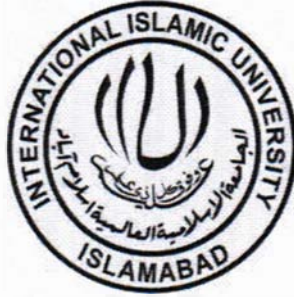


**FAIR TRADE UNDER COMPETITION REGIME IN PAKISTAN;
AN ANALYSIS FROM THE PERSPECTIVE OF SHARI'AH LAW**



LLM (ISLAMIC COMMERCIAL LAW)

Submitted By

**MUHAMMAD IFTIKHAR GUL
5-FSL/LLMICL/F07**

Supervised By

DR. MUHAMMAD NAWAZUL HASANI

A thesis submitted in partial fulfillment of the requirement for the degree of LLM
ISLAMIC COMMERCIAL LAW (Faculty of Shariah and Law) in the International
Islamic University Islamabad.

**Department of Law
Faculty of Shariah and Law
International Islamic University, Islamabad.**



Accession No. T/11066

MS
340.59
GUF

1 - Islamic law -

2. Sharia - Secular law

DATA ENTERED

Amz 05/07/17

APPROVAL SHEET OF THE COMMITTEE

Title of thesis "Fair Trade Under Competition Regime in Pakistan; An Analysis from the Perspective of Shari'ah Law", by Muhammad Iftikhar Gul, accepted by the Faculty of Shariah & Law, Department of Shariah (Islamic Law), International Islamic University, Islamabad, in partial fulfillment of the requirement of L.L.M Islamic Commercial Law.

VIVA-VOCE COMMITTEE



Supervisor/Chairman Viva Voce Committee

Dr. Muhammad Nawaz Al-Hasni

External Examiner

Dr. Abdul Quddus Sohaib

Internal Examiner

Maj. Attaullah Khan Mehmood Wattoo

Dean _____

Date:

FORWARDING SHEET

It is certified that Mr. **Muhammad Iftikhar Gul**, student of L.L.M (ICL), Reg No. 5-FSL/LLMICL/F07, International Islamic University Islamabad has completed his thesis titled as **"Fair Trade Under Competition Regime in Pakistan; an Analysis from the Perspective of Shari'ah Law"** under my supervision.

During the research work, he remained in touch with me and worked with diligence. He carried out his research work under my instructions and supervision. I forwarded this thesis for its submission and evaluation for the awarding of L.L.M (ICL) to him from International Islamic University, Islamabad.



Supervisor

Dr. Muhammad Nawaz Al-Hasni

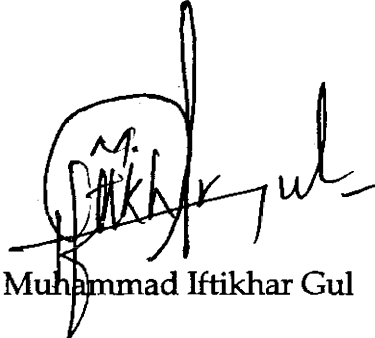
Faculty of Shariah & Law

International Islamic University, Islamabad

DECLARATION

I, Muhammad Iftikhar Gul, student of L.L.M (ICL), Reg No. 5-FSL/LLMICL/F07, International Islamic University, Islamabad, do hereby solemnly declare that the thesis entitled **"Fair Trade Under Competition Regime in Pakistan; An Analysis from the Perspective of Shari'ah Law"**, is submitted in partial fulfillment of degree of L.L.M (ICL).

I further declare that it is my original work and has not been submitted before for obtaining any degree from this or any other university or institution.



Muhammad Iftikhar Gul

DEDICATION

I, with utmost reverence and affection, dedicate this work to my father (for whose long life I always pray) and my late mother (May Allah bless her soul and rest her in peace), my teachers and all kind friends whose Contribution to this work is invaluable and who, throughout the course of this work, helped and pepped me in every possible manner. May Allah (SWT) bless them all!

ACKNOWLEDGEMENTS

I am grateful to Allah The Exalted for His endless bounties and favors that accompanied me since the start of my existence. His blessings have made me accomplish this task.

I am thankful to my parents and siblings who have been a great support throughout my studies. I can never pay them back for what they have done for me.

I am indebted to my all teachers. Their scholarly guidance has made the completion of this study possible.

My hearty gratitude is for all my friends who helped and supplicated for me.

May Allah bless them all!

ABSTRACT

Misleading representations and deceptive marketing practices can have serious economic consequences, especially when directed towards large audiences or when they take place over a long period of time. They can affect both business competitors who are engaging in honest promotional efforts, and consumers. Today's complex commercial operations and the large number of products and services in the market have made the situation complex for the consumers/end users. Consumers are normally head-hunted by the glamour of presentation or their own inability to evaluate the product as an 'expert'. So the consumer, not being enough informed in decision making, are in a rather defenseless position in front of the operation mode of modern businesses.

Under Shari'ah, the right to be informed properly regarding the product or service is safeguarded against the professional expertise of traders and manufacturers. The customer is supposed to be given proper information about the cost-and-benefit involved in any product or service. In the prophetic period and later in rightly-guided Caliphs' era, it was endeavored to ensure that the consumer is not exploited in the market. The Holy *Qur'an*, the *Hadith* and the classical *Fiqh* literature have dealt with this issue from general to minute details.

The Islamic Republic of Pakistan, being an Islamic welfare state in ideology behind its creation, promulgated laws that ensure states seriousness in mitigating these unfair and deceptive marketing practices. Therefore, the prohibition of deceptive marketing is made one of the four important pillars in the competition law of Pakistan. This is indeed a topic which is of great interest for not only to state itself but also to the citizens and the businesses world at large.

Therefore the legislature introduced the appropriate provisions in the statute that deal with the subject. The issue is quite important in the wake of cross-borders commercial operations of multinational corporations, especially in the third world/developing countries, where the awareness of consumer rights is not that much. Big companies are more comfortable with this state of things as they are in a sound position to extend their profit margins through the ignorance of consumers. Moreover, and most importantly, the Islamic Law tradition and its verdicts on this issue are not exposed to the academic eye of modern Law. Therefore, Shari'ah appraisal of the concept would not only give a comparative analysis but also reveal some fruitful aspects of Islamic Law which would be a contribution to this emerging regime in Pakistan. This is precisely what is intended by my research on this subject.

TABLE OF CONTENTS

Dedication	iv
Acknowledgments	v
Abstracts	vi
Introduction of the Topic	1
Significance of the Topic	6
Thesis Statement	7
Objective of Research	7
Research Questions	8
Hypothesis	9
Research Methodology	9
Literature Review	9

CHAPTER NO. 1: INTRODUCTION

1.1. COMPETITION LAW & POLICY; AN INTRODUCTION AND BACKGROUND	12
1.2. THE PURPOSE OF COMPETITION REGIME	17
1.3. COMPETITION COMMISSION OF PAKISTAN	18
1.4. FAIR TRADE; THE CONCEPT & SHORT HISTORY	20
1.5. FAIR TRADE AND WTO	24
1.6. UN-FAIR TRADE; NATURE & SCOPE	25
1.7. KINDS OF UNFAIR TRADE PRACTICE	27
1.7.1. Unfair practices	27
1.7.2. Misleading practices	27
1.7.2.1. Products	28
1.7.2.2. Marketing and advertising	29
1.7.2.3. Codes of Practice	29
1.7.2.4. Omission of Information	29
1.7.2.5. Unclear Information	29
1.7.2.6. Payment Methods	30

1.7.3. Aggressive practices	30
1.7.4. Practices which are always considered unfair	31
1.8. DECEPTIVE MARKETING; AN UN-FAIR TRADE PRACTICE	32
1.8.1. DMP Under the Competition Act	32
1.8.2. Causes and Kinds of Deceptive Marketing Practices	33
1.9. DECEPTIVE MARKETING PRACTICES AND MORAL CONSCIENCE	36
1.10. SOCIO-ECONOMIC REPERCUSSION OF THE MENACE	39

CHAPTER NO. 2: ISLAM AND FAIR TRADE

2.1. FAIR TRADE UNDER ISLAMIC LAW	41
2.2. UN-FAIR/DECEPTIVE MARKETING PRACTICES & SHARI'AH	52
2.2.1. Misrepresentation	54
2.2.2. Fraud	55
2.2.3. Concealment/Deception	56
2.3. THE INSTITUTION OF HISBAH IN ISLAM	60
2.3.1. Introduction	60
2.3.2. Scope and Functions of the Institution	62
2.3.2.1. Supervision of Markets	63
2.3.2.2. Taking care of public interests	64
2.3.3. Institution of <i>Hisbah</i> in the Sub-Continent	64

CHAPTER NO. 3: FAIR TRADE AND COMPETITION REGIME IN PAKISTAN

3.1. BREIF HISTORY & BACKGROUND	66
3.2. THE COMPETITION ACT 2010	70
3.2.1. Introductions & History	70
3.2.2. Objective of the Act	75
3.2.3. Substantive Provisions	75
3.2.4. Section-10 of the Act	76
3.3. OFFICE OF FAIR TRADE	79
3.3.1. The Aims and Objectives behind Establishing OFT	81

3.3.2. The Approach of OFT While Dealing With DMP	84
3.3.3. Nature of Actions against Business Entities Involved in DMP	86

CHAPTER NO. 4: IMPORTATN CASES

4.1. THE BANKS ORDER	89
4.1.1. Summary of the Case	89
4.1.2. Short Details of the Facts of the Case and the Order	91
4.2. THE Ufone AND ZONG ORDER	102
4.2.1. Summary of the Case	102
4.2.2. Brief Facts and the Order	104
4.2.2.1. Brief Details of the "CMPak"-Zong's Case	104
4.2.2.2. Brief Details of the Ufone's Case	105
4.3. THE PROCTOR AND GAMBLE ORDER	112
4.3.1. Summary of the Case	112
4.3.2. Brief Facts and the Order	113

CHAPTER NO. 5: REVIEW, ANALYSIS AND RECOMMENDATIONS

5.1. REVIEW & ANALYSIS	120
5.2. CONCLUSION & RECCOMENDATIONS	124

Bibliography	129
---------------------------	-----

Websites	137
-----------------------	-----

FAIR TRADE UNDER COMPETITION REGIME IN PAKISTAN; AN ANALYSIS FROM THE PERSPECTIVE OF SHARI'AH LAW

INTRODUCTION OF THE TOPIC:

Misleading representations and deceptive marketing practices can have serious economic consequences, especially when directed towards large audiences or when they take place over a long period of time. They can affect both business competitors who are engaging in honest promotional efforts, and consumers. Today's complex commercial operations and the large number of products and services in the market have made the situation complex for the consumers/end users. Consumers are normally head-hunted by the glamour of presentation or their own inability to evaluate the product as an '*expert*'. So the consumer, not being enough informed in decision making, are in a rather defenseless position in front of the operation mode of modern businesses.

Under Shari'ah, the right to be informed properly regarding the product or service is safeguarded against the professional expertise of traders and manufacturers. The customer is supposed to be given proper information about the cost-and-benefit involved in any product or service. In the prophetic period and later in rightly-guided Caliphs' era, it was endeavored to ensure that the consumer is not exploited in the market. The Holy *Qur'an*, the *Hadith* and the classical *Fiqh* literature have dealt with this issue from general to minute details.

The Islamic Republic of Pakistan, being an Islamic welfare state in its ideology behind creation, promulgated laws that ensure states seriousness in mitigating these unfair and deceptive marketing practices. Therefore, the prohibition of deceptive marketing is made one of the four important pillars in the competition law of Pakistan. This is indeed a topic which is of great interest for not only to state itself but also to the citizens and the businesses world at large. Therefore the legislature introduced the appropriate provisions in the statute dealing with the subject.

As a result, for the purposes of implementing the law effectively and mitigating these unfair and deceptive marketing practices, an Office of Fair Trade ("OFT") is established under competition regime in 2010.

The theme behind setting up of OFT is to build and develop the bond between CCP (or we may say the government) and the consumers, to establish a focal point for identifying the issues in the first place and then providing solutions to those issues which pose problems for the consumers arising out of the false, misleading and deceptive advertising. Its main objective and purpose is paving the way to create consumer awareness and to ensure that market functions better for consumers and to ensure the dealings in businesses are fair. The focus, of course, is protecting consumers from anticompetitive behavior to enable informed consumer choices.

In this context we would refer to the annual report of the Competition Commission of Pakistan in which while describing the role and establishment of OFT it is said that we must appreciate that OFT at CCP does not operate at the level similar to developed jurisdictions. Generally, OFT has multiple objectives and operates as an independent competition agency. In the UK, their competition commission initiates all enquiries following concern referred to by another authority, usually the OFT. In Australia, their OFT safeguards consumer rights and advises business men and traders on fair and ethical practices; licensing system is in place regulating rights and obligation under Fair Trading Laws. In USA and Canada, there is a Bureau of Consumer Protection, Fair Business Practices Branch performing same functions as that of an OFT.

It is further clarified in the landmark order passed by the Commission's tribunal - the Zong Order- wherein the members of the Commission deciding the case noted that our law envisages deceptive marketing within its mandate no matter how narrow or restricted the scope has been kept in Section 10 of the statute. Establishment of OFT facilitates in completing the picture of the competition agency in Pakistan – paving way for creating consumer awareness.

It is further said that "In Pakistan, the setting up of OFT is focused on the mandate to oversee and act as a watch dog for misleading and deceptive marketing practices, aiming to build a vibrant, fair and competitive market place for consumer confidence. It also ensures that no competitor gains or retains market share by deception. The competitive market forces

operating under the principles of competition law should determine the winners and losers in the marketplace.

It is of significance to know in this regard that Section-10 prohibits certain marketing practices which includes; “distribution of false or misleading information that is capable of harming the business interests of another undertaking; distribution of false or misleading information to consumers, including lacking reasonable basis, related to price, character, method or place of production, properties, suitability for use, or quality of goods; false or misleading comparison of goods in process of advertising; and last fraudulent use of another’s trade mark.”

CCP, in a case against Ace Group of Industries (“AGI”), decided recently, fined AGI for the fraudulent use of trademarks of BMW and Harley Davidson, on its website and held that “it is capable of harming the business interest of the complainants in violation of Section 10 of the law. (A trademark is a symbol or phrase that distinguishes ownership of a product or service and can also stand as a mark of quality/good will). However, keeping in view, the cooperation AGI extended during investigation and hearings only a token penalty was imposed in the sum of Rs. 2,50,000.”

It is worth mentioning here that Office of Fair Trade’s compliance oriented approach has, to a certain extent, brought, corrective behavior in two very important sectors i.e., telecom companies and consumer banking.

The undertakings in these two important sectors were reprimanded to cease, immediately, deceptive marketing and all submitted to the jurisdiction and gave their written commitments to rectify their behavior and assured the authority of their intention for future compliance with the law. Both of these cases were in connection with the claims regarding price/rates charged by the undertakings.

The Commission apart from making it clear that the responsibility rests on the undertakings to establish the reasonable basis of the claim, has also laid down the principles that: 'fine print disclaimers, are inadequate to correct the deceptive impressions', half-truth or concealment may be construed as deceptive, for the purposes of deceptive marketing, actual deception need not be shown to carry the burden of proof and it is sufficient to establish that the advertisement has the tendency/potential to deceive and the capacity to mislead.

As for the mechanism of dealing with these unfair trade practices, OFT has provided an online complaint provision. Upon receipt of complaint acknowledgment is immediately issued and a preliminary probe is initiated by the OFT subject to, however, initial verification of facts, complaint can either be closed or proceeded with through formal enquiry under Section 37 of the statute. It is the outcome of enquiry which determines initiation of proceedings under Section 30, i.e. a show cause notice followed by hearings and concluded through an order.

As for the remedies in this regard, these include seize and desist orders, injunctive relief, commitments ensuring compliance, confiscation, forfeiture or destruction of any goods having hazardous or harmful effect and requiring the undertaking concerned to take such actions as may be necessary to restore the pervious market conditions.

It is worth mentioning here that in Pakistan, choice to other laws is available to level out deceptive marketing practices, some of those laws which are promulgated to protect consumers in Pakistan include: Pakistan Standards and Quality Control Authority Act 1996; The Drugs Act 1940; The Drugs Act 1976; Pakistan Penal Code 1860; West Pakistan Pure Food Ordinance 1960 etc. We; however, in terms of deterrence and effectiveness of remedies, seem appropriate to invoke Section 10 of the Competition Act 2010. Hence this study.

SIGNIFICANCE OF THE TOPIC:

The issue is quite important in the wake of cross-borders commercial operations of multinational corporations, especially in the third world/developing countries, where the awareness of consumer rights is not that much. Big companies are more comfortable with this state of things as they are in a sound position to extend their profit margins through the ignorance of consumers. Moreover, and most importantly, the Islamic Law tradition and its verdicts on this issue are not exposed to the academic eye of modern Law. Therefore, Shari'ah appraisal of the concept would not only give a comparative analysis but also reveal

some fruitful aspects of Islamic Law which would be a contribution to this emerging regime in Pakistan.

THESIS STATEMENT:

The law of Fair Trade under competition regime does not contradict the principles of Islamic Law (Shariah). Rather it supports the principle of public interest or maslaha, the concept of blocking the means to an evil deed or sad al-dharai under Shariah.

OBJECTIVE OF RESERCH:

The aim of the current study is to investigate the competition laws vis-à-vis fair trade (in other words counteract of un-fair trade/deceptive marketing practices under competition regime) and its broader aspects, which include the disparity in the operational legislation within Pakistani context and internationally, by exploring the standardization of these laws, their effective application and compliance with respect to the Islamic law ("Shari'ah").

The study will further identify and analyse these laws in creating an opportunity or threats for the business, Fair Marketing Practices, international standards by recognizing the ways by which these can be successfully implemented. The Shari'ah's perspective of commercial law would also be accounted in this current study.

RESEARCH QUESTIONS:

In our study, we will try to address and find answers to the following questions:

1. What are the international standards for regulations dealing with Un-fair Trade/Deceptive Marketing Practices?
2. How does Islamic Law view the Deceptive Marketing Practices and provide mechanism to mitigate these practices?
3. Are the Pakistani competition laws, dealing with deceptive marketing practices, meeting the international standards?
4. Are these laws (Pakistani Competition Laws) in accordance with Islamic Commercial Laws?
5. What are the international standards for the "Fair Marketing Practices"?
6. Are these laws being enforced? If not, how can these laws be enforced effectively?
7. Are these laws creating any hindrance in the ways of business to prosper?
8. What are the lessons we learnt from decisions made by Office of Fair Trade ("OFT") to mitigate DMP since its inception?
9. What measures should be taken/adopted to have a more efficient and resourceful OFT?
10. What measures, if any, should be taken or adopted to have a more Shari'ah Compliant OFT?

HYPOTHESIS:

- The competition law which deals with fair trade meets international standards and is fully Shari'ah compliant and.
- The competition law which deals with fair trade does not meet international standards and is not Shari'ah compliant at all.
- The competition law which deals with fair trade partially meets international standards and is partially Shari'ah compliant.

RESEARCH METHODOLOGY:

The methodology adopted for this research would be evaluative and an analytical method of study would be followed. Finally, it would be accompanied with a comparative analysis and recommendations. Verses of the Holy Quran and traditions of the Holy Prophet (peace be on him) would be quoted from the original sources. Other sources of information will include books, articles, research papers, law journals, magazines and electronic media.

LITERATURE REVIEW:

We would like to mention here that a comprehensive literature review was undertaken at the initial stage of the research. This included a critical and analytical review of relevant legislation, rules, regulations, guidelines and policies of Competition Commission of Pakistan. Main documents which were reviewed included (i) The Competition Act 2010, (ii) CCP, 'Policy Notes & Opinions, (iii) Competition Commission (Service) Regulations, 2007

(PAK) (SRO 1192(I) 2007), (iv) CCP Rules and Regulations, (v) Competition Policy Report 2011, (vi) Payment Systems and Electronic Fund Transfer Act, 2007, and (vii) Guidelines for Dealing with Customer Complaints.

In addition to the above, complaint redress procedures of CCP, Appeals procedure, Show Cause Notices issuance procedure, and orders passed by the Commission were also reviewed and analysed. Furthermore, guidelines, policies, etc., secondary sources including research papers, reports, publications, different reports, articles, research done by the academia, and articles developed by various institutions and individual authors were also consulted to substantiate and authenticate the findings of the study.

Relevant studies conducted in other countries such as India and Bangladesh, Saudi Arabia, China, UK, Australia, Thailand, Korea, and other important developing and the developed countries in this regard were also consulted. South East Asian, particularly developing countries were also reviewed.

Different reports which were published by the CCP and other national and international organizations were also studied and analyzed for the purpose. Articles written by the worthy members and/or officers of the Commission, research papers published in different journals, interviews of the former Chairman and the current chairperson, news aired on the television networks, or published in the leading newspapers were also taken into account while interpreting different approaches. The books published in this regard by the UNDP, and

other international agencies were consulted. Specifically, the books and article written on the Islamic perspective of the issue were taken into account in order to address and find the answers to the research questions, mentioned earlier, for this study.

CHAPTER-1

INTRODUCTION

1.1. COMPETITION LAW & POLICY; AN INTRODUCTION AND BACKGROUND:

The world has, over the last seventy years, has rapidly moved away from using traditional diplomatic methods, which have proved ineffective too, and towards implementation of the more bendable soft law framework – ‘acts of international actors having a prescriptive content and non-binding effect’¹ – to restructure the international economic governance system in place since the end of the second world war.

As we have witnessed in many economic issues, the spread of competition legislation around the world may be attributed to international flexible law. It is said that “the globalization of competition law is a more recent phenomenon, efforts to internationalize the same are much older. As far back as 1947, there were calls to introduce international rules regarding competition on the International Trade Organization (ITO) forum through the Havana Charter. ITO was never formed and the General Agreement on Tariffs and Trade (GATT) made no mention of competition rules. Efforts to internationalize competition rules through United Nations Economic and Social Council (ECOSOC) in the 1950s, and through the

¹ UNDP, Human Development Report 2001, London: Oxford University Press, 2001.

voluntary UN General Assembly's Set of Multilaterally Agreed Equitable Principles and Rules for Control of Restrictive Business Practices (SET) in 1980 met similar fate."²

International and regional organizations' involvement in the matter has also greatly changed the situation. World Bank (WB) and the International Monetary Fund (IMF), Organization of Economic Conference and Development (OECD), and United Nations Commission of Trade and Development (UNCTAD) have been amongst the most prominent organizations in this regard. Rather we can say that "IMF and WB have been instrumental since they make adoption or improvement of the latter as one of the conditions states must agree to before using their fiscal resources. OECD is primarily active in providing technical capacity building assistance to states which have recently adopted competition legislations, or have plans to adopt it in the near future, China being one major example. UNCTAD considers itself to be an informal platform where discussions about competition policy can take place. It recommends domestic competition legislation, has published a model competition law and provides technical assistance."

Pakistan passed its first competition law in the early 1970s with the promulgation of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (hereinafter referred to as "MRTPO 1970"). As mentioned in a research article recently published by the Competition Commission of Pakistan, "The concentration of economic power in the hands of few family based business groups back then, led the country to adopt

²UNDP, Human Development Report 2001, London: Oxford University Press, 2001.

legislation that aimed to prevent 'undue concentration of economic power, growth of unreasonable monopoly power and unreasonably restrictive trade practices'. The bare reading of the provisions, leads to the conclusion that the MRTPO 1970 was designed mainly to break up single or familial ownership of businesses in the country by introducing ceilings on private ownership and limits on mergers and acquisitions. MRTPO 1970 also sought to prohibit collusive behavior, both horizontal and vertical. However, it allowed for exceptions to certain prohibitions by introducing the concept of economic efficiency. To oversee implementation, the Monopoly Control Authority (MCA) was formed and vested with the power to conduct enquiries into possible violations and, on finding violations, to order remedial measures³² and impose penalties."³

The article further noted that "despite being ambitious, MRTPO 1970 proved far from efficacious due to several legal, economic and political considerations. Almost immediately after its promulgation, the government nationalized all major industries, which then, due to the exemption given to state owned enterprises, did not attract the application of the MRTPO 1970 till the privatization process started in the nineties. MCA lost its independent existence, and the MRTPO 1970 was pushed further on the backburner, in 1981 when it was made part of Pakistan's Corporate Law Authority. By the time it was made independent again in 1994, the desire to attract private and foreign investment, made the notion of applying competition law less desirable for the government. In wake of the changing economic realities, MCA

³ Umer Javed, Syed., *Globalization of Competition Law – Challenges for Pakistan's Competition Regime*, Islamabad: CCP, 2012.

found itself to be rather toothless: it had no power to make pre-merger notification mandatory, or go after state owned enterprises, or to do anything more than slap a violator on the wrist.”⁴

Pakistan, with the wake of liberalization and privatization regime of the nineties, started the reforming its competition law or, at least we can say, started the process in this regard. Although there was a need to overhaul the competition regime in as early as 1993, the government became seriously looking into it when the flexible law framework of various international organizations started taking part in the last decade. To reorganize Pakistan’s largely nationalized economy, the government twisted to the IMF and WB for financial and technical support.

As we look in the history, we discover that, “since 1995 Pakistan has accessed IMF resources though three Standby Credit Facilities (1995-1997, 2000-2001, 2008-2011), one three-year combined Enhanced Structural Adjustment Facility/Extended Fund Facility (1997-2000), and one three year Poverty Reduction and Growth Facility (2001-2004). As part of the understanding to obtain these facilities, Pakistan prepared three national strategies in the last decade titled Poverty Reduction Strategy Papers (PRSP): the Interim PRSP in 2001 (I-PRSP), the PRSP-I in 2003 and PRSP-II in 2009. These papers were prepared with the active involvement of numerous international organizations. While considering

⁴ Umer Javed, Syed., Globalization of Competition Law – Challenges for Pakistan’s Competition Regime, Islamabad: CCP, 2012.

regulatory reforms in PRSP-I, the government announced plans to restructure the MCA and adopt a new competition law.”⁵

First time the government started paying serious attention to the issue was when MCA started advocating reform using German and OECD models in 1993 and 2001 respectively. Pakistan, in order to obtain IMF and WB funding, desired to reform its economic structures and for this WB’s involvement did provide the much needed push to support this issue on the government’s agenda. Many other factors also provide support to the view that international organizations played an essential role in this reform process.

The government of Pakistan, in 2005, requested the WB for technical assistance in developing the new competition law and policy framework. For this purpose, WB engaged a Brussels based legal firm named “Jones Day”, to draft a proposed law. This firm proposed a law modeled after the EU. The law was customized by the executive branch of the government which by-passed the country’s legislature and promulgated it as the Competition Ordinance, 2007 (hereinafter called “CO 2007”).

The CO 2007 mostly kept the overarching legal characteristics and language of the EU. A bare reading shows that the two of the four substantive provisions relating to abuse of

⁵Umer Javed, Syed., Globalization of Competition Law – Challenges for Pakistan’s Competition Regime, Islamabad: CCP, 2012.

dominance and prohibited agreements (Section 3 and Section 4), had striking resemblance to Article 101 and 103 of the Treaty on the Functioning of the EU.

The government, in 2009, while seeking a new funding facility, reported the progress in reforming the competition law to the international organization. The MRTPO 1970 got repealed with the enactment of CO 2007 and MCA, therefore, was dissolved. The government notified the establishment of the Competition Commission of Pakistan (“CCP”) to replace the MCA. This CO 2007 ultimately became the Competition Act 2010 (“CA 2010”) after it was passed by the parliament of Pakistan.

1.2. THE PURPOSE OF COMPETITION LAW AND POLICY:

Generally speaking, the purpose of competition law and policy in a market-based financial system is, in its spirit, to ensure a) that manipulative and unfair trade practices are not only restricted but restrained too, b) that exploitative “dog-eat-dog” tendencies are limited but contained, c) that the market does not malfunction, d) that new business entrants are not discouraged, and e) that rational commercial conduct prevails instead of the laws of the jungle, and above all, f) a level playing field is enforced for the benefit of all economic agents.

We believe that this best describes the purposes of competition policy in any market based economy and this is exactly what the government of Pakistan has and is trying to achieve in its efforts to enforce an effective competition regime.

1.3. COMPETITION COMMISSION OF PAKISTAN;

As we have mentioned earlier, the MRTPO 1970 got repealed with the enactment of CO 2007 and MCA, therefore, was dissolved. The government notified the establishment of the Competition Commission of Pakistan (CCP) to replace the MCA. CCP was initially run under CO 2007.

CO 2007's main purpose/objective was to focus on protecting competition and increasing consumer welfare. Therefore, it outlawed four basic categories of anti-competitive behavior namely; a) abuse of dominance, b) collusive agreements, c) deceptive marketing practices, and d) certain mergers & acquisitions. This ultimately became the main four focuses of the Competition Commission of Pakistan as an institution. CA 2010 also had the same set of laws with slight procedural changes introduced in it which could best be described as: "Section 3 prohibited an undertaking with substantial market power from unfairly using it to the disadvantage of others. Section 4 prohibited undertakings from entering into agreements, or an association of undertakings from taking decisions, which have the negative consequences on competition, whether vertical or horizontal. However, Section 5 and 7 allowed CCP to exempt individual agreements or category of agreements, respectively, from

the application of Section 4 under the criteria recorded in Section 9. Section 10 prohibited undertakings from giving misleading or incomplete information that can impact competition and from fraudulent use of other's trademarks. Section 11 disallowed those mergers and acquisitions which create or strengthen a dominant position and created a mandatory pre-merger notification regime.”⁶

Furthermore, “under CO 2007 (and later under CA 2010), CCP was mandated and empowered to do a variety of tasks to ensure competition. CCP was authorized to undertake law-enforcement actions by conducting investigations into possible violations of the substantive provisions.

It was further authorized to order remedial measure to restore competition where violations were found, and to impose substantial penalties on the violators. Moreover, it was authorized to conduct research into the competitiveness of various sectors of the economy. It was also mandated to increase awareness about competition to all stakeholders in the society, and to suggest policy and legislative reviews to the government.”⁷

CCP was empowered to gather information from different sources in order for it to carry out these functions appropriately, conduct inspections and take possession of evidence, record

⁶The Competition Commission of Pakistan, Annual Report, Islamabad: CCP, 2011.

⁷ Ibid.

testimony and documentary evidence, call for assistance from other private and public agencies, give leniency, and exercise wide range of powers for the recovery of penalties.

It is worth mentioning here that the decisions of CCP are made appealable directly before the Supreme Court of Pakistan ("SC"), the country's apex court.

1.4. FAIR TRADE; THE CONCEPT & SHORT HISTORY:

The father of modern economics Adam Smith said:

"—Every business transaction is a challenge to see that both parties come out fairly. — Adam Smith, 1759"

The term "Fair Trade" refers to a lot of things; or in other words, we, by this term, mean a lot of things: a faith-based activity, a social justice movement, a tool for international development, a system of global commerce, an alternative business model and what not. For different individuals, organizations and societies, it means different things. Everyone takes it in one's own way and understands from it the best suits one. There is no single, regulatory, authoritative definition for "Fair Trade" in the world. And hence there is no specific body for this in the world. We, therefore, sometimes, need to explore various models and concepts in this regard. However, one thing which needs to be not only realized but also appreciated is

that almost every definition of Fair Trade do always emphasize that the exchange of goods should be based on principles of economic and social justice.

We, in other words, can say that Fair Trade takes many forms around the world, with many different definitions, and no single, authoritative body. Every organizations and different individuals use different criteria for determining what is, and isn't, a Fair Trade or what constitutes a Fair Trade and what does not.

Now a days, in many parts of the world, the term Fair Trade is used to refer to the "Fair Trade Movement" as a whole and is also used to describe both labeled and unlabeled goods and the work of Alternative Trade Organizations (hereinafter referred to "ATOs"), Fair Trade networks and federations such as IFAT, NEWS, EFTA etc.

So we may say that the term fair trade is a broader term which is often used to describe one or many or all of the above, but may also sporadically be used to refer to "Trade Justice Issues". In these cases, it can be as extensive as to describe general fairness in trade, such as different other things like tariffs, subsidies, worker rights etc.

It may be interesting for the reader to know that the term "Fair trade" is also used to describe the certification and labeling system administered by the FLO which is designed to allow consumers to identify goods produced under approved labor and environmental standards.

The Fairtrade Foundation U.K elaborates the concept further as follows:

*"Fairtrade is about better prices, decent working conditions, local sustainability, and fair terms of trade for farmers and workers in the developing world. By requiring companies to pay sustainable prices (which must never fall lower than the market price), Fairtrade addresses the injustices of conventional trade, which traditionally discriminates against the poorest, weakest producers. It enables them to improve their position and have more control over their lives."*⁸

It is further said that, "Fair trade principles have deep roots in European societies long before the first structured alternative trading organizations (ATOs) emerged following World War II. Many of the fundamental concepts behind fair trade actually show a great resemblance with pre-capitalist ideas about the organization of the economy and society."

As recorded in the famous book on subject by Robert A. Cook, "in 1827 in Philadelphia, Pennsylvania, a moral and economic boycott of slave-derived goods began with the formation of the "Free Produce Society", founded by Thomas M'Clintock and other abolitionist members of the Religious Society of Friends (Quakers). In the Free produce movement, they sought to fight against slavery with a new tactic, one that emphasized the value of the honest labor of free men and women, and to try and determine the unseen added

⁸ Audretsch et al., Audretsch, D. B., Baumol, W. J. and Burke, A. E., "Competition policy in dynamic markets," International Journal of Industrial Organization, Vol. 19, 2001.

costs to goods such as cotton and sugar which came from the toil of slaves. In 1830, African Americans formed the "Colored Free Produce Society", and women formed their own branch in 1831. In 1838, supporters from a number of states came together in the American Free Produce Association, which promoted their cause by seeking non-slave alternates to products from slaveholders, forming non-slave distribution channels, and publishing a number of pamphlets, tracts, and the journal *Non-Slaveholder*.⁹

The book further describes that "The movement did not grow large enough to gain the benefit of the economies of scale, and the cost of "free produce" was always higher than competing goods. The national association disbanded in 1847, but Quakers in Philadelphia continued until 1856. There have been a few instances in which fair trade in the 'old moral economy' was focused on producer rights: as early as 1859, Dutch author Multatuli (the pen name of Eduard Douwes Dekker) questioned the injustice of the colonial and capitalist system towards commodity producers in his novel *Max Havelaar*. The fictional tale recounts the story of Max Havelaar, a Nederlandse Trade Company employee, who leaves everything to work in solidarity with local Indonesian workers. This account draws a direct correlation between the wealth and the prosperity of Europe and the poverty of the suffering of other parts of the world."¹⁰

⁹ Robert A. Cook, and Joseph D. Looney, "Unfair and Deceptive Advertising of Consumer Credit." *Maryland:2002*.

¹⁰ Robert A. Cook, and Joseph D. Looney, "Unfair and Deceptive Advertising of Consumer Credit." *Maryland:2002*.

1.5. FAIR TRADE AND WTO:

The Declaration of the WTO Ministerial Conference held in Singapore in December 1996 stated in paragraph 20:

" ... we also agree to: establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anticompetitive practices, in order to identify any areas that may merit further consideration in the WTO framework. In the conduct of the work of the working group[s], we encourage cooperation ... to make the best use of available resources and to ensure that the development dimension is taken fully into account. ... It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations." The General Council of the WTO established a Working Group in April 1997 on the Interaction Between Trade and Competition Policy under the chairmanship of Professor Frédéric Jenny, a French expert on industrial organization. The non-paper by the chair, "Checklist of Issues Suggested for Study", called for particular attention to the "development dimension" in the Working Group's discussion on these issues: "It was widely recognised that the Working Group's work programme should be open, non-prejudicial and capable of evolution as the work proceeds. It was also emphasized

that all elements should be permeated by the development dimension.” (emphasis added)

The above paragraph is self-explanatory and need not any further illustrations.

1.6. UN-FAIR TRADE; NATURE & SCOPE:

Generally speaking, the un-fair trade practices can be of many kinds. It greatly depends on the nature and kind of trade itself to determine as to what constitutes fair or otherwise un-fair in that specific area. It may be noted that the same thing, practice or attitude, sometimes, if fair in one society could be, at the same time, deemed un-fair in another society. A group of people may find one business practice as ethical but the same practice may be deemed un-ethical for another group. It could also be based upon one's religious belief. Something may be considered fair in general but, if put to the litmus test of religion; the same thing would be un-fair. So, this varies from person to person, people to people, society to society and country to country. But there are certain things/ trade practices which have got a universal recognition as unfair when it comes the question of competition law and policy. We will hereby, discuss only what constitutes “un-fair trade” in the eyes of law in a particular territory or a jurisdiction.

It seems appropriate here to mention that in 1998, four European organizations mainly Fairtrade Labeling Organizations (now Fairtrade International, FI), International Fair Trade

Association (now World Fair Trade Organization, WFTO), the Network of European Worldshops (NEWS!) and the European Fair Trade Association (EFTA) created a widely accepted definition of Fair Trade. They created a workgroup known as FINE, an acronym of their names, and defined Fair Trade as:

—a trading partnership, based on dialogue, transparency, and respect, that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, disadvantaged producers and workers—especially in the South. (FINE, 1998)

To them only what fulfills the conditions laid down in the above definition would be considered a fair trade and rest will be everything but fair trade.

Unfair trade practices include misrepresentation, false advertising, tied selling and other acts that are declared unlawful by law in a country. It can also be referred to as deceptive trade practices. In other words, using various deceptive, fraudulent or unethical methods to obtain business and harm the consumers by infringing their rights. As mentioned in the Zong Order of CCP,

“The Florida Supreme Court has defined "unfair" practices to include conduct that "offends public policy and that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." The Court has defined deceptive conduct as

"representation[s], omission[s], or practice[s] that [are] likely to mislead the consumer."¹¹

In order to best describe the nature and kinds of un-fair trade/commercial practices, we will rely on European Union Commercial Practices Directive which describes this phenomenon as follows;

1.7. KINDS OF UNFAIR TRADE PRACTICE:

1.7.1. Unfair Practices

According to European Union Commercial Practices Directive, "a commercial practice is considered to be unfair if it is contrary to the requirements of professional diligence. That means it is contrary to the general principle of good faith in the trader's field of activity and/or the standard of skill and care that the trader could reasonably be expected to exercise towards consumers."¹²

1.7.2. Misleading Practices

The Directive defines misleading practices as:

"Existing consumer legislation already prohibited some misleading commercial practices, for example, misleading advertisements. This Act, however, provides for a more extensive list of

¹¹The Zong Order., Competition Commission of Pakistan, Islamabad: CCP, 2010.

¹² The European Union, "The Unfair Commercial Practices Directive", Luxembourg: Office for Official Publications of the European Communities, 2006.

prohibited practices. The sale of property was not covered by existing legislation but is included in the scope of this Act. The Minister has the power to make Regulations prescribing the sort of information which must be provided with specific products and with specific advertising.”¹³

The Directive provides that certain practices in relation to Products, Marketing and advertising, Codes of practice, Omission of information, Unclear information, Payments are misleading.

More detailed information on these specific practices is set out below:

1.7.2.1. Products

According to the Directive: “a commercial practice is misleading if it includes providing false information about or, would cause you to be deceived about; a) the existence or nature of a product and its main characteristics, b) the price, c) the need for any part, replacement, servicing or repair, d) the existence, extent or nature of any approval or sponsorship (direct or indirect) of the product by others, e) the nature, attributes or rights of the trader, f) the extent of the trader's commitments, g) the trader's motives for the commercial practice, h) the nature of the trader's supply process, i) the legal rights of a consumer.”¹⁴

¹³ The European Union, “The Unfair Commercial Practices Directive”, Luxembourg: Office for Official Publications of the European Communities, 2006.

¹⁴ The European Union, “The Unfair Commercial Practices Directive”, Luxembourg: Office for Official Publications of the European Communities, 2006.

1.7.2.2. Marketing and Advertising

“A commercial practice involving marketing or advertising is misleading if it causes the average person to confuse a competitor's product with the trader's product or a competitor's trade name or trademark, or some other distinguishing feature or mark, with that of the trader.”¹⁵

1.7.2.3. Codes of Practice

TH 11065
“A commercial practice is misleading if it involves a representation that the trader abides or is bound by a code of practice and the trader fails to comply with a firm commitment in that code of practice.”¹⁶

1.7.2.4. Omission of Information

“A commercial practice is misleading if the trader omits or conceals material information that the average consumer would need in order to make an informed decision.”¹⁷

1.7.2.5. Unclear Information

“A commercial practice is misleading if the trader provides material information in a manner that is unclear, unintelligible, ambiguous or untimely, or fails to identify the commercial intent of the practice.”¹⁸

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ The European Union, “The Unfair Commercial Practices Directive”, Luxembourg: Office for Official Publications of the European Communities, 2006.

1.7.2.6. Payment Methods

The Directive forbids the practice of charging consumers more for using different methods or modes of payment. Traders who are prepared to accept payment by two or more of the following; a) Cash, b) Credit card, c) Direct debit, e) Any other prescribed methods may not charge the consumer more for using one such method.

1.7.3. Aggressive Practices

Under the Directive, aggressive commercial practices are defined as “practices involving harassment, coercion or undue influence that impair your freedom of choice and affect your purchasing decisions.”

The Directive sets out some examples of aggressive practices (but the list is not exhaustive). “Aggressive commercial practices include; a) Sales tactics that try to intimidate or coerce consumers, b) The use of threatening or abusive behavior, c) Practices that try to take advantage of vulnerable consumers. (A vulnerable consumer is one whom the trader could foresee as vulnerable because of mental or physical infirmity, age or credulity.), d) The imposition of onerous or disproportionate non-contractual barriers by the trader when the consumer wishes to end the contract or exercise a contractual right, or switch to another product or trader., e) Threats to take legal action when the trader has no basis for such action.”¹⁹

¹⁹ The European Union, “The Unfair Commercial Practices Directive”, Luxembourg: Office for Official Publications of the European Communities, 2006.

1.7.4. Practices which are always considered unfair:

The Directive provides that certain commercial practices are always prohibited, whether they are likely to affect a consumer's decision or not.

They mainly include:

- i. *Claims that a product or trader has an endorsement or authorization that does not exist or that the product or trader is not in compliance with*
- ii. *False claims that a trader is about to cease trading or move premises*
- iii. *Prize promotions where there is either no prize or consumers must make a payment in order to claim a prize*
- iv. *False claims that the supply of a product is legal*
- v. *False claims that products can cure illnesses*
- vi. *Persistent unwanted cold calling*
- vii. *Creating an impression that a consumer cannot leave the premises until a contract is formed*
- viii. *Requiring a consumer to produce documents which are irrelevant in the case of an insurance claim or persistently failing to answer a consumer's correspondence in respect of an insurance claim in order to dissuade consumers from exercising their rights under the contract*
- ix. *Advertisements directly aimed at getting children to buy products or persuade adults to buy for them.*²⁰

²⁰Ibid.

1.8. DECEPTIVE MARKETING; AN UN-FAIR TRADE PRACTICE:

Deceptive marketing practice (hereinafter referred to as “DMP”) is the main element in whole concept of fair trade. It is considered to be one of the major types of unfair trade practices in the world. We are also focusing on it because it is the main topic of our research. It is the core issue that Section 10 of the Competition Act 2010 deals with. It is worth mentioning here that according to description of deceptive marketing practice by the commission itself, “for the purposes of deceptive marketing, actual deception need not be shown to carry the burden of proof. It is sufficient to establish that the advertisement has the tendency to deceive and capacity to mislead.”²¹

1.8.1. DMP under the Competition Act

An entity (business firm, entity or individual, and for the purposes of the CA “an undertaking”) is considered to have opted to deceptive marketing practices under the Act if “it distributes false or misleading information that may harm the business of another undertaking or if such information is distributed to consumers and lacks a reasonable basis, relates to price, character, method or place of production, properties, suitability for use or quality of goods.

²¹ The Zong Order., Competition Commission of Pakistan, Islamabad: CCP, 2010.

Deceptive marketing practices also include false or misleading comparison of goods in advertisements and the fraudulent use of another trademark, firm name, product labeling or packaging.”²²

In cases relating to deceptive marketing practices, the Commission has held that;

“it is not necessary to establish actual deception, disclaimers in fine print cannot correct deceptions in the main body of the advertisement, incomplete or half statements may be regarded as being misleading or false, not necessary to show that the claim in an advertisement has a material effect on the consumers choice to purchase a product, not necessary to establish actual harm, in respect of financial products there has to be clarity regarding the rate of return and the prohibition of deception marketing applies to both goods and services.” (emphasis added)

1.8.2. Causes and Kinds of Deceptive Marketing Practices:

In the Zong Order, Commission described it as follows:

“Section 10 of the Ordinance talks of deceptive marketing practices which without prejudice to the generality of the provision broadly includes distribution:

- (a) of ‘false information’, or
- (b) of ‘misleading information’;
- (c) to consumers, or

²² The Zong Order., Competition Commission of Pakistan, Islamabad: CCP, 2010.

(d) fraudulent use of another's trade mark, firm name or product labelling or packaging."²³

Commission further held that;

*"Deception involves: (1) materially false advertising (materially false, i.e., there is a claim-fact discrepancy or (2) misleading advertising, whereby false subjective consumer impressions or perceptions are created Consumer research could be used to determine whether a significant number of buyers are fooled or whether they merely willingly suspend their disbelief. If consumers are fooled, the comparative claim is unethical since it misleads them; if people are willingly suspending their disbelief then no deception is involved and making a comparative claim doesn't violate any moral standard. Furthermore, if the claim provides useful information for informed decision making, it is morally justifiable. However, if it is used simply to bash the competitor with the intent to damage their image or reputation via derogatory statements, as seems to be the case here, then the advertising could be viewed as a malicious violation of fair play."*²⁴

²³ Ibid

²⁴ Ibid

We would like to mention here a few of the instances of Deceptive and Unfair Business Practices as described by the Florida Law. Florida case law is stuffed with instances of businesses that were held accountable for their deceptive or unfair trade practices. Some of those illustrations are as follows:

- (a) Using a business name similar to an established business so as benefit from the other business's reputation and marketing²⁵
- (b) Misrepresenting a lease transaction as a sale transaction²⁶
- (c) Using a business name similar to an established business so as benefit from the other business's reputation and marketing²⁷
- (d) A manufacturer intentionally delaying repairs of defective fishing boats²⁸
- (e) Grossly overcharging a hospital patient for medical treatment²⁹
- (f) Attempting to collect condominium association dues when it was known that further payments were not owed³⁰
- (g) Taking steps to deceive a consumer into believing that a car was new, when it fact it was used³¹
- (h) Landlord's failure to maintain a commercial property for the benefit of a commercial tenant, even though a contractual duty existed³²

²⁵ *Contemporary Restaurant Concepts, Ltd. v. Las Tapas-Jacksonville, Inc.*, 753 F. Supp. 1560, M.D. Fla. 1991.

²⁶ *Cummings v. Warren Henry Motors, Inc.*, 648 So. 2d 1230., Fla. 4th DCA 1995.

²⁷ *Ibid.*

²⁸ *Yvon v. Baja Marine Corp.*, 495 F. Supp. 2d 1179, N.D. Fla. 2007.

²⁹ *Colomar v. Mercy Hosp., Inc.*, 461 F. Supp. 2d 1265., S.D. Fla. 2006

³⁰ *Williams v. Edelman*, 408 F. Supp. 2d 1261., S.D. Fla. 2005

³¹ *Tuckish v. Pompano Motor Co.*, 337 F. Supp. 2d 1313., S.D. Fla. 2004

1.9. DECEPTIVE MARKETING PRACTICES AND MORAL CONSCIENCE:

Mr. Rakesh R. in his famous book, *"Ethics in Marketing - Indian Spirituality"* writes;

"Ethics are a collection of principles of right conduct that shape the decisions people or organizations make. Many people assume that only actions that violate laws are considered unethical. While it is true that illegal activity is also unethical, a business activity can be unethical even though no laws are violated. Practicing ethics in marketing means deliberately applying standards of fairness, or moral rights and wrongs, to marketing decision making, behavior, and practice in the organization. Marketing ethics is the area of applied ethics which deals with the moral principles behind the operation and regulation of marketing. Indian spirituality is all about showing respect to all living beings—animals, trees, rocks, and even water and lead a positive and healthy life. It is believed that the supreme Creator has put each one of us in this world for a purpose and that purpose is to be compassionate, caring and loving to one-another. The great Indian spiritual personalities and gurus have played an important role in spreading the message of love, care and the need for positive living all over the world. "In Karma-yoga no effort is ever lost, and there is no

³² *Beacon Property Mgmt, Inc., v. PNR, Inc.*, 890 So. 2d 274., Fla. 4th DCA 2004.

harm. Even a little practice of this discipline protects one from great fear [of birth and death].”³³

The law and morality, indeed, are not coextensive in their functions. Generally, the law provides a moral minimum. Laws can be immoral and inconsistent over time and place (Lantos, 1999).

One can observe that a very little attention is given within marketing to the ethical issues underlying the use of deception or to the potential consequences of deceptive marketing practices. In the words of a leading expert on the subject: “Deceptive practices increase transactions costs, which in turn raise business costs, thereby reducing corporate profits and/or increasing consumer prices (and we are all consumers).”

Rakesh. R. further describes it as “Ethics in marketing refers to the practice of marketing in business in an ethical and morally sound way. It means deliberately applying standards of fairness and portray the company to others. While the goal of any business is to be profitable, if a company has to use false advertisement, or deceptive or objectionable marketing tactics to achieve it, it's really not running an effective marketing campaign. Sure, there may be short term gain to be had in doing something unethical, but the loss of trust and respect in the

³³ Rakesh. R., *Ethics in Marketing - Indian Spirituality*, Bombay: Research Institute of Bombay, 2012.

marketplace, not to mention potential lawsuits, will eventually catch up to any business owner.”³⁴

A business entity that acts in an ethical manner will definitely collect long-term rewards for its actions. It will build loyal customers, enjoy, of course, word of mouth referrals, and will, indeed, be building a positive image in its prospects' mind about its business. A lot of people think that only the actions which violate the laws are considered to be unethical. Every illegal activity is also unethical, and there is no doubt in it. It may be interesting to know that a business activity can be unethical even if no laws are violated. For example, “some people consider it unethical for marketing companies to aggressively promote unhealthy foods to children though such promotional practices are generally not viewed as illegal. Many may ask “is there a place for ethics in marketing?” In discussing concerns that consumers and advocacy groups have with the apparent lack of concern for consumers’ well-being.” A need address the challenges that marketers have to ‘self-regulate’ and become more socially responsible has arisen in rigorously.

In an ordered society it is the responsibility of all the individuals to behave ethically. This is something which would be expected of all of us. A major issue within the marketing industry is that if marketers do not change their ways, and if they do not become more socially responsible then they will, surely, be made subject to more government controls rather stricter controls. As we know that the “Service” is really an art of offering a

³⁴Rakesh. R., *Ethics in Marketing - Indian Spirituality*, Bombay: Research Institute of Bombay, 2012.

consumer/customer more than just the product he or she is purchasing. A Fair element of that offering is to promise consumers or customers that what you are marketing to them is based on ethically fair principles: It is indeed a growing concern to check as to whether business entities treat their customers with respect? Are these entities honest and forthright in their communications and representations with the consumers or their potential customers?

Unfortunately, the answer, in the most of cases, is in negative.

1.10. SOCIO-ECONOMIC REPERCUSSION OF THE MENACE:

Misleading representations and deceptive marketing practices can have serious economic consequences, especially when directed towards large audiences or when they take place over a long period of time. They can affect both business competitors who are engaging in honest promotional efforts, and consumers. With the increases in awareness amongst consumers, if the consumer perceives that they are being deceived or being treated unethically they will, definitely go somewhere else since in this activity relationship between the consumer and the businessman or the service provider is all what matters. These customers will not only leave but they will take with them as many others as they can. This is indeed, and shall be considered, the biggest danger and a hazard for the business.

Today's complex commercial operations and the a great deal of variety of products and services in the market have beclouded the situation for the consumers/end users. They are generally head-hunted by the glamour of presentation and/or their own inability to evaluate

the product as an 'expert'. So today's consumer not being enough informed in decision making are in a rather vulnerable position before the operation mode of modern business.

On the other hand, as described by the experts, "Deceptive Marketing Practices increase transactions costs for businesses, which in turn raise business costs, thereby reducing corporate profits and/or increasing consumer prices (and we are all consumers). Deceptive marketing practices reduce consumer confidence in the marketing system. When the business system collapses in the absence of morals we end up in a Hobbesian "war of all against all.""

Commenting on American's ethical standards in the nineteenth century, French historian and politician "Alexis de Tocqueville" declared that;

"The nation had become great because it was good." (Emphasis added)

(Alexis de Tocqueville)

CHAPTER-2

ISLAM AND FAIR TRADE

2.1. FAIR TRADE UNDER ISLAMIC LAW:

Islam is a religion that provides guidance to its followers in each and every sphere of life and lays the basic groundwork for all the aspects of a Muslim's life. The compilation of revelations used for this can be found in the Qur'an. In practicing the religion, the Qur'an is supplemented through Hadith (the reported authentic words and actions ("Sunnah") of the Holy Prophet Muhammad (peace be upon him) and by Shari'ah (the Islamic law).³⁵ Shari'ah, which is based on the Qur'an, Hadith and the Sunnah, covers the details of duties of human towards fellow human beings (and to the other creatures too) and outlines all types of human interactions.

It, for all intents and purposes, constitutes what would be considered criminal, personal and commercial law in a different place. It covers all the aspects of a life ranging from the highly spiritual to material matters, including business. Islam, being a complete code of life, not only considers business to be an acceptable pursuit but also a noble activity which should be

³⁵ Dabbah, M.M., *Competition Law and Policy in the Middle East*, Cambridge: Cambridge University Press, 2007.

carried out for the sake of good of society and fellow human beings.³⁶ The Holy Prophet Muhammad (peace be upon him), himself, was a merchant in Mecca before he was commanded to announce his Prophet-hood.³⁷ A respected Lady Syeda Khadijah (May ALLAH be pleased with her), a rich businesswoman in the region during the time, was married to the Prophet (peace be upon him), which signifies the importance of the pursuit of business in Islam.³⁸

Islam emphasizes a lot on just business interactions –

“.....If ye do it not, Take notice of war from Allah and His Messenger:

*But if ye turn back, ye shall have your capital sums: **Deal not unjustly, and you shall not be dealt with unjustly**”³⁹ (Emphasis added)*

(al-Qur'an, 2:279),

At another place ALLAH (SWT) says:

“.....If two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the command of Allah; but if it

³⁶ Khan, K., & Aftab, S., “Consumer Protection in Islam: The Case of Pakistan”, Canberra: *Australian Economic Papers*, 2000

³⁷ Saleh, Nabil A., *Unlawful Gain and Legitimate Profit in Islamic Law*, London: Graham & Tortman, 1992.

³⁸ Darir, Muhammad Siddiq, *Al-gharar in Contracts and its effects on Contemporary Transactions*, Jeddah: Islamic Development Bank, 1997.

³⁹ Yusuf Ali, Abdullah, “An English Interpretation of the Holy Qur'an”, Lahore: Sh. Mu-hammad Ashraf, 1975.

complies, then make peace between them with justice, and be fair: for Allah loves those who are fair (and just)."⁴⁰ (al-Qur'an, 49:9). (Emphasis added)

While individuals face problems and ethical issues in the area of business, "Islam necessitates that Muslims act in a way that shall ensure socio-economic justice at all times".⁴¹ We can find that, throughout the Qur'an, there are verses echoing this sentiment:

*"And give full measure when you measure, and weigh with a balance that is straight....."*⁴² (al-Qur'an, 17:35);

*".....Do not withhold from the people the things that are their due and do not commit mischief in the land, causing corruption"*⁴³ (al-Qur'an, 11:85).

Islam, indeed, discourages all kinds of prejudices, oppression and discrimination and injustice. The last sermon of the Holy Prophet Muhammad (peace be upon him) is a living legacy⁴⁴ wherein he declared:

⁴⁰ Ibid.

⁴¹ Darir, Muhammad Siddiq, Al-gharar in Contracts and its effects on Contemporary Transactions, Jeddah: Islamic Development Bank, 1997.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Razi Khan, Maulana Muhammad., Encyclopedia of Hadith on Economy, New Delhi: Anmol Publications Pvt. Ltd., 2007.

*"all mankind is from Adam and Eve, no Arab has any superiority over a non-Arab; no dark person has a superiority over a white person and no white over a dark person. The criterion of honor in the sight of God is righteousness and honest living."*⁴⁵

This is important when considering the societal interactions between people⁴⁶.

According to the Holy Prophet ﷺ,

*"the best earnings are from a blessed sale and the product of a man's own hands."*⁴⁷

According to the article written by Susan El. Ajou on Islam and Fair Trade, "[a] sale would not be considered to be a "blessed one" if it has an element of deception or cheating of any sort in it; the character of a Muslim trader must be upheld at all times.

Islam not only highly regards business ventures but also encourages individual initiative, drive, efficiency, and enterprising attitudes along with a right to make profits and own private properties. It, at the same time condemns greed, dishonesty and an attitude of disregard for the rights and needs of others. Islam clearly mentions that excessive accumulation of wealth shall not be the ultimate objective for a Muslim."⁴⁸

⁴⁵ Hussain, Hafiz Mubashir., *Jadid Fiqhi Masail*, Lahore: Mubashir Academi, 2008.

⁴⁶ Ma'sum Billah, Prof. Dr. Mohd., "Regulatory Framework of Doctrine of 'Utmost Good Faith' In *Takaful*", Jeddah: Islamic Development Bank, 2005.

⁴⁷ El-Ajou, Suzan, "*Islam and Fair Trade*", Karachi: Maktabah Ma'arif ul Qur'an, 2008.

⁴⁸ Ibid.

Almighty Allah (SWT) commands fair dealings in every sphere of life including any commercial transactions⁴⁹:

*"Allah commands justice, the doing of goods and liberality to kith and kin, and He forbids all shameful deeds and injustice and rebellion. He instructs you that you may receive admonition."*⁵⁰
(*al-Qur'an*, 16: 90)

Prof. S. Misbahul Hassan, a famous expert on Islamic commercial laws suggests that "[t]he elements of *Maisir* (gambling), *al-Garar* (uncertainty), *Riba* (usury), monopolies, restrictive trade practices, hoarding of wealth, fraudulent and deceitful activities, deceptive advertising and other deceptive market strategies, acts of exploitation and discrimination, and dealings in goods and services which are forbidden by the Shari'ah principles should be removed from any kind of commercial dealings if we want to establish fairness and justice in commercial transactions."⁵¹

There are repeated guidance and directions given by Allah (s.w.t.) and also by the Holy Prophet (s.a.w.) so as to maintain honesty, fairness and justice, and of course fear of Allah (s.w.t.) in any form of transaction. Abiding by such honesty, justice and fairness in the

⁴⁹ *Al-Quran*, "Surah al-Nahl", 16:90

⁵⁰ Ibid.

⁵¹ Hassan, S. Misbahul, "Good faith and fairness in Commercial transaction: The Common law, the civil law and the Islamic perspective," (u/p.) presented at IIU Malaysia on April 1996.

utmost good faith⁵² is the supreme ethic in any kind of commercial transaction which must be observed in order to ensure a legitimate transaction recognised by the Shari'ah principles.

Thus, Almighty Allah (SWT) commands His creatures to abstain from any wrongful appropriation while He (SWT) advises them to consume through mutual good will:

*"O you who believe eat not up your property among yourselves in vanities, but let there be amongst you traffic and trade by mutual good will."*⁵³ (al-Qur'an, 4: 29)

Islam also considers the element of usury involved in the transaction as an injustice to the person who has to give it. This is why Almighty Allah (SWT) forbids us from getting involved in any kind of transaction which involves usury. In this regard, Almighty Allah (SWT) said:

*"But Allah had permitted trade and forbidden usury."*⁵⁴

(al-Qur'an, 2: 275)

Similarly, Islam also considers the element of uncertainty (*al-Garar*) as injustice in any kind of transaction and regards it as an evil attitude which gives the person, committing it, an

⁵² Khan, Adnan A. M., "Specific Performance in Arab Contract Law," Jeddah: IDB Jeddah, 1994.

⁵³ al-Quran, Surah al-Nisa., 4: 29.

⁵⁴ al-Quran, Surah al-Baqarah, 2: 275.

opportunity to cheat and victimize the innocent. This may be one of the reasons why the Holy Prophet (s.a.w.) prohibited us from getting involved in it or practice it in our daily lives. As narrated by the Prophet (SAW):

"Yahya related to me from Malik from Abu Hazim ibn Dinar from Sa'id ibn al-Musayyab that the Messenger of Allah (s.a.w.) forbade the sale with uncertainty it." ⁵⁵

There are many other forms of dishonesty and cheating which can be involved in a business transaction. The noble teachings of Islam not only permit but also encourage any and all kinds of transaction which is required and regarded as useful for the harmonious life of the mankind provided that the transaction does not involve any unfair element (Ghara, cheating, dishonesty, etc.).

That is perhaps why the Holy Prophet (SAW) advised the contracting parties in a business transaction, before it is concluded, to pronounce to the other party that there is no cheating in the transaction.

'Narrated by 'Abdullah bin 'Umar: A person came to the Prophet (s.a.w.) and told him that he was always betrayed in purchasing.

⁵⁵ Anas, Imam Malik bin, *"Al-Muwatta, Kitab al- Buyu"*, Lahore: Muhammad Ashraf, 1996.

The Prophet (s.a.w.) told him to say at the time of buying, no cheating.”⁵⁶

The Holy Prophet (SAW) in another tradition “strongly prohibited us from practising Najsh (a kind of cheating or false trick used in the transaction to deceive the other party)”⁵⁷. The Holy Prophet (s.a.w.) said:

‘Narrated by Ibn Umar: Allah Messenger’s (s.a.w.) forbade Najsh’.⁵⁸

Again reported to the same effect⁵⁹:

‘Ibn Abi Aufa said, one who practises Najsh is a riba eating, traitor. And such a practice is a false trick which is forbidden, and the Prophet (s.a.w.) said deception would lead to the Hell (fire) and whoever does a deed which is not in accord with our tradition, that deed will not be accepted.’⁶⁰

⁵⁶ Bukhari, Abu Abdullah Muhammad ibn Ismail, Sahih al-Bukhari, tran. Muhammad Daud Raz, Lahore: Maktabah Qudosiyah, 2004

⁵⁷ Ma'sum Billah, Prof. Dr. Mohd., “Regulatory Framework of Doctrine of ‘Utmost Good Faith’ In *Takaful*”, Jeddah: Islamic Development Bank, 2005.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Bukhari, Abu Abdullah Muhammad ibn Ismail, Sahih al-Bukhari, tran. Muhammad Daud Raz, Lahore: Maktabah Qudosiyah, 2004

**

In a business transaction, it is one of the primary obligations of the parties to observe utmost good faith, strictly, in order to making the said transaction a clean transaction. A clean transaction (with utmost good faith⁶¹) deserves blessing from the almighty *Allah (SWT)* in favour of the parties to the transaction. On the other hand, an unclean transaction (with cheating, dishonesty and/or falsehood in it) may bring to the doer everything but the blessing. The Holy Prophet (s.a.w.) said:

*“Narrated by Halim bin Hizam(r.a). Allah’s Messenger (s.a.w.) said: the seller and the buyer have the right to keep or return the goods so long as they have not parted or till they part and if both the parties spoke the truth and described the defects and qualities (of the goods) then they would be blessed in this transaction, and if they told lies or hid something then the blessings of their transaction would be lost.”*⁶²

While declaring the consequences against those trading parties who in their transaction used to violate “utmost good faith (with cheating, dishonesty, falsehood, etc.)”, the Holy Prophet (s.a.w.) said:

⁶¹ Ma'sum Billah, Prof. Dr. Mohd., “Regulatory Framework of Doctrine of ‘Utmost Good Faith’ In *Takaful*”, Jeddah: Islamic Development Bank, 2005.

⁶² *Ibid.*

‘Obaid bin Rafia from his father reported that the Holy Prophet (s.a.w.) said: the merchants will be gathered on the Resurrection day as transgressors except those who were fearful of Allah, pious and truthful.’⁶³

Giving good news for those who observe honesty and trustworthiness (utmost good faith) in their transactions, the Holy Prophet (s.a.w.) said:

‘Abu Sayed (r.a.) reported that the Messenger of Allah (s.w.t.) said : the truthful trustworthy merchant will be with the Prophets, truthful and martyrs.’⁶⁴

Dr. Ma’sum Billah⁶⁵ writes that, “[o]ne of the companions of the Holy Prophet (s.a.w.) , ‘Uqba bin ‘Amir highlighted the legal consequences against violation of utmost good faith (with dishonesty, cheating, etc.) in transactions:

“ ‘Uqba bin ‘Amir said: It is illegal for one to sell a thing if one knows that it has a defect, unless one informs the buyer of that defect.’⁶⁶

⁶³ Al-Bayhaqi, Ahme ibn al-Hussain ibn Ali, Sunan Al-Kubra, Beirut: Dar-al-Marafah, 1992.

⁶⁴ Qudamah, Abu Muhammad Abdullah Ibn Ahmed, Al-Mughni, Cairo: Hajar, 1992.

⁶⁵ Ma’sum Billah, Prof. Dr. Mohd., “Regulatory Framework of Doctrine of ‘Utmost Good Faith’ In *Takaful*”, Jeddah: Islamic Development Bank, 2005.

In the light of what has been stated above, we can conclude that, for the purpose of having a harmonious and comfortable life, it is important for the mankind and necessary to engage themselves in various commercial activities according to their wishes and as they like and require.

Mere involvement in commercial activities is not permitted by the Shari'ah. It is, rather, something which is repeatedly encouraged by the Shari'ah provided it is done in accordance with the injunctions of *Qur'an and Sunnah*.

Under Islamic law (Shari'ah), "the freedom of commercial activities is not absolute but limited. This means that mankind may involve themselves in commercial activities as they like, provided that all activities should be absolutely in line with the Shari'ah principles. It is the supreme requirement for mankind to strictly observe 'utmost good faith' in every aspect of their commercial activities in order to ensure that the activities are valid and may also be blessed by Allah (s.w.t.).

⁶⁶ Bukhari, Abu Abdullah Muhammad ibn Ismail, *Sahih al-Bukhari*, tran. Muhammad Daud Raz, Lahore: Maktabah Qudosiyyah, 2004.

In other words, the validity of the commercial activities under Shari'ah principles depends greatly on the principle of utmost good faith.”⁶⁷ Fair and honest dealing in every transaction is what is required by Shari’ah.

2.2. UN-FAIR/DECEPTIVE MARKETING PRACTICES & SHARI’AH:

In Christine Huda Dodge’s words, a famous western scholar on Islamic law, “[i]n Islam, business and trade are highly encouraged, as long as they are conducted by lawful means and through lawful channels. It is expected that any earnings be made through decent and honest labor. A Muslim is to be self-supporting and should avoid becoming a liability on any person or the society at large. Business practices must be conducted with frankness and honesty. Islam encourages that contracts and agreements should be written down and witnessed by two trustworthy persons so neither party can try to take advantage of the other or make false claims in the future.”⁶⁸

She further describes,

“[m]uslims are forbidden from cheating, hiding defects in merchandise, and engaging in exploitation, monopoly, and fraud. There is a chapter of the Qur'an called Al-Mutaffifin, or ‘Dealing in Fraud.’ It begins,

⁶⁷Ma'sum Billah, Prof. Dr. Mohd., “Regulatory Framework of Doctrine of ‘Utmost Good Faith’ In *Takaful*”, Jeddah: Islamic Development Bank, 2005.

⁶⁸ Dodge. C. Huda, “*Fair Business Practices in Islam*”, Brussels: COD Publications, 2008.

*"Woe to those that deal in fraud. Those who, when they have to receive some measure from men, exact full measure, but when they have to give by measure or weight to men, give less than due"*⁶⁹ (al-Qur'an 83:1-3).

*Muslims are encouraged to pay for services as soon as they are performed and not to withhold or delay payment. Muhammad instructed that when Muslims hire laborers to do some work, they should "compensate them before the sweat dries."*⁷⁰

This subject has been dealt with in detail in the holy Qur'an. The Almighty Allah commands Muslims in another section saying;

*"Give just measure, and cause no loss to others by fraud. And weigh with scales true and upright. And do not withhold things that are justly due to men, nor do evil in the land, working mischief"*⁷¹ (al-Qur'an 26:181-3).

It was common practice in ancient times to "tip the scales" or to hide defective merchandise underneath a pile of quality goods. These practices were strictly forbidden in Islam.

Islamic law prohibits certain business practices considering them un-fair and deceptive, and advises Muslims not to involve or engage in any such practices while dealing with one another. Shari'ah scholars mentioned a list of these practices in the books particularly written on the subject. We will, however, mention only those practices here which are related to our subject. Some of these practices are:

⁶⁹ al-Quran, Surah al-Mutaffifin, 83:1-3

⁷⁰ Ibid.

⁷¹ Al-Qur'an, "Surah ash-Shu'ara", 181-3

2.2.1. Misrepresentation:

Misrepresentation is meant to say or present something otherwise than the truth. Islam has no room for the commission of misrepresentation, not only in the business transaction but also in any matter of human dealings. The Almighty *Allah (SWT)* commands in the holy Qur'an:

“O you who believe why say you that which you do not, grievously odious is it in the sight of Allah that you say that which you do not.”⁷² (*al-Qur'an 61:2-3*)

It is, therefore, a moral responsibility upon the parties in a business transaction that “they should disclose the truth and material facts or matters affecting that transaction (without any misrepresentation) before it is concluded.”⁷³

The Prophet (*SAW*) said:

*“If both the seller and the buyer explain the good and bad points concerning the transaction and hide nothing and give sincere advice (then they are blessed in their bargain).”*⁷⁴

⁷² *al-Quran, Surah al-Saff, 61: 2-3.*

⁷³ Ma'sum Billah, Prof. Dr. Mohd., “Regulatory Framework of Doctrine of ‘Utmost Good Faith’ In *Takaful*”, Jeddah: Islamic Development Bank, 2005.

⁷⁴ Bukhari, Abu Abdullah Muhammad ibn Ismail, *Sahih al-Bukhari*, tran. Muhammad Daud Raz, Lahore: Maktabah Qudosiyah, 2004.

2.2.2. Fraud:

Fraud can be described as, “an act or omission created by a person with malice aforethought, or with an evil intention, or a deceptive trick, is a fraud”.

Islamic law (Shari’ah) has no room for fraud, because, “a fraud in the commercial activities enables its inventor to hope for an unlawful gain while bringing an injustice against the innocent.”⁷⁵

Ibn Abi Awfa narrated that:

*“One who practices Najsh (a kind of fraud) is a riba eating, traitor. And such a practice is a false trick which is forbidden, and the Prophet (s.a.w.) said : Deception would lead to the hell (fire) and whoever does a deed which is not in accord with our tradition, then that deed will not be accepted.”*⁷⁶

Islamic jurists sum up that “the act of fraud in the commercial activities consists of two fundamental elements:

- (i) exploitation by way of trick; and
- (ii) inducement of the contracting party into contract.”⁷⁷

⁷⁵ Hassan, S. Misbahul, “Good faith and fairness in Commercial transaction: The Common law, the civil law and the Islamic perspective,” (u/p.) presented at IIU Malaysia on April 1996.

⁷⁶ Bukhari, Abu Abdullah Muhammad ibn Ismail, Sahih al-Bukhari, tran. Muhammad Daud Raz, Lahore: Maktabah Qudosiyah, 2004.

⁷⁷ Rayner, S.E., “The Theory of Contracts in Islamic Law”, London: Oxford Publishers, 2000.

A well-known companion of the Holy Prophet (SAW) narrated the following *hadith*:

*"Uqba bin Amir (r.a.) said: it is illegal for one to sell a thing if one knows that it has a defect, unless one informs the buyer of that defect."*⁷⁸

Therefore we will conclude by saying that "a fraudulent statement is unlawful and if such an unlawful statement or act influences an innocent party to enter into a contract or a business transaction in which such fraudulent statement stands as a term or condition in the contract, the innocent party in such a contract may not be bound by the contract."

2.2.3. Concealment/Deception:

Under Islamic law (Shari'ah), it is not only a legal obligation but also a moral obligation on the parties who are involved in any form of commercial or business transaction to make a disclosure with a sincerity of any material facts or matters that pertains to the subject matter of that particular transaction or to the transaction itself.

There is no room in shari'ah for the parties in a business transaction to even try to conceal any defect, hidden either in the subject matter or the transaction itself, while dealing with others.

⁷⁸ Abu Dawud, Sulayman Ibn al-Ash'ath al-Sijistani, Sunan, Lahore: Muhammad Ashraf, 1984.

The Almighty *Allah* (SWT) appreciates the transaction, with his blessings, in which the parties to that transaction make a fair and honest and sincere disclosure about any material facts relevant to the transaction. But at the same time, if they do not make a disclosure of the material facts the blessings of Almighty *Allah* (SWT) may be blotted out from that transaction.

The Holy Prophet (SAW) said:

*"Narrated by Hakim bin Hizam, Allah's Messenger (s.a.w.) said: the seller and the buyer have the right to keep or return the goods so long as they have not parted or till they part; and if both the parties spoke the truth and described the defects and qualities (of the goods) then they would be blessed in their transaction but if they told lies or hid something, then the blessings of their transaction would be lost."*⁷⁹

The Holy Prophet (s.a.w.) announced and confirmed the penalty against those who did not make disclosure and concealed the truth relevant to a transaction.

The Holy Prophet (s.a.w.) said:

"Narrated by Waseleh b. Asqa'a (r.a.): I heard the Holy Prophet (s.a.w.) say: whoever sells a defective thing without disclosing it

⁷⁹Bukhari, Abu Abdullah Muhammad ibn Ismail, Sahih al-Bukhari, tran. Muhammad Daud Raz, Lahore: Maktabah Qudosiyah, 2004.

continues to be in the wrath of Allah and angels continue to curse him.”⁸⁰

On another occasion the Holy Prophet (SAW) warned the people engaged in any kind of commercial transaction that involves deception as follows:

*“The Holy Prophet (s.a.w.) said: Deception (by way of concealment of defect or any other evil conduct affecting the transaction) would lead to the Hell (Fire) and whoever does a deed which is not in accord with our tradition, then that deed will not be accepted.”*⁸¹

As for the legal effect of intentional concealment of a defect relevant to the subject matter of a transaction, “Uqba bin ‘Amir and Imam Malik concluded⁸² that such an evil attitude (concealment of defect) is unlawful, which causes the transaction to be held void.

Relying on the saying of the Holy Prophet (SAW), Uqba bin Amir said:

*“It is illegal for one to sell a thing if one knows that it has a defect, unless one informs the buyer of that defect.”*⁸³

⁸⁰ Abu Dawud, Sulayman Ibn al-Ash’ath al-Sijistani, Sunan, Lahore: Muhammad Ashraf, 1984.

⁸¹ Bukhari, Abu Abdullah Muhammad ibn Ismail, Sahih al-Bukhari, tran. Muhammad Daud Raz, Lahore: Maktabah Qudosiyah, 2004.

⁸² Khan, K., & Aftab, S., Consumer Protection in Islam: The Case of Pakistan, *Australian Economic Papers*, 2000.

⁸³ Abu Dawud, Sulayman Ibn al-Ash’ath al-Sijistani, Sunan, Lahore: Muhammad Ashraf, 1984.

Similarly Imam Malik (R.A.) also narrated:

*"Malik (r.a.) said: The generally agreed upon way of doing things among us regarding a person, whether he is an inheritor or not, who sells a slave, slave girl or animal, without a liability agreement, is that he is not responsible for any defect in what he sold unless he knew about the fault and concealed it. If he knew that there was a fault and concealed it, his declaration that he was free of responsibility does not absolve him, and what he sold is returned to him."*⁸⁴

Almighty Allah (SWT) commanded mankind not to let themselves conceal the truth and present something in their dealings by mixing the truth with the falsehood. Almighty Allah (SWT) says:

*"And cover not truth with falsehood, nor conceal the truth when you know (what it is)."*⁸⁵ (al-Qur'an 2:42)

Relying on the above authorities and the foregoing discussion, we will conclude by saying that Islam encourages fair dealings in not only the business transactions but also in every

⁸⁴ Mansoori, Dr. Muhammad Tahir., Shariah Maxims on Financial Matters, Islamabad: International Islamic University, Islamabad, 2007.

⁸⁵ al-Quran, Surah al-Baqarah 2:42.

aspect of human life. At the same it not only dislikes and discourages the unfair dealing but also prohibits them.

2.3. THE INSTITUTION OF HISBAH IN ISLAM:

2.3.1. Introduction:

For the purposes of our current study we have reviewed a lot of books and articles on the subject in order to understand the institution of *Hisbah* and its role in the Islamic society. In the coming lines, we will discuss the same relying on the information provided in an article published on the website of the Institute of Policy Studies, Islamabad⁸⁶

According to the author, “[t]he medieval Islamic state developed three institutions of judicial and quasi-judicial nature i.e. *qazā*, (judiciary), *mazālim* and *hisbah* or *ih}tisāb*. *Hisbah* or *ih}tisāb* was by and large a practical form of the Qur’ānic injunctions of *da’wah ila al-khayr* (call to the good) and *amr bi al-ma’rūf wa-nnahī ‘an al-munkar* (enjoining the doing of all that is *ma’rūf* and forbidding all that is *munkar*).”⁸⁷

While referring to the definitions of *ma’rūf* and *munkar* under the Islamic Law, the author said, “[b]oth the words are repeatedly used in Qur’ān. By examining all the verses, where these words are used, one may deduct that *ma’rūf* is an act or a process considered right and

⁸⁶<http://www.ips.org.pk/>

⁸⁷ Ibid.

just by the common sense of a person of integrity and upright character, and *munkar* is something opposite to it.”⁸⁸

According to the literature available on the subject, Muslims are supposed to perform the duty of *da‘wah ila al-khair*⁸⁹ and *amr bi al-ma‘rūf wa-nnahī ‘an al-munkar*⁹⁰ in his or her individual and social capacities. *Da‘wah*⁹¹ is known as “a call or an invitation to the good which may be extended to anyone irrespective of one’s status, though within the limits of social norms.

The author of the aforementioned article reiterates that, “[i]t does not need any authoritative force but so far as *amr bi al-ma‘rūf wa-nnahī ‘an al-munkar* is concerned, it does need one or the other sort of enforcing authority.

The parents exercise moral, social and upto certain extent even economic levers to induce the children to follow certain acts and not indulge in some others. The executives enjoy administrative powers to bring their subordinates in line.

The social relationship of the teacher-students or elder-youngsters may work for compliance of certain orders, but when it comes to the general public where no such official or social bonds exist, the injunctions of *amr bi al ma‘rūf wa-nnahī ‘an al-munkar* fail to materialize. In

⁸⁸ Ibid.

⁸⁹ Ibn Qudamah, Abu Muhammad Abdullah Ibn Ahmed, Al-Mughni, Cairo: Hajar, 1992.

⁹⁰ Ibid.

⁹¹ Al-Haskafi, Muhammad Alaiddin., Al-Durr al-Mukhtar, Beirut: Dar-ul-Fikr, 1386H.

cognizance of such situation, the medieval Islamic state evolved the institution of *hisbah* or *ih}tisāb* from the time of second rightly-guided caliph 'Umar, the Great'.⁹²

2.3.2. Scope and functions of the institution:

The institution of *Hisbah* was developed over the centuries. IPS mentions that "the scope of the institution and the functions of its chief i.e. the *muhtasib*⁹³ were gradually established. Nevertheless, historical and juristic studies of the institution show that its scope never remained fixed; it is all but natural. The Islamic societies from Indonesia to Morocco differed in their composition and complexities, and faced different kinds of problems.

Moreover even the society of a region or a country did not remain static, so the nature of the steps taken by the *hisbah* functionaries continued to change. Duties performed by the functionaries of the medieval Islamic state under the institution of *hisbah* were sometimes transferred to the judiciary and some other times to the police."⁹⁴

The report describes that apart from gradual development of the institution it, by and large, covered the following areas from the 1st Century AH/7th Century CE onward:

- (a) Supervision of Markets.
- (b) Taking care of public interests.

⁹²Ibn Qudamah, Abu Muhammad Abdullah Ibn Ahmed, Al-Mughni, Cairo: Hajar, 1992.

⁹³Ibid.

We will discuss briefly these areas in the coming lines.

2.3.2.1. Supervision of markets:

According to the report, “[i]t was the foremost area of *hisbah*. The earliest available writing in the form of a book (*Ahkām al-Sūq*) on the *hisbah* is by the third century Andalusian jurist Yahyā b. ‘Umar Kinānī (213-289 AH/828-902 CE). With respect to market supervision, the person in charge was named as *sāhib al-sūq*. He was supposed to ensure the use of standard weights and measures. He used to ensure that commodities were sold at approved prices and prohibited practices like sale of wine, indulgence in usury and gambling were not committed. He had to look after the interests of all those concerned in trade and business and to ensure no one was duped or illegally benefited. That is why, the *hisbah* manuals prepared from time to time included chapters on the malpractices used in manufacturing and sale of goods.”⁹⁵

Author said that the “*Muhtasib* was therefore considered to be a person equipped among other things with sufficient knowledge of trade rules and regulations. He was also entitled to appoint professional experts for his assistance to detect the malpractices in manufacturing of goods.”⁹⁶

⁹⁵ Saleh, Nabil A., *Unlawful Gain and Legitimate Profit in Islamic Law*, London: Graham & Tortman, 1992.

⁹⁶ *Ibid.*

2.3.2.2. Taking care of public interests:

The third important sector was that “the *hisbah* was to guard the public interest as well. By curbing the malpractices of the market, like hoarding and adulteration, public interest was served. The rights of weaker sections of society (daily wage-earners, children etc.) were to be looked after by the *muh}tasib* against the excesses of the rich and powerful. The *muh}tasib* was also empowered to admonish those who committed cruelty to animals.”⁹⁷

2.3.3. Institution of *Hisbah* in the subcontinent:

It will be an interesting fact to know that the institution of *Hisbah* established in the subcontinent. We see that in the context of the subcontinent, “Umar b. Muhammad al-Sunāmī, an 8th Century AH/14th century (C.E.) *muhtasib* of Tughlaq dynasty (1320 to 1413 C.E.) discussed in detail the functions of *muhtasib* in his *Nisāb al-Ihtisāb*, a manual of *hisbah*.”⁹⁸

Interestingly, “Umar b. Muhammad al-Sunāmī, in the background of his own time, emphasized the eradication of all those additions and *bid'ahs* [innovations in Muslim beliefs and practices that were not sanctioned by the Qur'ān and the *Sunnah* of the Prophet Muhammad (PBUH)].”⁹⁹

⁹⁷ Ibid.

⁹⁸ Hassan, S. Misbahul, “Good faith and fairness in Commercial transaction: The Common law, the civil law and the Islamic perspective,” (u/p.) presented at IIU Malaysia on April 1996.

⁹⁹ Ibid.

He points out that “swearing in the name of someone or something other than God is reprehensible since it is *shirk* (association of others with God in His divinity). The inscription of talismans, the practices of sorcerers, soothsayers, astrologers and the magicians are discussed and judgments are strictly made in accordance with the Qur’ān and *Sunnah*. The thrust of the author is to practice *Sunnah*, and reject the practices based on *bid’ah*. Apart from condemnation of *bid’ah* in general terms, *bid’ahs* connected with funerals and marriages are elaborately discussed.”¹⁰⁰

He also “discusses the importance of the observance of congregational prayers, and takes it as the foremost duty of the *muhtasib* to be accomplished. Along with all these duties with respect to eliminate *munkar*, he talks about the prohibition of gambling, and consumption of wine, drugs and all *harām* things. *Al-Sunāmī* talks about the games, dress code and hair styles of the people in the context what is *ma’rūf* and what is *munkar*.”¹⁰¹

It is very unfortunate to that the institution of *Hisbah* lost its vitality, in the subcontinent, because of the political incompetence and moral degeneration during the Mughal dynasty in the 12th century which was followed by British colonial rule. It is no secret that in the British era, the Muslim institutions became almost defunct.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

CHAPTER-3

FAIR TRADE AND COMPETITION REGIME IN PAKISTAN

3.1. BREIF HISTORY & BACKGROUND:

Pakistan has come a long way, as a developing economy, in its drive from the old Monopoly Control Authority to the creation of “the Competition Commission of Pakistan”, a modern institution. In this incredible journey, the institution has seen a lot from hot and cold weathers, changing political and economic situations both inside and outside the country. In order to know as to why and how this modern competition institution was established and what was the aim and objective behind its creation, we have to go back in the history of this institution.

The Competition Commission of Pakistan (CCP) was established on October 2, 2007 under the Competition Ordinance, 2007, which was re-promulgated in November 2009 after the Supreme Court of Pakistan issued a historic decision in the history of Pakistan. The main aim of this Ordinance was to provide a legal framework for the creation of a business environment which is based on healthy competition, for improving economic efficiency, developing competitiveness and protecting consumers from anti-competitive practices. As described in the history of this institution by one of its founding member, “prior to the Competition Ordinance, 2007, Pakistan had an anti-monopoly law namely ‘Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance’ (MRTPO) 1970.

The Monopoly Control Authority (MCA) was the organization to administer this Law. In the fast changing global and national economic environment, the MRTPO, 1970 was inadequate to address competition issues effectively.”¹⁰²

This was mainly because of the following three factors:

1. the 1970's law was out of date for a market economy which was modernizing and rapidly changing;
2. the MCA was not able to meet the expectations of businesses and the consumers at large and there was several limitations in that law;
3. there was a growing need of a competition policy framework that could promote and protect competition and innovation which was, indeed, a result of the first generation reforms that liberalized the economy and encouraged the private sector.

The Government of Pakistan, therefore, launched a programme in order to develop Competition Policy as its key “second generation reform” initiative. Towards this end, the Ministry of Finance and the MCA worked with the World Bank and the Department for International Development (DFID), UK.

¹⁰² Khan, K and Mansoor, S, “A Strategy for Consumer Protection in Pakistan”, Islamabad: The Pakistan Development Review, Vol. 35, No. 4, 1996.

As a result of these efforts, Competition Ordinance, 2007 was promulgated which replaced the MRTPO. After getting approved, Competition Ordinance 2007 was finally transformed into Competition Act 2010.

The Competition Act, 2010 addressed the then current and future economic realities as well as aimed at correcting the deficiencies of the MRTPO related to definitional aspects, coverage, penalties, and other procedural matters.

In order to read the mindset behind it and to understand the intention of legislature behind this new law we are to see the report which was published by the then Monopolies Control Authority with the collaboration of Sustainable Development Policy Institute and the Network for Consumer Protection in Pakistan.

In the foreword of that report, the then chairman of the authority wrote:

"The rules relating to competition are one aspect of a broad range of policies to increase competition in an economy. If the law is framed and enforced correctly, frictions with other policies will be minimized, and the result will be enhanced efficiency and transparency in the economy, as well as a broader range of choice for consumers. In a market economy, competition is necessary to ensure that the pursuit of profit by private enterprises is compatible with the public interest. Competition

policy and law not only provides a well functioning market for existing companies, it also removes market entry barriers to newcomers."¹⁰³

The report further reiterated that:

"In an increasingly globalised world, with falling barriers to international trade, the competition regime needs to be strengthened. It is perhaps the only effective tool left for governments to deal with the restrictive trade practices of trans-national corporations and provide a level playing field for smaller domestic firms. This requires a dynamic approach, adjusting to changes in the global economy. The work of the WTO Working Group on Competition Policy and the introduction of elements of competition into bilateral and regional trading agreements reflect this need. Pakistan's law, the Monopolies and Restrictive Trade Practices (control and prevention) Ordinance, 1970, is much the same as when it was enacted. Since the international economic environment has changed dramatically, we have drafted a new competition law. In this context, this report, by the Sustainable Development Policy Institute (SDPI) is very important.

The new draft law represents an effort to shift from a monopolies law to a competition law and is a step in the right direction. We are striving to get the

¹⁰³ Monopoly Control Authority "Competition Regime in Pakistan – Waiting for a Shake-Up", Islamabad: CUTS, 2002.

message across that competition law protects both businesses and consumers, in terms of increased market transparency, adaptability and efficiency. This would help to bring about voluntary compliance and promote a competition culture. In this sense, competition advocacy and information provision need more attention.....

..... "Effective competition law and policy would lead to a fairer world for all –not only consumers, but businesses and governments too." ¹⁰⁴

This sufficiently, we believe, describes the background and the history of this legislation and elaborates the intention of the legislature behind this regime. We hope that the reader will now be able to clearly understand as to how and why this institution was established.

3.2. THE COMPETITION ACT 2010

3.2.1. AN INTRODUCTION & HISTORY:

Mr. Joseph Wilson, currently a member of the CCP in his book *"At the Crossroads: Making Competition Law Effective in Pakistan"* while writing about the Act, says: "The new competition law was initially promulgated in the form of Competition Ordinance, 2007, and eventually appeared in its permanent form as the Competition Act of 2010⁷ [the Act] -- an act of the Parliament as opposed to temporary legislation by the President. The new competition regime in Pakistan was introduced through an Ordinance, promulgated by the

¹⁰⁴ Monopoly Control Authority "Competition Regime in Pakistan – Waiting for a Shake-Up", Islamabad: CUTS, 2002.

President of Pakistan on 2 October 2007.⁸ A federal ordinance is a temporary piece of legislation, valid only for 120 days, which the President of Pakistan can promulgate under Article 89 of the Constitution of Pakistan, if (1) the Senate or National Assembly is not in session; and (2) the President is satisfied that circumstances exist which render it necessary for him to take immediate action.”¹⁰⁵

According to the book, “The Ordinance of 2007 repealed the MRTPO, dissolved the MCA, and provided for the establishment of the Competition Commission of Pakistan. The Commission was established on 12 November 2007 through a notification of the Federal Government appointing five members, including the Chairman of the Commission. The newly formed Commission assumed some of the existing staff, liabilities, and assets of the MCA.”¹⁰⁶

“In November 2007, the then President declared emergency rule and issued the Provisional Constitutional Order of 2007 (PCO), which under Clause 5(1) & (2), gave exemption to all the ordinances in force at the time of Proclamation of Emergency, which included the Competition Ordinance, from being “subject to any limitations as to duration prescribed in the Constitution. On 15 February 2008, in *Tikka Iqbal Muhammad Khan and others v. General Pervez Musharraf*, a seven member bench of the Supreme Court of Pakistan validated the PCO. The Court held:

¹⁰⁵ J. Wilson, *At the Crossroads: Making Competition Law Effective in Pakistan*, Northwestern Journal Of International Law And Business, Vol. 26, AT 565, 2006.

¹⁰⁶ Ibid.

*"Ordinances promulgated and legislative measures taken by the President, or as the case may be, by the Governor, which were in force at the time of, or during the period for which the Proclamation of Emergency, dated 3-11-2007 held the field, would continue to be in force by virtue of the Provisional Constitution Order, 2007 read with Art. 270AAA(3) of the Constitution, until altered, repealed or amended by the appropriate Legislature and there would be no question of expiry of these Ordinances in terms of Art.89(2), or as the case may be, under Art.128(2) of the Constitution."*¹⁰⁷

Mr. Wilson writes that "[o]n 31 July 2009, a fourteen member bench of the Supreme Court in *Sindh High Court Bar Association v Federation of Pakistan*¹⁴, declared the PCO as unconstitutional and, *inter alia*, directed that all Ordinances protected by the PCO be placed before the Parliament and the respective provincial assemblies for their proper validation in accordance with Articles 89 and 128 of the Constitution and granted a period of four months from 31 July 2009 for federal ordinances and three months for provincial ordinances. Thus a federal ordinance was to be ratified by the Parliament by or before 28 November 2009; otherwise, it would stand repealed. The Competition Ordinance, 2007 was tabled in the

¹⁰⁷ J. Wilson, *At the Crossroads: Making Competition Law Effective in Pakistan*, Northwestern Journal Of International Law And Business, Vol. 26, AT 565, 2006.

National Assembly as the Competition Bill in October 2009. However, the National Assembly was prorogued on 16 November 2009, before it could deliberate on the Bill.”¹⁰⁸

In order to evade any lacunae that might be created by the lapse of CO 2007, the President of Pakistan promulgated the Competition Ordinance, 2009 on November 26, 2009. The President gave effect to the Competition Ordinance of 2009 from October 2, 2007 and therefore gave validity to all actions taken, and decisions made, by the Commission under the old Competition Ordinance.

The National Assembly, on January 27, 2010, passed a bill called “the Competition Bill, 2009”, which was then tabled in the Senate of Pakistan on February 24, 2010. The Parliament could not pass this Bill within 120 days of promulgation of the Competition Ordinance 2009. As a result, “[t]he Competition Ordinance, 2009 lapsed on March 26, 2010, leaving the Commission without any legal status until 18 April 2010, *i.e.*, for 22 days, when the President promulgated Competition Ordinance, 2010. The modern competition regime of Pakistan got reincarnated the third time as CO 2010. Yet again, the Commission and the businesses were presented with an ephemeral competition regime – casting doubts on the authority and future of the Commission. On 5 May 2010, the Senate’s Standing Committee

¹⁰⁸ J. Wilson, *At the Crossroads: Making Competition Law Effective in Pakistan*, Northwestern Journal Of International Law And Business, Vol. 26, AT 565, 2006.

on Finance unanimously approved the draft of the Competition Bill, 2010 with two major amendments.”¹⁰⁹

These two amendments were;

- (a) the penalties, that Commission imposes and/or recovers should become part of the Commission Fund.
- (b) the government should set up a special appellate tribunal - the Competition Appellate Tribunal - for taking up appeals against the decisions of the Competition Commission of Pakistan, instead of respective provincial high courts.¹¹⁰

It is also interesting to mention that it was further suggested the Committee that the said Competition Tribunal should be formed within 30 days after the enactment of the Act and that it should be located in Islamabad, the capital of Pakistan. It was suggested that appeals against the decisions of the proposed three-member Competition Tribunal should be heard by the Supreme Court of Pakistan, the highest court in the country.

Unfortunately, the Competition Bill, was again not passed within the stipulated time period i.e., 120 day life of CO 2010. It left the fate of the Commission in limbo again. The Parliament, after another pause of 57 days, finally passed the Competition Act 2010 on October 6, 2010. This Act received the assent of the President on October 13, 2010.

¹⁰⁹ Ibid

¹¹⁰ The Competition Commission of Pakistan, “*Annual Report, 2010*”, Islamabad: CCP, 2011.

3.2.2. Objective of the Act:

The Competition Act was enacted with the objectives to: “

- (a) to ensure free competition in all spheres of commercial and economic activity;
- (b) to enhance economic efficiency; and
- (c) to protect consumers from anticompetitive behavior.”¹¹¹

As mentioned in by the current chairperson, of the Commission, herself, “[t]he foregoing triad captures the various facets of the notion “consumer welfare”, which is globally recognized as the *raison d’être* for having a competition regime. The object reflects a marked shift from the objective of the MRTPO, which was enacted with a view to prevent undue concentration of economic power in the hands of a few.”¹¹²

3.2.3. Substantive Provisions:

The Act applies to all “undertakings” (business firms, corporations, banks etc), whether governmental or private, and to all their actions or matters which may have an effect of deforming competition within Pakistan. For the purposes of the Act, the term “undertaking” also includes a governmental regulatory body.

The substantive provisions of the Act include prohibitions against;

- (a) abuse of dominant position;

¹¹¹ The Competition Commission of Pakistan, “*Annual Report, 2010*”, Islamabad: CCP, 2011.

¹¹² The Nation, “*CCP Chairperson’s Interview*” Islamabad: 2011

- (b) entering into agreements which have the object or effect of preventing or reducing competition within the relevant market; and
- (c) deceptive marketing practices. It also introduced a sophisticated pre-merger clearance regime.

The substantive provisions have integrated competition policy and consumer protection policy. For the purpose of this study only important provision that deals with the fair and deceptive marketing practices, will be discussed here. Section 10 of the Act is the provision that prohibits deceptive marketing. We will be elaborating it in the coming lines.

3.2.4. Section-10 of the Competition Ordinance:

Section 10 of the Competition Act 2010 prohibits deceptive marketing practices. It seems appropriate that first we see the language of the Section. For ease of reference the text of Section 10 is being reproduced herein below:

"10. Deceptive marketing practices

- 1) No undertaking shall enter into deceptive marketing practices.*
- 2) The deceptive marketing practices shall be deemed to have been resorted to or continued if an undertaking resorts to:*
 - (a) the distribution of false or misleading information that it is capable of harming the business interests of another undertaking;*

- (b) the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;*
- (c) false or misleading comparison of goods in the process of advertising;*
- or*
- (d) fraudulent use of another's trademark, firm name, or product labelling or packaging.”¹¹³*

It is apparent from the language that Section 10 prohibits certain marketing practices which includes but not limited to the following; a) distribution of false or misleading information that is capable of harming the business interests of another undertaking; b) distribution of false or misleading information to consumers, including lacking reasonable basis, related to price, character, method or place of production, properties, suitability for use, or quality of goods; c) false or misleading comparison of goods in process of advertising; and last fraudulent use of another's trade mark.

The first important step towards the appropriate application of Section 10 of the Act is to examine the scope and realm of the terms 'false' and 'misleading'. As the Act does not

¹¹³ The Government of Pakistan, "The Competition Act 2010- No. XIX of 2010", Islamabad: Ministry of Law, 2010.

define these terms or we can say that as these are not defined under the Act, we would refer to the ordinary dictionary meaning of these two terms.

According to the New Oxford Dictionary of English¹¹⁴;

'false' means "not according with truth or fact; incorrect, or appearing to be the thing denoted; deliberately made or meant to deceive; or illusionary; not actually so."

Whereas,

'misleading means "giving the wrong idea or impression".

Under the Black's Law Dictionary 7th Edition¹¹⁵:

'false' means "untrue, deceitful, not genuine".

Whereas,

*'misleading' means "delusive; calculated to be misunderstood"*¹¹⁶.

For the enforcement of Section 10 of the Competition Act, an office of Fair Trade was established. This Office of Fair of Fair Trade works as a watch dog for Misleading and Deceptive Marketing Practices under Section 10 of the Act. We will, in the coming line,

¹¹⁴New Oxford Dictionary of English, New addition, Karachi: Oxford University Press; 2001.

¹¹⁵Black's Law Dictionary 7th Edition, Karachi: Oxford University Press; 2007.

¹¹⁶Black's Law Dictionary 7th Edition, Karachi: Oxford University Press; 2007.

describe in details as to what exactly is the function of OFT and how and under what circumstances it was established and how it works under the regime.

3.3. OFFICE OF FAIR TRADE:

The Office of Fair Trade (hereinafter referred to as “OFT”) was established at CCP in 2008 in order to deal exclusively with deceptive marketing practices that are prohibited under Section 10 of the Competition Ordinance, 2010. In order for us to understand the way and background of establishing the Office of Fair Trade in CCP we would refer to the Zong order in which the member passing that order writes that “.....[b]efore I proceed to address the issue it will be helpful to explain by way of background that OFT in CCP has been established to create a business environment in Pakistan that is based on healthy competition in order to protect consumers from anti-competitive practices. OFT has been established with the aim of enhancing the link between CCP and the consumers and to establish a focal point for identifying and providing solutions to issues which pose or may potentially pose problems for the consumers arising out of deceptive marketing practices. The OFT's mandate is to oversee and act as a watch dog for misleading and deceptive marketing practices as enumerated in Section 10 of the Ordinance. It aims at paving the way to create consumer awareness with the objective of making markets function better for consumers and to ensure fair dealing in businesses. The focus is on the protection of

consumers from deceptive marketing practices to ensure provision of adequate information to enable informed consumer choices.”¹¹⁷

The OFT operates under the Legal Department of the CCP and has absolute powers. It enjoys the functions required for the enforcement of the provisions of Section 10 of the Act. The OFT is authorized to take “suo moto” notice in case of any deceptive marketing practices found in any sector or initiate enquiries upon receiving any complaints in respect of any deceptive marketing practices prescribed under the Act.

The OFT as a department of CCP, since its creation, has administered a number of enquiries in respect of a number of matters relating to deceptive marketing practices. This has resulted in the passing of different orders by the CCP. These Orders passed by the CCP, with regards to deceptive marketing practices, include orders against Proctor & Gamble¹¹⁸, ordering P&G to modify an advertisement relating to its product “Head & Shoulders Shampoo” which was found to be deceptive and synonymous to spreading misleading information in terms of Section 10 of the Act.

In the case of Askari Bank Limited, United Bank Limited, MyBank Limited and Habib Bank Limited¹¹⁹, CCP took suo moto notice of the advertisements extended by the banks in the print media. The banks advertised deposits accounts along with the associated profit rates for

¹¹⁷ The Zong Order., Competition Commission of Pakistan, Islamabad: CCP Orders, 2009.

¹¹⁸ The Procter & Gamble Order., Competition Commission of Pakistan, Islamabad: CCP Orders, 2010.

¹¹⁹ The Banks Order, Competition Commission of Pakistan, Islamabad: CCP Orders, 2010.

such accounts. CCP, in its order, found those advertisements to be misleading to consumers, and that the advertisements lacked a reasonable basis related to the character of what was being offered apart from being capable of harming other businesses' interests. CCP, therefore, directed the banks to ensure compliance with the provisions of Section 10 of the Act.

Most importantly, in another case of deceptive marketing practices which was initiated with respect to the advertisements by China Mobile Pak Limited (Zong) and M/s Pakistan Telecom Mobile Limited¹²⁰, CCP found that the said advertisements violated the provisions of Section 10. Since the concerned undertakings stopped running the unlawful advertisements and started complying with the directions of CCP, CCP took a lenient approach and no penalty was imposed upon both the undertakings.

3.3.1. The Aims and Objectives behind Establishing OFT:

The OFT aims at "ensuring that consumers are protected from all sorts of deceptive marketing practices covered by Section 10 of the Ordinance and encourages consumers and undertakings to lodge any complaints that they might have in this regard."¹²¹

If we look at the website of the Competition Commission of Pakistan, the pages that are dedicated for Office of Fair Trade have a saying of the founding father of Pakistan. Quaid-e-Azam in his *Speech at the opening ceremony of State Bank of Pakistan 1948* said:

¹²⁰The Zong Order., Competition Commission of Pakistan, Islamabad: CCP Orders, 2009

¹²¹ <http://www.cc.gov.pk/>

"We must work our destiny in our own way and present to the world an economic system based on true Islamic concept of equality of manhood and social justice. We will thereby be fulfilling our mission as Muslims and giving to humanity the message of peace which alone can save it and secure the welfare, happiness and prosperity of mankind" ¹²²

This shows the purpose and aim of establishing this Office of Fair Trade under Competition regime. In the light what has been stated by the chairperson of Commission in an article, *"[t]he Office of Fair Trading or OFT is one of the major initiatives of the Competition Commission of Pakistan (CCP) to redress deceptive marketing practices and enhance the link between the Commission and the consumer. Establishment of OFT facilitates in completing the picture of the competition agency in Pakistan. The purpose of setting up of OFT is to create a business environment based on healthy competition by protecting consumers from deceptive marketing practices. OFT has a mandate to oversee and act as a watch dog for Misleading and Deceptive Marketing Practices under Section 10 of the Competition Act 2010. The objectives of OFT are;*

- To build a vibrant, fair and competitive market place for consumer confidence.*
- To encourage and ensure disclosure of sufficient information to enable informed consumer choice.*
- Reach out to consumers and general public with the aim of identifying and providing solutions to the potential issues.*

¹²² <http://www.jinnaharchive.com/copy.htm>

- *Ensure fair dealing in business and to handle individual/group grievances on account of deceptive marketing practices.*¹²³

AS stated the Zong Order:

*"OFT in CCP has been established to create a business environment in Pakistan that is based on healthy competition in order to protect consumers from anti-competitive practices. OFT has been established with the aim of enhancing the link between CCP and the consumers and to establish a focal point for identifying and providing solutions to issues which pose or may potentially pose problems for the consumers arising out of deceptive marketing practices. The OFT's mandate is to oversee and act as a watch dog for misleading and deceptive marketing practices as enumerated in Section 10 of the Ordinance. It aims at paving the way to create consumer awareness with the objective of making markets function better for consumers and to ensure fair dealing in businesses. The focus is on the protection of consumers from deceptive marketing practices to ensure provision of adequate information to enable informed consumer choices."*¹²⁴

"It needs to be appreciated that unlike other jurisdictions where OFT operates and functions as an independent Competition Agency, the establishment of an Office of Fair Trading

¹²³ Mehta, P.S., "Competition Policy in Developing Countries: an Asia-Pacific. Perspective", *Bulletin on Asia-Pacific Perspectives*, United Nations, 2002.

¹²⁴ The Zong Order., Competition Commission of Pakistan, Islamabad: CCP Orders, 2009.

within the CCP is focused on consumer protection essentially within the limited scope of Section 10 of the Act 2010."¹²⁵

The theme behind setting up of OFT was to build and enhance the link between CCP and the consumers, to establish a focal point for identifying and providing solutions to issues which pose problems for the consumers arising out of false or misleading advertising. It aims at paving the way to create consumer awareness with the object of making market functions better for consumers and to ensure fair dealing in businesses. The focus, of course, is protecting consumers from anticompetitive behavior to enable informed consumer choices.

3.3.2. The Approach of OFT While Dealing With DMP:

The basic approach of the Office of Fair Trade is compliance oriented and is not that of penalizing the businesses. As described above the approach of OFT is to build and enhance the link between CCP and the consumers, to establish a focal point for identifying and providing solutions to issues which pose problems for the consumers arising out of false or misleading advertising.

The approach of the OFT while dealing with the deceptive marketing practices can be clearly seen in it's a landmark decision, the Zong Order wherein the presiding member ruled that:

"OFT in CCP has been established to create a business environment in Pakistan that is based on healthy competition in order to protect consumers from anti-competitive practices. OFT

¹²⁵ The Competition Commission of Pakistan, "Annual Report, 2010", Islamabad: CCP, 2011.

has been established with the aim of enhancing the link between CCP and the consumers and to establish a focal point for identifying and providing solutions to issues which pose or may potentially pose problems for the consumers arising out of deceptive marketing practices. The OFT's mandate is to oversee and act as a watch dog for misleading and deceptive marketing practices as enumerated in Section 10 of the Ordinance. It aims at paving the way to create consumer awareness with the objective of making markets function better for consumers and to ensure fair dealing in businesses. The focus is on the protection of consumers from deceptive marketing practices to ensure provision of adequate information to enable informed consumer choices.”¹²⁶

The Commission further held that “[n]onetheless, we are fortunate that our law envisages deceptive marketing within its mandate no matter how narrow or restricted the scope has been kept in Section 10 of the statute. Establishment of OFT facilitates in completing the picture of the competition agency in Pakistan – paving way for creating consumer awareness.”¹²⁷

In Pakistan, as mentioned by the writer of *“Competition Law and Policy in the Middle East”*, “the setting up of OFT is focused on the mandate to oversee and act as a watch dog for misleading and deceptive marketing practices, aiming to build a vibrant, fair and competitive market place for consumer confidence. It also ensures that no competitor gains

¹²⁶ The Zong Order., Competition Commission of Pakistan, Islamabad: CCP Orders, 2009.

¹²⁷ Ibid.

or retains market share by deception. The competitive market forces operating under the principles of competition law should determine the “winners and losers in the marketplace”.¹²⁸

3.3.3. Nature of Actions against Business Entities Involved in DMP:

As discussed in the preceding lines, the OFT is authorized to take “suo moto” notice in case of any deceptive marketing practices found in any sector or initiate enquiries upon receiving any complaints in respect of any deceptive marketing practices prescribed under the Act.

OFT, upon receipt of a complaint, makes sure that an acknowledgment is issued forthwith and initiates a preliminary probe with respect to the subject matter for initial verification of the facts mentioned in the complaint. Complaint, upon the report of the initial inquiry, can either be closed by the OFT or it is proceeded with through formal enquiry under Section 37 of the Act. The result of the final enquiry decides as to the initiation of proceedings under Section 30. If appropriate, OFT, under Section 30, issues a show cause notice which is followed by hearings and ultimately concludes through an operating order.

The remedies under the law include “seize and desist orders, injunctive relief, commitments ensuring compliance, confiscation, forfeiture or destruction of any goods having hazardous

¹²⁸ Dabbah, M.M., *Competition Law and Policy in the Middle East*, Cambridge: Cambridge University Press, 2007.

or harmful effect and requiring the undertaking concerned to take such actions as may be necessary to restore the pervious market conditions.”¹²⁹

In a recently decided case against Ace Group of Industries, “OFT fined AGI for the fraudulent use of trademarks of BMW and Harley Davidson, on its website and held that it is capable of harming the business interest of the complainants in violation of Section 10 of the law. (A trademark is a symbol or phrase that distinguishes ownership of a product or service and can also stand as a mark of quality/good will). However, keeping in view, the cooperation AGI extended during investigation and hearings only a token penalty was imposed in the sum of Rs. 2,50,000.”¹³⁰

The compliance oriented approach of the OFT has brought, to a certain extent, corrective behavior in two very important sectors: i.e., telecom companies and consumer banking.

“These undertakings were reprimanded to desist from deceptive marketing and all submitted to the jurisdiction, gave written commitments to rectify their behavior and assured future compliance. Both cases pertained to claims regarding price/rates charged. The Commission apart from making it clear that the responsibility rests on the undertakings to establish the reasonable basis of the claim, has also laid down the principles that: ‘fine print disclaimers, are inadequate to correct the deceptive impressions’, half truth or concealment may be construed as deceptive, for the purposes of deceptive marketing, actual deception need not be

¹²⁹ The Nation, “CCP Chairperson’s Interview” Islamabad: 2011

¹³⁰ The Competition Commission of Pakistan, “Annual Report, 2010”, Islamabad: CCP, 2011.

shown to carry the burden of proof and it is sufficient to establish that the advertisement has the tendency/potential to deceive and the capacity to mislead.”¹³¹

In order to further understand the procedure and nature of actions against businesses that are involved in Deceptive Marketing Practices we will discuss in details a few selected cases decided by the CCP so far.

¹³¹ Ibid.

CHAPTER-4

IMPORTATN ORDERS PASSED BY THE COMMISSION

In order to understand the way OFT is dealing with the deceptive marketing practices we will discuss three important cases decided by the Commission since its creation in 2007. After reading these cases, we will be able to see as to how the Office of Fair Trade is dealing with the businesses involved in DMP and what steps it is taking to reprimand them and force them to adopt a compliance approach. Mentioning only three cases does not at all mean that these are the only cases which commission has decided so far. There are a lot of other cases that can be mentioned in this regard but keeping in view the rulings and findings mentioned in these three cases by the Commission, we deemed it necessary to select these three for our study. The three cases that we selected for our study are:

- (a) The Banks Order 2010
- (b) Ufone and Zong Order 2010
- (c) Proctor and Gamble Order 2010

4.1. THE BANKS ORDER 2010:

4.1.1. Summary of the Case:

The brief summary of the case is that “CCP took suo moto notice of the advertisements published in the print media, on behalf of MyBank Limited, United Bank Limited, Askari Bank Limited, and Habib Bank Limited (the 'Undertakings') for

advertising term/time deposits accounts giving exaggerated and incorrect profit rates, and conducted detailed enquiry under Section 37 (2) of the Competition Act, 2007 ('the Ordinance') which was concluded vide Enquiry Report dated 2009, and issued Show Cause Notices to these Undertakings under Section 30 of the Act for engaging in deceptive marketing practices.

After giving due opportunity of hearing to all the parties, it was held that the relevant advertisements were deceptive in that they did not specify the basis of calculation of the expected rate of return, did not disclose consequences of early withdrawal from such deposit accounts and carried important information in small print.”¹³²

The Bench, relying on a precedent from the US, referred to the “Truth in Savings Act” of the US. The said Act lists different requirements and provide guidelines to be followed while advertising financial goods and/or services. The Bench, in its order, clarified that Section 10 applies to the marketing of “goods and services” both at the same time.

The matter was disposed of on January 14, 2010 by the CCP giving a detailed order on the subject. It was because the Undertakings stopped the advertisements under question, upon initiation of proceedings and showed their eagerness to comply with

¹³²The Competition Commission of Pakistan, “*Annual Report, 2010*”, Islamabad: CCP, 2011.

the provisions of Section 10, as evidenced “by the written commitments made by them”¹³³, the Bench took a lenient view and did not impose any penalty on them.

According to the CCP’s annual report, “[t]his leniency was shown because of the earnest desire of the Undertakings to seek compliance of the then Ordinance which was still in its nascent stage. The parties were warned that in future, if, similar violations are found to be committed, it may give rise to serious consequences under the Competition Act.”¹³⁴

4.1.2. Short Details of the Facts of the Case and the Order:

Askari, HBL, UBL and MyBank (hereinafter collectively referred to as the “Undertakings”) issued advertisements in the print media for promotion of term/time deposits accounts giving exaggerated and incorrect profit rates.

The CCP took *suo moto* notice of said advertisements and took cognizance of the matter when “the Mutual Funds Association of Pakistan (hereinafter referred to as “MUFAP”) sent a letter to the State Bank of Pakistan (hereinafter the “SBP”), a copy of which was also sent to the Commission, alleging that the profit rates being advertised by the Undertakings in the

¹³³ The Banks Order, Competition Commission of Pakistan, Islamabad: CCP Orders, 2010.

¹³⁴ The Competition Commission of Pakistan, “Annual Report, 2010”, Islamabad: CCP, 2011.

print and electronic media were being calculated using a flawed formula which did not reflect the actual returns earned by the depositor.”¹³⁵

According to what is recorded in the Banks Order, “[a]n enquiry under section 37 of the Ordinance was initiated to assess whether the rate of return advertised by the Undertakings is deceptive and as to whether the advertisements by the Undertakings are disseminating misleading information and hence *prima facie* in violation of the Ordinance.”¹³⁶

The Commission asked the Undertakings to clarify as to how they had formulated the advertised profit rates/expected rates of return and to advise as to how the profits had been calculated.

Briefly, the clarifications offered by the Undertakings were as under:

- (a) **HBL:** HBL denied that its advertisements were deceptive.
- (b) **UBL:** UBL denied that it had engaged in deceptive marketing practices of any sort.
- (c) **MyBank:** MyBank submitted that its scheme was not deceptive because it clearly disclosed the tenor of the respective deposits, and also specified the amount payable on completion of the term on the deposit receipt. MyBank claimed to have modeled its scheme on Defense Saving Certificates issued by the Government of Pakistan. In addition to that, MyBank stopped the media campaign upon receiving the letter from the Commission.

¹³⁵ Ibid.

¹³⁶ Ibid.

(d) **Askari:** Askari Bank stated that “the method being applied for the computation of return is the “accumulation of returns (normally referred to as compounding of profit) over the period of profit.””

The Commission found the clarification offered by the Undertakings unsatisfactory because the alleged clarification did not plainly provide the ground or formula on the basis of which the high profit rates (as advertised) were being calculated.

As a result, a show cause notices were issued to the Undertakings for, *prima facie*, engaging in deceptive marketing practices in violation of Section 10 (1) and in terms of Section 10 (2)(a)&(b).

The Commission int inquiry report noted that a) “the advertised Profit Rate is deceptive in that the deposit/ investment is not being cushioned for the decreasing real value of money for the time period of the deposit as is generally done in term deposits;”¹³⁷ b)the advertised Profit Rate is deceptive and misleading in that it does not duly disclose that the rate advertised for the term shall further vary depending as to when payments are received by the consumer (i.e. on monthly, quarterly or half yearly basis);¹³⁸ c) No due disclosure is made to the depositor that interest paid annually cannot be added to the principal as may otherwise be

¹³⁷ Ibid.

¹³⁸ Ibid.

done in term deposits;¹³⁹ d) that the Profit Rate is only applicable when there is disbursement on maturity, while the condition is stated on the advertisement in small print it is hardly legible and is likely to mislead the consumer as to the true terms and conditions of the scheme.¹⁴⁰ e) additionally with reference to the Show Cause Notice issued to Askari, it was also stated that *“the amount payable on a principal of Rs. 100,000 with an effective rate of return of 16.5% should be Rs. 460,537 and not Rs. 265,000 as is stated on the advertisement which indicates that either the effective rate of return as stated on the advertisement is incorrect or the advertised amount payable on maturity is incorrect; f) In the Show Cause Notice issued to HBL in addition to the main findings summarized above, it was stated that “No due disclosure is made to the depositor that interest paid annually cannot be added to the principal as may be otherwise done in term deposits;”*¹⁴¹

The respondents appeared before the Bench separately and explained their advertisements. The officials of the Askari Bank submitted that they did not have an intention to deceive and that they immediately stopped the advertisements upon receipt of the Show Cause Notice. In addition, Askari also argued that advertisement by Askari was less deceptive as compared to the other advertisements under question “because they mentioned the exact amount that would be payable on maturity which showed that there was no intention to mislead on the part of Askari.”

¹³⁹ Ibid.

¹⁴⁰ The Banks Order, Competition Commission of Pakistan, Islamabad: CCP Orders, 2010.

¹⁴¹ Ibid.

Similarly, the then President of MyBank, appeared on behalf of the Bank, and stated that his Bank also had no intention to mislead the customers. He also claimed that his bank's advertisement was less deceptive as compared to the advertisements by other banks because his bank "had clearly specified the tenure and associated profit rates of the schemes; and the deposit receipt had a saving schedule printed on them as is done on the defense saving certificates".

The Legal Advisor, of UBL submitted that "the intention of the advertisements was not to deceive the consumer or falsify information.

As mentioned in the Order, HBL "filed written submissions which analyzed the framework for deceptive marketing practices in the different jurisdictions. However, this issue was not pressed at the hearing. HBL maintained that its advertisements were not false or misleading nor were they in violation of Section 10 of the Ordinance."¹⁴²

Interestingly, all the banks submitted an undertaking assuring on behalf of each bank concerned that;

" henceforth, our advertisements, promotional material or instructional manuals, in print or communicated through the electronic medium or otherwise in relation to the Product shall clearly specify the rate of profit or rate of return offered to the customers in clear legible font in a manner comprehensible by an ordinary/average consumer disclosing (i) that the

¹⁴² Ibid.

return being offered is calculated on simple interest rate or as the case may be; (ii) that the rate of profit varies depending on maturity tenure and/or pay out periods; (iii) that the terms and conditions apply, which will be reasonably accessible to a potential customer; and (iv) disclaimers (if any) therein shall also be stated in clear terms which are understandable, readable and/or audible, as the case may be, for an ordinary consumer."

And,

"That, we shall comply with any and/or all directions of the Commission in the subject proceedings and shall ensure compliance with the provision of Section 10 of the Competition Ordinance, 2007, in letter and spirit in relation to any distribution of information or making any future advertisement in relation to the Product."

The Bench, in its decision, deemed it necessary to address only two main issues on the basis of what was submitted by the banks.

The two issues taken up by the Bench were;

- (a) The scope and applicability of section 10 of the Ordinance to goods and/or services, and;
- (b) Deceptive nature of the advertisements. We will discuss these two issues briefly hereunder in the light of the Order passed by the Bench.

(a) The scope and applicability of section 10 of the Ordinance [the “Act”] to goods and/or services:

The Bench in its decision, while ruling on this issue, held that:

“.....at the outset it must be highlighted that Section 10 (1) is a broadly worded provision and applies to all undertakings without making a distinction between provision of goods and/or services. It prohibits all undertakings from entering into deceptive marketing practices. The definition of an Undertaking in section 2 (p) of the Ordinance [Now Act] is instructive and leaves no doubt that both goods and services are covered. The said definition in its relevant part reads; “‘Undertaking’ means any natural or legal person... in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services.” (Emphasis added)

“Secondly, section 10 (2) lists when deceptive marketing practices shall be deemed to have been resorted to or continued by an Undertaking. Section 10 (2) read with 10 (2) (b) illustrates this deeming provision and is to be understood in two parts: the first part states that deceptive marketing practices shall be deemed to have been resorted to or continued by an undertaking through distribution of false or misleading information to consumers. Therefore again the use of the word „undertaking” makes it amply clear that distribution of false or misleading

information to consumers by an undertaking (be it engaged in the provision of goods or services) is prohibited."

*"The latter half of section 10 (2) (b) goes on to give a few illustrative examples of what this false or misleading information to consumer could be: "including the distribution of information lacking a reasonable basis related to the: (a) Price, (b) Character, (c) Method or place of production, (d) Properties, (e) Suitability of use, or (f) Quality of goods;" However, this illustrative list of examples of false or misleading information to consumers is by no means exhaustive and does not preclude the possibility of a violation of Section 10 in instances other than those stated."*¹⁴³

The Commission further held:

"a statute must be so construed as to make it effective and operative on the principle expressed in the maxim ut res magis valeat quam pereat i.e. that the thing may rather have effect than be destroyed. The ambit of the law should not be restricted or narrowly construed, and a wide interpretation be given to the law, especially one which has as its aims the protection of consumers. The law will be given full effect if deceptive marketing practices pertaining to both goods and services are stopped. If the scope of Section 10 was limited only to goods then that would defeat the purpose of the law.

¹⁴³ Ibid.

Furthermore, when interpreting Section 10 it is important to bear in mind the purpose and scheme of the law. The Ordinance prohibits anti competitive behavior in every sector of the economy and a reading of Section 3 (Abuse of Dominance) and Section 4 (Prohibited Agreements) evidences that the Ordinance extends to the service sector as well as goods. The scheme of the law is such because anti competitive activities in the services sector are as detrimental to consumer interests and economic efficiency as any other sector.

..... he Ordinance does not specify whether the harm to the interest to other business undertakings has to be direct or indirect. Neither does it make clause (a) of section 10 a subset of clause (b) of section 10 as has been argued; the import and scope of clause (a) of section 10 is different than clause (b) and can stand with out the support of clause (b). So far, the advertisements of the Undertakings raise a concern capable of causing harm to the business interests of the mutual funds industry as well other businesses trying to attract money for investment purposes from potential customers, the actual harm need not be established. The amount of investment that potential consumers can make is limited and investing with one business over another carries an opportunity cost. In order to convince potential consumers that this opportunity cost is worth the bargain, advertising assumes high importance and value. Hence true and full disclosures should be made onerous for the banks and perhaps for all undertakings."

(b) Deceptive nature of the advertisements

The Bench while deciding the deceptive nature of the advertisements, held that all the advertisements had the following common features:

1. Basis of expected rate of return is not mentioned;
2. Important information is displayed in small print.
3. Consequences of early withdrawal were not clearly listed.

The Bench further noted that

"..... [t]he most problematic feature of the advertisements is the lack of clarity regarding the rates that are being offered. There is no standard term which is used by the undertakings when referring to the rate of return that they are offering; the terms „profit rate“, „yield“, „rate of return“ are used interchangeable (while Askari does not mention what sort of rate it gives). This can be very confusing for an average ordinary consumer who wants to make a comparison between the products offered in the advertisements.....the Undertakings fail to use the more universally understood term of simple interest, which would bring clarity and ease of understanding for the consumer

Bench in its order said that “[n]othing 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..... the advertisements constitute a deceptive marketing practice with which depositors are being furnished misleading information aimed at inciting them to entrust their savings with the Undertakings. Individuals seeking to increase the value of their savings through investment will of course be attracted by high profit rates being advertised. A misleading advertisement regarding high return on original deposit moneys is very capable of affecting the choices and conduct of people. It is therefore important that such practices be stopped and the Undertakings be obliged to provide more accurate information in their advertisements regarding their deposit schemes."

The Bench reiterated that the objective of the Commission here is "not to seek to intervene in the voluntary bank consumer relationships that underpin the integrity of the financial system, nor to alter/modify them in any way." The Commission concern, instead, is that "all the banks must use terms in their marketing efforts or campaigns that conform to their meanings as generally understood."

The Bench found the impugned advertisements as deceptive and misleading to consumers. The advertisements lacked a reasonable basis related to the character of goods/services apart from capable of harming other businesses interests in terms of section 10 (2) (a) & (b) of the Act. Therefore these advertisements were held in violation of section 10(1) of the Act. But the Bench, in its order, took a lenient view because the banks stopped the subject advertisements upon initiation of proceedings and expressed willingness to comply with the

provisions of the law (i.e., Section 10), and made written commitments. Therefore, no penalties were imposed on them. The banks were; however, warned that in future, if, similar violations were found to be committed, it will give rise to serious consequences under the Competition Act.

The Bench directed the banks to follow the guidelines laid down in the Order in respect of their future advertisements and to ensure compliance with not only the provisions of section 10 but also any subsequent promulgation of legislation in this regard.

4.2. UFONE AND ZONG ORDER 2009:

4.2.1. Summary of the Case:

CCP took suo moto¹⁴⁴ notice of the advertisements of ZONG known as “8 Any per call” and Ufone’s “UWON” package and issued Show Cause Notices (herein after referred to as “SCN”) to both the telecom companies for alleged violation of Section 10.

An Order was passed on September 9, 2009, in respect of SCNs issued to China Mobile Pak Limited (CMPak) (also known as “Zong”) & Pakistan Telecom Mobile Limited (also known as “Ufone”) wherein it was said that the subject advertisements by both the undertakings were in violation of Section 10 of the Competition Act.

¹⁴⁴The Competition Commission of Pakistan, “*Annual Report, 2010*”, Islamabad: CCP, 2011.

However, due to “CCP's conciliatory and compliance-oriented approach, and the assurances given on part of both the companies through an undertaking in writing for future compliance with the provisions of the Ordinance, CCP did not impose any penalty. Both the companies were warned that in future CCP would take a very strict view of any or all non-compliance or contraventions under the Act.”¹⁴⁵

The Order also laid down some general guidelines in relation to enforcement of Section 10. Regarding the definition and distinction between 'false' and 'misleading' information, it was 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. 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 to errors 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.”¹⁴⁶

¹⁴⁵ The Zong Order., Competition Commission of Pakistan, Islamabad: CCP Orders, 2009

¹⁴⁶ The Competition Commission of Pakistan, “*Annual Report, 2010*”, Islamabad: CCP, 2011.

In regards to who qualifies as the “consumer” within the ambit of Section 10 of the Act, CCP held that “the consumer to whom such information is disseminated has to be the 'ordinary consumer' who is the usual, common or foreseeable user or buyer of the product. Such a consumer need not necessarily be restricted to the end user. It has also been emphasized that the 'ordinary consumer' is not the same as the 'ordinary prudent man' concept evolved under contract law. Unlike the 'ordinary prudent man' the thrust on ordinary diligence, caution or duty of care and ability to mitigate (possible inquiries) on the part of the consumer would not be considered relevant factors.”¹⁴⁷

4.2.2. Brief Facts and the Order:

4.2.2.1. Brief Details of the ‘CMPak’ (Zong) Case:

CMPak an entity engaged in the business of providing mobile telecommunication services and offering various package plans to consumers in Pakistan providing wide coverage, voice and data communication services, as well as a wide range of tariff options to choose from etc, issued an advertisement print and electronic media known as “‘8 *Anay per call*’ offer” in which, it was publicized that, the users of ZONG network can now call to one number of any network at ‘8 *Anay per call*’ and they can change that number anytime. CCP took *suo motto* notice of the advertisement.

¹⁴⁷ The Zong Order., Competition Commission of Pakistan, Islamabad: CCP Orders, 2009.

CCP asked CMPak to provide the details of the advertisement of the offer, in order to verify that no misleading information is given to consumers through the said advertisement. CMPak in reply to that, submitted a written response. CCP found that the information provided by CMPak relating to “‘8 Any per call’ offer” was not in consistency with the advertisements and that CMPak, “*prima facie*” appeared to be distributing false or misleading information to customers/consumers. CCP found that CMPak did not appear to disclose clearly to customers/consumers the true terms and conditions of the *said* offer and, therefore, a Show Cause Notice (“SCN”) was issued to CMPak.¹⁴⁸

It was alleged in the SCN that, “the advertisement *prima facie* appeared to be distributing false or misleading information to customers/consumers, lacking a reasonable basis related to the price, character and/or suitability for use of the product advertised in terms of clause (b) sub-section (2) of Section 10 of the Act.”¹⁴⁹

4.2.2.2. Brief Details of the ‘Ufone’s Case:

Ufone, a wholly owned subsidiary of Pakistan Telecommunication Company Limited established to operate cellular telephony, advertised one of its packages known as ‘*Uwon*’ in the print and electronic media.

¹⁴⁸The Zong Order., Competition Commission of Pakistan, Islamabad: CCP Orders, 2009.

¹⁴⁹Ibid.

CCP, finding the said advertisement in violation of the Section 10, took a *suo motto* notice of the advertisement and issued a letter to Ufone asking it to clarify its position and to furnish information regarding the advertisements and tariff of Ufone's *Uwon Package* in this regard. CCP asked *Ufone* to provide the details of the basis on which the information was disseminated to consumers that "they can now make calls to other networks at the cheapest rates not in Pakistan, not in Asia but world wide."

Ufone, through its counsel, denied the allegations. CCP found the the claims made by Ufone of its advertised *Uwon package* and the actual facts, contradictory and misleading. Therefore, a Show Cause Notice was issued to Ufone by CCP.

Both of these cases were simultaneously heard by the Commission. During the hearing of the case, it was submitted, through the counsel, that "although the advertisement does not mislead the customers on any aspect, yet CMPak is willing to address all the concerns of CCP." CMPak (Zong) further emphasized that the advertisement by no means was intended to mislead the consumers and inform the Bench that it had stopped the said impugned advertisement.

Commission appreciated the conciliatory and compliance oriented approach of the CMPak; however, it deemed it important to address the basic issue of determining the misleading aspect of the subject advertisement, i.e., "whether the advertisement is of a nature that misleads the consumer?"

Commission stated that in its considered view,

*"Section 10 of the Ordinance talks of deceptive marketing practices which without prejudice to the generality of the provision broadly includes distribution: (a) of 'false information', or (b) of 'misleading information'; (c) to consumers, or (d) fraudulent use of another's trade mark, firm name or product labelling or packaging."*¹⁵⁰

Bench further 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. 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."*¹⁵¹

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

The second issue that Bench addressed in its order was the definition of “Consumer” for the purposes of the Competition Act. The Bench held that “[t]his might mean taking into account the consideration that most consumers do not read advertisements and commercial communications carefully, in an observant and circumspect way, but rather look hastily at the heading and the pictures. The average consumer might, in some situations, act as a casual observer and therefore include elements of hasty observations in the concept of the ‘average consumer’.”¹⁵²

The Bench further held that; “[i]t would be totally unwarranted to permit an advertiser to focus a marketing campaign on a less than sophisticated audience, and then judge their claims from the perspective of the reasonable person.”

Bench in its Order clarified that it wanted to encourage a compliance oriented approach vis-à-vis Section 10 of the Act. It reiterated that a higher onus must be placed on the Undertakings in relation to the marketing practices. Therefore, from OFT’s perspective, “the consumer to whom such information is disseminated has to be the ‘ordinary consumer’ who is the usual, common or foreseeable user or buyer of the product. Such a consumer need not necessarily be restricted to the end user. Here it may be relevant to point out that the ‘ordinary consumer’ is not the same as the ‘ordinary prudent man’ concept evolved under contract law. Unlike the ‘ordinary prudent man’ the thrust on ordinary diligence, caution/duty of care and ability to mitigate (possible inquiries) on the part of the consumer

¹⁵² Ibid.

would not be considered relevant factors. It must be borne in mind that one of the objectives of the Ordinance is to protect consumers from anti-competitive practices; hence, the beneficiary of the law is the consumer. Therefore, in order to implement the law in its true letter and spirit, the scope of the term 'consumer' must be construed most liberally and in its widest amplitude."¹⁵³

The Bench ruled that the term 'consumer' under Section 10 of the Ordinance is to be construed as an 'ordinary consumer' but need not necessarily be restricted to the end consumer of the goods or services."

After examining the concepts of the terms 'false', 'misleading' and 'consumer' in the context of 'deceptive marketing practices', the Bench then determined the nature of advertisements in order to check as to whether these were deceptive in nature or not.

The Bench ruled that the subject "advertisement was misleading as it gave an ordinary consumer not only the wrong impression about the call duration but also of the charges levied for making such a call. 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'".

¹⁵³ Ibid

Bench held that, the “advertisement of ‘8 Any per call’ offer was false and misleading, hence, deceptive and in violation of sub-section (1) of Section 10 of the Ordinance in terms of clause (b) of sub-section (2) of Section 10. It lacked the reasonable basis regarding the price i.e., call rates, exclusive or inclusiveness of government taxes being not specified and its character i.e., the duration of call at which the rates were applicable was not stipulated clearly.”

Since the CMPak stopped its advertisement effective as of the date of SCN, showing its willingness to comply with the provisions of Section 10, therefore, “no penalty was imposed on it.” However, CMPak was reprimanded that in the future OFT of CCP will take a very strict view of any or all non-compliances or contraventions of the section 10.

IN Ufone’s matter, Bench, after referring to the same definitions as in CMPak’s case, concluded that the Ufone’s advertisement was also misleading hence deceptive under Section 10. The Bench held that,

“in the telecom sector, the scope of the term ‘consumer’ in its widest amplitude will include an ordinary user/consumer, whereas the omissions in disclosure and the implied impression conveyed through representations are of the nature that are likely to be deceptive even for a sophisticated consumer.”

It was further ruled that “for the purposes of deceptive marketing, actual deception need not be shown to carry the burden of proof. It is sufficient to establish that the advertisement has the tendency/potential to deceive and the capacity to mislead.”¹⁵⁴ (Emphasis added)

Therefore the Bench held the omission on part of Ufone “to disclose in the televised advertisement the duration of call at which the rates are applicable despite the fact that there is a disclaimer (which was not legible and in the language (i.e. English) other than that used for advertising the product) - as distribution of misleading information to consumers.”

Keeping in view the fact that Ufone stopped its advertisement, after issuance of the SCN and incorporated the disclosure in Urdu and in a legible font in their advertisement following consultation with the OFT, the Bench did not impose any penalties on Ufone.

However, it was reprimanded that in future CCP will take a very strict view of any or all non-compliances or contraventions of Section 10 if it finds Ufone in violation of Section 10. The Bench emphasized that the lenient approach was taken in view of the peculiar circumstances of both the cases and the fact that initially CCP was inclined to have a compliance oriented approach *viz a viz* OFT matters.

¹⁵⁴ Ibid.

4.3. PROCTOR AND GAMBLE ORDER 2010:

4.3.1. Summary of the Case:

CCP took suo moto notice of the advertisements of one of the products of Proctor & Gamble ('P&G'), those of 'Classic Clean Head & Shoulder Shampoo' (the 'Product'), wherein, it was advertised that, "the Product is 'World's No. 1 anti-dandruff shampoo' suggesting that its use renders a consumer's hair '100% dandruff free' (hereinafter referred to as the 'Advertisements')."

P&G was asked by the CCP to provide the evidence to substantiate the claims made in the Advertisements. As in almost all the cases, P&G was unable to provide satisfactory evidence to substantiate its claims. Therefore, a Show Cause Notice was issued and hearings were conducted.

The case was disposed of vide Order dated February 23, 2010. CCP in its Order directed P&G "to comply with the following, within a period of two weeks from date of issuance of this Order:

- (a) stop advertising the subject advertisement in its then-current form in all segments of media and in future P&G shall not use the phrase '100% dandruff free' in their advertisement of the Product, unless it is properly substantiated by a cogent evidence providing it a reasonable basis for such claim; and/or,
- (b) modify its claim of '100% dandruff free' to include significant conditions that it 'removes 100% of visible dandruff flakes' and 'the claim is based on the

visibility of flakes at two feet distance when used regularly', in line with what has been approved by ClearCast for broadcast on TV in UK; and

- (c) file compliance report with CCP forthwith after implementing the aforementioned directions."

The Order stated that if P&G failed to comply with the above directions within the specified time period and continued with the contravention of Section 10 of the Act, it would be liable under Section 38 of the Act to pay "a penalty amounting to PKR 25,000,000 (twenty five million rupees) and an additional penalty of PKR 250,000 (two hundred and fifty thousand rupees) per day from the date of passing of the Order."

4.3.2. Brief Facts and the Order:

P&G is a multinational company (an undertaking for the purposes of the Competition Act, 2010) which carries the business of manufacturing of beauty, household and health care products for the consumers in Pakistan. Head & Shoulders Shampoo (herein after referred to as the "**Product**"), is the anti-dandruff brand shampoo of P&G, and is very popular among the consumers.

CCP took *suo motto* notice of an advertisement of the Product of P&G, wherein, it has been advertised that, the Product is "*World's No. 1 anti-dandruff shampoo*" suggesting that its use renders the hair "*100% dandruff free*" (hereinafter referred to as the "**Impugned Advertisements**").

P&G was asked to provide information along with necessary documents explaining the basis of making such claims. P&G, through its counsel, replied to the query saying that:

"a) The claim of being "World's No.1 anti-dandruff shampoo" has been made by Proctor & Gamble reasonably based on the date and information made available to it by Nielsen Company; b) The claim "100% dandruff free" appears in conjunction with the phrase "up to 100% visible flakes with regular use" in the advertisement; c) The claim 100% dandruff free has been made by the Proctor & Gamble reasonably based on the data and information made available by internal research and development department of Proctor & Gamble external institutes and dermatologists that show that Head and Shoulders shampoo removes 100% of visible flakes."

P&G did not, however, supply any documents to support its position. In addition to that, in a subsequent hearing of the case, the counsel for P&G raised some other questions as to the *locus standi* of the Commission and alleged that the show cause notice was not warranted under the law, and that it should not have been issued in the first place and therefore is a nullity in the eyes of law.

The Bench although addressed all the issue raised by the counsels of P&G and proved that all the assertions were baseless and hence had no legal value. However, the Bench, in its Order, reiterated that the main and core issue remained same i.e., "to determine as to whether

the advertisement is deceptive, as the information disseminated through the advertisement lacks reasonable basis, related to the character, properties and suitability for use of the Product.”

In order to address this issue, P&G was also specifically asked as to what dandruff is? The response was that, “it is a common skin condition resulting in scalp flaking and itching.” The Bench, in its order referred to, Dr. James Schwartz’s definition of dandruff, one of the Research Fellow at Procter & Gamble, who has defined dandruff as follows:

“Dandruff is not just flaking. It manifests as a multitude of symptoms that include itchiness, scalp tightness, dry feel, irritation, and flakes.”¹⁵⁵

The representative of P&G further raised the issue of definition of reasonable consumer. The Bench, in this regard, said that reference has to be made to the ZONG Order¹⁵⁶, wherein it was held that, *“in order to implement the law in its true letter and spirit, the scope of the term “consumer” must be construed most liberally and in its widest amplitude. In my considered view, restricting its interpretation with the use of the words “average”, “reasonable” or “prudent” will not only narrow down and put constraints in the effective implementation of the provision it would, rather be contrary to the intent of law. It would result in shifting the onus from the Undertaking to the consumer and is likely to result in*

¹⁵⁵ Audretsch et al., Audretsch, D. B., Baumol, W. J. and Burke, A. E., “Competition policy in dynamic markets,” International Journal of Industrial Organization, Vol. 19, 2001.

¹⁵⁶ The Zong Order., Competition Commission of Pakistan, Islamabad: CCP Orders, 2009.

providing an easy exit for Undertakings from the application of Section 10 of the Ordinance. Accordingly, the term "consumer" under Section 10 of the Ordinance is to be construed as an "ordinary consumer" but need not necessarily be restricted to the end consumer of the goods or service." [emphasis added].

Referring to the Zong Order, the Bench held that *"the approach of the Commission is to evaluate complete advertisements and an opinion regarding deception is to be formulated on the basis of the net general impression conveyed by them and not on isolated excerpts"*¹⁵⁷

CCP's Bench deciding the case appreciated the fact that "P&G on its own accord after the first hearing modified the advertisement by increasing the font size of the statement at the bottom of the advertisement '*up to 100% visible flakes with regular use*' and also added the word "stay" before the claim "*100% dandruff free*", however, it held that the claim was still potentially misleading and deceptive and lacked a reasonable basis as the advertisement on the whole still gives an impression that the regular use of Product would render the hair 100% dandruff free."¹⁵⁸

Keeping in view all the facts and circumstances of the case, the Bench directed P&G to comply with the following within a period of two (2) weeks from date of issuance of the Order;

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

- (a) *stop advertising the impugned advertisement (which was even modified by P&G) in all segments of media and in future P&G shall not use the phrase '100% dandruff free' in their advertisement of the Product, unless it is properly substantiated by a cogent evidence providing it a reasonable basis for such claim; and/or*
- (b) *modify its claim of '100% dandruff free' to include significant conditions that it "removes 100% of visible dandruff flakes" and "the claim is based on the visibility of flakes at two feet distance when used regularly", in line with what has been approved by ClearCast for broadcast on TV in UK.*
- (c) *file compliance report with the Commission forthwith after implementing the aforementioned directions.*

Bench further said that in case of failure by the P&G to abide by the directions of the Bench, within the stipulated time period, and continuous violation of Section 10, P&G shall be liable under Section 38 of the Act to pay "a penalty amounting to Rs. 25,000,000/- (Rupees Twenty Five Million) million and an additional penalty of Rs. 2,50,000/- (Rupees Two Hundred and Fifty Thousand Only) per day from the date of passing of the Order."

We, after a careful perusal of the Orders passed by CCP in all three cases referred to above, note that the Commission, while addressing deceptive marketing practices, through its Office of Fair Trading, has, among other issues, kept the onus directly on the undertakings/business entities that publish the impugned deceptive advertisements by construing the word

“consumer” in its widest amplitude as the “ordinary consumer” without qualifying it by pre-fixing words like “reasonable” or “prudent”.

In determining responsibility with respect to deceptive advertisements, the Commission also held that: “it is not necessary to establish actual deception; - disclaimers in fine print cannot correct deceptions in the main body of the advertisement; - incomplete or half statements could tantamount to being misleading or false; - it is not necessary to show that the false or misleading claim in the Ad was in any way material to the consumer’s decision to purchase the product; - it is not necessary to establish actual harm; - in financial products, there must be clarity regarding the rate of return using the principles contained in the US Truth in Savings Act as a benchmark; and - the term “goods” in Section 10 of the Competition Act means both “goods” and “services” – to exclude “services” would be absurd!”

It can also be noted that almost all the Undertakings also submitted signed commitments before CCP that;

"henceforth, our advertisements, promotional material or instructional manuals, in print or communicated through the electronic medium or otherwise in relation to the product, shall clearly specify the rate of profit or rate of return offered to the customers in clear legible font in a manner comprehensible by an ordinary/average consumer disclosing (i) that the return being offered is calculated on simple interest rate or as the case may be; (ii) that the rate of profit varies depending on maturity tenure and/or payout periods; (iii) that the terms and conditions apply, which will be

reasonably accessible to a potential customer; and (iv) disclaimers (if any) therein shall also be stated in clear terms & which are understandable, readable and/or audible, as the case may be, for an ordinary consumer."¹⁵⁹

¹⁵⁹ The Competition Commission of Pakistan, "Annual Report, 2010", Islamabad: CCP, 2011.

CHAPTER-5

REVIEW, ANALYSIS AND RECOMMENDATIONS

5.1. REVIEW AND ANALYSIS:

As we discussed in the preceding chapters, Islām is a practical system of life and it provides guidance for all walks of life individual, economic, moral, politics and including intellectual property right. As a comprehensive religion, Islam covers all aspects of life and it includes *shariah*, *akhlak*, and *aqidah*. The objective of *shariah* is to protect five main values to the human being namely *religion*, *aqal*, *nasab*, *property* and *life*. Islam protects those values in order to uphold justice amongst mankind. Unfair treatment to other person is prohibited in Islam. Hence, in discussing the issue of unfair treatment/trade, we discussed an Islamic perspective on the competition law and policy. During the time of the Prophet (SAW) *Ahlaf* and *Fudul* were established by group of wealthy merchants in which the objectives were to protect the business monopoly and to maintain virtues, protect poor and needy. Islam has already laid down principles on competition as Islam rejected total monopoly and unfair trade in the system of economy.

It is universally affirmed that such act is against human right, dictum and principle of morality, ethic and in Islam such act is against divine revelations as proscribed in the al-Quran and al-Sunnah. The basic premise of the competition law and policy is to promote fair trade, healthy competition and ultimately consumer welfare in the market. Islam is the way

of life and if there is no such law on competition, the economic situation may become worse and the problem of corruption, hoarding and cheating will increase. This condemnation is not only to ensure the effectiveness of economic administration but also as a basis to form a just and fair society in the light of Islamic teaching.

In order to examine and describe this preceding discussion, we, in our research, have tried to briefly explain the general overview of the competition law and policy and to discuss the Islamic perspective with regard to same. We tried to analysis the concept of certain prohibited transactions in Islamic law relating to the unfair competition such as hoarding, prohibition of all types monopolies, sale by a city dweller to a desert dweller, meeting merchants from neighboring village and towns and overbidding in others people's sales. Our research is intended to provide an overview of the Islamic perspective vis-à-vis the competition law and policy or the competition regime in Pakistan.

We have seen during the course of our research that the competition laws in Pakistan are meant to introduce and formulate the rules or regulations for promoting healthy and fair-trading in the market through the legal mechanism. The rationale for such laws or regime is to enable right holders to secure economic remuneration for their endeavor in creating useful products and knowledge, creativity and technology. The competition laws are meant to protect consumer welfare in the market. We all know that if there is no such law regulating competition in the common market it will lead to so many problems into the economy and the society as a whole.

The objective of the competition laws, as illustrated in the European Commission report is as follows: *“An effective competition policy is the sole means of making the most of the potential offered by the completion of the larger market and thus, by increasing competitive pressure, of producing a more competitive community economy. More competition will also strengthen the position of European industry in both world and domestic markets. Without such a policy, there is the risk that Community consumers would be unable to enjoy the promised benefits of a larger integrated market”*.

The example of competition law is the law of unfair competition. Unfair competition takes many forms either in passing off, pirating, false advertising and refusal to license. False Advertising/Deceptive Marketing Practice refers to one who diverts from competitor by fraudulently representing that the goods, which he markets, have ingredients or qualities, which in fact they do not have.

There are various legislations on the competition laws around the world. In United States of America, The United Kingdom, Europe where the Treaty of Paris was signed, which proscribed anti-competitive agreements between undertaking and abuse of a dominant position. The Roman Treaty establishing EEC was signed in Rome in 25th March 1957 whereby European Economic Community then passed the EC Competition law. These laws are meant to protect the customers/consumers from wrong behavior of businessman and to abstain them from, *inter alia*, deceptive marketing practices.

On the other hand, general principle in Islam, as enshrined in *al-Quran* and *al-Sunnah*, is *that*; “whatever deals justice should be observed and established in society”. Justice involves equality of all men before the law, equality in exercise of basic human and social rights.

The Islamic Law provides the believers with the modes of life, which they should follow in all matters pertaining to man’s duties to God and to his fellow beings. Law is respected if its objective is fulfilled. The objective is to live in peace and be kind to the creatures of God as the prophet reminded us to respect the law of God and be merciful to the people of God.

If there is no such law or policy on competition in Islam, the economic situation would become worse and the problem of corruption and unhealthy economic activities will increase drastically. Islam really condemned these practices and this condemnation is not only to ensure the effectiveness of economic administration but also as a basis to form a just and fair society in the light of Islamic teaching. In discussing the Islamic law perspective on the competition law and policy, we referred to the several basic Islamic principles that could be applied in promoting fair-trading and healthy competition.

Based on the discussions in preceding lines, we have recognized that if each person in this world understand and implement the concept of *Islamic law with regards to the competition laws*, surely there will be no more problems of economic injustice, pirating, and fraudulent, criminal breach of trust and so on and so forth. We have seen that this is the very concept which has actually been adopted in the implementation of the competition law and competition regime in Pakistan. In other words, the rules and regulation on the area of competition promotes the concept of *Islamic law of consumer rights*.

We also recognized that the law of competition is clearly in line with the principle of *maqasid syariah* as enshrined in *al-Quran* and *al-Sunnah*. This principle derives from the spirit of the textual injunctions of the *al-Quran* and *al-Sunnah* and guarantees the protection of the five interests of the Muslims i.e. Islamic religion, soul, mind, and descendants and particularly to the property.

The Competition laws are also seem to serve the purpose of *Qawaid fiqhiah* (legal maxim), for example “*al dharar yuzal*” or “any harm, which occurs, need be redressed”; and “*Taqdim al maslahah al ammah ala almaslahah al khassah*” or “general or unspecified harm should be given priority to specific harm”; and “*Dafi al-mafasid muqaddimun alal jalb al-masalih*” or “the avoidance of harm takes precedence over the promotion of interest”. These famous legal maxims are the basis for the legality and the permissibility to legislate and implement the law and policy of competition. The said legal maxims provide us with clear guidelines for the enforcement of competition law and policy with strong emphasizes on the need to measure relative benefits and ill consequences at all times. The objective of the competition law and policy is to promote fair and just market competition is actually in accordance with the guidelines stipulated under the *qawaid fiqhiah*.

5.2. CONCLUSION & RECOMMENDATIONS:

After the above analysis and review, we can safely conclude that Shariah/Islamic law provides clear guidelines and principles on the competition law and policy. Shariah

emphasizes on the physical and spiritual aspects in maintaining justice and peace amongst human being as stipulated in *al-Quran* and *al-Sunnah*.

Shariah views the competition law and policy, vis-à-vis fair trade, as recommendable and should be invoked in the administration of justice especially in the field of economy and commerce. This submission is supported through the doctrine of public interest, the concept of blocking the means to an evil deed, the concept of abuse of rights or wrongful exercise of rights, the principles of all legal rights are not absolute in nature and the concept of objectives of the shariah.

The problem of unfair competition will actually be eradicated totally if the heart of businessmen and consumers are showed by the *nur* (light) of *iman* (belief). Muslims are able to take a positive measure to avoid unfair competition if they take into account the teaching of Islam and abstain from the prohibition of Allah towards conspicuous consumption wastage deception accumulation of wealth through prohibited means.

Islam offers firm basis guidelines for the just and fair system of the competition law, which is benefited to all human beings regardless of religions, races and castes and this is exactly the purpose behind establishing competition regime in Pakistan. It is evident from mere reading of the judgments passed by and the lectures given and speeches made by the chairpersons of the Competition Commission of Pakistan that the aim and purpose behind these laws is to protect consumers/customers from the anti-competitive behavior and to

promote fair trade in the country. This is completely in line with what is laid down in Shari'ah for this purpose. However, as far as the effectiveness and standard of these laws are concerned, we can safely say that the competition regime in Pakistan, if not above, is surely not below any other regime in the South Asian Countries or amongst the competition regimes in the developing countries. However, there, surely, is a need for improvement. The laws made in this regard meet the international standard. These laws are in accordance with the basic Islamic Commercial Laws' principles laid down in *Quran* and *Sunnah*. Although, these laws are being enforced in Pakistan in core areas of business; however, these shall be enforced in their letter and spirit and Government should back its effective enforcement. These laws are not creating hindrance in the ways of business to prosper. These laws are, rather, paving the way for businesses to flourish by fair dealing and fair marketing practices. The decisions made by the office of fair trade clearly demonstrate that businesses, knowingly and sometimes un-knowingly, get involved in un-fair/deceptive trade/marketing practices and that the need of effective enforcement of these competition laws arises in such situations in order to protect customers from this wrong behavior.

In order to have a more efficient and resourceful office of fair trade and to improve the effective enforcement of the Competition Law in Pakistan, we hereby make a few recommendations which are as follows;

- (i). There should be a transparent process of recruitment and selection of members. Clear, qualitative criteria for the appointment of members of the authority should be applied in a non-discriminatory manner.
- (ii). It is valuable to design the appointment process in a manner that assists the selection of fair and impartial people who can sustain political pressures. The committee for making recommendations for the selection of chairperson or members should be defined under the law, thereby securing appointment on merit, independent of the political situation of the country, as it is undesirable that the members can be removed from office in the event of a change of government.
- (iii). The government, learning lessons from the previous law, should relinquish its control over the regular functions and decision-making processes of the authority and allow it to work independently.
- (iv). Experts/professionals in the field of law (be it Conventional law or Islamic law) should be engaged to assist the Commission in discharging its functions on the basis of merit.
- (v). It will also be productive to familiarize students from economics, Shariah & law, management and finance with the Competition Law and its provisions, and to impart training on competition and related issues.

- (vi). An initiative should be undertaken to provide internships to students in the field of competition law and policy.
- (vii). Efforts shall be made, on governmental level, to further strengthen the competition regime and by giving it more and more administrative and financial independence.
- (viii). The Superior Courts should play their role by endorsing the law and decision of the regime and giving support to the institution on carving out Competition Commission of Pakistan's future path.
- (ix). Efforts shall be made, on governmental level, to bring our regulations in line with the best practices that are there in developed regimes.
- (x). Efforts shall be made, on governmental level, to create awareness among citizens about competition regime so that the goal and objective behind these laws could be achieved.

Bibliography

Text Translation and Commentary of the Holy Qur'an by Muhammad Picthal (Beirut: Dar a;-Kitab, 1970)

1. Bukhari, Abu Abdullah Muhammad ibn Ismail, *Sahih al-Bukhari*, tran. Muhammad Daud Raz, Lahore: Maktabah Qudosiyah, 2004.
2. Abu Dawud, Sulayman Ibn al-Ash'ath al-Sijistani, *Sunan*, Lahore: Muhammad Ashraf, 1984.
3. Ibn Qudamah, Abu Muhammad Abdullah Ibn Ahmed, *Al-Mughni*, Cairo: Hajar, 1992.
4. The Government of Pakistan, "The Competition Act 2010- No. XIX of 2010", Islamabad: Ministry of Law, 2010.
5. The Gazette of Pakistan, "The Competition Act, 2010. , Act XIX of 2010", Islamabad: 2010.
6. Dabbah, M.M., *Competition Law and Policy in the Middle East*, Cambridge: Cambridge University Press, 2007.
7. Damanai, R. & Round, D., *The Economics of Consumer Protection: Introduction*, *Australian Economic Papers*, 2000.
8. Gray, C. S., & Davis, A. A., *Competition Policy in Developing Countries Pursuing Structural Adjustment*, *Antitrust Bulletin*, 1993.
9. Hoekman, B., *Competition Policy and the Global Trading System*, *The World Economy*, 1997.

10. Khan, K., & Aftab, S., Consumer Protection in Islam: The Case of Pakistan, *Australian Economic Papers*, 2000.
11. Marcos, F., *Do Developing Countries Need Competition Law and Policy?* , *A web article*, 2006.
12. Mehta, P.S., Competition Policy in Developing Countries: an Asia-Pacific. Perspective, *Bulletin on Asia-Pacific Perspectives*, United Nations. *A web article*, 2002.
13. Palim, M. R. A., The Worldwide Growth of Competition Law: An Empirical Analysis, *Antitrust Bulletin*, 1998.
14. Edelstein, Jeffrey S., *False Advertising and the Law: Coping with Today's Challenges*. New York: Practising Law Institute, 1996.
15. Ippolito, Pauline M., and Janis K. Pappalardo., *Nutrition and Health Advertising: Evidence from Food Advertising, 1977-1997*. New York: Nova Science Publishers, 2003.
16. Jacobs-Meadway, Roberta., "False Advertising." *American Law Institute-American Bar Association* C122, April 3, 1995.
17. Leighton, Richard J., "Using (and not using) the Hearsay Rules to Admit and Exclude Surveys in Lanham Act False Advertising and Trademark Cases." *Trademark Reporter* 92, November-December, 2002.
18. Postel, Theodore, "Consumer Fraud Act: False Advertising of Used Cars." *Chicago Daily Law Bulletin*, February 5, 1993.

19. Reddy, Anitha., "Nike Settles With Activist in False-Advertising Claim." *Washington Post*, September 13, 2003.
20. Epstein, J., The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?, *American University International Law Review*, 2002.
21. Gal, M.S., The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries, *Competition, Competitiveness and Development*, 2004.
22. Bangert, Sharon J., Robert A. Cook, and Joseph D. Looney, "Unfair and Deceptive Advertising of Consumer Credit." *The Maryland Bar Journal* 35, March–April 2002.
23. Saleh, Nabil A., Unlawful Gain and Legitimate Profit in Islamic Law, London: Graham & Tortman, 1992.
24. Abd al-Sattar, *Jadid Fiqhi Masail or Unka Mujawaza Hal*, Tran. Muhammad Razi al-Islam, Karachi: Modern Islamic Fiqh Academi, 2006.
25. Nawawi, Abu Zakariyyah Mohyiuddin ibn Sharaf., *Al-Majmu al-Shar'h al-Muhadhab*, Beirut: Dar Alim al-Kitab, n.d.
26. Al-Haskafi, Muhammad Alauddin., *Al-Durr al-Mukhtar*, Beirut: Dar-ul-Fikr, 1386H.
27. Al-Nishabori, Muslim ibn Al-Hajjaj al-Qusheri., *Sahih*, Trans. Abdul Hameed Siddique, Lahor: Sh. Muhammad Ashraf, 1976.
28. Al-Bayhaqi, Ahme ibn al-Hussain ibn Ali, *Sunan Al-Kubra*, Beirut: Dar-al-Marafah, 1992.

29. Al-Kasani, Abu Bakar ibn Masud., Bada'I'Al-Sana'i fi Tartib al-Shara'i, Beirut: Dar-l-Kutub al-Ilmiyyah, 1982.
30. Darir, Muhammad Siddiq, Al-gharar in Contracts and its effects on COntemporary Transactions, Jeddah: Islamic Development Bank, 1997.
31. Mansoori, Dr. Muhammad Tahir., Shariah Maxims on Financial Matters, Islamabad: International Islamic University, Islamabad, 2007.
32. Hussain, Hafiz Mubashir., Jadid Fiqhi Masail, Lahore: Mubashir Academi, 2008.
33. Taqi Usmani, Muhammad., Bahoos fi Qadaya Fiqhiya Mu'asara, Quetta: Maktabah Marofiyah, 2006.
34. Taqi Usmani, Muhammad., An Introduction to Islamic Finance., Karachi: Maktabah Ma'arif ul Qur'an, 2008.
35. Razi Khan, Maulana Muhammad., Encyclopedia od Hadith on Economy, New Dehli: Anmol Publications Pvt. Ltm., 2007.
36. Hassan, S. Misbahul, "Good faith and fairness in Commercial transaction: The Common law, the civil law and the Islamic perspective," (u/p.) presented at IIU Malaysia on April 1996.
37. Amjad, R., "Impact of Concentration on Profitability in Pakistan", Journal of Development Studies, Vol.13, No. 4, April 1977.
38. Government of Pakistan, Regulation and Prevention of Monopolies, Cartels and Restrictive TradePractices, Corporate Law Authority, Islamabad: 1983.
39. Government of Pakistan, Economic Survey 2000-2001, Statistical Appendix, Islamabad: Ministry of Finance, 2001.

40. Government of Pakistan, National Drug Policy of Pakistan, Islamabad: Ministry of Health, 1996.
41. Haq, Mahbub Ul, The Poverty Curtain: Choices for the Third World, New York: Columbia University Press, 1974.
42. Hoekman, Bernard M, and Mavroidis, Petros, "Linking Competition and Trade Policies in Central and Eastern European Countries", in Winters, L. Alan, London: Foundations of an Open Economy: Trade Laws and Institutions for Eastern Europe, CEPR, 1995.
43. Humayun, S, et al, Model Consumer Protection Act 2000, Islamabad: Consumer Rights Commission of Pakistan, 2000.
44. Khan, K and Mansoor, S, "A Strategy for Consumer Protection in Pakistan", Islamabad: The Pakistan Development Review, Vol. 35, No. 4, Winter 1996.
45. Papanek, G F, Pakistan's Development: Social Goals and Private Incentives, Massachusetts: Harvard University Press, Cambridge, 1967.
46. Rizvi, S A, "MCA: the Consumer Friendly Dragon Awakens", Pakistan and Gulf Economist, Vol. 15, No. 31, 1996.
47. Sharwani, K, "Some New Evidence on Concentration and Profitability in Pakistan's Large-Scale Manufacturing Industries", The Pakistan Development Review, Vol. XV, No. 3, Autumn 1996.
48. State Bank of Pakistan, Annual Report (2000-20001), 2001.
49. UNCTAD, Model Law on Competition, 2000.
50. UNDP, Human Development Report 2001, London: Oxford University Press, 2001.

51. UNIDO, Pakistan: Towards Industrial Liberalization and Revitalization, London: Blackwell, Oxford, 1990.
52. White, L, Industrial Concentration and Economic Power in Pakistan, New Jersey: Princeton University Press, 1974.
53. World Bank, 'Pakistan at a Glance', <http://www.worldbank.org/data/>. 2001.
54. Zaidi, Akber S, Issues in Pakistan Economy, Karachi: Oxford University Press, 1990.
55. Rachlinski, J. J. The uncertain psychological case for paternalism. New York: University Law Review, 2003.
56. Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 1977.
57. Audretsch et al., Audretsch, D. B., Baumol, W. J. and Burke, A. E., "Competition policy in dynamic markets," International Journal of Industrial Organization, Vol. 19, 2001.
58. Baumol, W. J. "When is inter-firm coordination beneficial? The case of innovation," International Journal of Industrial Organization, Vol. 19, 2001.
59. Brazil Ministry of Finance and Ministry of Justice (joint publication). Competition Policy in Brazil. Brasilia: Brazil Ministry of Finance, July 2002.
60. Clarke, J.L., "Competition Policy and Foreign Direct Investment." Paper presented to the Fifth meeting of the European Trade Study Group in September 2003.
61. Clarke, J. L., and Evenett, S. J., "The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel." Forthcoming in Antitrust Bulletin. 2003.

62. Clarke, J.L., and Evenett, S.J., "A Multilateral Framework for Competition Policy?" in Simon J. Evenett and SECO (eds.) *The Singapore Issues and The World Trading System: The Road to Cancun and Beyond*. Bern, Switzerland. June 2003.
63. Cooke, S., and Elliott, D., "Competition Policy Issues for Developing Asian Economies." Mimeo. Prepared for the OECD: Cooke and Elliott 1999.
64. Consumer Unity & Trust Society (CUTS). *Pulling Up Our Socks*. February 2003.
65. Nicholson, M., "Quantifying Antitrust Regimes." 15 October 2003.
66. Posner, R., *Antitrust Law: An Economic Perspective*. Chicago: University of Chicago Press. 1978.
67. Noland, M., "Competition Policy and FDI: A Solution in Search of a Problem?" Institute for International Economics working paper number 99-3. 1999.
68. White & Case, *Worldwide Antitrust Notification Requirements*, 2001 Edition. 2001.
69. World Bank-OECD. *World Bank and OECD. A Framework for the Design and Implementation of Competition Law and Policy*. Paris. 1997.
70. World Economic Forum 2002. *World Economic Forum. Global Competitiveness Report 2001-2002*. Geneva: 2002.
71. The Nation, "CCP Chairperson's Interview" Islamabad: 2011
72. The Competition Commission of Pakistan, "Annual Report, 2010", Islamabad: CCP, 2011.
73. WTO (2003). World Trade Organization. "Study on Issues Relating To A Possible Multilateral Framework on Competition Policy." WT/WGTCP/W/228. 19 May 2003.

74. Elhauge E and Geradin D, *Global Competition Law and Economics*, 2nd edn, New York: Hart Publishing, 2011.
75. Williams M, *Competition Policy and Law in China, Hong Kong and Taiwan*, London: Cambridge University Press 2005.
76. J. Wilson, *At the Crossroads: Making Competition Law Effective in Pakistan*, Northwestern Journal Of International Law And Business, Vol. 26, AT 565, 2006.

Websites

1. <http://www.cc.gov.pk/> (2012)
2. <http://sabr.com/> (2012)
3. <http://www.islam101.com/quran/> (2012)
4. http://www.searchtruth.com/hadith_books.php (2012)
5. <http://www.hadithcollection.com/> (2012)
6. <http://www.law.harvard.edu/programs/ilsp/research/> (2012)
7. <http://www.irti.org/> (2012)
8. <http://jcle.oxfordjournals.org/> (2012)
9. <http://www.law.com/> (2012)
10. <http://islamiclawoffinance.blogspot.com/> (2012)
11. <http://www.farmersweekly.co.za/> (2012)
12. <http://papers.ssrn.com/> (2012)
13. <http://icrier.org/> (2012)
14. http://lawprofessors.typepad.com/antitrustprof_blog/ (2012)
15. <http://www.jftc.go.jp/> (2012)
16. <http://papers.ssrn.com/> (2012)
17. <http://www.wipo.int/> (2012)
18. <http://www.jdsupra.com/legalnews/> (2012)
19. <http://www.devex.com/en/> (2012)
20. <http://www.tandfonline.com/> (2012)