BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF

SHOW CAUSE NOTICE ISSUED TO
PAKISTAN STATE OIL COMPANY LTD
FOR DECEPTIVE MARKETING PRACTICES

(F. NO: 170/OFT/PSO/CCP/2013)

Dates of hearing:	25-11-2014 11-06-2015 11-08-2016
Commission:	Ms. Vadiyya Khalil **Chairperson** Dr. Shahzad Ansar **Member** Mr. Ikram Ul Haque Qureshi **Member**
Present on behalf of: **M/s. Pakistan State Oil Company Ltd**	Mr. Asif Aslam, General Manager Mr. Mansoor Ismail, General Manager, Islamabad Syed Ali Yasir Rizvi, Advocate Syed Qamar Hussain Sabzwari, Advocate Mr. Iftikhar Ahmad Bashir, Advocate High Court, Jurispak Advocates Mr. Umair Khalid Mirza, Advocate
Mr. Inaam Athar Siddiqui	

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ORDER

1. This order shall dispose of the proceedings initiated pursuant to show cause notice No. 12/2014 dated 02.10.2014 (the "**SCN**") issued to Pakistan State Oil Company Limited (**PSO**, the "**Respondent**" or the "**Undertaking**") by the Competition Commission of Pakistan (the '**Commission**') for *prima facie* violation of Section 10 of the Competition Act 2010 (the "**Act**").

2. The main issue before the Commission is whether the Respondent's advertisements and marketing campaigns and materials relating to '**Premier XL Gasoline**' *and* '**Green XL Plus Diesel**' (individually the "**Product**" and collectively the "**Products**") constitutes deceptive marketing practices in terms of Section 10 of the Act.

Background

3. A complaint dated 30.06.2014 (the "**Complaint**") was filed by Mr. Muhammad Inaam Azhar Siddiqi (the "**Complainant**") with the Commission. After the initial probe, the Commission authorized an enquiry under Section 37(2) of the Act and appointed an enquiry committee (the "**Enquiry Committee**") to further probe into the matter. The Enquiry Committee completed its report on 09.11.2014 (the "**Enquiry Report**"), which concluded that *prima facie* the Respondent has been/ is engaged in '*deceptive marketing practices*' in violation of Section 10(1) read with Sections 10(2)(a) and (b) of the Act.

4. The Respondent is the largest petroleum distribution and marketing company in Pakistan with petroleum products including Motor Gasoline (gasoline/petrol), High Speed Diesel (HSD/diesel), Furnace Oil (FO), Jet Fuel (JP-1), Compressed Natural Gas (CNG), Liquefied Petroleum Gas (LPG), kerosene, and lubricants.

5. The Complainant alleged that since 2003/2004 the Respondent has been marketing that the use of the Products both in old and new vehicles results in more mileage and improved performance of vehicle's engine due to use of various additives. In

2012/2013, the Respondent, however, abruptly discontinued the use of such additives, while the name of the Products and associated branding/ insignias launched alongside the Products in 2003/2004 remain in place to-date. Thus the Complainant's allegation is that the Respondent has been/ is engaged in '*deceptive marketing practices'* by distributing false and misleading information to consumers and also that distribution of such information is capable of harming the business interests of competing undertakings in violation of Section 10, which is reproduced below:

> *10.* ***Deceptive Marketing Practices.****—(1) No undertaking shall enter into deceptive marketing practices.*
> *(2) The deceptive marketing practices shall be deemed to have been resorted to or continued is an undertaking resort to—*
> *(a) the distribution of false or misleading information that is capable of harming business interests of another undertaking;*
> *(b) the distribution of false or misleading information to consumers, including the distribution of information lacking reasonable basis, related to the price, character, method, or place of production, properties, or product's labelling and packaging;*
> *(c) false or misleading comparison of goods in the process of advertising; or*
> *(d)fraudulent use of another's trademark, firm name, or product's labelling or packaging.*

6. Based on the findings and recommendations made in the Enquiry Report, the Commission issued the SCN to the Respondent, providing it an opportunity of being heard. The relevant parts of the SCN are reproduced herein below:

> *"8. WHEREAS, in terms of paras 40 and 47 of the Enquiry Report, although it has been claimed by the Undertaking that the use of new brand names of 'Premier XL Gasoline' and 'Green XL Plus Diesel' were used in 2003-2004 as a brand initiative launch in line with the marketing strategy and to*

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achieve consistency with the Undertaking's brand identity i.e. green colour logo. However, it appears that the actual facts are in contrast to the foregoing; and

9. WHEREAS, it terms paras 47 to 51 of the Enquiry Report, it appears that at the time of launch of the brand names 'Premier XL Gasoline' and 'Green XL Plus Diesel', the claims i.e. enhancement in fuel economy, better engine cleanup and corrosion control of fuel tanks and piping and reduction in exhaust emissions was claimed, which were also advertised in the press release issued by the Undertaking at the time of rebranding of gasoline and diesel; and

10. WHEREAS, in terms of the Enquiry Report, it appears that the Undertaking concealed the discontinuation of the additives in the gasoline [petrol] and diesel in a manner that an ordinary consumer could not have discovered the discontinuation of the use of additives in the gasoline [petro] and diesel products, which even otherwise prima facie were not capable of achieving the claims which were advertised; and

11. WHEREAS, in terms of paras 55 to 58 of the Enquiry Report, it appears that the Undertaking is making claims regarding the efficiency and performance of the 'Premier XL Gasoline' and 'Green XL Plus Diesel', through use of certain additives in them appears to be false/misleading information that is prima facie lacking a reasonable basis regarding the suitability for use or quality of goods in violation of subsection (1) of Section 10, in particular, clause (b) of subsection (2) of Section 10 of the Act; and

12. WHEREAS, in terms of paras 51, 55 to 58 of the Enquiry Report, it appears that the Undertaking adopted the

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names 'Premier XL Gasoline' and 'Green XL Plus Diesel', for its gasoline [petrol] and diesel by giving an impression to the consumers through advertisements that the aforesaid products due to inclusion of additives in them is superior in performance over other competing fuels in the market, which prima facie, is capable of harming the business interest of the other competing undertakings in violation of subsection (1) of Section 10, in particular, clause (a) of subsection (2) of Section 10 of the Act."

Submissions of Parties

7. The Respondent in its written comments to the SCN received on 12.11.2014 raised certain objections, which are summarized as follows:

i. The Enquiry Report and the SCN are based on no cogent evidence. The Complainant has failed to discharge the burden of proof in terms of the Qanoon-e-Shahadat Order 1984 (the "**QSO**"). Furthermore, it is the principle of enquiry/ adjudication and administration of justice that the party who is likely to be affected by any enforcement action must be provided with accurate evidence to respond appropriately. The Enquiry Report placed on the Commission's *website* is dated 05.09.2014, *whereas* the Enquiry Report provided to the Respondent is dated 09.09.2014. Therefore, the findings of the Enquiry Report are denied and the SCN is liable to be dismissed for want of evidence.

ii. The marketing campaign referred to in the SCN is passed and closed, which was never carried out when the Act was in place and is no more in the market. The Enquiry Report refers to the '*deceptive marketing practices*', however, no marketing material has been placed on record indicating dates of publication of the advertisement. The additives used in its Products provide no additional benefits to the fuel being sold at Respondent's retail outlets. The claims made in the Enquiry Report and the SCN are merely a reproduction of the contents of the *September 2013/ATC Document No 113 titled "Fuel Additives: Use &*

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Benefits" prepared by the Technical Committee on Petroleum Additives Manufacturers in Europe.

iii. All Oil Marketing Companies (OMCs) in Pakistan are making similar claims in marketing their products. Without providing any reference, the Respondent submitted that one OMC states that its products prevent the build-up of deposits that can harm your engine's performance over time. A cleaner engine may help to get better combustion and greater fuel efficiency. Similarly, another OMC states that its products have a unique ingredient in its fuel that keeps your engine cleaner and freer of the deposits left behind the inferior fuel. This aspect has been ignored by the Enquiry Committee. Hence, the Enquiry Report has treated PSO discriminately in violation of Article 25 of the Constitution of Islamic Republic of Pakistan 1973.

iv. That the contents of para 4 of the SCN are denied to the extent that the Respondent has concealed the fact of discontinuation of the use of additives in its fuel from consumers. On the contrary, the Respondent submitted that it discontinued the use of additives as they were not significantly improving the quality of fuel and were not seen to be having any of the benefits as claimed by it. It further submitted that it began to use additive believing that such use would deliver better quality product to the customer and the same were relayed upon in its marketing campaigns at the time. However, in Part III, para 4 of its reply, the Respondent submitted that since the discontinuation of the additives, it has stopped the advertisements in question i.e. 2012/2013.

v. The standard of fuel to be sold to customers is notified by the Ministry of Petroleum and Natural Resources ("**MP&NR**") and the Oil and Gas Regulatory Authority ("**OGRA**") and the fuel sold at its outlet's is fully compliant with those standards.

vi. The brands/ insignias "**Premier XL Gasoline**" and "**Green XL Plus Diesel**" were used as branding initiatives launched in line with the marketing strategy, which was consistent with its green coloured logo. The product/brand names are not premised on Products' composition rather, it was part of its overall

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rebranding strategy. Any undertaking including the Respondent is at liberty to change the name of its brands. The justifications provided regarding the rebranding of the products *i.e.* Premier XL Gasoline and Green XL Plus Diesel in para 40 of the Enquiry Report are misconceived. The symbols, logos, slogans, and trademarks are aimed to strengthen the identity of the by the name and such have been shown to be more memorable than words. The trademarks are intended to avoid confusion and preventing dilution of the marks by competing undertakings. Moreover, the brands/ insignia were launched to give PSO a completely new outlook.

vii. Its marketing campaign did not affect the business interests of the competing undertakings and the Complainant and the Enquiry Committee have failed to substantiate the allegations made therein.

8. The hearings on this matter were held on 25.11.2014, 11.06.2015, and 11.08.2016. Mr. Iftikhar Ahmed Bashir (Advocate High Court) of Jurispak Advocates and Legal Consultants represented the Complainant. Syed Ali Yasir Rizvi and Syed Qamar Hussain Sabzwari (Advocates High Court), Mr. Asif Aslam, General Manager(GM) PSO Karachi and Mr. Mansoor Islamil, GM PSO Islamabad appeared on behalf of the Respondent.

9. In the first hearing held on 25.11.2014,the Complainant's counsel presented its arguments, which are summarized as under:

i. That in the year 2004, the Respondent launched its products using new brands, namely, *Premier XL Gasoline* and *Green XL Plus Diesel* after adding certain additives in the Products claiming that the additives result in improved engine efficiency.

ii. It was highlighted that at the time of launch of its products in 2004 the Respondent claimed that the use of the additives will result in the cleaner engine and better drive, among other things.

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10. In response, the Respondent's counsel started their argumentation by referring to Section 10(2)(b), Section 28(c) and Section 33 of the Act and the QSO, which are summarized as under:

i. The Commission is conferred with the power of a Civil Court and the Enquiry Officers should have followed the rules of the QSO.

ii. The Respondent, being a state-owned company has a low budget and thus has not advertised the Products for a while. Furthermore, the Respondent is regulated by OGRA, Ministry of Petroleum and Natural Resources (MPNR), the Hydrocarbon Development Institute of Pakistan (HDIP), the Oil Companies Advisory Committee (OCAC) and the Directorate General Petroleum Concessions (DGPC). None of them have raised this issue to date.

11. The second hearing held on 11.06.2015. The contentions of the Complainant and the Respondent are summarized as under:

i. The Respondent's counsel reiterated their objections as to the authenticity of the Enquiry Report asserting that have not been accorded an opportunity of being heard during the enquiry stage and the Commission has not fulfilled the requirements of the QSO.

ii. The use of additives in the Products by the Respondent was encouraged by research, in addition to the marketing/ branding purposes by the Undertaking.

iii. Regarding the retention of the brand/ insignia after discontinuation of the pre-additized Products, the Respondent submitted that new branding was part of Respondent's re-branding strategy, which was independent of the use of additives. The Respondent reiterated that the petroleum sector is already strictly regulated by OGRA, MPNR, HDIP, OCAC, and the Directorate General Petroleum Concession (DGPC).

iv. On the other hand, the Complainant asserted that the name and branding/ insignia of the Products i.e. gasoline/ petrol and HSD/ diesel sold by the

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Respondent remained unchanged even after discontinuation of the use of additives, which constitutes deceptive marketing in violation of Section 10 of the Act.

12. In the third hearing held on 11.08.2016, the Respondent's counsel reiterated and questioned the veracity of the enquiry process, the Enquiry Report and the SCN thereof. The Respondent's counsel referred to Articles 70, 72-89 and 11 to 120 of the QSO stating that the Complainant has failed to discharge the burden of proof and has not produced any evidence to support his allegation.

Issues and Analysis

13. Based on the Enquiry Report, the SCN and the submissions made by the Complainant and the Undertaking, the following issues need to be addressed:

    a. *Whether the enquiry conducted in the instant matter and the SCN issued to the Undertaking are in violation of the Act and principles of natural justice?*

    b. *Whether the advertisement and marketing campaigns of the Undertaking relating to its Products containing additives started in 2003/2004 and discontinued in 2012/2013 constitute deceptive marketing practices in violation of Section 10 of the Act?*

    c. *Whether the use of branding/ insignias of 'Premium XL Gasoline' and 'Green XL Plus Diesel' being used by the Undertaking at its outlets and website after discontinuation of additives in the Products constitute deceptive marketing in violation of Section 10 of the Act?*

14. In regard to the validity of the Complaint, the appointment of the Enquiry Committee, the Enquiry Report, the SCN, and the cogency of the evidence, the Undertaking has raised objections that the same are in violation of the principle of natural justice, hence the Enquiry Report and proceedings there under are infructuous. These objections are addressed herein below:

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i. At the outset, it is mentioned that the enquiry was initiated pursuant to Section 37(2) of the Act, which deals with complaints by undertakings. A formal complaint was lodged by Mr. Siddique, a regular consumer of the Undertaking's Products, with the Commission seeking action against the Undertaking for alleged deceptive marketing practices under Section 10 of the Act.

ii. The Complaint was filed in accordance with the procedure laid down under the Act and the Competition (General Enforcement) Regulation 2007 ("**CGER**"). Section 37(2) of the Act provides that:

> "37(2) *Where the Commission receives from an undertaking or a registered association of consumers a complaint in writing stating facts as appear to constitute a contravention of the provision of Chapter II, it shall, unless it is of the opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by prima facie evidence, conduct an enquiry into the matter to which the complaint relates.*"

iii. The expression used in Section 37(2) is that the Commission shall initiate proceedings on receipt of a complaint from an 'undertaking'. The term 'undertaking' is defined under Section 2(1)(q) of the Act, which includes natural persons. Thus, Section 37(2) does not bar the filing of complaints by individuals and all that is required is after receipt of a complaint, the Commission has to form an opinion whether or not to initiate an enquiry with regard to the alleged infringement(s) of the Act.

iv. The Complaint was filed on 28.06.2014, which was in conformity with the requirements of Section 37(2) of the Act and Regulation 17 of the CGER.

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v. On 16.07.2014, based on the facts and the evidence provided by the Complainant, the Commission formed an opinion that the Complaint warrants further investigation. Therefore, a formal enquiry under Section 37(2) of the Act was initiated by appointing Mr. Noman Laiq (Joint Director OFT) and Ms. Resham Ibrahim (Junior Executive Officer OFT) as the Enquiry Committee on 16.07.2014 to further probe into the issues raised in Complaint and to submit a report of their findings and recommendations. On 06.08.2014, the enquiry officers sent a letter enclosing the Complaint to the Respondent for its comments and contention regarding the alleged infringement of Section 10 of the Act.

vi. On 25.08.2014, the Respondent made submissions in response to the Complaint sent by the Enquiry Officers, the substance of which was made part of the Enquiry Report (para 15 to 20)). On 09.09.2014, the enquiry officers submitted the Enquiry Report wherein it was recommended that action be considered under Section 30 of the Act against PSO for *prima facie* violation of Section 10. After due consideration of the Enquiry Report and recommendation made therein, the Commission approved the issuance of show cause notice to the Respondent. On 02.10.2014, the SCN was issued along with the Annex-I i.e. the Enquiry Report was sent to the Respondent, providing it the opportunity of being heard and to place facts and material in support of its contentions. On 12.11.2014, the Respondent filed its submissions in response to the SCN.

vii. With reference to the objections raised by the Respondent that it was not involved at the stage of the enquiry, it is observed that the Commission is under no obligation to include the respondent(s) during the enquiry stage given that the findings of the Enquiry Report are *prima facie* opinion of the enquiry officers and not conclusive. It remains the prerogative of the enquiry officers to conduct the enquiry as they deem appropriate in the circumstances. Thus, the enquiry officers have not violated or overlooked any provisions of the Act during the course of the enquiry.

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viii. As regards the principles of natural justice and procedural fairness, the Commission has addressed the issue in its Order of *Jamshooro Joint Venture Limited and LPG Association of Pakistan* dated 14.12.2009 (the "**JV-LPG Order**"), the relevant part of which is reproduced herein below:

> *"96. Natural Justice has been described as a concept, sadly lacking in precision (as per R v Local Government Board [1914] 1 K.B. 160 referred to by De Smith's treatise 'Judicial Review: 6th edition (2007) at para 6-010). The Supreme Court of Pakistan has also held that the rule of natural justice is not cast in a rigid mould and that depending on the facts and circumstances of each case, there is not a mandatory requirement of natural justice that in every case the other side must be given a notice before preliminary steps are taken. As per the Honourable Supreme Court, it might suffice if reasonable opportunity of hearing is granted to a person before an adverse action or decision is taken against him (Commissioner of Income Tax and others v Messrs Media Network and others: 2006 PTD 2502)" Support can also be gleaned from the following precedents from the United Kingdom and the United States.*
>
> *Similarly, in Rees and Others (1994) 1 All E.R. 833 at page 842-845*
>
> *97. It was held by the Privy Council that there were many situations in which natural justice did not require that a person must be told of the complaints made against him and given a chance to answer them at a particular stage in question. Essential features leading the Courts to that conclusion had included the fact that the investigation was purely preliminary, that there*

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would be a full chance adequately to deal with the complaints later, that no penalty or serious damage to reputation was inflicted by the proceeding to the next stage without hearing, that the statutory scheme properly construed and exclude such a right to know and to reply at the earlier stage.

In Regina v Saskatchewan College of Physicians and Surgeons (1996) 58 D.L.R. (2d) 622.52

98. Held that the preliminary enquiry committee had no power to decide whether a doctor had been guilty of misconduct; it had no power to affect any of his legal rights in any way whatsoever, and it had no power to impose any penalty or obligation upon him. Hence the requirements of natural justice did not apply.

In Parry Jones v Law Society and Others (1969) 1 Ch Division 1 at pp.8 and 10

99. Held by the Court of Appeal that where the only inquiry was as to <u>whether there was prima facie evidence</u>, natural justice did not require that the party should be given notice of it.

100. From the United States of America, the following precedents may be referred to:

Traditional notion of due process do not attach in adjudicative, fact-finding investigation (U.S. Georator Corp v Equal Employment Opportunity Commission, 592 F. 2d 765 (4th Cir. 1979).

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Accordingly, the full panoply of due process safeguards needs not necessarily be afforded to an individual during the investigative phase, as opposed to adjudicative phase of administration of proceedings (U.S. Tolbert v McGriff, 434 F. Supp. 682 (M.D. Ala. 1976))

ix. In view of the principles laid down in the above-mentioned cases, the Commission is of the considered opinion that no provision of the Act or CGER obligates the Commission to issue a notice and/or hold a hearing at the enquiry stage, in particular, when its findings are not final. The SCN provides an opportunity for hearing to the party against whom the violation is alleged.

x. The Respondent's assertions in regard to natural justice and the question as to the validity of Enquiry Report have no merit. In the matter at hand, the Enquiry Report and the subsequent proceedings provide sufficient material, which suggested *prima facie* contraventions of Section 10 of the Act. The difference in dates on the printed copy of the Enquiry Report provided to the Respondent and the document uploaded on the Commission's website is merely a typographical error and is immaterial. What needs to be appreciated is the substance and content of the Enquiry Report, which is coherent.

xi. Given the non-judicial nature of the enquiry and that its findings are *prima facie* in substance, there is no question regarding the applicability of the QSO. During an enquiry the officers/committee are required to adhere to the provisions of the Act and CGER, which have been fulfilled by the officers in preparing the Enquiry Report. Hence, there has been no violation of the provisions of QSO as is asserted by the Respondent.

15. In view of the aforementioned, the Commission holds that the procedure adopted by the enquiry officers (which is adequately reflected in the Enquiry Report) and relying on the case-law quoted above, there is no violation of the Act, CGER, QSO, and the principles of natural justice.

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16. It further noted that the proceedings were initiated under Section 30 of the Act. In addition to sharing Complaint and seeking Respondent's comments/contentions during the enquiry stage, para 14 of the SCN provides that the Undertaking to appear and place before the Commission, fact and material in support of its contentions and the *opportunity of being heard* through a duly authorized representative in the hearing carried out by the Commission. The JJVL-LPG Order also discusses the effect of a SCN as follows:

> *"102. As quoted above the Honourable Supreme Court has stated in 2006 PTD 2502 that it might suffice if the reasonable opportunity of hearing is granted to a person before an adverse action or decision is taken against him This dictum of the apex Court clearly draws a, quite logical, distinction between and adverse order and an adverse action. As will become clear, the latter is related to recovery proceeding and not a finding of contravention of the law. Such distinction is amply evident from other cases as well. In the case reported at 2007 PTD 763, an appeal against levy of sales tax on a vehicle was preferred. Sales Tax Department filed an appeal against the decision of High Court with the Supreme Court. The appeal was pending before the Supreme Court when an adjudicating officer passed an order against the taxpayer stating that the amount in question could be recovered subject to the outcome of said appeal pending before the Supreme Court. It was held that "cause of appeal against this Order of the adjudicating officer did not arise as no adverse action has been ordered." Tribunal, for the satisfaction of the appellant, determined that amount in dispute was not to be recovered until the Supreme Court gives its decision. Recovery could only be made if Supreme Court decides*

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in favour of the Revenue Department. Similarly, in the case of 2006 PTD 2207, Petitioner Company contended that if had already appealed to Appellant Tribunal against Impugned Order of the Department. The appeal was pending due to unavailability of a Member (Technical) the Tribunal had not taken up the appeal for a hearing. Petitioner further contended that it would be satisfied if the petition was disposed of with observation that till the said appeal was taken by the Tribunal; no adverse action could be taken against the petitioner on the basis of Impugned Order. High Court ordered the Department would not take any adverse action against Petition on the basis of Impugned Order and recovery notice, till appeal of Petitioner was taken up for hearing.

103. Furthermore, the Honourable Lahore High Court, Lahore, through its Order dated 24.08.2009 in W.P. No. 1561/2009 (related to Cement Cartel case) observed the following: "There is a lot of sensitivity about the repercussions of an adverse order being passed as the same would affect market capitalization of the petitioner companies and may expose them to further criticism and adverse action by other authorities. Be that as it may, for the present it is appropriate that the [Competition] Commission be allowed to complete its proceedings in accordance with law; this includes the disposal of the pending applications by the petitioners and the issuance of the final order in the matter of show cause notices issued to the petitioners. However, until the next date of hearing such Order shall not be published nor be issued to the press, not any adverse action thereunder taken against the petitioners".

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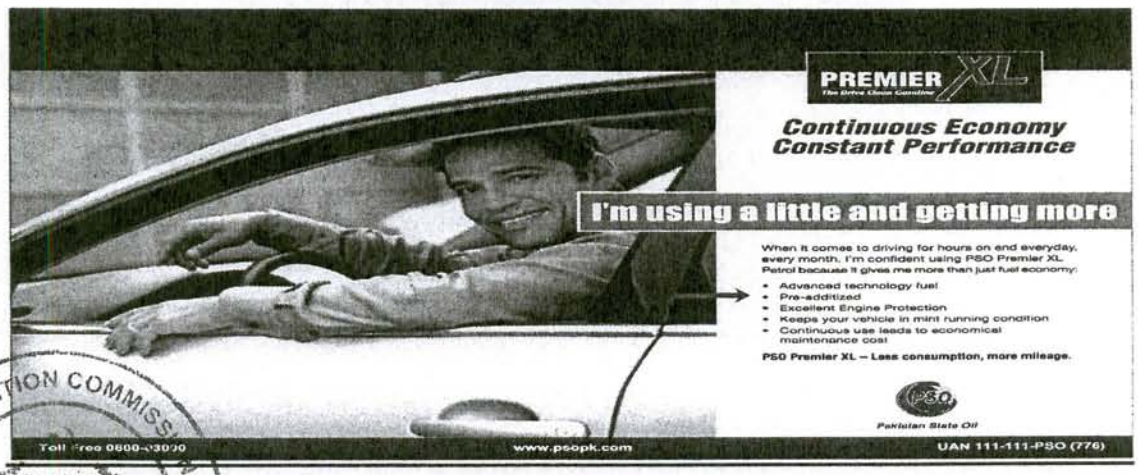
104. It is pertinent to point out that, in our considered view on the basis of case-law and judicial pronouncements quoted above, even a finding of contravention of the law do not amount to an adverse action. From afore-referred judgements, the position emerges that 'adverse action' relates to recovery proceedings. As a corollary, issuance of Show Cause Notices, requesting the parties to submit their written replies does not in any manner mean taking of adverse action as parties at that stage are only called upon to show cause in writing and also to avail the opportunity of being heard..."

17. In view of the above, the Commission is of the considered opinion that the issuance of the SCN to the Respondent is in conformance with the principles of natural justice and fairness. The SCN and the subsequent proceedings have provided the Respondent ample opportunity to present its case, adduce evidence and rebuttals, which they have availed to the fullest.

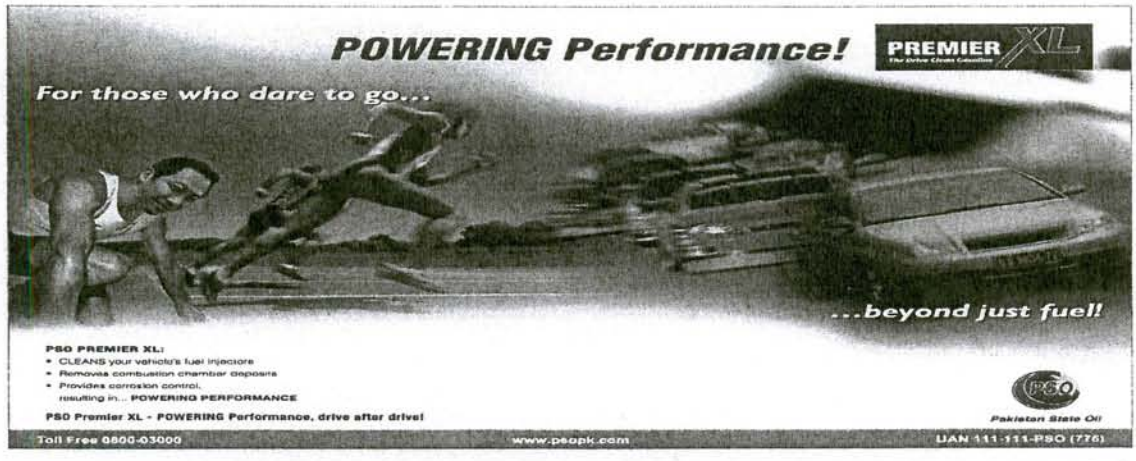
18. The Commission now proceeds to address the second issue. For reference, the advertisements and marketing campaign launched by the Respondent are reproduced below:

PSO PREMIUM XL GASOLINE [ADVERTISEMENTS]



[A]

[B]



[C]

19. The above ads of Premier XL with slogans *The Drive Clean Gasoline* are self-descriptive and self-suggestive of the fact to the consumers that because of the use of multifunctional additives, switching to Premier XL Gasoline will directly or indirectly result in:

   i. *Continuous economy and continuous performance*
   ii. *Excellent engine protection*
   iii. *Keep your vehicle in mint running condition*
   iv. *Continuous use leads to economical maintenance cost*
   v. *Cleans your vehicle's fuel injectors*
   vi. *Remove Combustion chamber deposits*
   vii. *Provides corrosion control resulting in high performance*
   viii. *PSO Premier XL – POWERING Performance, drive after drive*

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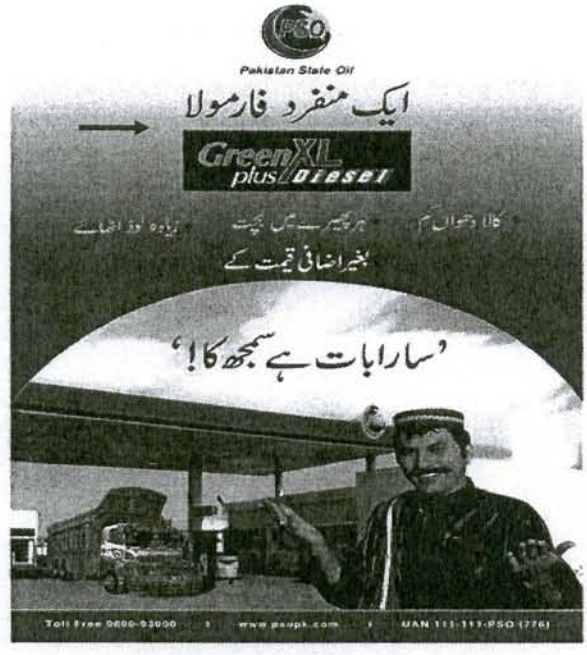
GREEN XL DIESEL PLUS [ADVERTISEMENT]



[D]

[E]

20. The above ads of self-descriptive and self-suggestive are also self-descriptive of the fact to the consumers that the Product is a unique formula and switching to Green XL Diesel Plus will directly or indirectly result in increase in engine life, keep it clean, less black emission and more mileage in comparison to other HSD/ diesel available in the market.

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21. In addition to the above, several Television Commercials (TVCs) available in the public domain (achieved versions of which still remain available online), allude, among other things, that the Respondent's Products are more efficient, eco-friendly and improve engine performance than any other fuel in the market.

22. In its submission, the Respondent has contended that the Enquiry Report is not based on expert opinion and the enquiry officers are not qualified to make findings on this issue. In this regard, it must be stated the enquiry officers during the course of any enquiry are fully independent and have full power, including under Section 33 of the Act, to enquire into the alleged violation in any manner as they deem appropriate, including seeking expert opinion (if required) on a case-by-case basis.

23. To elaborate, while conducting an enquiry pursuant to the provisions of the Act, enquiry officers' primary task is to undertake a factual assessment and investigate whether or not a *prima facie* violation of Section 10 of the Act by the concerned undertaking's representations, omissions or practices during the course of advertising and marketing its products or services has occurred.

24. To establish *prima facie* violation(s), their task is to conduct an examination of the factors *such as* express or implied claims made in an advertisement by juxtaposing the expressions, nature and contents of the claims, and evaluation of the overall general or net impression of the advertising and marketing practices of the concerned undertaking while keeping in view the targeted consumers. In order to make such an assessment, the enquiry officers are well trained and have the requisite skills and knowledge. Therefore, the Respondent's contention as to whether the enquiry officers possess suitable qualifications, whether they consulted experts, whether they used the powers envisaged under Section 33 of the Act are baseless and uncalled for.

25. For the above reasons, the Commission is of the considered opinion that a thorough and vigorous enquiry was carried out by the enquiry officer and the Enquiry Report is well-balanced and well-directed towards the facts of the case, fulfilling the requirement of cogent reasons and sufficient evidence, related to Respondent's advertising and marketing practices in question under Section 10 of the Act.

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26. Further, with regard to discharge of burden of proof by the Complainant and application of the QSO, the Commission in its Order in the matter of Show Cause Notice to Paint Manufacturers dated 13.01.2012 has clearly stated that:

> *"...for the purposes of deceptive marketing, actual deception need not be shown to carry the burden of proof. It is sufficient to establish that the advertisement has the tendency to deceive and capacity to mislead."*

27. In its reply to the SCN, the Respondent in Part II (B) "Preliminary Objections" has submitted that "*the so-called campaign in the SCN is passed and closed campaign, which was never carried out when the Competition Act was in place and is no more in the market*" i.e. in 2010. However, as noted above, in Part (III)(4) of the reply, the Respondent has submitted that "*PSO began the use of the additives believing that such use would deliver a better quality product to the customers and the same was relayed through its marketing campaigns at the time. However, it is submitted that since the discontinuation of the additives, PSO has canceled all previous marketing campaigns that referred to the use of the said additives in the fuel*" i.e. in 2012/2013. The two submissions are self-contradictory. Nonetheless, when viewed in the context of overall facts and circumstances of the case and evidence produced by the parties, the later statement tantamount to an admission of the fact that the Respondent actually discontinued its advertising and marketing campaigns of the Products by the end of 2012/2013 and/or as early as the Complaint was filed. During the hearing held on 11.08.2016, the Bench drew the Respondent's attention to the above-quoted statement on record. However, the Respondent did not opt to challenge the same. Even otherwise, the Respondent by his representations, act or omission before and after 2012/2013 has caused and/or persuaded consumers to believe that they are buying pre-additized Products, which according to the Respondent are of much superior quality and functionality than the similar products of the competing undertakings. In view of the foregoing, the Commission has no cavil in holding that the Respondent's advertising and marketing campaigns, as well as use of the brand/ insignia in question, continued while the Act was in place.

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Hence, the Respondent's representations, act or omissions accordingly remain actionable under the Act.

28. The Respondent's claims referring to the statements made by other OMCs were never substantiated and remain unproven. Moreover, the enquiry was initiated pursuant to the Complaint which was specifically directed to the representation and omissions of the Respondent. It is, therefore, the enquiry officer were required to investigate into advertising and marketing campaigns of the Respondent only instead of the whole industry.

29. In regard to the issue at hand, the Respondent has made absolute claims that because of the multifunctional additives, its Products will, inter alia, significantly reduce vehicles' maintenance costs, improve engine protection, reduce corrosion control, and enhance fuel economy.

30. It is noted that in order to avoid deceptive marketing practices, undertakings must have a reasonable basis to make claims. In this respect, the Commission in order in the Matter of Procter and Gamble dated 23.02.2010 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". The Respondent has failed to provide a reasonable basis in terms of scientific studies or tests that would have enabled it to make the impugned claims. In para 11(ii) of its reply, the Respondent has submitted that its claims were guided by research but it has been unable to provide any material in support of its contentions, which raise a fair presumption that there was no reasonable basis to make the claims in question as such.

31. For the above reasons, the Commission is of the considered opinion that Respondent's claims and representations during its advertising/ marketing campaigns in question, which started in 2003/2004 and continued beyond the enactment of the Act in 2010 till at least 2012/2013 with regard to its Products constituted the distribution of false or misleading information to consumers, including the distribution of information lacking reasonable basis, related to the character, method, properties, suitability of use and quality of the Products, and

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hence amounts to deceptive marketing practices in violation of Section 10(1) read with Section 10(2)(b) of the Act.

32. In addition, it is noted that distribution of information lacking reasonable basis is always capable of harming consumers as well as business interests of the competing undertakings. Therefore, the Respondent's representations, actions, and omissions with respect to the impugned claims are in violation of Section 10(1) read with Section 10(2)(a) of the Act.

33. With regard to the issue about continued branding/ insignias displayed at the Respondent's point of sales, both the Complainant and the Enquiry Report suggests that the same branding/ insignias are being used by the Respondent to-date which it launched at the time of launch of additized Products in 2003/2004. For ease of reference, a visual representation and website description of the Products are reproduced herein below:

PREMIER XLGASOLINE BRAND/ISIGINA AT PSO's POINT OF SALES

[F]

Website Description (retrieved on 27.09.2016)

Premier XL Gasoline: "Premier XL Gasoline has various properties that affect its performance in engines:

- *Vaporizes and ignites easily at low temperature*
- *Allow the engine to start and run well in cold or hot weather*
- *Better mileage and become cost effective with enhanced Octane number (RON)* [without any specification of the RON]
- *More refined that enable good engine performance*
- *Environmentally friendly by Controlled emission*
- *Engine runs reliably and efficient for a long time*
- *Controlled contents of Benzene to avoid Health Risks*
- *Efficient to Reduce CO omission*

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- *Meeting Euro-II Standards for Gasoline"*

GREEN XL PLUS DIESEL BRAND/ INGINGIA AT PSO's POINT OF SALES

[G]

Website Description (retrieved on 27.09.2016)

Green XL Plus Diesel: "PSO-Green XL plus Diesel take part in combustion cycle of diesel engine with following characteristics:

- *Starting ease*
- *Low Wear (Highly Lubricant)*
- *Efficient to reduce SOx and NOx Emission being Low Sulphur fuel*
- *Low Noise and low Emissions*
- *Long Filter Life (Stability and Fuel cleanliness)*
- *High Flash point for Complete Combustion*
- *Sufficient Power*
- *Low Particulate Matter*
- *Suitable for all Diesel Engine*
- *Low-Temperature Operability"*

34. As noted above, the Complainant has submitted that even after discontinuation of the pre-additized Products, the Respondent has continued the use/ display of same brands/ insignias highlighting *Premium XL Gasoline* and *Green XL Plus Diesel* in its advertisements and marketing campaigns and at its point of sales to promote the Products. However, post-2013, the Respondent has not publicized the fact that it has discontinued the use of additives in the Products. In addition, the acclaimed efficacy representations made on its Website concerning the Products properties and qualities, among other things, remain the same in substance, which in turn are deceptive because the consumers are likely to be under the impression that the Products still contain the same added benefit and efficacy as were introduced in 2003/2004.

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35. On the other hand, the Respondent has submitted that it introduced *Premier XL Gasoline* and *Green XL Plus Diesel* as a part of its re-branding strategy in 2003/2104. However, the facts of the case suggest that the use of additives and re-branding of the Products took place simultaneously; hence the same timing of two initiatives cannot be a coincidence. Therefore, the Commission observes that the continuation/ dissemination of the 'Premium' and 'Green' claims are baseless and amount to deception. Reference is made to the Australian Competition and Consumer Commission' Guide on 'Premium Claims' (Advertising Guide) in the process of advertising and selling. The Advertising Guide provides that[1]:

> *"Businesses often make claims about their products in an attempt to obtain a selling advantage. 'Premium Claim' is a broad term used to describe a claim that gives the impression that a product, or one of its attributes, has some kind of added benefits when compared to similar products and services. These claims go beyond a generic description of products."*
>
> *"Premium claims may influence consumers' purchasing decision if they give the impression that the product is a better choice than those without the claimed added benefits. As consumers are often unable to assess the accuracy of premium claims, [businesses] must ensure that the claims [they] make can be substantiated".*

36. In the similar vein, the US FTC's Guide for the Use of Green or Environmental Claims 2012 provides that:

> *"s.260.4 'General Environmental Benefit Claims' (a) It is deceptive to misrepresent, directly or by implication, that a product, package, or service offers a general environmental benefit'*

[1] http://www.accc.gov.au/system/files/722_Advertising%20and%20selling_FA_2015.pdf

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(b) Unqualified general environmental benefits claims are difficult to interpret and likely convey a wide range of meanings. In many cases, such claims are likely to convey that the product, package or service has specific or far-reaching benefits and may convey that the item or service has no negative environmental impact. Because it is highly unlikely that marketers can substantiate all reasonable interpretations of these claims, marketers should not make unqualified general environmental benefit claims.

(c) Marketers can qualify general environmental benefit claims to prevent deception about the nature of the environmental benefits being asserted. To avoid deceptions marketers should use clear and prominent qualifying language that limits the claim to a specific benefit. Markets should not imply that any specific benefit is significant if it is, in fact, negligible. If a qualified general claim conveys that a product is more environmentally beneficial overall because of that particular touted benefit(s), marketers should analyze trade-off resulting from the benefit(s) to determine if they can substantiate this claim.

(d) Even if a marketer explains, and has substantiation for, the product's specific environmental benefits claim if the advertisement otherwise implies deceptive claims. Therefore, the marketers should ensure that the advertisement's context does not imply deceptive environmental claims".

37. The Federal Trade Commission (FTC) of the United States regarding false and unsubstantiated claims in the matters of *Dura Lube* and *Motor Up* has stated that:

"...that both Dura Lube and Motor Up used labelling, packaging, infomercials, and other ads that represented, among other things, that compared to motor oil alone, their products reduce engine wear;

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extend engine life; and help prevent engine breakdowns or reduce the risk of serious engine damage when oil pressure is lost. The ads for both products also represented that they protect engines for up to 50,000 miles, according to the complaints. Motor Up ads also allegedly claimed that their product prevents engine corrosion, and will not drain out from the engine even when the oil is changed, and protects against engine wear even without motor oil. Dura Lube ads allegedly claimed that their product reduces emissions and improves gas mileage by up to 35%. The FTC alleged that the companies did not possess or rely on competent and reliable evidence to substantiate any of their performance claims, and therefore the claims were deceptive."

38. The Respondent in para 11(ii) of its reply has stated that the use of additives in fuel at the time, the original advertisement aired was encouraged by research. However, when it was asked for the basis of research, the Respondent did not produce any competent and reliable scientific evidence in terms of tests, analysis, studies based on the expertise of professional in the relevant area, that has been conducted and evaluated in an objective manner using procedures generally accepted in the profession to yield accurate and reliable results for the claims made in its marketing and advertising practices pertaining the Products.

39. While explaining the term '*knowingly*' the Guide provides *"that the person knew or must have known that his or her conduct was fraudulent or deceptive"*. This rule suggests the burden to prove whether or not an undertaking has been/ is engaged in *deceptive marketing* is on the Undertaking concerned because it has the advantage of having intimate knowledge or product, its characters, properties, among other things. In this respect, attention is drawn to the findings of the Commission in the matter of *Askari Bank Ltd., United Bank Ltd., MyBank Ltd., and Habib Bank Ltd.*, dated 14.01.2010 (the "Bank Order"), in which it was held that:

"[...] the language of Section 10 does not require a finding to be made regarding the alleged effect of the advertisement on the decision making of the consumer. All that is necessary is whether

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false or misleading information was disseminated through advertisement. This has also been the view taken in Zong Order, wherein it has been held that for the purposes of deceptive marketing, actual deception need not be shown to carry the burden of proof. It is sufficient to establish that the advertisement has the tendency to deceive and capacity to mislead. While there is nothing to preclude the Commission from conducting an enquiry into the effect that an advertisement has on consumer behaviour, there is no obligation under law to make such a determination".

40. Therefore, it is observed that the burden of proof is on the Undertaking as to whether or not it had imparted or is imparting factually correct information having a reasonable basis to its consumers. In this regard, it is noted that, while relying on the International Harvester Co., 104 FTC 949 at pg. 1058, the Commission in its Zong Order has held that:

"[i]t 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 statements from creating a misleading obligation..." Moreover, "it can also be deceptive for a seller to simply remain silent if he does so under circumstances that constitute an implied but false representation."

41. It is found that the marketing claims pre-2013 that the Products launched by the Respondent, it was claimed that the use of the Products will, *inter alia,* enhance 'fuel economy', lead to 'better engine cleanup and corrosion control of fuel tanks and piping,' and reduce 'exhaust emissions'. In view the absolute nature of the claims, any consumer could expect that the Respondent has added multifunction additives in the Products and he or she could gain the acclaimed benefits by use of them. Hence, the Products branding/ insignias displayed at the Respondent's point of sales neither were independent nor had the reasonable basis regarding the benefits of the use of the Products. In its Order of M/s Al-Hilal Industries (Pvt.) Limited Order dated June 20, 2012, the Commission has unequivocally stated that:

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"Keeping in view all the facts and circumstances of the matter at hand, the Commission is of the view that consumers are entitled to expect that actual contents of [product] match the overall impression created by the packaging and the marketing of the product. The undertakings must say what they mean and show what they sell to prevent deceptive marketing. The labelling on [the product] can have a significant impact on not only the consumer's purchasing decision but also the maintenance of fair competition in the market. In our considered view, there is no doubt that the undertaking's marketing in relation to its product, [...], is deceptive and found to be lacking a reasonable basis, in terms of Section 10 (1) read with Section 10 (2) (b) of the Act"[2]

42. Finally, it is observed that the continuation of branding /insignias of *Premier XL Plus* and *Green XL Plus Diesel* which were simultaneously launched with the introduction of pre-additized Products by the Respondent constitute omission of material information from the consumers, which certainly constitute advertisement and convey the impression through the display of brands/ insignias at its point of sales and hence deceptive marketing practice. To refer, in *Cliffdale Associates, Inc., 103 FTC 110 (1984),* it was held:

"Oral statements, label disclosure or point-of-sale material will not necessarily correct a deceptive representation or omission. Thus, when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser. "

43. Thus, after a careful scrutiny of the facts and the applicable law, Commission finds that the omission by the Respondent for not publicizing the fact of discontinuation of the use of additives from Products while retaining the same insignia/ branding of its Products amount to the distribution of materially false or misleading information to consumers related to the Products character, method, properties, suitability of use

[2] http://www.cc.gov.pk/images/Downloads/fresher_juice_20_06_2012.pdf

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and quality in violation of Section 10(1) read with Sections 10(2)(a) and 10(2)(b) of the Act.

44. Finally, before imposing the remedies and penalties in the matter at hand, it is clarified that though the petroleum industry in Pakistan is generally regulated by the MP&NR and OGRA, it remains the exclusive mandate of the Commission to protect the consumers from anti-competitive behaviours, including, *inter alia*, 'deceptive marketing practices' as are envisaged under Section 10 of the Act. It is also pertinent to note that dominant position of an undertaking is not condemned under the Act. As a principle, the Commission is of the considered opinion that a dominant undertaking may compete to whatever extent; they should nevertheless remain wary of the fact that the core of competition law is that where an undertaking has dominant position in the relevant market it has '*special responsibility not to allow its conduct to impair competition on the [...] market*' (Michelin v Commission, 1983 ECR 3461). Because of its dominant position, an undertaking is likely to enjoy more trust and therefore a larger consumer base, hence its anti-competitive practices are likely to cause more harm to consumers and damage competition not only in the relevant market but also in the related markets and to the competing undertakings.

Remedies and Penalties

45. For each of the two violations of Section 10(1) read with Section 10(2)(a) and 10(2)(b) of the Act related to the advertisement and marketing campaign and display of brand/insignia post discontinuation of the additives in the Products of, the Commission hereby imposes PKR 75 million as penalty for a total of PKR 150 million.

46. The Commission further directs the Respondent to immediately cease the use of 'Green' and 'Premium' in its branding/ insignia, including its trademarks/ logos on its Products and in marketing, advertising, packaging, and carrying material including on its website and its point of sales, and to make appropriate changes to its branding/ insignia within thirty (30) days that remove the impression that the Products are premium and environmentally friendly.

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47. The Respondent is further directed to inform the general public regarding the discontinuation of the use of additives in the Products through appropriate clarifications in all English and Urdu dailies for a period of one (1) week.

48. The Respondent is also directed to file a compliance report with the Registrar of the Commission within a period of forty-five (45) days from the date of issuance of this order and is reprimanded from indulging in deceptive marketing practices and violation of other provisions of the Act.

49. The Respondent is forewarned that non-compliance of this order and any further violation of any provisions of the Act shall attract stricter penalties and remedies.

50. The penalties and direction hereinabove have been imposed after taking into account the seriousness and length of the violations and its impact on the consumers, competitors, and the market in general.

51. Before parting, it is pertinent to mention here that the Commission is aware that the registration of potentially deceptive marks enables undertakings to engage in violation of Section 10 with impunity. In this regard, the Commission will consider issuing a policy note to concerned authorities under Section 29 of the Act separately.

52. In terms of the above, the SNC No. 12/2014 dated 02.10.2014 is hereby disposed of.

53. Ordered accordingly.

Vadiyya Khalil	Shahzad Ansar	Ikram Ul Haque Qureshi
Chairperson	***Member***	***Member***

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ISLAMABAD, The 29th Nov, 2016

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