



**COMPETITION COMMISSION OF INDIA**

**Case No. 64 of 2014**

**In Re:**

**Madhya Pradesh Chemists and Distributors Federation (MPCDF)  
A-101, Vardhman City Plaza,  
Dawa Bazar, Hamidia Road,  
Bhopal-462001, Madhya Pradesh**

**Informant**

**And**

**Madhya Pradesh Chemists and Druggist Association (MPCDA)  
C/o. Jain Products (India)  
224, II Floor, Giriraj Heritage, Near Kshipra Residency,  
Madhav Club Road, Teen Batti Chauraha, Freeganj,  
Ujjain-456010, Madhya Pradesh**

**Opposite Party No. 1**

**Bhopal Chemist Association,  
118, 1<sup>st</sup> Floor, Shri Shantinath Plaza,  
Hamidia Road,  
Bhopal-462001, Madhya Pradesh**

**Opposite Party No. 2**

**District Gwalior Chemist Association,  
M/s. Anil Distributors,  
1<sup>st</sup> Floor, Dawa bazar,  
Huzrat Road, Lashkar,  
Gwalior-474001, Madhya Pradesh**

**Opposite Party No. 3**

**Apex Laboratories Private Limited  
III Floor, SIDCO Garment Complex,  
Guindy, Chennai – 600032, Tamil Nadu**

**Opposite Party No. 4**

**Win Medicare Private Limited  
1400 Hemkunt Tower,  
98, Nehru Place,  
New Delhi-110019**

**Opposite Party No. 5**

**Fourrts (India) Laboratories Private Limited  
No. 1, Fourrts Avenue,  
Annai Indira Nagar,  
Okkiyam, Thoraipakkam,  
Chennai – 600096, Tamil Nadu**

**Opposite Party No. 6**



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**Meyer Organics Private Limited**  
**Road no. 16z,**  
**I.T. Park, Wagle Industrial Estate,**  
**Thane West – 400604, Maharashtra**

**Opposite Party No. 7**

**Cipla Limited**  
**Cipla House, Peninsula Business Park**  
**Ganapat Rao Kadam Marg**  
**Lower Parel,**  
**Mumbai – 400013, Maharashtra**

**Opposite Party No. 8**

**Eris Lifesciences Private Limited**  
**7<sup>th</sup> Floor Commerce House IV,**  
**Besides Shell Petrol Pump,**  
**100 Feet Road, Prahladnagar,**  
**Ahmedabad – 380015, Gujarat**

**Opposite Party No. 9**

**Mankind Pharma Limited**  
**236, Okhla Phase – III,**  
**New Delhi-110020**

**Opposite Party No. 10**

**The Indore Chemists Association**  
**66, 3<sup>rd</sup> Floor, Dawa Bazar**  
**13-14, R.N.T. Marg**  
**Indore – 452001, Madhya Pradesh**

**Opposite Party No. 11**

**The Himalaya Drug Company**  
**Khasra No – 79/1, Karmela**  
**Katangi road, Opp Honda City Show Room**  
**Near St. Alloys School**  
**Jabalpur – 482002, Madhya Pradesh**

**Opposite Party No. 12**

**Torrent Pharmaceuticals Limited**  
**Torrent House, off Ashram Road**  
**Ahmedabad – 380009, Gujarat**

**Opposite Party No. 13**

**Intas Pharmaceuticals Limited**  
**11-B, J.S.R, Compound**  
**Opp. Maharaja Roadlines**  
**Dewas Naka,**  
**Indore- 452010, Madhya Pradesh**

**Opposite Party No. 14**

**Jabalpur Chemist & Druggist Association**  
**C/o, Madhu Medical Stores**  
**Shop No. 1 Medicine Complex**  
**Jabalpur, Madhya Pradesh**

**Opposite Party No. 15**



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## CORAM

**Mr. Ashok Kumar Gupta**  
**Chairperson**

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

**Ms. Sangeeta Verma**  
**Member**

### ***Appearance during the hearing held on 29.01.2019 and 30.01.2019:***

<i>For Informant</i>	<i>Mr. Amit Gupta, Advocate Ms. Vidhi Goyal, Advocate Ms. Mansi Kukreja, Advocate</i>
<i>For OP-1, OP-11 and their office bearers</i>	<i>Mr. Jayant Mehta, Advocate Mr. Shantanu Srivastava, Advocate Ms. Anu Srivastava, Advocate</i>
<i>OP-2, OP-3 and OP-15</i>	<i>Mr. Shantanu Srivastava, Advocate</i>
<i>For OP-4 to OP-7</i>	<i>None</i>
<i>For OP-8</i>	<i>Mr. Avinash Amarnath, Advocate Ms. Archana Sahadeva, Advocate</i>
<i>For OP-9</i>	<i>Mr. Abhay Joshi, Advocate Ms. Krushika Nayan Choudhary, Advocate</i>
<i>For OP-10</i>	<i>Mr. Divye Sharma, Advocate</i>
<i>For OP-12 &amp; its officials</i>	<i>Mr. Raj Shekhar Rao, Advocate Ms. Kruttika Vijay, Advocate Ms. Abhilasha Nautiyal, Advocate Mr. Anandh Venkatramanai, Advocate</i>
<i>For OP-13 and Mr. Dhruv Gulati, ED, OP-13</i>	<i>Mr. Ramji Srinivasan, Sr. Advocate Mr. P. Ram Kumar, Advocate Mr. Toshit Shandilya, Advocate Ms. Rahat Dhawan, Advocate Ms. Nidhi Mehta, AGM, Legal Mr. Biju Samuel, AGM, Supply Chain Management Mr. Kripal Bisht, GM</i>



*Mr. Vijay Basarkar,  
Mr. Debasis Bhattacharya,  
Mr. K.C. Mathew, Manager  
(officials of OP-13)*

*Mr. Akash Khurana, Advocate  
Mr. Rohan Alva, Advocate  
Mr. Reshabh Bajaj, Advocate*

*For OP-14 & its office bearers*

*Mr. A. N. Haksar, Senior Advocate  
Mr. Ramji Srinivasan, Senior Advocate  
Mr. Abeer Kumar, Advocate  
Ms. Sitwat Nabi, Advocate  
Mr. Sahil Sharma, Advocate  
Mr. Rahul Jain, Advocate  
Mr. Tarun Gulati, Advocate  
Mr. C.K. Yagnik, Executive Vice President- Legal*

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

1. This order shall dispose of the case that has arisen from the information filed by M/s Madhya Pradesh Chemists and Distributors Federation, through its Secretary Mr. Virendra Jain, (hereinafter, the “**Informant/Federation**”) under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the “**Act**”) alleging contravention of the provisions of Section 3 of the Act by Madhya Pradesh Chemists and Druggist Association (hereinafter, referred to as “**MPCDA/Association/OP-1**”), Bhopal Chemist Association (hereinafter, “**OP-2**”), District Gwalior Chemist Association (hereinafter, “**OP-3**”), Apex Laboratories Private Limited (hereinafter, “**OP-4**”), Win Medicare Private Limited (hereinafter, “**OP-5**”), Fourrts India Limited (hereinafter, “**OP-6**”), Meyer Organics (hereinafter, “**OP-7**”), Cipla Pharmaceuticals Limited (hereinafter, “**OP-8**”), Eris Lifesciences (hereinafter, “**OP-9**”) and Mankind Pharma Limited (hereinafter, “**OP-10**”). During investigation, Indore Chemist Association was impleaded as “**OP-11**” by the Commission on request of the DG. After consideration of the investigation reports, the Commission impleaded certain pharmaceutical companies, viz. The Himalaya Drug Company, Torrent Pharmaceuticals Limited and Intas Pharmaceuticals Limited as “**OP-12/Himalaya**”, “**OP-13/Torrent**” and “**OP-14/Intas**”, respectively; and later, impleaded Jabalpur Chemist and Druggist Association as “**OP-15**”. The opposite parties are, hereinafter, collectively referred to as “**OPs**”.



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### **Brief facts and allegations**

2. The Informant Federation is stated to comprise of entities involved in pharmaceutical trade. It is stated to be affiliated to All India Chemist and Distributors Federation (AICDF), which is a registered organization of the chemists and distributors in the state of Madhya Pradesh.
3. MPCDA/OP-1 is a registered state level association of wholesalers and retailers of pharmaceutical companies in the State of Madhya Pradesh since 1976. OP-2 and OP-3 are the district level associations of chemists and druggists, affiliated with OP-1 and carry on their activities in the districts of Bhopal and Gwalior, respectively. OP-11 and OP-15 (subsequently impleaded parties) are also district chemist associations, affiliated to MPCDA, carrying on their activities at Indore and Jabalpur, respectively.
4. OP-4 to OP-10 are pharmaceutical companies named by the Informant in the information, and OP-12 to OP-14 are the pharmaceutical companies subsequently impleaded by the Commission. These pharmaceutical companies carry on their business through their appointed Clearing & Forwarding (hereinafter, “C&F”) agents or distributors in the State of Madhya Pradesh.
5. The genesis of the information lies in the grievance of one of the Informant’s member – M/s. Pharma Agencies, a proprietorship firm run by Mr. Gopal Gupta, dealing in pharmaceutical products at Gwalior, Madhya Pradesh. The Informant has alleged that its aforesaid member *i.e.* Mr. Gopal Gupta of M/s Pharma Agencies had approached C&F agents of various pharmaceutical companies *i.e.* OP-4 to OP-10, seeking supply of their products, for which he made advance payment to them in the form of cheques/Demand Drafts (DDs) . However, these cheques/ DDs were returned and M/s. Pharma Agencies was denied supply of pharmaceutical products by the said companies without assigning any reason. It is alleged in this regard that OP-1 to OP-3 issue No Objection Certificate (“NOC”)/Letter of Consent (“LOC”) on the basis of which appointment of the stockist is made by pharmaceutical companies and, this practice of mandating NOC/LOC is stifling competition in the market by limiting access of consumers to various pharmaceutical products and controlling supply of drugs in the market by ensuring that only those



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distributors which are favoured by OP-1 to OP-3 are eventually selected by the pharmaceutical companies to do business with them. It is further alleged that pharmaceutical companies being OP-4 to OP-10 are also active participants in the anti-competitive practices carried out by OP-1 to OP-3 since they willingly adhere to the directives of these OPs (Associations) and refuse to appoint fresh distributors until OP-1 to OP-3 give their consent for such appointment, as a result of which supply of drugs to the consumers is restricted. The Informant has also averred that on account of the Commission's orders passed in certain previous cases, the OPs have stopped corresponding in writing with pharmaceutical companies to appoint stockists, which are favoured by OP-1 to OP-3; and the practice continues unabated.

#### **Directions to the Director General (DG)**

6. The Commission heard the Informant and his learned counsel in the preliminary conference held on 13.11.2014.
7. Based on the material available on record and oral submissions made by the Informant, the Commission *prima facie* found merit in the allegations of the Informant. Accordingly, the Commission, *vide* order dated 29.12.2014, passed under Section 26(1) of the Act, directed the Director General (“**DG**”) to cause an investigation into the matter and submit its investigation report (hereinafter, “**the prima facie order**”).
8. During the course of investigation, the DG moved a request dated 15.06.2016 to the Commission for impleading Indore Chemists Association, Indore as an Opposite Party in the present matter. The Commission, on being *prima facie* satisfied of the involvement of Indore Chemists Association (“**ICA**”) in the alleged contravention, *vide* its order dated 05.07.2016, arraigned the said association as OP-11. After completing the investigation, the DG submitted the Investigation Report (“**Main Investigation Report**”) on 30.09.2016.

#### **Observations and Findings of the DG in the Main Investigation Report**

9. During the course of investigation, DG issued probe letters to the Informant, M/s Pharma Agencies, all the OPs and third parties in order to collect information/documents. The



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statements of the Informant and its member (M/s Pharma Agencies), office bearers of the associations and officials of the pharmaceutical companies were recorded to examine the veracity of the allegations levelled by the Informant.

10. DG investigated the conduct of MPCDA (OP-1) and its district associations namely, Bhopal Chemists Association (OP-2), District Gwalior Chemist Association (OP-3) and Indore Chemist Association (OP-11) to determine whether they were mandating the requirement of NOC/LOC to be taken from them prior to appointment of stockists by the pharmaceutical companies.
11. Further, DG also examined the allegations levelled against the pharmaceutical companies arraigned as OP-4 to OP-10 as to whether they refused to supply pharmaceutical products to M/s Pharma Agencies, who is the member of the Informant, for not obtaining NOC/LOC.
12. DG observed in its Main Investigation Report that Clause 28(a) of the Drugs (Price Control) Order, 2013 (hereinafter, “**DPCO**”) creates an obligation on a pharmaceutical company/ distributor to sell drugs/ medicines unless there is a ‘*good and sufficient reason*’ to refuse. The Informant stated that one of its members, namely M/s Pharma Agencies, having valid wholesale license under Drugs and Cosmetic Rules, 1945, had approached various pharmaceutical companies arraigned as OP-4 to OP-10 for supply of their products to it (M/s. Pharma Agencies) and made advance payment along with the indent for the products. It has been alleged that supply of the products was denied to it (M/s. Pharma Agencies) time and again without any cogent reasons and the DDs/cheques submitted by it were returned. Some of the OPs (OP-4, OP-8 and OP-9) redirected it to their local distributor/stockist to purchase the indented products. The Informant alleged that if a wholesaler is asked to buy products from another wholesaler, and not directly from the manufacturer, the wholesaler would not be able to sell the drug to retailer at a competitive price since it would not have sufficient margin while selling the drug. The Informant alleged that refusal to supply the products by the pharmaceutical companies directly to M/s Pharma Agencies was because of insistence on obtaining NOC/LOC from the OPs (Associations) before appointment of stockist by pharmaceutical companies.



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### **OP-2 and OP-3**

13. With respect to Bhopal Chemist Association (OP-2) and District Gwalior Chemist Association (OP-3), the DG could not find any direct evidence of their involvement in the anti-competitive conduct as alleged by the Informant.

### **OP-4**

14. It is relevant to note that an application dated 28.01.2016, was filed by OP-4 *i.e.* Apex Laboratories Pvt. Ltd. while the matter was under investigation by the DG. Through this application, OP-4 sought termination of proceedings *qua* it, as purportedly there was no evidence against it in the information filed before the Commission. Thus, OP-4 prayed for deletion of its name from the array of OPs and recall of the *prima facie* order. The Commission heard OP-4 on the said application on 28.04.2016.
15. The Commission observed that the matter was under investigation by the DG. Pursuant to the investigation by the DG, if OP-4 is not found to have contravened the provisions of the Act, then the matter will be closed against it by the Commission. The Commission found it inappropriate to pre-determine the result of investigation and to recall the order *qua* OP-4 at that stage. Therefore, the Commission, after thoughtful consideration, was of the view that there was no infirmity in the *prima facie* order that warranted recall or any other intervention and accordingly, *vide* order dated 28.06.2016, rejected the said application of OP-4 on account of being without merit.
16. Having been aggrieved by the abovementioned order of the Commission, OP-4 filed a petition bearing WP(C) 6395/2016 & CM No. 26145/2016 before the Hon'ble High Court of Delhi. The Hon'ble High Court of Delhi, *vide* its order dated 25.07.2016, directed as follows:

*“...the investigations are under way and likely to conclude in about 3 months' time. It is clarified that the investigation may go on and even final report made. However, no coercive action be taken against the petitioner without leave of the court.”*



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17. Since, there was no stay on investigation and submission of final report in the matter, the DG investigated the role of OP-4. The DG perused the relevant data of appointment of new stockists in the State of Madhya Pradesh during 2014 and 2015 by OP-4 and found that it had not appointed any new stockist in Gwalior district during that period. The DG found that OP-4 already had four distributors in Gwalior district which had sales lower than the expectation of OP-4 and, thus, there was no scope for appointment of an additional stockist in the said area. Hence, on receipt of DD from M/s Pharma Agencies for delivery of products, the same was returned and the name of the existing stockist at Gwalior were intimated to M/s Pharma Agencies so that it could procure the required product from them. Thus, during investigation, no evidence could be found which could establish the complicity of OP-4 with regard to the imposition of NOC/LOC or any other manner of restriction on supply of the drugs in the market. No case of contravention could, therefore, be made out against OP-4 by the DG.

#### **OP-5**

18. Regarding the role of OP-5 *i.e.* Win Medicare Pvt. Ltd, DG observed that the two letters allegedly sent by M/s Pharma Agencies at the registered office address of OP-5, were actually sent to C&F agent of OP-5 at Bhopal namely, M/s Asha Care. The C&F agent expressed its inability to supply pharmaceutical products to M/s Pharma Agencies on account of having no power/authority to appoint stockist on behalf of OP-5. In its response before the DG, OP-5 also clarified that appointment of stockist was based on various factors such as need of the market on account of geographical growth, increase in doctor population ratio, current demand supply gap to service the retailer *etc.* and the same was subject to completion of its various due diligence procedures *etc.* In support of its claim, OP-5 adduced the sample proposal form for appointment of a stockist. The DG also examined the transcript submitted by the Informant along with the Information in support of the allegation of NOC/LOC practice being followed by OP-9. The said transcript contained conversation of Mr. Virendra Jain, Secretary of the Informant Federation and Mr. Puneet Kumar, Regional Sales Manager (RSM) of OP-5 on 15.03.2014. Despite opportunity being accorded to Mr. Virendra Jain to submit certificate in terms of Section 65B of the Indian Evidence Act, 1872 read with Section 7 of the Information Technology Act, 2005, he failed to do so. Since the purported conversation was admitted by Mr.



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Puneet Kumar, RSM OP-5, the DG examined the conversation on merits to ascertain the real intent and thrust of the conversation and found that the discussion did not indicate that OP-5 demanded NOC/LOC as a precondition for grant of stockistship. In consideration of the totality of facts and in the absence of any evidence to establish the complicity of OP-5, the DG found the allegation against OP-5 devoid of merit.

#### **OP-6**

19. With respect to OP-6 (Fourrts India Ltd), the DG observed that M/s Pharma Agencies had sent the DD drawn in favour of incorrect name of the C&F agent of OP-6. Moreover, the DG was convinced by the contention of the C&F agent of OP-6 that it could only make supply to the stockist whose name appeared in the portal of the concerned company. On examination of documents relating to appointment of new stockists during 2014 and 2015 in Madhya Pradesh by OP-6, it was found that no new stockist was appointed by OP-6 in Gwalior district during that period. In the absence of any evidence, no case of contravention of the provisions of the Act was found against OP-6 by the DG.

#### **OP-7**

20. Regarding OP-7 (Meyer Organics Pvt Ltd.), the DG found that incomplete documents were sent by M/s Pharma Agencies to the incorrect address of OP-7 and a reminder letter was issued by Informant within three days of the original letter, which was not in the realm of normal human conduct but appeared to be made with a view to make out a strong case against the said company. The same was rejected by the C&F agent of OP-7 on the ground that it could supply to only those stockists whose name appeared in the portal of the company. Moreover, scrutiny of the documents relating to appointment of new stockist in Madhya Pradesh during 2013-2014 did not indicate that OP-7 demanded any NOC/LOC from any of the association *i.e.* OP-1 to OP-3, as alleged by the Informant. DG, thus, was of the opinion that no case of contravention was made out against OP-7.

#### **OP-8**

21. Upon receiving the request to supply indented products from M/s Pharma Agencies, OP-8 *i.e.* Cipla Limited, informed M/s Pharma Agencies about its existing authorised stockist in Gwalior from where the products could be procured. The DG found that OP-8



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appointed stockist after conducting proper due diligence and the criteria adopted for appointment included financial status of the applicant and compliance with all applicable laws, rules and regulations *etc.* After due diligence, the company identified/ shortlisted prospective stockists and executed the agreement for appointment of stockist. Upon examination of documents relating to appointment of stockist during 2014 and 2015, the DG could not find any evidence against OP-8 to substantiate the allegations of the Informant.

### **OP-9**

22. In case of OP-9, *i.e.* Eris Lifesciences Pvt Ltd., M/s Pharma Agencies sent requisitions along with DD to the office of consignee sales agent of OP-9 at Indore, who purportedly on behalf of OP-9, requested M/s Pharma Agencies to collect the products from local authorized stockist of OP-9 at Gwalior and returned the said DD. The DG took into account the submissions of OP-9 that its consignee sales agent was reprimanded for unauthorized representation on its behalf in responding to the request of M/s Pharma Agencies. The DG also observed that OP-9 had put the request of M/s Pharma Agencies for becoming a stockist under consideration against future requirements and ultimately, after completion of due diligence, appointed M/s Pharma Agencies as its stockist and commenced supply of products in July, 2015. DG also examined an email dated 01.08.2015, written by Mr. Vinay Bakliwal, President, Indore Chemist Association (OP-11) to Mr. Nitin Purohit, Assistant General Manager of OP-9, which contained an attachment in the form of an application dated 14.07.2015, written by some field staff on behalf of OP-9, seeking approval for appointment of two stockists in Indore. Upon scrutiny of list of stockists appointed by OP-9 in Madhya Pradesh, the DG found that apart from M/s Pharma Agencies, OP-9 had appointed two new stockists in Indore during 2014 and 2015, *i.e.* on 29.07.2015 and 30.07.2015; and the supplies were made to them before the impugned email dated 01.08.2015 sent by President of OP-11 to an official of OP-9. Thus, in the absence of any evidence of discrimination in the appointment of stockists, the DG found the allegation against OP-9 to be unfounded.

### **OP-10**



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23. With regard to OP-10, *i.e.* Mankind Pharma Ltd, along with two letters sent by M/s Pharma Agencies to OP-10 suggesting itself to be eligible for becoming a stockist, the Informant also provided a telephonic transcript of a conversation purportedly held between Mr. Gopal Gupta of M/s Pharma Agencies and Mr. Ghanshyam Das Aggarwal, C& F agent of OP-10 on 15.06.2014. It was alleged in the information that Mr. Ghanshyam Das Aggarwal, C&F agent of OP-10 was insisting Mr. Gopal Gupta of M/s Pharma Agencies to obtain NOC/LOC from OP-1 for being appointed as stockist of OP-10 and getting supply of products. During investigation, the DG found that Mr. Ghanshyam Das Aggarwal denied having such conversation with Mr. Gopal Gupta and clarified that being a C&F agent he has no authority/power to appoint any distributor and that appointment of stockists is the sole prerogative of the company. Mr. Aggarwal further stated that only upon allotment of distributor code by OP-10, its C&F agent could generate a bill against supply of products. While recording the statement of Mr. Gopal Gupta, the DG found that M/s Pharma Agencies was appointed as a distributor for Gwalior by OP-10 on 27.11.2015, without insisting on any NOC/LOC from any association. Thus, no case of contravention was made out against OP-10 by the DG.
24. Thus, based on the responses and documentary evidence furnished by the pharmaceutical companies during investigation, the DG found that the pharmaceutical companies arraigned as OP-4 to OP-10, had not contravened the provisions of the Act, as refusal by them for appointment of M/s Pharma Agencies as stockist was on account of justified/commercial reasons and the same could not be attributed to alleged non-production of NOC/LOC from the associations. Further, the DG did not come across any evidence of alleged practice of NOC/LOC being followed by OP-2 and OP-3. Therefore, no case of contravention could be made out against the following OPs by the DG:
- (i) Bhopal Chemist Association (OP-2)
  - (ii) District Gwalior Chemist Association (OP-3)
  - (iii) Apex Laboratories Private Limited (OP-4)
  - (iv) Win Care Medicare Private Limited (OP-5)
  - (v) Fourrts (India) Laboratories Private Limited (OP-6)
  - (vi) Meyer Organics Private Limited (OP-7)
  - (vii) Cipla Limited (OP-8)



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(viii) Eris Lifesciences Private Limited OP-9)

(ix) Mankind Pharma Limited. (OP-10)

25. On the contrary, as per the DG, these pharmaceutical companies were able to demonstrate, with the help of documentary evidence, that they appointed their stockists after their respective internal evaluations and thus, acted independently of any dictates of OP-1 association and without seeking any NOC/LOC from such association.
26. In the Investigation Report, the DG also observed that member of the Informant Federation *i.e.* Mr. Gopal Gupta of M/s Pharma Agencies used to send indent along with draft/ cheque, without having been appointed as a stockist, despite being aware of procedure for appointment of stockist. Instead of following the due procedure, he indulged in threatening the pharmaceutical companies, issuing reminders within very short gap and sending letters at wrong addresses and not enclosing the DDs while claiming in the covering letters that these have been *etc.* which appeared to be unreasonable. The DG also noted that mere possession of the required documents and sending cheque or DDs would not entitle M/s Pharma Agencies to be appointed as a stockist, unless the concerned pharmaceutical company appoints the said agency as its stockist after due diligence.

#### **OP-1 and OP-11**

27. With regard to the allegation against the MPCDA (OP-1) and Indore Chemist Association (OP-11), the DG relied upon the following evidences to establish in its Main Investigation Report that they were carrying on the anti-competitive practice of requirement of NOC/LOC prior to appointment of stockists in the State of Madhya Pradesh:
- i. Email dated 04.11.2014, sent by Mr. R. K. Vachher, Sales Manager, OP-12 *i.e.* Himalaya to Mr. Goutam Chand Dhing, President, MPCDA/OP-1, which contained six attachments namely,
    - a) Two separate letters dated 07.10.2014, issued by Manager-Distribution, Himalaya (OP-12) to Jabalpur Chemists and Druggist Association (OP-15) for grant of its approval for appointment of M/s Bhateja Agencies, Jabalpur and M/s Devi Medical Agencies, as stockists;



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- b) A letter dated 13.10.2014, issued by Manager-Distribution, Himalaya (OP-12) to OP-15 for grant of its approval for appointment of M/s Drug House, Jabalpur as stockist; and
- c) Three separate letters issued by Manager-Distribution, Himalaya to M/s Bhateja Agencies, Jabalpur, M/s Devi Medical Agencies and M/s Drug House, Jabalpur, to obtain necessary clearances from Chemists and Druggists Association, Jabalpur.

Based on the points (a) and (b) above, DG arrived at the conclusion that OP-1 (MPCDA) had contravened the provisions of Section 3(3)(b) and Section 3(1) of the Act.

- ii. Email dated 24.09.2014 sent by Mr. Goutam Chand Dhing, President OP-1 (MPCDA) to Mr. Vijay Basarkar, Regional Sales Manager (RSM) of OP-13 *i.e.* Torrent, enclosing therewith a list containing particulars of twenty four stockists stationed at different places in the State of Madhya Pradesh, out of which remark 'yes' was marked against nineteen stockists and 'pending' against the name of remaining five stockists. It was further mentioned in the said email "*by phone he also cleared one more stockist M/S Khandelwal Chemist Mhow he refused to do the mail once again saying that if anybody wants to confirm about this stockist can call him at any time*". The said email was forwarded by Mr. Basarkar to various persons in Torrent, *via* email, titled "*List MPCDA President cleared some more stockists*" on the same day *i.e.* 24.09.2014. The investigation also relied upon copy of other emails dated 06.08.2015 and 26.08.2015 sent by Mr. Dhing to Mr. Vijay Basarkar on the subject MPCDA recommending two more stockists *viz.* M/s Deenbandhu Ausdhalaya and M/s Mahamaya Medicose in the former mail, and M/s Lalwani Drug, Chindwada and Mahamaya Medicose, Bhind in the latter mail. Mr. Dhing deposed that these emails were exchanged in the context of purchase of certain division of Elder Pharmaceuticals Limited (hereinafter, '**Elder Pharma or EPL**') by Torrent (OP-13) as existing distributors of Elder Pharma wanted to become the stockists of Torrent also. However, Mr. Dhing failed to produce any documentary evidence to establish or support his contention.



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- iii. Email dated 23.01.2014, sent by Mr. Goutam Chand Dhing to Mr. Sanjay Dixit, General Manager (GM) of OP-14 *i.e.* Intas (forwarding an email dated 15.01.2014) which highlighted a number of issues, *ad seriatim*:
- a) Appointment of five stockists with the consent of Indore Chemist Association (OP-11),
  - b) Allowing its C & F agent to work as stockist under the name of M/s Vijay Distributors without consent of OP-11 who was offering heavy discounts to certain parties,
  - c) Directly billing the parties such as doctors, institutions and others without consent of OP-11,
  - d) Raising concerns about the M/s Vijay Distributors ignoring OP-11; and
  - e) Requesting to instruct the company to stop supply to parties except five authorised stockists and discontinue M/s Vijay Distributors.

A response over email was given by Mr. Sanjay Dixit of OP-14 to Mr. Dhing of OP-1 on 18.02.2014, assuring that its C&F agent will meet the President of OP-11, to discuss the points and resolve the issues. M/s Vijay Traders, C&F agent of OP-14, *via* email dated 25.02.2014, forwarded to Mr. Dixit, a letter addressed to the President, OP-11 containing list of the stockists of OP-14. Mr. Dixit forwarded the same to Mr. Anil Nair, Assistant Manager-Logistics and Distribution (AM-L&D) of OP-14 *vide* email dated 01.03.2014. Mr. Nair, *vide* email dated 04.03.2014, provided point-wise reply to Mr. Dhing, President, OP-1. Upon confronting the same to Mr. Dhing while recording his statement, Mr. Dhing stated that OP-14 used to supply products directly to in-house retail shops of various hospitals on a heavy discounted price but used to charge higher rates from its member distributors, due to which dispute arose and he had to intervene. According to DG, Mr. Vinay Bakliwal, President, OP-11, feigned ignorance of the facts contained in the email dated 25.02.2014. However, the C&F agent of OP-14 stated that all the distributors appointed so far by OP-14 had been approved by OP-11. Therefore, based on self-speaking contents of the aforementioned emails, statements of Mr. Dhing (President of OP-1), Mr. Bakliwal (President of OP-11), Mr. Nirmal Jain, (Secretary of OP-11), the officials and C&F agent of OP-14, the



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DG concluded that OP-1 and OP-11 were consistently practicing anti-competitive activities which include grant of approval before appointment of stockists, imposing restrictions on the rates of the products and regulating supply of the goods.

- iv. In addition to above-mentioned three emails, the investigation also relied upon an email dated 01.08.2015, from Mr. Bakliwal, President of OP-11, to Mr. Nitin Purohit, Assistant General Manager ('AGM')-Distribution of OP-9, wherein Mr. Bakliwal complained about the manner of seeking approval for appointment of additional stockist by an official of OP-9, *i.e.* on a plain paper and without disclosing name *etc.* Mr. Bakliwal, stated in the said email that "*please let us know how we can entertain this illegitimate application. We request you to sit together for amicable solution.*" During deposition, Mr. Purohit had acknowledged the receipt of the said email and attached letter. He clarified that some of their field staff might have given the same, however, the decision of appointment of stockists was taken by the company as per its policy, without being influenced by OP-11. This was corroborated by the evidence obtained by the DG (discussed above in para 22 while discussing the role of OP-9). During the course of their statements, both Mr. Bakliwal (President of OP-11) and Mr. Nirmal Jain (General Secretary of OP-11) admitted that no resolution was passed by the association (OP-11) which allowed it or its office bearers to communicate with the pharmaceutical companies on issues relating to the appointment of stockists. The DG also found the said email in the email dump of Mr. Dhing and concluded that the said activities of OP-11 were well within the knowledge of OP-1 despite the fact that OP-1 had issued a circular dated 03.05.2013, to its district associations directing them to cease and desist from indulging in anti-competitive activities such as NOC/LOC, boycott *etc.*
- v. The Main Investigation Report submitted by the DG also relied upon letter dated 12.09.2011 by OP-11 to Paviour Pharmaceuticals Ltd. (hereinafter '**Paviour Pharma**') New Delhi, wherein, OP-11 complained about the appointment of M/s Vaccine House, Indore as stockist without '*fulfilling the norms of this Association*'



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and instructed for withdrawal of stockistship of M/s Vaccine House. With regard to the said letter, Mr. Bakliwal, President, OP-11 submitted that *“for settlement of the claim, the above letter was issued in the interest of the members, the letter was not meant for any sort of NOC”*. However, he could not adduce any evidence to support his aforesaid statement.

- vi. In another letter dated 10.05.2014, by OP-11 to Aditya Medisales Ltd., Indore (hereinafter ‘**Aditya Medisales**’), OP-11 wrote *“This is to intimate that Indore Chemist Association has not given any LOC for the merger of Milmet and Solares division. Hence please do not make any supplies of Sun Pharma other divisions to Milmet and Solares stockists.”* Aditya Medisales, in its response to the DG, stated that OP-11 was active in grant of LOC, which was a mandatory requirement wherever any organization changed its business. According to the DG, Mr. Vinay Bakliwal gave evasive replies upon being confronted with the said reply of Aditya Medisales Ltd.
  - vii. The Main Investigation Report also mentions the communication between OP-1 and Alembic Pharmaceuticals Ltd. (hereinafter, ‘**Alembic**’) through email dated 23.04.2015, which was found in the email account of Mr. Goutam Chand Dhing, President OP-1. In the said email, Mr. Dhing asked Mr. Masud Mahmood Shaikh of Alembic to start supply of Dabur products to M/s Vikas Medical Agencies in Jabalpur. During the course of his deposition before the DG, Mr. Shaikh stated that Alembic bought some products of Dabur some years back and since Mr. Dhing was known to him, he might have sent the request. Mr. Dhing stated that as M/s Vikas Medical Agency was the stockist of Alembic products, he had sent email to Mr. Shaikh to resume supplies of Dabur products also. The DG found the conduct of Mr. Dhing being selective as OP-1 was supposed to look after the interest of all the members on matters of importance as opposed to just a few.
28. In view of the foregoing, the DG concluded that despite there being a circular dated 03.05.2013 in place against the practice of seeking and providing NOC/LOC, OP-1 was constantly violating it and continued to impose the practice of issuance of NOC/LOC prior



to appointment of new stockists/distributors during 2014 and 2015. The DG also found OP-11 to be acting in connivance and with knowledge and support of OP-1. According to the DG, the act of indulging in the said practices by OP-1 and OP-11 amounted to limiting and controlling supplies of pharma products in the State of Madhya Pradesh, thereby contravening provisions of Section 3(3)(b) read with Section 3(1) of the Act.

29. The investigation further found the involvement of the following office bearers of OP-1 and OP-11 to be complicit in the anti-competitive practices and to be liable under Section 48 of the Act:

S. No	Name	Designation and Organization
1	Mr. Goutam Chand Dhing	President, MPCDA (OP-1)
2	Mr. Nirmal Jain	Secretary, MPCDA (OP-11)
3	Mr. Vinay Bakliwal	President, Indore Chemist Association (OP-11)

30. The Commission considered the Main Investigation Report in the meeting held on 07.12.2016, and noted that the Main Investigation Report contained certain communications (in the form of letters, emails *etc.*) between OP-1/OP-11 and some pharmaceutical companies *viz.* Himalaya, Torrent and Intas, who were not arraigned as OPs in the Information filed. The Commission observed that the evidence collected by the DG with regard to the said pharmaceutical companies, was *prima facie*, indicative of their involvement in the impugned anti-competitive practices. Therefore, Himalaya, Torrent and Intas were impleaded as OP-12, OP-13 and OP-14, respectively. The Commission, therefore, directed the DG, under Section 26(8) of the Act, to carry out further investigation for ascertaining the role of the pharmaceutical companies, including OP-12, OP-13 and OP-14, in perpetrating the anti-competitive conduct of seeking NOC/LOC mandatorily prior to appointment of stockists.
31. Pursuant to the directions for further enquiry into the matter, the DG issued probe letters to OP-1, OP-12, OP-13 and OP-14 and examined the office bearers of OP-1 and officials of OP-12, OP-13 and OP-14 on oath. The DG submitted the Supplementary Investigation Report in the matter on 27.11.2017.



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### **OP-12, OP-13 and OP-14**

32. In furtherance of the findings of the Main Investigation Report, the DG found that the statement of Mr. Dhing, President OP-1, did not address the specific allegations which were duly corroborated by evidence. The contentions of OP-12 of having a Standard Operating Procedure (hereinafter, 'SOP') in place for appointment of a new stockist and claiming the letters in question to be *hygiene check* letters were found baseless by the DG when OP-12 was unable to produce such letters in respect of other seventy seven stockist appointed by it in the State of Madhya Pradesh. The DG found OP-12 to have forced the applicant stockist to procure clearance from Jabalpur Chemist and Druggist Association, a district affiliate of OP-1. Thus, the DG found that OP-12 was acting in concert with OP-1 and its district association, in creating entry barriers in appointment of new stockist which was anti-competitive and in clear violation of Section 3(1) of the Act.
33. With respect to OP-13, in addition to the emails referred in the Main Investigation Report, the DG found four more sets of emails:
- a) Set of seven emails from 27.08.2014 to 08.09.2014 between Mr. Dhing (OP-1) and officials of OP-13 to limit the supplies to only those stockists of Elder Pharma who had an average monthly sales of Rs 50,000/- and above,
  - b) Two emails dated 24.09.2014 from Mr. Dhing, President of OP-1, to officials of OP-13 intimating clearance of some more stockists,
  - c) Set of eight emails exchanged during 27.09.2014 to 26.08.2015 from Mr. Dhing, President of OP-1, to officials of OP-13 with instructions to open new stockists in different districts of Madhya Pradesh for billing, and
  - d) Set of four emails dated 13.01.2015, 02.03.2015, 17.04.2015 and 15.06.2015 sent by Mr. Rajeev Singhal, General Secretary, OP-1 to Mr. K.C. Mathew, Manager, Supply Chain Management (SCM), OP-13, with instructions to initiate/resume supplies to various stockists located in different districts of Madhya Pradesh.

In the absence of any cogent justification by OP-13 and OP-1, the DG inferred that OP-13 was actively engaged in creating entry barriers by its several concerted acts with complicity of OP-1 in contravention of the provisions of Section 3(1) of the Act.



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34. With regard to role of OP-14, apart from the email dated 23.01.2014, obtained during the main investigation, the DG also found an email dated 25.06.2015, upon scrutiny of documents relating to appointment of new stockists by OP-14 in Madhya Pradesh, during 2014 to 2016. This email dated 25.06.2015 was sent by Mr. Hitesh Paida, Sales Manager, Wish Division, OP-14 to senior officials. The DG found that the impugned email with subject “PP Enterprises” contained a request for activation of M/s P.P. Enterprises, Indore with remarks “Mr. Goutam Chand Dhing president of Indore association has spoke to Nair Sir for NOC.” The DG noted from the records that stockist information form of M/s P.P. Enterprises was approved by the Division head on 29.05.2015, but it was appointed as stockist only on 30.06.2015 *i.e.* after receiving the aforesaid email dated 25.06.2015 from Mr. Hitesh Paida. Based on the evidence gathered and statements of the concerned persons, the DG concluded that OP-14 acted in concert with OP-1 and its district association *i.e.* OP-11 in creating entry barriers in appointment of stockists by requiring clearances, in violation of Section 3(1) of the Act.
35. DG also observed that OP-1 and OP-11 were aware of the order dated 19.02.2013, passed by the Commission in *M/s Santuka Associates Pvt. Limited v. All India Organisation of Chemists and Druggists (AIOCD) & Others* (Case No. 20 of 2011), (hereinafter, “**AIOCD Matter**”), and OP-1 has in fact issued circular dated 03.05.2013 endorsing the circular dated 18.04.2013 of AIOCD to its district chemists and druggist associations.
36. DG further analysed the conduct of the associations and pharmaceutical companies in the light of the factors enumerated under Section 19(3) of the Act to assess whether there was any appreciable adverse effect on competition (AAEC). The DG noted that the understanding between the associations (OP-1 and OP-11) and the pharmaceutical companies (OP-12, OP-13 and OP-14) had restricted appointment of stockists and had consequently led to limiting and controlling the supply of drugs in the State of Madhya Pradesh. According to DG, even though it should have been the prerogative of pharmaceutical companies to appoint their authorised stockists, the same was being driven by OP-1 and OP-11 (*i.e.* chemists and druggists’ associations) who gave NOC/LOC, consent letters, thereby instructing pharmaceutical companies, as to whom the said companies may appoint as their authorised stockists. DG further observed that as per



Section 3(3) and Section 3(1) read with Section 19(3) of the Act, horizontal agreements carried presumption of AAEC, and as such no further evidence needed to be adduced to establish AAEC.

37. Thus, apart from finding MPCDA (OP-1) and ICA (OP-11) in contravention of the provisions of Section 3(3)(b) read with Section 3(1), the DG found Himalaya (OP-12), Torrent (OP-13) and Intas (OP-14) acting in violation of Section 3(1) of the Act.
38. The DG also identified the following individuals/ officer bearers/ officials of the OPs to be liable under Section 48 of the Act:

S. No	Name	Designation and Organization
1	Mr. Goutam Chand Dhing	President, MPCDA (OP-1)
2	Mr. Rajeev Singhal	General Secretary, MPCDA (OP-1)
3	Mr. Vinay Bakliwal	President, ICA (OP-11)
4	Mr. Nirmal Jain	General Secretary, ICA (OP-11)
5	Mr. Philipe Haydon	Chief Executive Officer (CEO), Himalaya (OP-12)
6	Mr. R.K. Vachher	Sales Manager, Himalaya (OP-12)
7	Ms Sagaya Mary	Manager Distribution, Himalaya (OP-12)
8	Mr. Dhruv Gulati	CEO/ Executive Director, Torrent (OP-13)
9	Mr. Vijay Basarkar	Regional Sales Manager (RSM), Torrent (OP-13)
10	Mr. Debashish Bhattacharya	RSM (resigned at present) Torrent (OP-13)
11	Mr. K. C. Mathew	Manager, Supply Chain Management, Torrent (OP-13)
12	Mr. Nimish Chudgar	Managing Director & CEO, Intas (OP-14)
13	Mr. Sanjay Dixit	General Manager- Logistics and Distribution, Intas (OP-14)
14	Mr. Anil Nair	Assistant Manager-Logistics and Distribution, Intas (OP-14)
15	Mr. Hitesh Paida	Sales Manager, Wish Division, Intas (OP-14)



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### OP-15

39. The Commission considered the Supplementary Investigation Report in its meeting held on 25.01.2018. It was observed that said report also brought out the role of Jabalpur Chemist and Druggist Association in the impugned anti-competitive conduct. Accordingly, the Commission decided to implead Jabalpur Chemist and Druggist Association as OP-15. Pursuant to the directions of the Commission, *vide* order dated 25.01.2018, Main Investigation Report and the Supplementary Investigation Report (“**Investigation Reports**”) were forwarded to all the opposite parties and their respective office bearers to file their submissions/ objections by 16.03.2018. The hearing in the matter was scheduled on 24.04.2018.
40. OP-1 and OP-11, *vide* applications dated 13.03.2018, requested for additional time for filing their submissions/objections to the Investigation Reports, which was acceded to by the Commission in its meeting held on 28.03.2018. Accordingly, the Commission directed the parties to file their suggestions/objections to the Investigation Reports, by 13.04.2018, and appear for an oral hearing on 09.05.2018 and 10.05.2018, with directions to share copies of the suggestions/objections in advance.
41. OP-1 and its office bearers moved an application dated 02.05.2018, seeking cross examination of: (a) Mr. Virendra Jain, authorised person and Secretary of Informant Federation; (b) Mr. Gopal Gupta, Proprietor of M/s Pharma Agencies (member of the Informant Federation); (c) Mr. R.K. Vachher, National Sales Manager, Himalaya (OP-12) and (d) Mr. Vishnu Singhal, Proprietor of Singhal Trading Corporation. A similar application dated 02.05.2018, was also filed by OP-11 and its office bearers, for cross examination of: (a) Mr. Sanjay Dixit, GM, Intas (OP-14), and (b) Mr. Santosh Jhavar, Proprietor of M/s Vijay Traders (C&F Agent of OP-14).
42. In the meeting held on 09.05.2018, OP-1 and OP-11 pressed on their requests for cross examination. The Commission heard the parties at length and accordingly, allowed the cross examination of Mr. Gopal Gupta and Mr. R.K. Vachher, to OP-1 and cross examination of Mr. Santosh Jhavar to OP-11, while rejecting the request for cross-examination of Mr. Virendra Jain, Mr. Vishnu Singhal and Mr. Sanjay Dixit. The cross-



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examination, as allowed by the Commission, was duly conducted on 13.06.2018 in the presence of a designated officer of the Commission.

43. The Commission considered the record of cross examination in its meeting held on 19.06.2018 and decided to forward the same to the parties. Accordingly, the Commission decided to hear the parties on 28.08.2018 which was rescheduled to 14.09.2018 and then to 04.10.2018 on account of administrative exigencies.
44. In the meanwhile, the counsel of OP-1 and its office bearers moved an application dated 26.09.2018 seeking a review and recall of the order dated 09.05.2018 passed by the Commission wherein, the Commission had disallowed the cross examination of Mr. Virendra Jain, Secretary of the Informant, while allowing the cross examination of two witnesses. On 04.10.2018, the Commission, upon hearing the learned counsel of OP-1 and considering the grounds urged by him, allowed the cross examination of Mr. Virendra Jain. The said cross examination was duly conducted on 29.10.2018 in presence of the designated officer of the Commission. The Commission considered the record of cross examination in meeting held on 06.11.2018 and directed to forward the same to the parties.
45. On account of adjournments sought by the parties, the Commission adjourned hearing in the matter from time to time. Lastly, on 03.01.2019, the Commission adjourned the hearing in the matter to 29.01.2019.
46. On 29.01.2019 and 30.01.2019, the parties appeared before the Commission through their counsel and argued in the matter at length. They were also given an opportunity to file their respective synopsis of submissions within seven days. The Commission, thus, having heard the parties decided to pass a final order in the matter.



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**Reply/Objections to the Investigation Reports filed by the Parties and their oral submissions**

***MPCDA (OP-1) and its President Mr. Goutam Chand Dhing***

47. OP-1 filed its written objections to the Investigation Reports on 10.08.2018, after seeking extension of time. OP-1 also cross examined Mr. Gopal Gupta of M/s Pharma Agencies and Mr. R.K. Vachher of OP-12 on 13.06.2018 and subsequently, Mr. Virendra Jain, Secretary of Informant Federation on 29.10.2018. Pursuant to oral hearing, OP-1 and its President, filed synopsis of their submissions dated 06.02.2019 and reiterated their earlier submissions. Through written and oral submissions, they have contended as under:
- i. OP-1 was falsely arrayed as OP by the Informant and all the allegations against it were baseless and thus, were vehemently denied.
  - ii. OP-1 had no role to play between the distributors/stockists and the pharmaceutical companies. The allegations of the Informant that pharmaceutical companies were imposing conditions of NOC/LOC on the diktats of OP-1 should not be relied upon and OP-1 was dragged into the matter by Mr. Virendra Jain, Secretary of the Informant to satisfy his grudges on account of losing in elections at Bhopal Chemist Association (OP-2), which is a district affiliate of OP-1.
  - iii. In the present case, OP-1 and OP-11 were not engaged in similar trade of goods or provision of any services in which the pharmaceutical companies are engaged and, thus, there was no question of existence of any agreement within the meaning of Section 3(3)(b) of the Act. The DG ignored the observations of the erstwhile Hon'ble Competition Appellate Tribunal (hereinafter, "COMPAT") in the matter titled *M/s. Alkem Labs Ltd. v. CCI and Ors* and the Commission's order in *Neeraj Malhotra v. Deutsche Post Bank*. Reference was also made to *Suo Moto Case No. 01/2010 (In Re: Sugar mills)*, to emphasise that in order to prove infringement of Section 3 of the Act, there must be conclusive proof of meeting of minds and that the parties must have decided on concerted course of action which must be implemented.



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- iv. DG failed to establish that the allegation of seeking NOC/LOC by the pharmaceutical companies for appointment of stockist were on account of diktats of OP-1 and even otherwise, the same could not be considered as an agreement within the meaning of Section 2 (b) of the Act since an agreement requires voluntary occurrence *i.e.* free will. There was no evidence to suggest any agreement between OP-1 and/or its affiliate OP-11 and the pharmaceutical companies within the meaning of Section 3(1) of the Act, which is a pre-requisite to hold the OPs liable under the provisions of the Act.
- v. *Prima facie* observations of the Commission contained in the order dated 29.12.2014 were based upon false and incorrect evidence produced by the Informant. Cross-examination of Mr. Gopal Gupta on 13.06.2018, brought out the fact that he did not place on record any documentary proof to establish that NOC/LOC was sought by OP-1 or its affiliated district association in the State of Madhya Pradesh. Further, regarding the compact disk (CD) filed along with the information, allegedly containing recording of telephonic conversation between Mr. Ghanshyam Das Agarwal and Mr. Gopal Gupta, Mr. Gupta was unable to explain the whereabouts of original recording and was unsure of who transferred the said recording into CD. Furthermore, it was admitted by him that he was found to be in illegal possession of Phensedyl Syrup and was sent to jail. It was also brought to notice from his cross-examination that he was not comfortable with English language while recording of statement by the DG. Since, he could not provide any documentary evidence of obtaining NOC/LOC, it can be inferred that he had not taken any NOC/LOC to become stockist.
- vi. The authenticity of the CD submitted by Mr. Virendra Jain, Secretary of the Informant Federation containing telephonic transcript purportedly held between him and with Mr. Puneet Kumar (official of OP-5) could not be established and thus, could not have been relied upon by the investigation. Moreover, during cross-examination, he refused to answer the question whether he obtained any NOC/LOC from OP-1 or its affiliates for being appointed as stockist (as he held stockistships of 25 companies as on date). He also stated that he became aware of



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the illegal activities of Mr. Gopal Gupta only after the receipt of record of cross-examination.

- vii. OP-1 also submitted that the DG failed to consider contents and directions given by Expert Committee under chairmanship of Dr. R.A. Mashelkar (hereinafter, “**Mashelkar Committee**”), wherein, Mashelkar Committee recommended various actions to be taken by pharma traders’ associations such as:
- a) curb the problems of spurious /substandard drugs in the country,
  - b) identifying the persons directly or indirectly involved in abetting distribution of spurious drugs,
  - c) to prepare checklist for guidance of members and widely publicise the same for information of all members, and
  - d) every chemist/pharmacist to act as watchdog to prevent entry of any spurious/doubtful quality drugs from unauthorized sources or without proper bill.
- viii. OP-1 further stated that the DG had cherry picked the statements of witnesses to suit its findings and had not provided complete detailed versions of replies and submissions of the Informant or OPs. The statements of officials of various pharmaceutical companies as well as the office bearers of the OP-1 and OP-11 made it clear that:
- a) the appointment of stockist/distributor was made by the pharmaceutical companies based on their own assessment of various financial and commercial parameters, such as need of the market on account of geographical growth, population growth, increase of number of doctor-population ratio, current distribution gaps to service retailers *etc.*,
  - b) a stockist is appointed after completion of due diligence procedure by a particular pharmaceutical company, and
  - c) appointment of stockists is an independent process of the company without interference by the Chemists and Druggists Associations (“**CDAs**”).



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- ix. With respect to the email communication dated 04.11.2014, between President, OP-1 and official of OP-12, OP-1 averred that it was neither the receiver nor the sender of the email but still the DG arrived at a conclusion that OP-1 violated the Act. OP-1 further averred that the DG failed to note that the statements and explanations given by President of OP-1 fully corroborates the explanations given by Mr. R. K. Vachher of OP-12. Submissions of OP-12 to the Investigation Reports detailed the purpose of impugned email and the fact that appointment of aforementioned stockists was done without intervention of OP-1. Reliance in this regard was also placed by OP-1 on submissions filed by Mr. Vachher and Ms. Sagaya Mary, being concerned officials of OP-12. Further, the President of OP-1 mentioned before the DG that whenever any dispute arose between the stockists, OP-1 used to inform the pharmaceutical companies and which is duly corroborated by the statement of Mr. Vachher and, thus, there arose no instance of any contravention on part of OP-1. Moreover, during cross-examination, Mr. R. K. Vachher, Sales Manager of OP-12, mentioned that appointment of stockist was based on individual choice of a company and CDAs had no role to play in the same. He reiterated that OP-1 and its local associations *i.e.* CDAs, played a significant role in resolving disputes. The same was corroborated by the statement of Mr. Goutam Chand Dhing, President, OP-1, but ignored by the DG.
- x. With respect to the communication between President, OP-1 and OP-13, OP-1 stated that the DG failed to appreciate the context in which the interaction between OP-1 and OP-13 took place. The said emails were exchanged between OP-1 and OP-13 because some dispute arose between the existing stockists of Elder Pharma wanting to become the stockist of OP-13 as a result of acquisition of certain products/divisions of Elder Pharma by OP-13 in June 2014. The matter reached the consideration of President of OP-1. Thereafter, on the suggestion of OP-1, OP-13 engaged more stockists from the list of Elder Pharma. Such list was merely a suggestion by the President of OP-1 and there was no obligation on OP-13 to appoint stockists suggested by OP-1 and the DG had not quoted certain other specific responses given by Mr. Basarkar, of OP-13, wherein, he stated that



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NOC/LOC was not mandatory and only sometimes OP-1 suggested names of proposed distributors.

- xi. With respect to the communication between President of OP-1 and officials of OP-14, OP-1 stated that the DG had relied upon certain emails and correspondences between them and concluded that the email established that OP-1 had indulged in anti-competitive practices. However, during deposition, President of OP-1 explained that it had come to notice that OP-14 used to supply pharmaceutical products directly to the in-house retail shops of various hospitals at a discounted price, however, for the same products, higher rates were charged from other distributors. As a result, some issue arose and President of OP-1 wrote an email dated 23.01.2014, to sort out the issues. The DG had not accepted this explanation on the ground that he could not adduce any documentary evidence in support of his contention. Along with the objections to the Investigation Reports dated 10.08.2018, OP-1 also submitted some invoices, as a proof to reflect varying discounts being offered by M/s Vijay Distributors to different purchasers.
- xii. OP-1 further submitted that just because President of OP-1 was marked as a recipient in the email dated 01.08.2015, sent by the President of OP-11 to official of OP-9 (Eris Lifesciences), the DG concluded that the matter was known to the President of OP-1. The inference drawn by the DG that there existed a continuing practice of grant of approval by OP-1 or its district association. This was not correct as he was neither the sender nor the receiver of the said email.
- xiii. With respect to communication between OP-1 and Alembic, OP-1 stated that an email dated 23.04.2015 was relied upon by the DG which was explained by the President of OP-1 by stating that since Alembic had purchased the pharmaceutical division of Dabur and as Vikas Medical Agency was the stockist of Alembic, the email was sent to Mr. Masood Shaikh of Alembic for supply of Dabur products to Vikas Medical Agency. This stood corroborated with the statement of Mr. Shaikh.



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- xiv. Some persons who deposed before the DG were not well versed in English language. They were interrogated in Hindi language but their statements were recorded in English language and they were made to sign those statements. This was in gross violation of law as the DG ought to have got the statements signed in vernacular language and could have used a true typed translated copy of the same in English language for the proceedings.
- xv. No new facts or evidences had emerged against OP-1 and its office bearers during re-examination of witnesses and recording of statements at the time of supplementary investigation undertaken by the DG.
- xvi. The DG failed to prove any AAEC in the market of provisions of medicines. The DG also failed to establish that there was any restriction on the quantity of stock that could be supplied by a manufacturer to existing/already appointed stockist. Thus, there was no evidence to prove that on account of non-appointment of additional stockist due to non-issue of NOC/LOC or otherwise, any retailer or customer was unable to get supply of medicines. Moreover, NOC/LOC acted more like a benchmark to ensure that adequate quantity of drugs were available in the market and quality thereof was not compromised.
- xvii. With respect to identification of office bearers liable under Section 48 of the Act, OP-1 stated that liability could only be fixed on the officer bearers after the Commission passed its final order holding a party in breach of the Act. Section 48(1) of the Act is applicable if the person fails to prove that the contravention was committed without his knowledge or that he exercised all due diligence to prevent commission of such contravention. President of OP-1 had issued various directions to district associations and its office bearers from time to time to refrain from any activity that was anti-competitive and he could not be proceeded against only because of his designation or by virtue of his position in OP-1.



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**Mr. Rajeev Singhal, General Secretary of OP-1/ MPCDA**

48. Mr. Rajeev Singhal filed his written objections to the Investigation Reports on 10.08.2018, after seeking extension of time. The submissions of Mr. Singhal are on similar lines as that of OP-1 and Mr. Dhing (President of OP-1). Pursuant to the oral hearing before the Commission, Mr. Singhal, filed synopsis of his submissions dated 06.02.2019. While disagreeing with the findings of the DG, he contended that:

- i) The DG has drawn illogical conclusions and the findings which has resulted from cherry-picking of facts/information/documents.
- ii) The DG failed to appreciate that OP-1's conduct is in conformity with the directions given by Mashelkar committee and the DG has mistakenly found it to be limiting and controlling the supplies and, therefore, contravening the provisions of the Act.
- iii) The Main Investigation Report has not recorded any finding/conclusion against him, however, under the Supplementary Investigation Report, the investigation has relied upon certain email correspondences of Mr. Singhal with OP-13 and statements of officials of OP-13, to hold him guilty under the Act. The DG ignored the answers given by Mr. Debasis Bhattacharya of OP-13 that OP-13 never faced any problem with OP-1. However, to settle dispute at local level, the matter was discussed with office bearers of OP-1 and the meeting was in the interest of smooth business operations of OP-13.
- iv) The DG ignored answers given by Mr. Vijay Basarkar of OP-13 which mentioned that OP-1 had no role in stockist appointment and the earlier practice of obtaining NOC/LOC was not mandatory anymore. As there was some dispute with existing stockists of Elder Pharma, the matter reached President of OP-1 who suggested certain names of stockists. For instance, the email dated 28.08.2015 sent by Mr. Singhal to official of OP-13, requesting to open Lalvani Drug, Chindwara and Mahamaya Medicos, Bhind as stockist, was a request to continue two stockists of Elder Pharma and not otherwise.



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- v) The DG ignored answers given by Mr. K.C. Mathew of OP-13, wherein, Mr. Mathew stated that he never approached OP-1 for appointment of stockist. However, he used to receive requests/problems from the trade body (OP-1). Mr. Mathew clarified that the objective of series of emails forwarded by Mr. Singhal to him was in connection with appointment/supply of products of OP-13 after acquiring two divisions of Elder Pharma.
- vi) The statements of Mr. Rajeev Singhal (General Secretary of OP-1) and Mr. Goutam Chand Dhing (President of OP-1) fully corroborate with those of officials of OP-13. Moreover, OP-13 provided detailed explanations with background and reasons for emails exchanged which establish that OP-1 and its office bearers were not intervening in business operations of the company (OP-13) and rather were helping the company for resolving disputes with certain stockists.
- vii) Mr. Singhal contended that liability can only be fastened after the Commission passes final order holding a party in breach of the Act. Any proceeding against individual office bearers of OP-1 until finding of contravention against OP-1 is unsustainable in law. For the same, reliance was placed on separate orders dated 10.05.2016 passed by the Hon'ble Appellate Tribunal's in *Shib Sankar Nag Sarkar v. Competition Commission of India* (Appeal No. 34/2014) and *A.N. Mohana Kurup and others v. Competition Commission of India and others.* (Appeal No. 05/2016).

#### ***OP-2 to OP-8***

49. OP-2 to OP-8 have not filed any reply/submissions/objections to Investigation Reports or to submissions of OPs. It is relevant to mention that there were no findings of contravention against them in the Investigation Reports.

#### ***Eris Lifesciences/OP-9***

50. OP-9 filed its submissions to the Investigation Reports on 14.03.2018. OP-9 was in agreement with the observations of the DG that its process of decision making for appointment of stockist was driven by business and economic consideration.



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***Mankind Pharmaceuticals/OP-10***

51. OP-10 filed its submissions to the Investigation Reports on 15.03.2018. OP-10 agreed with the findings of the DG and reiterated that it had not insisted on procurement of NOC/LOC from concerned associations for appointment of stockists.

***Indore Chemist Association/OP-11, its President Mr. Vinay Bakliwal and General Secretary Mr. Nirmal Jain***

52. OP-11 and its office bearers filed their submissions/objections to the Investigation Reports on 10.08.2018. Thereafter, pursuant to the oral hearing before the Commission, OP-11 and its office bearers filed the synopsis of submissions dated 06.02.2019. OP-11 reiterated the submissions of OP-1 with respect to Mashelkar Committee Report, non-applicability of Section 3(3)(b) of the Act, non-existence of agreement within the meaning of Section 2(b) of the Act and non-existence of *prima facie* case based on the information filed by the Informant. Apart from these, OP-11 submitted that:

- i. With respect to the communication dated 01.08.2015 between Mr. Vinay Bakliwal, President of OP-11 and Mr. Nitin Purohit, AGM–Distribution of OP-9, the DG concluded that the content of the said email establishes rampant practice of issuing NOC/LOC before appointment of new stockist in the State of Madhya Pradesh by OP-1 and its district associations. However, the DG did not consider statements and explanations given by Mr. Purohit of OP-9, in which he clarified that OP-11 or any other chemist association has no role in its process of appointment of stockist. OP-11 also relied upon objections to the investigation report dated 14.03.2018 filed by OP-9, wherein, OP-9 has stated that OP-1 and OP-11 had no role to play in the appointment of stockist or supply of drugs made by OP-9. Therefore, all allegations in this respect deserve to be dismissed by the Commission for lack of merit.
- ii. With respect to letter dated 12.09.2011 of OP-11 addressed to Paviour Pharma, the DG failed to note that the said letter was issued in 2011 *i.e.* much prior to the cause of action in the present matter. The date of the said letter is relevant as it is prior to the order dated 19.02.2013, passed by the Commission in the



AIOCD Matter, directing the association to curb the practice of NOC/LOC. With respect to another letter dated 10.05.2014, sent by OP-11 to Aditya Medisales Ltd., OP-11 contended that the DG solely relied on the contents of the letter and did not examine any witness from the concerned pharmaceutical company or Aditya Medisales. Though during deposition, Mr. Nirmal Jain, Secretary of OP-11, stated that Sun Pharma took over another company and letter was issued to avoid dispute amongst existing stockist.

- iii. The DG has cherry picked the statement/submissions of the Informant and the OPs and, thus, failed to consider complete detailed replies as the same would have made it amply clear that the stockist appointment process, being an integral process of the company, is based on market requirements and therefore, no NOC/LOC was sought from OP-1 or its district associations. OP-11 mentioned that Mr. Anil Nair, AM- L&D of OP-14, during his deposition denied obtaining clearance from OP-1 and OP-11, prior to stockist appointment. Similarly, Mr. Hitesh Paida of OP-14 in his statement before the DG stated that the company appoints stockists on the basis of evaluation report and there is no role of OP-1.
- iv. On the basis of a sole reference to OP-11 in an email correspondence between President OP-1 and officials of OP-14, the DG concluded that OP-11 indulged in anti-competitive activities without even checking the veracity of contents with office bearers of OP-11. During investigation, Mr. Dhing, President of OP-1, deposed that Intas (OP-14) used to supply pharmaceutical products directly to in-house retail shops of various hospitals on a heavy discounted price, however, for the same products they used to charge higher rates from other distributors. Some dispute arose between chemists and druggist and on that account Mr. Dhing wrote an email to sort out the issues. However, the DG did not accept the explanation given by Mr. Dhing in this regard and stated that he could not bring any documentary evidence on record, OP-1 and OP-11 were held by the DG liable for anti-competitive conduct.



- v. The methodology adopted by the DG while examining Mr. Santosh Jhawar of M/s Vijay Distributors who is also the C&F Agent of OP-14, was incorrect as he did not fully understand English. OP-11 also averred that the statement of Mr. Santosh Jhawar, C&F of OP-14, cannot be relied upon as during cross-examination (by OP-11) he pointed out that he did not understand the question posed by the DG, wherein he had originally answered that all distributors were approved by OP-11.
- vi. There is no evidence to show disruption in supply of medicine due to alleged requirement of NOC/LOC. Furthermore, NOC/LOC acts more like a benchmark to ensure that adequate quantity of drugs is available in the market and their quality is not compromised. Consultation and discussion between manufacturers and dealers' association is undertaken to avoid indiscriminate appointment of stockists without reference to actual requirements *etc.* as this would result in unviable business for the existing stockists of a company. The DG failed to appreciate that the practice of issuance of NOC/LOC, if any, was not creating any appreciable adverse effect on competition.
- vii. Section 26(8) of the Act does not envisage an investigation by the DG but an inquiry by the Commission.
- viii. The DG incorrectly and prematurely identified Mr. Vinay Bakliwal, President of OP-11 and Mr. Nirmal Jain, General Secretary of OP-11 to be liable under Section 48 of the Act, as liability could be fastened after final order is passed by the Commission holding OP-11 liable for contravention of the provisions of the Act. Moreover, there lies no evidence on record to show that Mr. Bakliwal and Mr. Jain engaged in any sort of anti-competitive activity and they could not be proceeded merely by virtue of holding the position of President and General Secretary of OP-11.



***Himalaya (OP-12), its CEO Mr. Philipe Haydon, Sales Manager Mr. R.K. Vachher and Manager Distribution Ms. Sagaya Mary***

53. OP-12 and its officials filed their submissions/objections to the Investigation Reports on 16.03.2018. Pursuant to the oral hearing, they also filed synopsis of their submissions on 06.02.2019. Through its written and oral submissions, OP-12 submitted that:

- i. The Commission does not have jurisdiction to look into the alleged contravention and State Drugs Control Department is the only competent statutory authority to take cognizance of the matter of alleged non-supply of essential medicines/ drugs. OP-12 has referred to the ruling of the Hon'ble Supreme Court in *CCI v. Bharti Airtel Limited*, (2018) SCC online SC 2678, and stated that sectoral regulator under the Essential Commodities Act should be allowed to first operate and decide issues within their purview.
- ii. During the course of investigation, the DG has violated principles of natural justice as OP-12 could not have effectively presented its case had investigations against OP-15 were complete and OP-12 was provided with an opportunity to examine the evidence during investigation and/or cross-examine representatives of OP-15, thereafter.
- iii. The impugned email dated 04.11.2014 was the only basis of arraying OP-12 in the present case. The same was written by OP-12 when its old stockists were creating hurdles in appointment of new stockists in the area and further when OP-15 did not intervene in the situation. This was corroborated by the statement of Mr. Goutam Chand Dhing, President of OP-1.
- iv. In its response before the DG, OP-12 had inadvertently provided an incorrect explanation as to why M/s Drug House, Jabalpur was not appointed as a stockist. However, the same was not *malafide* rather a genuine mistake made by responsible officer responding to the queries of the DG.
- v. OP-12 submitted that the letters enclosed with the emails were part of the hygiene check and have been wrongly interpreted by the DG to mean



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‘approval’ akin to an NOC/LOC from OP-1 or its district associations. OP-12 further submitted that email sent by Mr. R. K. Vachher and letters from Ms. Sagaya Mary of OP-12, at the relevant time, were part of standard checks and balances followed by OP-12 for appointment of stockists. The SOP of OP-12 included a first level clearance from OP-12’s field staff, and if necessary, was supplemented by a ‘hygiene check’ conducted by the Head Office through the relevant association. Hygiene checks were used to additionally confirm the financial credibility and goodwill of stockist from the CDAs. Financial credibility is an important aspect of OP-12’s own procedure for appointment of stockists and forms an essential condition in its appointment letter. In some cases, associations were also contacted to help resolve disputes among their own members who created hurdles in OP-12’s appointment of new stockists since existing stockists apprehended a division of their market share. In this respect, OP-12 has reasoned out all the letters in question:

- a) The first hygiene check letter sent with respect to M/s Batheja Agencies was an oversight on the part of Ms. Mary, as it was already appointed as stockist in July 2014 and OP-12 had made supplies to it much before hygiene check letter was sent to OP-1 in October 2014. Thus, this letter is entirely irrelevant for the present proceedings. In fact, this reinforces OP-12’s stand that hygiene check letters to confirm stockists’ credibility were wholly optional;
- b) Hygiene check letter was sent with respect to M/s Devi Medicals but the appointment of this stockist was kept on hold in 2014 on request of Devi Medicals itself owing to its financial difficulty. This has been OP-12’s stand and no evidence to the contrary has been placed on record by the DG. Devi Medicals applied for and was appointed as a stockist in April 2016; and
- c) M/s Drug House was never appointed as stockist because it was “preoccupied” and was not interested in pursuing its application with



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OP-12. This has been confirmed both by Ms. Mary and M/s Drug House itself.

Thus, there is no evidence to show that OP-12 demanded NOC/LOC from OP-1 in appointment of stockist or would terminate a stockist's appointment if OP-1 objected to the appointment. In fact, it is a matter of record that OP-1, OP-15 and Mr. Dhing (President of OP-1) did not respond to OP-12's email/letters. Therefore, the fundamental pre-requisite of section 3(1) of the Act *i.e* an "agreement" between the parties, never existed.

- vi. The Investigation Reports prove that OP-12 appointed seventy seven stockists in Madhya Pradesh based on its SOP without any interference from any third party (this number has now grown to two hundred). OP-12 never received any complaint from the market about restricting or limiting supply and there were absolutely no geographic restrictions imposed on stockists. OP-12 has the freedom to appoint more than one stockists for each district and the same is informed to prospective stockist as part of terms and conditions in the appointment letter itself. In fact, communication from AIOCD regarding the order of the Commission in first case relating to practice of issuance of NOC was received in 2013 and complied with by OP-12.
- vii. The case suffers from fundamental procedural flaws which strike at the very root of the matter. The DG findings are not supported by any credible evidence in support of the allegations in relation to OP-12 having entered into any anti-competitive agreement or that such agreement resulted in any AAEC in the market.
- viii. Order dated 07.12.2016 was passed by the Commission under Section 26(8) of the Act, but the Commission does not have such power to direct the DG investigation under this provision. OP-12 has averred that the legislature in its wisdom, used discrete terms '*inquiry*' and '*investigation*' and, thus, separate and discrete meanings must be ascribed to these terms for which reference is



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made to the Hon'ble Supreme Court's decision in *CCI v. Steel Authority of India* case, wherein, the Hon'ble Supreme Court has held that both these terms ('*inquiry*' and '*investigation*') cannot be treated as synonymous and are distinct, different in expression and operate in different areas. Thus, as per OP-12, if the DG recommended contravention then the Commission had to inquire into such contravention itself and, only if necessary, pass appropriate orders setting out the metes and bounds of investigation to be carried out by the DG. The erstwhile Hon'ble COMPAT in its order dated 30.10.2015 passed in *Chemists and Druggists Association, Ferozpur v. Competition Commission of India*, Appeal No. 21/2014 and Appeal No. 22-28/2014 (hereinafter, "***Ferozpur Chemist and Druggist Association matter***"), had laid down procedure to be followed in "*inquiry*" under Section 26(8) of the Act. As per OP-12, the Commission was bound to put it to notice prior to passing order dated 07.12.2016 directing further investigation in the matter. If this would have been done, then it would have been beneficial to the parties as well as to the Commission, as the findings in both the investigation reports do not extend beyond one stray email dated 04.11.2014 sent by a former employee of OP-12 *i.e.* Mr. R.K. Vachher to Mr. Dhing, President of OP-1, which was already discovered during the first round of investigation by the DG. OP-12 could have demonstrated that this evidence was insufficient to show contravention of the Act.

- ix. In addition, OP-12 has stated that the 'relevant market' is not defined, which is a critical step in inquiry of violation of Section 3 of the Act and absence of defining it is a grave error and goes to the very root of the matter.
- x. The Supplementary Investigation Report states that OP-12 contravened only Section 3(1) of the Act. This is not similar to the findings of the DG in the Main Investigation Report, wherein the DG gave the finding that OP-1 and OP-11 contravened Section 3(3)(b) read with Section 3(1) of the Act. This distinction is important as unlike the automatic presumption of contravention by a person in Section 3(3) of the Act causing AAEC, onus to establish AAEC



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to hold contravention of Section 3(1) of the Act rests squarely upon the DG. The DG has failed to discharge this burden by not establishing AAEC for holding OP-12 liable for contravention under Section 3(1) of the Act and thus, failed to make out a case against OP-12 under Section 3(1) of the Act.

- xi. Office bearers can be held liable under Section 48(1) of the Act only for contravention of the orders of the Commission and in this case, no orders have been passed by the Commission against OP-12 and, hence, no question of liability of office bearers arise.
- xii. Mr. Philippe Haydon, CEO of OP-12, is not personally liable for actions of employees of OP-12 *i.e.* with respect to email investigated by the DG, since he had no knowledge of the same and the contrary is not proved by the DG.
- xiii. The learned counsel for OP-12 also submitted that Mr. R.K. Vachher, Sales Manager, OP-12, wrote an email dated 04.11.2014 based on historic conduct and during his employment with OP-12, he was not the final decision maker and was merely one step in process of SOP for appointment of stockist set in place by OP-12. Similarly, Ms. Sagaya Mary was not a decision maker for appointment of stockist and her role was more akin to conduit which received and forwarded communication from field staff with head office and/or where necessary with the associations. The officials of OP-12 averred that they received a copy of order dated 25.01.2018 passed by the Commission and copies of Investigation Reports in February 2018. They had not been provided with orders dated 29.12.2014 under Section 26(1) of the Act or order dated 07.12.2016 passed by the Commission under Section 26(8) of the Act. The Commission initiated process under Section 48 of the Act merely on the DG's recommendation and by initiating proceedings under Section 48 of the Act, the Commission bypassed a vital link in the scheme of Sections 48 and 27 of the Act, in the absence of any finding of contravention against OP-12 under Section 27 of the Act. It would be premature to proceed against an individual under Section 48 of the Act when contravention against the company (OP-12)



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is not concluded. Moreover, it is unclear as to whether the officials are being proceeded against under Section 48(1) or Section 48(2) of the Act which constitutes violation of principles of natural justice.

- xiv. Through written and oral submissions, the learned counsel also requested to maintain the confidentiality with respect to the Income Tax Returns (“ITRs”) of Mr. Philippe Haydon, Mr. R.K.Vachher and Ms. Sagaya Mary.
- xv. Without prejudice to the above submissions, in case the Commission is inclined to impose penalty, the Commission ought to consider the relevant turnover in the relevant market based on AAEC caused by OP-12 and such penalty should not be based on total turnover of OP-12.

***Torrent (OP-13) and its CEO Mr. Dhruv Gulati***

54. OP-13 and Mr Dhruv Gulati, CEO of OP-13, filed their submissions/objections to the Investigation Reports on 07.05.2018 after seeking extension of time. Pursuant to oral hearing, they also filed synopsis of their submissions on 05.02.2019. OP-13 averred that unlike other CDA cases, this case against OP-13 has no evidence of:
  - a) understanding/agreement/meeting of minds to require NOC/LOC for appointment of stockist,
  - b) no approval/permission/NOC/LOC was sought by OP-13 from OP-1 for appointment of stockist, as evidence against OP-13 does not mention words like approval, consent, permission, *etc.*
  - c) no fixing of trade margins or any boycott of stockist/druggists.
55. Apart from above, OP -13 contended that:
  - i. There was no allegation against OP-13 in the information filed with the Commission. OP-13 should have been given an opportunity before referring the matter to the DG under Section 26(8) of the Act for further investigation, to explain the context of communication with OP-1.



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- ii. Furthermore, the DG, under the scheme of the Act, is not authorized to conduct further investigation under Section 26(8) of the Act and it is the Commission, which is empowered to enquire under Section 26(8) of the Act. Thus, OP-13 was deprived of an additional protection granted to the parties under the Act and was subjected to long drawn investigation by the DG that could have been avoided in the first instance. Therefore, the order dated 07.12.2016 passed under Section 26(8) was without jurisdiction and in violation of principles of natural justice.
- iii. In legal parlance, Section 3(1) of the Act cannot be applied in a standalone manner. Section 3(1) of the Act must be read with Section 3(3) or Section 3(4) of the Act, *i.e.* breach must be interpreted as comprising two types of agreements falling either under Section 3(3) or Section 3(4) of the Act.
- iv. The DG has failed to establish any ‘agreement’ between OP-13 and OP-1, and has presumed the existence of an agreement merely from select correspondences concerning resolution of disputes between stockist of Elder Pharma and OP-13. Even if assuming but not agreeing that there was an “agreement”, there is no AAEC or likelihood of causing AAEC as OP-13 has neither the incentive nor the ability to cause foreclosure in the market of supply of pharmaceutical products. The DG has failed to prove the existence of an “agreement” under Section 2(b) of the Act. Without prejudice to the above, OP-13 contended that there can be no ‘agreement’ under coercion.
- v. DG failed to understand the context of communication between OP-13 and OP-1. OP-13 acquired two marketing divisions of Elder Pharma in 2014 on pan India basis and acquired nearly two thousand stockists of Elder Pharma across the country such as in Delhi, Uttar Pradesh, Rajasthan, Haryana, Chandigarh etc. As per the agreement, OP-13 took over all the stockists of Elder Pharma and created stockist codes for all of them in June 2014. It communicated to all the stockist of Elder Pharma across India to comply with the Know Your Customer (‘KYC’) norms, other terms and conditions such as advance postdated cheques *etc.* Further, pending KYC formalities, it made



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first supplies to the stockists of Elder Pharma in July 2014, to ensure that there was no scarcity of Elder Pharma products in the market. In some cases, even second and third supplies were also made in July 2014. However, it was made clear to the stockists that supply thereafter, would only be made after completion of the KYC formalities. Moreover, such communications were uniformly made to stockists of Elder Pharma across India.

- vi. The DG failed to consider that all the stockist of Elder Pharma *i.e.* a hundred and seven in Madhya Pradesh, were appointed as the stockist of OP-13 by creating stockist codes and first supplies were made to them. OP-13 further emphasised that three set of supplies were made to 28 stockists, two sets of supplies were made to 25 stockists and one supply was made to 10 stockists prior to any role or intervention by OP-1 as they satisfied its norms. The email interactions between OP-1 and OP-13, relied upon by the DG to conclude that OP-13 indulged in NOC/LOC practice on instance of OP-1, were in fact with respect to giving preference or resuming supply to those Elder Pharma Stockist who had yet not complied with the KYC formalities or advance payment obligations or were in the process of complying the same. The interactions were certainly not in the context of appointment of stockists.
- vii. The Investigation Reports do not contain even a single evidence to suggest that OP-13 insisted on NOC/LOC for appointment of stockists or compelled prospective stockist to obtain NOC/LOC from OP-1 or its district chemist and druggist associations. Besides hundred and seven stockists of Elder Pharma, OP-13 also appointed few more stockists in the State of Madhya Pradesh without any requirement of NOC/LOC, which has been overlooked by the DG. The DG exonerated OP-6, OP-7, OP-8 and OP-9 on the ground that they appointed new stockist in 2014 and 2015 without seeking NOC/LOC, but overlooked that OP-13 also appointed various stockists without seeking any NOC/LOC from the OP-1 or its district arms. The DG found no evidence of meeting/interaction/agreement/ discussion between OP-13 and OP-1 concerning appointment of stockist.



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- viii. The DG's findings against OP-13 are based entirely on 50-60 stockists of Elder Pharma. The DG has failed to consider the rest 40-50 stockists to whom supplies were made as they had satisfied OP-13's criteria for stockist enrolment and it was only in case of approximately four stockists to whom supplies were made after OP-1's intervention. The DG failed to consider that supplies to certain stockists were made after a gap of four to five months even after recommendation from OP-1 because of pending KYC formalities. Moreover, despite the recommendation of OP-1, some pharmacists were not appointed as stockists by OP-13. Thus, the DG failed to consider that the OP-13 followed a comprehensive process for appointment of stockist, which is independent of recommendation/ clearance from OP-1 or local chemist and druggist associations.
- ix. The analysis of the DG is confined to a one-off instance of names being provided by OP-1 to OP-13, in relation to stockists of Elder Pharma and does not form any part of the business practice or conduct being followed by OP-13. It is for this reason that in the most recent case concerning practice of NOC in the State of Gujarat, OP-13 had been exonerated.
- x. OP-13 placed reliance on the depositions before DG, wherein, the office bearers of OP-1 and pharmaceutical companies have admitted that the practice of NOC was prevalent earlier but was since discontinued. OP-13 stated that the peculiar facts and circumstances in this case specifically relating to acquisition of, *inter alia*, two divisions of Elder Pharma and stockist of Elder inherited by OP-13 under the acquisition should be taken into account before determining liability of OP-13.
- xi. Without prejudice to the submissions that OP-13 has not violated the provisions of the Act, the Commission should consider principle of proportionality while determining the appropriate level of penalty *qua* OP-13 and it should be commensurate with the gravity of alleged misconduct. Therefore, the Commission should impose penalty on the relevant turnover *i.e.*



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turnover of OP-13 in the State of Madhya Pradesh. Moreover, the Commission should consider the following mitigating factors:

- a. OP-13 is not a repeat offender,
  - b. OP-13 has cooperated with the DG at all stages of investigation,
  - c. No harm has been caused to consumers, and
  - d. OP-13 has always acted independently to appoint stockist and is driven by conscious commercial considerations based on specific business and market conditions.
- xii. With regard to the liability of Mr. Dhruv Gulati, OP-13 stated that Supplementary Investigation Report of the DG has failed to adduce any evidence to suggest any action, consent, connivance or otherwise of Mr. Dhruv Gulati, so as to render him liable under Section 48 of the Act for alleged agreement with OP-1 to obtain NOC for appointment of stockists. There lies no causal connection between alleged practice of obtaining NOC by OP-13 and/ or its CEO and, therefore, there is no basis to proceed against him. Besides this, confidentiality is sought on the ITRs of Mr. Dhruv Gulati.

***Submissions of other three officials of OP-13 namely, Mr. Vijay Basarkar, Business Manager, Mr. K.C. Mathew, Manager-SCM, and Mr. Debasis Bhattacharya, Ex-Regional Manager***

56. The aforesaid officials of OP-13 filed their objections to the Investigation Reports on 04.05.2018 after seeking extension. The submissions are primarily made against allegations and findings of the DG against these officials contained in the Supplementary Investigation Report. Their submissions are as under:

- i. Section 48 of the Act is not capable of being applied to contraventions under Section 3 of the Act, as Section 48 of the Act, a penal provision, is only applicable to penalties and was never intended to be applied to contraventions referred to under Section 3 of the Act.



- ii. Proceedings against Mr. K.C. Mathew, Mr. Vijay Basarkar and Mr. Debasis Bhattacharya are premature and without authority of law as till date there is no finding by the Commission against OP-13. The finding of contravention, as required under Section 48 must necessarily be recorded by the Commission under Section 27 of the Act. Despite absence of any such finding against OP-13, the Commission has initiated proceedings under Section 48 of the Act against these officials merely on the recommendation of the DG and such an action is fundamentally flawed.
- iii. Furthermore, this approach of the Commission is gravely prejudicial to these officials as in case the Commission does not find any contravention against OP-13, these officials would have been unnecessarily subjected to protracted proceedings.
- iv. Moreover, stated officials of OP-13 were deprived of right of natural justice as a copy of *prima facie* order was never served on them during the investigation and they were unaware that they were being investigated in their personal capacity for the purpose of Section 48 of the Act, and consequently, they were deprived of their right to cross-examine.
- v. Moreover, these officials became aware of proceedings against them upon receipt of the order dated 25.01.2018 passed by the Commission, which does not provide any clarity on the ultimate action being contemplated against them, which is essential if they have to be granted a fair hearing. Thus, not only the DG, but the Commission also failed to safeguard the rights of natural justice available to these officials.
- vi. All interactions and emails referred in the Supplementary Investigation Report are in the context of stockists inherited by OP-13 upon acquisition of Elder Pharma. A meeting was called by OP-1 to resolve the dispute related to few stockists of Elder Pharma who had an issue with KYC processes of OP-13. It is relevant to note that the said meeting was not about appointment of new stockists but for resuming supplies to such stockists till KYC process was ongoing. In this regard,



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Mr. Mathew specifically stated that he did not take part in any meeting related to negotiations with OP-1 in relation to issues faced by stockist of Elder Pharma.

- vii. One of the most crucial things to note was that none of these officials had any final or concrete say in the decisions with respect to appointment of stockists, as the stockists were appointed by supply chain officials in consultation with sales team.
- viii. The Supplementary Investigation Report does not substantiate or prove that contravention took place due to the consent or connivance or neglect on the part of Mr. Vijay Basarkar, Mr. K.C. Mathew or Mr. Debasis Bhattacharya, as these officials had acted only within their zone of authority. Their functions were limited to considering the recommendations of marketing and sales department of OP-13 regarding requirement of new stockists and analysing the actual demand of company products before recommending to higher authorities for final approval. Their role was limited to ensuring supplies to the stockists.

***Intas (OP-14) and its officials namely, Mr. Nimesh Chudgar, MD; Mr. Sanjay Dixit, GM; Mr. Anil Nair, AM-L&D and Mr. Hitesh Paida, Sales Manager***

57. OP-14 and its officials filed their submissions/objections to the Investigation Reports on 21.03.2018 after seeking extension of time. Pursuant to oral hearing before the Commission, OP-14 and its officials filed synopsis of their submissions on 11.02.2019. Through written and oral submissions, OP-14 and its officials have contended that:

- i. The ingredients of Section 3(1) and Section 3(3)(b) of the Act are not satisfied and there is nothing in the Investigation Reports to show that OP-14 denied distributorship to any person on the grounds of non-availability of clearance from OP-1/OP-11. The DG failed to examine any person, whose application for distributorship was rejected by OP-14 on such ground. Moreover, the allegation of limiting/controlling production, supply, markets, technical development or provision of services is unfounded. Without prejudice to the above, an “agreement” has to be out of free will. Reliance is placed on the decision dated 10.05.2016 passed by erstwhile Hon’ble COMPAT in *M/s Alkem Laboratories*



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*Ltd. v. Competition Commission of India and others*, Appeal No. 09/2016 wherein, it was held that where NOCs are being made a requirement as a result of diktats being issued by Trade Association, no violation of section 3(1) can be said to have been committed. Applying this decision in the present case, OP-14 averred that in case the Commission concludes that there was an agreement between OP-14 and OP-1 and OP-11, the same was not out of free will of OP-14 and, therefore, it cannot be said to be an “agreement” under section 3(1) read with section 3(3)(b) of the Act.

- ii. The Main Investigation Report and the Supplementary Investigation Report are self-contradictory as Main Investigation Report states that OP-2 and OP-3 are not involved in anti-competitive activities, whereas, the Supplementary Investigation Report states that OP-1 and OP-11 have caused entry barriers in the relevant market. As per the Investigation Reports, some district level chemist and druggist associations *i.e.* OP-2 and OP-3, associated with OP-1, do not follow NOC/LOC practice. Had NOC/LOC practice been mandatory, OP-2 and OP-3 would have also followed the said practices. There lies no evidence to prove that NOC practice was followed throughout the State of Madhya Pradesh.
- iii. The DG failed to appreciate that OP-14 already had over 160 non-exclusive stockists in the State of Madhya Pradesh out of which 50 stockists were selling the products of OP-4 to OP-10 also. For majority of drugs manufactured by OP-14, substitutes were available which are manufactured and marketed by many other companies including OP-4 to OP-10. Any attempt to create shortage would result in erosion of meagre market share of OP-14 which is 2.17% in the State of Madhya Pradesh. Moreover, no commercial purpose would have been served by restricting supply rather it may prove counter-productive for OP-14 to indulge in restriction of supply of medical products in such a highly competitive market which consisted of large number of manufacturers of the same products. The DG has failed to establish any circumstances in which OP-14 would restrict appointment of stockists in Madhya Pradesh despite the fact that OP-14 has appointed more than 4600 non-exclusive stockists across India and no such allegation exists against



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OP-14 elsewhere and why OP-14 would follow a different policy for the state of Madhya Pradesh.

- iv. The DG has failed to consider that stockist appointment is a business decision and prerogative of the company. The Investigation Reports failed to consider that mere requirement for obtaining clearances/NOC/LOC from OP-1/OP-11 does not lead to presumption that there is an attempt to control or limit supply of medical drugs in Madhya Pradesh.
- v. The DG has relied upon an email dated 25.08.2014 from Mr. Hitesh Paidia of OP-14, wherein, reference is made to discussions between Mr. Anil Nair of OP-14 and Mr. Goutam Chand Dhing, President of OP-1. The email pertains to appointment of M/s P.P. Enterprises as stockist and that OP-14 requested NOC from OP-1. The DG ought to have established this only after examining the owner of M/s P.P. Enterprises. However, the DG has not collected or adduced credible direct evidence but has relied on circumstantial evidence. Circumstantial evidence is not sufficient to conclude violation of Section 3(1) and Section 3(3) (b) of Act and especially when the witnesses examined by the DG have corroborated the stand of OP-14 in this regard.
- vi. All the personnel of OP-14 who deposed before the DG have corroborated the stand taken by OP-14 and the DG, while disregarding their oral testimonies, has not produced any cogent evidence which could discredit or controvert the testimonies. For instance, the DG has disregarded the oral statement of Mr. Santosh Jhawar, proprietor of M/s. Vijay Traders, C&F Agent of OP-14 who stated that email dated 23.01.2014 was written by Mr. Goutam Chand Dhing, President, OP-1 to Mr. Sanjay Dixit, GM, OP-14, raising issue of selling drugs at heavily discounted prices and the said issue was sorted out by meeting with the officials of OP-11. The DG did not examine Mr. Santosh on the NOC/LOC issue despite him being the C&F agent of OP-14. Therefore, the statement of Mr. Santosh Jhawar is inconclusive and cannot be selectively relied upon by DG.



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- vii. The DG in its Supplementary Investigation Report has observed that for OP-14, NOC requirement was a *sine qua non* for appointment of stockist. However, the DG failed to consider that had this been a mandatory requirement, then it would have equally applied in the case of OP-4 to OP-10 and they also would not have appointed stockists without obtaining NOC.
- viii. Without prejudice to above submissions, OP-14 stated that NOC requirement *per se* is not anti-competitive, the DG should adduce evidence to conclude that seeking NOC for appointment of stockist has the effect of restricting or limiting the supply, distribution or production of medical products. The Investigation Reports are based on conjectures and there is no 'practice' of NOC as claimed by the DG. Moreover, mere membership of trade association is not anti-competitive.
- ix. The DG has relied upon statements of witnesses without affording an opportunity of cross-examination to OP-14.
- x. OP-1/OP-11 are not enterprises for the purpose of Section 3 of the Act, as they are not engaged in trading activity by themselves neither are they engaged in manufacturing, marketing and distributing medical products, which is the trade in which OP-14 is engaged. Thus, no presumption of AAEC as envisaged under Section 3 of the Act will arise because Section 3 applies to agreements between enterprises or persons engaged in similar trade. No AAEC analysis has been done by the DG.
- xi. The order dated 07.12.2016 passed under Section 26(8) of the Act is void as Section 26(8) deals with 'inquiry' which is to be carried out by the Commission itself and is different from an 'investigation' that can be delegated to the DG under Section 26(1) of the Act. Thus, order dated 07.12.2016 is bad and beyond the powers conferred upon the Commission.
- xii. The officials of OP-14 have adopted the submissions of OP-14, which are not repeated hereunder for the sake of brevity. Apart from those, the officials of OP-14 have submitted that there is no reference to any facts or evidence supporting



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requirements under Section 48(1) of the Act. It was contended that there should be a specific averment in relation to the role and involvement of the office bearers along with supporting evidence. Invocation of Section 48(2) of the Act against the officials of OP-14 is completely erroneous as there is no discussion in the Investigation Reports on the role played by each of such official in the alleged activities except for the fact that such official is the recipient or sender of two emails mentioned in the Investigation Reports. For invoking Section 48(2) of the Act, it was incumbent on the part of the DG to establish that the official was in position to appoint or remove a stockist and in exercise of such power, such official refused to appoint new stockists, who did not have a NOC. However, such finding does not find any place in either of the Investigation Reports. With respect to the liability of the officials of OP-14, they have submitted that they had no powers to appoint or remove a stockist.

- xiii. OP-14 has asserted that no personal liability can be imposed on the officers of OP-14. Resort to section 48(1) of the Act is unwarranted and not maintainable in the present facts of the case. Without prejudice, the MD & CEO has no role in stockist appointment as it is clearly established through documentary and oral evidence and there is nothing on record to suggest otherwise. Moreover, the DG has failed to adduce any evidence which would suggest involvement of MD & CEO of OP-14 or could lead to such inference that he was personally aware of the alleged practice of NOC. No reference has been made to his functions in the company or his active intent in the form of consent or connivance, or to his knowledge or neglect, and as such the allegations against him cannot be sustained by mere repetition of the charging section of the Act. Further, CEO& MD was deprived of an opportunity to meet and counter the allegations in the Investigation Reports in the absence of any specific facts or material relied therein. Notwithstanding above, officials of OP-14 sought confidentiality in respect of the ITRs filed by them.

***Jabalpur Chemist and Druggist Association (OP-15)***

58. OP-15 filed its objections to the Investigation Reports on 10.08.2018. Pursuant to the oral hearing in the matter, OP-15 also filed synopsis of its submissions on 06.02.2019. OP-15



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vehemently denied the findings of the DG in the Investigation Reports which found the existence of any NOC/LOC practice. OP-15 reiterated the submissions of OP-1 and OP-11 with respect to non-applicability of Section 3(3)(b) of the Act, failure of the DG to establish AAEC due to NOC/LOC practice and validity of order passed under Section 26(8) of the Act. Through its written and oral submissions, OP-15 contended as under:

- i. The Information filed by the Informant contained no allegations against OP-15. Moreover, OP-15 was wrongly arrayed as an OP in the present matter as there were no findings or conclusion against OP-15 in either the Main Investigation Report or the Supplementary Investigation Report.
- ii. Despite any finding of contravention by the DG against OP-15, the Commission arraigned it as an opposite party *vide* order dated 25.01.2018 (wrongly stated as 01.02.2018 in the response) on account of certain letters being sent by OP-12 to OP-15.
- iii. OP-15 was not given an opportunity by the Commission prior to passing the order dated 25.01.2018 (wrongly stated as 01.02.2018) thereby arraying it as an opposite party post investigation by the DG, and thus, OP-15 was denied an opportunity to provide explanations and clarifications to the alleged evidence against it nor its office bearers were called upon by the DG for providing reply to the evidence (if any) on record. Reference was made to the decision of the Supreme Court in the case of *Competition Commission of India v. Steel Authority of India Ltd.* (2010) 10SCC 744, wherein it was observed that while a *prima facie* order dated Section 26(1) does not provide for requirement of notice, the provisions of Section 26(8) does necessitate prior notice to parties. In the present case, there was neither a clear statement of allegations against it nor was there any clear iteration of the nature of action proposed to be taken against it.
- iv. The name of OP-15 appeared in the Investigation Reports only with reference to analysis of an evidence relating to an email dated 04.11.2014 between Mr. R.K. Vachher, Sales Manager, OP-12 and Mr. Guatam Chand Dhing, President of OP-



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1, which contained six attachments, out of which three letters were addressed to OP-15. Two of these letters dated 07.10.2014 were issued by Manager-Distribution of OP-12 for grant of its (OP-15) approval for appointment of M/s Bhateja Agencies, Jabalpur and M/s Devi Medical Agencies, as stockists; and a similar letter dated 13.10.2014 for grant of approval for appointment of M/s Drug House, Jabalpur. OP-15 argued that the said letters were neither received nor replied or acted upon by it. To aid its assertion, OP-15 relied on cross-examination of Mr. R. K. Vachher, wherein he stated that Himalaya (OP-12) had not placed on record any postal receipt evidencing the postage and delivery of the said letters purportedly sent to OP-15 and it was not clear whether the said letters were actually sent to OP-15 or not, as there was no proof of dispatch and/ or delivery. OP-15 submitted that Mr. Vachher clarified in his statement that OP-15 had never replied to the said letters, due to which the company (OP-12) approached MPCDA (OP-1).

- v. Moreover, there is no evidence or finding placed on record to prove that the alleged acts of OP-15 restricted/limited supply of medicines or that there were insufficient stockist in the market or that the manufacturers had any difficulty in distributing their products.
- vi. OP-15 objected to the findings of the DG that even after appointment of M/s Devi Medical Agencies, its supplies were held back by OP-12 for want of clearance from OP-15 and found it completely farfetched especially when OP-15 was not involved in the matter, as admitted by the officials of OP-12 in their statements/objections.
- vii. The DG failed to note the recommendations of the Raghavan Committee Report on Horizontal Agreements that horizontal agreements are agreements between two or more enterprises that are at same stage of the production chain and in the same market and has failed to carry out any economic analysis in respect of the relevant market or any anti-competitive agreement in the report and there is no evidence showing existence of any agreement between the members of OP-15 and the pharmaceutical company (OP-12).



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viii. It has further been contended that NOC/LOC acts as less of a limiting and controlling tool and more of a benchmark to ensure that adequate quantity of drugs is available in the market and the quality is not compromised. OP-15, without admitting that the practice of appointment of stockist based on NOCs/LOCs resulted in limited number of stockist being appointed by the Manufacturers, submitted that over the years there was enormous increase in number of stockist and it was not the case of any manufacturer that products manufactured by it were lying unsold for want of additional stockists. If there were less number of stockists in an area, it would only mean that the existing stockists had more volume to transact and if there were more stockists each one would have less volume to transact. Thus, appointment of stockists had no direct correlation to supply and sale of the product to the consumer. Consultation and discussion between manufacturer and dealers' association was undertaken to avoid indiscriminate appointment of stockists without reference to the actual requirements as the same would result in the business of the existing stockists of the company non-viable. For a stockist and manufacture to operate efficiently, there has to be a reasonable volume of business. In the past, it had been found that indiscriminate appointment of stockists by the manufacturer resulted in the ruin of existing stockists, wastage of stock and disruption of supply, even though there were no complaints against functioning of such stockists.

***Informant***

59. Despite opportunity being given to the Informant to file its written submissions/objections to the Investigation Report and to the submissions of the OPs by 16.03.2018, which was later extended to 13.04.2018, the Informant did not file any submissions or suggestions to either of the investigation reports or on submissions filed by the OPs.
60. During the oral hearing held on 29.01.2019 and 30.01.2019, the counsel for the Informant reiterated the facts and allegations and endorsed the findings of the Investigation Reports of the DG. In its written synopsis/submissions dated 04.02.2019 filed pursuant to the oral hearing, the Informant averred that the Investigation Reports should be accepted in their



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entirety and contravening parties should be held liable for violation of the Act, notwithstanding that OP-11 to OP-15, were not originally named as opposite parties by the Informant, in the information filed by it. The Informant further stated that the order dated 07.12.2016 passed by the Commission under Section 26(8) of the Act is valid and there was no requirement under law to give a hearing to any newly impleaded party against which further investigation was ordered. The Informant contended that the facts and evidence disclosed in the Investigation Reports clearly pointed to the anti-competitive conduct on the part of OP-1 and OP-11 to OP-15. The Informant chose not to impugn the findings of the Investigation Reports wherein nothing was found against OP-2 to OP-10.

### **Analysis by the Commission**

61. On examination of the Main Investigation Report, Supplementary Investigation Report, record of cross-examinations, replies/objections filed by the parties, submissions made by them during the oral hearings held in the matter and upon consideration of other material available on record, the Commission is of the view that the following issues arise for determination in this matter:

***Issue 1: Whether the allegations, regarding practice being carried on with respect to the requirement of NOC/LOC prior to appointment of stockists by pharmaceutical companies, against OP-1, OP-11 and OP-15 are substantiated by evidences, and if so, the provisions of the Act contravened?***

***Issue 2: Whether the allegations regarding non-appointment of stockists/ non-supply of pharmaceutical products by OP-4 to OP-10 as well as the newly impleaded OP-12 to OP-14 (pharmaceutical companies) on the ground of inability to produce NOC/ LOC from the Associations i.e. OP-1, OP-11 and OP-15, are substantiated by facts and evidences and if so, the provisions of the Act contravened?***

***Issue 3: Identification of role of opposite parties who have been found to have contravened the provisions of the Act, if any, and the respective officers/ office bearers/ persons/ individuals liable under the provisions of Section 48 of the Act.***



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62. The Commission notes that besides objecting to the findings of the Investigation Reports on merits, the OPs have raised some preliminary issues/objections in their respective responses to the Investigation Reports. Thus, before delving into the substantive issues on merits, the Commission deems it appropriate to deal with the preliminary objections raised by the OPs.

### **Jurisdiction of the Commission**

63. The Commission notes that some of the OPs have contended that the pharmaceutical sector is regulated by Drug Control Departments of respective states, National Pharmaceutical Pricing Authority ('NPPA') and such other authorities. The said OPs further contended that the Drugs and Cosmetics Act, 1940 and rules framed thereunder provide regulations for licensing and functioning of persons engaged in manufacture, sale, import, *etc.* of drugs in India and as such the Commission has no jurisdiction to look into the issues relating to pharmaceutical industry. OP-12 further submitted that the Informant should have approached licensing authority under clause 28 of DPCO in case of refusal by the pharmaceutical companies to appoint any of the Informant's member as stockist. As per the OP, since a remedy is available to the Informant under a special law *i.e.* DPCO, the Commission is barred from exercising jurisdiction in the present matter. OP-12 further stated that Section 60 and Section 62 of the Act are subject to legal interpretation. Moreover, DPCO was promulgated in 2013 and amended in 2016; therefore, if the legislature or executive wanted powers under DPCO to be made subject to the Act, it had ample opportunity to do so. OP-12 also relied upon the ruling of the Hon'ble Supreme Court in *Competition Commission of India v. Bharti Airtel Ltd* (2018), SCC Online SC 2678, and stated that sectoral regulator under the Essential Commodities Act, 1955, should first examine and decide the matters under its purview.
64. The Commission, with respect to the contention of the OP regarding DPCO issued by the Central Government, in exercise of the powers conferred under Section 3 of the Essential Commodities Act, 1955, and the same being the authority regulating the pharmaceutical sector, notes that the same is in the nature of a subordinate legislation. The Commission being a market regulator bears the mandate to intervene when markets are adversely affected by anti-competitive conducts of players. One such anti-competitive is a decision



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which is the result of a collective understanding between pharmaceutical companies to refuse to deal with a particular stockist or is pursuant to a decision or practice of the chemists and druggists associations. This is due to the fact that such conduct creates entry barriers as a result of decisions taken by such associations which operate in the form of requirement of an NOC/LOC from an association prior to appointment of a new stockist by the pharmaceutical companies.

65. The Commission is fully cognizant that the remedy for refusal to supply drugs to a stockist by a pharmaceutical company for insufficient cause may lie with the sectoral regulator in certain cases. However, what the Commission, as a Competition Regulator, is concerned about is not an independent decision of pharmaceutical company in refusing to supply to a stockist, but the fact that when such decisions flow from the diktat of an association, they take a competition angle. In such a case it is the duty of the Commission to make the markets work in a fair, competitive and unfettered manner and any conduct that comes in the way of such fair and efficient functioning, is amenable to the jurisdiction of the Commission. This power of the Commission is supplemented by Sections 60 and 62 of the Act. While Section 60 is a non-obstante clause giving an overriding effect to the provisions of the Act, Section 62 states that the provisions of the Act are not in derogation of any law but in addition to the provisions of any other law, for the time being in force.
66. The Commission finds it difficult to accept the contention of OP-12 that DPCO, which came in force after the Act, could have been specifically made effective subject to the provisions of the Act. Given the clear legislative intent and wide mandate of the Act as enshrined in the preamble, it would be inappropriate to imply that the legislature has intended to oust the jurisdiction of the Commission in matters governing competition in any sector, even if there are other sectoral law(s) which are governing such sector. While DPCO, 2013 has come later in time than the Act, there is no provision that either expressly or by interpretation ousts the applicability of Act. Further, Competition law is a special law with a mandate overarching across all sectors (which may also be governed by their respective sectoral regulators). While the sectoral regulators define *ex-ante* rules to regulate the day to day functioning of the market participants in their respective sectors, the Commission acts more as an *ex-post* regulator which only intervenes when such



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players disturb the fair functioning of the markets. Thus, both the regulators and the laws complement each other and can be interpreted harmoniously, rather than being interpreted as mutually exclusive. In view of the above, the Commission rejects the objection of the OPs with regard to its jurisdiction in the present matter.

### **Validity of Order dated 07.12.2016 passed under Section 26(8) of the Act**

67. Some of the OPs have vehemently contended that the Commission ought not to have referred the matter back to the DG *vide* order dated 07.12.2016, under Section 26(8) of the Act, as the said provision provides for further inquiry by the Commission and not by the DG. Moreover, the Act provides for sharing the investigation report with the parties under Section 26(4) of the Act. Section 26(5) provides that if the report of the DG recommends no contravention, then the Commission shall invite objections or suggestions from the parties concerned. Upon considering the objections or suggestions of the parties, if the Commission is of the opinion that further investigation is called for it may direct further investigation in the matter by the DG or cause further inquiry to be made in the matter or itself proceed with the inquiry under Section 26(7) of the Act. The learned counsel for the Informant on the other hand submitted that order dated 07.12.2016 passed by the Commission is valid and there was no requirement under the law to give a hearing to any party before directing the DG for further investigation in the matter. To elaborate, the learned counsel for the Informant referred to Section 19 of the Act which empowers the Commission widely and extensively to inquire into any alleged contravention under the Act, either "*on its own motion*" or "*on receipt of information by any person*". The learned counsel further submitted that the Commission may, if deemed necessary, call a preliminary conference to form an opinion whether a *prima facie* case exists. Thus, the powers of the Commission to direct an inquiry are unfettered and does not require grant of any hearing to any of the party before referring the matter for further investigation.
68. In response to the contentions of a few of the OPs that under Section 26(8) of the Act, the Commission has to make further inquiry on its own and cannot refer the matter to the DG, the learned counsel for the Informant stated that the powers of the Commission under sub-section (1) of Section 26 of the Act are co-extensive with the powers under sub-section (7) and sub-section (8) of Section 26 of the Act. In the instant case, the Commission



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directed for the investigation by the DG under Section 26 (8) which mentions that the Commission shall *inquire into such contravention in accordance with the provisions of this Act*. As already mentioned, under Section 26(1) of the Act, power to inquire includes the power to get investigation conducted by the DG. Thus, merely because sub-section (8) mentions the word “inquiry”, it does not imply that the Commission has no powers to direct further investigation by the DG under Section 26(8) of the Act, where Commission finds that such further investigation is warranted. Investigation is part of inquiry and not *de-hors* it.

69. The Commission finds merit in the submissions made by the Informant. The word ‘inquiry’, as appearing under Section 26(8) of the Act, necessarily includes all possible modes through which Commission can consummate its inquiry. It can be an inquiry by the Commission itself and it also includes investigation by the DG. The DG carries out the investigation to facilitate the fact-finding process when the Commission entrusts such matters to it for investigation. Thus, merely because Section 26(8) of the Act, mentions the word “inquiry” and does not mention the word “investigation”, it does not imply that the Commission has no powers to direct further investigation by the DG. Moreover, Regulation 18 (2) of the Competition Commission of India (General) Regulations, 2009 (hereinafter, “**General Regulations, 2009**”) provides that “*A direction of investigation to the Director General shall be deemed to be the commencement of an inquiry under Section 26 of the Act*”. The Commission is of the view that investigation is a subset of inquiry and remanding of the matter to the DG for further investigation is within the scope of inquiry by the Commission. Thus, the Commission may remit the matter back to the DG for carrying out further investigation where the Commission finds that such further investigation is warranted. Notwithstanding the above, Regulation 20(6) of the General Regulations, 2009 specifically provides that if the Commission, on consideration of the report, is of the opinion that further investigation is called for, it may direct the DG to make further investigation and submit a supplementary report on the specific issues.
70. It is worthwhile to note that when the Commission deems it fit that the Main Investigation Report is deficient *qua* certain aspects, the Commission is well within its powers to send it to the DG for further investigation before sharing the investigation report with the



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parties and in doing so, referring the matter to the DG under Section 26(8) of the Act cannot in any manner be said to have caused prejudice to any of the OPs. In this case, neither the Supplementary Investigation Report substitutes the Main Investigation Report, nor does it, in any manner, changes/modifies the findings of the Main Investigation Report. The OPs have been provided with a copy of the Main as well as Supplementary Investigation Reports to present their submissions/suggestions/objections to such reports. Further, by referring the matter back to the DG, the OPs were provided with an additional opportunity to present their case before the DG. Thus, the Commission finds the objection of the OPs raised in this regard as a mere technical façade to unnecessarily object to the process adopted by the Commission, without being adversely affected by the same in any manner. The contentions are therefore, rejected being without any merits.

**Non-applicability of Section 3(3)(b) of the Act on account of not being engaged in similar trade of goods or provision of services**

71. OP-1, OP-11 and OP-15 have contended that the Association and its affiliates are not engaged in similar trade of goods or provision of services as that of pharmaceutical companies, and thus, there is no question of agreement between them within the meaning of Section 3(3)(b) of the Act. The Commission notes that OP-1, OP-11 and OP-15 are associations comprising members who are engaged in similar trade *i.e.* operating in the distribution of pharmaceutical products. Any decisions taken or practices carried on by such association(s) are squarely covered by the provisions of Section 3(3) of the Act, which clearly includes '*[a]ny agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services [...]*'. Further, in plethora of cases, the Commission has found similar practices of the trade associations to be falling within the domain of Section 3(3) of the Act. Thus, given the fact that decisions taken by association of persons engaged in identical or similar trade of goods or provision of services under Section 3(3) of the Act and the past decisions of the Commission, the objection raised by the OPs is found to be rather frivolous.



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### **No Opportunity to cross-examine**

72. With regard to the plea of some of the OPs including OP-14 that it was not given an opportunity to cross examine, the Commission observes that these OPs had never sought cross-examination of any witness at any stage of investigation or thereafter, and hence, the question of not granting an opportunity to cross examine does not arise. The Investigation Reports were forwarded to all the OPs including these OPs way back *i.e.* in January 2018 and in the meantime some other OPs had sought cross-examination of certain witnesses which was allowed by the Commission after due consideration. Thus, every party had ample opportunity to make request(s) seeking cross-examination of the witnesses if they were aggrieved with the findings of the DG.
73. Regulation 41 of the General Regulations, 2009, deals with the procedure for taking evidence including cross-examination of the persons giving such evidence. The Commission or the DG may take evidence either by way of affidavit or by directing the parties to lead oral evidence in the matter. However, if the Commission or the DG, as the case may be, directs evidence by a party to be led by way of oral submissions, the Commission or the DG, if considers necessary or expedient, may grant an opportunity to the other party(ies), on a reasoned application by it, to cross-examine the person giving the evidence. Moreover, in the scheme of the General Regulations, 2009, the Commission notes that the words '*if considered necessary or expedient*' are of great import. When the information supplied by a party is based on personal knowledge, the other party may be granted the right to cross-examine the party giving evidence. However, when the information provided by a party is based on documents, the same can be sufficiently rebutted by filing affidavits and cross-examination of such a party may not be required in every case. In the instant case, the thrust of the conclusions drawn by the DG is essentially based upon the self-speaking documentary evidence to which the OPs have tried to give different explanations. No prejudice can be said to have been caused to the said OPs as they were given ample opportunity to file their objections to the Investigation Reports and to make both their oral and written submissions before the Commission. Given these circumstances, the contention of these OPs with regard to violation of principles of natural justice is not sustainable.



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**Informant had no grudge against OP-11, OP-12, OP-13, OP-14 or OP-15**

74. The captioned OPs, who have been impleaded as opposite parties during the course of inquiry, have contended that the Informant had no grievance against them in the information filed before the Commission. They have alleged that the DG had exceeded its jurisdiction and indulged in a fishing and roving enquiry where it investigated their respective roles regarding indulgence in alleged anti-competitive activities upon failure to find any evidence against the opposite parties arraigned as OP-2 to OP-10.
75. At the outset, the Commission finds it relevant to mention that the legislature, *vide* the Competition (Amendment) Act, 2007, substituted the word ‘*information*’ in place of ‘*complaint*’. While playing its role in ensuring free and fair competition in the markets in India, the Commission is concerned with the information, which is a pre-cursor for initiating remedial actions against an anti-competitive conduct. Further, the proceedings before the Commission are not in the nature of a ‘*lis*’ brought by the parties and thus such proceedings are inquisitorial and not adversarial in nature. It can be seen as a cue to dig deeper into the larger issue having an impact on the market. This is the reason why the DG is directed to investigate into the matter and do the fact-finding exercise. Similarly, in this case, the DG brought the names of Indore Chemist Association, Himalaya, Torrent and Intas before the Commission with respect to their involvement in mandating NOC/LOC in appointment of stockists. Consequently, the Commission appropriately impleaded OP-11 to OP-15 as parties into the matter. Needless to mention that these OPs got enough opportunity before the DG as well as before the Commission to prove to the contrary. Moreover, where the Commission gets evidence of other parties who are involved in anti-competitive conduct, it is the duty of the Commission to have the conduct of such party also investigated.
76. The Commission further observes that as per the directions given in the *prima facie* order, it is expressly stated that “*Nothing stated in this order shall tantamount to a final expression of opinion on merit of the case and the DG shall conduct investigation without being swayed in any manner whatsoever by the observations made herein*”. Thus, the order under Section 26(1) was directory in nature and does not bind the DG with the observations of the Commission at the *prima facie* stage. It is only during the detailed



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investigation that the veracity of the allegations is tested and role of various parties come to the forefront. It is further observed that a similar issue arose before the Commission in an earlier case, namely, *Alis Medical Agency and ors. v. Federation of Gujarat Chemists and Druggists Association and ors.* (Case Nos. 65, 71, 72 of 2014 and 68 of 2015). The Commission, while underscoring the wide powers of the DG during investigation, observed as follows:

*“As stated earlier, the proceedings before the Commission are inquisitorial in nature and thus, the scope of inquiry need not be confined to the facts stated in the information. The purpose of filing information before the Commission is only ‘to set the ball rolling’ as per the provisions of the Act. If the inquiry by the Commission were to be limited to the facts stated in the information, it would render its purpose of the enquiry infructuous and incomplete. Further, once the matter is sent for investigation, Regulation 20(4) of the Competition Commission of India (General) Regulations, 2009 (hereinafter, the ‘General Regulations’) obligates the DG to investigate comprehensively and give its finding on each of the allegation made in the information. The DG need not be restricted to the specific facts or the specific parties stated in the prima facie order as the information. Thus, the Commission finds no infirmity in the DG proceeding to investigate the Applicants, especially when there was a specific direction in the prima facie order to investigate the conduct of such other parties who may have indulged in the said contravention. Specific inclusion of such a direction to the DG also empowers it to investigate not only the named OPs but also such other parties which are found to be indulging in the contravention under investigation. The purpose of such a direction is to allow the DG to carry out a detailed investigation in the matter, without getting restricted to the specific facts and parties stated in the information and concerned prima facie order. In light of the foregoing discussion, the objection of the pharmaceutical companies in this regard is hereby rejected.”*



77. Thus, given the aforesaid observations, the Commission finds no infirmity in the investigation being directed by the Commission, and consequently carried on by the DG, against OP-11, OP-12, OP-13, OP-14 and OP-15.

#### **OPs acting within the directions of Mashelkar Committee**

78. The Commission observes that a few OPs contended that the DG failed to consider the conduct of OPs in conformity with the directions given by the Expert Committee under the Chairmanship of Dr. R. A. Mashelkar, wherein the Committee recommended various actions to be taken by Pharma Traders' Associations so as to curb the problem of spurious/sub-standard drugs in the country. The Commission has dealt with similar contention earlier in *Sudeep M. & Ors and All Kerala Chemists and Druggists Association* (Case No.54 of 2015). In the said matter, the Commission perused the Mashelkar Committee Report and found 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. There was no mention of the practice relating to grant of NOC/LOC by district/state/national level chemists and druggists associations or that such practice would lead to curb of supply of spurious drugs. The recommendations made in the Mashelkar Committee report in respect of pharma trade associations were as follows:

- a. Play a proactive and visible role to contain the menace of spurious/counterfeit drugs.
- b. Develop its mechanism in identifying the persons directly or indirectly involved in abetting the distribution of spurious, counterfeit or questionable quality drugs.
- c. Prepare a checklist for the guidance of members and widely publicize it for information of all members.
- d. Sub-Rule 3 of Rule 65 (4) of the Drugs & Cosmetics Rules requires that the retail supply of any drug shall be made against a cash/credit memo. This condition of license should be strictly adhered to by all retail licensees.



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- e. Every chemist/pharmacist to act as a watchdog to prevent the entry of any spurious/doubtful quality drugs or those purchased from unauthorized sources or without proper bills in the supply chain.

79. The aforesaid recommendations of the Mashelkar Committee report were found to be mainly aimed at combating the distribution of spurious, counterfeit and questionable quality drugs. The Commission, in the *Sudeep M & Ors. and All Kerala Chemists and Druggist Association*, was of the view that these recommendations did not, in any manner, appear to suggest that the associations could undertake the task of mandating NOC/LOC prior to appointment of stockists. The Commission subscribes to same view in the case at hand and accordingly, dismisses the contention of the OPs being devoid of any merit.

***Issue 1: Whether the allegations, regarding practices being carried on with respect to the requirement of NOC/LOC prior to appointment of stockists by pharmaceutical companies, against OP-1, OP-11 and OP-15 are substantiated by evidences, and if so, the provisions of the Act contravened?***

80. Having dealt with the preliminary objections/contentions, the Commission proceeds to determine Issue-1 on merits. This matter originated from the allegations by one of the members of the Informant Federation namely, M/s Pharma Agencies. It was alleged in the information that M/s Pharma Agencies applied to become stockist of the pharmaceutical companies, arraigned as OP-4 to OP-10 but was denied the same on account of non-production of NOC/LOC from MPCDA (OP-1) and its affiliates at Bhopal (OP-2) and Gwalior (OP-3). However, the investigation could not find conclusive evidence to suggest that OP-2 to OP-10 were involved in imposition of NOC/LOC for appointment of stockist in State of Madhya Pradesh though evidence was found by the DG against some other OPs, namely OP-1 and OP-11 to OP-15. It has been the contention of OP-11 to OP-15 that no such practice of NOC/LOC for appointment of stockists is prevalent in the State of Madhya Pradesh as there is no evidence against OP-2 to OP-10. The Commission observes that lack of evidence against a few associations and some pharmaceutical companies does not, in any manner, conclusively suggest absence of such practice. The evidence has to be analysed in totality to ascertain whether such practice existed or not.



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Accordingly, the Commission proceeds to ascertain whether OP-1, and its constituent associations, OP-2, OP-3, OP-11(impleaded by the DG) and OP-15 (impleaded by the Commission after supplementary investigation), were indulging in such practice. To begin with, the Commission notes that the DG has not found any direct evidence against Bhopal Chemist Association and Gwalior Chemist Associations arraigned as OP-2 and OP-3, respectively. Hence, the Commission finds it appropriate to analyse the evidence collected during the investigation by the DG against OP-1, OP-11 and OP-15, in the light of the objections raised by the parties.

### ***MPCDA/OP-1***

81. Firstly, the role of OP-1 is examined by the Commission. During the hearing, OP-1 vehemently claimed that though the association in the State of Madhya Pradesh was earlier mandating NOC/LOC, but after the issuance of circular by AIOCD in 2013, which was also endorsed by it to the regional/district associations, it is no more indulging in such a practice.
82. Further, the evidence collected by the DG reveals three different sets of communications among the three pharmaceutical companies viz. OP-12, OP-13 and OP-14 constituting evidences against OP-1 other than an email sent by OP-1 to Alembic Pharmaceuticals. The same are discussed in succeeding paras.

### ***Email dated 04.11.2014 received from OP-12***

83. The first set refers to an email dated 04.11.2014, sent by Mr. R.K. Vachher, Sales Manager, Himalaya/OP-12 to OP-1, wherein the said official made a request to President, OP-1, to *grant LOC for appointment of stockists at Jabalpur*, for appointment of three stockists. The contents of the email are reproduced below:

*“Dear Sir,*

*This is to request you to please grant LOC for the appointment of stockists at Jabalpur. Sir, we have been always following & respect the norms of trade & requested president Jabalpur chemists & Druggist Association to give LOC to appoint the following as our stockists vide letter dated 7<sup>th</sup> &*



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*13<sup>th</sup> October. Please find the attachment of letter of offer to the proposed stockists & president chemist & Druggist Association. Jabalpur.*

*Devi Medical Agencies*

*Batheja Agencies*

*Drug House*

*Sir As we have not received the reply so far request you to give us permission & oblige.”*

84. During the investigation, Mr. Vachher admitted sending this email stating that some objection was raised by few old stockists. In his statement, he stated that:

*“...as there was objection raised by few of our old stockist in Jabalpur for appointment of new stockist and the District Chemist and Druggist Association, Jabalpur was creating hurdles in appointment of new stockist so I have requested President MPCDA to intervene and help in appointment of new stockist.”*

85. However, the said officer of OP-12 failed to adduce any evidence in support of this assertion. Rather, it seems to be a case that OP-12 informs the association in case of every new appointment of stockist, which is normally conveyed in person. This is clearly highlighted in his statement before the DG, wherein, Mr. Vachher has stated that:

*“When we appoint a new stockist normally we have to inform the District Chemist and Druggist Association, M.P. If there is any objection from the existing Distributor/stockist that District Chemist and Druggist Association intervene and issue letter of consent [LOC]. Normally they convey us in person.”*

86. Further, in the record of cross-examination, Mr. Vachher has stated that the term LOC used by him in the statement before the DG meant recommendation or suggestion by OP-1 and in no manner indicated requirement of compulsory NOC/LOC for appointment of stockists. It further emerged from his cross-examination that though appointment of stockists is a company's choice, but sometimes due to the issues faced from existing stockists, intervention of the association is sought to resolve the issues. The issues are



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raised by the stockists generally because their business gets divided with the appointment of new stockists. He further submitted that no response to the said email/ letters was received from OP-1 or OP-15.

87. The Commission notes that though OP-12 has tried to take shelter in the defence that such letter(s) were issued in a few cases where the credentials of the prospective stockist were required to be verified from the chemist and district association, such defence of OP-12 falls in the face of the fact that the said email contained some letters addressed to the prospective stockists, asking them to procure necessary/relevant clearances from OP-15, prior to their appointment by OP-12.
88. During his deposition before the DG, Mr. Dhing, President of OP-1, stated that *“Pharma Company usually inform our association when they like to appoint new distributor. However, we do not force any company for obtaining permission/NOC. This practice has been stopped by us since the order of CCI.”* With regard to the email dated 04.11.2014 sent by Mr. Vachher, Mr. Dhing has stated that *“... because I am the state president of MPCDA so whenever any dispute/difference of opinion arises in our Stockist of Himalaya they used to inform us. I have not made any reply to his mail”*. This, as per him, corroborates the statement of Mr. Vachher. He further stated that he has not replied to the email dated 04.11.2014 and thus, OP-1 or him cannot be held liable on account of an email received by him over which he had no control.
89. The Commission finds the argument offered by Mr. Goutam Chand Dhing not tenable. It is an admitted position by OP-1, and also by OP-11, that the practice of NOC/LOC was prevalent prior to 2013 and after the issuance of circular by AIOCD in April 2013 which was subsequently endorsed by OP-1 in May 2013, they discontinued such practice. While the Commission does not accept the assertion of OP-1 of discontinuance of such practice post 2013, even though admittedly OP-1 issued a circular dated 03.05.2013 to its district associations *inter-alia* sensitizing them that NOC/LOC prior to appointment of stockists and PIS prior to introduction of new drugs will not be mandatory but voluntary. Even if the contention of OP-1 to this effect is accepted, the Commission is of the view that it was the duty of OP-1/OP-11 to apprise the pharmaceutical companies about discontinuance of



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such practice, which would have obviated the need for any request for NOC/LOC by these companies from the associations.

90. The Commission is of the opinion that had the assertion of discontinuance of the practice been a genuine one, Mr. Dhing, President of OP-1, would have responded to the said email informing about the order of the Commission condemning the anti-competitive practices being carried on by CDAs, or at least informing that such consent from OP-15 was not required anymore. However, this was not done. Further, the Commission is of the view that being an apex association of CDAs in the State of Madhya Pradesh, it had a duty to publicise that the requirement of NOC/LOC from the district association had been done away with. Instead, the Commission finds that OP-1 chose to remain silent on the issue without feeling any need to clarify this aspect to the pharmaceutical company (OP-12). The Commission observes that this deliberate silence on the part of OP-1 constitutes an act of acquiescence, calculated to give effect to the pernicious practice of seeking NOC/LOC from associations. Further, if the practice of seeking NOC/LOC was not in existence, there would have arisen no occasion for OP-12 to have addressed such a communication to the President of OP-1. Hence, for the foregoing reasons, the impugned email dated 04.11.2014, constitutes an important piece of evidence against OP-1. Further, the Commission finds no merit in Mr. Dhing's argument that he is not the receiver of this email, as the said e-mail was retrieved by the DG from his own email dump.

**Various emails exchanged between OP-1 and OP-13**

91. In the Main Investigation Report, the DG found an email dated 24.09.2014, titled "*list*" sent by Mr. Goutam Chand Dhing, President of OP-1 to Mr. Vijay Basarkar, RSM of OP-13 for recommending names of nineteen out of a list of twenty-four stockists. The said email was forwarded on 26.09.2014 by Mr. Basarkar to another official of OP-13 with title "*MPCDA President cleared some more stockists*". During supplementary investigation, OP-13 submitted copies of certain emails and their attachments exchanged between officials of OP-13 and office bearers of OP-1. Among those emails, email dated 27.08.2014 sent by Mr. Debashis Bhattacharya of OP-13 to Mr. Rajeev Singhal, General Secretary, OP-1(MPCDA) brings out the fact that the field level officials of OP-13 held a meeting with office bearers of OP-1 and decided the criterion for appointment of



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stockists/resumption of supplies on the basis of average monthly sale of Elder Pharma products (A2 and GYN) being fixed at Rs 50,000 or more.

92. While clarifying the context of such emails, OP-13 has submitted that it acquired two divisions of Elder Pharma and as a result it also took over 107 Elder Pharma stockists subject to fulfilment of its norms by such stockists. Such norms included provision of Post-Dated Cheques (PDCs) and KYC *etc.* Some old stockists of Elder Pharma were not in agreement with respect to applicability of such norms and raised disputes regarding the same. OP-13 has submitted that in order to resolve such disputes, it had approached OP-1. Thus, as per OP-13, the main purpose of exchange of these multiple emails was to ensure dispute resolution by OP-1 to ensure smooth supply to the stockists during the transition of business from Elder Pharma to Torrent (OP-13). OP-13 had appointed all the stockists of Elder Pharma as its stockists by creating stockist codes for all of them on 26.06.2014, subject to completion of certain requirements as aforementioned. Moreover, first supplies were made to most of them in July 2014, which is stated to be much before the emails exchanged between it (OP-13) and OP-1.
93. The Commission observes that Mr. Goutam Chand Dhing, President OP-1, *vide* email dated 18.12.2014, also recommended names of seven stockists who did not satisfy the criterion of monthly average sale of rupees fifty thousand. Further, regarding email dated 13.01.2015 and 02.03.2015 sent by Mr. Rajeev Singhal, General Secretary of OP-1 to official of OP-13, recommending names of two stockists as contained in such mail, Mr. Rajeev Singhal deposed that *“The above two stockists were earlier working as EPL stockists and I received verbal request from our respective District Association to continue them as Torrent stockist although their monthly average sales were less than fifty thousand. Hence, through above mails I requested Torrent officials to continue them as a stockists of Torrent.”* The Commission finds merit in the contextual background provided by OP-13 for exchange of the impugned emails with OP-1. Given such contextual background, the Commission is of the opinion that these emails do not indicate imposition of any NOC/LOC for appointment of stockist or refusal to appoint on account of any requirement of NOC/LOC from OP-1 and cannot be relied upon as evidence against OP-1.



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**Email dated 23.01.2014 by President, OP-1 to Mr. Sanjay Dixit, General Manager, OP-**

**14**

94. Through email dated 23.01.2014, Mr. Goutam Chand Dhing, President of OP-1, highlighted issues of concern to OP-14, such as appointment of M/s Vijay Distributors as new stockist without the consent of its affiliated association at Indore (OP-11), about OP-14 having offered heavy discounts to certain parties, direct billing to certain parties by OP-14, about M/s. Vijay Distributors of OP-14 ignoring instructions of OP -11 to OP-14 to stop supply to stockists except those authorized by the association and discontinue supply to M/s Vijay Distributors. The contents of the email in *verbatim* are as under:

*“Dear Sir,*

- A) M/s Intas Pharmaceuticals Ltd. has appointment following Stockists with consent of Indore Chemist Association.**
- 1) Khandelwal Medical Agency-Indore
  - 2) Om Pharma –Indore
  - 3) Jeet Enterprises-Indore
  - 4) Jay Medical Corporation-Indore
  - 5) Pharma Traders-Dewas (Rakesh Medical Agencies)
- All the above stockists are working as per the company.*
- B) M/s Vijay Traders C&F Agent of Intas Pharmaceuticals has started his own Concern M/s Vijay Distributors Indore& working as a stockist of Intas Pharmaceuticals without consent of Indore Chemist Association &supplying goods to the following parties in Heavy discount. This is creating a lot problem in trade Business.**
- 1) Dr. Rajesh Mule-Indore
  - 2) Dr. Abha Jain-Indore
  - 3) M/s Cosmo Derm (Dr. Hemnani) –Indore
  - 4) M/s Medicure (Mayank Hospita Indore)
  - 5) Dr. Naresh Pahwa-Indore
  - 6) M/s Kwaliti Drug House-Indore
  - 7) M/s Kothari Brothers-Indore
  - 8) M/s Rajpal Agencies-Indore
  - 9) M/s Arogaya Medical Store-Indore
- C) Secondly Company is starting billing to many Parties, doctors & Institution to directory without the consent of Indore Chemist Association.**
- 1) M/s D. N. Sanghvi & Sons-Indore
  - 2) M/s Teatal Pharmacy (Dr. Sunil Jain)
  - 3) M/s A. R. Life care
  - 4) M/s Rajveer Medical (Rajesh Pharma –Jabalpur)
  - 5) M/s Intervac



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- 6) *M/s Sommaya Pharma-Indore*
- 7) *M/s Adhiraj Marketing-Indore*
- 8) *M/s Phrama Vision-Indore*  
*And many more Parties.*

- D) Company has many divisions but they are supplying some of division goods to one or two stockists only.*
- E) Goods are not recd as per order.*
- F) Discrepancy always comes in the goods recd at our end.*
- G) Expiry/Breakage have not done in proper way. Its takes 5 to 6 month every month.*
- H) He always ignores Indore Chemist Association.*

*Therefore you are request to instruct the company stop supply to the parties except authorized five stockists & Discontinues M/s Vijay Distributors.”*

95. The Commission notes that the content of the aforementioned email are self-explanatory in as much as they indicate the significant influence exerted by OP-1 on OP-14 through its district affiliate, *i.e.* OP-11. The Commission further notes that the email is split into several sub points (A-H) of which A relates to appointment of stockists with the consent of OP-11 and B relates to M/s Vijay Traders, C&F Agent of Intas, who has started his own concern and working as a stockist without the consent of OP-11. Further, C shows certain parties whose billing had been started directly by OP-14 without the consent of OP-11. On being confronted with the said email during deposition, Mr. Dhing, stated that: *"Since it has come to my notice that Intas Pharmaceuticals used to supply pharma products directly to the in-house retail shop of various hospitals on a heavy discounted price. However, the same products they used to charge higher rates from our distributors and chemist brothers as a result some dispute arises and to sort out the problem this email has been written by me."* The Commission observes that Mr. Dhing has not offered any explanation on various issues forming part of the email, such as consent of OP-11 being required for appointment of stockists by OP-14, instruction to stop supply to those appointed without consent of OP-11 *etc.*; rather, he has only commented on the issue of heavy discount offered by OP-14 to certain parties. During the hearing also, the learned counsel for OP-1 stressed on the issue of heavy discount, relying upon copies of certain invoices to highlight the factum of discounts, which were filed along with the common written submissions dated 10.08.2018 of OP-1 and Mr. Dhing. The Commission notes



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that the same shall not be of any avail as despite there being ample opportunity available to OP-1 to put forth these invoices before the DG during investigation, the same was not done. The Commission observes that such adhoc/random invoices cannot be admitted as evidence at a belated stage especially in view of the fact that the veracity of the same cannot be verified at this stage. Moreover, the Commission is of the opinion that the plea of discount taken by OP-1 is futile as discount offered by OP-14 or M/s Vijay Distributors should not be a cause of concern for OP-1 or its President given the fact that quantum of discount is based on the commercial prudence of an undertaking, be it the pharmaceutical company or the stockist. Rather, the official of OP-14 and its C&F agent has also stated that supplies were made to institutions at the contracted price. The Commission, therefore, finds no merit in this contention of OP -1 and its President.

96. Further, the Commission notes that the argument of OP-1 of taking up the matter with OP-14 regarding heavy discount being offered by M/s Vijay Distributors is unsubstantiated as Mr. Sanjay Dixit, General Manager, OP-14 has stated in his deposition before the DG that: *“Indore Chemist Association raised an objection regarding supply of Intas products to M/s Vijay Distributors. Association claimed that Vijay Distributor is not approved by the Indore Chemist Association. So far I remember in this regard this mail was received from President MPCDA. Thereafter, Anil Nair discussed with the C&F and instructed M/s Vijay Traders (C&F Intas) to discuss with the Indore Chemist Association and sort out the allegation.”* Regarding the issue contended by Mr. Dhing that OP-14 was selling products at heavy discount to hospitals, and used to charge more from its member chemists, Mr. Sanjay Dixit, stated that *“the allegation is not true. The fact was Vijay Distributor used to supply the Intas Product to various institution/hospitals on a discounted price as per the contract with the institution”*. During the cross-examination, in response to the query on whether Intas always sold goods to all distributors at same price, Mr. Santosh Jhawar of Vijay Traders (C&F Agent of Intas) stated that *“Yes, depending upon the quantity purchased the discount is given”*.
97. The Commission observes that OP-1 has said nothing to controvert that OP-1 and its affiliate at Indore (OP-11) were imposing their consent in the appointment of stockists by OP-14 and were in fact aggrieved with the fact that M/s Vijay Distributors was appointed



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as stockist without their consent. The clout of OP-1/ OP-11 is also evident from another email dated 25.06.2015 found by the DG on scrutiny of documents relating to appointment of stockists submitted by OP-14 during investigation. The DG had found that despite submissions of requisite documents in respect of M/s P.P. Enterprises long back, the same was appointed as stockist on 30.06.2015 *i.e.* after this email was sent by Mr. Hitesh Paida to another official in OP-14, stating that Mr. Goutam Chand Dhing has orally confirmed the NOC of the association. The said email in *verbatim* is as under:

“ .....

*This is regarding PP Enterprises Indore new party activation.*

***Mr Goutam chand dhing president of Indore association has spoke to Nair Sir for NOC.***

*You are requested to submit all documents for the said party which we have submitted long back.*

*Please do needful,*

...”

98. The Commission observes that Mr. Dhing has relied upon the statements of Mr. Anil Nair (official of Intas), Mr. Santosh Jhawar (C&F of OP-14) to submit that OP-1/MPCDA or its affiliate has no role in appointment of stockist. Moreover, Mr. Dhing has relied upon the record of cross-examination of Mr. Santosh Jhawar (C&F of OP-14), to show that supply has not been stopped to M/s Vijay Distributors post the impugned emails. In this regard, the Commission observes that immediately upon receipt of email dated 23.01.2014 from Mr. Dhing (President OP-1), officials of OP-14 instructed the C&F agent to meet the officials of OP-11 and sort out the matter. The evidence on record shows that the C&F agent of OP-14 met the office bearers of OP-11 and submitted the list of authorised stockists of OP-14 to OP-11. The Commission observes that probably due to this immediate steps took by OP-14, supplies were not restricted to M/s Vijay Distributors. In the absence of any concrete evidence to controvert the above mentioned assertions flowing from the email exchange between OP-1 and OP-14, the Commission is of the opinion that the aforesaid correspondences between OP-1 and OP-14 establishes the influence being exerted by OP-1 upon OP-14 for appointment of stockists and thus, OP-1 is found to have acted in contravention of the provisions of Section 3 of the Act.



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99. Apart from the above emails exchanged between OP-1 and the pharmaceutical companies arraigned as OP-12, OP-13 and OP-14, the DG also found an email dated 23.04.2015 sent by President, OP-1 to Mr. Masud Mahmood Shaikh of Alembic Pharmaceuticals for initiating supplies of Dabur Products to M/s Vikas Medical Agencies, which was confronted to Mr. Dhing as well as to Mr. Shaikh. The reply given by Mr. Dhing and Mr. Shaikh were not found to be supported by any material evidence that such supplies were not started only in respect of Vikas Medical Agencies but for other stockists also. No reasons were stated by them. Rather the contents of the email "*Vikas medical ag. Jabalpur me DABUAR ke product start karna hai*" clearly brings out that a directive has been issued by Mr. Dhing to Alembic Pharmaceuticals for compliance. The Commission is of the view that issuing such directions in favour of one stockist appears to be highly selective and does not conform to the standards for which the Association should work *i.e.* looking after the interest of all its members on matters of importance and not to be selective about resolving any issue. The Commission finds such practices of promoting anti-competitive activities by OP-1 being violative of Section 3 of the Act.

***Indore Chemist Association (OP-11)***

100. In respect of OP-11, the Commission observes that its role is highlighted prominently in the email dated 23.01.2014, sent by President of OP-1 to Mr. Sanjay Dixit, General Manager, OP-14 wherein among many other issues, appointment of stockists by OP-14 without the consent of OP-11 has been the main issue. The contents of the email have been dealt with in detail above at para 93-94 and are not dealt again for the sake of brevity. Mr. Vinay Bakliwal, President of OP-11 has feigned ignorance of the contents of the said email. However, Mr. Nirmal Jain (General Secretary of OP-11), in his statement before the DG has stated that "*So far I know M/s Vijay Traders C&F Agent of M/s Intas Pharmaceuticals started his own distributorship business in the name of Vijay Distributors. He was selling the Intas Products to various firm on heavy discount so our members complained to the Indore Chemist Association and we taken up the matter with the company through our parent body i.e. MPCDA. In those context our President MPCDA might have taken up the matter with the Intas Pharmaceuticals Ltd.*" The aforesaid statement of the Honorary/General Secretary of OP-11 clears the air that the said email was sent by OP-1 to OP-14, at the behest of and for the benefit of OP-11.



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Therefore, OP-11 cannot take any plea that it was neither the sender nor the receiver of the impugned email and that the said email has only reference to OP-11. Moreover, OP-11 and its office bearers have not been able to provide any material to support their contention that their members had complained about the heavy discount being offered. Certain invoices enclosed with written submissions to the Investigation reports filed by OP-11 have been relied upon by the counsel of OP-11 to emphasise that M/s Vijay Distributors was offering more discount to certain parties as compared to others. The Commission notes that similar invoices were also filed by OP-1 and its President in their common written submissions dated 10.08.2018. The same has been dealt with while examining the role of OP-1 and hence not discussed again for the sake of brevity. Suffice to say that the quantum of discount is based on commercial prudence of an undertaking and such commercial decisions ought not to be interfered with by the associations. Moreover, the Commission takes note of the submission of Mr. Sanjay Dixit of OP-14 and record of cross-examination of Mr. Santosh Jhavar, C&F agent of OP-14, to emphasize that the price offered by M/s Vijay Distributors was as per the contract with the institution/ hospital and discounts offered depended on the quantity purchased. The Commission notes that the justification offered by the official and C&F agent of OP-14 indicates the business considerations of OP-14 and cannot be the subject matter of interference by the chemist and druggist associations such as OP-1 and OP-11. The Commission further notes that OP-11 has annexed a circular dated 03.05.2013 issued by OP-1 wherein it is specifically mentioned that pharmaceutical companies and their wholesalers/stockists can offer any discount as per their discretion. Thus, its present stand that it was only resolving the disparity in discounts being offered to stockists and institutions is not sustainable.

101. During the hearing, the learned counsel for OP-11 reiterated that the statements of officials of OP-14 corroborated the statements given by office bearers of OP-11 and this, established that no information about membership of OP-11 or any association was sought in the stockist appointment application form. Stockists were appointed based on the evaluation report by OP-14 without any role of OP-11 and no NOC/LOC practice was being imposed by OP-1 and/ or its affiliate OP-11.



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102. The Commission is of the opinion that both the OPs are on the same side of the fence and espousing each other's cause and are acting in agreement with each other. The Commission is mindful of the existence of practice of internal evaluation of new stockist, at the instance of the pharmaceutical companies prior to their selection. However, the difficulty arises when associations' overstep their assigned/legitimate roles and use this procedure to mandate NOC/LOC, without which new stockist cannot be appointed. Thus, in the guise of background check of the stockist, the association transgresses its jurisdiction and assumes the role of an authority which grants NOC/LOC, without which the pharmaceutical company is not able to appoint a stockist. By doing so such associations not only disrupt the fair functioning of the markets but also replace the sound commercial decisions of pharmaceutical companies by their own ill-motivated/anti-competitive decisions. Thus, the Commission is of the view that the email correspondence between OP-1 and OP-14 amply demonstrates the involvement of both such opposite parties including OP-11 in indulging in anti-competitive activities.

103. Further, during the course of investigation, the DG found a communication *i.e.* email dated 01.08.2015 between Mr. Vinay Bakliwal, President of OP-11 and Mr. Nitin Purohit, AGM- Distribution of OP-9 . In this regard, the learned counsel for OP-11 submitted that Mr. Bakliwal wanted to clarify regarding a letter received from some field official of OP-9, seeking consent for appointment of two stockists. The contents of the said email are reproduced for reference:

*“Please find attached the application received by us on a simple plane paper in which nothing has been mentioned (no telephone number and name of the signing authority by your company) dated 17.07.2015.*

*Please let us know how we can entertain this illegitimate application. We request you to sit together for amicable solution within three days. Thanking you in anticipation.” (emphasis supplied)*

104. Thus, it is evident that Mr. Vinay Bakliwal was not concerned with the fact that post the circular issued by AIOCD and endorsed by MPCDA on 03.05.2013, the chemist and druggist associations were not supposed to indulge into conducts such as mandating



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payment of PIS charges, granting NOC *etc.*, rather he was concerned with the incompleteness of the said application. The Commission observes that the rationale for not entertaining or acting upon the said application purportedly sent by OP-9 was the incomplete/illegitimate form in which it was given and not the contents thereof. The contents of the attached handwritten application (receiving stamp of OP-11 dated 14.07.2015) addressed to the President, OP-11 were:

“ .....

.....

*Subject: Application for new stockist appointment.*

*Respected sir,*

*We (Eris Lifescience Pvt. Ltd.) are planning to appoint 2 new stockist in Indore town because sale of Eris is growing ..... So for better distribution purpose we want to appoint two new stockist in Indore town. Kindly allow us.*

*Note: Please find here with attached sales data of all division of 6 stockist who are working in Indore town.*

.....

..... ”

105. Given the unambiguous nature of the said letter, President of OP-11 should have responded stating that there was no requirement of seeking any NOC/LOC or permission from the said association. However, he failed to do so. Moreover, when Investigation found the above said email (forwarded by M/s Manas Distributors) in his email dump, Mr. Dhing President of OP-1 during his deposition submitted that he has not replied to the said email. The Commission observes that the existence of the above email in the mail box of President of OP-1 establishes the rampant practice of issuing NOC/LOC by OP-1 and its district affiliate at Indore (OP-11). Being aware of the said mail, he had not raised any objection to such email and letter and had not taken any steps to create a positive understanding, not just in letter but also in spirit, with respect to its own circular dated 03.05.2013. Thus, this email serves as an important piece of evidence against OP-11 and OP-1.



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106. During the course of investigation, the DG also found two letters issued by OP-11, which are:

- a) letter dated 12.09.2011 to Paviour Pharma
- (b) letter dated 10.05.2014 to Aditya Medisales.

In its letter to Paviour Pharma, OP-11 stated the subject “*Unauthorized appointment of Stockist at Indore*”. OP-11 had objected to appointment of M/s Vaccine House and had directed Paviour Pharma to call back goods supplied to M/s Vaccine House. The learned counsel for OP-11 submitted that the said letter was issued prior to the order of the Commission in the AIOCD matter. In this regard, the Commission observes that the provisions of the Act came into force in May 2009, and hence, such conduct of OP-11, was anti-competitive in nature on the day it was committed and no reliance can be placed on the earlier order of the Commission in this regard. Thus, the Commission finds this defence devoid of merits.

107. In another letter, sent to Aditya Medisales, OP-11 wrote that “*This is to intimate you that Indore Chemist Association has not given any LOC for the merger of Milmet and Solares division. Hence please do not make any supplies of Sun Pharma other divisions to Milmet and Solares stockists*”. During deposition Mr. Vinay Bakliwal gave evasive replies casting some doubts about its issuance by him, despite the fact that the said letter was issued under his signature. On being confronted by the said letter, Mr. Nirmal Jain, Honorary Secretary, OP-11, stated before the DG that “*This letter has been issued by us because M/s Sun Pharmaceuticals Industries Limited has taken over some other company during that period and in order to avoid any dispute with the existing stockist, we informed the C&F agent that Indore Chemist Association has not given any letter of clearance (LOC)*”. Apart from reiterating his written submission, the learned counsel for OP-11 objected to DG relying on the aforementioned statement of office bearers of OP-11 stating that witness of the concerned pharmaceutical company or of Aditya Medisales had not been examined by the DG and the DG has solely relied on the contents of the letter. The Commission observes that the contents of the email are self-explanatory and not open to any other interpretation. The Commission notes that in the said letter, OP-11 had asked Aditya Medisales not to supply products of other divisions of Sun Pharma to Milmet and



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Solare stockists because OP-11 had not given any LOC for the merger of Milmet and Solares division. The Commission is of the view that OP-11 has not been able to offer any plausible justification for its direction regarding stopping of supply and thus, finds OP-11 acting in contravention of the provisions of Section 3(3)(b) read with Section 3(1) of the Act.

***Jabalpur Chemists and Druggist Association (OP-15)***

108. While examining the role of OP-15, the Commission observes that reference to Jabalpur Chemist and Druggist Association is made in the email communication dated 04.11.2014, by official of OP-12 to President OP-1, seeking intervention of OP-1 on account of having received no response from OP-15. The DG did not find any direct evidence of involvement of OP-15 in any anti-competitive conduct in either of its Investigation Reports. While considering the Supplementary Investigation Report, the Commission directed to seek submissions from Jabalpur Chemist and Druggist Association in the matter and also impleaded it as party *i.e.* OP-15 *vide* order dated 25.01.2018. In its written and oral submissions, OP-15 submitted that it was neither the sender nor the receiver of the said email dated 04.11.2014. Moreover, it did not receive three letters addressed to it (attached to the impugned email). The learned counsel of OP-15 relied upon cross-examination of Mr. R.K. Vachher, official of OP-12 to submit that no postal receipt(s) was on record and thus, there was no evidence to suggest that OP-15 received the impugned letters. It was further contended that there was no evidence to suggest that OP-15 otherwise acted upon such letters or email. The Commission is of the opinion that in the absence of any cogent evidence establishing that OP-15 was involved in giving NOC/LOC for appointment of stockists in Jabalpur, OP-15 is not found liable for contravention of the provisions of the Act in the facts and circumstances of the present case.

109. The Commission acknowledges the active role played by trade associations in promoting the interests of its members. This position has been clarified in many previous orders, including in *Ref. Case No. 06 of 2014 (Cochin Port Trust and CTOCC and Ors.)* where the Commission held that '*[t]here can be legitimate reasons for forming trade associations and such associations undoubtedly serve an important platform for*



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*betterment of a particular trade, for establishing code of conduct, for laying down standards for fair trade, for facilitating legitimate co-operative behaviour in case of negotiations with government bodies etc. However, there is a very thin line between legitimate trade activities and anti-competitive practices that take place through these trade association meetings/discussions. And when these trade associations are used as a charade to transgress that thin line to promote illegitimate/anti-competitive ends, it becomes necessary for the Commission to intervene, for lifting the charade to penalise the anti-competitive conduct.'*

110. The present case is a perfect example of transgression of this thin line. OP-1 has not been able to discharge the burden of proof that it did not interfere with the appointments of stockist by OP-12 and OP-14. Appointment of a new stockist should be the exclusive right of a pharmaceutical company, without any interference by any third party. Any influence or interference with the choice of a distributor of a pharmaceutical company would restrict its freedom to do business with persons of its choice. Such interference not only disrupts the distribution chain, but also results in limiting and controlling the supply of drugs in the market, as many-a time the diktats are sanctioned by consequent boycott of the pharmaceutical companies not following the directions of the association(s).
111. In the earlier cases relating to conduct of regional/ district/ state level Chemists and Druggists Associations, the Commission has held that the practice of mandating NOC in any form, *i.e.* clearance/consent /LOC/Welcome Letters *etc.* prior to appointment of stockists results in limiting and controlling the supply of drugs in the market, thereby contravening Section 3 (3) (b) read with Section 3 (1) of the Act. The Commission has held that requirement of NOC is an obstacle that discourages new/existing stockist to enter/expand in a market. Despite orders of the Commission, the chemist and druggist associations have not refrained from indulging/ interfering in the commercial decision making of pharmaceutical companies. The Commission finds that there is ample evidence to suggest that OP-1 and OP-11 were carrying on the practices in contravention of provisions of Section 3(3) read with Section 3 (1) of the Act.



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112. The Commission deems it fit to deal with the common contention of OP-1 and OP-11 regarding the *mala-fide* intention of the Informant in filing the information. In this regard, the Commission notes that the Informant is a mere information provider and, as long as the allegations contained in the information are established by evidence brought on record/collected by the DG during investigation and further assessed by the Commission, the *locus/* credentials of the Informant is subservient. Thus, the Commission rejects this contention being devoid of merit.
113. Further, the Commission notes the objection raised by OP-1 and OP-11 regarding the authenticity of two telephonic transcripts of purported conversations submitted along with the Information. The DG has not relied upon those CDs/ telephonic transcripts to arrive at any finding of contravention of the provisions of the Act. It is a matter of record that those CDs/ transcripts were not accompanied by certificates under Section 65B of the Indian Evidence Act, 1872, as required for admissibility of electronic evidence. Since the Commission has not relied upon such evidence to establish the anti-competitive conduct of the OP-1 and OP-11, there does not seem to be any necessity to deal with this objection.

***Issue 2: Whether the allegations regarding non-supply of pharmaceutical products by the original Opposite Parties i.e. OP-4 to OP-10 as well as the newly impleaded OP-12 to OP-14 (pharmaceutical companies) on the ground of the applicant stockist's inability to produce NOC/ LOC from the Associations i.e. OP-1, OP-11 and OP-15, are substantiated by facts and evidences and if so, the provisions of the Act contravened?***

114. Now, the Commission proceeds to examine the role of the pharmaceutical companies in non-supply of pharmaceutical products to the applicant stockist on account of inability to produce NOC/LOC from the Associations. The Commission takes note of the findings of the DG that there is no direct evidence against OP-4 to OP-10 in respect of seeking NOC/LOC for appointment of stockists. Further, OP-9 and OP-10 submitted that they agreed with the findings of the DG that no such practice was being followed by them as alleged by the Informant. The Commission finds that the allegations made by the Informant against OP-4 to OP-10 are unsubstantiated and devoid of any merit. Neither the Main Investigation Report nor the Supplementary Investigation Report has identified any



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anti-competitive conduct on the part of these OPs. Thus, there being no evidence of any anti-competitive conduct on the part of OP-4 to OP-10, the Commission holds that the said OPs are not liable in the present case. It is pertinent to mention that in terms of the directions in order dated 25.07.2016 passed by the Hon'ble High Court of Delhi in WP(C) 6395/2016, no coercive action is being taken against OP-4. Hence, the Commission proceeds to examine the role of the remaining pharmaceutical companies *i.e.* OP-12, OP-13 and OP-14, who were impleaded as parties pursuant to the order dated 07.12.2016 of the Commission.

### **Himalaya (OP-12)**

115. One of the objections raised by OP-12 is that OP-1 and OP-12 do not operate at the same level of the production chain and, as such, their conduct cannot fall under the provisions of Section 3(3) of the Act. It is noted that OP-1 is an association of enterprises and is not engaged in the market of supply and distribution of drugs and medicines, in which OP-12 is active as manufacturer of drugs and medicines. OP-1 and OP-12 are neither horizontally placed nor vertically related in the production chain. The Commission however observes that the constituent members of such association are involved in conduct of such activity. Moreover, even if an agreement does not specifically fall under Sections 3(3) or 3(4) of the Act, it can still be examined under Section 3(1) of the Act which has an independent existence and object. Further, if the contention of the OP that Section 3(1) does not have a standalone applicability is accepted, an agreement though anti-competitive, but not specifically covered under specific provisions of Section 3(3) and Section 3(4) of the Act, will escape scrutiny under the Act, which could not have been the intent of the legislature. It is relevant to note that provisions of sub-section (3) and (4) of Section 3 are only species of Section 3 while sub-section (1) is the *genre* thereof. With that background, the conduct of OP-12 has been analysed to see whether there has been an arrangement/understanding/agreement between OP-1 and OP-12 within the meaning of Section 3(1) of the Act.
116. At the cost of repetition, few pertinent facts are again set out, *viz.* Mr. R. K. Vachher, Sales Manager of OP-12, through email dated 04.11.2014, requested for clearance/LOC from President of OP-1, for appointment of three stockists. The email also contained



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letters dated 07.10.2014, addressed to these three stockist (i) M/s Batheja Agencies, (ii) M/s Devi Medical Agencies, and (iii) M/s Drug House, Jabalpur and separate letters addressed to the President of OP-15, requesting its 'approval' for making such appointments in the territory of Jabalpur. In its written and oral submissions, OP-12 contended that it is a matter of record that OP-15, OP-1 and OP-1's President have not acted upon the said email/letters. Based on the said email and letters, the DG held OP-12 liable for non-supply/ non-appointment of stockist on account of inability of such stockists to procure NOC/LOC from the OP-1 or its district affiliate and, hence, liable for acting in contravention of provisions of Section 3(1) of the Act, which according to OP-12 is not correct. With regard to the contention of OP-12 that OP-1 has not acted upon the said email of OP-12 and such one sided conduct of OP-12 does not amount to an agreement under Section 3(1) of the Act, the Commission observes that OP-12 must have addressed such email to OP-1 to get consent of OP-1, in view of the practice that was prevailing and which had not ceased to exist. Hence, the defence of an omission to act by OP-1, is of no consequence given the fact that had the practice of seeking NOC/LOC indeed been stopped, OP-1 would have informed OP-12 that the practice of seeking/issuing such approvals had been done away with. The Commission observes that being the President of OP-1, Mr. Dhing should have acted responsibly in ensuring that the orders of the Commission declaring certain practices as anti-competitive should have been adhered to. On the contrary, Mr. Dhing chose to remain silent.

117. The Commission further takes note of the contention of OP-12 that such email was part of the then standard checks and balances *i.e.* SOPs, followed for appointment of stockists by OP-12, which included a first level clearance from its field staff and if necessary, was supplemented by a hygiene check conducted by the Head Office through the relevant association. It was claimed by OP-12 that such hygiene checks were additionally used to confirm the financial credibility and goodwill of a stockist from the district Association as financial credibility is an essential condition for appointment of stockist. The Commission finds no merit in the contention of OP-12 as the contents of the email are abundantly clear, wherein the official of OP-12 is found requesting the President of OP-1 to grant LOC. The email is reproduced below for ready reference:



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*“This is to request you to please grant LOC for the appointment of stockists at Jabalpur. Sir, We have been always following & respect the norms of trade & requested president Jabalpur Chemist & Druggist Association to give LOC to appoint the following as our stockists vide our letter dated 7<sup>th</sup> and 13<sup>th</sup> October. Please find the attachment of letter of Offer to the proposed stockists & president chemist and Druggist Association, Jabalpur.*

*Devi Medical Agencies*

*Batheja Agencies*

*Drug House*

*Sir as we have not received the reply so far request you to give us permission and oblige”*

118. The Commission notes that OP-12 has nowhere requested OP-1 to verify the credentials or goodwill or the reputation of the proposed stockists from the OP-1, rather it has apparently requested for permission *i.e.* LOC for appointment of stockists. Moreover, ‘*always following & respect the norms of trade*’ as used in the above email also indicates that it is not a lone case where OP-12 was seeking such permission. Moreover, the Commission notes that the annexed letters were also addressed to the prospective stockists *to procure all the relevant clearances from Jabalpur Chemist and Druggist Association.* The Commission is of the view that these letters completely rule out the plea taken by OP-12 that the email was written merely to check the credibility of the said stockists.
119. In its reply, OP-12 has submitted that it had appointed a number of other stockists during the relevant period in the State of Madhya Pradesh without any such hygiene check letters being sent to OP-1 or its district affiliate and such number has grown substantially in the present times. Such argument of OP-12 has failed to convince the Commission as during investigation, it came to the light that OP-12 though intended to appoint the aforementioned stockists but failed to do so at that time on account of objections raised by old stockists. Further, since OP-15 was creating hurdles in such appointment, it approached OP-1 for intervention and sought its aid in appointment of new stockists without being independently guided, in contrast with what it claimed. The Commission further observes that lack of documentary evidence in respect of appointment of seventy seven other stockists of OP-12 in the State of Madhya Pradesh, as claimed by OP-12, does not reflect that it acted independently in the appointment of stockists without being



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influenced by OP-1. DG has examined the conduct of the OPs for 2014 and 2015. These stockists might have been appointed before the relevant period. Moreover, the strong possibility of grant of oral permission/ LOC from OP-1, which leaves no trail, cannot be completely ruled out in the instant matter, especially as there has been evidence in correspondence with OP-13/OP-14, that President of OP-1 had stated that he would clear certain appointments over phone.

120. The Commission is of the view that existence of strong documentary evidence, clearly brings out the fact that OP-12 was obtaining clearance from OP-1 and/or its district association prior to appointment of a new stockist. The Commission takes note of further contentions of OP-12 that holding it liable under Section 3(1) of the Act requires establishing AAEC in the market. Section 19(3) of the Act provides that the Commission shall, while determining whether an agreement has an AAEC on competition within India, under Section 3 of the Act, have due regard to all or any of the factors contained therein, viz. creation of barriers to new entrants in the market, driving existing customers out of the market, foreclosure of competition by hindering entry into the market, accrual of benefits to consumers, improvements in production or distribution of goods or provision of services, and promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services. The Commission observes that by mandating NOC/LOC requirement for appointment of stockists, the potential stockists have been discouraged in entering the distribution channel so as to ensure wider options both to the consumers and pharmaceutical companies. By mandating the condition of NOC/LOC, their entry may be restricted even if they are otherwise satisfying the requisite criteria as may be laid down by respective pharmaceutical companies. Further, such a restrictive practice does not accrue any benefits to end consumers in as much as the availability of medicines to the consumers can be adversely affected both in terms of quantity as well as its availability at competitive prices. The contravening trade association (OP-1) and pharmaceutical company (OP-12) have failed to exhibit that such NOC/LOC practice is in any manner beneficial in terms of factors laid down under clauses d), (e) and (f) of Section 19(3) of the Act.



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121. CDAs existing in different regions and states have been unabashedly indulging in the practice of mandating NOC prior to the appointment of stockists by pharmaceutical companies. In a fair and competitive market, players should be given an equal and unhindered opportunity and freedom to operate and compete on merits. It is evident from the Commission's previous orders that CDAs have made their approval, whether in the form of NOC/LOC/Welcome letters *etc*, a mandatory requirement prior to the appointment of stockists by pharmaceutical companies. Requirement to seek NOC is a hindrance that dissuades new/existing stockists to enter/expand in the market. This also acts as a hindrance for pharmaceutical companies which are required to procure NOC before appointment of a new stockist. Apart from pecuniary considerations of the business, influence or interference with the choice of a distributor of a pharmaceutical company would restrict their liberty to do business with players of their choice. Every pharmaceutical company should be free to select distributors/stockists of their preference, without being affected by a third party. However, it has been observed in various cases that pharmaceutical companies are succumbing to the practice of seeking approval, in acquiescence with associations. The fact that the impugned practice is being followed by the pharmaceutical companies at the instance of the associations makes a pharmaceutical company also complicit in participation and in aid of such anti-competitive activity. The Commission is unable to fathom the reason behind these pharmaceutical companies not exercising the independent option of reporting such anti-competitive acts especially when the Commission in its previous orders as well as through various advisories has made efforts to uproot this practice and has encouraged the affected parties to come forward and report. Instead, by not raising their objections but by meekly submitting to the diktats of CDAs with regard to the NOC requirement, pharmaceutical companies can be perceived as perpetrators of such anti-competitive practices. Needless to mention, such practices under the influence of the associations, restrict supply of goods or services in the market, thereby distorting free and fair play among market players and adversely affecting the consumers.
122. In the instant case, it cannot be ruled out that OP-12, though having acted under influence of OP-1, insisted upon the prospective stockists to obtain necessary approval from the association for being appointed as its stockists. Moreover, on account of obstacles being



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created by OP-15 in appointment of new stockists, OP-12 sought approval of OP-1 to appoint new stockists. However, the same cannot absolve OP-12 from liability under the Act for its anti-competitive arrangement/ understanding with OP-1. During the hearing, the learned counsel for OP-12 had contended that the existence of such standard format letters for obtaining clearances was the outcome of baggage of old practices which persisted during the transition. However, the Commission is of the opinion that the existence of pressure, if any, whether from OP-1 or its district affiliate, ought to have been brought to the notice of the Commission by OP-12 rather than being abided by. This matter assumes further significance in the light of previous orders of the Commission denouncing the practice of mandating approvals/ NOC/LOC from associations as being anti-competitive. Instead of reporting the fact to the Commission, OP-12 chose to abide by the anti-competitive practices of OP-1 and actively aided OP-1 in perpetrating such conduct. Thus, OP-12 also renders itself liable for the consequences of such anti-competitive impact in the overall market for supply of medicines arising out of mandating NOC/LOC for appointment of new stockists in the state of Madhya Pradesh. In view of the foregoing, the Commission holds that OP-12 and OP-1 have entered into an anti-competitive arrangement/understanding/coordination in violation of Section 3(1) of the Act.

123. Finally, it is important to deal with the objection raised by OP-12 that the DG failed to define the relevant market in the instant matter. By way of a recent order (clarificatory order) dated 07.05.2018, passed by the Hon'ble Supreme Court in *Competition Commission of India v. Co-ordination Committee of Artists and Technicians of West Bengal Film and Television and Others*, AIR 2017 SC 1449, it has been clarified that delineation of a relevant market is not a mandatory precondition for determination of violation of Section 3 of the Act. Accordingly, the Commission finds no merit in the objection of OP-12 that the DG has defined the relevant market incorrectly.

**Torrent (OP-13)**

124. In an email dated 27.08.2014, officials of OP-13 sent the minutes of the meeting to Mr. Rajeev Singhal, General Secretary, OP-1, wherein it was stated that *with the bilateral and mutual understanding in concern of Mr. Gautam Chand Dhing (Hon-President, MPCDA)*



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over telecommunication, OP-13 could start billing the stockists whose average monthly business turnover of specified Elder Pharma's products was rupees fifty thousand or more. Numerous emails were exchanged between OP-1 and officials of OP-13, wherein OP-1 cleared names of certain stockists meeting the aforesaid sales criterion. Subsequently, OP-1 also cleared names of certain other stockists who did not meet the criterion on account of insistence from such members. In its response, OP-13 submitted that the DG failed to appreciate the nature and context of interactions between OP-13 and OP-1. OP-13 further stated that it had acquired two divisions – A2 and GYN DIV of Elder Pharma and had already taken a view to continue all the existing Elder Pharma stockists provided they comply with its norms and rules. Immediately after the said acquisition, stockist codes were created for all of them on 26.06.2014. Pursuant to acquisition, OP-13 noticed that many of Elder Pharma Stockists did not satisfy OP-13's KYC norms due to difference in practices being followed by Elder Pharma and OP-13. In order to ensure availability of medicines in the market, OP-13 consciously decided and made first supplies in July 2014 *i.e.* much before the impugned email dated 27.08.2014. During transition of business transfer, some dispute surfaced locally from some existing stockists of Elder Pharma, who did not have the products of the two Elder Pharma divisions acquired by it (OP-13) and purportedly also wanted OP-13's products but had issues with norms of OP-13 such as advance PDCs and KYC formalities. These stockists approached OP-1 to resolve the dispute. For ensuring smooth supply of products of OP-13, a meeting was fixed with OP-1 which was attended by two officials of OP-13 and by Honorary Secretary of OP-1. As an outcome of meeting, it was locally decided that pending KYC those stockists of Elder Pharma who had average monthly sales of rupees fifty thousand per month or more would be given preference in supply, so that there was no shortage in the market. As a result, KYC documentation of forty large stockists, as referred to in the email dated 27.08.2014, were given priority. OP-13 asserted that OP-1 was contacted for dispute resolution and to ensure adequate supply during transition. OP-13 reiterated that all the hundred and seven stockists of Elder Pharma were appointed as stockists without any role of OP-1 and even first supplies were made to those which satisfied its norms, without any intervention of OP-1. Only about four stockists were given supplies after intervention by OP-1. It was stressed by OP-13 that it collaborated with OP-1 for dispute resolution and for devising a means of ensuring supply during the transition period and this definitely was not a case



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of influence of OP-1 over OP-13 in appointment of stockists or restriction of supply. Thus, as per OP-13, the emails in question had no connection with appointment of stockists.

125. The investigation found KYC documentation as a mere alibi citing the case of Mahendra Medico, Ashok Nagar, which was recommended by Mr. Rajeev Singhal, General/Honorary Secretary of OP-1, *vide* his email dated 02.03.2015 to C&F agent of OP-13, followed by reminder email on 24.03.2015 to the official of OP-13. In response to the instructions, OP-13 made first supplies to Mahendra Medico on 01.04.2015, despite the fact that wholesale drug license certificate submitted by Mahendra Medico was effective from 22.05.2015. To this OP-13, in its written submissions to the Investigation Reports, stated that Mahendra Medico was appointed based on a renewed challan valid from 01.01.2015 to 31.12.2019, however the license considered by the DG was freshly issued to the widow, who became the proprietor after the demise of the original proprietor. Thus, the DG was incorrect in drawing the inference that the KYC was a mere formality. Besides, an alleged lacuna in a stray instance cannot discredit the entire KYC process of OP-13.

126. OP-13 also asserted that despite recommendation from OP-1 it had not appointed certain entities as stockists who were not part of the Elder Pharma stockist list. Moreover, it was further emphasized that though supplies were made to a few stockists after recommendation from OP-1, this was done only after due completion of KYC documentation as there was substantial gap in date of recommendation by OP-1 and date of supply by OP-13. OP-13 has stated that it acted independently in appointment of stockists and has not compromised/diluted its KYC norms under the influence of OP-1 in any manner.

127. In this regard, the Commission observes that OP-1, *vide* emails dated 18.12.2014 and 06.08.2015, recommended the names of M/s Lucky Medical & General Agencies and M/s Mahamaya Medico, respectively. However, OP-13 made supply to them on 02.04.2015 and 13.02.2016, respectively. The Commission further observed that M/s Kailash Medical Agencies and M/s Deenbandhu Aushdhalaya were recommended by OP-1 *vide*



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emails dated 02.03.2015 and 06.08.2015, but the same were never appointed by OP-13 as they were not part of the list of Elder Pharma stockists. Furthermore, the Commission notes that OP-1 recommended the name of Om Medical Store, Sehore and Sikharwar Pharma, Vidisha *vide* emails dated 28.08.2014 and 29.08.2014, however, stockists codes were already created for them on 26.06.2014 and first supplies were made to them on 01.07.2014 and 07.07.2014, respectively.

128. The Commission takes note of OP-13's submissions and arguments that it had appointed its stockists without seeking any clearance or NOC/LOC or by being influenced by OP-1 or its district affiliates. The Commission is of the view that there is no evidence to suggest that OP-13 insisted on NOC/LOC from OP-1 or its district affiliates for appointment of stockists or indulged in any anti-competitive behavior such as restricting supplies. Rather, the Commission observes that in this matter OP-13 sought aid of the association *i.e.* OP-1 for avoiding disruption in supply in the market and resolve disputes arising amongst the stockists. In the absence of any concrete evidence to suggest the role of OP-13 in insisting on NOC/LOC from OP-1/OP-11 for appointment of stockists or refusal to supply its products to stockist, the Commission does not find OP-13 guilty of an anti-competitive conduct in terms of the provisions of the Act.

#### **Intas (OP-14)**

129. On 23.01.2014, President, OP-1 forwarded an email dated 15.01.2014 to Mr. Sanjay Dixit, General Manager (Logistics and Distribution), OP-14. The email, *inter alia*, contained:
- a) name of five stockists appointed *with the consent of Indore Chemist Association (OP-11)*,
  - b) grievance regarding appointment of Vijay Distributors, a firm associated with the existing C&F agent (M/s Vijay Traders), as stockist, *without consent of Indore Chemist Association*, and also offering products at heavy discount to certain parties
  - c) concern that OP-14 has started billing some parties, doctors and institutions directly *without consent of Indore Chemist Association*, and
  - d) request to instruct the company to *stop supply to the parties except authorized five stockists and discontinue M/s Vijay Distributors.*



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The said email has been reproduced at para 92 while examining the role of OP-1 and as such not reproduced again for the sake of brevity. Mr. Anil Nair, AM L&D, OP-14, *vide* email dated 04.03.2014, replied point-wise to the email dated 23.01.2014, to OP-1 on the instructions of Mr. Sanjay Kumar Dixit, GM, OP-14.

130. OP-14 vehemently argued that it is a generic drug manufacturer, having more than 4600 non-exclusive stockists all over India and around 160 non-exclusive stockists operating in the state of Madhya Pradesh. It is impossible for OP-14 to impose the condition of NOC for appointment of stockists especially in the light of the fact brought out in the investigation reports that there is no evidence to suggest that its competitors (including OP-4 to OP-10) were imposing such NOC/LOC. If in such circumstances, OP-14 was to suggest to its prospective stockists to procure NOC/LOC from OP-1/OP-11, it would be harming its own business interests and there is no plausible justification for doing so. Moreover, such imposition is unfounded as OP-14 commands a negligible market share of 2.17% in the state of Madhya Pradesh. In addition to the statements of its officials recorded by the DG during investigation, the learned counsel for OP-14 relied upon cross-examination of the Informant and its (OP-14) C&F agent (by OP-1 and OP-11) to corroborate the fact that OP-14 does not seek any recommendation from any Chemist and Druggist Association and OP-1/OP-11 had no role in appointment of stockists by OP-14.
131. The Commission observes that the aforesaid defences of OP-14 are nothing but bald assertions as the communications exchanged between OP-1 and OP-14 clearly brings out that some stockists were appointed by OP-14 only with the consent of OP-11, whereas, some stockists were stated to be appointed by OP-14 without the consent of OP-1 and OP-11, prompting OP-1 to write an email to OP-14.
132. The learned counsel for OP-14 also contended that President, OP-1 merely forwarded the email dated 15.01.2014 but the DG failed to investigate the original sender of the email dated 15.01.2014. The Informant submitted that this cannot be the basis of objection as long as the contents of the email stands verified by the statement of office bearers of OP-1 and OP-11 and the officials of OP-14. The Commission is not impressed with this argument of OP-14 as OP-1 forwarded the email dated 15.01.2014 to OP-14 which



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implies, in no uncertain terms, that OP-1 wanted to seek clarification from OP-14 on those issues. This becomes more evident from the reply of OP-14 who responded promptly and instructed its C&F agent to initiate dialogue with the district affiliate of OP-1. It was further contended by the learned counsel for OP-14 that the DG failed to examine the authorized stockists on the issue of NOC/LOC at the instance of OP-1 or its district affiliate at Indore (OP-11). The Commission notes that it is the prerogative of the DG/investigation to conduct its investigation in an independent manner. Even otherwise, the self-explanatory content of the email dated 23.01.2014 mentioning appointment of five stockists by OP-14 *with the consent of Indore Chemist Association* (OP-11), needed no explanation/investigation. During the hearing, the learned counsel for OP-14 relied on the list of stockists appointed by OP-14 till date, to exhibit that all the stockists who so ever applied for stockistship were appointed without any intervention from any association. The Commission is of the view that the veracity of this assertion of OP-14 is questionable as such list would only contain the names of the stockists who were appointed by OP-14 and would not reflect names of those who though would have applied for grant of stockistship but would have been denied stockistship for want of NOC/LOC from OP-1 or its district affiliate.

133. The Commission notes that in response to the grievance of OP-1/OP-11 relating to appointment of M/s Vijay Distributors without consent of the association (OP-11), Mr. Anil Nair, AM-L&D, OP-14, stated that *“Vijay Distributors, Indore is very old stockist & they are the member of Indore Chemist Association, However, CFA [C&F] owner had already initiated meeting with the office bearers of Association in person to resolve the matter”*. Additionally, Mr. Anil Nair, of OP-14 also forwarded an email dated 25.02.2014 received from its C&F agent *i.e.* M/s Vijay Traders *via* Mr. Sanjay Dixit, GM of OP-14, enclosing a list of stockists of OP-14 shared by him (C&F agent) with OP-11. The Commission notes that the response of OP-14 to point number B appears to be defensive, probably on account of coercion/clout of OP-1. During the hearing, the Commission queried the counsel for OP-14 as to why OP-1 sought comments on various issues from OP-14 and under what obligation was OP-14 bound to reply. To this, the learned counsel for OP-14 iterated that associations form an integral part of commercial decision making in relation to the region in which OP-14 operates. It is very critical to maintain good



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relationship with the association. The businesses cannot choose to ignore the role of the association especially in the light of the strong countervailing power in the hands of such association in the form of boycott of particular company. The Commission reiterates that there exists a due procedure under law which can be followed by the pharmaceutical companies against such associations. Moreover, the pharmaceutical companies owe some responsibility as corporate citizens to stand up against the clout of the associations in order to bring an end to such practices which distort fair play among market participants.

134. The Commission is aware of the crucial role played by the association in furthering the cause of its members and promoting best practices, in collaboration with the pharmaceutical companies. However, what transpires in the meetings/communication between these associations and pharmaceutical companies is not recorded completely. The Commission notes that in the present case, the immediate actions taken by OP-14 in relation to the issues raised in the email dated 23.01.2014 from OP-1 display the nexus between OP-1 (association) and OP-14 (pharmaceutical company), which needs to be broken. The learned counsel for OP-14 also indicated that OP-14 was not complicit with OP-1 and its affiliate at Indore (OP-11) as highlighted in the fact at point no. H in the email dated 23.01.2014, which stated that *“He always ignores Indore Chemist Association”*. Taking cognizance of this defence by OP-14, the Commission notes that though OP-14 had purportedly attempted to act independently, it did not go down well with the Association (OP-1) and its Indore affiliate (OP-11), and OP-14 sought to mollify these associations to seek their goodwill.

135. The Commission notes that apart from OP-11’s consent for appointment of stockists, another aspect highlighted in point B of email dated 23.01.2014 by OP-1/ OP-11 was heavy discount being offered by M/s Vijay Distributors. To this OP-14 could not offer any defence except that OP-1 and OP-11 were concerned about the discount being offered by M/s Vijay Distributors as its related entity M/s Vijay Traders was also working as the C&F agent of OP-14 in the state of Madhya Pradesh. The Commission is of the view that offering discounts, whether heavy or nominal, is the choice of a particular stockists, which need not be interjected by the association. To avoid such interjections by these associations, the pharmaceutical companies need to exhibit courage to stand against the



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diktats of such associations, rather than yielding to the same and be complicit in such actions.

136. OP-14 chose to remain silent with respect to the email dated 25.06.2015, exchanged among its officials, which brought out the fact that M/s P.P. Enterprise was appointed as a stockist on 30.06.2015 *i.e.* only after Mr. Gautam Chand Dhing, President OP-1, spoke to Mr. Anil Nair for NOC, despite the fact that its documents were submitted to OP-14 long back. The contents of the email are reproduced:

*“This is regarding PP Enterprises, new party activation.*

*Mr. Goutam chand dhing president indore chemist association has spoke to Nair Sir for NOC.*

*You are requested to submit all documents for the said party activation.”*

137. In view of the foregoing, the Commission finds OP-14, to have acted in complicity and connivance with OP-1 and OP-11, for appointment of stockists. Therefore, the Commission finds OP-14 to have an agreement/arrangement/understanding with OP-1 and OP-11 within the meaning of Section 3(1) of the Act.

138. The Commission takes note of the contentions of these OPs that there can be no agreement under influence or coercion as stated by the DG. It is crucial to look back at the framework of the Act which gives a wider and inclusive interpretation to the term agreement. Section 2(b) of the Act states that, *“agreement includes any arrangement or understanding or action in concert,— (i) whether or not, such arrangement, understanding or action is formal or in writing; or (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.”* In the instant case, the Commission came across incriminating documentary evidence which establishes that the pharmaceutical companies were having an arrangement or understanding with the trade associations under which they sought clearances/NOC/LOC from such associations for appointment of stockists. By abiding with the diktats of the trade associations during the period under investigation, the pharmaceutical companies cannot now take the plea that they were coerced by the associations to follow such practices, more so when the Commission has already, in its previous orders, held such practices as anti-competitive. The Commission has always since the time it struck down such practices as anti-



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competitive, encouraged the pharmaceutical companies to report the anti-competitive conduct imposed upon them by trade associations under the threat of boycott *etc.* However, instead of bringing such issues to the notice of the Commission, if the pharmaceutical companies chose to abide by the diktats of these trade associations, they cannot now take the plea that they were coerced to do so. By continuing/permitting to cause such practices to continue, such pharmaceutical companies also render themselves liable for the consequences of such anti-competitive impact in the overall market for supply of medicines arising out of mandating NOC practice for appointment of new stockists in the state of Madhya Pradesh. Thus, Commission rejects this objection of the pharmaceutical companies being devoid of merit.

139. The OPs have placed reliance on many case laws including decision of erstwhile Hon'ble COMPAT in the *Ferozpur Chemist and Druggist Association matter*. In this regard the Commission understands that this matter is sub-judice at present. Be that as it may, the Commission is of the view that the conduct of the said pharmaceuticals companies *i.e.* OP-12 and OP-14 and the trade associations *i.e.* OP-1 and OP-11, as examined in the earlier paras aptly establishes the agreement/arrangement/understanding between these pharmaceutical companies and trade associations, in contravention of the provisions of Section 3(1) of the Act.

***Issue 3: Identification and role of Opposite parties who have been found to have contravened the provisions of the Act, if any, and the respective officers/ office bearers/ persons/ individuals liable under the provisions of Section 48 of the Act.***

140. Having found OP-1, OP-11, OP-12 and OP-14 to be responsible for contravention of the provisions of Section 3 of the Act, the Commission proceeds to examine the liability of the office bearers of the contravening association *viz.* OP-1, OP-11 and officials of contravening pharmaceutical companies *viz.* OP-12 and OP-14.

***Liability of individuals under Section 48 of the Act***

141. Liability of individuals of the erring companies/associations is provided under Section 48 of the Act. Section 48(1) of the Act is triggered when the party in contravention is a



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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 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 the liability under Section 48(1) of the Act. Section 48(2) of the Act, on the other hand, attributes liability on the basis of the *de-facto* involvement of an officer.

142. Before delving into the role of individuals, the Commission deems it appropriate to deal with a common objection raised by office bearers/ officials of all the contravening OPs that the Commission cannot commence proceedings under Section 48 of the Act without first reaching a conclusion of contravention by the entity, whether be the association or the company, as the case may be, under Section 27 of the Act. This objection has already been dealt with by the Commission in earlier cases. The Commission in Ref. Case No. 02/2015 and 9 other clubbed cases filed against *Mahyco Monsanto Biotech (India) Limited & Others*, while relying on various judgements of the Hon'ble Supreme Court and various High Courts, set aside the challenge made by the opposite parties in those cases and held that:

*“A proceeding under the Act has genesis in the investigation ordered under Section 26 (1) of the Act. The said Section envisages that the Commission shall direct the DG to cause an investigation to be made into the “matter”. There is no suffix, no prefix, no proviso, no explanation, and no caveats of any form attached to the word “matter”. Hence, it obviously means that the DG needs to investigate into the matter at one go in all its dimensions comprehensively. The said Section does not envisage either for the Commission or for the DG to investigate into the matter in phases, unless it is necessitated by circumstances. Whether or not an order under Section 26 (1) of the Act explicitly directs the DG to look into the role of any person incharge of and responsible for the conduct of business of the company under Section 48 of the Act,*



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*the DG is duty bound to look into the role of all persons behind the conduct of a company. Therefore, the provisions of Section 48 of the Act complement the provisions of Section 26 (1) of the Act. The said provisions, as stated earlier, are also pari materia with many statutes, some of which are around a century old. These provisions are time tested and the superior courts have always gone ahead with proceeding simultaneously in respect of the conduct of the company and its person in-charge.”*

143. In the backdrop of the above observations of the Commission, the contention of the OPs that liability of individual cannot be fixed under Section 48 of the Act before establishing contravention of the provisions of the Act against the entity, is rejected.
144. In the light of the aforesaid, the Commission proceeds to examine the role of each of the office bearers/officials of OP-1, OP-11, OP-12 and OP-14, identified by the DG, to be responsible for anti-competitive conduct of their respective associations.

**Mr. Gautam Chand Dhing, President, MPCDA/OP-1**

145. The role of Mr. Goutam Chand Dhing has been examined in detail while examining contravention by OP-1 in Issue no. 1 which needs no reiteration. The Commission observes that Mr. Dhing, in the capacity as President of OP-1, played an active role in perpetrating and enduring the anti-competitive practice of mandating approval/ consent/ NOC/ LOC for appointment of stockists by the pharmaceutical companies. The Commission also notes that apart from making bald assertions in his defence, Mr. Dhing was not able to dispel the evidence collected by DG against him. Hence, the Commission finds Mr. Dhing to be responsible both under Section 48(1) as well as Section 48(2) of the Act.

**Mr. Rajeev Singhal General Secretary**

146. The Main Investigation Report of the DG found no contravention by Mr. Rajeev Singhal. In the Supplementary Investigation Report, his role came into the picture in the context of communication with officials of OP-13 in resolution of dispute arising on account of



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acquisition of two divisions of Elder Pharma by OP-13. During the hearing, learned counsel for Mr. Singhal argued that the DG failed to establish that Mr. Singhal, as the General Secretary, was responsible for the affairs of OP-1 association. It was also argued that Mr. Singhal is one among the six elected office bearers of OP-1, who are appointed by virtue of election every three years.

147. The Commission is of the view that no sufficient evidence is on record to suggest that at the time of contravention, Mr. Singhal was in charge of or responsible for conduct of the affairs of OP-1 to hold him liable under Section 48(1) of the Act. Also, in the absence of any incriminating evidence on record demonstrating his involvement in the NOC/LOC practice, the Commission does not hold Mr. Rajeev Singhal liable under Section 48(2) of the Act.

**Mr. Vinay Bakliwal, President, Indore Chemist Association/OP-11**

148. The Commission finds that Mr. Vinay Bakliwal played a crucial role in mandating consent of OP-11 for appointment of stockists and even compelled them to stop supplies/ refuse supplies to stockists who were not appointed with the consent of OP-11 and termed them as unauthorized stockists. The same has been examined in detail while examining the role of OP-11 in Issue No. 1 and needs no reiteration. The Commission holds him liable under Section 48(1) as well as Section 48(2) of the Act.

**Mr. Nirmal Jain, General Secretary, Indore Chemist Association/OP-11**

149. The Commission observes that Mr. Nirmal Jain was aware of all the activities of OP-11. He also claimed being aware of the issues of OP-11 with OP-14 and claimed to have taken up the matter with OP-14 through OP-1. He is also found to be signatory to the letter dated 10.05.2014 issued by OP-11 to Aditya Medisales directing it to stop supply. In view of the foregoing, the Commission holds Mr. Nirmal Jain liable under Section 48(1) as well as Section 48(2) of the Act.

**Mr. Philippe Haydon, CEO, Himalaya (OP-12)**

150. The learned counsel appearing on behalf of Mr. Philippe Haydon submitted that Section 48 of the Act is only applicable to contraventions listed in chapter VI of the Act, titled



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*'Penalties'*. The interpretation of the whole statute would suggest that it was never intended to be applied to contraventions under Section 3 of the Act, as is erroneously sought to be done in the present case. In this regard, the Commission notes that the provisions of the Act cannot be given a narrow interpretation to suit the contentions of opposite parties. The Commission further notes that most of the officials/office-bearers of the opposite parties had objected to application of Section 48 of the Act to the contraventions under Section 3 of the Act stating that Section 48 of the Act is a penal provision and thus, it only applies to penalties and was never intended to be applied to contraventions referred to under Section 3 of the Act. The Commission does not find any merit in this contention. Section 48(1) of the Act clearly mandates that whenever there is contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder by a company (including an association of persons), every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly (emphasis supplied). Thus, the import of Section 48 of the Act is very wide and applies to contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder. The objection of the OPs is therefore, untenable.

151. The learned counsel for Mr. Haydon submitted that he is not personally liable for the actions of employees since he had no knowledge of the same, and that the DG did not put anything on record to show the connivance of Mr. Philippe Haydon in the alleged anti-competitive activities. The Commission notes that he was the CEO of OP-12 during the relevant time, and continues to hold that position. Thus, being in-charge of the affairs of the company, he cannot plead ignorance of the practice followed by his company for appointment of stockist. When they authorize people to work on behalf of the company, they make themselves vicariously liable for the acts done within the scope of such employment/authorization, by virtue of Section 48(1) of the Act. In such situations, the only exemption/exception available to such officials under Section 48(1) of the Act is the establishment of the fact that the contravention was committed without their knowledge or that they had exercised all due diligence to prevent the commission of such



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contravention. Mr. Haydon has however failed to establish such fact. The plea taken by Mr. Haydon that the DG failed to establish that he had knowledge or that he consented/connived with the association for appointment of stockists is of no avail as Section 48(1) of the Act which is a deeming provision, which presumes that the people at the helm of affairs ought to have knowledge of the activities carried on by the company. Thus, the Commission holds Mr. Haydon, in his official capacity as the CEO of OP-12 liable under Section 48(1) of the Act. However, in the absence of any direct evidence against Mr. Haydon, he is not held to be liable under Section 48(2) of the Act.

**Mr. R.K. Vachher, Sales Manager, Himalaya (OP-12)**

152. The learned counsel for Mr. R.K. Vachher submitted that though he wrote the email dated 04.11.2014, based on historic conduct, yet he was not the final decision maker but merely a step in the SOP. It was further submitted that he was the National Sales Manager, managing all India sales with a large team of Zonal Managers and Regional Managers working under him. He is stated to have been relying on the field staff to take his decision on appointment of stockists. The Commission does not find any substance in the plea that Mr. Vachher led a large team and did not look into minute details of each activity. On the contrary, the Commission is of the view that in a hierarchical structure, person at the top takes business decisions based on inputs from the rest of his/her team. The Commission also notes that despite being the all India in-charge of sales of OP-12, Mr. Vachher personally emailed to the President of OP-1 for *granting permission*. He also stated in the said mail that he was *always following & respect the norms of trade*. The Commission, thus, holds him liable under Section 48(2) of the Act.

**Ms. Sagaya Mary, Manager–Distribution, Himalaya (OP-12)**

153. The DG found six letters signed by Ms. Sagaya Mary, Manager Distribution, OP-12, three of which were addressed to the Jabalpur Chemist and Druggist association (OP-15) for seeking permission and other three to the prospective stockists to procure necessary clearance from the said association. The learned counsel for Ms. Sagaya Mary contended that these standard format letters were prepared as per the then practice followed by OP-12; she was a mere conduit who received and shared communication from the field staff with the head office of OP-12 and/or with the associations wherever necessary. The Commission observes that Ms. Mary used to issue letters to the prospective stockists to



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procure necessary clearances from the associations under her signature and thus, played an active role in perpetrating the NOC/LOC practice. Thus, the Commission holds her liable under Section 48(2) of the Act.

**Mr. Dhruv Gulati, Mr. Vijay Basarkar, Mr. K.C. Mathew and Mr. Debasis Bhattacharya (Officials of OP-13)**

154. Since the Commission has not found OP-13 to be acting in contravention of the provisions of the Act, therefore the Commission finds it appropriate to drop proceedings under Section 48 of the Act against officials of OP-13.

**Mr. Nimesh Chudgar, Managing Director and CEO, Intas (OP-14)**

155. The learned counsel for Mr. Nimesh Chudgar submitted that he had no role to play for appointment of stockists as the same was done by various marketing heads of OP-14. It is further contended that the DG has not been able to discharge the onus to show that Mr. Chudgar had knowledge or that he consented/connived with the association for appointment of stockists. Reliance was also placed upon various decisions of Hon'ble Supreme Court to the effect that where vicarious liability is sought to be imposed upon an employee of a company, the complaint filed against such employee should essentially contain a specific averment in relation to the role and involvement in the company also with specific evidence supporting the averment. The Commission has already dealt with similar contentions in foregoing paras. The Commission is of the view that Mr. Chudgar has failed to establish that he had no knowledge or that he had not consented/connived with the association for appointment of stockists. The Commission is also of the view that Mr. Chudgar, being in-charge of the affairs of the company, cannot plead ignorance of the practice followed by his company for appointment of stockists. Therefore, the Commission finds Mr. Chudgar liable under Section 48(1) of the Act. However, the Commission, in the absence of any evidence, does not hold him liable under Section 48(2) of the Act.

**Mr. Sanjay Dixit, General Manager, Intas (OP-14)**

156. The learned counsel for Mr. Sanjay Dixit, General Manager, OP-14, reiterated the submissions made on behalf of Mr. Chudgar except that Mr. Dixit was the receiver and sender of two emails. The Commission notes that Mr. Sanjay Dixit received an email



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dated 23.01.2014 from President of OP-1, which highlighted some issues regarding appointment of stockist without the consent of OP-11, direct billing by OP-14, offering more discounts etc. Mr. Sanjay Dixit acknowledged the said email and also assured the President of OP-1 to provide feedback and instructed C&F Agent of OP-14 to visit the Association in person to discuss and resolve the issues. He received the mail dated 01.03.2014 from M/s Vijay Traders regarding the list of stockist appointed with consent of OP-11 and forwarded the same to Mr. Anil Nair, Assistant Manager (OP-14) for responding to the queries raised by OP-1 in email dated 23.01.2014 on the instance of OP-11. He acted as a nodal point between the association (OP-1/ OP-11) and OP-14. The Commission is, therefore, convinced that Mr. Dixit was complicit with OP-1/OP-11 and also took action based on email of OP-1. The Commission, thus, holds him liable under Section 48(2) of the Act.

**Mr. Anil Nair, Assistant Manager, Intas (OP-14)**

157. The learned counsel for Mr. Anil Nair, reiterated the submissions made by Mr. Dixit. The Commission notes that Mr. Anil Nair provided the point-wise response to the email of OP-1. He also met officials of OP-11 on the instructions of Mr. Sanjay Dixit, General Manager of OP-14. The Commission is of the opinion that Mr. Nair acted in association with Mr. Dixit and was complicit in the anti-competitive conduct. The Commission, thus, holds him liable under Section 48(2) of the Act.

**Mr. Hitesh Paida, Sales Manager, Wish Division, Intas (OP-14)**

158. The counsel for Mr. Hitesh Paida made similar contentions and submissions as that of Mr. Sanjay Dixit and Mr. Anil Nair. The Commission takes note of the fact that Mr. Hitesh Paida played active role in forwarding the documents of prospective stockists and related formalities. The Commission is of the view that he was fully aware of the practice of seeking NOC/LOC for appointment of stockists, being followed by OP-14 and played a part in perpetrating the anti-competitive conduct in association with other officials of OP-14 and OP-1/OP-11. Therefore, the Commission is of the opinion that Mr. Hitesh Paida is liable under Section 48(2) of the Act.



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159. Before parting with the order, the Commission notes that the officials of OP-12, OP-13 and OP-14, who have been identified by the DG to be liable under Section 48 of the Act, while filing copies of their ITRs, have claimed confidentiality on the information on account of it being personal and sensitive in nature *qua* them. It is further submitted that such information is not available in public domain and disclosure of the same would cause serious harm and prejudice to them. With respect to such claims, the Commission observes that the scheme of confidentiality is governed by Regulation 35 of the General Regulations, 2009, read with Section 57 of the Act. The Commission is of the view that information pertaining to the Gross Total Income of the officials of OP-12 and OP-14 are required for the purposes of the Act and as such confidential treatment cannot be accorded to the said information. However, the copies of ITRs so filed by the officials as aforementioned are granted confidentiality in terms of Regulation 35 of the General Regulations, 2009.

### **Order**

160. In view of the findings elucidated in the earlier part of this order, the Commission directs OP-1, OP-11, OP-12 and OP-14, including such of their office bearers/officials, who have been found to be liable under Section 48 of the Act, to cease and desist from indulging in the practice of mandating clearance/NOC/LOC, which has been held to be anti-competitive in terms of the provisions of Section 3 of the Act.

161. The Commission is of the view that the erring associations should play active role in educating its members about principles of competition so as to avoid such conduct(s) which obstructs free and fair play of market forces. Therefore, in exercise of its powers under 27(g) of the Act, the Commission directs OP-1 to organize, in letter and spirit, at least five competition awareness and compliance programmes over a period of six months in the State of Madhya Pradesh for its members. Similarly, OP-11 is also directed to organize one competition awareness programme in the district of Indore. OP-1 and OP-11 have to organize such programmes within six months from the date of receipt of this order and file their respective compliance reports with the Commission within one month of holding the last programme.



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162. Further, the Commission finds that despite advising the pharmaceutical companies not to facilitate such practices of the associations and directing the companies to bring to the notice of the Commission any kind of anti-competitive conduct being forced upon them by the trade association(s), the pharmaceutical companies have failed to demonstrate such ability. The Commission directs the pharmaceutical companies *viz.* OP-12 and OP-14, to foster a culture of competition compliance within their respective organisations and sensitize their employees, by bringing into place a Competition Compliance Programme so as to ensure compliance with the provisions of the Act. OP-12 and OP-14 to file the compliance report within 180 days from the date of receipt of this order.
163. In the past, the Commission has been proscribing the anti-competitive practices of state and regional chemists and druggist associations in *inter alia* mandating NOC/LOC for appointment of stockists and imposing stringent penalties imposed upon them. Still, the associations are continuing to indulge in these practices in one form or the other. It is observed that the associations are devising ingenious ways and means to continue the pernicious practice, albeit in a covert manner. The Commission observes that the associations being the converging point for its constituent members should take lead to educate them about the pernicious effects of anti-competitive behaviour and also the consequences that can befall on account of violations of the provisions of the Act.

#### ***Penalties on the Associations***

164. The Commission observes that no mitigating factor(s) have been pointed out by the erring associations *i.e.* OP-1 and OP-11. Moreover, despite various orders of the Commission passed in other matters and advisories issued by the Commission, the anti-competitive conduct on the part of the associations and their office bearers has been unrelenting. Thus, it is necessary that this anti-competitive conduct is penalised adequately to discipline the erring parties for the said contravention, and to create deterrence so as to prevent future contraventions of the Act. Accordingly, the Commission deems it appropriate to impose a penalty on OP-1 and OP-11 at the rate of 10% of average of their respective incomes excluding interest income and sale of inspection books, as reflected in their respective Income and Expenditure accounts for three financial years as filed by them with the Commission, which are shown herein below:



### Income of OP-1 and OP-11

Year	MPCDA/OP-1	ICA/OP-11
	(In Rupees)	
2014-15	74,28,275	2,44,000
2015-16	25,98,082	3,21,100
2016-17	25,25,749	6,29,254
<b>Total</b>	1,25,52,106	11,94,354
<b>Average</b>	41,84,035	3,98,118
10% of Average Income	4,18,404	39,812

165. Resultantly, the following penalties, calculated at the rate of 10% of their average income, are payable by OP-1 and OP-11:

#### Penalty amount payable by OP-1 and OP-11

	MPCDA/OP-1	ICA/OP-11
(In Rupees)		
<b>Amount of penalty</b>	4,18,404/-	39,812/-

166. Considering the respective role of the office bearers of OP-1 and OP-11 as discussed earlier, the Commissions deems it apt to impose penalties at the rate of 10% of the average of Gross Total Income for three years based on the ITRs as filed by them and which are mentioned herein below:

#### Income of office bearers of OP-1 and OP-11

Name of Office bearers/ Officials	2014-15	2015-16	2016-17	Total	Average (In Rupees)	10% of Average Income
Mr. Goutam Chand Dhing, President of OP-1	7,77,104	10,22,721	11,18,309	29,18,134	9,72,711	97,271
Mr. Vinay Bakliwal, President of OP-11	6,43,076	6,34,182	6,61,652	19,38,910	6,46,303	64,630
Mr. Nirmal Jain, General Secretary of OP-11	7,11,474	7,13,092	8,75,869	23,00,435	7,66,812	76,681



167. Resultantly, the following penalties, calculated at the rate of 10% of their average income, are payable by them:

**Penalty amount payable by office bearers of OP-1 and OP-11**

	<b>Mr. Goutam Chand Dhing, President of OP-1</b>	<b>Mr. Vinay Bakliwal, President of OP-11</b>	<b>Mr. Nirmal Jain, General Secretary of OP-11</b>
<b>(In Rupees)</b>			
<b>Amount of penalty</b>	97,271/-	64,630/-	76,681/-

***Penalties on Pharmaceutical Companies***

168. OP-12 requested that the Commission should consider the relevant turnover and not the total turnover while imposing penalty. The Commission observes in this regard that other than raising the said contention, the said OP did not clarify as to what constitute the relevant turnover according to it when the said OP is dealing in all pharmaceutical products and not just few through its stockists. The Commission, thus, finds no merit in the contention of OP-12.
169. The Commission takes note of the steps taken by OP-12 to do away with the standard format letters and adopting an online registration process through its online portal named *Synergy*, from November 2015, onwards as mitigating factor. During the hearing, the counsel for OP-14 claimed that the evidence on record demonstrated that OP-14 had acted without the consent of the Indore Chemist Association (OP-11) for appointment of one stockist. Considering these mitigating factors being demonstrated by OP-12 and OP-14, the Commission deems it appropriate to impose penalties at the rate of 1% of the average of the revenue/turnover of the three years as per the financial statements as filed by them and which are mentioned herein below:

**Revenues of pharmaceuticals companies**

	<b>Himalaya/OP-12</b>	<b>Intas/OP-14</b>
<b>(Rupees in Lacs)</b>		
2014-15	1,52,281.64	4,54,258.92



2015-16	1,85,264.60	5,61,549.50
2016-17	2,20,327.63	6,52,094.94
<b>Total</b>	<b>5,57,873.86</b>	<b>16,67,903.36</b>
<b>Average</b>	<b>1,85,957.95</b>	<b>5,55,967.79</b>
1% of Average Income	1,859.58	5,559.68

170. Resultantly, the following penalties, calculated at the rate of 1% of their average income, are payable by OP-12 and OP-14:

#### Penalty amount payable by OP-12 and OP-14

	Himalaya/OP-12	Intas/OP-14
(Rupees in Lacs)		
<b>Amount of penalty</b>	1859.58	5559.68

171. Considering the respective role of the officials of OP-12 and OP-14 as discussed earlier, the Commissions deems it apt to impose penalties at the rate of 1% of the average of Gross Total Income for three years based on the ITRs as filed by them and which are mentioned herein below:

#### Income of the Officials of OP-12 and OP-14

Name of Office bearers/ Officials	2014-15	2015-16	2016-17	Total	Average (in rupees)	1% of Average Income
Mr. Philippe Haydon, CEO of OP-12	2,97,91,995	3,29,26,715	4,57,96,025	10,85,14,735	3,61,71,578	3,61,716
Mr. R.K. Vachher, Sales Manager of OP-12	25,84,357	43,31,817	24,80,311	93,96,485	31,32,162	31,322
Ms. Sagaya Mary, Manager Distribution of OP-12	5,88,583	6,75,491	7,15,921	19,79,995	6,59,998	6,600



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Mr. Nimish Chudgar, MD and CEO of OP-14	6,81,58,184	12,18,61,637	15,17,03,782	34,17,23,603	11,39,07,868	11,39,079
Mr. Sanjay Dixit, General Manager of OP-14	14,60,740	18,89,857	18,30,847	51,81,444	17,27,148	17,271
Mr. Anil Nair, Asst. Manager of OP-14	3,82,908	4,19,448	3,81,250	11,83,606	3,94,535	3,945
Mr. Hitesh Paida, Sales Manager of OP-14	13,52,347	19,06,299	22,94,324	55,52,970	18,50,990	18,510

172. Resultantly, the following penalties, calculated at the rate of 1% of their average income, are payable by them:

**Penalty amount payable by officials of OP-12**

	Mr. Philippe Haydon, CEO	Mr. R.K. Vachher, Sales Manager	Ms. Sagaya Mary, Manager Distribution
(In Rupees)			
<b>Amount of penalty</b>	3,61,716/-	31,322/-	6,600/-

**Penalty amount payable by officials of OP-14**

	Mr. Nimish Chudgar, MD and CEO	Mr. Sanjay Dixit, General Manager	Mr. Anil Nair, Asst. Manager	Mr. Hitesh Paida, Sales Manager
(In Rupees)				
<b>Amount of penalty</b>	11,39,079/-	17,271/-	3,945/-	18,510/-

173. The aforesaid parties, who have been subjected to penalty for their involvement in the anti-competitive conduct, are directed to deposit the penalty within sixty days of receipt of this order.



174. The Secretary is directed to inform the parties, accordingly.

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

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

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

**New Delhi**  
**Dated: 03.06.2019**