



COMPETITION COMMISSION OF INDIA

Case No. 28 of 2014

In Re:

**Mr. P. K. Krishnan
Proprietor, Vinayaka Pharma**

Informant

And

- 1. Mr. Paul Madavana, Divisional Sales Manager
M/s Alkem Laboratories Limited** **Opposite Party No. 1**
- 2. M/s Alkem Laboratories Limited** **Opposite Party No. 2**
- 3. All Kerala Chemists and
Druggists Association** **Opposite Party No. 3**

CORAM

**Mr. Ashok Chawla
Chairperson**

**Mr. S. L. Bunker
Member**

**Mr. Sudhir Mital
Member**

**Mr. Augustine Peter
Member**

**Mr. U. C. Nahta
Member**

**Mr. M. S. Sahoo
Member**



Appearances:

For the Informant: Advocate Ms. Rashmi Nanda Kumar

For OP 1 & OP 2: Advocates Mr. Manas Chaudhari and Mr. Sagardeep Rathi

For OP 3: Advocates Ms. Vibha Dutta Makhija and Mr. Sajith P. Warriar along with Mr. A. N. Mohana Kurup for OP-3 and its office bearers.

Order under Section 27 of the Competition Act, 2002

1. The present order will dispose of the information filed by Mr. P. K. Krishnan, Proprietor of Vinayaka Pharma, (hereinafter, the '**Informant**') under section 19(1)(a) of the Competition Act, 2002 (the '**Act**') against Mr. Paul Madavana, Divisional Sales Manager, M/s Alkem Laboratories Ltd. (hereinafter, '**Opposite Party No. 1**'/ '**OP 1**'), M/s Alkem Laboratories Ltd. (hereinafter, '**Opposite Party No. 2**'/ '**OP 2**'), All Kerala Chemists and Druggists Association (AKCDA) (hereinafter, '**Opposite Party No. 3**'/ '**OP 3**'), alleging *inter alia* contravention of the provisions of section 3 of the Act.

2. Facts, in Brief

2.1 The Informant is stated to be the sole proprietor of Vinayaka Pharma, engaged in the business of distribution of medicines manufactured by pharmaceutical companies in Palakkad district of Kerala. The Informant has a valid drug license in Form 20B & 21B. At present, he is dealing with 15 pharma companies and has a turnover of Rs. 6.50 crore per annum.

2.2 OP 2 is a pharmaceutical company engaged in the business of manufacturing and marketing of branded and generic drugs and has a huge presence across



several therapeutic segments with eight manufacturing plants and twenty five depots in various regions across India. OP 1 is the Divisional Sales Manager of OP 2. OP 3 is a society registered under the Travancore Cochin/ Literary, Scientific & Charitable Societies Registration Act, 1955, formed to establish and maintain fellowship, harmony and co-operation among chemists engaged in pharmaceutical trade, provide facilities for exchange of information among members, conduct meetings, seminars and conferences for the benefit of its members, pass on all relevant information regarding the trade to all the members through periodicals, letters, circulars *etc.*

2.3 The information was filed by the Informant alleging that OP 2 has rejected his application for appointment as its stockist as he failed to obtain a 'No Objection Certificate' (NOC) from OP 3. The Informant alleged that initially OP 1 had formally offered a stockistship of OP 2 in November 2013 *vide* letter dated 14.11.2013. However, OP 2 subsequently refused to supply drugs to the Informant against the supply order raised by him without assigning any reason. Upon enquiry, a representative of OP 2 verbally told the Informant that as he had failed to obtain NOC from OP 3, OP 2 had returned the supply order for 48 items and the demand draft of Rs. 5 lakh.

2.4 The Commission, after considering the information and materials placed on record, passed a *prima facie* order dated 29.09.2014 under section 26(1) of the Act, directing the Director General (DG) to conduct an investigation into the matter for the alleged violation of the provisions of the Act. The DG submitted an investigation report dated 31.03.2015 to the Commission. A brief of the findings arrived at by the DG are outlined below.

3. **Investigation by the DG**

3.1 Initially the information was filed only against OP 1 herein. However, the Commission while passing its *prima facie* order under section 26(1) of the



Act, directed the DG that if during investigation, involvement of any other party is found, DG shall investigate the conduct of such party as well as role of persons responsible for such conduct. The DG found that OP 1 had a limited role in issuing the letter dated 14.11.2013 in his capacity as Division Sales Manager of OP 2 *vide* which the Informant was offered the stockistship of OP 2. Noting that the primary grievance of the Informant was against the letter issued by OP 2 which was allegedly issued in pursuance to the mandate of OP 3, the DG had joined them as parties and had investigated their respected conduct also.

3.2 The DG considered the replies of the parties in the matter, as well as the submissions made by certain pharmaceutical companies, namely, M/s Merck Limited, M/s Mankind Pharma Limited, M/s Lividus Pharmaceuticals Limited, M/s Cadila Healthcare Limited, M/s Glenmark Pharmaceuticals Limited etc. (hereinafter collectively, the '**third parties**').

3.3 OP 3 denied its involvement in the matter and stated that pursuant to the undertaking dated 21.02.2014 filed by its President and General Secretary as per Commission's directions in Case No. 30 of 2011, *Peeveear Medical Agencies and All India Organization of Chemists and Druggists & Others* (hereinafter, the '**Peeveear Case**'), it has not indulged in any such anti-competitive conduct.

3.4 The DG, however, discovered various e-mail communications exchanged between the President of OP 3 and All India Organisation of Chemists & Druggists (AIOCD), a national level trade association of pharmaceutical dealers. It was further found during the investigation that President of OP 3, *i.e.*, Mr. A. N. Mohan, has been the Vice President of AIOCD since September, 2014. About 20 e-mails were downloaded from A. K. Mohan's email account (anmohanpoonam@gmail.com). The email dated 01.12.2014, sent by Mr. A. K. Mohan to Mr. J. S. Shinde, *inter alia*, revealed that the



practice of NOC was never stopped and most of the pharma companies are co-operating with OP 3, stockists are being appointed with approval of district units of OP 3 and OP 3 is not only imposing the practice of NOC but also aggressively implementing the same with threats of boycott and stoppage of supplies.

3.5 The DG also relied upon e-mails exchanged between OP 3 (through its President Mr. A.N. Mohan) and pharmaceutical companies. These indicated that the practice of NOC was very much prevalent. Although the third parties did not admit that they were taking approvals from OP 3 for appointing new stockists, the DG found that the replies of such pharmaceutical companies were evasive and contradictory to the emails available on record.

3.6 On the basis of the submissions made by the parties and third parties, the DG concluded that AKCDA and its office bearers have been insisting on NOC before appointment of new stockists of pharmaceutical companies which has led to limiting and controlling of the supply of drugs and medicines in Kerala apart from creating entry barriers contravening the provisions of section 3(3)(b) read with section 3(1) of the Act.

3.7 It was submitted by OP 2 to the DG that OP 1 had issued the offer of appointment to the Informant without any authorization of OP 2. However, before the DG neither OP 1 could clarify as to why he had issued the offer letter dated 14.11.2013 to the Informant without being authorized to do so nor OP 2 could explain the rationale behind the same. The DG found that the copy of the letter dated 14.11.2013 issued to the Informant by OP 1 was also sent to Mr. T. K. Haridas, Branch Manager of OP 2, who as per OP 2 was the authorised signatory to issue such a letter. Further, the evidence with regard to OP 3 also showed that the pharmaceutical companies were complying with the diktats of OP 3 and were not appointing stockists without the prior approval of the latter. Further, submissions of M/s Sunanda Associates and email dated



01.12.2014 sent by Mr. A. N. Mohan to Mr. J. S. Shinde were also relied upon by the DG to conclude that most of the pharmaceutical companies were appointing stockists with the approval of district units of OP 3. The DG accordingly concluded that the conduct of OP 2 in refusing to deal with the Informant was pursuant to an arrangement between OP 2 and OP 3. Accordingly, the DG found that OP 2 has contravened the provisions of section 3(1) of the Act.

3.8 During the course of investigation, the DG also identified the officials and office bearers of the Opposite Parties responsible for anti-competitive activities under section 48 of the Act. The DG noted that Sh. Johnson Mathew, DGM-ACE Sales (South & West), Bangalore and Mr. T. K. Haridas, Branch Manager and Authorised Signatory were the officers responsible for decision making and appointment of stockists, distributors *etc.* in Palakkad District for OP 2. Further, relying on the submission of OP 3 *vide* letter dated 21.03.2015 confirming that Mr. A. N. Mohana Kurup (President), Mr. Thomas Raju (General Secretary) and Mr. O. M. Abdul Jaleel (Treasurer) are the key persons who took active role in the decision making processes of OP 3, the DG found them responsible under section 48 of the Act.

3.9 Besides, the DG pointed out that though the Informant was appointed as stockist on 19.03.2014 and he got the first stock invoice the very next day *i.e.*, 20.03.2014, this fact was not disclosed in the information filed with the Commission. The DG observed that such conduct renders the Informant liable under section 45 of the Act.

4. **Reply/ Response of the Parties to the DG Report**

4.1 The Commission heard the counsels of the Informant and Opposite Parties in detail during the ordinary meeting held on 04.08.2015. Their respective written submissions were taken on record and considered by the Commission.



Bereft of details, their contentions are summarized in the following paragraphs.

Reply/ Response of the Informant to the DG Report

4.2 The Informant has supported the findings of the DG except the findings with respect to suppression of facts. *Vide* written submission dated 20.08.2015, the Informant denied that there was any wilful concealment of information on his part to attract the liability under section 45 of the Act. He had filed the information on 06.01.2014 and thereafter, he has only been curing defects in the Information as directed by the Commission. It was also submitted that since the Informant had filed the information personally without engaging a lawyer, he was under the honest belief that the substance of the information could not be altered once it has been filed with the Commission.

4.3 The Informant has submitted that soon after the Commission's *prima facie* order for DG investigation, he engaged a counsel. Thereafter, it is on the advice of his counsel, the Informant had amended his information to include the fact of his appointment as a stockist of OP 2 on 19.03.2014 and further clarified his intention of pursuing the matter irrespective of him being appointed a stockist of OP 2. In this regard, the Informant has emphasized that he had disclosed the fact of his appointment before the DG by way of any affidavit dated 27.01.2015, while the application under section 45(1)(b) was filed by OP 2 on a later date, *i.e.*, 20.02.2015.

4.4 It was also highlighted that the stockistship was granted to the Informant by OP 2 well after the Informant had initiated action in the form of filing an Information before the Commission and the Assistant Drugs Controller. The Informant has also alleged that OP 2 had been refusing to deal with him for many months for want of NOC and the information was primarily filed with a



view to ensure that OP 2 would continue to supply drugs to him even in the absence of an NOC.

4.5 It was reiterated by the Informant that he had applied for the stockistship of OP 2 on 02.09.2013 and was offered stockistship on 14.11.2013. However, for want of NOC from OP 3, OP 2 had refused to deal with the Informant until 19.03.2014 when the Informant was appointed as a stockiest.

4.6 The Informant has submitted that the findings of the DG with respect to the allegations of refusal to deal with the Informant for four months and other violations by OP 3 were found by the DG to be true and the same should be accepted by the Commission. It was submitted that explanation by OP 2 for returning the demand draft of the Informant in December 2013 is bereft of any substance and is only to cover up the anti-competitive practice of mandating NOC for appointing stockists. It was submitted that though OP 2 has justified its conduct by stating that Mr. Paul Madavana (OP 1) who had issued the letter of stockistship to the Informant in November 2013, was not authorised to do so, OP 2 failed to produce any information illustrating the duties that can be performed by each of the functionaries of OP 2. It was further highlighted that OP 2 claimed that Mr. T. K. Haridas, Branch Manager was the authorized person who could issue the appointment letter to the Informant. However, the letter for stockistship issued by OP 1 dated 14.11.2013 to the Informant was copied to Mr. T. K. Haridas who was the Branch Manager.

4.7 The Informant has also highlighted the evidence relied upon by the DG, including the practice of the pharmaceutical companies in requesting NOC from OP 3, affidavits by two stockists before the DG clearly stating that the practice of mandating NOC is still being carried out, email dated 01.12.2014 written by the President of OP 3 to the President of AIOCD clearly showing the prevalence of the practice of NOC.



4.8 The Informant has submitted that OP 2 refused to deal with the Informant for a period of over 4 months which caused great hardship to the Informant. It was alleged that despite the undertaking filed by the President and the Secretary of the OP 3 before the Commission in Peeveear case, stating that it has neither endorsed in the past nor shall it approve the practice of NOC for appointments of stockists, distributors *etc.* in the future, OP 3 has been still continuing the said practice.

Reply/ Response of M/s Alkem Laboratories (OP 2) to the DG Report

4.9 OP 2 has submitted that the Informant has suppressed certain vital facts from the Commission. It had filed an application dated 20.02.2015 against the Informant under section 45 of the Act submitting that since the Informant had been appointed as the authorized stockist of OP 2 for Palakkad district on 19.03.2014, the present case is liable to be dismissed. It was submitted that though there was delay, certainly there was no 'refusal to deal' in the appointment of the Informant as a stockist. It was submitted that the suppression of information by the Informant vitiates the foundation of his information and his right to seek relief. OP 2 has submitted that had the Informant not concealed this information from the Commission, in all probability, the Commission would have considered the matter in an entirely different light.

4.10 Accordingly, *vide* application dated 20.02.2015 under section 45(1)(b) of the Act, OP 2 alleged that the Informant had intentionally suppressed material facts from the Commission while filing the information dated 30.04.2014. It was alleged that the Informant was formally offered stockistship of OP 2 for Palakkad district on 19.03.2014 after verification and field survey as per the internal policies of OP 2. It was alleged that the Informant, in spite of two opportunities given by the Commission *i.e.*, on 19.06.2014 and on 01.07.2014, failed/ omitted to disclose the fact of his appointment as stockiest



of OP 2 on 19.03.2014. It was further alleged that ever since 19.03.2014, the Informant is an active stockist of the products of OP 2 and there have been regular transactions between Informant and OP 2. It was alleged that at the time of passing of the *prima facie* order, had the Commission been aware of the fact of the Informant's appointment with OP 2, the Commission might not have agreed to proceed with an investigation order against OP 2 since there has been no refusal to deal with the Informant which could possibly attract the provisions of section 3(4)(d) read with section 3(1) of the Act. It was submitted that the suppression of material facts by the Informant has made the information infructuous and made the Informant liable for a penalty under section 45(1)(b) of the Act. OP 2 substantiated its arguments by relying on various Supreme Court judgments to highlight that any party which comes to the court without full disclosure of facts is not entitled to any relief.

4.11 It was further highlighted that the DG had failed to take into account some of the essential documents provided by OP 2 as part of its defence during the investigation. It was also submitted that the DG had discriminated against OP 2 as the counsel for the Informant was allowed to be present during his deposition, the same privilege was denied to OP 2. Further, the fact that the Commission directed the DG in its *prima facie* order dated 29.09.2014 to investigate the role of persons responsible for management of affairs under section 48 of the Act, created prejudice in the mind of the DG against OP 2 and its office bearers. Moreover, no opportunity for examination/ deposition was provided to Mr. Johnson Mathew and Mr. T. K. Haridas, leading to denial of any opportunity to them to explain their anti-competitive conduct, if any, before the DG. As such, the investigation is biased against OP 2, Mr. Mathew and Mr. Haridas and the entire proceedings before the DG were vitiated.

4.12 It was also submitted that even if it is assumed that OP 2 did refuse to deal with the Informant, the DG has failed to establish any appreciable adverse



effect on competition due to such conduct of OP 2 which is a requisite condition under section 3(4)(d) read with section 3(1) of the Act.

4.13 Based on the aforesaid averments, OP 2 urged that the DG's findings against it be dismissed and the Informant be penalised under section 45(1)(b) of the Act.

Reply/ Response of AKCDA (OP 3) to the DG Report

4.14 OP 3 has submitted that the investigation report is bad in law as the same has been obtained by way of fraud and concealment of facts. The Informant had concealed and suppressed material facts and documents from the Commission, while filing the information as well as during later stages. At the time of filing the information, the Informant was already a stockist of OP 2, which fact he concealed in the information filed before the Commission. OP 3 has further submitted that the proceedings under Section 44 and 45(1)(b) of the Act should be invoked against the Informant for deliberate omission to provide material facts and documents.

4.15 OP 3 has also challenged the jurisdiction of the Commission to take cognizance of the matter on the ground that the State Drugs Control Department is the competent statutory authority which can take cognizance of the matter. The Informant should have approached licensing authority under clause 28 of Drugs (Prices Control) Order, 2013 for refusal by Alkem Laboratories to appoint the Informant as stockist. Since a remedy under special law, *i.e.*, Drugs (Prices Control) Order, 2013 is available to the Informant, the Commission is barred from taking jurisdiction of the present case. It has been further submitted that the DG has failed to comply with requirements of principles of natural justice. OP 3 had no role in grant or denial of stockistship to retailers. DG has wrongly construed one single email



sent by President of OP 3 to the National President to establish that there exists a practice of issuing 'No Objection Certificate'.

4.16 During the course of oral submissions before the Commission against the investigation report of the DG, the counsel for OP 3 submitted that prior to 2013, AKCDA had insisted on NOC but after the Commission's findings in Peeveear case, the practice of NOC has been completely stopped.

4.17 Lastly, it was further submitted that the practice of NOC leads to efficiency and NOC was insisted for as it was pro-competitive.

5. Issues and Analysis

5.1 The Commission has perused the DG report and the replies/ objections filed by the Informant and the Opposite Parties along with the material available on record, besides hearing the counsels appearing for the parties. On a careful consideration of the matter, the Commission is of the opinion that in order to arrive at a decision, the following issues need to be determined in the instant matter:

Issue I: Whether the suppression of facts by the Informant makes the present proceedings infructuous, as alleged by the Opposite Parties?
Whether the Informant is liable to be penalized under section 45(1)(b) of the Act?

Issue II: Whether the conduct/ practices of OP 2 and/ or OP 3 amount to contravention of any of the provisions of section 3 of the Act?

5.2 Before proceeding any further into the matter, it would be appropriate to deal with the jurisdictional issue raised by OP 3. It was contended by OP 3 that the Commission does not have the jurisdiction to take cognizance of the matter in the present case as the statutory authority, *i.e.*, State Drugs Control



Department is the competent statutory authority which can take cognizance of the matter. It was submitted that the Informant should have approached licensing authority under clause 28 of Drugs (Prices Control) Order, 2013 for refusal by Alkem Laboratories to appoint the Informant as stockist. Since a remedy under special law, *i.e.*, Drugs (Prices Control) Order, 2013 is available to the Informant, the Commission is barred from taking jurisdiction of the present case.

5.3 The plea is misconceived. it may be noted that section 60 of the Act gives the provisions of the Competition Act overriding effect by declaring that the provisions of the Competition Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Furthermore, the provisions contained in sections 62 of the Competition Act, may also be referred to which in clear terms state that the proceedings under the Competition Act are not in derogation of but in addition to the provisions of any other law for the time being in force.

5.4 In light of the legislative intent as reflected in the scheme of the Competition Act, it is futile to contend that the legislature intended to oust the jurisdiction of the Commission. It may be pointed out that Competition law is a special law with an overarching mandate across the sectors (which may also be governed by their respective sector regulators). In such a scenario, the legislative intent is writ large and self-evident from the scheme of the Competition Act, as adumbrated above. Thus, the Commission is a special body to oversee the markets from a competitive framework. To accede the contention of the counsel appearing for the opposite party is to render the existence of the Commission redundant, otiose and nugatory. Such an approach apart from being inconsistent with the legislative scheme would stultify the legislative intent in curbing the abusive conduct by dominant enterprises.



5.5 In view of the above, the Commission is of the considered opinion that both the Statutory Authority under Drugs (Price Control) order and the Commission operate in separate areas with different objectives with no conflict in their respective jurisdictions as is evident on a plain reading of sections 60 and 62 of the Competition Act.

6. **Issue I: Validity of the present proceedings in view of the suppression of facts by the Informant**

6.1 The Opposite Parties have repeatedly raised the issue of suppression of facts by the Informant to challenge the tenability of the present proceedings against them. In fact, OP 2 had specifically filed an application dated 20.02.2015 under section 45(1)(b) of the Act in this regard. The objections of the Opposite Parties are two-fold: first, it is argued that since the primary grievance of the Informant against the Opposite Parties was based on alleged refusal to deal, the information filed on 30.04.2014 was infructuous as the Informant was a stockist of OP 2 on the said date and second, since the fact of the Informant's appointment as a stockist of OP 2 was not revealed in the said information, the Informant is liable to be penalized under section 45(1)(b) of the Act.

6.2 The Commission is of the view that the following dates are relevant to be taken into consideration:

Date	Event
02.09.2013	Informant applied to OP 2 for stockistship
14.11.2013	Informant was offered stockistship of OP 2.
28.11.2013	Purchase/ supply order and Demand Draft No. 386358 dated 28.11.2013 sent by the Informant to OP 2.
December, 2013	OP 2 returned the DD without mentioning any reason. As per the Informant, on enquiring from the Depot Manager, the Informant was verbally informed that an



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	NOC from OP 3 had to be obtained by the Informant.
06.01.2014	Information filed by the Informant.
30.01.2014	The Commission advised the Informant as under: <i>“You are hereby informed that you may file an information as per the procedure mentioned in the Competition Act, 2002 r/w the Competition Commission of India (General Regulations) so that the matter may be looked into”</i>
19.02.2014	Information in the prescribed format filed by the Informant.
07.03.2014	The Commission advised the Informant as under: <i>“it is observed on scrutiny of your complaint/information, that the same has not been filed as per the provisions of the Competition Act, 2002 and the Competition Commission of India Regulations; there are various defects found in it. You are therefore advised to rectify the defects, Only after rectification of defects by you in your complaint/information, the same will be processed further. It is further advised that in case the defects are not removed by you within thirty days, the information/complaint filed by you will be treated as invalid and the fee paid shall stand forfeited.</i>
19.03.2014	Informant was appointed as the stockist for Palakkad district by OP 2.
06.01.2014	Information was filed by the Informant.
30.04.2014	The information was finally registered after curing of defects in the information by the Informant.



29.09.2014	<i>Prima facie</i> order of the Commission.
27.01.2015	Informant filed an affidavit with the DG putting on record the letter dated 19.03.2014 wherein the Informant was appointed as a stockist of OP 2.
20.02.2015	OP 2 filed an application under section 45(1)(b) of the Act stating that the Informant had intentionally suppressed certain material facts from the Commission in the information.

6.3 Keeping the above chronology of events, the Commission is of the view that in order to decide the legitimacy of the first contention, it is imperative to analyse the basis of the *prima facie* order of the Commission dated 29.09.2014 *vide* which the DG was directed to investigate the present matter (hereinafter, the '*prima facie* order'). A reading of the *prima facie* order of the Commission makes it amply clear that the primary basis of the said order was the refusal of OP 2 to deal with the Informant because of the absence of NOC from OP 3 prior to the appointment of the Informant as a stockist.

6.4 From the material placed on record, it is an uncontroverted fact that OP 2 had appointed the Informant as its stockist *vide* its letter dated 14.11.2013 sent by OP 1. The said letter was also marked to Mr. T.K. Haridas, Branch Manager of OP 2, who as per OP 2 was the authorized person to issue the appointment letter to the Informant. Thereafter, OP 2 refused to supply drugs to the Informant and returned the demand draft sent by the Informant dated 28.11.2013. On enquiry, the Informant came to know that the refusal to deal/supply the medicines by OP 2 was because of the intervention of OP 3. The Commission is of the view that these facts formed the foundation on which the *prima facie* order was issued. These facts, irrespective of the later appointment of the Informant as stockist of OP 2, were enough to cause the Commission to order enquiry in the said particular case. The Commission, however, is not revisiting the validity of its *prima facie* order and the present exercise has been



undertaken only with a view to satisfy that the process of the Commission has not been abused by the Informant.

6.5 The liability of the Informant for suppressing the facts in the present case is a separate issue and will be dealt later in this order. However, even if the same is established, it will not render the present proceeding infructuous for two reasons. First, there was alleged refusal to deal with the Informant for want of NOC. Mere appointment of the Informant as a stockist on 19.03.2014 and resumption of supplies to it will not undo the alleged anti-competitive practices/ conduct that prevailed from November, 2013 to March, 2014. Second, even otherwise the proceedings under the Act are not restricted to a particular Informant/ person. The Informant in the proceedings under the Act is only one medium through which the Commission becomes aware of the anti-competitive conduct/ practices prevailing in the markets.

6.6 In view of the foregoing, the Commission is of the view that the contention of the Opposite Parties that the present proceedings are liable to be set aside on account of suppression of facts by the Informant is misplaced.

6.7 As regards the application dated 20.02.2015 filed by OP 2 under section 45(1)(b) of the Act, the Commission observes that the information was initially filed by the Informant on 06.01.2014. Thereafter, from 06.01.2014 to 30.04.2014, the Informant was rectifying the defects in the said information to bring it in line with the filing requirement as per the Competition Commission of India (General) Regulations, 2009. On 19.03.2014, the Informant was appointed as a stockist by OP 2. Undoubtedly, the Informant was a stockist of OP 2 on the date when the information was registered with the Commission. However, the Commission is also cognizant of the fact that the Informant first filed the information, though incomplete, on 06.01.2014. Subsequently, he was only rectifying the defects to align the information with the procedural requirements under the Act.



6.8 In view of the above and further considering that the proceedings under the Act are inquisitorial in nature, the Commission does not find it appropriate to penalise the present Informant under section 45(1)(b) of the Act. No doubt, the act of suppression of material facts and submission of wrong information would tantamount to contravention of section 45(1)(b) of the Act if it was material in nature. However, in the circumstances detailed hereinabove, the non-disclosure in the present case was not of such a nature which would warrant penalty. OP 2 has submitted that had the Commission known about the Informant's appointment by OP 2, the Commission would not have passed the *prima facie* order against it. For the reasons provided earlier, the Commission does not find much weight in this contention of OP 2.

6.9 On a careful consideration of the material on record, the Commission is of opinion that no case has been made out which warrants initiation of proceedings under section 45(1)(b) of the Act against the Informant.

7. **Issue No. II: Whether the conduct/ practices of OP 2 and/ or OP 3 amount to contravention of any of the provisions of Section 3 of the Act?**

7.1 The DG investigated the allegations against OP 2 and OP 3 under section 3 of the Act. With regard to the conduct/ practices followed by OP 3, the DG relied on the submissions made by third parties including M/s Merck Limited, M/s. Glenmark Pharmaceuticals, M/s Mankind Pharma, M/s Cadila Healthcare, M/s Alkem Laboratories Ltd. (OP 2) and some other leading pharmaceutical companies. It opined that all these pharmaceutical companies have tendered vague excuses regarding the letters issued by their officials to different stockists for NOC and have stated that the officials who had sent those letters were not authorised to do so. Some of them accepted that the letters were issued by their officials under pressure/ threat from local trade association *etc.* but they had never approved such letters. Implicitly, the pharmaceutical companies have accepted the fact that the trade associations are verbally



compelling them to obtain NOC and they resort to practices like trade boycott, limiting the supplies and/ or market *etc.*, in the event pharmaceutical companies refuse to follow their diktats.

7.2 In this regard, it may be relevant to reproduce certain emails which were relied upon by the DG as important evidence in determining the present issue. A email sent by Mr. A. N. Mohana Kurup, President of AKCDA to Mr. J. S. Shinde (President, AIOCD) on 01.12.2014 is reproduced below:

“ *CONFIDENTIAL*

Dear Sir,

As aware most of the companies are co-operating with akcda and appointments are made with the approval of our District/State. M/s. MERCK Limited is not interested to meet us or submit their price list even after our repeated requests. Moreover their C&F M/s. C.M. Corporation, Kochi is a chartered accountant by profession and not both bothered to listen us. We had a meeting to discuss these issues with Merck at AIOCD office on 20th August with Mr. Chadha and assured that these issues will be taken up with their MD. Of late it is understood through Mr. Dalvi that they are not interested to pursue further.

Meanwhile they made one stockist appointment at Thrissur and supplies were made without information to akcda which was later cleared to avoid direct action. Subsequently they made another appointment at Kollam without our clearance and are holding. Last week they made another appointment at ALUVA, Ernakulam District without consent. Our state committee unanimously decided to extend non-cooperation with MERCK. Initially Stockists are requested (1) Not to give STOCK & SALES statement from 1st December onwards and (2) Not to accept NEW PRODUCTS without their signed order and Price List in Form V.



As per reports 95% stockists complied with our requests.

I request you to fix up an appointment with the Higher ups of MERCK LIMITED to resolve the issue on a early convenient date of yours at AIOCD office.

YOUR URGENT PERSONAL ATTENTION IS REQUIRED

A.N. Mohan”

7.3 The above stated email clearly establishes that the appointments of stockists were being made with the approval of district/ State units of OP 3. It is apparent that OP 3 was disgruntled because of M/s Merck Ltd. not following its diktats. It is also mentioned in the said email that Mr. A.N. Mohana Kurup discussed some issues with Mr. Chadha of M/s Merck Ltd. who assured that those issues would be taken up with their MD.

7.4 The e-mail also highlights that OP 3 unanimously decided to boycott M/s. Merck Ltd. by requesting the stockists not to provide medicines and sales statement to Merck and also not to accept any new product. Further, vide the said email, Mr. A.N. Mohana Kurup communicated to Mr. J.S. Shinde that 95% of the stockists members complied with its request.

7.5 This undoubtedly shows that OP 3 has been exercising influence and controlling the supply of medicines by way of allocations the geographic market, or number of stockists in the market and enforcing such intervention by way of boycotts *etc.* This conduct of OP 3 results in restricting the provisioning of goods in the market, is in contravention of section 3(3)(b) read with section 3(1) of the Act.



7.6 Further, the e-mails exchanged between pharmaceutical companies and OP 3 clearly illustrate the prevalence of anti-competitive practice of requiring NOC. *Vide* e-mail dated 09.12.2014, M/s Getwell Enterprises, a pharmaceutical company, sent the NOC received from one of its stockist to OP 3. Another email dated 10.12.2014 sent by Mr. A.N. Mohana President of OP 3 to M/s Getwell Enterprises *vide* which OP 3 had requested M/s Getwell Enterprises to send the names of the existing parties at Trivandrum to enable Mr. A. N. Mohana Kurup to send M/s Getwell Enterprises the ‘Bona-fide Member Certificate’. When enquired, Mr. A.N. Mohana Kurup could not give much justification for these emails. There are several other emails which were sent by pharmaceutical companies wherein the said companies had sent the names of their newly appointed stockists and requested the OP 3 ‘to do the needful’. All such emails are not reproduced herein for the sake of brevity.

7.7 It is relevant to reproduce another evidence relied upon by the DG which clearly shows the involvement of OP 3 and its district units in perpetuating their anti-competitive practices in the State of Kerala. M/s Sunanda Associates, one of the stockist, *vide* communication dated 20.08.2014 had sent to Mr. A.N. Mohan, President OP-3 and Mr. Thomas Raju, General Secretary of OP 3, complaining about the anti-competitive activities of OP 3 and its office bearers in Kozhikode district unit of OP 3. The relevant excerpts of the same are reproduced below:

‘This is to inform you regarding a hearing that I was allowed by Mr. K.P. Surendranath, Vice President, AKCDA (North Zone) and Mr. Asif, Secretary, AKCDA (North Zone) on 14.08.2014 at AKCDA office, Kozhikode in front of president and secretaries of north zone district. The district president and secretary of Kozhikode district AKCDA, Mr. K. T. Ranjit Damodaran had asked for action against my firm, Sunanda Associates and my wife’s firm, Sunanda Enterprises on charges that the two firms took the stockistship of M/s Glenmark Labs, Wallace



Pharmaceuticals, Alkem Labs and Lividus Pharma without obtaining permission (NOC) of all Kerala Chemists and Druggists Association. These two persons persuaded the office bearers of the other four districts of the north zone to launch boycott against Sunanda Associates and Sunanda Enterprises and meeting of the north zone committee held last month took a decision to inform our customers (retail chemists and hospital members and others alike) to stop buying medicines from these firms. The committee also took a decision to start non-cooperation against the above companies and the stockists of these companies were asked to restrict purchase in retaliation to the companies supplying medicines to the two firms without the permission of AKCDA. Consequent to this the field staff of these companies started putting pressure on the firms to drop stockistship so that the other stockists would resume purchase normally and would not cause shortage of life saving medicines in the market. Our customers in certain markets who were threatened by AKCDA started refusing to buy from the two firms. I explained about these difficulties to the office bearers of districts present in the meeting on the above date and requested them to desist from harming the two firms.....

.....

.....

.....'

7.8 Further, the Commission has also perused the copies of the complaints dated 11.09.2014 and 08.11.2014 submitted by M/s Sunanda Associates to Drug Controller of Kerala regarding the holding of stocks partly/ non-supply of medicines by OP 2 even after they had received payment. Purportedly, the authorised representative of OP 2 i.e., Mr. T.K. Haridas has expressed that OP 3 had threatened him that OP 2 will be boycotted if supplies were made by it to M/s Sunanda Associates.



7.9 These lead to inescapable conclusion that OP 3 has been indulging in the practice of mandatory NOC/ clearance certificate from it before appointment of any new stockist. It has also been revealed that OP 3 has been threatening the pharmaceutical companies to follow its diktats by threatening them that it would boycott the products of non-complying pharmaceutical companies.

7.10 In many previous cases namely, Case No.C-127/2009/MRTPC (*Varca Drugs & Chemists & Ors. v. Chemists & Druggists Association Goa*); Case No. 20/2011 (*M/s Santuka Associates Pvt. Ltd. v. All India Organization of Chemists and Druggists and Ors.*); Suo moto Case No. 05 of 2013 (*In re: Collective boycott/refusal to deal by the Chemists & Druggists Association, Goa, M/s Glenmark Company and M/s Wockhardt Ltd. etc.*), the Commission has unequivocally held that imposing the requirement of NOC for the appointment of chemists/ druggists/ stockists/ super stockists and/ or imposition of PIS charges is anti-competitive in terms of the Act. It directed these chemists and druggists associations and their members to cease and desist from indulging in such anti-competitive trade practices.

7.11 More particularly, in Case No. 30 of 2011 (*M/s Peeveear Medical Agencies, Kerala and AIOCD and others*), the Commission *vide* its order dated 09.12.2013 found that the practice of NOC was prevalent in the State of Kerala and the same was leading to problems for the consumers by limiting or controlling the supply of drugs in the market. The Commission held the conduct of AIOCD and its State affiliate AKCDA (OP 3) to be in contravention of the provisions of section 3(3)(a) and 3(3)(b) read with section 3(1) of the Act. Apart from imposing monetary penalty on AKCDA, the Commission further had directed AKCDA *i.e.*, OP 3 (and AIOCD) to file an undertaking that the practices carried on by their members such as the issue of grant of NOC for appointment of stockists, fixation of trade margins, collection of PIS charges and boycott of products of pharmaceutical companies have been discontinued. Accordingly, OP 3 filed an undertaking



dated 21.02.2014 declaring that it had not conducted its activities nor would it indulge in future in any kind of anti-competitive conduct in contravention of the Commission's order dated 09.12.2013.

7.12 The Commission, however, notes that in spite of the said undertaking, OP 3 and its office bearers who have signed the undertaking *i.e.*, Mr. A. N. Mohana Kurup and Mr. Thomas Raju have indulged in the anti-competitive conduct after they were directed to cease and desist. Their conduct is in the nature of continued contravention with complete disregard to the mandate of the Commission and the Act. It is apparent from the evidence on record that OP 3 has no intention of complying with the law and has wilfully ignored the undertaking submitted by it on 21.02.2014 and its office bearers are actively involved in anti-competitive conduct even after filing the undertaking.

7.13 The Commission, under section 48 of the Act, holds the individual officer/ office bearer responsible for the conduct of the company/ association found to be in contravention of the provisions of the Act. In this regard, the DG has found Mr. A. N. Mohana Kurup (President), Mr. Thomas Raju (General Secretary) and Mr. O. M. Abdul Jaleel (Treasurer) are equally complicit with the practices carried on and decisions being taken by OP 3 which have been found to be anti-competitive.

7.14 Section 48(1) of the Act provides that where a person committing contravention of any of the provisions of this Act is a company (including a firm or an association), every person who, at the time the contravention was committed, was in charge of, and was responsible for the conduct of the business of the company/ association, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. Further the proviso to that sub-section entails that such person shall not be liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence



to prevent the occurrence of such contravention. The Commission has taken note of the evidence on record which clearly shows the involvement of Mr. A. N. Mohana Kurup (President) and Mr. Thomas Raju (General Secretary) of OP 3 in the anti-competitive practices committed by OP 3. Further, the undertaking dated 21.02.2014 was also signed by these two office bearers. Moreover, in spite of ample opportunity given to them, they failed to adduce any evidence to establish that the anti-competitive decisions were made without their knowledge or that they had exercised all due diligence to prevent its occurrence. In view of the foregoing, the Commission holds Mr. A. N. Mohana Kurup (President) and Mr. Thomas Raju (General Secretary) liable under section 48 of the Act for the contravention of the provisions of the Act by OP 3.

7.15 With regard to Mr. O. M. Abdul Jaleel (Treasurer), the Commission notes that the DG primarily found him responsible under section 48 of the Act in view of the statement furnished by OP 3 on 21.03.2015 enlisting its key personnel. The said statement mentioned the names of three office bearers A. N. Mohana Kurup (President), Mr. Thomas Raju (General Secretary) and Mr. O. M. Abdul Jaleel (Treasurer). The description of duties, however, suggests that Mr. O. M. Abdul Jaleel was only the custodian of funds and responsible for keeping financial statements on behalf of OP 3 as the treasurer of OP 3. As such, the Commission does not deem it appropriate in the present case to penalise Mr. O. M. Abdul Jaleel considering the nature of duties he was discharging.

7.16 Based on the foregoing, the Commission holds the conduct of OP 3 to have contravened the provisions of section 3(3)(b) read with section 3(1) of the Act. Further, the Commission also holds Mr. A.N. Mohana, President of OP 3, Thomas Raju, General Secretary of OP 3 to have contravened the provisions of section 48(1) of the Act.



7.17 With regard to OP 2, it may be noted that as per the accepted position, the Informant was offered to become a stockist of OP 2 *vide* letter dated 14.11.2013. However, no supplies were made to the Informant in spite of repeated request. Thereafter, the Informant claims that he was informed by the Branch/ Depot Manager of OP 2, Mr. T.K. Haridas that supplies were denied because of the pressure from OP 3 as the Informant did not obtain NOC before being appointed as a stockist. OP 2, on the other hand, claims that supplies were denied because the letter dated 14.11.2013 was issued by OP 1 without authority. Thereafter, the Informant was finally appointed as stockist of OP 2 on 19.03.2014 and the supplies were made from 20.03.2014 onwards.

7.18 The Commission is not convinced with the justification offered by OP 2. OP 2 failed to explain why OP 1 issued a letter without authority. It is observed that letter was also sent to Mr. T.K. Haridas who was the authorised signatory to issue such appointment/ offer letters. Further, the demand draft of the Informant dated 28.11.2013 was returned without assigning this reason which also shows that the same was an after-thought to cover up the refusal to supply for want of NOC.

7.19 The Commission further notes that the evidence collected by the DG in this case shows that OP 2 was holding up the supply of stocks to other stockists also because of the pressure of OP 3. The complaint dated 11.09.2014 and 08.11.2014 submitted by M/s Sunanda Associates to Drug Controller of Kerala regarding holding up of the stocks partly/ non-supply of medicines by OP 2 shows that OP 2 was indulging in such anti-competitive conduct. Purportedly, the authorised representative of OP 2 *i.e.*, Mr. T.K. Haridas has expressed that OP 3 had threatened him that OP 2 will be boycotted if supplies were made by it to M/s Sunanda Associates.



7.20 Based on the aforesaid, the Commission is of the opinion that denial of supply by OP 2 is established by the evidence placed on record. Such refusal was because of the instructions given by OPs and as such amounts to understanding between OP 2 and OP 3.

7.21 Since OP 3, an association of enterprises, was not itself engaged in the supply and distribution of drugs and medicines in the market and, OP 2 is the manufacturer of drugs and medicines, as such, any agreement between OP 2 and OP 3 being not between entities engaged in identical or similar trade of goods or provision of services, as envisaged under section 3(3) of the Act, does not fall within the ambit of the said sub-section. Also, such an agreement between OP 2 and OP 3 cannot also be considered to be an agreement between entities at different stages or levels of the production chain in different markets in terms of the provisions of section 3(4) of the Act.

7.22 However, pursuant to Commission's decision in Dr. L. H. Hiranandani Case (Case No. 39 of 2012) the position is quite clear that an agreement, even if it is not falling under section 3(3) or 3(4) of the Act, is amenable to the jurisdiction of the Commission under section 3(1) if the same has an appreciable adverse effect on competition (AAEC). With that background in mind, the Commission considered the arrangement/ understanding between them.

7.23 Therefore, OP 3's instructions to OP 2 and OP 2's agreement to such instructions can be construed as an agreement amenable under section 3(1) of the Act subject to establishment of AAEC.

7.24 With regard to the AAEC, the Commission has looked into the effect of OP 2's conduct in executing the anti-competitive instructions of OP 3. During



oral arguments, OP 2 submitted that there is no AAEC of OP 2's conduct as its market share is miniscule in market for supply of drugs and medicines.

7.25 Under the preamble and section 18 of the Act, the Commission is under a duty to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India. Therefore, one of the functions of the Commission is to eliminate practices having adverse effect on competition. The facts revealed in the information and established during the investigation clearly bring out the potential consumer harm due to the impugned conduct of the Opposite Parties in healthcare sector besides lessening of competition.

7.26 The Commission has seen in number of previous cases involving chemists and druggists associations where the diktats of the Association are followed by the members without any hesitation. Even though OP 2 acted on the directions and threats of OP 3, the same cannot absolve it from any liability under the Act. OP 2 could have approached the Commission instead of complying with the directions of OP 3 which were against the order of the Commission for refusing to deal with unauthorized stockists. Such denial of supply to unauthorized stockists by various pharmaceutical companies like OP 2 undoubtedly affects the competition in the market adversely and appreciably. The Commission thinks it appropriate to issue orders against such pharmaceutical companies as well to deter their actions of facilitating the associations in indulging in anti-competitive practices in the market. In view of the foregoing, the Commission deems it appropriate to hold OP 2 responsible for its anti-competitive conduct under section 3(1) of the Act as they were facilitating the acts of OP 3. With regard to the liability under section 48, the DG found Mr. Johnson Mathew, DGM-ACE Sales (South & West Bangalore) and Mr. T.K. Haridas, Branch Manager & Authorised



Signatory of OP 2 to be responsible for the conduct of OP 2 which has been found to be in contravention of the provisions of the Act.

7.27 The Commission notes that these officials are responsible by virtue of their key positions in OP 2 in terms of the provisions of section 48(1) of the Act. Further, despite ample opportunity given to them, they failed to adduce any evidence to establish that the anti-competitive decisions were made without their knowledge or that they had exercised all due diligence to prevent their implementation. Therefore, proviso to section 48(1) would not be applicable to them.

7.28 Accordingly, the Commission holds OP 2 responsible for contravention of section 3(1) of the Act for facilitating the acts of OP 3 and its officials Mr. Johnson Mathew and Mr. T.K. Haridas of OP 2 individually responsible under section 48(1) for the anti-competitive conduct perpetrated by OP 2.

ORDER

8. Considering the findings elucidated in the earlier part of this order, the Commission directs OP 2, OP 3 and their officials/ office bearers to cease and desist from indulging in any of the practices which are found to be anti-competitive in terms of the provisions of section 3 of the Act.
9. Section 27 of the Act empowers the Commission to issue such other order or direction as it may deem fit in case of contravention of the provisions of section 3 or 4 of the Act. Further, in case of an anti-competitive conduct committed by a company, including a firm or other association of individuals, the Commission may proceed under section 48 of the Act to penalise the individuals responsible for the anti-competitive conduct. The Commission observes that OP 3 *vide* the Commission's order in *Peeveear* Case had been directed to cease and desist from indulging in and following the practices which had been found to be anti-competitive in violation of section 3 of the



Act in the said case. It was further directed to file an undertaking that it and its members would refrain from undertaking such practices with respect to the issue of grant of NOC for appointment of stockists, fixation of trade margins, collection of PIS charges and boycott of products of pharmaceutical companies *etc.* OP 3 had filed an undertaking in the said case on 21.02.2014 which was signed by its President and General Secretary named above. Despite the said order and undertaking filed by it, OP 3 has not hesitated to indulge in anti-competitive practices. The Commission is of the view that to discipline such erring party for its anti-competitive conduct in the present case and, also to deter future contravention by other entities which are operating under similar circumstances and are indulging in similar anti-competitive conducts, it is extremely imperative to levy financial penalty that is proportionate to meet the said end.

10. In view of the foregoing, the Commission deems it appropriate to impose a penalty on OP 3 at the rate of 10 % of its income based on the financial statements filed by it as follows:

Year	Turnover /Income during the Year (in Rupees)
2011-2012	Not Submitted
2012-2013	Not Submitted
2013-2014	4357782.60
Total	4357782.60
Average	4357782.60
10 % of Average Turnover (Penalty Amount)	435778.26

11. Resultantly, a penalty of Rs. 435778/- calculated at the rate of 10 % of the average income of OP 3 is hereby imposed on OP 3.



12. With regard to the individual liability of the office bearers of OP 3 in terms of the provisions of section 48 of the Act is concerned, for the reasons stated above, the Commission deems it appropriate to impose a penalty at the rate of 10 % of their income based on the income statements filed by them as follows:

Office Bearers of OP 3 (Income in Rupees)

Year	A. N. Mohana Kurup Income during the Year (in Rupees)
2012-2013	519182
2013-2014	496962
2014-2015	489975
Total	1506119
Average	502039.67
10 % of Average Income (Penalty Amount)	50203.967

13. Resultantly, a penalty of Rs. 50203/- calculated at the rate of 10% of the average income is hereby imposed on Mr. A.N. Mohana Kurup.
14. Additionally, the Commission directs OP 3 association to organize, in letter and in spirit, at least five competition awareness and compliance programmes over the next six months in State of Kerala for its members. OP 3 is further directed not to associate Mr. A.N. Mohana Kurup and Mr. Thomas Raju with its affairs including administration, management and governance in any manner for a period of two years.
15. With regard to OP 2, the Commission observes that OP 2 had appointed the Informant as its stockist subsequently. Though this does not absolve OP 2 of its liability, it nevertheless works as a mitigating factor in favor of OP 2.



Considering the same, the Commission is of the opinion that a penalty at the rate of 3 % of its income based on the income statements filed by it as follows would meet the ends of justice:

Year	Turnover /Income during the Year (Rs. in Lakh)
2011-2012	208823.44
2012-2013	249713.08
2013-2014	287774.15
Total	746310.67
Average	248770.22
3 % of Average Turnover (Penalty Amount)	7463.1066

16. Accordingly, a penalty of Rs. 7463.10/- Lakh calculated at the rate of 3 % of the average turnover of OP 2 is hereby imposed on OP 2. For the reasons cited in context of OP 2, the Commission is of the considered view that a penalty under section 48(1) at the rate of 3 % of their respective income based on the income statements filed by them would serve the purpose:

Officials of OP 2 (Income in Rupees)

Year	Johnson Mathew	T.K. Haridas
2012-2013	1676311	722451
2013-2014	2416509	920600
2014-2015	3044287	1781785
Total	7137107	3424836
Average	2379035.67	1141612
3 % of Average Income(Penalty Amount)	71371.0701	34248.36

17. Accordingly, penalties of Rs. 71371/- and Rs. 34248/- calculated at the rate of 3% of the average income are hereby imposed upon Mr. Johnson Mathew and Mr. T.K. Haridas, respectively.



सत्यमेव जयते



18. The aforesaid parties are further directed to deposit the amount of penalty within 60 days of the receipt of this order.

19. Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

Sd/-
(M. S. Sahoo)
Member

New Delhi
Dated: 01/12/2015