



**COMPETITION COMMISSION OF INDIA**

**Case No. 61 of 2015**

**Mr. Nadie Jauhri**

Medhraj Amber, D. K. Nagar,  
Gangapur Road,  
Nashik-422013,  
Maharashtra.

**Informant**

**AND**

**Jalgaon District Medicine Dealers Association  
(JMDMA)**

Jalgaon, Chemist Bhavan,  
Behind Central Jail Jila Petha,  
Jalgaon-425001,  
Maharashtra.

**Opposite Party**

**CORAM**

**Mr. Ashok Kumar Gupta  
Chairperson**

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

**Ms. Sangeeta Verma  
Member**

**Present:**

For the Informant:

In person

For the Opposite Party and its  
Office Bearers :

Mr. Nakul Mohta, Advocate  
Ms. Misha Rohatgi Mohta, Advocate  
Mr. Lalit Mohan, Advocate  
Mr. Johnson Subba, Advocate  
Mr. Sunil Ramdas Bhangale, President, JMDMA



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Mr. Shrikant Vasant Patil, Joint Secretary, JDMDA

### **Order under Section 27 of the Competition Act, 2002**

#### **A. Background:**

1. The present information was filed by Mr. Nadie Jauhri (**the Informant**) under Section 19(1)(a) of the Competition Act, 2002 (**the Act**) against Jalgaon District Medicine Dealers Association (**OP/JDMDA**) alleging, *inter-alia*, that the OP was collecting Product Information Service (**PIS**) charges from the manufacturers of pharmaceutical products, in violation of the provisions of the Act.
2. The OP, is an association of medicine dealers, located at Jalgaon District, and is affiliated to Maharashtra State Chemists and Druggists Association (**MSCDA**) which in turn is affiliated to All India Organisation of Chemists and Druggists (**AIOCD**).
3. In the Information, a reference was made to the public notice dated 31.01.2014 issued by the Commission in the Hindustan Times, wherein attention was drawn to certain anti-competitive practices prevailing in the pharmaceutical sector such as procurement of a No Objection Certificate (**NOC**) or Letter of Consent (**LOC**) from the associations, compulsory payment of PIS charges by pharmaceutical entities to the associations, fixation of trade margins, *etc.* These practices were dictated and followed by the all India level, State level and District level associations of chemists, druggists, stockists, wholesalers and manufacturers. The Commission, *vide* aforementioned public notice, exhorted that such practices be stopped forthwith, failing which action shall be initiated by the Commission against the violators.
4. In the Information, it has, *inter-alia*, been alleged that despite the aforesaid notice, the OP was charging and collecting PIS charges from various manufacturers of pharmaceutical products. In support of the allegations, copies of the relevant pages of the balance sheets of the OP in respect of financial years 2012-2013, 2013-2014 and 2014-2015 have been enclosed to show that the OP was charging PIS charges under the



head of pharma service income. Based on the aforesaid allegation, the Informant sought investigation against the OP.

**B. *Prima facie* consideration by the Commission:**

5. Upon considering the information and allegations therein, the Commission was convinced that there existed a *prima facie* case of contravention of the provisions of Section 3(3)(b) read with Section 3(1) of the Act. Accordingly, the Commission passed an order dated 25.08.2015, under Section 26 (1) of the Act, directing the Director General (**DG**) to cause an investigation into the matter. The DG was also directed to investigate the role of the office bearers/ persons who, at the time of contravention, if any, by the OP, were in-charge of and responsible for the conduct of its activities.

**C. Proceedings before the Hon'ble High Court of Delhi:**

6. Aggrieved by the order dated 25.08.2015, passed by the Commission under Section 26 (1) of the Act, the OP approached the Hon'ble High Court of Delhi by filing a Writ Petition being W.P. No. 11163/2015. The Hon'ble High Court of Delhi *vide* order dated 02.12.2015, directed the Commission and the DG to restrain from taking any coercive steps till the next date of hearing. The Commission and the DG, however, were given liberty to continue with the investigation. However, *vide* order dated 19.03.2018, the Hon'ble High Court of Delhi directed that while interim order dated 02.12.2015, would continue to operate till further orders of the Court, if the Commission passes any final order, it would be subject to its orders.

**D. Findings of Investigation:**

7. The DG submitted the Investigation Report on 05.01.2017, after conducting detailed investigation in respect of the allegations made by the Informant. During the investigation, the DG considered submissions of the Informant, replies of the OP, third parties and certain pharmaceutical companies which were examined by the DG.



8. From the material and evidence collected during investigation, the DG found that the OP was levying and collecting PIS charges in Jalgaon District. The investigation revealed that pharmaceutical companies were paying PIS charges to MSCDA for getting the details of their products published in the bulletin/magazine published by their respective district association. The DG noted that pharmaceutical companies informed that they usually paid PIS charges for all new products except for a few products for which no charges were paid. Though the pharmaceutical companies stated that such charges were paid voluntarily, the DG found those charges to be in the nature of approval by the OP to pharmaceutical companies to launch their products in Jalgaon District. The DG further found no substance in the claim made by the OP and the pharmaceutical companies that the PIS charges were furthering the cause of advertising or were in compliance with Drug Price Control Order (**DPCO**). For the sake of brevity, the evidence relied upon by the DG would be referred to and dealt with appropriately while analyzing the case on merits.

9. A brief of the findings of investigation is as under:

- a. A sum of Rupees 500/- per product, per district, was collected from the pharmaceutical companies, who approached MSCDA seeking advertisement of their new products, through publication in the bulletin of the OP. After deducting service tax and 20 percent as operational cost on the aforesaid amount of Rs. 500, MSCDA transmits the remaining amount to the district associations, affiliated to it including the OP. The aforementioned 20 percent of the amount (*i.e.* Rupees 100/-) was kept by MSCDA for meeting its operational cost of manpower, stationery, clerkage, bank charges, *etc*;
- b. The OP submitted that during the financial years, 2012-2013, 2013-2014 and 2014-2015, it collected PIS charges amounting to Rupees 17,47,203/-, Rupees 9,08,440/- and Rupees 7,47,206/-, respectively;
- c. Ten pharmaceutical companies were examined by the DG in relation to payment of PIS charges by them to the OP, out of which nine informed that



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the purpose of payment of PIS charges was to seek advertisement of their products in the bulletin published by the District Associations including that of the OP. Representatives of two companies, on being questioned in relation to mandatory nature of PIS charges, deposed that PIS charges are paid for taking permission of the OP for launch of products and to avoid risk of boycott of products. On the other hand, representatives of three companies, on being questioned in this regard, deposed that it was not mandatory to get product information published through MSCDA before selling the products in the state of Maharashtra;

- d. The investigation relied upon a letter dated 20.01.2014, sent by M/s Unifab Pharmaceuticals to the OP, seeking permission of the OP for launch of its drugs in Jalgaon District;
- e. The DG also relied upon another email dated 05.02.2013, sent by Cerovene Healthcare Private Limited to the OP wherein it gave an undertaking on 11 points including on payment of PIS charges viz *“neither take any other products without PIS”*.
- f. The DG also found that despite payment of PIS charges by the pharmaceutical companies to the OP, information about the newly launched drugs was not published in its bulletin even after considerable lapse of time;
- g. Thus, information was being published by the OP in its bulletin about new drugs, for which PIS charges had been received, with no adherence to any time frame and there being no uniform frequency of release of such bulletin;
- h. Pharmaceutical companies were not getting copies of the bulletins, in which their advertisements were published by the OP, despite payment of such PIS charges;
- i. Information being published was not as per format prescribed by DPCO as it did not contain the formulation of the drug; and



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- j. Letters forwarded by Pharmaceutical companies to MSCDA for publication in the district bulletin mentioned “*Contribution*” and MSCDA put the rubber stamp on Form V filed by such companies, wherein it was mentioned “*product approved for advertisement*”. The DG also found that two pharmaceutical companies wrote letters to MSCDA seeking NOC for launch of their products, which brought out the purpose of PIS.
10. Based on the above evidence, the DG found that the practice of the OP of demanding PIS charges from pharmaceutical companies was not for the purpose of any advertisement. Rather, the DG opined that the pharmaceutical companies did not mind paying Rupees 500/- per drug of dose/form for securing the goodwill of the association (*i.e.* the OP) and it was meant only for the purpose of getting prior permission of the OP to launch new drug in the market. The DG, thus, concluded that payment of PIS charges was in contravention of the provisions of Section 3(3)(b) read with Section 3(1) of the Act, as the levy of such charges limited and controlled free supply of products by pharmaceutical companies in the market.
11. The DG also opined that the practice of levying PIS charges by the OP would result in appreciable adverse effect on competition in the market, based on the factors listed under Section 19(3) of the Act, due to the following reasons. *Firstly*, the said practice would distort supply of medicines in the market and create barriers to entry for pharmaceutical companies planning to enter the market. *Secondly*, the practice would foreclose competition in the market as there are very few products of similar kind available in the market. *Thirdly*, action on part of the OP would be detrimental to the economic development as it would restrict distribution of new drugs or launch by way of any change in product brand, dosage, form, strength, *etc.* *Fourthly*, this practice would put unwarranted restrictions on the freedom of trade by market participants and *finally*, the interest of consumers would be adversely affected by this practice.
12. The investigation also identified certain office bearers of the OP who were in charge of and looking after the day to day activities of the OP during the period from 2012 to 2015 and thus, found to be responsible under Section 48 of the Act.



#### **E. Consideration of Investigation Report by the Commission:**

13. The Commission considered the Investigation Report submitted by the DG, in its ordinary meeting held on 25.04.2017, and decided to forward copies of the same to the parties for seeking their respective objections / suggestions thereto. The OP was also directed to file copy of its audited financial statements including balance sheet and profit and loss account for the financial years 2013-14, 2014-15 and 2015-16. The Commission also directed the Informant and the OP along with its office bearers to appear before the Commission for final hearing on 10.08.2017.
14. On 03.07.2017, the Informant filed its written submissions. However, the OP, *vide* letter dated 09.08.2017, filed an application seeking adjournment of hearing by four weeks. On 10.08.2017, the Commission considered the request of the OP and adjourned the matter to 16.08.2017. In the hearing held on 16.08.2017, a request was made by the OP, seeking adjournment of the proceedings till disposal of Writ Petition No. 11163/2015, pending before the Hon'ble High Court of Delhi relating to the present matter. In this regard, the Commission directed the OP to file an affidavit in support of its contention and to appear on 14.09.2017, for hearing on the application of the OP.
15. Subsequently, the OP, *vide its* application dated 17.08.2017, as also its submissions dated 13.09.2017, requested the Commission to adjourn the proceedings *sine-die* pending decision of Hon'ble High Court of Delhi in the aforementioned writ petition. On 14.09.2017, the authorised representative of the OP appeared before the Commission and contended that the Hon'ble High Court of Delhi, *vide* order dated 02.12.2015, in Writ Petition No. 11163 of 2015 had directed the Commission not to take coercive steps against the OP. In this connection, the Commission observed that seeking objections/suggestions from the OP and conducting final hearing on the Investigation Report could not be termed as coercive action against the OP. Accordingly, the Commission directed the OP and its office bearers to file their submissions to the Investigation Report along with a copy of their financial statements latest by 16.10.2017. The Informant was granted time to file its reply to the aforesaid submissions of the OP by 23.10.2017. The Parties were directed to appear before the Commission for final



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- hearing on 07.11.2017. The Informant filed his submissions on the Investigation Report on 10.10.2017 and the OP filed its objections to the Investigation Report on 06.11.2017.
16. Meanwhile, the OP filed an application dated 03.11.2017, seeking cross-examination of three witnesses, namely, (i) Mr. Dilip Sawant (Head Distribution, Wanbury Limited) (**Witness 1**); (ii) Mr. Sushant Nandkumar Chachad (Executive, Sales and Administration, Cerovene Healthcare Private Limited) (**Witness 2**) ; and (iii) Mr. Mohammed Salem (Proprietor, M/s Unifab Pharmaceuticals) (**Witness 3**), whose statements were recorded by the DG and were relied upon in the Investigation Report. On 07.11.2017, the Commission allowed the cross-examination request of the OP. Witness 1 and Witness 3 were cross-examined by the OP on 15.12.2017 and 02.02.2018, respectively. Witness 2, however, could not be cross-examined as he failed to appear on various dates fixed by the Commission for his cross-examination by the OP. As cross-examination of Witness 2 was pending, hearing of the parties on the Investigation Report scheduled on 12.06.2018, 19.07.2018, 09.08.2018, 19.09.2018, 13.11.2018 and 19.12.2018 could not be conducted. Witness 2 was finally cross-examined by the OP on 21.12.2018.
  17. On 22.01.2019, the present case was listed for hearing of the parties on the Investigation Report. Neither the Informant nor the OP appeared. Further, no request for adjournment of hearing was made either by the Informant or OP or their authorised representative prior to the said date. Accordingly, the Commission decided to proceed with the matter based on the material available on record and pass appropriate orders.
  18. Subsequently, the authorised representative of the OP filed an application dated 23.01.2019, before the Commission requesting for grant of an opportunity to make oral submissions on 27.01.2019, or any other date thereafter. The Commission did not accede to the request of the counsel for the OP as the reasons stated in such application were not found to be plausible.
  19. Thereafter, the OP moved an application dated 08.03.2019, seeking permission of the Commission to place on record certain documents, which according to the OP were necessary for proper adjudication of the present case. In the application, it was stated that on 21.12.2018, Mr. Chachad was cross-examined and during the cross-examination, he



was questioned whether Cerovene Healthcare Private Limited had stockists/wholesalers in Jalgaon District. In response thereto, Mr. Chachad testified and answered the question put forth to him in the negative. As per the OP, the documents sought to be placed on record by way of the application would indicate that Cerovene Healthcare Private Limited had appointed stockists in Jalgaon District, *i.e.* M/s Shiva Medicals, M/s Mandar Distributors and M/s Ganesh Medicals. Based on such documents, the OP contended that the testimony of Mr. Chachad was evidently false.

20. On 20.03.2019, the Commission considered the aforesaid application, dated 08.03.2019, filed by the OP and observed that the documents annexed along with the application were not submitted by the OP during investigation, to the DG. Further, they were not submitted by the OP along with its objections/comments dated 06.11.2017, to the Investigation Report dated 05.01.2017. The Commission further observed that the OP duly cross-examined Mr. Chachad on 21.12.2018. A copy of the record of cross-examination proceedings was forwarded to the OP *vide* letter dated 10.01.2019, seeking its comments, if any. However, no comments, were received from the OP. The Commission, therefore, noted that ample opportunity was available at each stage of the proceedings to the OP to put forth its documents and contentions, if any. The Commission further observed that matter was reserved for passing of final order and the OP chose to file certain documents at a belated stage. Further, the documents being purportedly sought to be relied upon by the OP, were neither examined by the DG nor were shared either with the Informant or Mr. Chachad or with Cerovene Healthcare Private Limited (former employer of Mr. Chachad), to elicit their respective views and also to test the veracity of such documents. The Commission further observed that it was unfair on the part of the OP to introduce certain pleas, based on such documents, which the OP never chose to file at the appropriate time as aforementioned. Hence, the Commission declined the request of the OP to consider the documents.
21. On 28.03.2019, the authorised representative of the office bearers of the OP, identified by the DG, under Section 48(1) of the Competition Act, 2002 (**Act**), filed an application seeking an opportunity of hearing on merits of the case. It was stated in the application by the office bearers that their right to defend should not be closed merely because of



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- non-appearance of the OP. It was stated that it would be in gross-violation of the principles of natural justice if the Commission proceeded and decided against the office bearers without granting them a hearing. On 02.04.2019, the Commission considered the aforesaid application filed on behalf of the office bearers of the OP, and in the interest of justice, the Commission granted an opportunity of hearing on the Investigation Report to the office bearers of the OP, identified by the DG under Section 48(1) of the Act, on 24.04.2019.
22. On 22.04.2019, authorised representative of the OP also filed an application seeking recall of orders dated 22.01.2019 and 23.01.2019, passed by the Commission, with a liberty to make oral submissions on the Investigation Report of the DG on behalf of the OP. It was stated in the application that the Investigation Report was pending consideration before the Commission *qua* the office bearers of the OP found liable by the DG under Section 48(1) of the Competition Act, 2002. It was also stated that as opportunity was granted by the Commission to office bearers of OP, such opportunity of hearing be also granted to the OP.
  23. On 23.04.2019, the Commission considered the aforesaid application filed on behalf of the OP and decided to grant an opportunity of hearing to the OP on the Investigation Report on 24.04.2019, *i.e.* date already fixed for hearing the office bearers of the OP.
  24. Accordingly, the Commission heard detailed submissions of the parties on the Investigation Report on 24.04.2019, and directed them to file a synopsis of the oral arguments made by them on the said date.
  25. As mentioned earlier, the Hon'ble High Court of Delhi *vide* order dated 19.03.2018, in Writ Petition (C) No. 11163 of 2015, directed that while interim order dated 02.12.2015 would continue to operate till further orders of the Court, any final order passed by the Commission would be subject to the orders in the above writ petition. In view of the said order of the Hon'ble High Court of Delhi, the Commission notes that there is no impediment to pass final order in the matter. However, the implementation of the said final order would be subject to the orders of the Hon'ble High Court of Delhi in the above mentioned Writ Petition.



26. The Commission notes that the issues in the present case are similar to Case No. 60 of 2015 (*Nadie Jauhri And Retail & Dispensing Chemists Association*). Though the said cases were not clubbed, these were linked and taken up together on the same date on various occasions. As cross-examination proceedings of Witness 2 were underway in the present case, the Commission delinked the proceedings of Case No. 60 of 2015 from present case and passed appropriate final order in the said Case No. 60 of 2015 on 08.11.2018. The order passed by the Commission in Case No. 60 of 2015 was also made subject to the orders of the Hon'ble High Court of Delhi in the above mentioned writ petition.

**F. Objections filed by the OP:**

27. The OP had filed its objections to the Investigation Report on 06.11.2017. Synopsis of oral arguments made by the OP in the hearing held on 24.04.2019 was filed by it on 01.05.2019. A summary of the objections and synopsis of arguments of the OP is as under:

- a. The OP had challenged the order dated 25.08.2015, passed by the Commission under Section 26(1) of the Act directing the DG to conduct investigation. It argued that since a superior Court *i.e.* Hon'ble High Court of Delhi *vide* order dated 02.12.2015, directed the Commission as well as the DG not to take any coercive steps, it was expected of the subordinate court (*i.e.* the Commission) to steal its hands away from the proceedings and await further orders in the matter until passed by the superior court;
- b. Pharmaceutical companies entail huge expenditure towards promotion and advertisement of newly launched drug. In addition to the advertisements, DPCO requires the pharmaceutical companies to furnish the price list of products to all the wholesalers/retailers/dealers in Form V. The dissemination of information to various wholesalers/retailers/dealers was not possible for every pharmaceutical company due to lack of manpower. Thus, pharmaceutical companies used to pay nominal charges



on account of PIS to district associations for publishing the price list information in the bulletin for dissemination of information;

- c. During the investigation by the DG, most of the companies had stated that the purpose of payment of PIS charges was to ensure widespread dissemination of information and to create awareness about the new drugs launched by these companies. Such payment in respect of PIS charges ensured deemed compliance of law and enabled advertisement and circulation of product information to all the retailers at a very nominal cost. The same was stressed upon by Mankind Pharma Limited, Koye Pharmaceutical Private Limited, Unichem Laboratories Limited, Macleods Pharmaceuticals Limited, Intas Pharmaceuticals Limited and Alkem Laboratories Limited;
- d. Payment of PIS charges was not mandatory. Many pharmaceutical companies had sold medicines in Jalgaon District without payment of PIS charges which showed that PIS charges were voluntary. In support of its submissions, the OP has relied upon the statements of representatives of pharmaceutical companies including Mankind Pharma Limited, Koye Pharmaceutical Private Limited, Unichem Laboratories Limited, *etc.* to prove that payment of PIS charges was not mandatory. Replies of Organisation of Pharmaceutical Producers of India (**OPPI**) and Indian Drug Manufacturers Association (**IDMA**) were also referred to, to submit that there had been no instance when pharmaceutical companies, being members of the association faced difficulty while launching new drugs. Further, there was no instance of refusal of publishing of product details after collecting PIS charges, which was evident from the statements of pharmaceutical companies recorded during the course of investigation;
- e. In *Varca Druggist & Chemist and others Vs. Chemists & Druggists Association*, MRTP Case No. C-127/2009/DGIR (4/28) and *Santuka Associates Pvt. Limited Vs. AIOCD and Others*, Case No. 20 of 2011 (**Santuka Case**), decided by the Commission, it was held that the voluntary payment of PIS charges by the pharmaceutical companies was not an anti-competitive practice under the Act;



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- f. Further, contents of the public notice dated 31.01.2014, published by the Commission in Hindustan Times newspaper were also referred to, wherein it was stated that compulsory payment of PIS charges by pharmaceutical firms to associations for release of new drugs is anti-competitive, which implied that the voluntary payment of PIS charges by pharmaceutical companies was permitted;
- g. From January, 2013 to April, 2015, several drugs had been introduced in the market without paying PIS charges, which proved that PIS was not mandatory for launching or selling medicines. In support of the said submission, a list of new drugs, which were introduced in the market in the above mentioned period and sold without any PIS approval was placed on record. Further, in the aforementioned period, the OP had published 12 bulletins containing price list of medicines which contained information in respect of several drugs of many pharmaceutical companies;
- h. Details of a few medicines were not published in PIS journal even though the charges were paid due to oversight. The omission in publication of information about new drugs was a mistake by the printer appointed by the OP. The OP used to hand over information of new drugs to the dealers/ wholesalers/ stockists of the pharmaceutical companies for onward circulation to the retailers. Further, the retailers used to visit office of the OP to avail copy of price list, through which the OP ensured dissemination of information about new drugs even though the information was not published in the bulletin;
- i. Even if there was default in publication in bulletin, such an omission to publish or default in publication was not a competition law issue and was purely a contractual issue between pharmaceutical companies and the chemist and druggist association. The delay did not limit the supply and distribution of medicines, as many medicines were sold without paying any PIS charges. Thus, delay in PIS publication did not raise any competition concern. Further, there was no written stipulation of the time within which the price list had to be published in the bulletin or otherwise. At times, the OP was unable to publish the price list in its next edition because of lack of availability of sufficient pages in the bulletin. On some occasions, even though the



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intimation was received from MSCDA, the OP awaited for funds before publishing the price list as the OP did not have any independent source of income and it was entirely dependent upon MSCDA financing its operations. Therefore, delay in publication of price list was on account of *bonafide* reasons;

- j. In respect of letter dated 20.01.2014, sent by M/s Unifab Pharmaceuticals, it was stated that the OP does not give permission for launch/ sale of drugs in its district and it is unaware of the reason why M/s Unifab Pharmaceuticals had written the said letter to it seeking such permission. M/s Unifab Pharmaceuticals has in its own interest informed the OP about the launch of its new product. The contents of the aforesaid letter, in absence of corroborative evidence, cannot be construed to imply that NOC was required from the OP for sale of medicines in Jalgaon District by M/s Unifab Pharmaceuticals;
- k. As regards email dated 05.02.2013 and the statement of representative of Cerovene Healthcare Private Limited, the OP denied that a new drug could not be launched without payment of the LOC/PIS charges. The aforesaid email was sent by the said company voluntarily and not under any compulsion/insistence from the OP. The contents of the email by itself did not disclose any anti-competitive practices being carried out by the OP. There were thousands of pharmaceutical companies which operated in Jalgaon District and had appointed stockists without any requirement of LOC/ NOC or PIS. Further, aforesaid facts related to a period prior to the decision of Commission in *Santuka case* (Supra). AIOCD, the apex body of chemists and druggists association had submitted an undertaking with the Commission pursuant to the decision in the *Santuka case* that no NOC/LOC was required for appointment of stockist and PIS service was to be availed only on voluntary basis without any compulsion from the association;
- l. No complaint was filed by any pharmaceutical company against the OP in respect of the alleged default in publication of price list;
- m. The bulletin was meant for distribution amongst the members of the OP. The pharmaceutical companies had never requested the OP for copies of the bulletins



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- published by it. Moreover, the charges paid by the pharmaceutical companies for publication in the bulletin were nominal in comparison to the funds spent by it in research of medicines or advertisement and promotion of medicines by way of medical representatives or in print media or digital media;
- n. Since the year 1999, price list was being published in the bulletin in the format used earlier by the OP. Even though the bulletins were not directly sent to the pharmaceutical companies, it was sent to the stockists appointed by the pharmaceutical companies;
- o. Regarding the publication not in Form V as per DPCO format, it was stated by the OP that the said format was for compliance by pharmaceutical companies and did not apply to a chemist and druggist association. Moreover, the primary objective of PIS was not compliance with DPCO, but to create publicity of the pharmaceutical products;
- p. As regards the letters dated 22.12.2012 and 01.09.2013, sent by Bestochem Formulations (I) Limited and Raks Pharma Private Limited to MSCDA seeking NOC, it was clarified by MSCDA that the letters were issued prior to the undertaking given by AIOCD to the Commission. Further, PIS was not mandatory anymore. The two pharmaceutical companies *viz.* Bestochem Formulations (I) Limited and Raks Pharma Private Limited were not examined by the DG and thus the letters of the said companies lacked evidentiary value;
- q. As per the OP, the Mashelkar Committee appointed by Government of India, recommended that pharmaceutical company and trade association must act in tandem to improve distribution system and PIS is a step in that direction. Therefore, by no stretch of imagination PIS is anti-competitive *per-se*;
- r. The provisions of Section 3(1) and Section 3(3)(b) of the Act, could not be invoked in the present case. The practice of PIS was introduced solely for the benefit of pharmaceutical companies pursuant to a mutually agreed Memorandum of Understanding between the pharmaceutical companies and associations;



- s. As regards the liability of office bearers, the DG mechanically observed that because the said office bearers were present in the executive meeting, they were liable for the actions of the OP; and
- t. The OP relied upon the decision of the Commission in Case No. 60 of 2015 (*Nadie Jauhri v. Retail Dispensing Chemists Association*), wherein the Commission had closed the case for want of evidence.

#### **G. Submissions filed by the Informant**

28. The Informant filed his submissions, dated 03.07.2017 and 07.10.2017, to the Investigation Report. Synopsis of the arguments made by Informant during the hearing held on 24.04.2019, was filed on 02.05.2019. A summary of submissions of Informant is, *inter-alia*, stated as follows:

- a. PIS charges were neither furthering the cause of advertising nor compliance of DPCO as claimed by pharmaceutical companies and the OP. The evidence relied upon by the DG suggested that PIS charges were in fact in the nature of securing approval of the OP by the pharmaceutical companies for launch of their products;
- b. Information with regard to many drugs, for which payment was actually received was not published in the bulletin even after considerable lapse of time;
- c. The Informant relied on information available in the audited balance sheet and Income and Expenditure Account of MSCDA for the year ended 31.03.2015, 31.03.2016 and 31.03.2017, under the heading “*significant accounting policies and notes to accounts*”, wherein it was stated that PIS was started by MSCDA for providing information service to their district association members. The contribution received from pharmaceutical companies were paid to the district association, to the extent of 80 percent for utilising the same for dissemination of information to their respective district members for publication of PIS in news bulletin and the balance 20 percent was retained by MSCDA; and



- d. The Informant further contended during the hearing held on 24.04.2019, that though the case filed by him pertained to charging of PIS, requirement of NOC by the OP, which is an anti-competitive practice was also highlighted by him to the DG during investigation. Thus, the issue pertaining to NOC should also be dealt with.

## H. Analysis and observations of the Commission

29. The Commission has perused the information, the Investigation Report, submissions of the parties to the Investigation Report and other material available on record. Upon consideration of the aforesaid, the following issues arise for determination in the present matter:

- i. *Whether the collection of PIS charges by the OP from pharmaceutical companies was made mandatory/compulsory by the OP in contravention of provisions of Section 3 of the Act?*
- ii. *If answer to Issue 1 is in affirmative, whether office bearers of the OP are liable for violation under Section 48 of the Act?*

30. In the last few years, the Commission has dealt with several cases concerning practices carried out by chemists and druggists associations in various parts of India. Thus, before dealing with the merits of the present case, the Commission finds it imperative to provide a brief background about its decisional practice in relation to PIS charges.

31. PIS is in the nature of a fee charged by chemists and druggists associations for introducing a new product/drug launched by the pharmaceutical companies in the bulletins/newsletters published by such associations and in return, the said associations are ideally required to publish the information and circulate it amongst all the dealers, distributors, etc.

32. In *Santuka Associates Pvt. Limited and All India Organization of Chemists & Druggists & Others, (Case No. 20 of 2011)*, the Commission in its order dated 19.02.2013, passed under Section 27 of the Act, observed as follows:



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“28.19. From the examination of the evidence forwarded by the DG, as discussed above, the Commission observes that the practice of PIS approval from the State Chemists & Druggist Association on payment of the prescribed charges in the name of advertisement in the association bulletin is again a sine qua non in absence of which new products are not allowed to be introduced in the distribution channel. The DG had mentioned that the issue of PIS also forms part of the various MOU’s between AIOCD, OPPI and IDMA. It was also mentioned by the DG that the bulletin carries the information as per Form V of the DPCO.

28.20. The justification / rationale for making payment of the prescribed charges for PIS approval had been explained by Mr. Aniruddha Rajurkar, Vice President, German Remedies, a division of Cadila Healthcare Limited (at page no. 76 of the DG report) that it (PIS approval) helps to circulate and inform large number of retailers regarding price and availability of new products. The relevant excerpts from the reply of Mr. Rajurkar is reproduced here under:

“..... As regards PIS approval, the PIS publication from the association helps to circulate and inform large number of retailers regarding price and availability of new products. In the absence of PIS approval, the company would have to bear huge time and money and resources to provide the same information regarding the product and prices to the retailers .....

28.21. The DG, in this regard, has observed that the payment of PIS charges by the pharma companies in the name of advertisement charges to the State Chemists & Druggists Associations at the time of the product launch or any change in product brand / dosage form / strength thereof in the respective PIS bulletin ensures not only deemed compliance of the law but also enables it to advertise and circulate product information to all the retailers at a very nominal cost. However, the launch of product in the market being made contingent on PIS approval by the concerned association of Chemists & Druggists sometimes results in restraint of trade and leads to denial of market access / controlling of supply / market for any product of a company which can also deprive consumers of the benefits of such drugs.

28.22. The DG has mentioned that there are many instances where the association of Chemists & Druggists refuses to grant PIS approval on a variety of factors, including asking for charges in excess of the prescribed charges in the MOU. The Secretary General of IDMA has also testified to this effect. As and when the different AIOCD affiliates ask for exorbitant charges, the new product launches get delayed and cause hindrance to freedom of trade of the manufacturers and deprive the consumers of the products. The DG, in view of the same, has concluded that any attempt on the part of the members of AIOCD and or its affiliates to delay or withhold any PIS approval on any ground which limits or controls supply or market thereof has to be treated as a kind of boycott,



*thus attracting the provisions of Section 3(3) (b), read with Section 3(1) of the Act.*

*28.25 In view of the preceding discussion and assessment of evidence forwarded by the DG, the Commission is in agreement with the DG's finding that AIOCD and its affiliates actions regarding delay or withholding of PIS approval on any ground is in violation of Section 3(3)(b) read with Section 3(1) of the Act.*

.....  
*35. Accordingly, the Commission passes the following orders under Section 27 of the Act against AIOCD.*

- (i) .....*
- (ii) .....*
- (iii) .....*
- (iv) .....*
- (v) It shall also issue circular that PIS charges were not mandatory and PIS services could be availed by manufacturers/pharmaceuticals firms on voluntary basis.*
- vi).....*

33. From the above, it is clear that the decisive factor of whether PIS charges are anti-competitive depends upon whether such charges are being paid voluntarily by the pharmaceutical companies or are mandatorily payable prior to the launch of their drugs. If the same are mandatory *i.e.* non-payment will lead to new drugs not being introduced in the market, then the practice is anti-competitive. Juxtaposed to this, a voluntary decision of manufacturers/ pharmaceutical companies to avail the service on voluntary basis makes it outside the purview of the Act. The Commission, *vide* its public notice dated 31.01.2014, reiterated this position.

34. With the aforesaid background, the Commission proceeds to determine the issues framed above.

***Issue 1: Whether collection of PIS charges by JDMDA/OP from pharmaceutical companies was mandatory/compulsory and thus in contravention of the provisions of Section 3 of the Act?***

35. In order to ascertain the need and purpose for which PIS charges were paid by pharmaceutical companies before launch of products in Jalgaon District, the DG



considered replies of certain pharmaceutical companies namely Unichem Laboratories Limited, Macleods Pharmaceuticals Limited, Wanbury Limited, Intas Pharmaceuticals Limited, Cerovene Healthcare Private Limited, Cadila Pharmaceuticals Limited, Alkem Laboratories, M/s Unifab Pharmaceuticals, Mankind Pharma Limited, *etc.*

36. The DG, after considering the replies of the aforesaid pharmaceutical companies, observed that they were paying PIS charges to the tune of Rupees 500/- per product, per district to MSCDA, for getting the same published in the bulletin/magazine being published by the respective district association. It was further observed by the DG that the pharmaceutical companies usually paid PIS charges for all the new products launched by them, barring some exceptions. The DG, however, observed that the evidence nevertheless established existence of a practice of demanding payment of PIS charges by the OP from the pharmaceutical companies for publication in their bulletin/magazine. The OP, on the other hand, claimed that the PIS charges received by it were not mandatory but voluntary.
37. The Commission perused the replies/statements of the following pharmaceutical companies recorded before the DG, the relevant excerpts of which are reproduced below:
- a. Mankind Pharma Limited, in its reply dated 12.05.2016, to the DG's notice, stated as under:  
*"....The "information about new drugs" is published in the Jalgaon Chemist Samachar for wider dissemination/publicity of information with respect to new drugs for the benefit of trade and distribution channel of MPL."*
  - b. Koye Pharmaceuticals Private Limited, in its reply dated 28.04.2016, to DG's notice stated as under:  
*"....The purpose of getting "information about new drugs" published in various districts of the news bulletins including Jalgaon Chemist Samachar is to spread information about the launch of new products and their prices to the large number of retailers."*
  - c. Unichem Laboratories Limited, in its reply dated 11.05.2016, to DG's notice stated as under:



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*“.....We state that the purpose of getting the “information about new drugs” published is to create awareness amongst the trade and public about the new products launched by us and their prices. This practice enhances exercising of wider choice by the trading community.”*

d. Macleod Pharmaceuticals, in its reply dated 28.04.2016, stated as under:

*“...The publication of product information in the MSCDA bulletin is for publicizing information about new product amongst maximum number of retailers. This is an additional and cheapest way to communicate information to retailers.”*

e. Intas Pharmaceuticals Limited, in its reply dated 13.05.2016, stated as under:

*“..Our company has remitted charges for providing information about our new drugs available in the market/trade.”*

f. Cerovene Healthcare Private Limited, in its reply dated 10.11.2016, stated as under:

*“We had obtained the information about new drugs so as to market our products.”*

g. Alkem Laboratories Limited in its reply dated 11.02.2016, stated as under:

*“The purpose of getting the “information about new drugs” published with the MSCDA is to create market awareness for the customers with regard to the new drugs that are launched by Alkem.”*

38. A collective reading of the responses of various pharmaceutical companies, as reproduced above indicates that these companies found the publication of their products in the association’s bulletin/ newsletter as an effective way to spread awareness about the new products. The Commission notes that throughout their submissions/ arguments, the OP has relied upon these assertions by the pharmaceutical companies to establish that the publication was beneficial for them. But, whether the said publication was beneficial or not is not an issue for determination before the Commission. From the perspective of competition law, the relevant issue is whether the OP has made payment of PIS charges mandatory prior to the launch of new products by the pharmaceutical companies in the market.



39. To further ascertain whether PIS charges were mandatory or voluntary, the Commission considered the statements of the following representatives of pharmaceutical companies recorded before the DG during investigation:

a. Statement of Mr. Chachad, an ex-employee of Cerovene Healthcare Private Limited

*“Q7 What is the purpose of paying the PIS charges?”*

*Ans. For the launching of our product in the particular districts, the company has to pay the PIS charges to the concerned association, for example, in the state of Maharashtra, the company paid the PIS charges to JDMDA through MSCDA for the launch of companies product in Jalgaon. Once the PIS charges is paid, the receipt of the same is given to the Regional Sales Manager concerned of the company who in turn forward a copy of the same to the dealer. Only after getting the said receipt, the dealers takes the stock of the company.*

*Q8 What are the consequence if PIS charges is not paid by your company?*

*Ans. If PIS charges are not paid then the product will not be sold in that particular district.”*

b. Statement of Mr. Dilip Sawant, Head Distribution of Wanbury Limited

*“Q8 Please clarify whether it is mandatory for the company to get the PIS published through MSCDA before selling said product in the State of Maharashtra?”*

*Ans. As per my previous experience in M/s Elder Pharma and M/s Torrent Pharma from Mar 2004 to May 2014, it was a trade practice which was followed to avoid risk of product boycott. However, in Wanbury we were paying PIS till Nov 2015 because of trade practice which we stopped in Nov 2015.”*

c. Statement of Mr. Saibaba Puppala, Head Distribution of Unichem Laboratories Limited

*“Q9 Please clarify whether it is mandatory for the company to get the PIS published through MSCDA before selling said product in the State of Maharashtra?”*

*Ans. No, it is not mandatory*

*Q10 Despite not being mandatory, please clarify how come your company has made PIS payment to MSCDA for almost all new products introduced by it during period 2012 to 2015 with the exception only 12 new products?*

*Ans. It is a beneficial proposition for the company as the information spreads widely to the retailer which is not possible for the company to approach individually.”*



d. Statement of Ms. Ashu Gupta, Associate Vice President, Supply Chain Management of Koye Pharmaceutical Private Limited

*“Q9 Please clarify whether it is mandatory for the company to get the PIS published through MSCDA before selling said product in the State of Maharashtra?”*

*Ans. It is voluntary and we are aware of the CCI public notice to the pharma industry informing that PIS is voluntary.”*

e. Statement of Mr. Prateush Sharma, General Counsel of Mankind Pharma Limited

*“Q8 Please clarify whether it is mandatory for the company to get the PIS published through MSCDA before selling said product in the State of Maharashtra?”*

*Ans. No it is not mandatory to get the PIS published through MSCDA before selling said product in the State of Maharashtra.*

*Q9 Despite not being mandatory, please clarify how come your company has made PIS payment to MSCDA for almost all new products introduced by it during period 2012 to 2015 with the exception of only 8 new products?*

*Ans. It is very useful in supplementing marketing strategy for new product launched by the company.”*

40. The Commission notes the statement of Mr. Chachad, the then Executive (Sales & Administration), Cerovene Healthcare Private Limited was recorded before the DG during the course of investigation. Mr. Chachad has categorically stated that the company has paid PIS charges to the OP for launch of its products in Jalgaon District. He further stated that if PIS charges were not paid then the products were not allowed to be sold in that particular district. The Commission observes that the statement of Mr. Chachad is corroborated by an e-mail dated 05.02.2013 (along with attachments), sent by Mr. Chachad to the OP wherein the company has provided an undertaking as to “*not take any products on which PIS charges are not paid*”. A copy of the undertaking (attachment to e-mail dated 05.02.2013) is extracted hereinbelow:



AJM/MKTG/908/12-13

CEROVENE

February 05, 2013

To,

The President/Secretary  
The Jalgaon District Medicine Dealers Association  
Chemist Bhavan, Behind Jail Building,  
Jilha Peth, Jalgaon – 425003  
Phone – 0257 2274968

1. We will neither take any other of products without PIS and stockiest appointment of District Association nor any advance cheque or D.D.

.....  
.....

Thanking You,

For CEROVENE HEALTHCARE PVT LTD

AUTHORISED SIGNATORY

CEROVENE HEALTHCARE PVT LTD  
Souri Building, 1<sup>st</sup> Floor, 74/80, Babu Genu Road, Mumbai – 400002  
Tel: 022-23690425 Telefax: 022-2203 1203  
Website: [www.cerovene.in](http://www.cerovene.in)

41. During investigation, Mr. Chachad was confronted with this e-mail. The relevant part of his statement in this regard is as under:

*“Q.3 I am showing you two documents dated 05.02.2013 of your company. Please clarify the documents bears whose signatures at point ‘x’?”*

*Ans. I can identify the signatures, the documents bears the signatures of Sh. Kirit Bhadiadara. He was the General Manager (Marketing) of the company. He has resigned from the company in 2014*



*Q.5 I am showing you an email dated 05.02.2013 sent by you from your email id [marketing@cerovene.in](mailto:marketing@cerovene.in) to Jalgaon District Medicine Dealers Association on its email id [pis\\_jalgaon@rediffmail.com](mailto:pis_jalgaon@rediffmail.com) whereby two attachments were annexed. In the said email you have mentioned as under:*

*Please find attached stockiest letter file. Hard copy will send to you soon.*

*Please clarify about the said email?*

*Ans. Sh. Kirit Bhadiadara asked me to send the said email therefore, I sent the same to the said association. The attached letters have also been signed by Sh. Kirit only.”*

42. The Commission observes that it is clear from the reply of Mr. Chachad that he had sent the said e-mail along with attachments to the OP on the directions of Mr. Kirit Bhadiadara, the then GM, Marketing of the Company.

43. During investigation, Secretary of the OP, Mr. Anil R. Zawar was also confronted with the e-mail dated 05.02.2013. The relevant extract of his statement recorded during the investigation is as under:

*“Q9. I am showing you an email dated 05.02.2013 (Annexure 2) (retrieved from email dump filed by you) sent by M/s Cerovene Healthcare Pvt Ltd to your association ([pis\\_jalgaon@rediffmail.com](mailto:pis_jalgaon@rediffmail.com)) whereby two attachment were annexed. One attachment is related to appointment of two stockiest by the company in Jalgaon and other attached is type of undertaking filed by the company on various issues including PIS. Please clarify about this email?*

*Ans. It has been our experience that there are sometimes new companies which appear and then sometimes disappear after 6-8 months.*

*In such a situation our stockiest /retailers may be left with unsold stock. To protect our members from such a problem we ask new companies who approach us to submit undertaking. Regarding the information to be given in the undertaking we guide the company accordingly. This is not in the nature of permission to the company nor there anything binding on the company.”*

44. The Commission observes that Secretary of the OP has admitted before the DG, upon confrontation with this email, that such undertaking is taken by the OP from new companies to protect the interest of its members. He, however, stated that this undertaking is not in the nature of any permission.



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45. The Commission notes that Mr. Chachad was cross-examined by the counsel for the OP on 21.12.2018. Mr. Chachad was questioned whether he was presently working with Cerovene Healthcare Private Limited. In response, Mr. Chachad said 'No'. In response to another question, he stated that he was working with Cerovene Healthcare Private Limited for six years and left the company in 2017. On being questioned about the name of all products of Cerovene Healthcare Private Limited that were launched in Jalgaon District during the tenure of his employment, he categorically stated that none of the products were launched in Jalgaon District during the tenure of his employment. He was also queried whether products of Cerovene Healthcare Private Limited were being sold by retailers/wholesalers in Jalgaon District. Mr. Chachad, again stated 'No'. Counsel of the OP also asked Mr. Chachad the reason why the products were sold in rest of Maharashtra but not in Jalgaon District, to which Mr. Chachad stated that Cerovene Healthcare Private Limited did not receive permission from the OP. Mr. Chachad was also questioned about the reason for seeking permission by Cerovene Healthcare Private Limited from the OP. Mr. Chachad responded that they were required to take permission from the OP to launch their products and that's why they were writing e-mail to them. The Commission notes that Mr. Chachad has maintained the veracity of evidence available on record that the permission of the OP was required before launch of products in Jalgaon District. The relevant extracts of cross-examination proceedings of Mr. Chachad are reproduced herein below:

**Extract of record of cross-examination of Mr. Sushant Nandkumar Chachad**

*“Q1. Are you working with Cerovene?”*

*Ans. No*

*Q2. Are you making the present statement on the basis of your personal knowledge and in your personal capacity or as a representative of Cerovene?”*

*Ans. Personal capacity.*

*Witness volunteered: The witness stated that he was working with Cerovene for six years and left the company in 2017.*



*Q3. Can you name all the products of Cerovene that were launched in Jalgaon District during the tenure of your employment in Cerovene?*

*Ans. None of the products were launched in Jalgaon District during the tenure of my employment.*

*Q4. Does Cerovene has stockiest s/wholesalers in Jalgaon District?*

*Ans. No*

*Q5. During your tenure of your employment in Cerovene, were its products being sold by retailers or wholesalers (if any) in Jalgaon District?*

*Ans. No*

*Q6. During your tenure of employment in Cerovene, were its products being sold by retailers or wholesalers (if any) in Maharashtra other than Jalgaon District area?*

*Ans. Yes*

*Q7. According to you, why were Cerovene products being sold in the rest of Maharashtra but not in Jalgaon District area?*

*Ans. Cerovene did not receive the permission from Jalgaon District Medicine Dealers Association (JDMDA).*

*Q8. Why did Cerovene not receive permission from JDMDA according to you?*

*Ans. I have no idea/answer. How would I know why permission was not given.*

*Q9. Why was Cerovene required to take permission of JDMDA?*

*Ans. We were required to take permission from JDMDA to launch our products in the Jalgaon District and that's why we were writing email to them.*

*Q10. Can you show from the email or any other document that JDMDA had asked you to take its prior permission before launching the products?*

*Ans. JDMDA never formally asked us to take their permission but it is the procedure to take the permission of JDMDA and MSCDA before launching the products.*

*Q11. During your tenure in Cerovene, in which districts of Maharashtra the products of Cerovene were being sold?*

*Ans. All over Maharashtra except Jalgaon District."*



46. The statement of Ms. Nita Shah, Director of Cerovene Healthcare Private Limited recorded before the DG is noteworthy. The relevant extract of Ms. Nita Shah's statement is as under:

*“Q6. As per your reply, the products of your company were already in circulation in some districts of Maharashtra then why did your company paid PIS charges for advertisement in Jalgaon?”*

*Ans. Even though the products were already in circulation in some districts in Maharashtra, however, we could not launched in Jalgaon until we paid the LOC (List of Charges) charges to the district association through MSCDA. These charges were paid along with Form-V which was compulsory to be sent to retailers.”*

47. As regards email dated 05.02.2013 and the statement of representative of Cerovene Healthcare Private Limited, the OP denied that a new drug cannot be launched without payment of the PIS charges. As per the OP, the aforesaid e-mail was sent by the company voluntarily and not under any compulsion/insistence from the OP. According to them, the contents of the email by itself do not disclose any anti-competitive practices being carried out by the OP. Further, the OP submitted that there are thousands of pharmaceutical companies which operate in Jalgaon District and they have appointed stockists without LOC/ NOC or PIS.
48. The Commission is not convinced with the response submitted by the OP, in this regard. Further, the OP has not filed its comments to the record of the cross-examination proceedings of Mr. Chachad, despite an opportunity being provided to it. Further, the Commission observes that a combined reading of statement of Mr. Chachad along with his record of cross-examination, the statement of Ms. Nita Shah and the undertaking sent by Cerovene Healthcare Private Limited to the OP as an attachment to its email dated 05.02.2013, clearly establishes that payment of PIS charges by pharmaceutical companies was mandatory and the launch of products in Jalgaon District was possible only after payment of PIS charges. Further, the occasion to send the email dated 05.02.2013, with a list of undertakings arose only because the practice was relevant at that time and without which the company could not have sold its products in Jalgaon District.



49. The Commission accords importance to the statements of Mr. Chachad and Ms. Nita Shah and finds them categoric, noteworthy and credible. These statements alongwith email dated 05.02.2013 to the OP, succinctly brings out the anti-competitive conduct of the OP in making payment of PIS charges mandatory.
50. During investigation, the DG found a letter dated 20.01.2014, sent by M/s Unifab Pharmaceuticals to the OP seeking permission for launch of its drugs in Jalgaon District. An extract of the letter dated 20.01.2014, is as below:

*Date: 20<sup>th</sup> January 2014*

*To,*

*The President,*

*Jalgaon District Medicine Dealers Association, Jalgaon.*

***Sub: Request for the Permission to Launch Unifab Pharmaceuticals in Jalgaon District.***

*Dear President,*

*We Unifab Pharmaceuticals are in process of launching our company's pharmaceutical formulations in Jalgaon District.*

*Hence, we request you to give us the permission to launch Unifab Pharmaceuticals in Jalgaon district.*

*Thanking You,*

*Sincerely Yours*

*-sd-*

*Pravinkumar Wayakaskar*



51. The Commission notes that the above letter shows that prior permission of OP was a prerequisite for launch of new products in Jalgaon District. If that was not the case, then such letter would not have been sent by the company. Further, Mr. Saleem, Proprietor of M/s Unifab Pharmaceuticals on being confronted with the said letter chose to remain silent and stated “*I have no comment*”.
52. Secretary of the OP, Mr. Anil R. Zavar, was also confronted with the said letter during investigation. The relevant extract of his statement is reproduced as under:

*“Q12 I am showing you a letter dated 20.01.2014 (Annexure-3) sent by M/s Unifab Pharmaceutical to your association wherein it has requested for your permission to launch its products in Jalgaon District. Please clarify about the same.*

*Ans. I have completely read the contents of the letter. In the said letter the company has only informed us about launch of their new company in our district.*

*Q13. It is seen that your aforesaid reply is contradictory to the contents of the letter as in the said letter it has been specifically mentioned as under:*

*‘We Unifab Pharmaceutical are in the process of launching our companies pharmaceutical formulations in Jalgaon District.*

*Hence, we request you to give us permission to launch Unifab Pharmaceuticals in Jalgaon District.’*

*Ans. Since this letter has been written by concerned company, I do not know why they have mentioned word permission. We never ask for permission to be taken. New companies just inform association for our record purpose.”*

53. The Commission notes that the Secretary of the OP gave ambiguous and evasive answers to the questions posed to him during investigation.
54. Mr. Saleem, Proprietor of M/s Unifab Pharmaceuticals was cross-examined by the counsel for the OP on 02.02.2018. He was questioned whether he was paying PIS charges for all medicines in Jalgaon District. He responded by stating that he had paid PIS charges for all medicines. On being queried by the counsel of the OP as to whether the OP compelled him to take prior approval before selling medicines in Jalgaon District, Mr.



Saleem stated that he was not forced. The relevant extracts from cross-examination proceedings of Mr. Saleem are as under:

*“Q9. Do you recollect whether for all the medicines you were selling in Jalgaon, you paid the PIS charge?”*

*Ans. Yes, we have paid PIS charge for all the medicines.*

*Q11. Whether in the past the Jalgaon District Association has compelled you to take prior approval before selling medicines in the District?”*

*Ans. No, they did not force.*

*Witness Volunteered: I had paid the PIS charge to create awareness through publication in the news bulletin of the association and this being the easiest route, I adopted it.”*

55. The Commission notes that the contents of the letter dated 20.01.2014 are self-explanatory and leave no doubt that M/s Unifab Pharmaceuticals sought permission of the OP for launch of its products even though the Secretary of the OP stated that company only informed the OP about launch of their new company in Jalgaon District and such information was only for the purpose of record. This letter in any event does not appear to be merely for information or as a matter of record. The usage of words in the subject line of the letter dated 20.01.2014, i.e. ***‘Request for the Permission to Launch.....’***, is so categorical as to connote that permission of the OP was mandatorily required for launch of new drugs/products in Jalgaon District that any other interpretation seems implausible. The Commission further notes that Mr. Saleem remained silent on being questioned about the letter during investigation. During cross-examination, he stated that he paid PIS charges for all the medicines though he was not forced to pay the same by the OP. Nevertheless, the Commission notes that the nature and tenor of the letter clearly brings out that permission of the OP was required before launch of products.

56. The Commission has also taken note of the statement of Mr. Sawant, Head Distribution of Wanbury Limited. Mr. Sawant, in his statement before the DG during investigation, stated that as per his earlier experience in Elder Pharma and Torrent Pharma from March, 2004 to May, 2014, it was a trade practice which was followed to avoid risk of boycott.



For his present company, *i.e.* Wanbury Limited, he stated that the company stopped payment of PIS charges from November, 2015 onwards.

57. Cross-examination of Mr. Sawant was conducted by the counsel of the OP on 15.12.2017. During the cross-examination, the counsel questioned him whether it was correct to say that Wanbury Limited had been selling /marketing/distributing medicines in Jalgaon District or Maharashtra without paying PIS charges to either MSCDA or the OP. In response to this question, Mr. Sawant stated “*It is not correct*”. Further, during his cross examination, he volunteered to state that when he inspected the files, he came to know that it was routine in Wanbury Limited to pay PIS charges to MSCDA and Jalgaon District for selling/marketing/distributing medicines in Jalgaon District and other regions in State of Maharashtra. Mr. Sawant, however, denied any boycott of products of Wanbury Limited in Jalgaon District due to non-payment of PIS charges. The relevant extracts of the proceedings of cross-examination of Mr. Sawant is reproduced as under:

*“Q.12. I put to you that Wanbury Limited has been selling/marketing/distributing medicines in the Jalgaon District and other regions in the State of Maharashtra without paying PIS charges to either MSCDA or OP? Is it correct?”*

*Ans. It is not correct*

*Witness Volunteered: When I inspected the files, I came to know that it was a routine in Wanbury to pay PIS charges and Jalgaon District for selling/marketing/distributing medicines.*

*Q.1c. Whether during your tenure in Elder Pharma or Torrent Pharma, sale of any existing or new product was boycotted by OP?*

*Ans. To my knowledge, I was not handling this portfolio being boycotted by OP*

*Q.11. During your tenure in Wanbury Limited, were the products sold/ marketed by the Company in jalgaon district ever boycotted by OP*

*Ans. No, not to my knowledge.”*

58. Upon perusal of the statement and cross-examination proceedings of Mr. Sawant, the Commission notes that payment of PIS charges by pharmaceutical companies was a trade practice which was prevalent. Even though Mr. Sawant has denied that there was any



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boycott of products by the OP in Jalgaon District for non-payment of PIS charges, the same cannot be taken as an evidence of its voluntary nature. Given that his company was paying PIS charges for all the products, there was no occasion for the OP to boycott any of their products.

59. The Commission also notes the statements of representatives of Unichem Laboratories Limited, Koye Pharmaceuticals Private Limited, and Mankind Pharma Limited, before the DG to the effect that payment of PIS charges was not mandatory before introduction of drugs but as it was a beneficial proposition, these companies paid such charges.
60. The OP, in its reply as well as during the hearing, submitted that from January, 2013 to April, 2015, several drugs had been introduced in the market without paying PIS charges, which proved that PIS was not mandatory for launching or selling medicines. Further, the OP relied upon the responses of OPPI and IDMA that there had been no instance when members of the associations faced difficulty while launching new drugs.
61. In this regard, it has been brought out that while there have been instances when products have been launched in Jalgaon District without payment of PIS charges, the Commission notes that the categorical testimony of Mr. Chachad and Ms. Nita Shah of Cerovene Healthcare Private Limited, discussed above, points to the contrary, *i.e.* that products could not be launched without payment of PIS charges. This suggests that payment of PIS was an established trade practice. This is further substantiated by the evidence provided by Mr. Saleem of M/s Unifab Pharmaceuticals, who stated that PIS charges have been paid for launch of all medicines in Jalgaon District. Mr. Sawant of Wanbury Limited also confirmed that payment of PIS charges is a practice followed as a matter of routine.
62. With regard to the submission made by the OP regarding PIS charges in Mashelkar Committee report, the Commission observes that the said Committee was formed to examine all aspects relating to regulatory infrastructure for supply of drugs to combat the problem of spurious/substandard drugs in the country. The recommendations of the



Mashelkar Committee do not, in any manner, appear to suggest that the associations could undertake the task of mandating PIS charges prior to launch of new drugs.

63. The Commission further notes that during investigation, the DG relied upon certain evidences which showed that the PIS charges were neither furthering the cause of advertising nor compliance of DPCO stipulations. As per the DG, pharmaceutical companies were paying such charges as a matter of practice only. The DG found that non-publication in bulletins of price list by the OP even after lapse of considerable time, delayed publication in such bulletins, non-publication as per DPCO format, use of word 'contribution' in the covering letters issued by pharmaceutical companies to MSCDA, and marking of 'product approved for advertisement' by the said association on receipts issued to pharmaceutical companies *etc.* suggested that the OP was conveying approval for launch of new drugs in Jalgaon District, which is in contravention of the provisions of Section 3(3)(b) read with Section 3(1) of the Act. The practice restricted the entry of new drugs by pharmaceutical companies in Jalgaon District. As per the DG, the circulation of price list through MSCDA by way of publications in the bulletins of the OP, but not publishing them in the manner and format as forwarded by the pharmaceutical companies in compliance with the DPCO guidelines disrupted the chain of transmission of information to the end consumer. The said conduct resulted in denial of benefits accruing to consumers and deprived them of vital information about the particulars of the formulations.
64. The Commission notes that the DG found that the information about certain drugs was not published in its bulletin for the period from 2012-13 to 2014-15. Only three of twelve issues of the bulletin were published by the OP. Secretary of the OP admitted to have missed out about 70-80 drugs from publication. The DG pointed out that PIS had been published only in respect of 216 drugs. As per the DG, there were approximately 4000 drugs for which payment was received by the OP but no PIS information was published. This establishes that the purpose of PIS was not to spread information about new drugs in Jalgaon District. Had it been so, the OP, ought to have published the information supplied by the pharmaceutical company for every drug/dosage/strength in its bulletin. The DG also considered the statements of representatives of various pharmaceutical



companies to the effect that though the companies paid PIS charges to MSCDA, prior to launch of their drugs, they were not concerned about the timeframe, within which, the information about their new drugs was actually published in the bulletin of the OP. The DG inferred that the absence of such timeframe for publication of the information about new drugs reflected that the pharmaceutical companies were making payments to the OP through MSCDA only for the purpose of getting approval for launch of their products in Jalgaon District.

65. The DG also recorded statements of representatives of pharmaceutical companies who stated that they had never seen copy of such bulletins. The DG has also pointed out that the companies, after making the payment of Rs.500/- to the OP were not even checking whether their 'advertisements' were actually published or not which is indicative of the fact that payments made by them in the name of PIS, were neither for the purpose of advertisement nor for compliance with DPCO.
66. In view of the foregoing, the Commission concluded that the conduct of the OP falls foul of the provisions of Section 3(3) of the Act which raises a presumption of appreciable adverse effect on competition. Under the scheme of the Act, the burden of proof lies upon the OP to show that no appreciable adverse effect on competition existed as a result of the conduct of the OP. In the case in hand, it was open for the OP, *i.e.* JDMDA, to rebut the presumption raised against it under Section 3(3) of the Act by showing efficiency justifications for enforcing the practice of payment of PIS charges. However, the OP has not been able to rebut the same.
67. In view of the above, the mandatory requirement of payment of PIS charges, as alleged by the Informant in the present case, stands established by the evidence on record, against the OP. The Commission notes that the practice of payment of PIS charges to the OP by pharmaceutical companies was made mandatory and it resulted in limiting and controlling the supply of drugs in the market and amounted to an anti-competitive practice, in violation of the provisions of Section 3(3)(b) read with Section 3(1) of the Act.



***Issue 2: Whether office bearers of the OP are liable for violation under Section 48 of the Act?***

68. Section 48(1) of the Act is triggered when the party in contravention is a company (including a firm or an association of individuals) and a person/individual officer/office bearer is found to be in-charge of, and responsible for the conduct of the business of the contravening company/firm/association. Once Section 48(1) of the Act is triggered, it is for such person/officer/office bearer to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention, in order to be absolved of liability under Section 48(1) of the Act. Section 48(2) of the Act, on the other hand, attributes liability on the basis of involvement of an officer/office bearer. In light of the provisions contained in Section 48(1) and 48(2) of the Act, the role of each of office bearers/officials of the OP has to be examined to ascertain whether the evidence on record substantiates their liability for the anticompetitive conduct of their association.
69. The DG found the following office bearers of the OP as being the persons responsible for conduct of the OP's activities under Section 48(1) of the Act:

**Table: 1: Office Bearers of the OP found responsible by the DG under Section 48(1) of the Act**

S.No.	Name	Designation	Period
1.	Mr. Sunil R. Bhangale	President	2012-till date
2.	Mr. Anil R. Zawar	Vice-President	2012-14
		Secretary	2014-15
3.	Mr. Brajesh Jain	Vice-President,	2014-15
		Secretary	2012-14



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4.	Mr. SakirChittawala	Vice President	2012-14
5.	Mr. Shamkant R. Wani	Vice President,	2014-15
		Joint Secretary	2012-14
6.	Mr. Sunil Mahajan	Vice President	2012-15
7.	Mr. Shrikant Patil	Joint Secretary	2014-15
8.	Mr. Kanakmal Raka	Joint Secretary	2012-14
9.	Mr. Chandrakant C.Pakhale	Joint Secretary	2014-15
10.	Mr. Dhananjay Talele,	Joint Secretary	2012-15
11.	Mr. Mahendra Mahajan	Treasurer	2012-15
12.	Mr. Rupesh Chaudhari	Organisational Secretary	2012-15
13.	Mr. Harish Kalwani	Joint Organisational Secretary	2012-14
14.	Mr. Banwari Lal D. Agrawal	Joint Organisational Secretary	2014-15

Thus, besides the OP, contravention of the provisions of Section 3(3)(b) read with Section 3(1) of the Act, was committed by the above said persons during the relevant period. As per the DG, the Memorandum of Association of the OP, names the President, First Vice President, Second Vice President, Secretary, Joint Secretary, Treasurer as the officers of the association. Further, the executive committee of the OP looks after day to day affairs of the association which comprises the aforesaid six office bearers and other three members selected in annual general meeting. As per the DG, the executive committee of the OP has all the powers to carry out all such acts and things authorised by the Memorandum of Association. The minutes of meeting of the executive committee of the OP during 2013 to 15, revealed that all the meetings were duly attended by the said office bearers and the decisions were taken in consensus. Based on the details submitted by the



OP of its office bearers from 2012 to 2015, the DG found the above mentioned office bearers to be liable under the provisions of Section 48(1) of the Act.

70. The OP has submitted that the DG has mechanically observed that as the said office bearers were present in the executive meeting, they are liable for the actions of the OP. It was contended that finding of the DG in respect of office bearers is premature and without jurisdiction. It was further stated that the office bearers of the OP could be proceeded against under Section 48 of the Act only when there was a final order of contravention passed against the said office bearers. The OP, without prejudice to its submissions, submitted that none of its Office bearers is liable in any manner. During the course of hearing, the Opposite Party had submitted that it is only the President and Secretary of the OP who are generally involved in the day-to-day affairs of the OP and not any other office bearers.
71. Having considered the submissions made by the counsel for the OP and its office bearers, the Commission finds merit in the submissions that in the present case it is only the President and Secretary of the OP who were in charge and were in control of the affairs of the OP and responsible to the OP for conduct of its affairs. Thus, Mr. Sunil R. Bhangale, President of the OP and Mr. Anil R. Zawar, the then Secretary of the OP, are found to be liable under Section 48(1) of the Act. As regards the remaining office bearers, the Commission finds the evidence on record insufficient to hold them liable either under Section 48(1) or 48(2) of the Act.

### **ORDER**

72. In view of the findings elucidated in the earlier part of this order, the Commission directs the OP, including its office bearers/officials, who have been held liable under Section 48 of the Act, to cease and desist from indulging in practices which have been found to be anti-competitive in terms of the provisions of Section 3(3)(b) read with Section 3(1) of the Act.
73. With regard to penalty under Section 27 of the Act, the Commission is of the considered view that the same has to be determined after taking into account the aggravating and



mitigating factors as regards contravening OP and its office bearers. Further, the anti-competitive conduct needs to be penalised sufficiently to cause deterrence in future among the erring entities and its individuals engaged in such activities. The Commission finds that there are no mitigating factors in the present case as it was in the knowledge of the parties that mandatory charging of PIS charges has been held to be anti-competitive by the Commission in its previous orders and wide publicity has been given to such orders. Accordingly, the Commission deems it appropriate to impose a penalty on the OP at the rate of 10 percent of its income from PIS charges for three financial years i.e. 2013-14, 2014-15 and 2015-16, as computed hereinbelow:

**Table 2: Income of the OP from PIS charges**

(In Rupees)	
<b>Financial Year</b>	
2013-14	9,08,440
2014-15	7,47,206
2015-16	7,49,920
<b>Total</b>	24,05,566
<b>Average</b>	8,01,855
10% of Average Income	80,185

74. With regard to the liability of the office bearers of the OP in terms of the provisions of Section 48(1) of the Act, the Commission deems it appropriate to impose penalties calculated at the rate of 10 percent of their average income based on their income tax returns (ITRs) for three financial years, as filed by them as mentioned hereinbelow:

**Table 3: Income of Office Bearers of the OP**

(In Rupees)						
<b>Officer Bearers</b>	<b>FY 2013-14</b>	<b>FY 2014-15</b>	<b>FY 2015-16</b>	<b>Total</b>	<b>Average</b>	<b>10 % of Average Income</b>
<b>Mr. Sunil R. Bhangale, President (2012-till date)</b>	17,00,127	24,72,441	22,576,42	64,30,210	21,43,403	2,14,340
<b>Mr. Anil R. Zawar, Vice President (2012-14) and Secretary (2014-15)</b>	12,57,621	13,71,424	11,94,373	38,23,418	12,74,473	1,27,447



75. Consequently, penalty of Rs. 80,185/-, calculated at the rate of 10 percent of the average relevant income, is payable by the OP and penalty of Rs. 2,14,340/- and Rs. 1,27,447/-, is payable by Mr. Sunil R. Bhangale and Mr. Anil R. Zawar, respectively, within 60 days of receipt of this order.
76. The implementation of the decision passed in the present case shall, however, be subject to the orders passed by the Hon'ble High Court of Delhi in CWP No.11163 of 2015.
77. Secretary is directed to inform the parties, accordingly.

**Sd/-**  
**(Ashok Kumar Gupta)**  
**Chairperson**

**Sd/-**  
**(U.C. Nahta)**  
**Member**

**New Delhi**  
**Dated: 20/06/2019**

**Sd/-**  
**(Sangeeta Verma)**  
**Member**