

# COMPETITION COMMISSION OF PAKISTAN

## ENQUIRY REPORT

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(Under the provisions of Section 37(2) of the Competition Act, 2010)

**IN THE MATTER OF COMPLAINT FILED BY M/S PAKISTAN FRUIT JUICE  
CO. (PVT) LIMITED AGAINST M/S. UNILEVER PAKISTAN LIMITED AND  
M/S FRIESLAND CAMPINA ENGRO PAKISTAN LIMITED FOR  
DECEPTIVE MARKETING PRACTICES**

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M. SALMAN ZAFAR & UROOJ AZEEM AWAN

DATED: June 29, 2022

## I. BACKGROUND:

- 1.1 M/s Pakistan Fruit Juice Co. (Pvt.) Limited (the '**Complainant**'), filed a complaint, dated 21<sup>st</sup> of Feb, 2022, against M/s Unilever Pakistan Limited (the '**Respondent No. 1**') and M/s Friesland Campina Engro Pakistan Limited (the '**Respondent No. 2**') with the Competition Commission of Pakistan (the "**Commission**") for alleged violation of Section 10 of the Competition Act, 2010 (the "**Act**"), i.e., deceptive marketing practices.
- 1.2 It has been alleged in the complaint that the Respondents are falsely and misleadingly advertising their product, i.e., frozen dessert, as ice cream across various media, thereby in violation of Section 10 of the Act. It was further alleged that such conduct of the Respondents was capable of harming the business interest of the Complainant, which amounts to, *prima facie*, violation of Section 10 (2) (a) of the Act. Moreover, it was alleged that the Respondents were engaged in distribution of false or misleading information to consumers related to character, properties and suitability for use of frozen desserts, *prima facie*, a violation of Section 10 (2) (b) of the Act. It was also alleged that the Respondent No. 1 was engaged in false and misleading comparison of frozen desserts with ice cream without substantiation, in violation of Section 10 (2) (c) of the Act.
- 1.3 After attaining the preliminary facts, the Competent Authority initiated an enquiry, dated 2<sup>nd</sup> of Mar, 2022, in accordance with sub Section (2) of Section 37 of the Act by appointing Mr. M. Salman Zafar, Director (OFT) and Ms. Urooj A. Awan, Deputy Director (OFT) as enquiry officers (collectively the '**Enquiry Committee**') to conduct an enquiry on the issues raised in the complaint and to submit the enquiry report by giving its findings and recommendations, *inter alia*, on the following;
  - i. *Whether the Respondents are engaged in making false or misleading comparison of goods in the process of advertising, prima facie, in violation of Section 10 (2) (c) of the Act?*
  - ii. *Whether the conduct of the Respondents is capable of harming the business interest of the Complainant, prima facie, in violation of Section 10 (2) (a) of the Act?*
  - iii. *Whether the Respondents are disseminating false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, properties, suitability for use, and quality of goods, prima facie, in violation of Section 10 (2) (b) of the Act?*
  - iv. *Whether there is a spillover effect of the conduct of the Respondents?*

## 2. THE COMPLAINT:

- 2.1 The Complainant in its complaint to the Commission has made the following submissions:

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- 2.2 This complaint was made on behalf of the Complainant through its authorised representative i.e. Dawood Iqbal Law Chambers, Advocates & Corporate Counsel. It was submitted that the Complainant is a private limited company registered under the laws of Pakistan and is a pioneer in the ice cream and beverages industries. The Complainant is engaged, inter alia, in the business of ice cream through its brand 'Hico' Ice Cream. Copy of the Board Resolution and Power of Attorney in the subject matter were provided respectively and are attached as annexures to the complaint for reference.
- 2.3 It was submitted that M/s Unilever Pakistan Limited (hereinafter "Respondent No 1") is a company registered under the laws of Pakistan and is engaged, inter alia, in the business of frozen desserts through its brand "Wall's".
- 2.4 It was further submitted that M/s Friesland Campina Engro Pakistan Limited (hereinafter "Respondent No 2") is also a company registered under the laws of Pakistan and is a subsidiary of the Dutch multinational corporation, M/s Royal Friesland Campina. Respondent No 2 is engaged, inter alia, in the business of frozen desserts through its brand "Omoré".
- 2.5 It was explained that the industry in question comprises of two types of products: "ice cream" and "frozen desserts" due to difference in their nature with significant differences in their composition and cost structures. Moreover, these different products are recognized by relevant regulatory authorities such as the Punjab Food Authority as well as international authorities like the United States Food & Drug Administration.
- 2.6 The difference between ice cream and a frozen dessert is that ice cream is made from dairy fat (e.g., milk, cream, butter, etc.), whereas frozen dessert is made from vegetable fat (e.g., palm oil, etc.). It was submitted that for a product to be considered ice cream, it must contain at least 10% milk fat and 10.1% non-fat milk solids.
- 2.7 Due to this difference, the cost of manufacturing ice cream is significantly higher than that of frozen dessert because of the expensive raw materials. Specifically, the primary driver in cost difference between ice cream and frozen dessert is the use of ingredients like milk, whole milk powder, cream, and/or butter instead of skimmed milk powder, whey powder, and palm oil.
- 2.8 The Complainant is a manufacturer of "ice cream" products through its brand Hico Ice Cream whereas Respondent No.1 and Respondent No. 2 are manufacturers of "frozen dessert" products. It was alleged that the Respondent No. 1 and Respondent No. 2 have been engaging in deceptive marketing practices by presenting their products (i.e. frozen desserts) as ice cream

through their televised advertisements, social media campaigns, packaging, and other marketing materials.

- 2.9 The Complainant submitted that Punjab Food Authority has, in the past, issued public notices under Punjab Food Authority Act, 2011 stating therein that frozen desserts are not substitutes for ice cream and had urged parents to prefer ice cream over frozen desserts for their children. The Public Notice was issued in light of the survey conducted by the Government of Pakistan, according to which 44% children in the country were suffering from malnutrition. (Copy of the notice is attached herewith as Annex A.)
- 2.10 It was alleged that since the products of Respondent No. 1 and Respondent No. 2 are made using vegetable fat, and do not meet the specifications to be categorized as ice cream, they cannot be referred to as ice cream and consequently, cannot be branded, marketed, and sold as ice cream under the Competition Act, 2010 as well as the relevant Regulatory Laws.
- 2.11 However, it was submitted that both the Respondents products, despite not being ice cream, are being marketed, branded, promoted and sold as and/or under the guise of ice cream through Deceptive Marketing Practices. They have continuously been disseminating false and misleading information with the ulterior motive to harm business interests of their competitors, including the Complainant, by creating a false perception about their products in the consumer market. Copy of the evidence of Deceptive Marketing Practices by both Respondent No. 1 & No. 2, is attached herewith as Annex B.
- 2.12 The Complainant also discussed in detail some of the false and misleading contents of Respondents being advertised, marketed, published, and promoted on television, social media, and digital media, as below:

#### A. WALL'S

- 2.13 In one of the commercials which is/was regularly aired on major television channels, featuring prominent actors, the use of words "ٹھنڈ میرا کیم" gives a clear impression to the "ordinary consumer" that Wall's is an ice cream brand and not frozen dessert. The said advertisement is placed on Slide No. 8 of the Annex B. This advertisement can also be accessed on YouTube at <https://www.youtube.com/watch?v=JMITytRstDE>, where it was posted on 16 November 2021. As of February 15, 2022, it has received 6,680,369 views.
- 2.14 A clip dated 9 June 2021, placed on Slide No. 10 of the Annex-B mentions the words "Creamy Vanilla ice cream" which are clearly false and deceptive, as the product is a frozen dessert and

not ice cream. Moreover, the use of word "Creamy" falsely gives an impression that the product is made using cream. The advertisement can be accessed at <https://www.youtube.com/watch?v=fxY8qVP4BBI>. This video has received 1,266,763 views as of February 15, 2022.

- 2.15 Another advertisement dated 29 November 2021, posted on official Facebook page of Wall's Pakistan mentions the words "THAND MEIN ICE CREAM?". This is false representation of the product of Respondent No. 1 and is meant to deceive consumers into believing that the product is ice cream. The said advertisement is placed on Slide No. 11 of the Annex B. The advertisement can be accessed <https://www.facebook.com/Walls.Pakistan/videos/438361271151876>. This video has received 363,000 views as of February 15, 2022.
- 2.16 The clip dated 1 December 2021, placed on Slide No. 12 of the Annex B, also shows the words "THAND MEIN ICE CREAM?". The same is absolutely false and is only meant to deceive consumers and harm business interests of competitors. This clip can be seen on Instagram at <https://www.instagram.com/p/CW7vF3JF4qN/>.
- 2.17 Similarly, a clip dated 1 December 2021 placed on Slide No. 13 of the Annex B also shows the words "THAND MEIN ICE CREAM?". It is available on Instagram at <https://www.instagram.com/p/CW7u656l0s8/>.
- 2.18 Similarly, a clip dated 24 May 2019, placed on Slide No. 14 of the Annex B shows Wall's as "ice cream", and, hence, is false, deceptive and is capable of harming business interests of the competitors. It can be accessed on Facebook at <https://www.facebook.com/WallsCreamyDelights/videos/2273246619>. This video has received 614,000 views as of February 15, 2022.
- 2.19 A clip dated 30 April 2021, placed on Slide No. 15 of the Annex B also shows Wall's as "ice cream", and, therefore, is false and deceptive. It can be seen on Facebook at <https://www.facebook.com/WallsCreamyDelights/videos/1602383059>. This video has received 220,000 views as of February 15, 2022.
- 2.20 A television advertisement placed on Slide No. 16 of the Annex B, and also available on YouTube at <https://www.youtube.com/watch?v=FxuJEKJQBU0> (Posted on 25 June 2017), gives an impression that Wall's is an ice cream brand. The said advertisement disseminates the following: "Hey, yaar tu ice cream ho ke kaanp raha hai?". This video has received 4,474,587 views as of February 15, 2022.

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- 2.21 The social media post placed on Slide No. 17 of the Annex B falsely mentions the word "*Ice Cream*" on the label of the product.
- 2.22 Wall's products are being sold by almost all E-Commerce platforms as ice cream due to the false perception it has created, over the years, not only in the minds of ordinary consumers but also sophisticated consumers such as the E-Commerce platforms. Screenshots of the evidence is placed on Slide No. 23, 25, 26, 27, 28, 29 and 30 of the Annex B.
- 2.23 The official website of Respondent No. 1 deceives consumers by falsely referring to Wall's as an ice cream brand. Screenshot of the evidence is placed on Slide No. 20 of the Annex B. It can be accessed at <https://www.unilever.pk/brands/foodrefreshment/walls/>.
- 2.24 The television advertisement that is placed on Slide No. 37 of the Annex B and posted on YouTube on 18 September is misleading as it conceals material information regarding the nature of the product. The said advertisement can be accessed at the [https://www.youtube.com/watch?v=4CLXOWJ\\_uhc](https://www.youtube.com/watch?v=4CLXOWJ_uhc). It has received 595,387 views as of February 17, 2022.
- 2.25 The advertisement placed on Slide No. 38 of the Annex B was posted on YouTube on 21 February, 2019. It misleads consumers into believing that the product is made using cream through deceptive phrases like "*Itna Creamy*". The advertisement is available at <https://www.youtube.com/watch?v=gOO37V7jkBU>. It has received 1,662,932 views as of February 15, 2022.
- 2.26 The advertisement posted on official Instagram account of Respondent No. 1's walls creamy delights on 17 May 2021 is misleading as it shows milk splashes and lacks proper disclosures, thus, giving an impression that Wall's is an ice cream brand. It is placed on Slide No. 46 of the Annex B and can be seen at <https://www.instagram.com/p/CO93sZXBpY/>.
- 2.27 Another advertisement placed on Slide No. 47 of the Annex B was posted on YouTube on 7 April 2021. The said advertisement misleads consumers into believing that the product is made using cream. It is available on Facebook at <https://www.facebook.com/WallsCreamyDelights/videos/3639605081>. This video has 518,000 views as of February 15, 2022.
- 2.28 Same is the case with the clip posted on official Facebook page of Wall's on 26 March 2021. The said video is placed on Slide No. 48 of the Annex B and can be accessed at

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<https://www.facebook.com/WallsCreamyDelights/videos/4499319062>. This video has 1,000,000 views as of February 15, 2022.

- 2.29 The advertisement placed on Slide No. 49 of the Annex B, which is also available on Facebook at <https://www.facebook.com/watch/?v=1459543427423048> (Posted on 3 April 2017), gives a wrong impression to ordinary consumers due to the absence of proper disclosures regarding nature of the product and splashes of milk shown therein.
- 2.30 The Instagram post, dated 8 April 2021, placed on Slide No. 50 of the Annex B, and available at <https://www.instagram.com/p/CNZRIgxBZAe/> shows milk splashes and lacks proper disclosures, hence, is misleading as well. Similarly, an Instagram post, dated 26 March 2021, also shows milk splashes and lacks proper disclosures. It is placed on Slide No. 51 of the Annex B and can be seen at <https://www.instagram.com/p/CM4llw7Bama/>.
- 2.31 On 24 May 2021, a misleading clip, giving an impression to ordinary consumers that the advertised product is made using cream, was posted on official Facebook page of Wall's. The said advertisement is placed on Slide No. 52 of the Annex B and can be accessed at <https://www.facebook.com/WallsCreamyDelights/videos/4807302998>.
- 2.32 The video dated 15 May 2019, posted on official Facebook page of Wall's is misleading as it conceals material information regarding the nature of the product. The said video is placed on Slide No. 53 of the Annex B and can be accessed at <https://www.facebook.com/WallsCreamyDelights/videos/6772008260>.
- 2.33 The clip dated 16 April 2021, posted on official Facebook page of Wall's is also misleading as it gives an impression to ordinary consumers that the advertised product is cream based. It is placed on Slide No. 54 of the Annex B and can be seen at <https://www.facebook.com/WallsCreamyDelights/videos/4513015561>.
- 2.34 On 15 May 2019, a misleading picture, giving an impression to ordinary consumers that the advertised product is made using cream, was posted on official Facebook page of Wall's. It is placed on Slide No. 57 of the Annex B and can be accessed at <https://www.facebook.com/WallsCreamyDelights/photos/a.349016538475748/2439084282802286>. Similarly, another picture posted on official Facebook page on 21 February 2019, placed on Slide No. 58 of the Annex B can be accessed at <https://www.facebook.com/WallsCreamyDelights/photos/a.349016538475748/2307720269272022>.

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- 2.35 On 7 April 2017, a clip placed on Slide No. 64 of the Annex B, was posted on official Facebook page of Wall's which shows the following statement: *"Wall's Pakistan clarifies misconception regarding frozen dessert on social media. Both frozen dessert and ice cream are made using milk ingredients. Moreover, frozen dessert offers consumers a healthier choice by using skimmed milk and 100% natural vegetable oil. This is in line with global and local best practices and nutritional standards accepted by leading public health agencies. As a result frozen dessert has zero cholesterol, healthier fats and lesser calories in comparison to ice cream, which is made using cream and butter So go ahead and enjoy with a healthier choice this summer."*
- 2.36 This statement is unsubstantiated and portrays Wall's products to be better alternative of ice cream without any reasonable and scientific basis, and, hence, is false and misleading. It is available on Facebook at <https://www.facebook.com/WallsCreamyDelights/videos/1464706520>. This video has 296,000 views as of February 15, 2022.

## **B. OMORÉ**

- 2.37 In one of the posts dated 21 February 2015, placed on Slide No. 18 of Annex B, two pictures, mentioning the word "ice cream" were shared from the official Facebook page of Respondent No. 2's brand 'Omore'. The said post is false and has the ability to harm business interests of competitors by deceiving consumers. The said post can be accessed on Facebook at <https://www.facebook.com/OmorePK/photos/a.478251007077/101531>
- 2.38 On 25 February 2015, a picture, falsely mentioning the word "ice cream" was posted on the official Facebook page of Omoré. The said post is placed on Slide No. 19 of the Annex B and can be accessed at <https://www.facebook.com/OmorePK/photos/a.478251007077/101526>.
- 2.39 The official website of Respondent No. 2 deceives consumers by falsely referring to Omoré as an ice cream brand. Screenshot of the evidence is placed on Slide No. 21 of the Annex B.
- 2.40 Moreover, Omoré products are being sold by almost all E-Commerce platforms as an ice cream due to the false perception it has created, over the years, not only in the minds of ordinary consumers but also sophisticated consumers such as the E-Commerce platforms customers. Screenshots of the evidence is placed on Slide No. 24, 31 and 32 of the Annex B.
- 2.41 A clip placed on Slide No. 39 of the Annex B was posted on official Facebook page of Omoré on 23 March 2018. The said clip misleads consumers by omitting material information and showing milk splashes and fruits, thus giving an impression that the product is made using



fruits and milk fats. It is available at <https://www.facebook.com/watch/?v=10155376809572078>.

- 2.42 Similarly, another advertisement, posted on 28 August 2018, is available on YouTube at <https://www.youtube.com/watch?v=F4or5zIhiFM>. The said advertisement is misleading as it conceals material information from consumers and shows milk, thus, giving an impression that the product is dairy based ice cream. The said advertisement is placed on Slide No. 41 of the Annex B.
- 2.43 Moreover, on 12 May 2021, an advertisement placed on Slide No. 42 of the Annex B, was posted on the official YouTube Channel of Omoré. The said video is misleading as it gives wrong impression to ordinary consumers due to the absence of proper disclosures regarding nature of the product and splashes of milk shown therein. It can be accessed at <https://www.youtube.com/watch?v=V0hIVUA09I4>.
- 2.44 Allegedly, another misleading advertisement, placed on Slide No. 43 of the Annex B, was posted on YouTube. This advertisement shows milk splashes and conceals material information from consumers, thus, giving an impression that Omoré is an ice cream brand. It is available at [https://www.youtube.com/watch?v=Pq4PLt\\_rxJw](https://www.youtube.com/watch?v=Pq4PLt_rxJw).
- 2.45 The television advertisement placed on Slide No. 44 of the Annex B is misleading as it shows milk splashes and conceals material information from consumers while giving an impression that the product is ice cream. It can be seen at <https://www.youtube.com/watch?v=7NMNaOI2zek>, (Posted on 14 May 2015).
- 2.46 The advertisement posted on official Instagram account of Respondent No. 2 on 26 April 2018 is misleading as it shows milk splashes and lacks proper disclosures, thus, giving an impression that Omoré is an ice cream brand. It is placed on Slide No. 55 of the Annex B and can be seen at <https://www.instagram.com/p/BiB98tkl5P6>. A similar clip was shared by official Instagram account of Omoré on 4 June 2021. The said clip is placed on Slide No. 56 of the Annex B and can be seen at <https://www.instagram.com/p/CPsgq8uLS0V/>.
- 2.47 On 31 July 2021, a misleading picture, giving an impression to ordinary consumers that the advertised product is made using cream, was posted on official Facebook page of Omoré. The said advertisement is placed on Slide No. 59 of the Annex B and can be accessed at <https://www.facebook.com/OmorePK/photos/a.478251007077/101582>.

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- 2.48 The Facebook post, dated 23 March 2018, placed on Slide No. 60 of the Annex B and available at <https://www.facebook.com/OmorePK/photos/a.478251007077/101553> shows milk splashes and lacks proper disclosures, therefore, is misleading.
- 2.49 In addition to the instances alleged by the Complainant, it was submitted that both the packaging of Wall's and Omoré is misleading, as the word/term "frozen dessert" mentioned thereon is printed in very small font and the same conveys no useful information to the consumers of ordinary intelligence, and, is, therefore, inadequate disclosure in terms of Section 10 of the Competition Act, 2010.
- 2.50 Moreover, it was submitted that Punjab Pure Food Rules, 2011 (hereinafter the "PFA Rules '11") read with Punjab Pure Food Regulations, 2018 (hereinafter the "PFA Regulations '18") require frozen desserts manufacturers to write "the brand or trade name" of the manufacturer immediately followed by the words "**frozen dessert contains edible vegetable oil**" in both Urdu and English languages on 10% on the front side of the label, and in equal uniform lettering. They further require that these words shall form the first line or lines of the label and no other word shall appear in the same line or lines and these words will be surrounded by rectangular shape surrounding the line.
- 2.51 The express and implied claims made by both brands i.e. Wall's and Omoré in the advertisements and the overall general impression created by such advertisements/marketing in the mind of an "ordinary consumer" is that the products are ice cream. Moreover, the omissions in disclosure and the implied impression conveyed through representations are of the nature that is likely to be deceptive even for a sophisticated consumer, let alone the 'ordinary consumer'.
- 2.52 It was submitted that the instances of alleged Deceptive Marketing Practices undertaken by Wall's and Omoré, as detailed in paragraphs above, have a direct impact on the public at large, and therefore, it is in the interest of the general public and fair competition in the market that the undertakings should be stopped from marketing their products in an unfair and misleading manner and be encouraged to resort to marketing practices which are transparent and give consumers true and correct information. In addition, they have enabled Wall's and Omoré to gain business advantage over competing brands, including that of the Complainant and, hence, are in violation of Section 10 of the Competition Act, 2010.
- 2.53 Section 10 of the Competition Act, 2010 was reproduced in verbatim by the Complainant as ground of allegations for reference. The Complainant further quoted the Show Cause Notice issued to China Mobile and Pakistan Telecom Mobile, reported as 2010 CLD 1478, with regard

to the terms "False" and "Misleading", wherein the learned Commission had held that "False Information" can be said to include: oral or written statements or representations that are;

- (a) contrary to truth or fact and not in accordance with the reality or actuality;
- (b) usually implies either conscious wrong or culpable negligence,
- (c) has a stricter and stronger connotation, and
- (d) is not readily open to interpretation.

2.54 Whereas 'misleading information' may essentially include oral or written statements or representations that are;

- (a) capable of giving wrong impression or idea,
- (b) likely to lead into error of conduct, thought, or judgment,
- (c) tends to misinform or misguide owing to vagueness or any omission,
- (d) may or may not be deliberate or conscious and
- (e) in contrast to false information, it has less onerous connotation and is somewhat open to interpretation as the circumstances and conduct of a party may be treated as relevant to a certain extent..."

2.55 It was alleged that both the Respondents are disseminating false and misleading information through their product packaging, labelling, television commercials, advertisements, statements made by them on their official websites and social media platforms in respect of their products, and, therefore, are deceiving consumers into believing that the products are ice cream and, hence, constitute deceptive marketing practices in terms of Section 10 of the Competition Act, 2010.

2.56 Moreover, It was submitted that the terms ice cream and frozen desserts are defined under the PFA Rules '11 and the PFA Regulations '18 as follows:

### **Ice Cream**

Para 12.1.35 of the Appendix to the PFA Rules '11, defines the term Ice Cream as; "*the pure clean frozen product made from a combination of milk or cream or other milk products, with or without eggs, but with potable water, sugar and harmless flavouring and harmless colouring, and with or without added stabilizer, and with or without fruit, juices, nuts, coffee cocoa or chocolate, syrup, cakes or confections.*"

It is also defined under para 01.8.1 of Appendix-I (Chapter 1) to the PFA Regulations '18 as; "*the pure clean frozen product made from a combination of milk or cream or butter or other*

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*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 flavouring and harmless colouring, and with or without added stabilizer and emulsifier, and with or without fruits, vegetables, juices, nuts, coffee, cocoa or chocolate, syrup, cakes or confections."*

2.57 It was further submitted that the Ice Cream brands shall conform to the following standards;

- (i) Milk Fat Not less than 10 percent
- (ii) Total Solids Not less than 36 percent
- (iii) Milk solids not fat Not less than 10.1 percent.

*(Copies of the relevant portion of the PFA Rules '11 and the PFA Regulations '18 are attached herewith as Annex C and D respectively.)*


2.58 Moreover, the term frozen dessert, is defined in para 12.1.36 of the Appendix to the PFA Rules '11, as;

*"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."*

2.59 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.

2.60 Para 01.9.4 of Appendix-I (Chapter 1) to the PFA Regulations '18 defines the term "frozen desserts" in the same manner as reproduced here above. However, in addition, it provides as follows:

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*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 labelling requirement shall be mandatory.*

- 2.61 The Honourable Lahore High Court has held in the case titled Yummy Milk Products (Private) Limited versus Government of Punjab, reported as 1999 CLC 1443, Lahore that "the general rule is that different products should be packed, labelled and marketed in a manner that ordinary person is not misled and deceived by identity, name wrapper and packing. He should clearly understand what he was purchasing
- 2.62 Similarly, it was submitted that the products prepared with vegetable fat should not be permitted to be branded as ice cream. Such a rule is need of the time because' otherwise people would continue to be deceived. It was further held that "the preparation of ice cream with vegetable fat is an offence under, sections 6 and 8 read with section 23 of Ordinance, 1960. The local authorities as well as Respondents have failed to discharge their statutory duty under the Ordinance, 1960. The Honourable Court's observation was reproduced that "...two types of products must have different names quite distinguishable for the reasons that the literacy rate in the country is very low and the main consumer of these products are the children, therefore, the word "ice cream" not prepared as per para. 19 above should not be allowed to be used for any product. "
- 2.63 The learned Commission has, in the case of Show Cause Notices issued to Paint Manufacturers, reported as 2012 CLD 808, held that "an advertisement is deceptive if it has the aforementioned elements of being misleading, capable of giving the wrong impression or idea and tends to misinform or misguide owing to vagueness or any omission. "
- 2.64 It was alleged that in this regard the dissemination of false and misleading information regarding the nature of the products by the Respondents omissions in disclosure of material information and the impression that their marketing campaigns convey, are deceptive even for a sophisticated consumer, let alone the 'ordinary consumer' and, therefore, are in violation of Section 10 (1) of Competition Act, 2010.
- 2.65 Similarly, it was alleged that the marketing campaign/advertisements of the Respondents, being false and misleading, are, in fact, harming the business interests of the Complainant as well as other competing undertakings operating in the market. The effect of engaging in such practices is the diversion of customers to the products of the Respondents, thereby inflicting financial and reputational losses to competitors, and, hence, are in violation of Section 10 (2) (a) of the Act.



2.66 Moreover, the Commission has, in the Matter of Show Cause Notice issued to M/S Jotun Pakistan (Pvt) Limited, reported as 2015 CLD 1638, held that "[t]o prove conduct under Section 10 (2) (a) of the Act, it is not necessary to show actual harm to competitors. It is sufficient to show the existence of a deceptive marketing practice that has the potential to harm the business interests of the competitors...". Similarly, with regards to the violation of Section 10 (2) (a) of the Act, it has been held in the matter of Show Cause Notice issued to University of Management and Technology reported 2019 CLD 615, that "*the consequences of the distribution of false or misleading information is such that it is always capable of harming the business interests of and resulting in fatal consequences for the competitors of the Respondent concerned.*".

2.67 It was alleged that the evidences detailed in the paragraphs above clearly establish that the marketing campaigns of Respondents are deceptive in terms of Section 10 of the Act in general, read with sub-Section 10 (2) (b) of the Act which prohibits distribution of false and misleading information to consumers, including the distribution of information lacking reasonable basis, related to the character, properties, quality and suitability for use of a product. The claims of the Wall's and Omoré in marketing of their Products (textual, pictorial, and visual) are false and misleading the consumers, hence, deceptive in nature within the meanings of Section 10 (2) (b) of the Competition Act, 2010.

2.68 Furthermore, the official websites of the Respondents also refer to their respective brands of Wall's and Omoré as ice cream, hence, leading consumers to a deception that the product is ice cream, and, is, therefore, in violation of Section 10 (2) (b) of the Competition Act, 2010. Moreover, the packaging of the products of the Respondents give wrong impression to ordinary consumers due to the absence of proper disclosures and the presence of deceptive pictures thereon. This could lead an ordinary consumer into believing that the said product is ice cream.

2.69 The Complainant submitted that it was held in the matter of Show Cause Notice issued to Reckitt Benckiser Pakistan Limited, reported as 2021 CLD 484, that "*an advertisement is deceptive if it contains false or misleading statement or omits information that is likely to mislead consumers in ordinary circumstances; and is material in that it is important to a consumer's decision to buy or use the product. Examples of material information may include representation about a product's character, performance, features, safety, price or effectiveness.*" Wherein, it is submitted that in this matter both the Respondents are constantly omitting important and material information regarding the nature of their product and have deceived consumers into believing that their products are ice cream.

2.70 With regard to the disclosure i.e. mentioning the term frozen dessert on the labels by Respondents on their packaging, it was submitted that the same are neither in accordance with

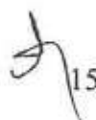
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the guidelines/principles provided/settled by the learned Commission through its orders, nor are they in line with the relevant regulatory laws i.e. Punjab Pure Food Ordinance, 1960, Punjab Pure Food Rules, 2011, and Punjab Pure Food Regulations, 2018. They are printed in a very small font which is not an adequate disclosure as such information would have to be clearly conveyed to the customer/consumer. Therefore, the advertisements as well as labels/packaging of the products are misleading, hence, deceptive and, in violation of Section 10 of the Act. Moreover, such disclosure is neither easily noticeable/legible nor easily understandable by an ordinary consumer, hence, the same is tantamount to distribution of false and misleading information to the consumer in violation of Section 10 (2) (b) of the Competition Act. The said deceptive marketing practices are also in violation of Section 10 (2) (a).

2.71 It was also submitted that this learned Commission has, in the matter of Show Cause Notices Issued to Askari Bank Ltd, United Bank Ltd My Bank Ltd & Habib Bank Ltd (No. 2(9)/DIR(L)/CCP/2008), held that *"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 easily understood by a lay person. ... Nothing can justify provision of misleading information to consumers. Accuracy and reliability of material representations made about the product are critical because distortion of material information impairs the consumer's ability to make an informed decision... ... In sum, all material features and conditions should be prominently displayed in clear and unambiguous language..."*

2.72 The principle regarding disclaimer/disclosure, as settled by this learned Commission, on various occasions, is that they must be "clear and conspicuous" and placed "as close as possible" to the advertising claim. While explaining "clear and conspicuous" disclosures, the Commission relied on order of the Federal Trade Commission in the matter of Epan, Inc. and Ayman A. Difrawi 2016, Case No: 6:16-ev-714-Orl-41TBS, wherein it was held that:

- i. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication that includes a representation requiring a disclosure and is made through both visual and audible mean, such a television advertisement, the disclosure must be made through the same means through which the representation is made.
- ii. A visual disclosure, by its size, contrast, location, in length of time it appears, and other characteristics must stand out from accompanying text or other visual elements so that it is easily noticed, read and understood.
- iii. An audible disclosure, including the telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

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- iv. In any communication using an interactive electronic medium such as the internet or software, the disclosure must be unavoidable.
- v. The disclosure must use the diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.
- vi. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.
- vii. The disclosure must not be contradicted or mitigated by, or inconsistent with anything else in the communication; and
- viii. When representation or sale practices target a specific audience, such as children or elderly or terminally ill, "ordinary consumer" includes reasonable members of that group.

2.73 The Complainant submitted that it is important that ordinary consumers cannot be expected to be able to appreciate the technical difference between ice cream and frozen desserts and unless frozen desserts manufacturers are directed to clearly highlight that their product is a frozen dessert and not ice cream in all advertising material (e.g., print, television, digital, radio) in the language easily understandable to consumers and to print the disclosure "یہ انسکریم نہیں ہے" in explicit, clear, visible and bold words on their labels and packaging along with their registered trademark, ordinary consumers would continue to be deceived by dissemination of false and misleading information. Reliance, in this regard, is placed on the orders of this learned Commission in the matters of Show Cause Notices issued to dairy companies for Deceptive Marketing Practices and Reckitt Benckiser Pakistan Limited, reported as 2017 CLD 789 and 2021 CLD 484 respectively.

2.74 With regard to Section 10 (2) (c) of the Competition Act, the Commission stated in the matter of Show Cause Notice issued to M/S Reckitt Benckiser Pakistan Limited for Deceptive Marketing Practices, reported as 2015 CLD 1864 that "...a comparison of goods made without reasonable basis will be considered to be false and misleading in terms of this provision. A comparison is made whenever the qualities of two or more products or services are judged against each other." In this regard, the statement posted on official Facebook page of Wall's and placed on Slide No. 64 of the Annex B, is false, misleading, and without any reasonable and scientific basis, and, is, therefore, in violation of Section 10 (2) (c) of the Competition Act, 2010.

2.75 Relevant portions of the statement is reproduced hereunder for ease of reference: "...Moreover, frozen dessert offers consumers a healthier choice by using skimmed milk and 100% natural vegetable oil. This is in line with global and local best practices and nutritional standards accepted by leading public health agencies. As a result frozen dessert has zero cholesterol,

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*healthier fats and lesser calories in comparison to ice cream, which is made using cream and butter So go ahead and enjoy with a healthier choice this summer."*

2.76 It was alleged that such claims and comparisons made by Wall's in relation to its product without any reasonable basis and support from any reliable scientific evidence are capable of deception and in violation of Section 10 (2) (c) of the Competition Act, 2010. The same is also capable of harming the interests of competing businesses, hence, in violation of Section 10 (2) (a) of the Competition Act, 2010 as well.

2.77 It was submitted that the concept of 'reasonable basis' has been recognized by this learned Commission in its order made in the matter of Proctor and Gamble Pakistan Limited, reported as 2010 CLD 1696. It was held as under: *"The concept of having a reasonable basis is an established concept in the USA and was introduced after much deliberations and public comments through policy statements regarding advertising substantiation. It provides that the advertiser must have had some recognizable substantiation for the claims made prior to making it in an advertisement. Moreover, in order to determine the net general impression of the claim, the claim cannot be evaluated as an isolated script."*

2.78 The Complainant submitted that it is well established that in cases of comparative marketing, the comparisons must be clearly identified, truthful, and non-deceptive. The claims made must have prior substantiation, and reasonable basis backed by 'competent and reliable' scientific evidence. Reliance is placed on orders of the Commission in the matters of Show Cause Notices issued to Askari Bank Ltd, United Bank Ltd My Bank Ltd & Habib Bank Ltd, reported as 2010 CLD 1454, M/s Jotun Pakistan (Private) Limited, reported as 2015 CLD 1638, M/s Proctor & Gamble Pakistan Limited, reported as 2017 CLD 1609, Colgate Palmolive, reported as 2017 CLD 1550, and Dairy Companies, reported as 2017 CLD 789.

2.79 In view of the above, it is clear that both the Respondents are engaged in anti-competitive behaviour and their advertisements and marketing campaigns on television and social/digital media etc. constitute deceptive marketing practice and that the consumers are being furnished false and misleading information. Thus, the same are in violation of Section 10 (1), 10(2) (a), (b) and (c) of the Competition Act, 2010.

2.80 In view of the breach of Section 10 of the Competition Act, 2010 by the Respondents, through their brands of Wall's and Omoré respectively, there is grave risk of serious and irreparable damage not only to the goodwill and market share of the Complainant but also to other undertakings competing in the relevant market. Therefore, it would be in the public interest to prevent all frozen desserts manufacturers, including the Respondents from continuing to

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deceive the general public during the pendency of any proceedings that may be initiated by this learned Commission.

2.81 The Complainant respectfully prayed that this learned Commission may be pleased to:

- i. Initiate proceedings against the Respondents for contravention of Section 10 of the Competition Act, 2010. Such proceedings may be initiated without further inquiry as envisaged by Regulation 22 (2) of the Competition (General Enforcement) Regulations, 2007 as sufficient information is available on record to establish contravention of Section 10 of the Competition Act, 2010;
- ii. Direct all frozen desserts manufacturers to cease and desist from undertaking deceptive marketing practices in respect of their products and to clearly highlight that their product is a frozen dessert and not ice cream in all advertising material (e.g., print, television, digital, radio) in the language and wording, which is understandable to the general public;
- iii. Require all frozen desserts manufacturers that the words "frozen dessert contains edible vegetable oil" shall be conjoint with the brand/trade name both in Urdu and English languages on 10% of the area of the label on front side in equal uniform lettering;
- iv. Further direct all frozen desserts manufacturers to print the disclosure "یہ انسکریم نہیں ہے" in explicit, clear, visible and bold words on their labels and packaging;
- v. Direct all frozen desserts manufacturers to cease and desist from showing pictorial representation of ice cream scoop from their packaging as most of the consumers are unable to differentiate between ice cream and frozen desserts;
- vi. Direct all frozen desserts manufacturers to place/make sufficient disclosure and/or adequate disclaimer not only on the box packing of the products, but also on each of the wrapper containing the frozen desserts as well as on the freezers they make available to retailers;
- vii. Restrain all frozen desserts manufacturers from serving their products to the consumers without sufficient disclosures as prayed for in the preceding paragraphs, at cafes, restaurant, and banquets etc.;
- viii. Bar the Respondents from using or making any of the claims or captions in marketing and sale of their products without giving the aforesaid disclaimers/disclosures, be it a publication, print, electronic or social/digital media;
- ix. Direct all frozen desserts manufacturers and require them to ensure that their agents, distributors, dealers, employees, any and all representatives immediately remove from the market as well as their social media accounts and websites any/or all false and misleading publications and marketing material of the products and permanently restrain them from indulging in deceptive marketing;
- x. Direct Respondents to publicize and notify the general public that their product is not ice cream and has been falsely marketed in the past; the quantum, contents, and manner of this communication should be based on the quantum, content, and manner of the deceptive

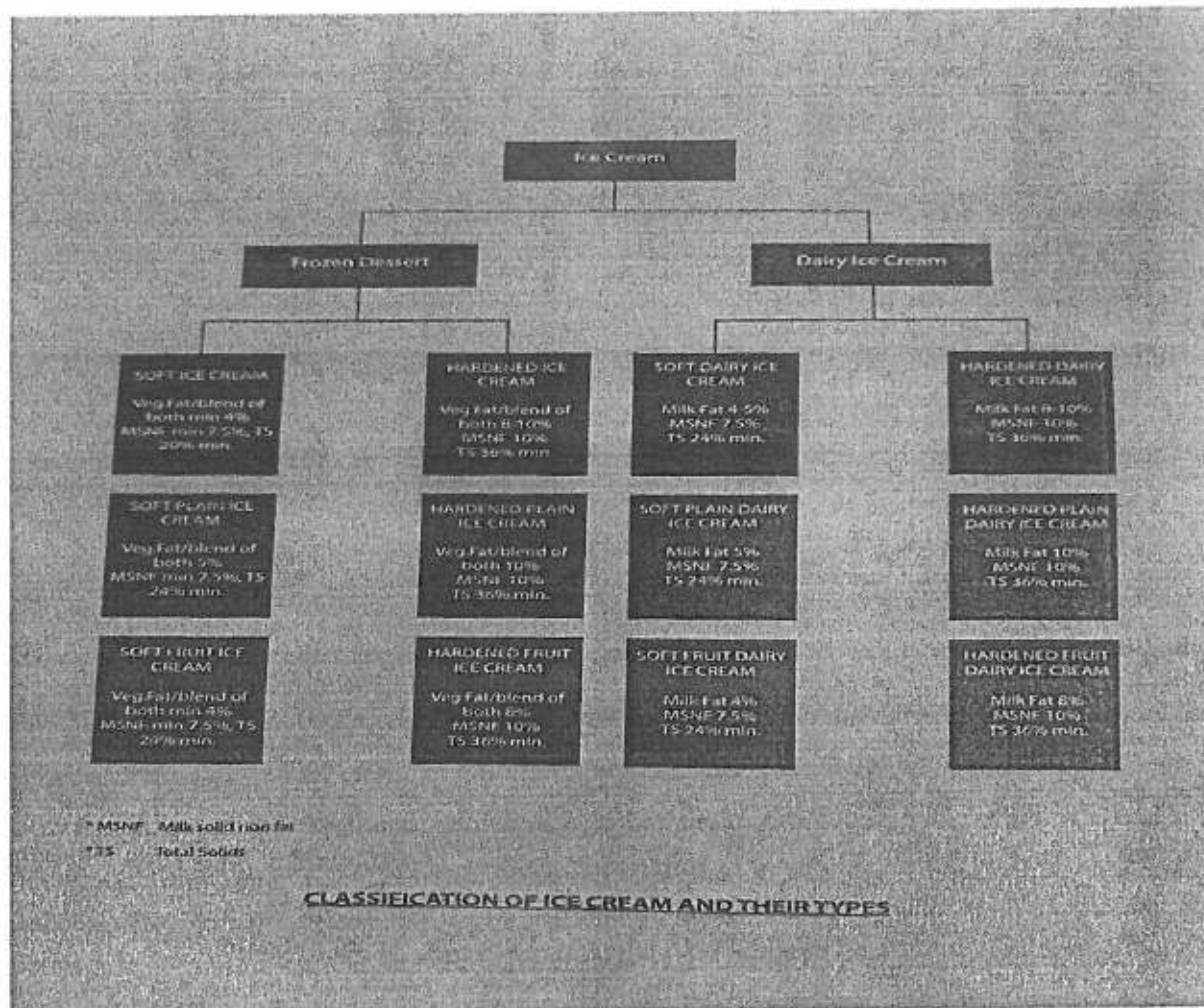


- advertising performed in the past by the Respondents and however this learned Commission may deem appropriate;
- xi. Impose maximum and deterrent penalty on the Respondents for violation of Section 10 (1), 10 (2) (a), (b), and (c) of the Competition Act, 2010;
  - xii. Grant injunction under Section 32 of the Competition Act, 2010 restraining the Respondents from publishing any further content, or advertising, in any other manner, their false and deceptive claims; and
  - xiii. Grant any other better relief to the Complainant that this learned Commission deems fit and appropriate in the circumstances of the case.

### **3. SUBMISSIONS OF THE RESPONDENT No 1 (Unilever Pakistan Limited):**

- 3.1 The complaint was forwarded to the Respondent No. 1 by the Enquiry Committee for comments on March 10, 2022. However, the Respondent No. 1 requested an extension vide letter dated March 17, 2022, which was granted through a letter dated March 29, 2022. The Respondent No. 1 once again requested for extension in time period for filing a reply vide letter dated 1<sup>st</sup> of April, 2022. Another extension was granted to the Respondent No. 1 vide letter dated 6<sup>th</sup> of April, 2022. The legal counsel to the Respondent, namely Fazleghani Advocates, filed for yet another extension in time period vide letter dated 15<sup>th</sup> of April, 2022. Another extension was granted to the undertaking vide letter dated 18<sup>th</sup> of April, 2022. The legal counsel to Respondent No. 1 finally submitted its comments received on 22<sup>nd</sup> of April, 2022, the contents of which are reproduced below.
- 3.2 The Respondent No. 1, through its legal counsel, submitted in reply to the subject complaint that it is a fast-moving consumer goods company engaged in the production and sale of various consumer products under world renowned brands. It is the largest dairy ice cream and frozen dessert manufacturer in the world. In Pakistan, the Respondent No. 1 manufactures and markets its frozen desserts and dairy ice creams under the brand names 'Wall's' and 'Magnum', respectively.
- 3.3 The Complainant had alleged that the Respondent No. 1 and Respondent No. 2 had violated Section 10 of the Competition Act, 2010. Respondent No. 1, with regards to allegation levelled against itself in the complaint, at the outset denied each and every averment cited, unless or until or any part thereof is expressly and specifically admitted herein below.
- 3.4 The legal counsel to Respondent No. 1 stated that the standards of quality of all food items in Pakistan are set by Pakistan Standards and Quality Control Authority, (hereafter referred to as 'PSQCA'). On 30.03.2010, the PSQCA adopted the Pakistan Standard Specification for Ice Cream (PS 969-2010). Through the PS 969-2010, the types of ice cream to which the standard applied were set out in the following manner.

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- 3.5 Respondent No. 1 submitted that, as detailed above, PS 969-2010 recognized that the term 'ice cream' included within itself both frozen desserts and dairy ice creams. Under the subcategory of frozen desserts, the PSQCA repeatedly lists various types of ice creams such as soft plain ice cream, soft fruit ice cream, hardened plain ice cream, and hardened fruit ice cream. The classification of frozen desserts within the broader heading of ice cream, therefore, was abundantly clear and could not be controverted.
- 3.6 The legal counsel to Respondent No. 1 claimed that in relation to PS 969-2010, the Respondent No. 1 had been granted certificates by the PSQCA for its products that fall under the categories of frozen desserts and dairy ice creams. (The same have been attached as **Annex-E** for reference).
- 3.7 Respondent No. 1 further stated that as per the decision of the 41<sup>st</sup> meeting of the council of common interests, the standards set by PSQCA are considered as the single harmonized standard prevailing across Pakistan, with any provincial standards being repealed. For the

implementation of the federal standards, the National Standards Steering Committee for Food Standards has been set up which conducted its first meeting on 10<sup>th</sup> of June, 2020. The referred committee also includes the Punjab Food Authority as one of its members. (The referred decision is attached as Annex-F for reference).

3.8 The Respondent No. 1 stated that it is pertinent to mention that it was upon the decision of the 41<sup>st</sup> meeting of the Council of Common Interests and the minutes of the meeting that the Hon'ble Lahore High Court disposed off the Writ Petition No. 230096 of 2018, through which the provincial usurpation of the federal power had been challenged. The referred disposal is attached as Annex-G for reference).

3.9 Respondent No. 1 stated that as per clarification dated 18<sup>th</sup> of March, 2022, issued by the Ministry of Science and Technology, the Council of Common Interests building upon the foundation set by the 41<sup>st</sup> meeting has clarified the roles of the federal and provincial governments through its 44<sup>th</sup> meeting in the following manner.

S. No.	Activity	Responsibility
1.	Formulation and Notification of Food Standards	PSQCA being a National Standard Body (NSB) is mandated to formulate and notify the standards and Pakistan Standard.
2.	Issuance of Labelling and Certification Marks/logo	Labelling and Certification Marks logo is the mandate of Federal Government/PSQCA
3.	Registration of business for sale of food products, licensing of factory establishment of food products	Registration of businesses for sale of food products, licensing of factory establishment of food products shall remain with the Provincial Governments.
4.	Enforcement and Monitoring	Enforcement and Monitoring of the food products shall remain with the Provincial Governments.

3.10 The Respondent No. 1 reiterated that through PS 969.2010, the PSQCA had unequivocally explained what it considered the term ice cream to include. Being the independent regulator in terms of setting food standards, the PSQCA's expertise should be given due deference.

- 3.11 It was also stated by the Respondent No. 1 that the Hon'ble Commission and PSQCA are entities that operate within the federal domain. For the harmonious interaction between the spheres of law and to avoid any conflict, the interpretation put forward by the PSQCA should be preferred and adopted by this Hon'ble Commission as well. The Respondent No. 1 stated that the standards set by PSQCA are the only standards to be followed across Pakistan, and all provincial standards, including those under the Punjab Food Ordinance 1960, Punjab Food Authority Act, Punjab Pure Food Rules 2011, and Punjab Food Regulations 2018 do not carry legal weight.
- 3.12 It was submitted by the Respondent No. 1 that by only focusing on the now defunct legal regime set up in Punjab, the Complainant had attempted to mislead this Hon'ble Commission. Therefore, the Complainant must be put to strict proof to explain the significant omission of any discussion of PS 969-2010 in the body of the complaint. That through the complaint the Complainant had highlighted marketing materials used by the Respondent No. 1 on conventional marketing channels and also on social media. The common denominator between the marketing materials was that the Respondent No. 1 had earlier used the term ice cream or given the impression that its products fall within the heading of ice cream. That for any deceptive marketing to have taken place, such practices must be predicated upon any false or misleading information that includes the consumer into buying a product. As detailed above the Respondent No. 1 claimed that all its products fell within the PSQCA standard for ice cream which applies to both frozen desserts and dairy ice cream. By the following classification set out by the federal standard which prevails across Pakistan and overrides any provincial standard, the Respondent No. 1 had wholly complied with operating legal regime.
- 3.13 The legal counsel stated that the Complainant was trying to create a distinction between frozen desserts and ice cream in the absence of legal footing. That the only distinction that PSQCA recognizes is one between frozen desserts and dairy ice creams with both sub categories falling within the umbrella heading of ice cream. In the absence of any legal basis in favor of the Complainant's stance and on the availability of the contrary legal basis in the shape of PS 969-2010 in favor of the Respondent No. 1's stance, the Respondent No. 1's marketing practices were completely in line with the prevailing law.
- 3.14 The Respondent No.1 stated that the complaint was predicated upon the underlying assumption that dairy ice cream was superior or more desirable to a consumer when compared to a frozen dessert. Dairy ice cream and frozen desserts are compositionally similar in nature except that the former contains only dairy fats whereas desserts may contain dairy or vegetable fats (or a combination of both). Any assumption to the effect that dairy ice cream is inherently superior is blatantly incorrect as not only are frozen desserts are lower in trans and saturated fats, they may also provide a non-dairy option which may be preferred due to a number of health and dietary restrictions. In this reference, a list of frequently asked questions prepared by the Respondent No. 1's global nutrition team is attached as Annex-H.



- 3.15 That as per the jurisprudence developed by this Hon'ble Commission, a disclosure or disclaimer may be made by a person in relation to any claim regarding a product subject to such disclosure being made in a clear and conspicuous manner. In the absence of any claim, the concept of disclosure is not attracted. In relation to the Respondent No. 1's products, it does not make any claims that may be qualified through the use of a disclaimer or disclosure.
- 3.16 The Respondent No. 1 states that its products that fall within the subcategory of frozen desserts, it has clearly provided such information on the packing material. Such information, however, cannot be construed as a disclaimer or disclosure as no claim is being made by the Respondent. That any reliance placed upon the Hon'ble Lahore High Court's decision in Yummy Milk Products (Pvt.) Ltd Punjab (1999 CLC 1443) to the present situation is entirely misconstrued. That said judgment of the Single Bench was appealed and set aside by a Division Bench of the Lahore Court in the Lever Brothers Pakistan Ltd v. Punjab (PLD 2001 Lahore 1). Any observations given by the single bench in relation to the marketing of ice cream and frozen desserts, therefore, are of no legal value. That without prejudice to the above, in relation to any violation under the PFA Act 2011, PFA Rules '11, or PFA Regulations '18, the Complainant may exercise the appropriate remedy under the provincial regime. A purported violation of the abovementioned however, does not entitle the Complainant to approach the Hon'ble Commission under Section 10 of the Competition Act, 2010.
- 3.17 Moreover, that as per the decision of the Lahore High Court's full bench in LPG Association of Pakistan v. Pakistan (2021 CLD 214), every notice under the Competition Act, 2010 must contain reasons disclosing the effect of anti-competitive behavior is spilling over provincial territorial limits. Neither the Complainant nor the notice of the Complainant issued to the Respondent No. 1 disclose any spillover effect.
- 3.18 The legal counsel states that the Respondent No. 1 craves leave to urge further grounds and provide supplementary information to this Hon'ble Commission, if necessary. That the reply provided by Respondent No. 1 is without prejudice to any constitutional or jurisdictional objections that the Respondent No. 1 may raise at the appropriate time before the appropriate forum.
- 3.19 The Respondent No. 1 clarified once more that it manufactures and markets both frozen desserts and ice creams, as opposed to the submissions in the complaint.
- 3.20 In the parawise reply to the facts in the Complainant's appeal the Respondent No. 1 stated that the Complainant has made an arbitrary and false distinction between frozen desserts and ice cream. The Respondent No. 1 stated that it is in absolute compliance with the present legal regime. Any reference to terminology used by the Respondent in its marketing materials follows the Pakistan Standards for ice cream, i.e., PS 969-2010.

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- 3.21 Moreover, as per PS 969-2010, the Respondent No. 1 claimed to meet the exact specification to be categorized as ice cream and for products that do not contain any dairy fats, it does not market them as dairy ice cream.
- 3.22 It was submitted that the Complainant has misread the applicable food regime for food standards and concocted a false and frivolous complaint against the Respondent No. 1.
- 3.23 It was also stated in response to the grounds in the complaint that in the matter of China Mobile Pak limited (2010 CLD 1478) (Zong Order), the Hon'ble Commission had specifically explained the contours of the terms 'false' and 'misleading' vis a vis deceptive marketing practice. None of the Respondent No. 1's marketing materials can be considered as containing false or misleading information due to such materials being in consonance with PS 969-2010.
- 3.24 The Respondent No. 1 also stated that no business interests of the Complainant are being harmed by its marketing practices. The Respondent No. 1 further stated that as per jurisprudence developed by this Honorable Commission, a disclosure or disclaimer may be made by a person in relation to any claim regarding a product subject to such disclosure being made in a clear and conspicuous manner. In the absence of any claim, the concept of disclosure is not attracted. In relation to its products, the Respondent No. 1 does not make any claims that may be qualified through the use of a disclaimer and disclosure.
- 3.25 That reasonable substantiation of the information has been attached as Annex-H by the Respondent No. 1, and therefore the grounds to lack of substantiation of claims is denied. The Respondent 1 claims that the scientific basis for making such claim as vetted by the Respondent No 1's Global Nutrition Team clarifies that frozen desserts as a variant of ice cream are healthier than dairy ice cream.
- 3.26 The legal counsel to Respondent No. 1 therefore respectfully prayed in the interests of justice that this Honorable Commission may dismiss the instant complaint and accordingly do not initiate proceedings under Section 30 of the Act, 2010 against the Respondent No. 1.

#### **4. SUBMISSIONS OF THE RESPONDENT No 2 (Friesland Campina Engro Pak Ltd.):**

- 4.1 The complaint was forwarded to the Respondent No. 2 by the Enquiry Committee for comments on March 10, 2022. However, the Respondent No. 2, through its legal counsel AJURIS Advocates and Corporate Counsel, requested an extension vide letter dated March 15, 2022, which was granted via email dated March 28, 2022. The legal counsel to Respondent No. 2 once again requested for extension in time via email dated 1<sup>st</sup> of April, 2022, which was granted via email dated 4<sup>th</sup> of April, 2022. The comments were finally submitted through letter dated 7<sup>th</sup> of April, 2022, the contents of which are reproduced below.

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- 4.2 The Respondent No. 2 is a public limited company established under the erstwhile Companies Ordinance, 1984 (presently under the Companies Act 2017) and is a subsidiary of the Dutch multinational cooperative M/s Royal Friesland Campina. The Respondent No. 2 was formerly known as Engro Foods Limited, and is now known as M/s Friesland Campina Engro Pakistan Limited. It is a leading dairy company in Pakistan and is engaged, inter alia, in the business of selling frozen desserts and ice cream under its brand "Omoré".
- 4.3 The legal counsel to Respondent No. 2 acknowledged to receiving letter dated 10<sup>th</sup> of March, 2022 bearing file no: 427/Pakistan Fruit Juice/OFT/CCP/2022, wherein the Enquiry Committee intimated of the initiation of enquiry proceedings against the Respondent No. 2 in the furtherance of the subject complaint. The reply by Respondent No. 2 only pertains to the allegations made against itself in the complaint.
- 4.4 The Respondent No. 2 submitted that the allegations contained in the complaint are wholly misconceived from the very outset. The crux of the Complainant's allegations is that the Respondent No. 2 has been indulging in deceptive marketing practices by disseminating false and misleading information which are prejudicial to business interest of the Complainant within the meaning of Section 10(1) and 10(2)(a), (b) and (c) of the Competition Act, 2010.
- 4.5 It has also been alleged in the complaint that the labelling on the packaging of the Respondent No. 2's products is misleading and confusing for the consumer and is under violation of the labelling requirements provided by the law. It was categorically stated that the Respondent No. 2 has not disseminated any false or misleading information. Rather, the marketing and labelling practices undertaken by itself are truthful and substantiated.
- 4.6 Although the Complainant is well within its rights to pursue any legal recourse it deems fit, it was stated that the instant complaint is a frivolous attempt to play the victim by not only distorting facts but also withholding crucial background information necessary to fully appreciate the true nature of the controversy at hand. That primary allegation of the Complainant is the violation of Section 10(1) read with sub Sections (a), (b) and (c) of the Section 10 (2) of the Act.
- 4.7 The perquisite of a violation under Section 10(2) (a), (b) and (c) of the competition act is the distribution of 'false' and 'misleading' information. In this regard according to Respondent No. 2, the Complainant has entirely relied upon the food standards for ice cream and frozen desserts as prescribed under the PFA Rules '11 and PFA Regulations '18. However, the Complainant has failed to appreciate two important aspects of the Respondent No. 2's business.
- 4.8 Firstly, it was submitted that the Respondent No. 2 is a trans-provincial entity and, therefore, the relevant food and labelling standards applicable to it with respect to its products i.e., ice cream and frozen desserts, are the food and labelling standards prescribed under the PSQCA Act, 1996, instead of the PFA Rules '11 and PFA Regulations '18. Secondly, the Respondent No. 2 has been labelling and marketing its products i.e., ice cream and frozen desserts, in a

manner which conforms to product standards and labelling requirements prescribed under the PSQCA act.

- 4.9 According to Respondent No. 2, without prejudice to the above and in addition thereto, it was submitted that the complaint has been filed under Section 37(2) of the Competition Act read with Regulation 17 of the Competition General Enforcement Regulations, 2007. Both of these provisions require the Competition Commission of Pakistan to entertain a complaint from an undertaking and conduct an inquiry thereupon *"unless it is of opinion that the application is frivolous or vexatious or based on insufficient facts, or it is not substantiated by prima facie evidence, conduct an inquiry into the matter to which the complaint relates"*.
- 4.10 The Complainant has only mentioned the minimum requirements of milk fat (10%) and milk solids not fat (10.1%) to constitute a product as ice cream under the PFA Rules '11 and PFA Regulations '18, but it has not mentioned anywhere in the complaint that whether these requirements have been violated, and if so, which products have violated these requirements and on what grounds. Even in the referred advertisements, the Complainant has only claimed that the products in the said advertisements are portrayed as ice cream when they are allegedly frozen desserts. Yet it has not mentioned the composition of milk fat and milk solids not fat of the said products which are below the required percentages constituting a frozen dessert or ice cream, especially in consideration of the fact that the Respondent No. 2 has separate licenses for frozen desserts and ice cream.
- 4.11 The Respondent No. 2 is a trans-provincial entity, having its operations across Pakistan and its head offices in Karachi, as admitted by the Complainant in the complaint. It is an established position of law that Parliament has the exclusive legislature competence over the matters pertaining to interprovincial trade and commerce, while provincial assemblies do not have the legislative competence to regulate such matters. Accordingly, only the food standards prescribed under the federal law are applicable to the Respondent No. 2, and the food standards under the provincial laws are not applicable in this regard.
- 4.12 It was submitted that the relevant law governing the food standards at federal level is the PSQCA Act. As per Sections 2(a) and 3 of the PSQCA Act, the relevant authority that governs and ensures compliance of the food standards is the PSQCA. In contrast, the relevant provincial laws pertaining to food standards in the province of Punjab are Punjab Food Authority Act, 2011, the PFA Rules '11, and PFA Regulations '18. The aforementioned provincial laws are only applicable to the entities whose entire operations are limited within the province of Punjab. Under scheme of the constitution, in view of Article 142 (a) read with entries 58 and 59 or part I of FLL, the executive legislature mandate over matters within the legislative competence of the parliament, or which relate to the federation, lies with the parliament (and its subsequent executive enforcement with the federal government). This position has been upheld by the Hon'ble Supreme Court of Pakistan in judgment rendered in Sindh Revenue Board etc. v. Civil Aviation Authority of Pakistan reported as 2017 SCMR 1344, wherein the Hon'ble Supreme Court held, inter alia, that the federal government is empowered to legislate,

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and the federal government is empowered to exercise authority, in respect of trans-provincial matters and/or matters relating to the federation.

- 4.13 The position of provincial assemblies not having legislative competence to regulate matters which are transnational in nature is fortified by another ruling of Hon'ble Supreme Court in the matter of Sui Southern Gas Company Limited etc. vs. Federation of Pakistan etc., reported as 2018 SCMR 802. The apex court had granted, in reference to entry 13 of part II of the FLL, parliament exclusive legislative authority in interprovincial matters and coordination.
- 4.14 Moreover, according to Respondent No. 2, any economic activity has a spillover effect. The aforesaid principle has been approved by the full bench Honorable Lahore High Court in its judgment rendered in LPG Association of Pakistan vs. Federation of Pakistan as reported in 2021 CLD 214. The foresaid principle applies to the goods of the Respondent No. 2, which are traded or sold across the country. Therefore, can only be subject to a federal law, which, for the purposes of food standards and labels is the PSQCA Act. In so far as food products are concerned, the Council of Common Interests has also decided that they shall be subject to federal regulations as far as their standards and labelling requirements are concerned.
- 4.15 The Respondent No. 2 is in the business of selling both ice cream and frozen desserts. The definition of ice cream is provided in entry 2.1.1 of PS 969, whereas the definition of frozen dessert is provided in entry 2.1.1.1. Moreover, the relevant compositions of dairy ice cream and frozen dessert are also prescribed in PS 969. These proportions are different from proportions described under the Punjab rules, 2001 and Punjab regulations 2018.
- 4.16 The Respondent No. 2 claimed to have not only been complying with the afore mentioned requirements of PS 969 in relation to its products, but it has also obtained relevant licenses from PSQCA for both categories of products, and are renewable. Frozen dessert bearing License No. CM/L-1059/2017 and ice cream License No CM/L 1058/2017, that are valid till August 27, 2022. Moreover, the Respondent No. 2's products are subject to tests by PSQCA, which it typically carries out through Pakistan's Council of Scientific and Industrial Research labs. Thus, the Respondent No. 2 is legally authorized to use the word 'ice cream' to market its products on digital, social and other e-commerce platforms. Those products of the Respondent No. 2 that comply with the requirements of frozen desserts under PS 969 are labelled and advertised as frozen dessert.
- 4.17 Therefore, no deceptive marketing practices have been undertaken by the Respondent No. 2. For the purpose of labelling pre-packaged food, PSQCA has prescribed Pakistan Standard for general standard for the labelling of pre-packaged foods PS/CXS 1-2021. Since the Respondent No. 2 is a transnational entity, the Pakistan standard is applicable.
- 4.18 According to Respondent No. 2, the relevant entry in the standards only requires additional words or phrases, representing the product's nature, to be labelled in conjunction with or in close proximity to the name of the food. There is no provision in these standards that requires such label to cover a certain percentage of the packaging of the product. The entry 4.1.2 is



comprehensive and disallows confusion in words to the consumer. Placing additional labelling requirements on the Respondent No. 2 is tantamount to exceeding the scope and intent of provisions of Pakistan Standards for labelling.

- 4.19 It was submitted that the Complainant relied on the PFA Rules '11 and PFA Regulations '18 that require the name of the frozen dessert to be followed by the words 'frozen dessert contains edible vegetable oil' both in Urdu and English languages on 10% of the front side label, with certain other requirements. Once more, the Respondent No. 2 claims to be a transnational entity not subject to provincial standards. Furthermore, the standards for nutrition labelling and health as adopted by PSQCA, have been displayed on labels as nutritional contents. Therefore, no misinterpretation as to the nature of nutrition and health claims is being made to the consumer.
- 4.20 As mentioned in the complaint, the terms 'false' and 'misleading' are defined by this commission in the matter of Pak China Mobile Ltd vs. Pakistan Telecom Ltd reported as Zong Order. In light of this order, the Respondent No. 2 claimed to not have labelling and marketing products that constitute false information, as they are not contrary to the truth and actuality. Furthermore, the Respondent had never made false qualitative or quantitative claims about its products or presented false information to its customers regarding the ingredients or quality of the products, therefore use of imagery cannot be categorized as deceptive marketing practice.
- 4.21 It was submitted that at best it can be described as puffery, an internationally accepted marketing practice. In M/s Hi-Tech Lubricants Pvt Ltd vs. Chevron Pakistan Lubricants Pvt Ltd, quoted as 2021 CLD, the Hon'ble Commission not only thoroughly discussed and accepted the concept.
- 4.22 In parawise reply the Respondent No. 2 admitted to the extent that ice cream and frozen desserts are two distinct categories. Although frozen desserts are manufactured by substituting milk fat with vegetable fat, they are also required to contain a minimum percentage of milk solids not fats under the federal Food Standard of PS 969. The composition requirements of ice cream under PFA Rules '11 and PFA Regulations '18 are different from PS 969. Furthermore, the Complainant has failed to establish on facts that the cost of preparing ice cream is necessarily higher than that of frozen products.
- 4.23 The contents of complaint pertaining to engaging in dissemination of false and misleading information were denied for being false and baseless on grounds. In addition to that, many of the TVC's or Facebook references in the complaint pertain to years 2015 and 2018. It was submitted that those TVC's are no longer advertised and are only available on YouTube and could not potentially harm the business interests of the Complainant.
- 4.24 In furtherance, the use of the word 'creamy' is only used to describe the texture of the product, used as an adjective and not in a quantitative manner referring to the list of ingredients of the product. In this sense the word creamy exhibits flexibility and generality.

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- 4.25 In light of above, it was submitted by Respondent No. 2 that the prayers of the Complainant are uncalled for and without any legal basis, and thus, are liable to be dismissed. In view of the foregoing, the legal counsel to Respondent No. 2 requested that the instant complaint may be dismissed.

## **5. REJOINDER:**

- 5.1 The Respondent No. 1 and Respondent No. 2's replies were forwarded to the Complainant for a rejoinder vide letters dated April 28, 202 and April 11, 2022, respectively. The rejoinders containing comments of the Complainant were received through letters dated May 13, 2022, the contents of which are summarized individually in the following paragraphs.

### **A. REJOINDER TO RESPONDENT NO 1's SUBMISSIONS (Unilever Pakistan Limited)**

- 5.2 The rejoinder is in addition to the facts and assertions already made in the original complaint contents of which are to be read as an integral part of this rejoinder.
- 5.3 It was submitted that the reply is misconceived, misleading and evasive and does not render due and plausible explanation as to how the Deceptive Marketing Practices elaborated in the complaint, especially Para 7 and Para 8 thereof are not in violation of the Competition Act, 2010 (the "Act") and the case law developed thereupon.
- 5.4 That the industry in question, admittedly, comprises of two types of products: "Ice Cream" and "Frozen Dessert". These products are fundamentally different in nature with significant differences in their composition and cost structures. The fact that these are different products is recognized by the relevant regulatory authorities such as PSQCA and PFA as well as international authorities like the United States Food & Drug Administration. Moreover, reliance on the PFA rules and regulations in the Complaint was to draw distinction between these two products
- 5.5 That the Respondent No. 1 has tried to mislead this learned Commission by digressing from the main issues. It is in violation of Section 10 of the Act by (a) dissemination of false and misleading information through televised advertisements, social/digital media campaigns, and marketing through ecommerce platforms and (b) dissemination of misleading information through its packaging/labels/marketing material. However, the Respondent No. 1 has deliberately tried to limit the scope the complaint to the disclosures on packaging of its products by erroneously linking it with the PSQCA laws and misinterpreting the same. In so doing, the Respondent No. 1 has tried to achieve the following objectives:

- i. Distracting this learned Commission from its violation of Section 10 of the Act by dissemination of false and misleading information through televised advertisements, social/digital media campaigns, and ecommerce platforms as well as its packaging/labelling; and
  - ii. Excluding the applicability of the Act and ousting the role and mandate of the Commission in matters which come under its exclusive jurisdiction and that too by misinterpreting the PSQCA laws/standards.
- 5.6 That the Act is a special law when it comes to issues relating to competition and matters such as Deceptive Marketing Practices come under the exclusive domain of this learned Commission and are covered in detail under the Act ensure to consumer welfare and a free and open market to all competitors.
- 5.7 Besides, the laws mentioned and relied upon by the Respondent No. 1 provide no mechanism to remedy anti-competitive practices and are, therefore, irrelevant. Reliance in this regard is placed on order of this learned Commission in the matter of Show Cause notice issued to M/s Medialogic (Private) Limited, M/s Pakistan Broadcasting Association and M/s Broadcasters Advertisers Council, reported as 2022 CLD 194.
- 5.8 That the Respondent has obtained licences for Ice Cream and Frozen Desserts from PSQCA, however, barring Magnum, all of its products fall under the category of Frozen Desserts. However, it is relevant to mention that the licences of the Respondent No. 1 attached with the reply are no longer valid. The Respondent No. 1 has tried to mislead this learned Commission by failing to mention the same in its reply. Product portfolio of the Respondent No. 1 is attached herewith as Annex-I.
- 5.9 That the violations of the Act perpetrated by the Respondent No. 1 may be categorized as follows:
  - i. Dissemination of false and misleading information through television, social media, digital media and e-commerce platforms; and
  - ii. Deceptive marketing practices through its packaging/labels/marketing material.
- 5.10 That the television and social/digital media advertisements and marketing through e-commerce platforms either falsely portray Frozen Desserts as Ice Cream or omit material information that the product is Frozen Dessert, thereby deceiving the consumer into believing that the product is Ice Cream and not Frozen Dessert.
- 5.11 That the use of word/term "Frozen Desserts" for the products that are not Ice Cream is also not disputed as it is referred to as such on the packaging/labels of such products of the Respondent No. 1. However, printing it in a very small font is neither easily noticeable/legible nor easily

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understandable by an ordinary consumer. The said disclosure is not adequate and does not convey any useful information to the consumers of ordinary intelligence, hence, the same is tantamount to distribution of false and misleading information to the consumer and is in violation of Section 10 (2) (b) of the Act. The said deceptive marketing practices are also in violation of Section 10 (2) (a).

5.12 That this learned Commission has, in the case of Show Cause Notices Issued to Paint Manufacturers, reported as 2012 CLD 808, held that *"an advertisement is deceptive if it has the aforementioned elements of being misleading, capable of giving the wrong impression or idea and tends to misinform or misguide owing to vagueness or any omission."*

5.13 That it was held by this learned Commission in the matter of Show Cause Notice issued to Reckitt Benckiser Pakistan Limited, reported as 2021 CLD 484, that *"an advertisement is deceptive if it contains false or misleading statement or omits information that is likely to mislead consumers in ordinary circumstances; and is material in that it is important to a consumer's decision to buy or use the product. Examples of material information may include representation about a product's character, performance, features, safety, price or effectiveness"*.

5.14 The Respondent by constantly omitting important and material information regarding the nature of its product i.e. Frozen Dessert, has deceived consumers into believing that its products are Ice Cream. That this learned Commission has, in the Matter of Show Cause Notices Issued to Askari Bank Ltd, United Bank Ltd My Bank Ltd & Habib Bank Ltd (No. 2(9)/DIR(L)/CCP/2008), held that *"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. ... Nothing can justify provision of misleading information to consumers. Accuracy and reliability of material representations made about the product are critical because distortion of material information impairs the consumer's ability to make an informed decision... ... In sum, all material features and conditions should be prominently displayed in clear and unambiguous language..."*

5.15 That the marketing campaign/advertisements of the Respondent, being false and misleading, are, in fact, harming the business interests of the Complainant as well as other competing undertakings operating in the market. The effect of engaging in such practices is the diversion of customers to the products of the Respondent, thereby inflicting losses to competitors, and, hence, are in violation of Section 10 (2) (a) of the Act. This learned Commission has in the Matter of Show Cause Notice issued to M/S Reckit Benkiser, reported as 2020 CLD 995 and in the Matter of Show Cause Notice issued to M/S Jotun Pakistan (Pvt) Limited, reported as 2015 CLD 1638, held that to prove conduct under Section 10 (2) (a) of the Act, it is not necessary to show actual harm to competitors. It is sufficient to show the existence of a

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deceptive marketing practice that has the potential to harm the business interests of the competitors.

- 5.16 That moreover, with regards to the violation of Section 10 (2) (a), it has also been held in the matter of Show Cause Notice issued to University of Management and Technology reported 2019 CLD 615, that *"the consequences of the distribution of false or misleading information is such that it is always capable of harming the business interests of and resulting in fatal consequences for the competitors of the Respondent concerned."*
- 5.17 That the claims and comparisons made by Respondent No. 1 (through statement posted on official Facebook page of Wall's and placed on Slide No. 64 of the Annex B) in relation to Frozen Desserts are false, deceptive and without any reasonable basis and support from any reliable scientific evidence and, hence, are in violation of Section 10 (2) (c) of the Act. The same is also capable of harming the interests of competing businesses, hence, in violation of Section 10 (2) (a) of the Act as well. Reliance in this regard is, inter alia, placed on order of this learned Commission in the Matter of Show Cause Notice issued to M/S Reckitt Benckiser Pakistan Limited for Deceptive Marketing Practices (File No: 145/OFT/DETTOL/CCP/2013).
- 5.18 That besides being violative of Section 10 of the Act, displaying important information regarding the nature of the product i.e. mentioning the name "Frozen Dessert" in small print and that too at the bottom of the packaging also contravenes provisions of Pakistan Standard Specification for Ice Cream (1st Rev.) (PS 969), Pakistan Standard Specification for Pre-packaged Foods (1st Rev.) (PS 1485) and Pakistan Standard Specification for General Standard for the Labelling of Pre-packaged Foods (1st Rev.) (Pakistan Standard for Labelling) which require that the brand name and trade mark may be used provided it is accompanied by the name of the food indicating its true nature and such information or labels of pre-packaged foods should be prominent, clear and readily legible by the consumer and that the letters in the name of the food shall be in a size reasonably related to the most prominent printed matter on the label.
- 5.19 In order to protect consumers, the said standards further require the Respondent No. 1 to have such additional words or phrases in the instant case "یہ آئسکریم نہیں ہے" on the label either in conjunction with or close proximity to, the name of the food, as are necessary to avoid misleading or confusing the consumer in regard to the true nature and physical condition of the food.
- 5.20 While explaining "clear and conspicuous" disclosures, the Commission relied on order of the Federal Trade Commission in the matter of Eband, Inc. And Ayman A. Difrawi 2016, Case No: 6:16-ev-714-Orl-41TBS wherein it was held that:

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

5.21 That in order to prevent the Respondent No. 1 from engaging in Deceptive Marketing Practices in respect of its packaging/labelling, this learned Commission may, if it deems appropriate, take guidance from the Rules and Regulations of PFA which require Frozen Desserts manufacturers to write "the brand or trade name" of the manufacturer immediately followed by the words "frozen dessert contains edible vegetable oil" in both Urdu and English languages on 10% on the front side of the label, and in equal uniform lettering. They further require that these words shall form the first line or lines of the label and no other word shall appear in the same line or lines and these words will be surrounded by rectangular surrounding line. In the alternative, the Commission may issue such other directions, which in its wisdom, are appropriate to protect the manufacturers of dairy Ice Cream from anti-competitive and deceptive marketing practices of the Respondent.

5.22 That the express and implied claims made by the Respondent No. 1 in the advertisements and the overall general impression created by such advertisements/marketing in the mind of an "ordinary consumer" is that all of its products are Ice Cream. Moreover, the omissions in disclosure and the implied impression conveyed through representations are of the nature that

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is likely to be deceptive even for a sophisticated consumer, leave alone the 'ordinary consumer'. Reliance in this regard is placed, inter alia, on in the matter of Show Cause Notice issued to M/s Qasim Iron Works, reported as 2022 CLD 152.

- 5.23 That under clause (b) of Section 29 of the Act, this learned Commission is empowered by the legislature to review the laws and policy frameworks, and to make suitable recommendations to the Federal or Provincial Governments to make new or amend the existing laws to foster competition. In this regard, if deemed appropriate, this learned Commission may issue policy notes/recommendations to the relevant authorities so as to protect consumers and ensure free competition in the Ice Cream/Frozen Dessert industry.
- 5.24 That the Complainant reserves the right to present further grounds at the time of arguments. However, it is relevant to clarify that the licenses granted by PSQCA are only of two types: one for Ice Cream and the other for Frozen Desserts. Additionally, the licences of the Respondent No. 1 attached with the reply are no longer valid.
- 5.25 That the Respondent No. 1 is trying to mislead this learned Commission by drawing its focus to the applicability or non-applicability of PSQCA or PFA laws. It is important to mention that the Act is a special law when it comes to issues relating to competition and matters such as Deceptive Marketing Practices come under the exclusive domain of this learned Commission. However, it is pertinent to mention that displaying important information regarding the nature of the product i.e. mentioning the name "Frozen Dessert" in small print and that too at the bottom of the packaging contravenes PS 969, PS 1485 and Pakistan Standard for Labelling as well.
- 5.26 That contents of the corresponding paragraph are admitted to the extent that that the marketing campaigns of the Respondent on television, social/digital media and e-commerce platforms etc. as well as its packaging/labelling constitute deceptive marketing practices and, are, therefore, in violation of Section 10 of the Act. Moreover, violations of Section 10 of the Act by the Respondent are not limited to dissemination of false and misleading information through its packaging/labelling as it has been engaging in deceptive marketing practices by presenting Frozen Desserts as Ice Cream through its televised advertisements, social/digital media campaigns, and ecommerce platforms. The said advertisements either falsely portray Frozen Desserts as Ice Cream or omit material information that the product is Frozen Dessert, thereby deceiving the consumer into believing that the product is Ice Cream and not Frozen Dessert.
- 5.27 The Respondent had obtained licences for Ice Cream and Frozen Desserts from PSQCA, however, barring Magnum, all of its products fall under the category of Frozen Desserts. That it is the Respondent which has, through unsubstantiated statement, portrayed Frozen Desserts to be a better alternative of Ice Cream without any reasonable and scientific basis, and, hence, is false and misleading in terms of Section 10 of the Act.

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- 5.28 That it is pertinent to note that ordinary consumers cannot be expected to be able to appreciate the technical difference between the two and unless Frozen Desserts manufacturers are directed to clearly highlight that their product “یہ آئس کریم نہیں ہے” is a Frozen Dessert and not Ice Cream in all advertising material (e.g., print, television, digital, radio) in the language easily understandable to consumers and to print the disclosure in explicit, clear, visible and bold words on their labels and packaging, ordinary consumers would continue to be deceived by dissemination of false and misleading information.
- 5.29 That the contents of the reply are based on misreading of law and are, therefore, vehemently denied. The marketing campaign/advertisements of the Respondent, being false and misleading, are, in fact, harming the business interests of the Complainant as well as other competing undertakings operating in the market. The effect of engaging in such practices is the diversion of customers to the products of the Respondent, thereby inflicting losses to competitors, and, hence, are in violation of Section 10 (2) (a) of the Act.
- 5.30 That the preceding paragraphs as well as the contents of the complaint and the evidence annexed therewith clearly establish that the marketing campaigns of the Respondent No. 1 on television, social/digital media and e-commerce platforms etc. and its packaging/labelling constitute deceptive marketing practices and, are, therefore, in violation of Section 10 of the Act.
- 5.31 That in view of the foregoing, this learned Commission may kindly be pleased to issue such directions to the Respondent No. 1 as are prayed for in the Complaint.

**B. REJOINDER TO RESPONDENT NO 2's SUBMISSIONS (Friesland Campina Engro Pak Ltd.):**

- 5.32 The Complainant submitted that the reply is misconceived, misleading evasive, based on misreading of law and does not render due and plausible explanation as to how the Deceptive Marketing Practices elaborated in the Complaint.
- 5.33 That the industry in question, admittedly, comprises of two types of products: “Ice Cream” and “Frozen Dessert”. These products are fundamentally different in nature with significant differences in their composition and cost structures. The fact that these are different products is recognized by the relevant regulatory authorities such as PSQCA, PFA as well as international authorities like the United States Food & Drug Administration. Moreover, reliance on the PFA rules and regulations in the Complaint was to draw distinction between these two products.

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5.34 That the Respondent No. 2 has tried to mislead this learned Commission by digressing from the main issues. It is in violation of Section 10 of the Act by (a) dissemination of false and misleading information through televised advertisements, social/digital media campaigns, and marketing through ecommerce platforms and (b) dissemination of misleading information through its packaging/labels/marketing material.

5.35 However, the Respondent No. 2 has deliberately tried to limit the scope the Complaint to the disclosures on packaging of its products by erroneously linking it with the PSQCA laws and misinterpreting the same. In so doing, the Respondent has tried to achieve the following objectives:

- i. Distracting this learned Commission from its violation of Section 10 of the Act by dissemination of false and misleading information through televised advertisements, social/digital media campaigns, and ecommerce platforms as well as its packaging/labelling; and
- ii. Excluding the applicability of the Act and ousting the role and mandate of the Commission in matters which come under its exclusive jurisdiction and that too by misinterpreting the PSQCA laws/standards.

5.36 That the Act is a special law when it comes to issues relating to competition and matters such as Deceptive Marketing Practices come under the exclusive domain of this learned Commission and are covered in detail under the Act to ensure consumer welfare and a free and open market to all competitors. Besides, the laws mentioned and relied upon by the Respondent No. 2 provide no mechanism to remedy anti-competitive practices and are, therefore, irrelevant. Reliance in this regard is placed, inter alia, on order of this learned Commission in the matter of Show Cause notice issued to M/s Medialogic (Private) Limited, Messrs Pakistan Broadcasting Association and Messrs Broadcasters Advertisers Council, reported as 2022 CLD 194.

5.37 That the Respondent No. 2 has obtained licences for Ice Cream and Frozen Desserts from PSQCA, however, barring one or two, all of its products fall under the category of Frozen Desserts. The Respondent No. 2 has tried to mislead this learned Commission by failing to mention the same in its reply. Product portfolio of the Respondent No. 2 is attached herewith as Annex-I.

5.38 That the violations of the Act perpetrated by the Respondent may be categorized as follows:

- i. Dissemination of false and misleading information through television, social media, digital media and e-commerce platforms; and
- ii. Deceptive marketing practices through its packaging/labels/marketing material.

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- 5.39 That the Respondent No. 2 has been disseminating false and misleading information to the consumers through television, social media, digital media and its marketing material. The television and social/digital media advertisements and marketing through e-commerce platforms either falsely portray Frozen Desserts as Ice Cream or omit material information that the product is Frozen Dessert, thereby deceiving the consumer into believing that the product is Ice Cream and not Frozen Dessert.
- 5.40 That the use of word/term "Frozen Desserts" for the products that are not Ice Cream is also not disputed as it is referred to as such on the packaging/labels of such products of the Respondent. However, printing it in a very small font is neither easily noticeable/legible nor easily understandable by an ordinary consumer. The said disclosure is not adequate and does not convey any useful information to the consumers of ordinary intelligence, hence, the same is tantamount to distribution of false and misleading information to the consumer and is in violation of Section 10 (2) (b) of the Act. The said deceptive marketing practices are also in violation of Section 10 (2) (a).
- 5.41 That it was held by this learned Commission in the matter of Show Cause Notice issued to Reckitt Benckiser Pakistan Limited, reported as 2021 CLD 484, that *"an advertisement is deceptive if it contains false or misleading statement or omits information that is likely to mislead consumers in ordinary circumstances; and is material in that it is important to a consumer's decision to buy or use the product. Examples of material information may include representation about a product's character, performance, features, safety, price or effectiveness"*. The Respondent No. 2 by constantly omitting important and material information regarding the nature of its product i.e. Frozen Dessert, has deceived consumers into believing that its products are Ice Cream.
- 5.42 That this learned Commission has, in the Matter of Show Cause Notices Issued to Askari Bank Ltd, United Bank Ltd My Bank Ltd & Habib Bank Ltd (No. 2(9)/DIR(L)/CCP/2008), held that *"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. ... Nothing can justify provision of misleading information to consumers. Accuracy and reliability of material representations made about the product are critical because distortion of material information impairs the consumer's ability to make an informed decision... ... In sum, all material features and conditions should be prominently displayed in clear and unambiguous language..."*.
- 5.43 That the marketing campaign/advertisements of the Respondent No. 2, being false and misleading, are, in fact, harming the business interests of the Complainant as well as other competing undertakings operating in the market. The effect of engaging in such practices is the diversion of customers to the products of the Respondent No. 2, thereby inflicting losses to competitors, and, hence, are in violation of Section 10 (2) (a) of the Act. This learned

Commission has held in the Matter of Show Cause Notice issued to M/s Reckitt Benckiser, reported as 2020 CLD 995 and in the Matter of Show Cause Notice issued to M/S Jotun Pakistan (Pvt) Limited, reported as 2015 CLD 1638, that to prove conduct under Section 10 (2) (a) of the Act, it is not necessary to show actual harm to competitors. It is sufficient to show the existence of a deceptive marketing practice that has the potential to harm the business interests of the competitors.

- 5.44 That with regards to the violation of Section 10 (2) (a), it has also been held in the matter of Show Cause Notice issued to University of Management and Technology reported 2019 CLD 615, that *"the consequences of the distribution of false or misleading information is such that it is always capable of harming the business interests of and resulting in fatal consequences for the competitors of the Respondent concerned."*
- 5.45 That principle regarding disclaimer/disclosure, as settled by this learned Commission, on various occasions, is that they must be "clear and conspicuous" and placed "as close as possible" to the advertising claim. While explaining "clear and conspicuous" disclosures, the Commission relied on order of the Federal Trade Commission in the matter of Eband, Inc. And Ayman A. Difrawi 2016, Case No: 6:16-ev-714-Orl-41TBS.
- 5.46 That in order to prevent the Respondent No. 2 from engaging in Deceptive Marketing Practices in respect of its packaging/labelling, this learned Commission may, if it deems appropriate, take guidance from the Rules and Regulations of PFA which require Frozen Desserts manufacturers to write "the brand or trade name" of the manufacturer immediately followed by the words "frozen dessert contains edible vegetable oil" in both Urdu and English languages on 10% on the front side of the label, and in equal uniform lettering. They further require that these words shall form the first line or lines of the label and no other word shall appear in the same line or lines and these words will be surrounded by rectangular surrounding line. In the alternative, the Commission may issue such other directions, which in its wisdom, are appropriate to protect the manufacturers of dairy Ice Cream from anti-competitive and deceptive marketing practices of the Respondent No. 2.
- 5.47 That the contention of the Respondent No. 2 that "many of the advertisements (TV commercials and Facebook posts) referred to in the Complaint pertain to the year 2015 and 2018" And since "[t]hose TV commercials are no more advertised and are only available on YouTube. Thus, such old TV commercials and Facebook posts could not potentially harm the business interests of the Complainant even if they were false and misleading, although they are not false and misleading" is based on misreading of the law. This learned Commission has in the Matter of Show Cause Notice issued to M/S Proctor & Gamble Pakistan (Pvt) Limited for Deceptive Marketing Practices, reported as 2017 CLD 1609, held that Section 10 (2) is applicable to practices whether they occurred and/or discontinued in the past or continue in the market. Additionally, to prove conduct under Section 10 (2) (a) of the Act, it is not necessary

to show actual harm to competitors. It is sufficient to show the existence of a deceptive marketing practice that has the potential to harm the business interests of the competitors. The fact that these commercials were advertised on television and its existence on YouTube make it violative of Section 10 of the Act.


- 5.48 That the express and implied claims made by the Respondent in the advertisements and the overall general impression created by such advertisements/marketing in the mind of an "ordinary consumer" is that all of its products are Ice Cream. Moreover, the omissions in disclosure and the implied impression conveyed through representations are of the nature that is likely to be deceptive even for a sophisticated consumer, leave alone the 'ordinary consumer'.
- 5.49 That the laws mentioned and relied upon by the Respondent No. 2 provide no mechanism to remedy anti-competitive practices and are, therefore, of no relevance. It is reiterated that packaging/labelling of the products that fall under the category of Frozen Desserts is misleading, as the word/term "Frozen Dessert" mentioned thereon is printed in very small font and the same conveys no useful information to the consumers of ordinary intelligence, and, is, therefore, inadequate disclosure in terms of Section 10 of the Act and the case law developed thereupon. Moreover, displaying important information regarding the nature of the product i.e. mentioning the name "Frozen Dessert" in small print and that too at the bottom of the packaging also contravenes PS 969, PS 1485 and Pakistan Standard for Labelling. Also, the violations of Section 10 of the Act by the Respondent are not limited to dissemination of false and misleading information through its packaging/labelling as it has been engaging in deceptive marketing practices by presenting Frozen Desserts as Ice Cream through its televised advertisements, social/digital media campaigns, and e-commerce platforms. The said advertisements either falsely portray Frozen Desserts as Ice Cream or omit material information that the product is Frozen Dessert, thereby deceiving the consumer into believing that the product is Ice Cream and not Frozen Dessert.
- 5.50 That the contents of the corresponding paragraph are vehemently denied being misconceived, incorrect and misleading. The Respondent holds licenses for both Ice Cream and Frozen Desserts, however, barring one or two, all of its products fall under the category of Frozen Desserts.
- 5.51 That the preceding paragraphs as well as the contents of the Complaint and the evidence annexed therewith clearly establish that the marketing campaigns of the Respondent No. 2 on television, social/digital media and ecommerce platforms etc. and its packaging/labelling constitute deceptive marketing practices and, are, therefore, in violation of Section 10 of the Act.

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5.52 That in view of the foregoing, this learned Commission may issue such directions to the Respondent as are prayed for in the Complaint.

## 6. ANALYSIS:

- 6.1 The Enquiry Committee was given the mandate to conduct an enquiry regarding the issues raised in the complaint and to submit the enquiry report by giving its findings and recommendations, *inter alia*, on the following issues:
- i. *Whether the Respondents are engaged in making false or misleading comparison of goods in the process of advertising, prima facie, in violation of Section 10 (2) (c) of the Act?*
  - ii. *Whether the conduct of the Respondents is capable of harming the business interest of the Complainant in, prima facie, violation of Section 10 (2) (a) of the Act?*
  - iii. *Whether the Respondents are disseminating false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, properties, suitability for use, and quality of its products in, prima facie, violation of Section 10 (1) in general and in particular, Section 10 (2) (b) of the Act?*
  - iv. *Whether there is a spillover effect of the conduct of the Respondents?*
- 6.2 Before drawing an analysis on the mandate, it is pertinent to mention that the Complainant prayed that the proceedings may be initiated against all of the undertakings manufacturing and selling frozen desserts in the market while engaging in similar alleged practices. However, the mandate of the enquiry does not entail a detailed investigation into the practices of frozen dessert manufacturers in general, and therefore, analysis will be drawn against the Respondents specifically in this report.
- 6.3 It is also pertinent to mention here that the mandate of the Commission is only limited to ensuring a free and fair competition in the market and does not entail enforcement of other laws in place to regulate products and services. Therefore, the analysis will purely be drawn in light of Section 10 of the Act.
- 6.4 Furthermore, the Complainant had submitted and emphasized in its complaint and the rejoinder that the PFA Rules '11 and PFA Regulations '18 are in place to regulate pre-packaged food items, such as dairy ice creams and frozen desserts. Consequently, both the Respondents had, in their individual replies, submitted that their products were being sold nationwide and meanwhile PFA Rules '11 and PFA Regulations '18 did regulate pre-packaged foods, the same did not apply to products sold nationally. Instead, it was submitted that Pakistan Standards by PSQCA were applicable to products sold nationally.
- 6.5 In this regard, while taking into consideration the PFA Rules '11, PFA Regulations '18 and Pakistan Standards by PSQCA, in cases where the matter has spill over provincial boundaries,

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federal jurisdiction prevails. Therefore, reliance will not be made on PFA Rules'11 and PFA Regulations '18 while drawing the analysis.

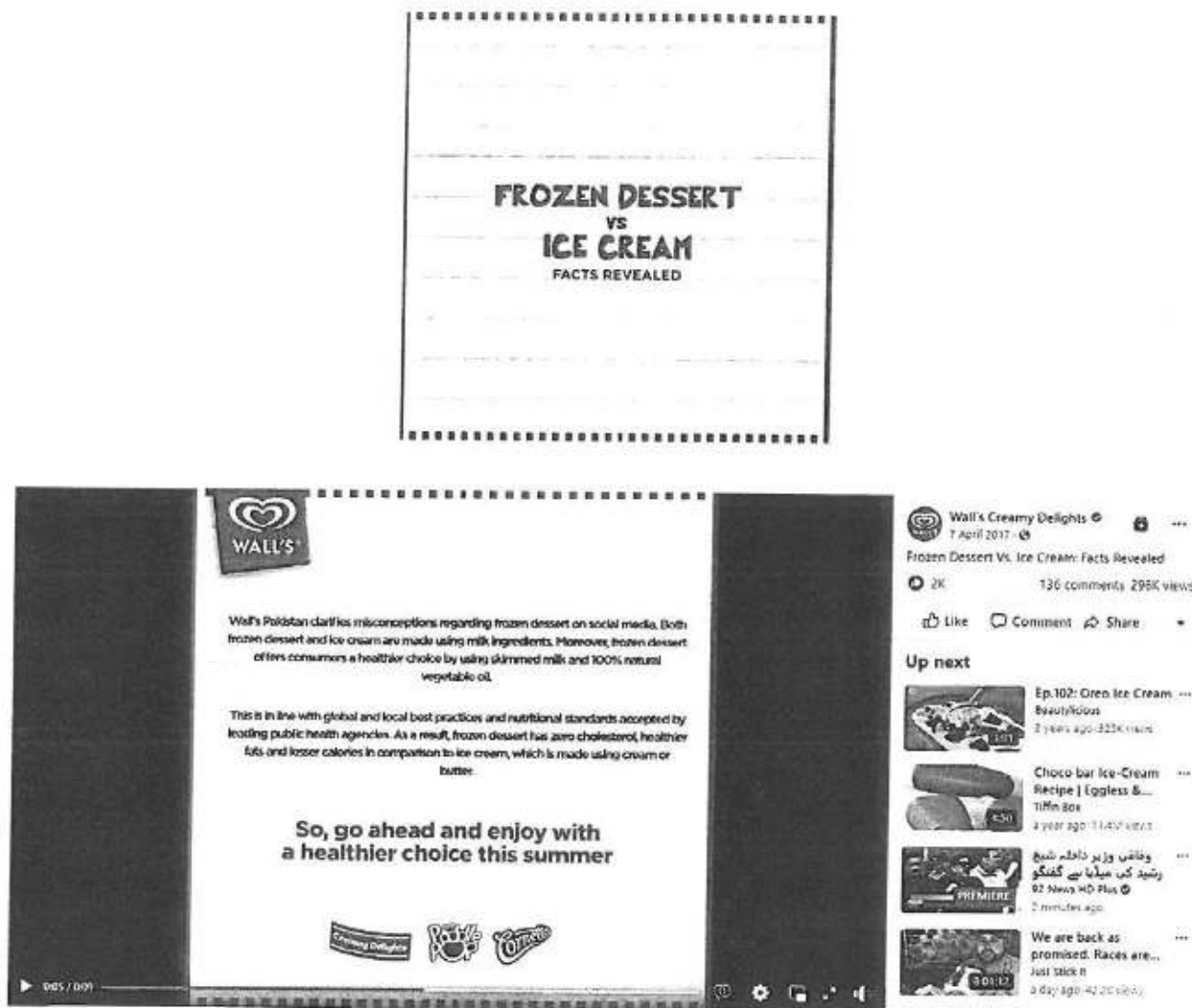
- 6.6 Moreover, the same is enforced by the 41<sup>st</sup> meeting of the Council of Common Interest, where it was also upheld that there should be uniform standards at the national level and all provinces and local authorities will enforce the same national standards within their own jurisdictions as well. (The same is attached as Annex-F for reference).
- 6.7 It is also pertinent to consider that Pakistan Standards are in place to regulate quality, packaging and labelling of pre-packaged foods, while the same does not regulate marketing practices undertaken for the same products. Therefore, even if the undertakings are in compliance with the Pakistan Standards regarding their packaging and labelling, the activities undertaken still fall under the jurisdiction of Section 10 of the Act, including packaging and labelling as well.
- 6.8 Similarly, the Respondents had argued that most of the advertisements reproduced by the Complainant belong to a period between 2017 to 2019. However, the principles regarding deceptive marketing practices were set by the Commission before this period and any violation thereof is accountable under Section 10 of the Act, irrespective of the time period.
- 6.9 It is also of importance that as per Para No. 3.4 above, the PSQCA has, through PS 969-2010, categorized both frozen desserts (containing vegetable fat or both vegetable and dairy fat) and dairy ice cream (containing dairy fat only) broadly under Ice Cream. However, PSQCA has also devised different standards for both categories of ice creams so that the consumer is aware of which product it is consuming. Making the consumer aware of the nature of the product is of essence here. Therefore, although calling a frozen dessert as ice cream may not be false, it still does not disclose the true nature of the product and is open to interpretation as to whether the product is dairy ice cream or frozen dessert, thereby misleading the consumer.
- 6.10 In light of the preceding paragraphs, a detailed analysis into the allegations levelled specifically against the Respondents in the subject complaint will be drawn hereunder individually.
- i. **Whether the Respondents are engaged in making false or misleading comparison of goods in the process of advertising, prima facie, in violation of Section 10 (2) (c) of the Act?**
- 6.11 In reference to Para no. 2.74 to 2.76 above, the Complainant had alleged contravention of Section 10 (2) (c) of the Act against the Respondent No. 1's brand Wall's. However, no allegation against the Respondent No. 2 was made under Section 10 (2) (c) of the Act. Therefore, the conduct of Respondent No. 1 will only be analysed in this part of the enquiry.
- 6.12 To reiterate, the Complainant had alleged, with regard to Section 10 (2) (c) of the Competition Act, that the Respondent No. 1 posted a statement on official Facebook page of Wall's, which is reproduced as under for ease of reference:

*"...Moreover, frozen dessert offers consumers a healthier choice by using skimmed milk and 100% natural vegetable oil. This is in line with global and local best practices and nutritional standards accepted by leading public health agencies. As a result frozen dessert*

*has zero cholesterol, healthier fats and lesser calories in comparison to ice cream, which is made using cream and butter. So, go ahead and enjoy with a healthier choice this summer."*

(The same is attached as Slide No. 64 of the Annex B)

6.13 Relevant portions of the statement visually are also reproduced hereunder for reference:



6.14 The Respondent No. 1, in response to this allegation, submitted a document of FAQ's designed by its Global Team of Nutritionists in 2015, adapted in India in March 2019. The same includes a series of questions regarding different aspects of a dairy ice cream and frozen dessert. (Attached as Annex-H for reference).

6.15 It is explained in the FAQ's that the main difference between the two is the type of fat used in the manufacturing process. Dairy ice creams only contain dairy fats whereas frozen desserts

contain vegetable fats and may or may not include a portion of dairy fat as well. However, both do contain milk solids for manufacturing.

- 6.16 Moreover, the Respondent No. 1 has also reproduced a nutrition profile of a vanilla flavoured dairy ice cream and vanilla flavoured frozen dessert for reference. (The same is also a part of Annex-H for reference).
- 6.17 Based on the profile, it has been explained that dairy ice creams naturally contain trans-fats because of the dairy fats used in them while vegetable fats are virtually trans-fat free or <0.1%.
- 6.18 However, it is pertinent to mention here that a mere comparison of a vanilla flavoured dairy ice cream and vanilla flavoured frozen dessert is not enough to generalize an opinion of the nutrition values. Whereas a vanilla flavoured dairy ice cream and frozen dessert may differentiate in fat composition, the same may not hold true for all kinds of flavours.
- 6.19 With the addition of fruits, artificial flavours, nuts, additives and all other types of ingredients, the nutrition value changes and therefore may not reflect these percentages for each variant of flavour manufactured for both dairy ice cream and frozen dessert. Moreover, frozen desserts themselves are also categorized as low, medium and high in fat percentage. The comparison drawn by Respondent No. 1 does not elaborate on the percentage of fat used for the frozen dessert referred to in this comparison. Furthermore, no research methodology has been furnished along with to substantiate how the results quoted have been achieved by the Respondent No. 1.
- 6.20 The substantiation provided also does not explain how many variants and flavours of frozen desserts and dairy ice creams from the market were analysed before forming a conclusion which has been generally applied to the industry as a whole in its claim on social media.
- 6.21 Since the claim of the Respondent No. 1 is open to many interpretations and devoid of a deeper study into the various variables involved into arriving at this conclusion, the Enquiry Committee is of the view that the social media awareness drive undertaken by the Respondent No. 1 is misleading in nature.
- 6.22 The Enquiry Committee is also of the view that the Respondent No. 1 has failed in its duty to conduct proper research for the customers in Pakistan before making such a claim on a widely circulated media.
- 6.23 It is also important to consider here that the Respondent No. 1, in its social media post, has drawn a comparison between frozen dessert and 'ice cream' whereas the comparison should have been drawn between a frozen dessert and 'Dairy' ice cream. This shows that the word ice cream is generally perceived in the market as a dairy ice cream, which is a major part of the problem. The same anomaly is also reflected in the FAQ's submitted by the Respondent No. 1 as substantiation. If the Respondent No.1, being itself engaged in the business, is not able to differentiate among the two, an ordinary consumer cannot be expected to understand the differentiation.

- 6.24 The Respondent No. 1 had taken defence in its reply that frozen desserts fall under the category of ice cream in PSQCA classification and therefore calling a frozen dessert as ice cream is not against the standards that have been set. However, in light of the above, it appears that the differentiation among the two is not common knowledge.
- 6.25 Therefore, in view of the Para No. 6.18 to 6.24 above, the Respondent No. 1 is found to be engaged in making a misleading comparison of goods in the process of advertising, *prima facie*, in violation of Section 10 (2) (c) of the Act.

ii. **Whether the conduct of the Respondents is capable of harming the business interest of the Complainant in, prima facie, violation of Section 10 (2) (a) of the Act?**

- 6.26 We will now draw an analysis on the conduct of both the Respondents individually, in light of Section 10 (2) (a) of the Act.

**RESPONDENT NO. 1:**

- 6.27 The Complainant had alleged that the Respondent No. 1 is engaged in disseminating false and misleading information regarding its brand Wall's, which is both a frozen dessert and dairy ice cream brand, allegedly being marketed expressly or impliedly as dairy ice cream.
- 6.28 Briefly reiterating, the Complainant had pointed out various instances, as summarised in Para 2.13 to 2.36 above, where it had found the Respondent No. 1 to be allegedly violating Section 10 of the Act. As already explained in the paragraphs referred above, it was alleged that the Respondent No. 1 was, in certain instances through various media, expressly calling its products under brand Wall's as ice cream.
- 6.29 The Enquiry Committee, during the course of enquiry, have considered several packaging of the Respondent No. 1 for review under the existing standards and Section 10 of the Act. In all instances, the Enquiry Committee has found the Respondent No. 1 to be disclosing the nature of the product, i.e., frozen dessert, adequately on the front of the packaging. The disclosure is both visible and clearly legible in all instances. The disclosure found on the packaging is therefore neither false nor misleading. Some of these sample packaging are also reproduced hereunder for reference:

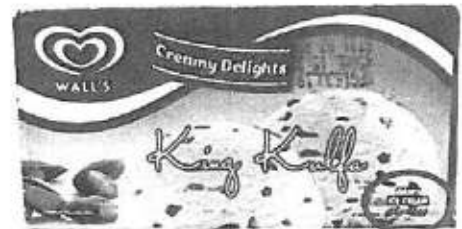




FROZEN  
DESSERT



FROZEN  
DESSERT



DAIRY  
ICE CREAM

- 6.30 Although, the Enquiry Committee is of the view that the disclosure of frozen dessert on the bars of the Respondent No. 1, such as reproduced in the image above for Wall's Donut, does appear to be hard to locate due to its placement on the extreme right corner of the bottom of the wrapper.
- 6.31 However, the marketing practices of the Respondent No.1 apart from its packaging have conveyed mixed messages to the consumers. For example, the Complainant has submitted a video, attached on slide 10 and 46 of the Annex-B, wherein a frozen dessert of the Respondent No. 1 is being marketed as an ice cream throughout the TVC as well as through the tagline in very bold letters. The same is reproduced hereunder for reference:



- 6.32 While the product represents "Frozen Dessert" on its packaging, the takeaway of a consumer from this TVC and image is the word ice cream. Therefore, *the word ice cream does appear*

*to be misleading in the absence of proper disclosure* that the product is frozen dessert, although ice cream includes both dairy ice cream and frozen dessert. Para No. 6.23 and 6.24 and reiterated here for emphasis.

- 6.33 In reference to slide no. 23, 25, 26, 27, 28, 29 and 30 of the Annex-B, the frozen dessert products of the Respondent No. 1 have been advertised as ice cream on the E-market pages. It is the responsibility of the Respondent No. 1 to instruct its distributors from advertising its frozen dessert products under the right category, since the Respondent No. 1 remains the prime beneficiary of any purchase made through misleading marketing. *Therefore, the sale of frozen desserts under the category of ice cream does amount to dissemination of misleading information.*
- 6.34 The Complainant had also alleged that the Respondent No. 1's website represents itself as an ice cream brand. However, the Respondent No. 1 has also repeatedly used the words frozen desserts and frozen dessert treats on the same page while referring to its products under Wall's. Since the brand Wall's consists of both dairy ice cream and frozen desserts, the same does not amount to false or misleading information. (The same can be accessed at <https://www.unilever.pk/brands/foods-refreshment/walls/>).
- 6.35 In reference to slide no. 37, the Complainant has alleged that the Respondent No. 1 shows splashes of milk while advertising its frozen dessert products. However, according to the Pakistan Standards, frozen desserts are also manufactured using milk solids. Therefore, the use of splashes of milk with its products in this particular instance does not amount to false or misleading marketing, since the information given is true to the nature of the product. Similar instance has been quoted in slide no. 57 of the Annex-B.
- 6.36 On Slide No. 14 of the Annex-B, the Complainant has alleged that the Respondent No. 1 is using word ice cream for its product King Kulfa under brand creamy delights. The Enquiry Committee during investigation have found out that the product in question was in actual a dairy ice cream and has been duly disclosed on the outer front of the packaging. Therefore, the instance does not amount to dissemination of false or misleading information. The same can be viewed in Para No. 6.29 above. Moreover, the advertisements reproduced regarding the product King Kulfa, in slides 14 and 38 of Annex-B, are from the year 2019. The Enquiry Committee, during investigation, were not able to locate this product in the market, either due to shortage or discontinuation of the product. Instead, a new variant namely 'King K' has been introduced in similar flavour under the umbrella of frozen dessert, also reproduced by the Complainant on Slide No. 65. Therefore, the image of King Kulfa reproduced in the Para 6.29 has been reproduced from web search. However, the fact does not affect the analysis drawn in this regard since at the time of the claim, the product did fall under the Dairy Ice Cream category.
- 6.37 Moreover, in certain instances cited, the Respondent No. 1 was alleged to be calling its frozen dessert products 'Creamy', or depicting splashes of milk in association to its products while marketing on several media.

- 6.38 In furtherance of this, reference to slide No. 38 of the Annex-B, the Respondent No. 1 is shown to advertise its products as 'creamy'. As per the view of the Enquiry Committee, the word is a description of the texture of the Respondent No. 1's products under the brand 'Creamy Delights' under house mark Wall's. It is neither referring to dairy ice cream nor frozen desserts.
- 6.39 Moreover, as already discussed in the Para No. 6.36 above, the product King Kulfa under Creamy Delights, also appearing in the referred TVC, is a dairy ice cream while two of the other products shown are frozen desserts in the TVC. Therefore, the TVC does not appear to be disseminating false or misleading information in this instance since the word creamy is used for both dairy ice cream and frozen dessert from its range. Similar instances have been cited in slide No. 47, 48, 49, 50, 52, 54, 58, 62 and 65 of Annex-B and the Enquiry Committee does not deem it to be false or misleading.
- 6.40 The allegation on Slide No. 15 and 53 of the Annex-B does not amount to false or misleading information since the term 'Ice Cream Shake' is a general word for a recipe and is known globally as the same, irrespective of the frozen product used to make it.
- 6.41 Similarly, the allegation on Slide No. 16 also does not appear to be false or misleading since it is a dialogue between the Respondent No. 1's own two products where the highlight or takeaway message is the qualities of the chocolate bar as opposed to the white bar. Moreover, since both the bars are from the brand Wall's, calling out its own bar of dairy ice cream lowly will not benefit the Respondent No. 1 itself.
- 6.42 The Complainant also alleged the campaign started by Respondent No. 1 for consumption of ice cream in the winters on TV and social media, including Facebook and Instagram, as misleading. The same can be seen on slides 8, 11, 12 and 13 of Annex-B. However, the Respondent No.1 manufactures both dairy ice creams and frozen desserts and therefore the reference of word ice cream in general without a specific association with any of its products does not appear to be misleading since both are collectively categorized under ice cream. Infact, the Complainant itself may even benefit more from the behaviour change campaign initiated by the Respondent No. 1.
- 6.43 Displaying its products as ice cream while specifically being frozen desserts causes a confusion between distinctions of the nature of the two products. The Complainant has a competitive edge in the market where it manufactures dairy ice creams only and is known for it. However, if frozen desserts are advertised as ice creams in the market, the differentiation will disappear over time, whereby the Complainant will lose its competitive advantage, since ice creams are perceived generally as being dairy.
- 6.44 Both the products, i.e., frozen dessert and dairy ice cream, are different in nature, which is why they are classified as such and standards are available with regards to declaring the same on the packaging of each product. However, due to the lack of regulations for marketing, the Respondent No. 1, although displaying duly on the packaging to comply with the standards, is

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not making an effort to create the same distinction in its other marketing practices on various media platforms.

- 6.45 Moreover, in reference to Para No. 6.25 above, the Respondent No. 1 is also engaged in the misleading comparison of goods in the process of advertising. The effect of the misleading comparison also reaches out to the Complainant since the brand value of the Complainant dilutes in the market due to the elimination of difference between both product categories. The competitive edge of the Complainant is lost if the consumer is no longer able to differentiate between a dairy ice cream and frozen dessert, much like the Respondent No. 1 itself.
- 6.46 Therefore, in light of Para No. 6.25 and 6.32, 6.33 to 6.45 above, the Respondent No. 1 is found to be disseminating misleading information that is capable of harming the business interest of the Complainant, *prima facie*, in violation of Section 10 (2) (a) of the Act.

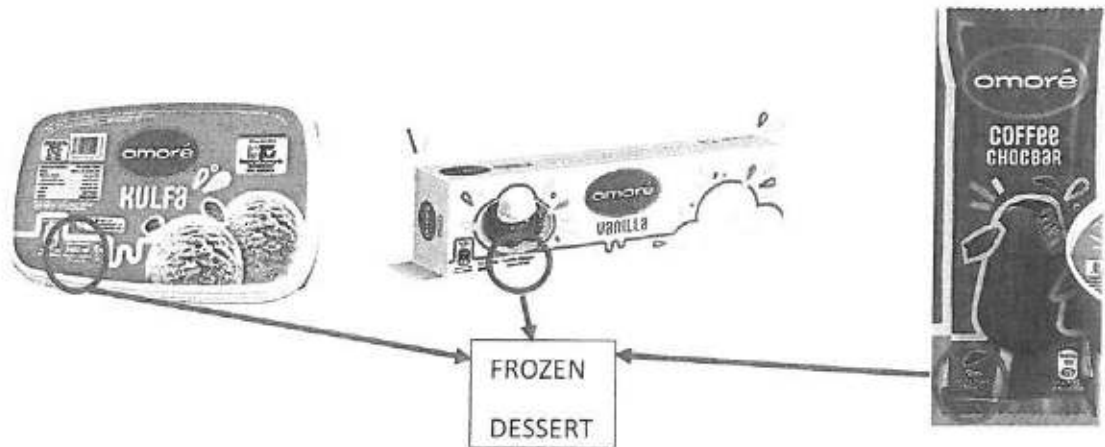
### **RESPONDENT NO. 2:**

- 6.47 The Complainant had alleged that the Respondent No. 2 is engaged in disseminating false and misleading information regarding its brand Omoré, which is a frozen dessert product allegedly being marketed expressly or impliedly as dairy ice cream.
- 6.48 Briefly reiterating, the Complainant had pointed out various instances, as summarised in Para 2.37 to 2.48 above, where it had found the Respondent No. 2 to be allegedly violating Section 10 of the Act. As already explained in the paragraphs referred above, it was alleged that the Respondent No. 2 was, in certain instances through various media, expressly calling its products under brand Omoré as 'ice cream'.
- 6.49 Moreover, in certain instances cited, the Respondent No. 2 was alleged to be calling its frozen dessert products 'Creamy', or depicting splashes of milk in association to its products while marketing on several media.
- 6.50 The Enquiry Committee, during the course of enquiry, have considered several packaging of the Respondent No. 2 for review under the existing standards and Section 10 of the Act. In all instances, the Enquiry Committee has found the Respondent No. 2 to be disclosing the nature of the product, i.e., frozen dessert, adequately on the front of the packaging. The disclosure is both visible and clearly legible in all instances. The disclosures found on the packaging are therefore neither false nor misleading. Some of these sample packaging, sourced from the official webpage of Omoré<sup>1</sup>, are also reproduced hereunder for reference:

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<sup>1</sup> <https://frieslandcampina.com.pk/omore/>





6.51 In reference to Slide No. 18 and 19 of the Annex-B, the Respondent No. 2 can be seen using the word ice cream for its frozen dessert products on Facebook. In reference to Para 6.9 above, ***use of the word ice cream for frozen desserts amounts to dissemination of misleading information.*** The same can be verified from the packaging of the products displayed in the Facebook post, sample of which is reproduced hereunder for reference:



6.52 Similarly, in reference to Slide No. 21 of the Annex-B, the Respondent No. 2 can be seen using the word ice cream on its webpage while describing its products under brand Omoré, whereas they are specifically frozen desserts. In this regard, ***the Respondent No. 2 is found disseminating misleading information while marketing its frozen desserts.*** (The webpage can be accessed at <https://frieslandcampina.com.pk/our-company/>).

6.53 Moreover, in reference to Slide No. 23, 24 and 32 of Annex-B, it is alleged that the Respondent No. 2's products under Omoré are being displayed as ice creams on E-market platforms. It is the responsibility of the Respondent No. 2 to instruct its distributors from advertising its products under the right category, since Respondent No. 2 remains the prime beneficiary of any purchase made through misleading marketing. ***Therefore, the sale of frozen desserts under the category of ice cream does amount to dissemination of misleading information.***

6.54 In reference to slide No. 39, 40, 41, 42, 43, 55, 56, 59, 60 and 63 of Annex-B, the Complainant has alleged that the Respondent No. 2's TVC and posts on other media shows the use of words

creamy and display of milk splashes at various instances throughout. However, reiterating the discussion above for the sake of brevity, the use of word creamy only describes the texture of the product rather than implying the use of cream in it. Furthermore, the use of milk does not amount to dissemination of misleading information since frozen desserts also contain milk solids as a main constituent of its ingredients.

6.55 Reiterating Para No. 6.43 and 6.44, the use of words ice cream by Respondent No. 2 for its frozen desserts has an impact on the business of the Complainant since it causes confusion regarding the nature and differentiation among dairy ice creams and frozen desserts.

6.56 Therefore, in light of Para No. 6.51, 6.52 and 6.55 above, the Respondent No. 2 is found to be disseminating misleading information that is capable of harming the business interest of the Complainant, *prima facie*, in violation of Section 10 (2) (a) of the Act.

iii. *Whether the Respondents are disseminating false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, properties, suitability for use, and quality of its products in, prima facie, violation of Section 10 (1) in general and in particular, Section 10 (2) (b) of the Act?*

6.57 In light of the analysis drawn in Para No. 6.27 to 6.56 above, it is evident that the information disseminated by the Respondents is misleading in individual instances and it does have the potential to cause harm to the Complainant and other competitors.

6.58 However, the same false and misleading information only impacts the businesses when it impacts the consumer, since any damage brought to the Complainant's business is through impact on sales and brand worth.

6.59 To understand if any damage can be or has been caused to the Complainant's business, it is first important to understand what an impact or impression is of a marketing practice. An impact or impression is 'One person, seeing one ad, at one time'<sup>2</sup>.

6.60 TV advertising increases, directly and indirectly, consumers' marginal willingness to pay for a brand. The direct effect automatically leads to an increased willingness to pay for the particular advertised goods or services. Similarly, the indirect impact derived from the advertising influence on the perception of product quality, which grows exponentially as the advertisement continues to be projected on consumers' TV devices<sup>3</sup>. Moreover, frequency of an impact refers to the number of times a target market is exposed to the message.

<sup>2</sup> <https://www.marketingiq.co.uk/what-is-a-tv-impact/#:~:text=TV%20audience%20impacts%20are%20a,tend%20to%20be%20called%20impressions.>

<sup>3</sup> Tsui, H. C. (2012). *Advertising, quality, and willingness-to-pay: Experimental examination of signaling theory*. *Journal of Economic Psychology*, 33(6), 1193-1203.

- 6.61 If the same finding, as referred to in Para No. 6.59 and 6.60, is applied to not just the use of TV but a collection of various media, the impact would multiply manifold. In this instance, the Respondents have been engaged in the use of TVC's, YouTube advertising, Facebook videos and posts, Instagram advertisements, E-Commerce platforms and webpage, to disseminate misleading information, thereby increasing frequency of impacts.
- 6.62 Since both brands, i.e., Wall's and Omoré, are national brands and already household names, through multiple impacts/ impressions, the Respondents were able to reach almost all of the population of Pakistan. Therefore, any misleading information imparted reached multitudes of people, young and old alike, based on personal preferences of use of different media.
- 6.63 It is very difficult for a company to differentiate its product when many competitors have similar attributes to their product<sup>4</sup>. In this case, the Complainant is the only company among top 5 competitors to be manufacturing a full range of dairy ice creams. Other 4 competitors, 2 of which are the Respondents, are manufacturing a mix of dairy ice cream and frozen desserts. *(The market shares of the competitors are given by the Complainant, attached as Slide No. 4 of Annex-B).*
- 6.64 In light of the above discussion, it is evident that consumer behaviour will become indifferent to the nature of the two products as the frequency of the misleading message increases, since the message intends to eliminate the differentiation of the two product categories. This will in turn cause a change in the buying behaviour of the consumers. The misleading information being imparted by the Respondents, in this matter, relates to the character, properties and suitability for use of the frozen desserts.
- 6.65 In case of Respondent No. 1 specifically, it has also been established, *prima facie*, that a misleading comparison has been drawn in order to influence a change in the buying behaviour of the consumer by portraying frozen dessert as the healthier choice in absence of reasonable substantiation.
- 6.66 Dissemination of false and misleading information, that has a capability of changing the buying behaviour of a consumer, amounts to deceptive marketing practices under Section 10 (2) (b) of the Act.
- 6.67 Therefore, in light of Para No. 6.58 to 6.66 above, the Respondents are found to be disseminating misleading information to consumers, lacking a reasonable basis, related to the character, properties and suitability for use, *prima facie*, in violation of Section 10 (1) in general and in particular, Section 10 (2) (b) of the Act.
- 6.68 It is important to mention that the Complainant had raised concern regarding the expiry of licenses of the Respondent No.1 for the use of Pakistan Standard Mark. However, as per the

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<sup>4</sup> Rehman et al. (2017)

samples procured from the market, as of date 28<sup>th</sup> of June, 2022, it has been found that the Respondent No. 1 is not engaged in the display of the PS mark on its products. Therefore, the matter does not fall under Section 10 of the Act.

iv. Whether there is a spillover effect of the conduct of the Respondents?

- 6.69 As regards the effect of anti-competitive behaviour spilling over territorial limits of other provinces is concerned, it is noted that the products of both the Respondents are marketed and sold nationwide through all leading stores, offline and online.

**7 CONCLUSION & RECOMMENDATION:**

- 7.1 In view of the analysis, the Respondent No. 1 is found to be engaged in making misleading comparison without reasonable basis regarding the nutrition value of frozen desserts over dairy ice cream, thereby calling frozen desserts a healthier choice in the process of advertising, *prima facie*, in violation of Section 10 (2) (c) of the Act.
- 7.2 In view of the analysis, it is also concluded that the Respondents are disseminating misleading information by advertising their frozen desserts as ice cream over various media which, *prima facie*, has the potential to inflict harm on the business interest of the Complainant, in violation of Section 10 (1) in terms of Section 10 (2) (a) of the Act.
- 7.3 In light of the facts, it is also concluded that the Respondents are disseminating misleading information to consumers lacking a reasonable basis related to the character, properties and suitability of use of frozen desserts, *prima facie*, in violation of Section 10 (1) in terms of Section 10 (2) (b) of the Act.
- 7.4 To ensure free and fair competition in the market undertakings should be stopped from marketing their products in deceptive and misleading manner. The undertakings should be encouraged to resort to the marketing practices that are transparent and give consumers/customers true and correct information. Therefore, in light of the above mentioned findings, it is recommended that the Commission may consider initiation of proceedings against M/s Unilever Pakistan Limited and M/s Friesland Campina Engro Pakistan Limited under Section 30 of the Act for, *prima facie*, violation of Section 10 of the Act.



**M. Salman Zafar**  
Director (OFT)  
Enquiry Officer



**Urooj A. Awan**  
Deputy Director (OFT)  
Enquiry Officer