC, the advertising claim thus creates an impression and/or conveys the message that Safeguard is '**Pakistan No. 1 Antibacterial Soap**' in violation of Section 10(2)(b) of the Act.

Issue No. II:

39. Considering now the appropriateness of the disclaimer/disclosure printed on the Respondent marketing and advertising material reproduced above, it is apparent that the same are 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 its *Zong Order*, 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.'

40. 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**' with the advertising claim. While explaining '**clear and conspicuous**' disclosures, the FTC in the matter of **Eband**,



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Inc. And Ayman A. Difrawi 2016, Case No: 6:16-cv-714-Orl-41TBS has made it clear that:

- i. 'in any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication that includes a representation requiring a disclosure and is made through both visual and audible mean, such as a television advertisement, the disclosure must be made through the same means through which the representation is made;
- ii. a visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from accompanying text or other visual elements so that it is easily noticed, read and understood;
- iii. an audible disclosure, including the telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it;
- iv. in any communication using an interactive electronic medium such as the internet or software, the disclosure must be unavoidable.
- v. the disclosure must use the diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears;
- vi. the disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications;
- vii. the disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication; and
- viii. when representation or sales practice targets a specific audience, such as children or elderly or the terminally ill, "ordinary consumer" includes reasonable members of that group.'



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41. In view of the above, the Commission finds that the Respondent's disclaimer/disclaimer placed at the bottom of the advertisement was neither easily noticeable/legible nor easily understandable by an ordinary consumer. Furthermore, the most part of the TVC and other marketing and advertising campaigns material was in Urdu, whereas the disclaimer/disclosure was in English and appeared for not more than 2 seconds (momentarily) out of a total of circa 30 seconds TVC, which was inadequate to correct the deceptive impression of Safeguard as 'Pakistan's No. 1 rated Antibacterial Soap'. In Zong Order, the Commission has observed that 'Even if express or implied representation in an advertisement is accompanied by disclaimers or qualifiers [i.e. disclosures]; such caveat will nullify a misleading [practice] only, if they appear, in such a way as to eliminate the advertisement tendency to mislead in its overall effect'. Therefore, the Commission is of the considered opinion that the disclaimer/disclosure used by the Respondent in its marketing and advertising campaigns itself tantamount to the distribution of false and misleading information to the consumers in violation of Section 10(2)(b) of the Act.

Decision and Remedies

42. The Commission, having carefully considered the briefs and materials submitted by the Complainant and the Respondent and the applicable law, hereby finds and orders as follows:

- i. The Respondent has clearly disregarded the Commission's public notice issued in 2013 to the undertakings to ensure that their marketing and advertising campaigns do not violate Section 10 of the Act and in specific making claims, *inter alia*, 'No.1 in Pakistan' or 'No.1 Selling Brand'. The Respondent's claim that Safeguard is 'Pakistan's No. 1 rated Antibacterial Soap' essentially creates a net general impression or conveys the message that the product is 'Pakistan's No. 1 Antibacterial Soap'. In view of the foregoing, the Respondent's claim is both false as well as it is misleading.



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- ii. The Respondent's reliance on Nielsen's and BHT study/survey to rank itself as Pakistan's No.1 antibacterial soap is irrelevant, materially false and misleading for two main reasons: firstly, the study reveals that Dettol ranks much higher in terms of value share and volume share than Safeguard in the antibacterial soaps category; secondly, the main message contained in the Respondent's marketing and advertising campaigns involves health and safety claim that Safeguard purportedly prevents cold and flu in winters. The Commission is of the considered opinion that such an advertising claim requires a higher level of substantiation in the form of 'competent and reliable scientific evidence'. Therefore, Nielsen's survey which is based on value share and volume share of the products and BHT equity tracking data are irrelevant and inconsequential to offset the falsity of advertising claim or substantiate the advertising claim made by the Respondent. Likewise, sales material and customer's or doctor's testimonials are anecdotal. The claims involving health and safety need to be backed up with scientific evidence. Therefore, the rule is that strong product claims require strong evidence to back them up.
- iii. Section 10(2)(a) of the Act states 'the distribution of false or misleading information that is capable of harming the business interests of another undertaking' constitutes deceptive marketing practice for the purposes of Section 10(1) of the Act. In regard to harm to competing business undertakings, the Commission has in its Order in the Matter of Jotun Pakistan (Pvt) Limited dated 17.03.2015, held that: "[...] to prove conduct under Section 10(2)(a) of the Act, it is not necessary to show actual harm to a competitor. It is sufficient to show the existence of deceptive marketing practice that has the potential to harm the business interests of the competitors [...]". Therefore, the Commission is of the considered view that the Respondent's deceptive marketing practices as identified above have violated Section 10(2)(a) of Act.

43. Before imposing sanctions, the Commission deems it appropriate to consider any mitigating/aggravating factors that may guide us in determining the quantum



of penalty to be imposed. For this reason, reference is made to the Commission's Guidelines on Imposition of Financial Penalties (the '**Fining Guidelines**'). The Counsel for the Respondent has stated that there are no guidelines as to what constitutes deception in marketing for the purpose of Section 10 of the Act. In this context, the Commission notes that the Respondent had earlier filed a complaint in the year 2012 against M/s S.C. Johnson & Sons, for a similar nature of claim i.e. "**No. 1 in Pakistan**" which was decided *vide* Order dated 20 January 2012 and is reported as 2012 CLD 783. Therefore, the Commission, keeping in view the specific fact and circumstances of this case, is not inclined to accept the Respondent's stance that there is no guidance or awareness as to what could constitute an infringement of Section 10 of the Act. On the contrary, being a complainant once before the Commission with reference to the similar nature of the claim, it is expected that the Respondent to have much better understanding of the Act and the nature of the conduct in question.

44. The Respondent has also submitted that it had withdrawn the advertisement in question upon realizing that the same was in violation of Section 10 of the Act. Thus the Respondent has contravened Section 10 of the Act and the duration of the contravention must be taken into account, either as an aggravating or, alternatively, a mitigating factor. The Fining Guidelines state that one such mitigating factor may be whether a violator has taken "**adequate steps taken with a view to ensuring compliance with the prohibitions of Chapter II of the [Act]**". The duration of the violation, therefore, may affect the quantum of penalty to be imposed.

45. In view of the above, for the violations of Section 10 of the Act in the preceding paragraphs, the Commission here imposes the following penalties/fines:

i. for violation of Section 10 of the Act related to the advertising claim and associated disclaimer/disclosure, the Commission hereby imposes a penalty in the amount of Rs. 10,000,000/ (Rupees Ten Million Only).

ii. with regard to the advertising claim that Safeguard is No.1 rated Antibacterial Soap, the Respondent is directed to inform the public at large, the falsity of its advertising claim that Safeguard is Pakistan's No.



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1 rated Antibacterial Soap through appropriate clarifications in all Urdu and English dailies and through TV channels for a period of one (1) week from the date of this order.

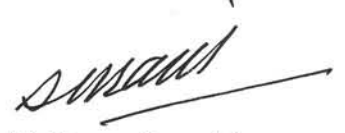
- iii. the Respondent is directed to file a compliance report with the Registrar of the Commission within the period of forty-five (45) days from the date of issuance of this order and is reprimanded from indulging in deceptive marketing as well as other anti-competitive practices provided in the Act.
- iv. in the event the Respondent fails to comply with the above directions within the specified time period and continues with the contravention of Section 10 of the Act, the Commission may impose additional penalties/fine as are provided, *inter alia*, under Section 38 of the Act.

46. In terms of the above, the SNC No. 14/2016 dated 08.03.2016 is hereby disposed of.

47. Ordered accordingly.



Vadiyya S. Khalil
(Chairperson)



Ikram Ul Haque Qureshi
(Member)



ISLAMABAD THE 20th JULY, 2017