

## **The Pakistani Consumer: *Dumb or Dumber?***

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### **Abstract**

The Competition Commission of Pakistan (CCP) has adopted the notion of *ordinary consumer* for assessing confusion or deception in ‘deceptive marketing practices’ cases under Section 10 of the Competition Act, 2010<sup>1</sup>. In its first order in this area, the CCP defined *ordinary consumer* as a person who is ‘the usual, common or foreseeable user or buyer of the product’ (CCPa, p. 30) and differs from the ‘ordinary prudent man’ under contract law. According to the CCP, this conceptualisation of the Pakistani consumer was important for achieving the goal of implementing the Competition Act 2010 in its letter and spirit, the intent of the law (CCPa, p. 30) and that of protecting Pakistani consumers from anti-competitive practices. Despite acknowledging that other jurisdictions such as the EU and the US follow the standards of *average* and *reasonable* consumer, respectively, the CCP considered that following these standards ‘would result in shifting the onus from the Undertaking to the consumer and is likely to result in providing an easy exit for Undertakings from the application of Section 10 of [CA, 2010]’. (CCPa, p. 30)

In this paper, I argue that the ordinary consumer of the CCP does not have any normative basis either in law or in economics. This standard is also incompatible with the well-established Pakistani trademark law, which employs the notion of ‘consumer’ in line with the concept of bounded rationality where the consumer is unable to make decisions that maximise her utility. Defining the concept of consumer is also imperative as it has practical ramifications for marketers. For example, in the presence of these conflicting standards confusion is bound to arise as whether a marketing campaign should be designed around the concept of consumer as defined by the CCP or around that adopted by higher courts, including the Supreme Court of Pakistan in various trademarks (and passing off or unfair competition) cases? Should marketers prepare separate campaigns

for so that they are not caught by the provisions of either law? Would there be one consumer profile from a target market or countless? And would there be *a* target market or many?

To ensure normative as well as positive consistency; to provide legal certainty to marketers and to meet consumer expectations, the CCP should refer to the representative customer profile created by the marketers, in cases of deceptive marketing practices. This is the consumer for whom the product or service or the marketing campaign is created and she is the one who should not be deceived.

This paper starts with the introduction of the CCP and the provision on ‘deceptive marketing practices’ in the Competition Act of 2010 (CA, 2010). I then discuss the standard of ‘ordinary consumer’ as defined by the CCP in *Zong* and subsequent orders. This is followed by the discussion of the basis of adoption of such standard including the basis of rejection of the EU and US definitions of the consumer. In the fourth part I discuss in detail the problem with the standard of ‘ordinary consumer’. The fifth part comprises of the discussion of the notion of ‘consumer’ under the Pakistani trademark law. I propose, in the sixth part, that the representative consumer profile created by the marketer for the purposes of developing marketing campaigns is a more appropriate standard and starting point for inquiry under Section 10 of the Competition Act, 2010. The last part concludes.

**Keywords:** Consumer protection, deceptive marketing practices, Economics, Law, Marketing, average consumer, ordinary consumer, reasonable consumer.

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## **1. Introduction\***

The Competition Commission of Pakistan (CCP) is charged with the task of monitoring deceptive marketing practices in Pakistan. It achieves this goal by implementing Section 10 CA, 2010 which prohibits undertakings from entering into marketing practices that may deceive consumers. Though, no definition of a ‘deceptive marketing practice’ is provided in CA, 2010, a closed list of four marketing practices that are considered deceptive is specified in Section 10(2) as follows:

- a) the distribution of false or misleading information that 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.

As the provision of correct information is one of the goals of Section 10 CA 2010 (Wilson, 2011), these four marketing practices are considered deceptive as they provide or distribute false or misleading information that may be harmful for both consumers as well as competitors. The marketing practices in sub-paragraphs (a), (c) & (d) cause direct harm to competitors and indirect harm to consumers. The practice in sub-paragraph (b) is harmful for consumer interests directly and competitor’s interest indirectly.<sup>ii</sup>

## **2. CCP’s Ordinary Consumer**

To analyse the extent of deceptiveness in marketing practices, the CCP developed the fiction of ‘ordinary consumer’. According to the CCP, if the ordinary consumer is deceived by a marketing practice it will be held as deceptive. The CCP developed the test of ‘ordinary consumer’ in its *Zong* order. The *Zong* order pertained to allegedly false and

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misleading advertisements shown on various television channels by two cellular media companies in Pakistan. The CCP held that the respective advertisements violated paragraph (b) of Section 10(2) of [CA, 2010], as they distributed false or misleading information to consumers (CCPa, p. 36 & 43).

The CCP considered it important to define the concept of ‘consumer’ under Section 10. According to the CCP, the concept of consumer could not be the same as the contract law’s ‘ordinary prudent man’. Hence, the ordinary consumer is relieved of all diligence, prudence and care demanded from the ‘ordinary prudent man’. At the same time, The CCP rejected the EU standard of ‘average consumer’ and the US ‘reasonable consumer’ standard (CCPa, p. 30).

The CCP defined the ‘ordinary consumer’ as ‘the usual, common or foreseeable user or buyer of the product’ (CCPa, p. 30). This ‘ordinary consumer’ is not burdened with the requirements of ‘ordinary diligence, caution/duty of care and ability to mitigate (possible inquiries) [...]’ (CCPa, p. 30). Hence, these factors are not to be considered relevant on the part of the ordinary consumer. In CCP’s opinion it was imperative to define ‘consumer’ ‘most liberally and in its widest amplitude’ to implement the law in letter and spirit (CCPa, p. 30).

The CCP, at the same time placed a higher burden on marketers. It held that,

‘restricting [the] interpretation [of the term ‘consumer’] 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 providing an easy exit for Undertakings from the application of Section 10 of [CA, 2010].’ (CCPa, p. 30)

In short, to achieve compliance with Section 10 and implementation of letter and spirit of CA, 2010, the CCP adopted the standard of the ordinary consumer and placed a higher burden of responsibility on the undertakings in relation to their marketing practices.

The ‘ordinary consumer’ standard was confirmed in the *Banks* order.<sup>iii</sup> Clarifying the standard further, the CCP held ‘that the definition of consumer as understood for the purposes of Section 10 of [CA, 2010] is different than that of the US Federal Trade Commission [(FTC)] or even the European Court of Justice (now Court of Justice for the European Union(CJEU))’ (CCPb, paragraph 27). The CCP refused to follow the standard of ‘reasonable consumer’ stated in the FTC Deception Policy Statement of 1984.<sup>iv</sup> In this regard, in contrast to the FTC practice and interpretation, CCP held that ‘when interpreting the term consumer for the purposes of Section 10, no subjective standard of “reasonableness” is thrust upon the consumer’ (CCPb, paragraph 28). The CCP held, in line with *Zong* and in contrast to FTC, that the undertakings have a responsibility to ensure that their advertisements are not deceptive or misleading.<sup>v</sup> The CCP held that ‘the focus is not on how much diligence or caution a consumer should exercise but rather the efforts made by the undertaking to ensure that its advisement is clear, unambiguous and truthful’ (CCPb, paragraph 28).

### **3. Basis of CCP’s ordinary consumer**

#### **a. Consumer protection**

In *Zong*, the CCP held that one of the objectives of CA, 2010 is to ‘protect consumers from anti-competitive practices’ and the consumer is the beneficiary of the law’ (CCPa, p. 30). This was reiterated, specifically with regards to Section 10 CA, 2010, in the *Paints* order that ‘the main aim of [Section 10] is consumer protection from anti-competitive behaviour’ (CCPc, p. 17; CCPd, p. 32). Hence, the CCP aims for high consumer protection for the Pakistani market and apparently, the standard of ‘ordinary consumer’ is also chosen to achieve that aim.

#### **b. Incardona & Poncibó (2007)**

While discussing the standard of ordinary consumer in *Zong*, the CCP has exclusively relied for justification on the conclusions of an article written by Rosella Incardona and Cristina Poncibó published in the Journal of Consumer Policy in 2007. To fully understand CCP’s standard of ‘ordinary consumer’ it is imperative to study the arguments in this article.

In their article, Incardona and Poncibó (2007) have critically examined the standard of ‘average consumer’ in EU cases in different areas including trademark law and unfair competition. In the following, I will briefly describe that EU standard of ‘average consumer’ followed by the criticism of Incardona and Poncibó.

The CJEU created the fiction of the ‘average consumer’ in *Gut Springenheide*<sup>vi</sup>, which pertained to free movement of goods within the European Community. The court held that the assessment of whether a statement or description to promote sales is misleading is to be determined from the perspective of ‘an average consumer who is reasonably well-informed and reasonably observant and circumspect’ (*Gut Springenheide*, paragraph 31). This standard was followed in many CJEU and General Court’s (formerly the Court of First Instance of the European Communities) decisions, before making its way in the Unfair Commercial Practices Directive (UCP Directive). Drawing upon the cases of the CJEU and the General Court, the UCP Directive defined ‘average consumer’ as one ‘who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors’ (UCP Directive, Recital 18). This standard demands a more than average level of intelligence and cautiousness from the European consumer. This is not only a criticism but has also been acknowledged by the European Commission. Accordingly, the average consumer ‘is a critical person, conscious and circumspect in his or her market behaviour. (S)he should inform themselves about the quality and price of products and make efficient choices’ (European Commission, 2009, p. 25). According to Mak (2010), ‘the consumer is presumed to be capable to work out for herself whether products or services live up to their description or quality requirements’ (Mak, 2010, p. 5).

Incardona and Poncibó do not agree with the high standard of ‘average consumer’ as developed and applied in the EU law and practice. They consider that the average consumer standard of the CJEU and the UCP Directive is that of the ‘traditional law and economics’. According to them, in this standard,

‘consumers are viewed as *rational* actors able to estimate the probabilistic outcomes of uncertain decisions and to select the outcome which maximises their sense of well-being at the time the decision is made. As a consequence of their assumed rationality,

consumers would largely be held responsible for their own actions, and the potential liability for the company would be greatly reduced (Incardona & Poncibó (2007), p. 30) (emphasis added).’

In their opinion, the assumptions of perfect information and rational consumer of ‘traditional law and economics movement’ do not hold true for the real world as it is ‘the economists’ idealistic paradigm of a rational consumer in an efficient marketplace’ (Incardona & Poncibó, 2007, p. 35). In reality, the consumers are not provided with complete information and their purchase decisions are affected by a variety of factors including cognitive biases such as imperfect recollection or perceptive decision-making as well as external stimuli such as social influence. They argue that contemporary law, should instead heed help from the emerging field of behavioural economics, according to which ‘human beings are not completely rational, consistent, or even aware of the various elements that enter into their decision making, and thus they often make poor choices, seizing upon irrelevant considerations to support their decisions and ignoring important ones’ (Incardona & Poncibó, 2007, p. 31) (internal citations omitted). Quoting Hanson and Kysar (1999) they also argue that ‘consumers “are subject to host of cognitive biases which make them susceptible to manipulation. Product manufacturers take advantage of this consumer blindness and use advertising, promotions, and price setting to shape consumer perceptions and maximise their profits’ (Incardona & Poncibó, 2007, p. 31). On the basis of these and other arguments, Incardona and Poncibó conclude that the ‘average consumer test overlooks the real world of individual consumer behaviour and sets an overly demanding standard for consumers’ (Incardona & Poncibó, 2007, p. 22).

### **c. CCP reliance on Incardona & Poncibó (2007)**

As mentioned earlier, the CCP exclusively based all its arguments in favour of the notion of ‘ordinary consumer’ based on Incardona and Poncibó (2007). Without defining the concept of ‘average consumer test’ in EU law, the CCP quoted the criticism by Incardona and Poncibó of the standard:

‘The average consumer test reflects the economists’ idealistic paradigm of a rational consumer in an efficient marketplace. This notion may be useful for economists’ calculations and projections,



but departs from the unpredictable realities of individual human behaviour and is hardly an appropriate standard for legislative or judicial sanctions [...] Generally, consumers do not have the time and resources at their disposal to acquire and process sufficient information for rational decision-making. It is impossible for consumers to devote all their intellectual, psychological, and physical resources as well as their time to the gathering and processing of information merely so that their choices can meet an abstract economic notion. Even well-informed consumers of a high intellectual and educational level, who would, at least in theory, be ideally suited for rational market behaviour, may often base their decisions on custom and feelings rather than on an analytical process. Extensive, multi-dimensional information leads to a significant decrease in the quality of consumer choice. Different types of consumers possess different information processing and perception abilities.’ (Incardona and Poncibó, 2007, p. 35; CCPa, paragraph 25)

The CCP further quoted Incardona and Poncibó as follows:

‘The over-demanding average consumer test conflicts with the overall system of EU consumer law resulting in many forms of weak paternalism. The disclosure obligations, “cooling-off” periods and the specific information required for certain sales, are based on the idea that, in the heat of the moment, consumers might make ill-considered or improvident decisions. The standard justification for these regulations is that they will protect consumers from unscrupulous, high-pressure and deceitful sellers and lenders whilst simultaneously fostering a more competitive marketplace and enhancing consumer confidence. Aware of information asymmetries and of the fact that consumers often act impulsively or in a way that they later regret, EU legislation does not block their choices, but ensures a period for sober reflection. This benevolent attention to consumer weakness is not present in the average consumer test.’ (internal citation omitted) (Incardona and Poncibó, 2007, p. 35; CCPa, paragraph 27).

The CCP also agreed, finding a lot of merit in the conclusions of Incardona and Poncibó (2007) that ‘[w]e would not favour a return to unregulated laissez-faire marketing that would transfer the burden of evidence from the seller, who has the advantage of intimate knowledge of the product, to the buyer, who of necessity must make many, often

instantaneous choices in the course of a day’ (Incardona and Poncibó, 2007, p.36; CCPa, paragraph 28).

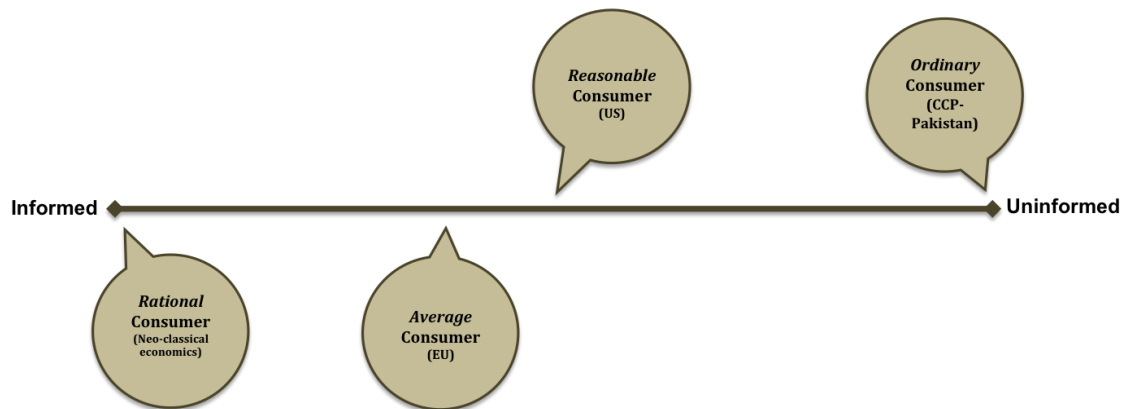
In refusing to follow the US standard of consumers acting reasonably, the CCP observed that it is ‘governed by the provisions of [CA, 2010] and that the guidance gained from any international law or precedent only has a persuasive value and is not enforceable.’ However, CA, 2010 does not provide any definition of the consumer, neither average nor ordinary. The only way to read CCP’s *created* standard of ‘ordinary consumer’ in the provisions of CA, 2010 is through the requirement of ‘reasonable basis’ for making any claims in marketing practices from the undertaking. As this is the requirement made of the undertaking, it seems that the CCP has taken it to mean that the analysis in Section 10 generally, and Section 10(2)(b) specifically, should focus on the claims made by the undertaking by holding that ‘[u]nder Section 10 (2) (b) it is the undertaking which must have a ‘reasonable basis’ for making any claims in an advertisement [...] [T]he determination of the ‘reasonableness’ of a consumer would not apply in the context of Section 10’ (CCPb, paragraph 28).

#### **4. Problem with the CCP standard**

The *raison d’être* for consumer protection is the presumed imbalance between the powers of buyers and sellers. This power imbalance comes from asymmetry of information between these two market players. The latter possess more and better information about products or services and their various characteristics. Moreover, the usual working of the market also fails to incentivise the seller to make information available to the consumer that may be helpful in making informed choices (Cseres, 2005, pp. 179-181). Resultantly, consumers make suboptimal choices. Therefore, the need of state intervention in the form of consumer protection laws and regulations to correct this market failure and to restore the balance between buyers and sellers is undisputed. The problem arises in ascertaining the correct degree of state intervention in the market to provide such information. (Cseres, 2005). This is further compounded by the fact that consumers, in line with the model of bounded rationality, are unable to make optimal decisions. This may happen even where the market is able to provide them with all necessary information (Cseres, 2005; Incardona and Poncibó, 2007). Being boundedly rational, they may fail to

comprehend such information. Therefore, understanding the level of rationality of the consumer in a product or service market is the key to determine the extent of state intervention.

Keeping in perspective the different schools of thought in Economics over the past few decades as well as leading jurisdictions, various degrees of consumer rationality can be depicted on a continuum, which I term as the ‘Consumer Rationality Continuum’. On the one end of this continuum is the perfectly *rational* consumer of the Neo-classical economics. This consumer possesses complete information of the product or service, makes informed choices and maximises her utility from a set of available options (Simon, 1955). On the other end is the ordinary consumer of the CCP who does not possess any capability of making informed choices in the marketplace. It appears that she completely lacks the ability to decide for herself and needs patronage for every market decision. Somewhere in the middle, but closer to the rational consumer, is the average consumer of the EU, who is not perfectly rational but nonetheless well-informed and circumspect. Though called *average*, this consumer appears to bear a high burden to knowledge and responsibility of its acts in the market. The US reasonable consumer standard would also lie in the middle, presumably not tilting towards either end.



**Figure 1 - Consumer Rationality Continuum**

As I have understood Incardona and Poncibó (2007) arguments, they opine that the consumer should not be pegged anywhere on this continuum. For them, the right standard of the consumer is *consumer*, neither average nor vulnerable (Article 5(3) UCP Directive) or ordinary. The consumer may lie anywhere on this continuum in accordance with the type of product or service as well as depending upon various socio-economic and cultural factors. They state that,

‘The parameter of the unfairness of a commercial practice is the consumer [...] who mirrors social, psychological, and cultural factors and may even represent the overwhelming majority of consumers. The consumer (like the trader, the creditor, the debtor, the seller, and any other abstract person employed in abstract norms) would serve the function of representing the whole of a category and would be deemed per se averagely reasonable, attentive, and/or even naturally vulnerable, without imposing or requiring an artificial level of attention or reasonableness. [...] The consumer does not need to be always treated as a child but neither should he or she be presumed to be Mr/Mrs I Know It All’ (Incardona and Poncibó, 2007, p. 36).

Whether their criticism of average consumer standard of the EU is correct from the perspective of behavioural law and economics is a topic for another discussion. The point to highlight here is that the CCP is committing the same error, which according to Incardona and Poncibó, the CJEU and UCP Directive have committed: by characterizing the Pakistani consumer as highly uninformed, gullible and impressionable, though not claiming it in the exact words, the CCP, much to the dislike of the authors on whose arguments they rest their case, is crystallizing the standard albeit at the other extreme of the Consumer Rationality Continuum. Incardona and Poncibó argue for a better assessment of consumers in a market. They do not argue for a strict consumer protection approach where the consumer is considered vulnerable in all instances and the burden of care is entirely shifted on sellers. By adopting the ordinary consumer standard, CCP does just that. It is instructive that the CCP adopted this standard in a case that pertained to cellular services where consumers were considered to be belonging to all segments of the society. This observation shades the standard of consumer even in cases where the target market is not as wide as that in the case of cellular services. Notwithstanding that, the

consumers of cellular services in Pakistan may not be even as gullible and in need of protection as the CCP considers. A recent study concluded that the consumers in Pakistan are most inclined towards the cellular service whose messages they conceive as least deceptive (Hasan, Subhani & Mateen, 2011). The study included responses from over 10,000 mobile phones users. The results of the study showed that the consumers could make a difference between the services offered and the services received from cellular companies. The fact that the consumers were more inclined towards the cellular service with least deceptive messages is a glaring example of the Pakistani consumer not being gullible or insensible.

Though the intention of the CCP to protect all consumers in the marketplace is worthy of praise, it is neither warranted nor economically or socially desirable. The well-established legal principle of 'standard of care'<sup>vii</sup>, which has been set aside by the CCP in cases of deceptive marketing practices, should not be considered a burden on the consumer. Apart from making them vigilant, the requirement of diligence incentivises consumers to educate themselves regarding the available subset of choices in the market and maximize their utility, even if in a boundedly rational manner. By being partly responsible for their choices, the consumer keeps increasing its knowledge pool as well as that of the society. On the contrary, the 'ordinary consumer' standard has the potential of freezing the consumer on its current level of knowledge (if any) and taking away the opportunity and the need for the consumer to educate itself of the changing marketing environment with the advent of new and advanced products. The 'ordinary consumer' standard, would not only stifle this progress of consumer maturity in Pakistan, it may even lead to unscrupulous consumer lawsuits against any and all marketing messages as being false or misleading.

The above discussion clarifies that the 'ordinary consumer' standard is incompatible with the assertions of Incardona and Poncibó (2007). This standard is not a reflection of actual consumer behaviour in the market but its behaviour as perceived by the CCP. Consumer markets differ from each other and so do consumers. The CCP's assumption that the ordinary consumer in Pakistan needs utmost protection in all cases and in all markets is

unfounded, even in the cellular service industry, which according to it has the widest amplitude.

In addition to its normative inconsistency both with economics and law, the ordinary consumer standard is also out of line with the long-standing law and practice of the trademark law in Pakistan to which I will turn next.

## **5. Consumer under the Pakistani Trademark law**

The standard of consumer adopted by the CCP is not isolated from the workings of other laws in Pakistan. The law of trademark (including *passing off* and *unfair competition*) also contains the concept of consumer. Hence, it is important that the standard is the same under both laws not only to ensure legal certainty, predictability and consistency for marketers in developing their product and marketing strategies but also to meet consumer expectations. This consistency is even more important as the Pakistani trademark law also contains provisions relating to consumer protection (Sections 67 and 68<sup>viii</sup>). Similarly, the CA, 2010 also contains provision relating to fraudulent use of other's trademark (Section 10(2)(d)). It is thus imperative that the two laws are read and interpreted harmoniously to avoid any conflicting results.

According to the Supreme Court of Pakistan, the trademark law in Pakistan has a two-fold objective: it benefits the traders by providing them the possibility of registering their trademarks and excluding others from using them without authorization, and it also benefits consumers by saving them 'from being deceived by the acts of unscrupulous manufacturers and sellers of goods bearing the fake trademarks for other' (*Alpha*, 1990, p. 1076). Keeping this in perspective, the superior courts of Pakistan have also adopted a standard of consumer that has been consistently employed to analyse the cases of consumer confusion and deception in trademark cases. It is important to note here that trademarks not only include the brand names of a product or service or its packaging. Companies are increasingly using trademark law in Pakistan for the protection of their advertising slogans and marketing titles. Hence, the definition of consumer adopted in trademark cases in Pakistan is of practical and utmost relevance for deceptive marketing cases under CA, 2010.

As early as 1963, the Pakistani case law relating to trademarks hinted that the Pakistani consumer is not the theoretical ‘rational consumer’ of Neo-classical economics. In *Bengal Oil Mills* (1963, p. 926), the West Pakistan High Court (now the High Court of Sindh) held that the test of trademark deception ‘is not what thoughtful people would take it to be, but how is the mind of common consumer affected by a mark’. A few years later, in *Bandenawaz* (1967, p. 495), the court held that for ascertaining resemblance between two trademarks, courts must take into account the likelihood of deception. Moreover, in this analysis, ‘[t]he court must be careful to make allowance for imperfect recollection of the [the trademark] and effect of careless pronunciation and speech [by the consumer]’. In *Glaxo Laboratories* (1977, p.865), the court reiterated that the ultimate purchasers are likely to be misled by imperfect recollection of trademarks’.

The above quotes show that Pakistani courts considered the Pakistani consumer a human being, who is prone to cognitive biases such as imperfect recollection and who may, at times, be (but not necessarily) a little careless with regard to pronunciation and speech when making purchase decisions by referring to trademarks of products. The Supreme Court of Pakistan further clarified this image of Pakistani consumer in 1984. In the famous *Jamia Industries Ltd* (1984, p. 11-12), the Court held that the similarities of two or more marks should be analysed from the perspective of an unwary purchaser where she ‘would be exposed to *reasonable* probabilities of confusion and deception that the goods of [one seller] carrying the proposed trade mark had their origin from [another seller]’ (emphasis added). In other words, the Supreme Court acknowledged the definition adopted by the lower courts that the Pakistani consumer was boundedly rational. At the same time, by introducing the factor of reasonability in the test of trademark deception, it clarified that the ‘unwary purchaser’ is not totally unsuspecting and relieved of all duty of care and diligence. In this regard, the holding of a lower court in another case is instructive. The High Court of Sindh in *Sunkist* (1987) explained the lower limit of the Pakistani consumer’s intelligence in assessing deception and confusion in trademark cases. The court held that in cases of similar or identical trademarks for dissimilar goods deception and confusion must be judged by the perspective of ‘average intelligent persons “with reasonable apprehension and proper eye-sight”’. (Sunkist, 1987,

p. 121). The court explained that ‘[t]he probable purchaser should be person of average intelligence who takes care to at least observe *prima facie* facts floating on the surface and not those who do not take care even to look at them. He should not be of “phenomenal ignorance [or] extraordinary defective intelligence”’. It further held that in cases of confusion and deception between two trademarks ‘the kind of errors to be considered are not those which are absolute impossibilities, but there should be reasonable probabilities.’ The court excluded the consumer from the fold of protection of the law who is extremely careless and without proper understanding. The court relied extensively on the case law from the UK and India where the same standard is followed.

The consumer under the Pakistani trademark law and practice can thus be summarized as a person of average intelligence, who has the ability to observe obvious information but also has imperfect recollection. The law does not require phenomenal intelligence but also does not want the Pakistani consumer to be a fool or over-careless. Thus, the Pakistani consumer under the trademark law has ordinary common sense and also the burden of responsibility for its act as a boundedly rational human being.

## **6. The right standard of consumer?**

The right standard of consumer is difficult to be pegged anywhere on the Consumer Rationality Continuum. In fact the right standard is the one that is not pegged at one place. It should depend upon the product or service in question and the attention required in decision making by the consumer. In this regard, social, psychological and cultural factors play an important role. Relieving consumer of all her responsibility for the purchase decision is not the right way to move forward. Same is true for considering consumer as perfectly rational. At the same time, starting the analyses assuming that marketers are in the business of defrauding consumers is also a self-defeating approach. Marketing campaigns are made to understand the consumer demand (both needs and wants) and to satisfy them in a way that builds consumer confidence as well as brand loyalty. This is not to say that there are no unscrupulous marketers out there. But they are the exception and not the rule. Any sensible business would vie to build for itself an image, which can be trusted by the consumers and results in customer loyalty. The insensitive business should fall under the axe of Section 10 CA, 2010.



As Economics has benefitted from the domain of psychology to better reflect consumer rationality, law can seek help from the domain of marketing to determine its correct level. At least from the perspective for the standard of consumer, there are parallels between the two fields of study. The social, psychological and cultural factors that affect the decision making of the consumer are already studied and analysed by the marketer and can provide a good estimate of who the consumer is in individual cases for the purpose of Section 10 CA, 2010.

Any product or service or marketing practice is geared towards a target market. This target market is composed of thousands of unique human beings who differ from each other in terms of preferences. Nonetheless, the product or service or the marketing practice is usually not personalized for each consumer in the target market, especially for standardised products. On the contrary, a consumer profile representative of the target market is created. This may also be called the average customer, the average of all customers (Kotler, 2001) (different from the EU standard of ‘average consumer’).

Once this profile is created and the various factors that shape a consumer’s purchase decision are determined, the product or service and the ensuing marketing campaigns are prepared keeping in perspective this representative consumer and such factors. As this representative consumer is the one for whom the product, service or marketing offer is developed, she is the most important criteria to judge whether a marketing practice is potentially deceptive. This test takes into account the actual conceptualisation of the consumer from the perspective of the marketer, who is, as mentioned earlier, in the business of understanding consumer preference and present solutions accordingly. On the contrary, a marketing practice that diverges from the representative consumer as created by the marketer can potentially be considered deceptive taking into account the facts of individual cases. Adopting this approach will enable the CCP to protect consumers in a targeted way without unnecessarily sacrificing the goals of consumer education. Moreover, this approach also allows singling out bad sheep that deliberately engage in marketing practices that are meant to deceive from the rest of the flock.

## **7. Conclusion**

The Pakistani consumer is no different from the consumers in other markets in the world. She can be very circumspect and well-informed in case of one marketing practice and very credulous of the other. The ordinary consumer of CCP who is not responsible for any of her decision is out of line with reality as much as the perfectly rational consumer of Neo-classical economics. These two models are the extremes of Consumer Rationality Continuum. Actual consumer falls between these two extremes. Where it actually falls is a function of many factors, which includes the nature of the product and service, the geographical market and socio-economic, psychological and cultural factors to name a few. The best manifestation of the consumer is the one created by the marketer herself. This is the consumer for whom the product or service or the marketing campaign is created and she is the one who should not be deceived.

At the same time, it is also to be understood that under the Pakistani law the consumer also has some responsibility for her own market decisions. This allows a continuous process of consumer education. Matured consumers exert pressure on marketers and sellers to provide not only accurate information for making informed choices, but also for a continuous flow of better product and services with new and improved features.

I conclude that the concept of ordinary consumer adopted by the CCP in *Zong* and carried forward in nine further orders is not only inconsistent with positive national and international law but also raises normative issues specially in the context of marketing and economics. Pakistani consumer is neither dumb nor dumber. She is boundedly rational!

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<sup>i</sup> All references to earlier versions of Competition Act, 2010 have been replaced by Competition Act, 2010, which is the most current.

<sup>ii</sup> Marketing practices that are directly harmful to the business interests of a competitor, irrespective of a culpable harm to consumer interests would fall under Section 10(2)(a). On the other hand, marketing practices that affect consumer choice and behavior to their detriment, which may also mean harm to business interests of a competitor would fall under Section 10(2)(b). This difference has been acknowledged in decisions of the Competition Commission of Pakistan. (CCPe, 2012, paragraph 3)

<sup>iii</sup> The standard has also been confirmed for the subsequent guidelines developed by the CCP relating to deceptive marketing practices for the telecom sector. (CCPf, Undated)

<sup>iv</sup> The test laid down by the FTC to analyse deceptive marketing practices is that:

1. there must be a representation, omission, or practice that is likely to mislead the consumer;
2. the act or practice must be considered from the perspective of the reasonable consumer; and
3. the representation, omission or practice must be material. (FTC, 1984)

<sup>v</sup> Apparently, this argument is predicated on the language of paragraph (b) of Section 10(2) of [CA, 2010] interpreted subsequently by the CCP as meaning that ‘it is the undertaking which must have a “reasonable basis” for making any claims in any advertisements’. (*Banks*, paragraph 28)

<sup>vi</sup> But already in an earlier decision, *Mars*, the CJEU foresaw the customer to be reasonably circumspect when comparing the size of publicity marking relating to an increase in a product and the size of that increase. (*Mars*)

<sup>vii</sup> The CCP states that the “ordinary consumer” is not the same as the “ordinary prudent man” concept evolved under contract law’ (CCPa, 2009, paragraph 32). As explained above, the ‘ordinary consumer’ does not need to show even ordinary diligence, any caution or duty of care or the ability to resolve inquiries by herself. Diligence, prudence and care are similar concepts in law. Diligence is defined the as ‘[p]rudence; vigilant activity; attentiveness; or care [...]’ (Black, 1995, p. 368). This is the opposite of carelessness or negligence. There are at least three degrees of diligence in law: common or ordinary diligence which is exercised with regards to one’s own concern and varies in accordance with the situation; high or extra-ordinary diligence which is exercised by individuals of extra-ordinary intelligence or where there is need for extra-ordinary care and low or slight which is less than common prudence and is exercised by people with less than common prudence. (Black, 1995). The CCP rejects all three degrees of diligence with regards to the ‘ordinary consumer’ by differentiating between the two standards.

<sup>viii</sup> Most of the cases that have been decided under these sections of the trademark law relate to infringement of unregistered trademarks, as area widely known as passing off under common law. There the standard of consumer is the same as that with regards to registered trademarks as discussed in this section.