



COMPETITION COMMISSION OF INDIA

Suo-Moto Case No. 05 of 2013

In re:

Collective boycott/refusal to deal by the Chemists & Druggists Association, Goa (CDAG), M/s Glenmark Company and, M/s Wockhardt Ltd.

CORAM

Mr. Ashok Chawla
Chairperson

Mr. M. L. Tayal
Member

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member



Appearances:

For CDAG: Shri Keane Sardinha (Advocate), Shri Gaurish Agni (Advocate), Shri Prasad Tamba (President, CDAG), Shri Lydon D'Silva (General Secretary, CDAG) and, Shri Santosh Fondekar (CDAG).

For M/s Glenmark Company: Shri A. N. Haksar (Sr. Advocate), Ms. Rashmi Virmani (Advocate), Shri Ashish Kohtri (Advocate) and Shri Sunil Miranda (Dy. G.M., Legal)

For M/s Wockhardt Ltd.: Shri Amit Sibal (Sr. Advocate), Shri M. M. Sharma (Advocate), Shri Vaibhav Choukse (Advocate) and Ms. Deepika Rajpal (Advocate).

For the Stockists of M/s Glenmark Company and M/s Wockhardt Ltd.: Shri Salil Kare (Advocate), Shri Ashish Raikar (Advocate), Ms. Bhumika Agarwal (Advocate) and, Shri Agostino Menezes.

Order under Section 27 of the Competition Act, 2002

1. Background

1.1 M/s Varca Druggist & Chemists and others, in Case No. MRTP-C-127/2009/DGIR (4/28), had previously filed an information with the then Director General (Investigations & Registrations), Monopolies and Restrictive Trade Practices Commission (DGIR, MRTPC) against Chemists & Druggists Association, Goa, (**hereinafter 'CDAG' / the 'Opposite Party No. 1'**) for its alleged anti-competitive practices. After repeal of the Monopolies and Restrictive Trade Practices Act, 1969, the said case was transferred to Competition Commission of India under



section 66(6) of the Competition Act, 2002 (**hereinafter the ‘Act’**). The Commission, having found *prima facie* violation of the provisions of section 3 of the Act and had the matter investigated by the Director General (**hereinafter the ‘DG’**) and after hearing the parties on the DG report passed an order under section 27 of the Act on 11.06.2012.

1.2 Subsequently, the Commission was informed by Mr. Mario Vaz, proprietor of M/s Xcel Healthcare (**hereinafter the ‘Informant’**) [also one of the Informants in case no. MRTP-C-127/2009/DGIR (4/28)] that CDAG had not complied with the above said order of the Commission and was restraining pharmaceutical companies such as M/s Glenmark Pharmaceuticals Limited (**hereinafter the ‘Opposite Party No. 2’**) and M/s Wockhardt Limited (**hereinafter the ‘Opposite Party No. 3’**) from doing business with his company.

1.3 It was alleged that under the guidance of CDAG, all stockists of the Opposite Party No. 3 appeared to have formed a cartel and stopped receiving goods from the Opposite Party No. 3 so as to compel it to stop dealing with the Informant. It was also alleged that under the influence of CDAG, the Opposite Party No. 2 and the Opposite Party No. 3 stopped supplies to the Informant.

1.4 The Commission took *suo-moto* cognizance of the allegations raised by the Informant and formed a *prima facie* opinion that the alleged collective boycott and refusal to deal with the Informant by the Opposite Parties falls foul of the provisions of section 3(3) read with Section 3(1) of the Act. Accordingly, vide order dated 31.05.2013 under Section 26(1) of the Act, the Commission directed the DG to cause an investigation into the matter.

2. In compliance with the Commission’s order, the DG investigated the matter and submitted the investigation report on 27.06.2014.



3. DG Investigation

Findings of DG investigation may be briefly noted:

3.1 The findings of the DG investigation are primarily based on material /evidences in the form of minutes of the Executive Committee (EC) meetings of CDAG, emails exchanged between the Opposite Parties and the Informant, details of supplies made by the Opposite Party No. 2 and the Opposite Party No. 3 to the Informant, the Memorandum of Understanding (MoU) signed between the Opposite Party No. 2 and the Informant, the agreement executed between the Opposite Party No. 3 and the Informant *etc.*, collected during the course of investigation.

3.2 Based on the minutes of different EC meetings of CDAG held during 2012 and emails exchanged between the Opposite Parties and the Informant, it has been reported by DG that CDAG provided a platform for anti-competitive conduct and it controls the supply chain through which drugs and medicines are made available in the market. It has also been reported that CDAG coerced the Opposite Party No. 2 on the issue of appointment of institutional stockists in Goa and restrained it from routing supplies through its appointed institutional stockist *i.e.*, the Informant thereby controlling as well as limiting supplies in the market, in contravention of provisions of Section 3(3) (b) read with Section 3(1) of the Act. DG investigation also found that CDAG coerced the Opposite Party No. 3 to stop supplies to the Informant thereby limiting and controlling supplies in the market of drugs and medicines in Goa in contravention of the provisions of Section 3(3)(b) read with Section 3(1) of the Act.

3.3 Based on the minutes of different EC meetings of CDAG, the DG reported that CDAG neither had any intention to comply with the order of the



Commission dated 11.06.2012 in case no. MRTP-C-127/2009/DGIR (4/28) nor did it, in fact comply with the directions of the Commission. Deliberations in the EC meetings of CDAG were indicative of the continuing control exercised by CDAG on the supply chain of drugs and medicines through the practice of requirement of LOC (Letter of Cooperation)/NOC (No objection Certificate) for appointment of stockists by pharmaceutical companies. Such conduct of CDAG was found to be in contravention of the provisions of Section 3(3) (b) read with section 3(1) of the Act.

3.4 From the emails exchanged between CDAG and the Opposite Party No. 2, between the Opposite Party No. 2 and the Informant and internal emails within the office of Opposite Party No. 2, supplies made by the Opposite Party No. 2 to the Informant between June, 2012 upto 20th August, 2013, the DG found that CDAG is issuing diktats and manipulating the behaviour of its members. It is reported that CDAG had serious reservations against the appointment of the Informant as an institutional stockist by the Opposite Party No. 2 and had coerced the Opposite Party No. 2 to refrain from routing supplies through the Informant. Apparently, CDAG directed the Opposite Party No. 2 to route all institutional supplies only through its other appointed stockists instead of an 'unauthorized stockist', referring the Informant as an 'unauthorized stockist', even though it was a duly appointed institutional stockist of the Opposite Party No. 2. Accordingly, the DG found that the conduct of CDAG resulted in limiting and controlling supplies in the market and led to foreclosure of market for the Informant.

3.5 The DG noted that ever since its appointment in June, 2012 as an institutional stockist of the Opposite Party No. 2, the Informant was getting regular supplies from it upto December, 2012. But, due to intervention of CDAG no goods were invoiced between December, 2012 to June, 2013



which indicates that CDAG did succeed in coercing the Opposite Party No. 2 to suspend supplies to the Informant. Ever since the Informant had been appointed as the institutional stockist/distributor of the Opposite Party No. 2, the Opposite Party No. 2 never supplied drugs and medicines directly to Directorate of Health Services (DHS) and Marmagoa Port Trust (MPT) during June, 2012 to January, 2013. However, it is observed in the DG report that during May, 2013 and June, 2013, direct supplies were made by the Opposite Party No. 2 to the said institutions/customers in spite of the Informant continued to be its distributor. It clearly indicates that the Opposite Party No. 2 succumbed to the coercion of CDAG and stopped routing supplies through the Informant.

3.6 Further, from the emails exchanged between CDAG and the Opposite Party No. 2, between the Opposite Party No. 2 and the Informant and some internal emails of the Opposite Party No. 2; DG has reported that, pursuant to the threats by CDAG, the Opposite Party No. 2 took a decision to suspend supplies through the Informant and intimated the same to all its officers to comply with the same decision. It indicates that the Opposite Party No. 2 actually implemented the directions given by CDAG in regards to suspension of supplies through the Informant.

3.7 DG has also collected material evidences showing that CDAG has coerced the Opposite Party No. 3 not to deal with the Informant. The Opposite Party No. 3 in its submissions before the DG has stated that the supplies to the Informant were stopped from June, 2012 onwards on the insistence/threat of CDAG. Examination of details of month wise supplies of the Opposite Party No. 3 to its other stockists during the period Jan, 2012 to December, 2012 and Jan, 2013 revealed that there was no disruption in supplies to the other stockists. It indicates that the Opposite Party No. 3, on the insistence/threat from CDAG, had stopped supplies to the Informant only.



3.8 Accordingly, it has been concluded in the DG report that the conduct of CDAG amounted to non-compliance of the order of the Commission dated 11.06.2012 and continued to carry on its anti-competitive practices and take decisions that have been found to contravene the provisions of Section 3(3)(b) read with Section 3(1) of the Competition Act, 2002.

3.9 It was reported by the DG that the following fourteen members of the managing committee of CDAG were involved in the deliberations and decisions taken in the meetings held from time to time. Accordingly, it was concluded in the DG report that these office bearers and members of CDAG are responsible for its anti-competitive conduct as detailed above:

- i) Mr. Balkrishna M. Prabhudesai (President)
- ii) Mr. Lyndon D Silva (Hon. Secretary)
- iii) Mr. Yatin G. Nayak (Treasurer)
- iv) Mr. Agostinho Menezes (Wholesaler's Chairman)
- v) Mr. Akhtar A. Shah (Retailer's Chairman)
- vi) Mr. Ashish J.N. Raikar (Vice President ,North)
- vii) Mr. Mackenzie Da Costa (Vice President , South)
- viii) Mr. Santosh Fondekar (Member)
- ix) Mr. Amit Kamat (Member)
- x) Mr. Allan Eric Valles (Member)
- xi) Mr. Dattaraj D. Karmalkar (Member)
- xii) Mr. Bhasker P. Naik (Member)
- xiii) Mr. Dattaram N. Mopkar (Member)
- xiv) Mr. Rajaram K. Gawas (Member)

3.10 The DG analyzed the conduct of the Opposite Party Nos. 2 & 3 and reported that succumbing to the diktats of CDAG and their other appointed trade stockists both the Opposite Party Nos. 2 & 3 suspended



supplies to the Informant. As per the DG report, pursuant to the diktats of CDAG, suspension of supplies to the Informant by the Opposite Party Nos. 2 & 3 can be construed to be an agreement between the Opposite Party Nos. 2 & 3 and their respective appointed trade stockists which is in contravention of the provisions of section 3(4)(d) read with section 3(1) of the Act.

3.11 The DG construed that suspension of supplies to the Informant amounts to refusal to deal under section 3(4)(d) of the Act the said agreements between the Opposite Party Nos. 2 & 3 with their respective appointed trade stockists caused or was likely to cause appreciable adverse effect on competition as such agreement had led to creation of entry barriers for new entrants in the market of supply and distribution of drugs and medicines in Goa, drove out existing competitors out of the said market and foreclosed competition by hindering entry into the market. The agreement neither resulted in accrual of benefits to consumers nor in improvement in production or distribution or provision of services and also did not result in promotion of technical, scientific and economic development by means of production or distribution or provision of services. Accordingly, the DG concluded that the conduct of the Opposite Party Nos. 2 & 3 in suspending supplies to the Informant amounts to an agreement between them in contravention of section 3(4)(d) of read with section 3(1) of the Act.

3.12 Further, it was reported by the DG that any agreement between CDAG with the Opposite Party No. 2 and the Opposite Party No. 3 does not fall within the ambit of section 3(3) and section 3(4) of the Act as they are neither engaged in identical or similar trade of goods or provision of services nor operating at different stages or levels of the production chain in different markets.



4. **Replies/objections of CDAG in response to the DG Report**

4.1 CDAG has submitted that the Informant has filed the present complaint to camouflage its own monopolistic, restrictive and anti-competitive activities as it is the only institutional stockist for all government supplies. It is submitted that the Opposite Party No. 2 through its reply dated 10.06.2014 has provided to the DG the details of institutional supplies effected by them in Goa during 01.04.2012 to 31.12.2013 from which it is clear that there are 10 authorised stockists of the Opposite Party No. 2 but supplies to the institutions/Government hospitals are made only through the Informant which is a monopolistic and anti-competitive practice.

4.2 CDAG has further submitted that as per the reply filed by the Opposite Party No. 3 on 05.03.2014, the Informant was the sole institutional stockist for its products. There were five other stockists appointed by it for the state of Goa, but the supplies were made exclusively through the Informant. It is submitted by CDAG that the Commission's order dated 11.06.2012 was followed in letter and spirit and the guidelines which were ordered to be deleted stood deleted and the Commission's order and deletion of guidelines were communicated to OPPI, IDMA, pharma companies and the Informant.

4.3 With regard to the EC meetings, CDAG has submitted that the same are not tenable in law and cannot be arrived at upon a meaningful reading and purposive interpretation of the minutes. It further submitted that there is no material placed on record to suggest that after the Commission's order dated 11.06.2012 CDAG practised any anti-competitive practice.

4.4 It is stated that email dated 17.01.2013 does not in any manner create a monopoly or cartel like situation. That the sender of the email, Mr. Santosh Fondekar, was not fully aware of the actual scenario and he wrongly stated



that there were only 7 authorised stockists and he was not aware that there were 10 authorized stockists including the Informant and two others. CDAG has stated that the Opposite Party No. 2 in its reply dated 10.06.2014 have placed material on record to the effect that the Opposite Party No. 2 has been duly supplying their products to MPT and DHS through the Informant during April 2012 till December 2013. It was also averred that the Opposite Party No. 2 had supplied their products to the Informant indirectly through other distributors and supply of the Informant was never affected by its influence. It is submitted that the conduct of CDAG cannot be inferred from the emails mentioning internal correspondences of the Opposite Party No. 2 as it was not a party to any of the correspondences. In order to falsely implicate the Opposite Party No. 2, the Informant had purposefully addressed email to the Opposite Party No. 2 with a view to give an impression that the goods were not supplied. Further, CDAG submitted that from the replies filed by the Opposite Party No. 3 on 02.08.2013 and 05.02.2014 it is clear that the Informant is the exclusive institutional stockists for the Opposite Party No. 3 in Goa for the last many years to the exclusion of its other seven stockists.

4.5 It is also highlighted that the Commission had recorded that CDAG had informed the Informant, the Opposite Parties Nos. 2 & 3 through its letter dated 07.06.2013 that they were free to appoint stockists as per their business needs. Further it is stated that in the meeting held on 16.05.2013, the issue of appointment of two stockists was taken up and CDAG was not in favour of stockists being appointed from same family so as to increase competition.

4.6 Lastly, it is submitted by CDAG that it has not violated the Commission's order dated 11.06.2012 and no anti-competitive activities have been continued by it after the said order.



5. **Replies/objections of the Opposite Party No. 2 in response to the DG Report**

5.1. The Opposite Party No. 2 has submitted that it was not a party before the Commission in Case No. MRTP-C-127/2009/DGIR (4/28) and the directions passed by the Commission in its order dated 11.06.2012 were against CDAG. So, the question of not complying with directions of the Commission does not arise. It is submitted that vide email dated 17.01.2013 CDAG raised objections to supply its products to DHO, MPT and GMC through the Informant. It is submitted that though a proposal was mooted to convert the status of the Informant from a non-exclusive distributor to a liaison agent, the same was never given effect to and the Informant still continues to be its non-exclusive distributor in respect of supply of products to DHO and MPT. It is submitted that on some occasions the Opposite Party No. 2 had even supplied products indirectly to the Informant through their other distributors. The Opposite Party No. 2 has alleged that there was no understanding between it and CDAG so as to violate the provisions of section 3 of the Act, as concluded by DG. It is contended that the Opposite Party No. 2 was well within its rights to make supplies directly to any institution, without routing through the Informant and even though it failed to supply its products to the Informant under certain government tender there was no appreciable adverse effect on competition.

5.2. The Opposite Party No. 2 has also submitted that the Informant has no grievances against it. The grievance of the Informant was only related to its appointment as liaison agent for the Opposite Party No. 2 and failure to supply goods against pending orders. It is further submitted that the DG has ignored the data and documents submitted by the Opposite Party No. 2 to show that it has been duly supplying goods to the Informant till date. The Opposite Party No. 2 has contended that DG has failed to appreciate



that the Informant was its only institutional stockist in Goa and there was no competition for the Informant in respect of supplies to be made to DHO and MPT.

5.3. It is further stated that the DG misconstrued the email dated 17.01.2013 and wrongly interpreted “all the other authorized stockists in Goa” to mean that the said email was sent on behalf of other stockists of the Opposite Party No. 2 whereas there was no specific reference to stockists of the Opposite Party No. 2. The email cannot be relied upon to allege any collusion between the Opposite Party No. 2 and other stockists to suspend supplies to the Informant. It is also stated that since the Informant was not a new entrant in the market and was doing business since 2006, the question of creating entry barrier for it does not even arise.

5.4. As regards the supply of goods under the tender to the government, the Informant only acts as facilitator for making supplies to these institutions. The prices and quantity in a tender are fixed and there can be no question of any price control or determination by the Opposite Party No. 2.

6. **Replies/objections of the Opposite Party No. 3 in response to the DG Report**

6.1. The Opposite Party No. 3 has submitted that DG has failed to prove any specific allegations against it and the Informant never alleged any refusal to supply by it in Goa. Further, DG has also not been able to prove that the Opposite Party No. 3 has not supplied goods to the Informant. It is submitted that goods were supplied to the Informant during July 2011 and April 2012 and there was no request from the Informant or from government departments for supply of medicines during the period from June 2012 to June 2013. The Opposite Party No. 3 has denied existence of any agreement between it and other authorized stockists and as per the



Opposite Party No. 3 it never adhered to the diktats of CDAG in stopping supplies to the Informant. Further, the Opposite Party No. 3 has submitted that even assuming that there exist agreements between it and its other authorized stockists, it was a result of undue influence and coercion by CDAG.

6.2. It is submitted by the Opposite Party No. 3 that, as DG was not able to provide any conclusive proof of the agreement between it and its authorized stockists, appreciable adverse effect on competition caused by such alleged agreement cannot be presumed. As per the Opposite Party No. 3, it has only 0.23% share in market for supply of drugs and medicines in state of Goa. Stockists can freely act for any pharmaceutical companies, and as such there is intense competition between pharma companies and stockists in Goa. It is submitted that the Opposite Party No. 3 possess no market power or dominant position and hence no appreciable adverse effect on competition could have resulted from its conduct.

7. Replies/objections of the Stockists of the Opposite Party No. 2 and the Opposite Party No. 3 in response to the DG Report

7.1 The followings stockists of the Opposite Party Nos. 2 and 3 have submitted their replies/objections to the DG investigation report:

i) Stockists of the Opposite Party No. 2: M/s CS Enterprises, M/s Martinho Lobo, M/s Goa Pharma, M/s EL Enterprises, M/s Drogaria Colvalcar, M/s Pharma Plus, M/s Drogaria Menezes & CIA, M/s Orient Pharmaceutical Distributors and, M/s Navin Laboratories.

ii) Stockists of the Opposite Party No. 3: M/s Drogaria Salcette, M/s GN Agencies, M/s Raikar Distributors, M/s Drogaria Ananta, M/s D'Silva & D'Silva, M/s Drogaria Menezes & CIA and, M/s Goa Pharma.



7.2 All the above stockists have submitted similar replies contending that they were not parties before the Commission in MRTP Case No. C-127/2009/OGIR (4/28)] and are also not parties in the present case. All these stockists have denied that they indulged in any anti-competitive practices or collective boycott. They have submitted that the DG report did not reveal any material to show that they were parties to any of the contravention of the Act.

8. **Analysis of the Matter**

8.1. On a perusal of the report of the DG and the replies/objections filed by the parties and other materials available on record, the Commission feels that the following issues emerge for determination in the matter:

Issue 1: Whether the practices of CDAG amount to continued contravention of Section 3(3) read with section 3(1) of the Act in violation/non-compliance of the order of the Commission dated 11.06.2012?

Issue 2: Whether the conduct of the Opposite Party No. 2 and Opposite Party No. 3 is in violation of section 3 of the Act?

8.2. **Issue 1: Whether the practices of CDAG amount to continued contravention of Section 3(3) read with section 3(1) of the Act in violation/non-compliance of the order of the Commission dated 11.06.2012?**

8.2.1 The Commission observes that the facts and evidences highlighted by DG clearly show that CDAG disregarded the Commission's order dated 11.06.2012 and indulged in anti-competitive conduct. By forcing pharma companies to discontinue supply through non-authorized



stockist like the Informant, it continued to carry on its anti competitive practices and took such decisions at its Executive Committee (EC) meetings which are clearly in contravention of the provisions of section 3(3)(b) read with section 3(1) of the Act.

8.2.2 Minutes of the EC meeting dated 15.06.2012 indicate that attempts had been made to use political influence in regard to the said order of the Commission. Further, the meeting dated 31.08.2012 shows that CDAG was imposing its decision on members on the issue of LOC/NOC. Minutes of the meeting dated 11.01.2013 show that CDAG was trying to find ways of evading the Commission's order and was threatening to take action against any of its members who would dare to go against its diktat. The EC meeting dated 16.05.2013 further shows that CDAG was indulging in collective boycott and was seeking to enforce its decision regarding 'bandh'.

8.2.3 The excerpts from some of the EC meetings are highlighted in the following paragraphs:

Dated 15/06/12: *"The CCI case was discussed; the Secretary said that we had been following up with Mr. Yusuf and we being assured that the issues were being handled. Mr. Fondekar put up his views and it was decided that we meet Mr. Shataram Naiki, Mr. Luzinho Faleiro to use some political clout."*

Dated 31/08/12: *"Mr. Yatin Naik said that he had high regard for Mr. Agostinho Menezes and surprised how the Ranbaxy LOC was given to Ofmacs when the E. C. had taken decision that no agencies should be given to C.S/Ofmacs till they satisfy Association on separation and give fresh License*



copies to the Association”.

Dated 11/01/2013: *“The President laid emphasis that major task before them is the CCI matter besides which the Association needs to find out a way to terminate the membership of any members who go against the Association.”*

Dated 16/05/2013: *“Further the Secretary said that since the President was not present for the last meeting, the issue of certain launch company's was not taken up since the issue of Companies launching in Goa who were appointing 2 stockists within the family itself was to be stopped. As regards action against the members who had their place of business open on the day of the bandh, the Secy said that the meeting was held on the next day of the bandh but due to poor attendance no action was proposed at that meeting. The President said that due to this 2% members that were open if no action was taken then the other 98% members will not keep their shops closed at the next call, if any. In fact he said that Mr Sudin of Pharmacia Moilio said that he would keep open if no action is taken and the same would apply to Hindu Pharmacy, Margao, he said. We should put this at the AGM and leave it to the Members to decide but some action must be taken”.*

8.2.4 After a conjoint reading of the excerpts of the E.C. meetings, the Commission is convinced that CDAG was indulging in anti-competitive practices. It was continuing controlling the supply chain through which drugs and medicines are made available in the market through the practice of requirement of LOC/NOC prior to appointment of stockists by pharmaceutical companies even



though CDAG has no legal or statutory authority to do so. Further, the deliberations in the said meeting regarding action to be taken against members who kept their shops open despite the call of 'Bandh' evinces the control being exercised by CDAG over provision of services thereby denying not only freedom of trade but also leading to limiting the provision of services in the market.

8.2.5 Further, contrary to its contentions of complying with the earlier orders of the Commission, CDAG in fact did not comply with the directions of the Commission which is clear from the way it influenced the Opposite Party Nos. 2 and 3 to discontinue their dealings with the Informant. The Commission is of the view that the aforesaid conduct of CDAG tantamount to violation of section 3(3)(b) read with section 3(1) of the Act as the same has resulted in limitation and restriction of supply of medicines in the market.

8.2.6 The Commission further observed that CDAG coerced the Opposite Party No. 2 as clearly visible from the e-mails exchanged between CDAG and the Opposite Party No. 2 and the Opposite Party No. 2 and the Informant. The following table provides a brief description of the contents of such emails.

Email dated	Sender	Recipient	Content
17.01.13	Mr. Santosh Fondekar (A member of the Managing Committee of CDAG)	Mr. Devang Vyas (Official of the Opposite Party No. 2).	CDAG expressed its discontent towards the Opposite Party No. 2's practice of supplying through an unauthorized stockist (appears to be the Informant. The Opposite Party No. 2 was directed to stop supplies through the unauthorized stockist.
21.01.13	Mr. Devang Vyas (Official of the	Mr. Santosh Fondekar (A	Assurance was given by the Opposite Party No. 2 that



	Opposite Party No. 2)	member of the Managing Committee of CDAG)	orders would be executed directly by Glenmark Pharmaceuticals (<i>i.e.</i> , the Opposite Party No. 2).
22.01.13	Ms. Revati Asawale (Official of the Opposite Party No. 2)	A. G. Prasad (Official of the Opposite Party No. 2) With a copy (Cc) to other officers of the Opposite Party No. 2	The decision to discontinue the Informant as a distributor and its appointment as a liasioner was communicated to the officers of the Opposite Party No. 2. Accordingly, it appears that directions were given for preparation of an appropriate MoU for the same reason.
11.02.13	The Informant	Mr. Vijayanand Pandey (Official of the Opposite Party No. 2)	The Informant brought to the notice of the Opposite Party No. 2 that supplies had been stopped probably because of the threats of CDAG and it was requested that the same should be resumed as the conduct of CDAG was anti-competitive and in defiance of Commission's order date 11.06.2012.
16.02.13	Nitin Nagar (Official of the Opposite Party No. 2)	Mr. Mario Vaz (The Informant)	It was intimated to the Informant that it has been decided to make direct supplies to the customers and to retain the Informant only as a liasioner.
16.02.13	A. G. Prasad (Official of the Opposite Party No. 2)	Mr. Mario Vaz (the Informant)	Mr. Mario Vaz was told that he should meet CDAG as it had taken a strong objection against billing through the Informant.

8.2.7 The above emails show that CDAG had an issue with the appointment of the Informant as a stockist by the Opposite Party No. 2 and coerced the Opposite Party No. 2 to refrain from routing supplies through it. Pursuant to the coercion of CDAG only, the Opposite Party No. 2 suspended supplies through the Informant. It further directed the



Opposite Party No. 2 and other members to route all supplies through appointed stockists only. It may be noted that none of the above stated emails was disputed by CDAG or the Opposite Party No. 2. Therefore, Commission has no doubt that the CDAG was controlling the supply chain through which drugs are made available to the consumers in the market, in complete disregard of Commission's order dated 11.06.2012.

8.2.8 Further, from the DG investigation report it is observed that on insistence/threat of CDAG, the Opposite Party No. 3 stopped supplies through the Informant from June, 2012 upto June, 2013. The Commission took note of the fact that many of listed stockists of the Opposite Party No. 3 *i.e.*, Mr. Lyndon D Silva of M/s D'Silva & D'Silva, Mr Yatin G Nayak of M/s G. N Agencies and Mr Agostinho Menezes of M/s Drogaria Menezes & Cia are members of the Managing Committee of CDAG for the term 2012-14. It appears to be a plausible explanation of CDAG's conduct.

8.2.9 Having regard to the facts of the case duly supported by the evidences placed on record by various parties and their submissions, the Commission is of the opinion that CDAG failed to comply with the directions of the Commission given in its order dated 11.06.2012 in the matter of M/s Varca Druggist & Chemist and Ors. in Case no. MRTP-C-127/2009/DGIR and continued to carry on its anti-competitive practices and take decisions that have been found to contravene the provisions of Section 3(3)(b) read with Section 3(1) of the Act. Further, it forced pharmaceutical companies *i.e.*, the Opposite Party Nos. 2 & 3 to follow its mandate by threatening the other stockists in Goa to stop taking supplies or suspend receiving supplies from them till such time they stopped supplies to the Informant.

8.2.10 Section 48 of the Act empowers the Commission to hold the persons



responsible for the conduct of the company/association liable which has been held to be in contravention of the provisions of the Act. The Commission has noted the findings of the DG in this regard. The DG has furnished the name of 14 office bearers who were members of the managing committee of CDAG and were responsible for decision making of the association and for running the affairs of the CDAG.

8.2.11 The Commission invited objections/replies from the office bearers to the findings of DG report and also requested them to furnish their Income Tax returns of the last three years. However, in view of the stay granted by the High Court of Bombay at Goa, in CWP 592/2014, on the order of the Commission dated 21.08.2014 seeking Profit and Loss Account and Income Tax Statements from the office bearers, the Commission refrains from dealing with the issue of individual culpability and penalty, if any, of the office bearers in the present order.

8.3. Issue 2: Whether the conduct of the Opposite Party No. 2 and Opposite Party No. 3 is in violation of section 3 of the Act?

8.3.1 The Commission is in agreement with the conclusion drawn by DG that agreement between CDAG with the Opposite Party No. 2 and the Opposite Party No. 3 does not fall within the ambit of section 3(3) and section 3(4) of the Act as they are neither engaged in identical or similar trade of goods or provision of services nor operating at different stages or levels of the production chain in different markets because CDAG an association of enterprises which is not itself engaged in the supply and distribution of drugs and medicines in the market and the Opposite Party Nos. 2 and 3 are manufacturers of drugs and medicines. The Commission also agrees with the conclusions of the DG that there is no agreement between the Opposite Party No. 2 and the Opposite Party No. 3 in regards to suspension of supplies to their appointed institutional



stockist.

8.3.2 DG in his investigation report has concluded that the act of the Opposite Party Nos. 2 & 3 in suspension of supplies through the Informant and thereafter routing of supplies through their other appointed stockists can be construed to be an agreement between the Opposite Party Nos. 2 & 3 and their appointed trade stockists in contravention of section 3(4) (d) read with section 3(1) of the Act as the effects of such agreement has caused or is likely to cause an appreciable adverse effect on competition (AAEC) in the market.

8.3.3 In this regard, the limited question which arises before the Commission is whether the act of the Opposite Party Nos. 2 & 3 of suspension of supplies through the Informant and thereafter routing of supplies through their other appointed stockists can be construed to be an agreement between the Opposite Party Nos. 2 & 3 and their respective appointed trade stockists which falls within the purview of section 3(4) of the Act, as existence of an agreement is a *sine qua non* for establishing contravention under section 3 of the Act.

8.3.4 The Commission is of the view that the email exchange between CDAG and the Opposite Party No. 2 and internal communication of the Opposite Party No. 2 among its employees/officials throws light on this issue. In the email dated 21.01.2013 sent by Shri Devang Vyas (official of the Opposite Party No. 2) responding to the email dated 17.01.2013 sent by Shri Fondekar (on behalf of CDAG), it was stated that:

“Per the telephonic discussion we had, we hereby confirm that supplies to GMC (Goa Medical College) and any other Govt / Semi Govt Institution shall henceforth be executed directly by Glenmark Pharmaceuticals.



We rest assure you of our best trade practices which Glenmark imbibes in its actions and corporate image”.

8.3.5 Further in an internal email dated 22.01.2013 circulated by one Ms. Revati Asawale (Official of the Opposite Party No. 2) among other employees of the Opposite Party No. 2, it was stated as under:

“Referring to the discussion held in Reddy Sir’s cabin and below trailing mail regarding Xcel Health Care. It seems we have to discontinue M/s Xcel Health Care, Goa as a distributors of DHS and Marmagoa Port Trust and appoint as a liasioner for both the Inst. Dear Wilson, PI note and prepare the MOU agreement of Xcel Health Care, Goa for above both the inst, with discussion of Mr. A. G. Prasad.”

8.3.6 The email dated 21.01.2013 clearly shows that although the Opposite Party No. 2 agreed not to supply through the Informant pursuant to the threats of CDAG, it also did not supply through any authorized stockists. Rather it directly supplied to the Marmagoa Port Trust (MPT). This is also verified from the data collected by DG that on two occasions (*i.e.*, May 2013 and June 2013) the Opposite Party No. 2 supplied to MPT directly. Based on this factual position, it is not possible to hold the Opposite Party No. 2 liable under section 3(4) (d) of the Act. The Commission disagrees with the DG on this aspect as there is nothing on record which shows that the Opposite Party No. 2 ever dealt with other authorized stockists. Accordingly, the Commission is of the considered opinion that the Opposite Party No. 2 is not liable under the provisions of section 3(4) (d) of the Act.

8.3.7 In regards to contravention by the Opposite Party No. 3, it is observed in



the DG report that though the Opposite Party No. 3 had appointed the Informant as its institutional stockist for the company's Super Specialty Division (SSD) in July, 2011, supplies were made to him only twice in the months of July, 2011 and April, 2012. Further, the DG has concluded that the conduct of the Opposite Party No. 3 in suspending supplies to the Informant can be construed to be an agreement between the Opposite Party No. 3 and their respective trade stockists in contravention of the provisions of section 3(4)(d) of the Act.

8.3.8 However, the Commission is of the opinion that mere non-dealing with the Informant for a short span of time under the coercion of CDAG cannot be construed as an agreement between Opposite Party No. 3 and their appointed stockists as per section 3(4) of the Act. Accordingly, the Commission is of the view that the Opposite Party No. 3 is not liable under the under section 3(4)(d) of the Act.

8.3.9 In view of the facts of the present case, the Commission does not find evidence of any agreement between the Opposite Party Nos. 2 & 3 with their respective stockists.

ORDER

9. In view of the above, the Commission directs CDAG to seize and desist from indulging in the practices which are found to be anti-competitive in terms of the provisions of Section 3 of the Act in the preceding paras of the order.

10. On the aspect of penalty under Section 27 of the Act, the Commission is of the view that the said anti-competitive conducts require to be penalized to cause deterrence in future among the erring entities engaged in such activities. Accordingly, it is required that the degree of punishment is scaled



to the severity of the violation. It is apparent that CDAG has completely disregarded the order of the Commission dated 11.06.2012. By continuing anti-competitive conduct in spite of specific directions against it, CDAG has shown utmost disrespect to the Commission's mandate. Further, absolutely no mitigating factor has been shown by the parties and none is borne out from the records.

11. Having regard to all these factors, the Commission feels it appropriate to impose a penalty on the CDAG at the rate of 10 % of its receipts based on the financial statements filed by them as follows:

Year	Turnover (in rupees)
2010-11	1,00,69,281.26
2011-12	1,09,19,590.52
2012-13	1,08,73,008.35
Total	3,18,61,880.13
Average	10620626.71

12. Resultantly, a penalty of Rs. 10,62,062/- (Rupees ten lakhs sixty two thousand and sixty two rupees only), calculated at the rate of 10% of the average receipts of OP 1 for three financial years is hereby imposed on CDAG.

13. The directions in para 09 above must be complied with immediately. The CDAG is further directed to file an undertaking in this regard within a period of 30 days from the date of receipt of this order. The amount of penalty imposed is directed to be deposited within 60 of the receipt of this order.



14. The Secretary is directed to inform the parties accordingly

Sd/-

(Ashok Chawla)
Chairperson

Sd/-

(M. L. Tayal)
Member

Sd/-

(S. L. Bunker)
Member

Sd/-

(Sudhir Mital)
Member

Sd/-

(Augustine Peter)
Member

Sd/-

(U. C. Nahta)
Member

New Delhi

Dated: 27.10.2014