BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF SHOW CAUSE NOTICES ISSUED TO M/S UNILEVER PAKISTAN LIMITED AND M/S FRIESLAND CAMPINA ENGRO PAKISTAN LIMITED

ON A COMPLAINT FILED BY

M/S PAKISTAN FRUIT JUICE COMPANY PRIVATE LIMITED REGARDING DECEPTIVE MARKETING PRACTICES

(File No. 427/Pakistan Fruit Juices/OFT/CCP/2022/454)

Date(s) of Hearing:

i. 02.09.2022,
ii. 06.09.2022,
iii. 26.06.2024

Commission:

Mr. Saeed Ahmad Nawaz
Member

Mr. Salman Amin
Member

Assisted By:

Mr. Hafiz Naeem
Senior Legal Advisor

Mr. Hassan Raza
Legal Advisor

Present on Behalf of:

M/s Pakistan Fruit Juice (Complainant)	Barrister Momin Ali Khan, Mr. Haider Rafay Butt Advocates
M/s Unilever Pakistan Limited **(Respondent No.1)**	Mr. Khawaja Aizaz Ahsan Advocate High Court
M/s Friesland Campina Engro Pakistan Limited **(Respondent No.2)**	Ms. Zainab Janjua Advocate High Court

ORDER

1. This order shall dispose of the proceedings arising out of Show Cause Notice No.14/2022 and 15/2022 both dated 20.07.2022 (hereinafter referred to as the **SCNs**) issued to ***M/s Unilever Pakistan Limited*** (hereinafter referred to as the **Respondent No.1**) and ***M/s Friesland Campina Engro Pakistan Limited*** (hereinafter referred to as the **Respondent No.2**) respectively, for *prima facie* violation of Section 10 of the Competition Act, 2010 (hereinafter referred to as the **Act**).

2. ***M/s Pakistan Fruit Juice Company (Private) Limited*** (hereinafter referred to as the **Complainant**) has alleged in its complaint that the Respondents were engaged in the deceptive marketing practices by promoting/depicting their products i.e. frozen desserts as ice creams through their televised advertisements, social media campaigns, products' packaging and other marketing materials. It also alleged that the Respondents tried to create a false identity of their products as ice creams that amounts to dissemination of false and misleading information under section 10 of the Act, and caused harm not only to the consumers but also to the business interests of the Complainant.

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FACTUAL BACKGROUND

The Complaint:

3. The Complainant is a private limited company, engaged in the business of manufacturing and marketing ice cream through its brand "*Hico Ice Cream*". The Respondents No.1 is a public unlisted company whereas the Respondent No.2 is a public listed company. Both Respondents are, *inter alia,* involved in the business of manufacturing, marketing, distribution and sale of frozen desserts under the name and style of their brands "*Walls*" and "*Omore*" respectively (hereinafter referred to as the **Products**). The Complainant lodged its complaint against the above referred Respondents on 21.02.2022.

4. According to the Complainant, the ice cream industry comprises of two categories of products namely, "ice cream" and "frozen dessert", and both the products are fundamentally different in nature, nutritional composition and cost structure. It was asserted that the "ice cream" is essentially made from dairy fats (e.g. milk, cream, butter etc.), whereas the "frozen dessert" is manufactured from vegetable fats (e.g. palm oil etc.). Furthermore, for a product to be considered as "ice cream", it must contain at least 10% milk fat and 10.1% non-milk fat solids. The Complainant assailed the following claims and deceptive marketing practices of the Respondents:

<u>Respondent No.1:</u>

i. "Thand mein ice cream";
ii. "Creamy vanilla ice cream";
iii. "Hey, yaar tu ice cream ho ke kaanp raha he";
iv. "Ice cream" word used in advertisements for frozen dessert;
v. "Itna creamy";
vi. Milk splashes in advertisements; and
vii. "Wall's Creamy Delights".

<u>Respondent No.2:</u>

i. "Ice cream" word used in advertisements;
ii. Advertisements show milk splashes; and
iii. "Creamy kulfa" phrase used in advertisements.

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5. The Complainant further stated that *Punjab Pure Food Rules, 2011* and *Punjab Pure Food Regulations, 2018* (hereinafter collectively referred to as the **Punjab Rules and Regulations**) were the relevant by-laws which defined differences between the two products. Moreover, Punjab Food Authority had documented the differences in its consumer advisory, publicising that "frozen dessert" was not a substitute of "ice cream" and urged the parents to prefer "ice cream" over "frozen desserts" for their children. The Complainant further alleged that the Respondents had marketed, branded, promoted and sold their products i.e. "frozen desserts" under the guise of "ice cream".

6. The Complainant asserted that Punjab Rules and Regulations required manufacturers of "frozen dessert" to include a phrase i.e. "*frozen dessert contains edible vegetable oil*" on the packaging, however, the Respondents actually printed this statement in a very small font, which was not an adequate disclosure of material information to the consumers. Therefore, the alleged advertisement and labels/packaging of the Respondents' products neither complied with the requirements of relevant food laws nor the disclosure parameters as set forth by the Competition Commission of Pakistan (hereinafter referred to as the **Commission**) in case of *Reckitt Benckiser Pakistan Limited, reported as 2021 CLD 484*. In absence thereof, the consumers were led to believe that the Respondents' products were "ice cream", hence, the same was misleading and deceptive within the meanings of section 10, sub-section (a) and (b) of the Act.

7. To the extent of the Respondent No.1, the Complainant also alleged that it had even engaged in false and misleading comparison of goods on its social media page by comparing the "frozen dessert" with "ice cream", especially claiming that the "frozen dessert" was a healthier choice as compared to the "ice cream". Therefore, the claim of the Respondent No.1 attracted the provisions of Section 10(2)(c) of the Act being a false and misleading comparison and thus prohibited under the Act.

8. In order to substantiate its allegations, the Complainant submitted documentary evidence with its complaint in the form of TV commercials, copies of

advertisements on social media pages, marketing materials on e-platforms, and information available on the Respondents' official websites.

Enquiry Report and Show Cause Notices:

9. Upon receipt of the Complaint dated 21.02.2022, the Commission considered the same and after verifying its veracity as required under section 37(2) of the Act, constituted an Enquiry Committee (hereinafter referred to as the **EC**) on 02.03.2022, to conduct a fact-finding exercise in the matter. The EC finalized the Enquiry Report (hereinafter referred to as the **ER**) on 29.06.2022 and concluded in paragraphs 7.1 to 7.4 that, *prima facie*, the Respondent No.1, had violated section 10(2)(a), 10(2)(b) and 10(2)(c) of the Act, whereas, the Respondent No.2 had violated section 10(2)(a) and 10(2)(b) of the Act. The EC proposed to initiate proceedings against the Respondents under Section 30 of the Act.

10. The Commission duly considered the findings and recommendations of the ER, and decided on 13.07.2022 to initiate proceedings under section 30 of the Act and accordingly issued SCNs dated 20.07.2022 to the Respondents requiring them to explain their respective positions and avail the opportunity of being heard in the open hearings. The Complainant as well as the Respondents submitted their written replies to the SCNs and appeared before the Commission in the hearings to put forth their point of view. Submissions of the Respondents to the SCNs are summarized hereunder:

SUBMISSIONS OF THE RESPONDENTS

The reply of the Respondent No. 1 to the SCN and submissions made by Khawaja Aizaz Ahsan, Advocate High Court, the learned counsel for Respondent No.1 during the hearings before the Bench are summarised as follows:

11. That the food standards framed by *Pakistan Standards and Quality Control Authority* (hereinafter referred to as **PSQCA**) are the only federal food standards applicable all over Pakistan, which must be given due recognition. Conversely,

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all standards framed under the *Punjab Pure Food Ordinance, 1960*, *Punjab Food Authority Act, 2011*, *Punjab Pure Food Rules, 2011* or *Punjab Pure Food Regulations, 2018* are provincial standards and do not override the federal standards.

12. That the Respondent's products fall within the ambit of PSQCA standards for ice cream i.e. PS 969-2010, which are applicable to both the "frozen desserts" as well as the "dairy ice cream". Both the "frozen desserts" and the "dairy ice cream" are product categories under the umbrella-heading of "ice cream". Since the term "ice cream" is used as a broad category for both the products, therefore, the Respondent is legally not forbidden from using this term. The Respondent's marketing practices are, hence, in accord with the prevailing food laws. However, without any legal basis, the Complainant is trying to create a distinction between "frozen dessert" and "ice cream", which is not a valid stance.

13. That PSQCA has also notified regulations for packaging and labelling of ice cream products, therefore, PSQCA's packaging regulations are applicable instead of the regulations framed by the Punjab Food Authority. Despite non-applicability of the provincial standards for packaging and labelling, the Respondent No.1 has already disclosed the nature of the product on its packaging, both in Urdu and English. Every product wrapper contains the information that the product is a "frozen dessert", hence, the Respondent has fulfilled the disclosure requirements of law.

14. That the Respondent No.1 is not even under any obligation to disclose or to make a disclosure because the "frozen dessert" is a sub-category of "ice cream" and, therefore, the Respondent No.1 has not made any claim that needs to be qualified through publication of a disclosure. In absence of any claim, the concept of disclosure is not attracted. That despite the aforesaid factual position, the Respondent No.1 has gone a step beyond the bare minimum requirements of law and advertises on front part of the product packaging that the product concerned is "frozen dessert", so as to make the consumers aware of the nature of the product.

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15. That the alleged post on the social media page is not a marketing strategy. Instead, it is a response to a consumer advisory posted by the *Punjab Food Authority* on its social media page, which accorded preference to one category of "ice cream". Since the Authority specifically used the Respondent's name in the post, therefore, feeling aggrieved, the Respondent considered it appropriate to respond to the same by issuing a clarification on its Facebook wall regarding the difference between "frozen dessert" and "dairy ice cream". Based on nutritional compositions, its "frozen dessert" contains zero cholesterol, lesser calories and healthier fats, therefore, it is a healthier choice as compared to "dairy ice cream".

16. That it has not made any affirmative claim, therefore, neither the concept of disclosure is attracted nor is the Respondent under any obligation to print a disclosure. Even if it is required, the text "frozen dessert" is already printed on its product packaging in conspicuous manner proportionate to the product name on the wrapper, hence, its placement and prominence is such that a reasonable consumer is able to identify the product category. Further, that the findings of the ER on the requirements of disclosure are misplaced.

The reply of the Respondent No. 2 to the SCN and arguments presented by Ms. Zainab Janjua, Advocate High Court, the learned counsel for Respondent No.2 during the hearings before the Bench are summarised hereunder:

17. That the arguments of the Respondent No.1 with respect to applicability of PSQCA standards and disclosure requirements are equally applicable in case of the Respondent No.2. However, in reply to the Show Cause Notice, the Respondent No.2 clarified that the Facebook posts referred to in Para 6.51 of the ER dated back to the year 2015, and that too, were posted by the Respondent No.2 inadvertently and erroneously without any intention to mislead the consumers. The Respondent No.2 has never reposted or re-advertised the said Facebook posts. This negates the impression created by the ER that the influence from the alleged advertisement grows as it continues to be projected to the consumers. Neither the alleged Facebook post is easily accessible by

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potential consumers nor viewed or liked by too many consumers, hence, not likely to mislead or affect the buying decision of the consumers.

18. That the ER incorrectly refers to the information on official website of the Respondent No.2 as advertisement. The information on the website is actually in relation to the company's overview and it traces history of the Respondent's business, hence, it is for information purposes only and not for the purpose of an advertisement. Even otherwise, this information on the Respondent's website is factually correct and does not constitute misleading information. The information communicates the fact that Respondent No.2 started business as ice-cream manufacturer and gradually expanded its range of products to frozen desserts. It has also obtained license to manufacture and sell ice cream under the brand name of "*Omore*".

19. That the ER incorrectly finds that the sale of "frozen desserts" on E-platforms under the category of "ice cream" amounts to dissemination of misleading information. The Respondent No.2 is not to be held liable for the alleged deceptive marketing practices that are carried out by third-party resellers, who are not even authorized dealers of the Respondent No.2. If any E-platforms, such as *Aywadeal.com*, *Ondoorstore.com* and *Airlift*, engages in deceptive marketing practices in any manner whatsoever, it does not have any connection or business relationship with the Respondent No.2. The said E-platforms are independent and are not under the control of the Respondent No.2. Even otherwise, section 10 of the Act does not obligate the Respondent No.2 to ensure that the retailers, wholesalers or any other actors in the supply chain do not engage in deceptive marketing practices.

ANALYSIS OF THE MATTER

20. Arguments of the parties heard and record perused. In order to decide the instant complaint, the determination of following issues is necessary:

A. Whether the Respondents have violated Section 10(2)(b) of the Act by disseminating false and misleading information to the consumers? and

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B. Whether the Respondent No.1 has violated Section 10(2)(c) of the Act by carrying out false and misleading comparison of goods in the course of advertisement?

Issue A: Whether the Respondents have violated Section 10(2)(b) of the Act by disseminating false and misleading information to the consumers?

21. In order to better comprehend the Complainant's concerns as well as the response thereof by the Respondents about the alleged violation of section 10(2)(b), it is necessary to be cognizant of the background of the standards which are applicable to the "ice cream" and "frozen dessert" products. The *Punjab Pure Food Rules, 2011* and *Punjab Pure Food Regulations, 2018* classified "ice cream" and "frozen desserts" into two separate categories, former being made of dairy fats whereas later being made from vegetable fats. Due to this factual difference in ingredients of both the products, the Complainant asserted that "frozen dessert" products were not "ice cream" and over a substantial period of time a general perception has been developed among the consumers that "ice cream" always meant "dairy ice cream" and not the "frozen dessert".

22. On the other hand, the Respondents relied upon the Pakistan Standards Quality Control Authority (PSQCA) Standard i.e. PS 969-2010 and claimed that "frozen dessert" and "dairy ice cream" both were treated therein as sub-categories of "ice cream". Hence, the Respondents claimed that there was nothing wrong in calling "frozen dessert" as "ice cream" for being its sub-category. In order to resolve this matter first, it is necessary to review both the provincial and federal standards as applicable to the "ice cream" and "frozen dessert" products and the requirements prescribed therein.

23. Pakistan Standards Quality Control Authority (PSQCA) is an autonomous body established under Pakistan Standards Quality Control Authority Act, 1996 (Act VI of 1996). It is a National Standards Body of Pakistan and its main objective is to develop Pakistan Standards related to services and products and also provide certification of mandatory articles, products and processes under Certification Marks Scheme of PSQCA. The Standards development by the

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PSQCA is based on the Act VI of 1996 read with Pakistan Standards Rules, 2008. Preamble of the Act VI of 1996 reads as under:

> *"WHEREAS it is expedient to establish a Pakistan Standards and Quality Control Authority to provide for the standardization and quality control services."*

24. The PSQCA has formulated certain national standards for products in various business sectors and adopted different international standards as well. Only 166 items/products fall under the Mandatory List of PSQCA regulation for Certification Marks (CM) license. Other items/products may opt for Voluntary Certification. The standard formulated for "ice cream" is PS 969-2010, however, the item "ice cream" does not fall within the ambit of list of mandatory items to meet Pakistan Standards.

25. The Punjab Food Authority (PFA), on the other hand, has been established under the Punjab Food Authority Act, 2011 (Act XVI of 2011) with the objective of protecting public health and to provide for the safety and standards of food. PFA enforces food hygiene and quality standards as stipulated in the Punjab Food Authority Act, 2011, the Punjab Pure Food Rules, 2011 and the Punjab Pure Food Regulation, 2018. The said purpose is also enshrined in the Preamble of the Act of 2011 in the following manner:-

> *"Whereas, it is expedient to protect public health, to provide for the safety and standards of food, to establish the Punjab Food Authority and for other connected matters."*

26. Evidently, the Act XVI of 2011 and the Act VI of 1996, do not conflict with each other and each law has a distinct and separate scope. The Act XVI of 2011 is a provincial law, which primarily addresses the concerns regarding safety, standard and hygiene of food, whereas the Act VI of 1996 pertains to the standardization of a wide range of products for advancement of national economy and promotion of industrial efficiency and development. It is also pertinent to mention here that the Rules, Regulations and Standards of the afore-stated two laws prescribe definitions of various products to fulfil their distinct and distinguished purposes. As per the decision of the *Council of Common Interests* (CCI) taken in its 44th Meeting, the framing of standards is the

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responsibility of PSQCA, whereas the enforcement of the standards falls within the ambit of the provincial authorities such as Punjab Food Authority.

Whether frozen dessert and ice cream are similar or distinct products?

27. Now, we would like to address the question that whether frozen dessert and ice cream are recognized as two similar or different products. In order to examine this issue in its proper perspective, we have decided to analyse the matter from different dimensions as imperative and also consider the relevant foreign jurisprudence to develop a deeper understanding in this regard.

28. **First:** The review of historic perspective and background of the dispute is relevant here. M/s Yummy Milk Products (Pvt.) Limited filed a Writ Petition in Honourable Lahore High Court, Lahore against the Government of Punjab and M/s Lever Brothers Pakistan Limited (predecessor of the Respondent No.1), whereby the petitioner assailed a letter dated 17.09.1992 issued by the Government of the Punjab, Health Department. In the said letter, the Government of Punjab had permitted, as an interim arrangement, the use of vegetable fat in the ice cream with few conditions such as ice cream made of vegetable fat shall be labelled and sold under the name "non-dairy ice cream", and the words "*Non-dairy*" would be conspicuously prefixed with the word "ice cream". Furthermore, both types of ice cream i.e. dairy ice cream and non-dairy ice cream would be manufactured separately and labelled accordingly.

29. The Single Bench of Lahore High Court vide its judgment reported as *1999 CLC 1443*, declared the said letter *ultra vires* to the main Act and illegal. It also observed that the two types of products must have different and quite distinguishable names because literacy rate in the country was very low and the main consumer of these products were children, therefore, the use of word "ice cream" could not be allowed for any such product. Against the said judgment, *M/s Lever Brothers Pakistan Limited* preferred an Intra Court Appeal before a Division Bench of Lahore High Court. The Division Bench of the Lahore High Court set aside the order of the learned Single Bench vide judgment reported as *PLD 2000 Lah 1*.

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30. Thereafter, *M/s Yummy Milk Products (Pvt.) Limited* filed an appeal against the order of the learned Division Bench before the Supreme Court of Pakistan. The appeal was disposed of by the August Supreme Court of Pakistan vide Order dated 27.02.2007 on the undertaking furnished by the Additional Secretary of Health Department, Government of the Punjab to the effect that Rules regarding milk and milk products would be revised under intimation to *M/s Yummy Milk Products (Pvt.)* and the Respondent. The relevant excerpt from the order of the Supreme Court of Pakistan is reproduced herein below:

> "*Pursuant to this Court order dated 1.2.2007 the Health Department has provided to the appellant and to contesting respondent No.4 copies of the Revised Rules for milk and milk products under which it is proposed to maintain the Rule that ice cream by whatever name it is called shall contain not less than 10 percent milk fat while a new name namely 'Frozen Dessert' is to be given to products manufactured with the use of derivatives of milk fat or vegetable fat or a combination of milk fat and vegetable fat. With the notification of these Revised Rules, the grievance of the appellant will stand satisfied. The Revised Rules are also acceptable to contesting respondent Mo.4 as indicated by Mr. Sharifuddin Pirzada, learned counsel for respondent No.4. They may now be notified by the Health Department.*"

31. *M/s Lever Brothers Pakistan Limited,* the respondent No.4 before the Supreme Court (and presently Respondent No.1), raised no objection to such definition of frozen dessert before the Court. If the Respondent No.1 had really believed that the terms "frozen dessert" and "ice cream" were not distinct then it would not have given its consent to the proposal forwarded by the Health Department, Government of the Punjab in the said proceedings before the Apex Court. This implies that the Respondent No.1 admittedly recognized both the terms separate and distinct from each other. It is pertinent to mention here that the Rules referred above were notified by the Government of Punjab in the year 2007 as Punjab Pure Food Rules, 2007 and "ice cream" and "frozen dessert" were defined accordingly as explained above.

32. **Second:** It is critical to note that PS 969-2010 (formulated under the Act VI of 1996) and Punjab Pure Food Regulations, 2018 (framed under the Act XVI of 2011) both recognize "ice-cream" and "frozen dessert" as two separate and distinct products. The same is evident from the definitions of the two products

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as provided in PS 969-2010 and Punjab Pure Food Regulations, 2018. Section 2.1.1 of PS-969-2010 defines "ice-cream" and "frozen dessert" as follows:-

> *"**2.1.1 ICE-CREAM**-The pure clean products made from a combination of milk or creams or other milk products with or without eggs, water, sugar and permitted food colors and flavor, with or without fruit juice, nuts, coffee, cocoas, or chocolate, syrup, confectionary and permitted Food Additives."*
>
> ***2.1.1.1 FROZEN DESSERT** means the pure clean frozen product made from pasteurized mix prepared with the combination of milk and milk products, milk fat and / or edible vegetable oils or fats and milk protein or/ and vegetable protein products, with or without eggs, but with potable water, nutritive sweetening agents like sugar, dextrose, fructose, liquid glucose, dried liquid glucose, malt dextrin, high maltose corn syrup, invert sugar, artificial sweeteners, honey and harmless flavoring and coloring agents, and with or without added stabilizer and emulsifier, and with or without fruit and fruit products, juices, nuts, coffee, cocoa or chocolate, syrup, cakes and bakery products and /or confections.*
>
> *Frozen Dessert by whatever name it is called is further classified as:-*
>
> *(i) "High Fat" shall contain not less than 36 percent of total solids and not less than 10 percent edible vegetable fat or oil*
>
> *(ii) "Medium Fat" shall contain not less than 30 percent of total solids and not less than 5percent edible vegetable fat or oil*
>
> *(iii) "Low Fat" shall contain not less than 26 percent of total solids and not less than 2.5percent edible vegetable fat or oil"*

Similarly, Punjab Pure Food Regulations, 2018 define "ice-cream" and "frozen dessert" in the following manner:-

> *"01.8.1 **Ice Cream, Fruit Juice Cream, Sundae Ice Cream, Malai-Ki-Baraf, Khoa-Ki-Baraf, Malai-Ki-Kulfi, Khoa-Ki-Kulfi, Kulfi, Milk kulfi, Kulfa, Cone Ice Cream***
>
> *Means the pure clean frozen product made from a combination of milk or cream or butter or other milk products, with or without eggs, but with potable water, nutritive sweetening agents like sugar, dextrose, fructose, liquid glucose, dried liquid glucose, maltodextrin, invert sugar, honey, and harmless flavoring and harmless coloring, and with or without added stabilizer and emulsifier, and with or without fruits, vegetables, juices, nuts, coffee, cocoa or chocolate, syrup, cakes or confections. It shall conform to the following standards.*
>
> *(i) Milk Fat Not less than 10 percent*

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(ii) Total Solids Not less than 36 percent

(iii) Milk solids not fat Not less than 10.1 percent

Provided that when the ice cream contains fruit or nuts or both, the contents of milk fat may be reduced proportionally but not less than 8.0 percent of milk fat."

"01.9.4 FROZEN DESSERT

"Frozen Dessert" means the pure clean frozen product made from pasteurized mix prepared with the combination of milk and milk products, milk fat and / or edible vegetable protein products, with or without eggs, but with portable water, nutritive sweetening agents like sugar, dextrose, fructose, liquid glucose, dried liquid glucose, maltodextrin, high maltose, corn syrup, invert sugar, artificial sweeteners, honey, and harmless flavouring and colouring agents, with or without added stabilizer and emulsifier and with or without fruit and fruit products, juices, nuts, coffee, cocoa, oak, chocolate, syrup cakes and bakery products and / or confections. Frozen desert, by whatever name it is called, is further classified as:

(a) "High Fat" shall contain not less than 36 percent of total solids and not less than 10 percent edible vegetable fat or oil.

(b) "Medium Fat" shall contain not less than 30 percent of total solids and not less than 5.0 percent edible vegetable fat or oil.

(c) "Low Fat" shall contain not less than 26 percent of total solids and not less than 2.5 percent edible vegetable fat or oil.

The word frozen dessert shall be conjoint with the name of product both in English and Urdu language in 10% of the area of the label on front side in uniform lettering. The label requirement shall be mandatory:"

It is noteworthy that both the PS-969-2010 and Punjab Pure Food Regulations, 2018, not only acknowledge "frozen dessert" and "ice cream" as two distinct and distinguished products, but have same definition of the "frozen dessert" and almost similar definition of "ice-cream". Further, it is also important to refer to the decision of *44th Meeting of* **CCI** in pursuance of which, the PFA vide its Notification No. DG (PFA)ADG (Admin & Finance)/2023/4102 dated 27.09.2023 has adopted certain standards formulated by PSQCA including PS 969-2010, which is now the applicable standard for enforcement of the same under the Punjab Food Authority Act, 2011 (Act XVI of 2011) by PFA.

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33. **Third:** PFA issued a consumer advisory in the year 2017 under the provisions of the *Punjab Food Authority Act, 2011*, wherein it categorically stated that vegetable oil is used in making of "frozen dessert", and the same is not a substitute of "ice cream", and urged the parents to prefer "ice cream" over "frozen dessert" for their children. This consumer advisory also recognised "ice cream" and "frozen dessert" as two distinct categories, hence, the term "ice cream" appeared to have referred to "dairy ice cream", and not as a generic term for both the products.

34. **Fourth**: The fact, that both "ice cream" and "frozen dessert" are two distinct categories and have distinct nomenclature, is also evident from other instances admitted by the Respondents themselves. For example, PSQCA issues separate license certificates bearing specific nomenclature i.e. specific licence for "frozen dessert" and a definite and separate licence for "ice cream". This clarifies that PSQCA itself recognizes "ice cream" as "dairy ice cream", otherwise it would have either used the nomenclature "ice cream" for both the products i.e. "dairy ice cream" and "frozen dessert", or else it would have used the term "dairy ice cream" for dairy based ice cream products. It is also noteworthy that both the Respondents have obtained separate licenses for "ice-cream" and "frozen dessert" from PSQCA.

35. **Fifth:** In addition to the above, the Rrespondent No.1 is branding and labelling all of its products (except Magnum) under the brand name Walls as "frozen dessert", while the Respondent No.2 is also branding and labelling all of its products as "frozen dessert". This also helps in concluding that the Respondents are not only aware of distinct nature, but also of the separate nomenclature of the two products.

36. **Sixth:** There is a Facebook post, dated 07.04.2017, referred to at Para 6.13 of the ER and Para 7(a)(II)(xiv) of the Complaint, (placed as Slide 64 of Annex-D of the Complaint), wherein the Respondent No.1 claims its "frozen dessert" is a healthier choice as compared to "ice cream". The Respondent No.1 has made statements on its Facebook page while comparing frozen dessert and ice cream, such as "*Frozen Dessert vs. Ice Cream, Facts Revealed*" and "*Moreover, frozen dessert offers consumers a healthier choice by using skimmed milk and 100%*

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natural vegetable oil". Evidently, the Respondent No.1 used the term ice cream for dairy ice cream in the said Facebook posts and acknowledged that both were the same. Therefore, its stance taken in the written reply that frozen dessert is also ice cream is rebutted by its own posts.

37. **Seventh:** In the international perspective, the term "ice cream" generally refers to "dairy ice cream" for the fact that it contains milk fats. For example, in the US Standards for ice cream and frozen desserts formulated by *Food and Drug Administration* (**FDA**) [1], cited as *21 C.F.R. §135.110*, the term "ice cream" is specifically assigned to the products containing milk fats, whereas for products containing vegetable fats, the term "*mellorine*" is used. In a case titled *US v Cintron-Fernandez*[2], an accused sold mellorine (frozen dessert) by the name of "*Caparra Ice Cream*", though, it contained less than 10% milk fats. The accused was charged and penalized for adulteration, misbranding and use of misleading food labelling. This example shows that labelling mellorine (frozen dessert) products as "ice-cream", is an offence in the US.

38. Likewise, as per Indian standards devised by *Food Safety and Standards Authority of India* (**FSSAI**)[3] the term "ice cream" only refers to the products containing milk fats, not vegetable fats which are otherwise referred to as "frozen desserts". In a case titled as *Gujarat Co-Operative Milk Marketing v Hindustan Unilever Ltd. And 3 Others*[4], the Bombay High Court held in 2019 that "ice cream" and "frozen desserts" were two distinct categories, while the nomenclature "ice cream" is used specifically for products which contain milk fats, hence, the relevant legal standards in India are similar to the standards for "ice cream" in Pakistan.

39. On the similar lines, in Australia, *Food Standards Australia New Zealand* (**FSANZ**) define ice cream as "*a sweet frozen food that is made from cream or milk products or both, and other foods, and is generally aerated*".[5] The definition does not mention the term vegetable fat here, hence, it proves the fact

[1] https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcfr/CFRSearch.cfm?CFRPart=135&showFR=1.
[2] (356 F.3d 340, US Court of Appeal, First Circuit)
[3] https://www.fssai.gov.in/upload/uploadfiles/files/Compendium_Food_Additives_Regulations_30_06_2022.pdf, para 2.1.14
[4] AIRONLINE 2019 BOM 1473
[5] https://www.legislation.gov.au/F2015L00385/latest/text, recital 1.1.2-3

that the term "ice cream" refers to dairy ice cream only. This is affirmed by the same standard when it says, "*A food that is sold as 'ice cream' must be ice cream*".[6]

40. **Eighth:** Paragraphs 6.23 and 6.44 of the ER are also relevant here, which confirm that the term "ice cream" is generally perceived in the market as "dairy ice cream". From the established facts as enumerated in above paragraphs, there is no doubt in holding that "ice-cream" and "frozen dessert" are two distinct products separate from each other as per their contents. Even otherwise, the Respondents themselves recognize and acknowledge them as two distinct and distinguished products.

41. In view of the above factual, historical and legal position prevalent in Pakistan and foreign jurisdictions, the arguments of the Respondents are not tenable that they are legally justified in using a generic term "ice cream" merely for the reason that a Flowchart in PS 969-2010 mentions the term "ice cream" above the category of "frozen desserts". For the sake of argument, even if it is accepted that the Respondents are right in their assertion and, for being generic, the term "ice cream" applies to both the "dairy ice cream" and "frozen dessert", even then the Respondents do not appear to have complied with the *General Standards for the Labelling of Pre-packaged Foods* (PS CX1-2021).[7] It stipulates in clause *4.1.1* that "*The name shall indicate the true nature of the food and normally be specific and not generic*" (Emphasis added).

42. Since the Respondents used generic name "ice cream", therefore, it is likely to create a confusion in the minds of ordinary consumers (primarily children) with regard to the impression of "frozen dessert" as "dairy ice cream". Thus, improper conformity by the Respondents to PSQCA Standards does not absolve them from their responsibility towards the consumers with regard to the true nature of the frozen dessert and ice cream products.

Disclosures Printed on the Products packaging/Labelling

[6] https://www.legislation.gov.au/F2015L00424/latest/text, recital 2.5.6
[7] https://drive.google.com/drive/folders/1GTIagZvXhTIzxrZruMgfrqiSSDwwX7Ec

43. Now we would like to examine the arguments of the Respondents that they have also printed the specific term i.e. "frozen dessert" on their products' packaging. This leads us to deliberate separately on the disclosure aspect of the subject matter that whether the disclosures of the Respondents printed on their products' packaging fulfilled the legal requirements of a disclosure as depicted in the images placed at Annex-D of the Complaint.

44. The Commission has clearly set disclosure parameters in its earlier decisions. The Commission, in case of *Askari Bank Ltd, United Bank Ltd, My Bank Ltd & Habib Bank ltd, 2008, Para 46*, has held as under:

> *"It is important to ensure that the material features of the product, that are significant to the consumer in making his decision should be displayed clearly, prominently, and in terminology that can be easily understood by a lay person."*

45. Likewise, the Commission acknowledged the importance of disclosure in case of *Paint Manufacturers, 2012 CLD 808, Para 41,* in the following terms:

> *"It can be deceptive to tell only half the truth, and to omit the rest. This may occur where a seller fails to disclose qualifying information necessary to prevent one of his affirmative. It can also be deceptive for a seller to simply remain silent, if he does so under circumstances that constitutes an implied but false representation or statements for creating a misleading impression..."*

46. In view of the above, the argument of the Respondent No.1 that it has not made any affirmative statement, which requires a disclosure or that it is not under any legal obligation to make disclosure, stands dismissed. We believe that disclosing the fact as to the true nature of a product is a **material information** that plays an important role in the decision-making process of the consumers. Therefore, the Respondents are bound to disclose properly whether their product is "frozen dessert" or "dairy ice cream".

47. Now we move to examine the disclosures printed on the Respondents' products' packaging, and in this respect, we refer to the images reproduced in the ER at Paragraphs 6.29, 6.31, 6.50 and 6.51. We will examine these disclosures in light of the parameters set by the Commission in the matter of *M/S China Mobile Pak Limited, 2010 CLD 1478, Para 36,* (**Zong Order**), which held as under:

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*"It is a settled principle that **'fine print disclaimers are inadequate to correct the deceptive impressions'**. In fact, such disclaimers are, in themselves, a deceptive measure."*

48. Similarly, in another case of ***M/s Proctor & Gamble Pakistan (Pvt) Limited for Deceptive Marketing Practices, 2017 CLD 1609, Para 40***, (**P&G 2017**) the disclosure requirement is further explained in the following terms:

*"The principle regarding disclaimer/disclosure is that they must be "**clear and conspicuous**" and placed "**as close as possible**" with the advertising claim."*

49. Finally, the Commission has also issued ***Guidelines on Deceptive Marketing Practices, 2023***, wherein the same aspect is reiterated at Para 6.3 that:

"The use of fine print disclaimers and qualifications that are difficult to read and/or hide important information must be avoided. There should be no ambiguity."

While elaborating it further, the Commission stipulated that:

"Disclosures must be made clearly and conspicuously. Undertakings should ensure that any disclosures made are inter alia:

- *Prominently/instantly visible;*
- *Adequately presented;*
- *Appropriately placed;*
- *Large/clear font – bold and legible*
- *Bright/conspicuous colors distinct from the surrounding;*
- *In the same language as the rest of the advertisement;"*

The Guidelines on Deceptive Marketing Practices, 2023, consolidated earlier orders of the Commission such as in the matter of *M/s AT-Tahur (Pvt.) Limited, reported as 2020 CLD 1148, Para 55, M/s Reckitt Benckiser Pakistan Limited, reported as 2020 CLD 995, Para 32 and M/s Proctor & Gamble Pakistan (Pvt.) Limited, Reported as 2017 CLD 1609, Para 21.*

50. Conventionally, disclosure parameters are set in accordance with the comprehension of an "*ordinary consumer*". This dismisses the arguments of the Respondent No.1 that reasonable consumer is able to identify the "ice cream" category. The Commission has already held in the ***Zong Order***, *supra*, that the term "*consumer*" in Section 10 is to be construed as an "*ordinary consumer*".

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The Commission in a series of subsequent Orders reiterated this view point. For example, the same was held by the Commission *in the Matter of Proctor & Gamble Pakistan (Pvt) Limited (Head 7 Shoulder Shampoo), 2010 CLD 1695, Para 29*, *M/s S.C. Johnson and Son Pakistan Limited, 2012 CLD 783, Para 23*, *Reckitt Benckiser Pakistan Limited, 2016 CLD 40, Para 17*, *A. Rahim Foods (Pvt) Limited, 2016 CLD 1128, Para 16*, *Eight campuses of Dar-e-Arqam Schools, 2022 CLD 1343, Para 38*, and finally in the case of *Kennol Petroleum (Pvt) Limited and another, 2022 CLD 859, Para 22* etc.

51. The examination of disclosures on the products' packaging of Respondent No.1 as pointed out in paragraphs 6.30 and 6.32 of ER reveals that the Respondent No.1 placed the disclosures on extreme right corner of the bottom of the wrapper and thus did not meet the requirements for printing of disclosures. Likewise, disclosures printed on the packaging of the Respondent No.2 are neither prominent nor appropriately placed, hence, the same are not adequate to give a clear message to the consumers as to the true nature of the products. Therefore, it is established that the disclosures printed by the Respondents do not fulfil the parameters of being "*clear and conspicuous*", and are deceptive themselves.

Violation of Section 10(2)(b)of the 2010 Act

52. Now turning to the main issue that whether in light of the above discussion, the Respondents have violated Section 10(2)(b) of the Act by disseminating false and misleading information to the consumers by way of marketing, branding, promoting and selling their "frozen dessert" products under the guise of "ice-cream". For the said purpose, the evidence provided by the Complainant was examined in detail by the EC as well as the Commission.

53. The examination of the video submitted by the Complainant (Slide 10 of Annex "D" to the Complaint) reveals that the Respondent No.1 has used the nomenclature "ice-cream" while advertising its products, which are actually "frozen dessert". Similarly, there is another TVC, wherein the products of the Respondent No.1, which are "frozen dessert" are represented as "ice-cream" to the consumers. Furthermore, Slide 15 of Annex "D" refers to a Facebook post published by the Respondent No.1, which also reveals that "*Dreamy Creamy*

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Vanilla DIY Ice-Cream Shake", which is actually "frozen dessert", is advertised as "ice-cream".

54. Similarly, on various E-Market pages (Slide No. 23, 25, 26, 27, 28, 29 and 30 of Annex "D" of the Complaint) frozen dessert products have been advertised as "ice-cream". Likewise, in Slide No.18 and 19 of Annex "D" of the Complaint, the Respondent No.2 is found using the word "ice-cream" for its frozen dessert products in the Facebook post. Moreover, on various E-Market pages (Slide No. 23, 24, 31 of Annex "D" of the Complaint) "frozen dessert" products of Respondent No.2 have been advertised as "ice-cream".

55. The Respondent No.2 tried to wriggle out under evasive denials, however, when confronted with evidence that was submitted by the Complainant and as observed in the ER, admitted that it termed its frozen dessert products as ice cream on its Facebook page. In this regard, the Respondent No.2, however, argued that its Facebook post was too old as it was posted in 2015 erroneously and also did not deceive the consumers. Legally, a violation under section 10 of the Act is not condonable because of any limitation of time and subjective intent of a respondent party is not relevant for the proceedings initiated by the Commission. The Commission held so in the case of *M/s. Al-Hilal Industries (Pvt.) Limited, 2012 CLD 1861, Para 19,* as follows:

> *"It is well established in the Commission's Zong Order dated September 29, 2009 and Paints Order Dated January 13, 2012 that it is not must to establish intent and information pertaining to the product in question 'may or may not be deliberate or conscious in order for it to qualify as misleading'. Accordingly, the onus is on the undertaking to ensure that no deception occurs through their marketing practices"*

56. The argument of the Respondent No.2 that it is not responsible for advertisements by third party reseller on E-platforms, we would like to give due consideration to the fact that no action was taken by the Respondent No.2 to stop these advertisements on E-platforms and it also did not clarify the same to the consumers at any stage. Besides, the financial and marketing benefits of alleged claims about their products on E-platforms are also reaped by the Respondents. If the Respondents had recognized that alleged claim is not crafted or created by them, then they would have definitely stopped third party resellers. However, as a matter of fact, the Respondents have not placed any evidence on

record to show that they had actually attempted to forbid third party resellers from using a nomenclature which is otherwise not meant for their products.

57. Therefore, the argument that the Respondent No.2 did not intend to deceive the consumers or the alleged conduct is done unintentionally or erroneously, as it continued for almost 84 months, is not a tenable defence in the circumstances of this case.

58. Considering the historical perspective and international usage of the terms of "frozen dessert" and "ice cream" as discussed above, and acknowledging the fact that the term "ice cream" has remained for a long time in the consumer's perception as "dairy ice cream", we have to conclude that despite being mindful of difference between these two products i.e. "frozen dessert" and "ice-cream", the Respondents knowingly initiated their marketing campaigns to sell their products, which are actually "frozen dessert", under the guise of "ice-cream", thus distributed false and misleading information to the consumers viz-a-viz the character and properties of their products. We are of the view that the answer to Issue A is in affirmative, and the conduct of both the Respondents is *contra legum* and amounts to deceptive marketing practices within the meaning of Section 10(1) read with Section 10(2)(b) of the Act.

Issue B: Whether the Respondent No.1 has violated Section 10(2)(c) of the Act by carrying out false and misleading comparison of goods in the course of advertisement?

In the Facebook post, dated 07.04.2017, referred to at Para 6.13 of the ER and Para 7(a)(II)(xiv) of the Complaint, (Slide 64 of Annex-D of the Complaint), the Respondent No.1 claims that its "frozen dessert" is a healthier choice as compared to "ice cream".

59. In order to substantiate its claim, the Respondent No.1 relied on nutritional profile of vanilla flavoured "dairy ice cream" and vanilla flavoured "frozen dessert". The EC has discussed the submissions of the Respondent No.1 on this question whether the "frozen dessert" is healthier than the "ice cream". The Respondent No.1 was unable to satisfy the EC with respect to the "frozen dessert" as being a healthier-choice, therefore, the EC concluded that the Respondent failed to substantiate the alleged claim.

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60. The ER also concluded at Paragraphs 6.19 to 6.21 that "*healthier choice*" claim was not only open to many interpretations but also devoid of any deeper study into various variables. The Respondent No.1 was not able to prove through any research methodology that how the quoted results could be achieved or substantiated. Furthermore, the ER also concluded at Para 6.23 that a comparison was made in the alleged advertisement between a "frozen dessert" and "ice cream", whereas, the word "ice cream" is generally perceived in the market as "dairy ice cream". Therefore, according to the ER, a comparison should have been actually drawn between "frozen dessert" and "dairy ice cream" if the Respondent considered its frozen dessert an ice cream on its own.

61. Section 10(2)(c) of the Act stipulates that deceptive marketing shall be deemed to have been resorted to or continued, if an undertaking resorts to "*false or misleading comparison of goods in the process of advertising*". Plain reading of the text suggests that there are four elements to constitute a violation under said provision namely; i) false or misleading, ii) comparison, iii) goods, iv) in the process of advertising. The issue at hand will be analysed in accordance with these four constituents.

62. The evidence presented at Paragraph 6.13 of the ER is self-explanatory that the Respondent No.1 carried out a healthier-choice comparison between two kinds of goods/products i.e. "frozen dessert" and "ice cream". Therefore, it fulfils the requirement of second and third constituents as mentioned in Section 10(2)(c) of the Act. However, we have to see whether the Respondent's claim of a "*healthier-choice*" was published during the process of advertising and whether the said comparison was false or misleading to fulfil the requirements of first and fourth constituents.

63. As to the element of "*in the process of advertising*", it is clarified that the alleged Facebook post communicated the information to the general public and the said post was published in a manner that was designed to attract public attention. The Respondent argued that the alleged post was a response to the Punjab Food Authority's consumer advisory, however, even if we accept the Respondent's argument for a moment, we cannot ignore the fact that the targeted audience of the Facebook post were ordinary consumers and not the Authority. The

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Respondent should have taken up its grievance, if any directly with the Authority under the law of the land instead of presenting their views (alleged comparison) on social media for the consumption of the consumers. Therefore, we believe that the alleged Facebook post is an advertisement within the meaning of section 10 of the Act, hence, the requirement of fourth constituent of Section 10(2)(c) is also fulfilled.

64. Now we turn to the first constituent of Section 10(2)(c) i.e. *false and misleading comparison*. As to the false or misleading nature, the argument of the Respondent No.1 was that in fact frozen dessert was healthier than ice cream due to its ingredients and the burden was on the Enquiry Committee to prove it otherwise. We do not agree with this argument of the Respondent No.1 for the reason that the Commission has earlier held in the Order of ***P&G 2017***, *supra*, that:

> "*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 this concept is that the consumers expect the product advertisers to have reasonable basis or substantiation in support of such representation*".

65. The burden of proof always lies on the undertaking to come up with reasonable substantiation in support of their claims instead of attempting to shift the burden towards the Complainant or Enquiry Committee. The Commission has also held in the matter of *M/s Catkin Engineering Sale and Services (Pvt.) Limited against KPK Directorate of Agricultural Engineering, 2020 CLD 497, Para 11(iii)*, that:

> "*The burden of proof is on the undertaking concerned i.e. manufacturer/seller of goods or provider of services that the claims made by them in the process of marketing about their products/services is appropriately substantiated*".

66. In addition to the above, the Commission in its earlier decision in the matter of *M/s Reckitt Benckiser Pakistan Limited, 2015 CLD 1864, Para 30*, has held that similar to Section 10(2)(b), a comparison of goods lacking "*reasonable basis*" is considered false and misleading within the meanings of Section 10(2)(c). This implies that the test for determination of false or misleading nature of a claim in the instant matter is also "reasonable basis". While keeping this test in view,

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we have to see whether the Respondent No.1 has been able to put forward *"reasonable basis"* for its claim/comparison.

67. Guidance in this respect may be drawn from another decision of the Commission dated 23.02.2010 passed in the case of *Proctor & Gamble Pakistan (Private) Limited, Para 33*, wherein the Commission explained the "*reasonable basis*" as follows:

> *"The advertiser must have had some recognizable substantiation for the claims made prior to making in an advertisement."*

68. Particularly in matter of health and safety claims, this standard of "***recognizable substantiation***" is further explained as "***competent and reliable evidence***" in **P&G 2017**, at *Para 32-33.* The Commission held therein that "*competent and reliable evidence*" means:

> *"Test, analyses, research, studies or other evidence based on 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."*

The same test for reasonable basis has been reiterated by the Commission later on in the case of *M/s. Kitchen Stone Foods, 2018 CLD 778, Para 34*.

69. Keeping this test in view, we find that the information relied upon by the Respondent No.1 is merely a nutritional value of the ingredients, which is at the most an information on what the product is actually composed of or what the nutritional value of the product is. The Respondent No.1 claimed that its "frozen dessert" was made of palm oil, which contained less saturated fats, less cholesterol and less calories as compared to "ice cream", made from butter oil. The Respondent referred to *Food Central USDA Nutrition Database*, *World Health Organisation* and *American Heart Association*, which regard butter oil prone to raising cholesterol level due to its high saturated fats.

70. It is important to clarify that the Commission is neither concerned with the nutritional value of the Respondent's products nor implementation/enforcement of any industry standards. Instead, in this case the test would be to determine as to how the composition in the form of frozen dessert qualifies to be a healthier

choice or better option as compared to "ice cream". If it is claimed that the "frozen dessert" is a healthier-choice then the Respondent No.1 must come up with verifiable substantiation prior to making any such claim. Further, it must have some scientific or empirical evidence or research report that would show in an objective manner that "frozen dessert" is a healthier choice over "ice-cream". Whereas, as a matter of record, the information with regard to nutritional value presented and relied upon by the Respondent No.1 does not substantiate the alleged claim.

71. It is not understandable as to how various ingredients with low fat and less saturated oils mixed up as "frozen dessert" will make a healthier choice compared with dairy ice cream. There is no credible scientific evidence or medical research report submitted to support this aspect in clear and objective terms. There is an analytical gap between the alleged claim, which promises a healthier-choice, and the belief that the product actually provides real health benefits. Therefore, reliance on mere nutritional information or justifying the same as a counter-response to the consumer advisory by Punjab Food Authority does not fulfil the criteria of a *competent or reliable evidence* and, hence, there are no merits in the arguments of the Respondent No.1.

72. From the term "*healthier choice*" in the alleged advertisement, the Respondent No.1 means that low cholesterol, less calories and healthier fats make a healthier choice, however, we consider that "*healthier choice*" is a relative term because it depends upon consumers' own preference and liking for the type and source of caloric intake and they may regard dairy fats healthier and more appropriate for their consumption as compared to vegetable fats on the basis of some medical advice, scientific evidence or personal liking. Regardless of this *praesumptio iuris tantum* (rebuttable presumption), only an authentic medical research or scientific report can be relied upon for the purposes of comparison. In absence thereof, the Respondent's assertion in its written reply remains unsubstantiated. Hence, the claim sans reasonable basis qualifies to be a false and misleading comparison.

73. According to the decision of *41st Meeting of Council of Common Interest dated 06.03.2020* PSQCA standards are applicable all over Pakistan. This, however,

is not the material point under consideration as the issue for determination here is that, what impression of the term "ice cream", has the Respondent No.1 projected towards the consumers through the alleged comparison. Instead of comparing "frozen dessert" with "dairy ice cream", the Respondent No.1 opted to compare "frozen dessert" with "ice cream". This is where deception occurred because the Respondent No.1 has taken advantage of the consumers' perception and exposed them to the false and misleading impression of the term "ice cream" whether inclusive of frozen dessert or exclusively dairy ice cream to be selectively decided by the Respondent No. 1 to the detriment of the consumers' interest.

74. It is pertinent to mention here that it is a well-settled canon of legal jurisprudence that no one is allowed to blow hot and cold in the same breath. While comparing the "frozen dessert" with "ice cream", the Respondent No.1 used only the term "ice cream" and not the term "dairy ice cream". This shows that the Respondent No.1 considers that the term "ice cream" implies that it is "dairy ice cream". Therefore, the Respondent No.1 while defending its position under "Issue A" could not claim that "frozen dessert" is sub-category of "ice cream". If the Respondent No.1 had really believed that "frozen dessert" and "dairy ice cream" were sub-categories of "ice cream", then it would have compared the "frozen dessert" with "dairy ice cream", and not with "ice cream". The Respondent No.1 has, in fact, exploited the perception of consumers regarding "ice cream" and "dairy ice cream" who perceive these products as same. Since *M/s Lever Brothers Pakistan Limited*, the predecessor of the Respondent No.1, was a party in the proceeding before the honourable Lahore High Court and the Supreme Court of Pakistan, wherein the distinction between ice cream and frozen dessert was settled, any effort on its part to go against the same is misleading as apples must not be compared with oranges.

75. For the reasons set forth above, we hereby hold that the Respondent No.1 has made false and misleading comparison of its "frozen dessert" products with "ice cream" and presented an unsubstantiated impression to the consumers that "frozen desserts" are healthier than other ice cream products. Hence, answer to

Issue B is in affirmative and it is held that the Respondent No.1 has violated Section 10(1) read with Section 10(2)(c) of the Act.

PENALTY/DIRECTIONS

76. In view of the above, it is held that a false and misleading impression of "frozen dessert" as "ice cream" was created and continued by the Respondents through their advertisements, in order to make the consumers believe that "frozen dessert" products are also "ice cream". The Respondents advertised, labelled and marketed their products without disclosing the true nature of their products as frozen desserts. The Respondents also failed to make proper disclosures in this regard as per the law and parameters already settled by the Commission, hence, the consumers could not know the exact nature of the products of the Respondents. They also took economic advantage of their deceptive marketing practices to the detriment of consumers welfare. The Respondents failed to produce any substantial evidence to show if they have employed any corrective measures to overturn or undo the deceptive impression they have created in the market. This warrants imposition of penalty upon the Respondents.

77. We determined that violation period on part of the Respondent No.1 continued from 03.04.2017 to 17.02.2022, which translates into fifty-eight (58) months in total. Similarly, the violation period on part of the Respondent No.2 continued from 21.02.2015 to 17.02.2022, which sums up to eighty-four (84) months.

78. The Guidelines of the Commission on imposition of financial penalties (Fining Guidelines) stipulate that the objective of imposition of financial penalties should be to deter the undertakings from engaging in anti-competitive practices and to reflect upon the seriousness of the infringement. Moreover, the quantum of penalty depends upon the seriousness of the infringement, duration thereof, aggravating or mitigating factors etc. It is accordingly observed that the deceptive marketing claims were made regarding food items mostly consumed by children and usually the competition agencies take strict action against such unfounded and misleading claims. Considering the seriousness of the violation, duration of the violation, which spanned over years and in order to deter other

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undertakings from engaging in such like practices in future, we have determined the amount of penalty to be imposed upon the Respondents.

79. Therefore, we hereby impose a penalty of Rupees Seventy Five Million (Rs.75,000,000/-) upon the Respondent No.1 and a penalty of Rupees Seventy Five Million (Rs.75,000,000/-) upon the Respondent No.2, for disseminating false and misleading information to the consumers related to the characteristics of their products within the meaning of Section 10(1) read with Section 10(2)(b) of the Act.

80. We also hereby impose a penalty of Rupees Twenty Million (Rs.20,000,000/-) upon the Respondent No.1 for conducting and disseminating false and misleading comparison of goods in the process of advertising within the meaning of Section 10(1) read with Section 10(2)(c) of the Act.

81. The Respondents are also hereby directed to:

i. Cease and desist from carrying out any false and misleading marketing practices concerning their "frozen dessert" products and restrain from making claims in a manner, which may give the consumers an impression of "frozen dessert" products as "ice cream".

ii. Modify all advertisements and promotional materials, whether through newspapers, TV campaigns, in electronic or digital media, social media posts or on their official websites, and display only truthful claims regarding their products.

iii. Ensure inclusion of the disclaimer or disclosure as to the true nature of their products in explicit, express and bold terms, as per the requirements of law, and display the same prominently on the product packaging, and in print/electronic/social media.

iv. The Respondents must file Compliance Report with respect to the implementation of the aforementioned directions not later than 30 days from the date of this Order, failing which, additional penalty of

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Rs.100,000/- (Rupees one hundred thousand only) per day will be imposed.

82. In the above terms, the SCNs No.14/2022 and 15/2022 are hereby disposed of.

83. It is so ordered.

(Saeed Ahmad Nawaz)
Member

(Salman Amin)
Member
18th Dec 24

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ISLAMABAD, THE 18th DAY OF DECEMBER 2024.