



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF SHOW CAUSE NOTICE ISSUED TO
M/S KAYMU.PK
FOR DECEPTIVE MARKETING PRACTICES**

(FILE No. 202/Kaymu.Pk/OFT/2016)

Dates of Hearing

21st February 2017
14th March 2018

Adjudicating Members

Dr. Shahzad Ansar
Member

Dr. Muhammad Saleem
Member

On behalf of

Respondent
Kaymu.pk
(E-Cart Services (Pvt.) Limited)

Mr. Monis Usman, Director
Jam Zeeshan Ali, Advocate
Fazleghani Advocates

Complainant
Mr. Umair Ali

Complainant in person



ORDER

1. This Order shall dispose of proceedings arising out of Show Cause Notice No. 1 of 2017 (hereinafter the 'SCN') issued by the Competition Commission of Pakistan (hereinafter the 'Commission') to M/s. Kaymu.pk (hereinafter 'Kaymu' or 'Respondent') for *prima facie* violation of Section 10 (2) (a) and (b) read with Section 10 (1) of the Competition Act, 2010 (hereinafter the 'Act').

COMPLAINT

2. Mr. Umair Ali (hereinafter the 'Complainant') filed a complaint with the Commission for alleged violations of Section 10 of the Act. The Complainant alleged that he ordered a wrist watch from the Respondent's website, which, when delivered, was in a poor condition and was very different as compared to the one shown in the product description on the website. The Complainant further purported that the Respondent, on the website, affirmed to be the mediator in case of a dispute, however in actuality, it withdrew from the responsibility of resolving the dispute appropriately.
3. The Complainant further alleged that upon noticing the differences between the ordered watch and delivered watch, he raised a dispute with the Respondent and the Seller and apprised them of the differences between what was ordered and what was delivered, including the damaged box, on 11th November 2014. The Respondent, it is alleged, advised the Complainant on 19th of November 2014 to send the disputed product to the Seller's address, and stated that the dispute would be resolved within 10 working days. When contacted, a representative of the Seller stated that their address had changed, however no new address was given to the Complainant on which he was to return the disputed item. Shortly afterwards, the Seller ceased responding to the Complainant.
4. On the 23rd January 2015, the Complainant alleges, he received a notification from the Respondent stating that the dispute had been closed. The Complainant informed the Respondent that the dispute had not, in fact, been resolved, upon which the Respondent once again advised the Complainant to send the disputed item to the Seller. He alleged that the Respondent is an undertaking involved in the distribution of false and misleading information through its marketing and advertising campaign on its website that lack a reasonable basis and is capable of deceiving the consumers and harming the business interest of its competitors.



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ENQUIRY AND SHOW CAUSE NOTICE

5. In order to assess the allegations levelled in the Complaint, the competent authority initiated an enquiry which was concluded vide Enquiry Report dated 19th December 2016 (hereinafter the '**Enquiry Report**'), which concluded as follows:

99. The Respondent, thus, is not only involved in disseminating false/misleading information to the consumers that is lacking a reasonable basis, related to character, properties, and quality of its services but these actions also give it a competitive advantage over other undertakings in the same line of business leading it to prima facie violation of Section 10 (1) in terms of Section 10 2 (a) & (b) of the Act.

100. Therefore, it is recommended that in the interest of the public at large, proceedings may be initiated against the Respondent under provisions of Section 30 of the Act for, prima facie, violation of Section 10 of the Act, in accordance with law.

6. Based upon the conclusion and recommendations of the Enquiry Report, the competent authority approved the initiation of proceedings under Section 30 of the Act. Accordingly, on 01st February 2017, SCN was issued wherein the Respondent was required to respond in writing within fourteen (14) days and to appear before the Commission through an authorized representative and to avail the opportunity of being heard. The relevant portions of the SCN issued to the Respondent are reproduced hereunder:

"4. WHEREAS, in terms of the Enquiry Report, in general and paragraphs 5 to 20 in particular, the Complainant alleged that the Undertaking is involved in unfair and deceptive trade practices as it guarantees a safe and highly cooperative platform for buyers and sellers, however it allows sellers to commit fraud and mislead customers with regard to services provided while placing an order as well as after sale services; and

5. WHEREAS, in terms of the Enquiry Report, in general and paragraphs 57 to 59 & 66 to 67 in particular, it appears that the



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Undertaking deceived its customers via self-contradictory information provided and in the absence of fair warnings with regard to the seller's return policy; and

6. WHEREAS, in terms of the Enquiry Report, in general and paragraphs 60 to 63 in particular, it appears that the Undertaking, in contrast to its claims, does not confirm reliability of the Seller; and

7. WHEREAS, in terms of the Enquiry Report, in general and paragraphs 71 to 73 in particular, it appears that the Undertaking claims to have been offering multiple delivery and shipping options whereas they remain unavailable for the customers; and

8. WHEREAS, in terms of the Enquiry Report, in general and paragraphs 58 & 61 to 65 in particular, it appears that the Undertaking claims to act as a 'mediator' but does not in fact provide the service; and

9. WHEREAS, in terms of the Enquiry Report, in general and paragraphs 91 to 100 in particular, and in relation to paragraphs 5 to 8 of this notice it appears that the Undertaking is prima facie involved in disseminating false/misleading information to the customers that is lacking a reasonable basis, related to character, properties, and quality of its services, in prima facie violation of Section 10 (1) in terms of Section (2) (b) of the Act; and

10. WHEREAS, in terms of the Enquiry Report, in general and paragraphs 91 to 100 in particular, and in relation to paragraphs 5 to 8 of this notice, it appears that the Undertaking's conduct is also capable of harming business interests of other competitors, in prima facie violation of Section 10 (1) in terms of Section 10 (2) (a) of the Act;”

HEARING AND SUBMISSIONS OF PARTIES

Hearing in the matter was scheduled for 16th February 2017. However, on the request of the Respondent, the hearing in the matter was adjourned to 21st February 2017. Subsequently, hearings in the matter were held on 21st February 2017 and 14th March



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2018. The Respondent in the hearings argued in detail the written reply filed by it in response to the SCN. The submissions for ease of reference are reproduced herein below:

- a) The SCN or Enquiry Report do not cite any evidence to show that any misleading information by Kaymu is capable of harming the business interests of another undertaking.
- b) Section 10 (2) (a) is not a consumer protection provision. In the absence of any conclusion in the Enquiry Report regarding harm to other undertakings, the requirements of Section 10 (2) (a) are not met.
- c) In order to make a finding of violation of Section 10 (2) (b) of the Act, two requirements must be met, i.e., firstly the Respondent must have distributed false or misleading information to consumers, or information must lack a reasonable basis. Secondly, the misleading information distributed must be related to price, character, method or place of production, properties, suitability for use or quality of goods. Even if the Respondent distributed false or misleading information or information lacking a reasonable basis (and this is denied), such information was not related to the price, character, method or place of production, properties, suitability for use or quality of goods.
- d) Section 10 (2) (b) of the Act prohibits the dissemination of false or misleading information or information lacking a reasonable basis related to price, character, method or place of production, properties, suitability for use or quality of *goods*.
- e) The Respondent is an e-commerce platform owned and operated by M/s. E-Cart Services (Pvt.) Limited, and is a facilitator between buyers and sellers. It is denied that Kaymu was deceiving its customers by providing contradictory information and failing to give fair warnings with regard to the seller's return policy. Had Kaymu wanted to deceive customers vis-a-vis its return policy, it would not have displayed a tab with information on return policies. It is admitted, however, that the return



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policy tab could have been more prominent, and that since then, Kaymu has made it more prominent by displaying it directly below each product.

- f) With reference to the role of Kaymu as mediator between sellers and buyers, Kaymu is a facilitator between buyers and sellers in cases where disputes have arisen. This representation has been removed from the website since it was the Commission's view that it may give a different impression to users.
- g) The Enquiry Report alleges that the website does not require a user to read and accept its terms and conditions. This is false. Anyone who uses the website has to read and accept its terms and conditions.
- h) Kaymu does not guarantee the reliability of sellers, however it does take action once any complaint is made or if Kaymu notices any suspicious activity. This is also stated on its website.
- i) Kaymu has introduced a system whereby buyers are able to rate sellers and give their feedback. This is the safest and most reliable mechanism for consumers to confirm the reliability of a particular seller, and that it was a form of self-regulation.
- j) With reference to the allegation that the Respondent has failed to provide valid contact information for the seller, Kaymu does not constantly review the details of each seller therefore at times this information may become out dated. If and when any issue arises in this regard, Kaymu contacts the seller to update this information.
- k) As for the allegation that Kaymu has been offering different delivery and shipping options whereas not all of these are actually available, those delivery and shipping options that were not available were erroneously listed and have since been removed.



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MAINTAINABILITY OF THE SHOW CAUSE NOTICE

8. Before proceeding further and deliberating on the merits of the case, we deem it appropriate to decide the maintainability of the PROCEEDINGS UNDER Section 30 of the Act whereby SCN was issued. It needs to be appreciated that the Act was enacted by Parliament with the primary objective of protecting consumers from anti-competitive behaviors, which are detailed in Chapter II of the Act. However, for the Commission to exercise jurisdiction under the Act, the legislature in all its wisdom has provided for a procedure under Section 37 of the Act, which ought to be followed. Section 37, for ease of reference is reproduced herein below:

37. Enquiry and studies. - (1) The Commission may, on its own, and shall upon a reference made to it by the Federal Government, conduct enquiries into any matter relevant to the purposes of this Act.

(2) Where the Commission receives from an undertaking or a registered association of consumers a complaint in writing of such facts as appear to constitute a contravention of the provisions of Chapter II, it shall, unless it is of 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.

(3) The Commission may outsource studies by hiring consultants on contract.

(4) If upon the conclusion of an inquiry under sub-section (1) or sub-section (2), the Commission is of opinion that the findings are such that it is necessary in the public interest so to do, it shall initiate proceedings under section 30.

9. From the bare perusal of the above provisions, it is unambiguously clear that the Commission is empowered to initiate an enquiry only on three occasions i.e.: (i) on its own, or (ii) upon a reference filed by the Federal Government, or (iii) on a complaint filed by an undertaking or a registered association of consumers.



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10. In the instant matter the proceedings were initiated on a complaint filed by Mr. Umair Ali through email dated 30th April 2015. Further perusal of the contents of the Complaint reveals that the Complainant had approached the Commission as a consumer and not as an undertaking. The competent authority also initiated the enquiry on the aforesaid complaint under Section 37 (2) of the Act. It needs to be appreciated that the Commission is not empowered under Section 37 (2) of the Act to proceed with an enquiry on the complaint of the consumer, rather, the legislature in all its wisdom has categorically outlined that the complaint is to be filed either by the 'undertaking' or 'registered association of consumers'. Before proceeding further it is relevant to refer to the definition of 'undertaking' as provided under clause (q) of subsection (1) of Section 2 of the Act, which for ease of reference is reproduced herein below:

(q) "undertaking" means any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association or undertakings;

11. The Commission in one of its recent Orders i.e. **Order dated 15th December 2017 in the matter of Show Cause Notice issued to M/s Utility Stores Corporation of Pakistan (Private) Limited** has defined the term 'undertaking', in the following manner:

"29. A bare perusal of the definition of an 'undertaking' leaves no doubt that it is divided in two parts. The first part of the definition takes within its folds the types of entities that can possibly exist i.e. an individual, a company, a firm, an association of undertakings, governmental entities, sector-regulators, a body corporate established under the Provincials or the Federal laws of Pakistan, a cooperative society and any other entity regardless of its legal status and the way in which it is financed. Whereas the second part focuses on the nature of activity which is performed by them be it directly or indirectly i.e. production, supply, distribution of goods or provision or control of services. The most important part of the second limb of the definition is that the legislature within its wisdom by using the words 'in any way' (emphasis added), has made it clear that there is no condition on the



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legal entity to engage in commercial or economic activity to fall within the purview of 'undertaking' for the purposes of the Act. If any legal entity or natural person is engaged in any way in the production, supply, distribution of goods or provision or control of services, the said undertaking would fall within the purview of the term 'undertaking'."

12. We are cognizant of the fact that nowhere in the definition of 'undertaking' the word 'consumer' is used. Upon analysis it is noticed that the term 'consumer' though is not defined under the Act, has been used in various other provisions, the instances are as follows:

- a) *In clause (e) of subsection (1) of Section 2 of the Act in the definition of 'dominant position',*
- b) *In clause (k) of subsection (1) of Section 2 of the Act in the definition of 'relevant market',*
- c) *In clause (b) of subsection (1) of Section 9 of the Act outlining the criteria for grant of exemptions,*
- d) *In clause (b) of subsection (2) of Section 10 of the Act, in the instance of deceptive marketing practices.*

13. There is no doubt that apart from providing for free competition in all spheres of commercial and economic activity and to enhance economic efficiency, the scope of the Act is also to protect consumers from anti-competitive practices, which *inter alia* include the deceptive marketing practices. Although the term 'consumer' is not defined in the Act, however, in other consumer protection laws the term has been defined. It has been held by the August Supreme Court in its judgment reported as *Muhammad Hussain Patel vs. Habib Wali Muhammad, PLD 1981 SC 1*, that definition from other statute can only be borrowed from other statutes where both the statutes are *pari materia*. The question is when statutes are considered *pari materia*, in this regard we draw guidance from the judgment of Honorable Sindh High Court reported as *Murtaza Flour Mills (Private) Limited vs. Federation of Pakistan and others, 1996 MLD 1273*, wherein the Honourable Court has held:



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...[s]tatutes in pari materia are statutes which are so related as to form a system or code of legislation and when they relate to same persons or things or to the same class of persons or things or have the same purpose or object it is only then that the statutes are called in pari materia ...

14. Keeping in view the above approach in mind, the consumer protections laws are framed to protect the interests of the consumers. Similarly, the Act also provides for protection of consumers, hence, we are of the considered view that the definition of 'consumer' can be borrowed from the consumer protection legislation in force. The definitions are as follows:

(i). Subsection (3) of Section 2 of the Islamabad Consumer Protection Act, 1995 has defined the 'consumer' in the following terms:

(3). "consumer" means any person who:

(i) buys goods for a consideration which has been paid or partly paid and partly promised to be paid or under any system of deferred payment or hire purchase and includes any user of such goods but does not include a person who obtains such goods for re-sale or for any commercial purpose; or

(ii) hires any goods or services for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any beneficiary of such services.

(ii). Clause (c) of Section 2 of the Punjab Consumer Protection Act, 2005 has defined the consumer in the following terms:



(c) "consumer" means a person or entity who:

(i) buys or obtains on lease any product for a consideration and includes any user of such product but does not

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include a person who obtains any product for resale or for any commercial purpose; or

(ii) hires any services for a consideration and includes any beneficiary of such services;

(iii). Clause (e) of Section 2 of the Sindh Consumer Protection Act, 2014 has defined the consumer in the following terms:

(e) "Consumer" means a person or entity who:

(i) buys or obtain on lease any product for a consideration and includes any user of such product but does not include a person who obtains any product for resale or for any commercial purpose; or

(ii) hires any service for a consideration and includes any beneficiary of such services,

(iv) Clause (c) of Section 2 of the Khyber Pakhtunkhaw Consumer Protection Act, 1997 has defined the consumers in the following terms:

(c) "Consumer" means any person who:

(i) buys goods for a consideration which has been paid or to promised or partly paid and partly promised to be paid or under any system of deferred payment including hire purchase and leasing and includes any user of such goods but does not include a person who obtains such goods for re-sale or for any commercial purpose; or

(ii) hires any goods or services for a consideration which has been paid or promised or partly paid and partly promised to be paid or under any system of deferred payment including hire purchase and leasing and includes any beneficiary of such services.



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- (v) Clause (c) of Section 2 of the Balochistan Consumers Protection Act, 2003 has defined the consumer in the following terms:

(c) "Consumer" means any person who:

(i) buys goods for a consideration which has been paid or promised or partly paid and partly promised' to be-paid or under any system of deferred payment including hire. Purchase and leasing and includes any user of such goods but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires any goods or services for a consideration which has been paid or promised or partly paid and partly promised to be paid or under any system of deferred payment including hire purchase and leasing and includes any beneficiary of such services.

15. Bare perusal of the above definitions reveals that there seems to be consensus on the fundamental characteristic of the consumer i.e. the consumer is user of a good or beneficiary of the services and does not include a person who obtains such goods for resale or for any commercial purpose or is rendering services. Hence, the legislature in its wisdom has excluded the consumers from any other legal entity which is engaged in provision of goods or services.

16. We have also noticed that in the above referred provision of the Act, in particular, clause (e) of subsection (1) of Section 2, Clause (b) of subsection (1) of Section 9 and clause (b) of subsection (2) of Section 10 of the Act, the legislature has used the word 'undertaking' independent of the consumers. The intention of the legislature, thus, can be gathered from the use of words in the statute. The normal presumption would be that every single word has been used in an enactment with a purpose. Hence, different words are used by the legislature to convey a distinct meaning or implication, and must be construed accordingly. Had the intention of the legislature been to use the words 'undertaking' and 'consumer' interchangeably, the legislature would have only referred to 'undertaking' and would have included the term 'consumer' in the definition of 'undertaking'. However, in all its wisdom, which cannot be doubted, the words are used



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distinctively under the Act and cannot mean one and the same thing. In this regard, we are guided by the judgment of the August Supreme Court reported as Cooperative Insurance Society of Pakistan Limited vs. State Life Insurance Corporation of Pakistan, 1999 SCMR 2799, wherein the August Supreme Court, while dealing with the interpretation of two different words in an enactment held that “it is trite law that use of terms/words separately in a provision of the concerned enactment cannot but be given full effect to for the simple reason that redundancy cannot be presumed/countenanced.”

17. After reaching the conclusion that term ‘undertaking’ excludes ‘consumers’, we now proceed to ascertain whether any enquiry can be initiated on a complaint filed by a consumer under Section 37(2) of the Act. The Commission is empowered to initiate an enquiry into any matter relevant to the provisions of the Act, either *suo moto* or upon a reference made to it by the Federal Government in accordance with Section 37(1) of the Act. Furthermore, an enquiry in pursuance of Section 37(2) of the Act can only be initiated by the Commission upon a complaint in writing received from an “undertaking” or a “registered association of consumers”. In this regard it would be relevant to refer to the case reported as M/s Nawabsons Laboratories (Private) Limited vs. Government of Punjab and others, PLD 2003 Lahore 115, wherein the Honourable Court has held that “when a law requires a particular thing to be done in a particular manner, it can only be done in that manner and in no other manner, particularly when it may affect the rights of a person”.
18. It is clear from the facts available on the record that the Complainant was a consumer and the complaint was not filed on behalf of any registered association of the consumers. Since, a consumer does not fall within the purview of the definition of ‘undertaking’, hence, we hereby conclude that the initiation of the enquiry under Section 37(2) of the Act on the basis of the complaint in question was in fact violative of the express provisions of law. We note that for initiation of the enquiry any complaint filed with the Commission must satisfy the criteria laid down in the express provision of law, i.e. it must be filed by an ‘undertaking’ or ‘a registered association of consumers’ and must be substantiated with *prima facie* evidence, failing which no enquiry thereon can be conducted. In this regard reference is made to National Feeds Limited vs Competition Commission of Pakistan, 2016 CLD 1688.



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19. Deviating from the explicit procedure of an enacted law, in the instant matter the Act, is not merely a technicality but negation of the will of the legislature embodied under the law in vogue. One should be mindful of the fact that a statute is a formal expression in writing of the will of the legislature. Similarly, when the law requires a thing to be done in a particular manner the same must be done accordingly, and, if the prescribed procedure is not followed, it is assumed that it has not been legally done. The August Supreme Court in its judgment reported as Atta Muhammad Oureshi vs. The Settlement Commissioner, Lahore Division, Lahore and 2 others, PLD 1971 SC 61, has held that:

One other principle which has been enunciated in this behalf is that as a general rule, statutes, which enable persons to take legal proceedings under certain specified circumstances demand that those circumstances must be accurately obeyed, notwithstanding the fact that the provisions thereof are expressed in merely affirmative language. At page 226 of Crates on Statutory Laws, 6th Edition, this rule is stated thus:-

"That when a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the condition and qualifications annexed to the grant must be strictly applied."

Bearing these principles in mind, I have reached the conclusion that sub-clause (5) of section 20 of the Act ISI mandatory in character and places a limitation on the jurisdiction of the revising authority not to make any adverse order against a person without giving him opportunity to show cause against it. If such an order is made without fulfilment of this pre-requisite, it would certainly lack jurisdiction.

20. We are conscious of the fact that the Commission is a special quasi-judicial law enforcement authority, entrusted with a special mandate and special powers, for which certain conditions have been imposed. For the Commission to exercise such powers i.e. conduct an enquiry for contravention of Chapter II of the Act, certain conditions codified in Section 37 must be met, failing which any action taken or order passed



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certainly would lack jurisdiction and be void. The Honourable Islamabad High Court in *National Feeds Limited Case (supra)*, has provided a broader guidelines to the Commission, which are instructive and for ease of reference are reproduced herein below:

8. *Section 37 refers to 'inquires' and 'studies'. There is definitely a distinction between these two expressions. An inquiry can be initiated by the Commission, firstly on its own, secondly upon a reference made to it by the Federal Government and thirdly on receiving a complaint in writing from an undertaking or a registered association of consumers. The language of subsection (2) of section 37 is instructive of the legislative intent i.e. the obligations of the Commission or the preconditions for initiating an inquiry alleging contravention of the provisions of Chapter II of the Act of 2010. The said provision explicitly provides that the Commission, before initiating an inquiry, is under an obligation to form an opinion that the application i.e. the written complaint is not frivolous or vexatious nor is it based on insufficient facts or that it is substantiated by prima facie evidence. The Commission, therefore, in forming an opinion in this regard has to apply its mind and proceed under section 37 to conduct an inquiry on the basis of sufficient facts and prima facie evidence. However, the existence of such preconditions is not contemplated for the purposes of carrying out a study. The power of the Commission to conduct an inquiry on its own is neither unfettered nor can it be interpreted in isolation. The Commission, while acting on its own, cannot proceed on the basis of insufficient facts or when the allegations are not substantiated by prima facie evidence. The legislative intent is obvious when subsections (1) and (2) of section 37 are read together. Initiating an inquiry for an alleged contravention of the provisions of Chapter II is definitely an adverse action for an undertaking. Besides undermining the repute of a commercial entity in the market, the inquiry proceedings entails inconvenience and intrusive proceedings. The Commission, therefore, has a statutory duty to exercise powers vested for the purposes of conducting an inquiry in a just, fair manner, particularly*



on the basis of sufficient facts and when the complaint or allegations are substantiated by prima facie evidence. The Commission may gather sufficient facts or prima facie evidence on the basis of a 'study' conducted under section 37 and then initiate an inquiry on its own. A notice issued under subsection (1) or (2) ought to disclose the sufficient facts or the prima facie evidence on the basis of which an inquiry is initiated.

21. In view of the above, we are of the considered view that the enquiry in the instant matter is not in line with subsection (2) of Section 37 of the Act, and accordingly, no proceedings under Section 30 of the Act could be initiated, therefore, both the Enquiry Report and the SCN are hereby set-aside. However, without discussing the merits of the case, we deem it appropriate to remand the complaint back to the Registrar, who shall place the complaint before the Commission within thirty (30) days from the date of the Order. This Order shall not preclude the Commission from authorizing the conduct of *de-novo* enquiry in the instant matter in accordance with law.
22. Before parting with the Order, we also deem it appropriate to direct the Registrar of the Commission to circulate this Order amongst the concerned Head of Departments of the Commission, for future compliance with the explicit provisions of the Act and the rules and regulations made thereunder.
23. Order accordingly.



Dr. Shahzad Ansar
Member



Dr. Muhammad Saleem
Member



Islamabad the 30th March, 2018