



COMPETITION COMMISSION OF INDIA

Case No. 71 of 2013

In Re:

M/s Maruti & Company, Bangalore

Informant

And

Karnataka Chemists & Druggists Association

Opposite Party No. 1

Mr. K.E. Prakash, President, KCDA

Opposite Party No. 2

**The Regional Sales Manager/State Incharge,
Lupin Diabetes Care Unit of Lupin Ltd.**

Opposite Party No. 3

Lupin Ltd.

Opposite Party No. 4

CORAM

**Mr. Devender Kumar Sikri
Chairperson**

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

**Mr. Sudhir Mital
Member**

**Mr. Augustine Peter
Member**

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

**Justice G. P. Mittal
Member**



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Appearances:

For the Informant:	Mr. H. Chandra Sekhar, Advocate Mr. Vinod Verma
For OP-1 and Mr. A.K. Jeevan:	Mr. Sanjoy Ghose, Advocate Ms. Pratishtha Vij, Advocate Mr. N. Padmakar Nayak, Member (OP-1)
For OP-2:	Mr. Rahul Goel, Advocate Ms. Anu Monga, Advocate Mr. Neeraj Lalwani, Advocate Mr. Nitish Sharma, Advocate
For OP-3, OP-4 and Mr. Nishant Ajmera:	Mr. Ramji Srinivasan, Sr. Advocate Mr. Manas Kumar Chaudhari, Advocate Mr. Sagardeep Singh, Advocate Mr. Pranjal Prateek, Advocate Mr. R. Kumar, Legal Mr. Vivek Mittal, Head Legal
For Mr. D.S. Guddodgi:	Dr. Vijay Kumar Aggarwal, Advocate Mr. Ankush Walia, Advocate

Order under Section 27 of the Competition Act, 2002

The present order will dispose of the information filed by M/s Maruti & Co., Bangalore, (hereinafter, the '**Informant**') under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') with the Competition Commission of India (hereinafter, the "**Commission**") on 16th September 2013 against Karnataka Chemists & Druggists Association (hereinafter, '**KCDA**'/'**Opposite Party No. 1**'/'**OP-1**'), Mr. K.E. Prakash, President of



OP-1 (hereinafter, '**Opposite Party No.2**'/ '**OP-2**'), the Regional Sales Manager/State Incharge, Lupin Diabetes Care Unit of Lupin Ltd. (hereinafter, '**Opposite Party No. 3**'/ '**OP-3**'), and Lupin Ltd. (hereinafter, '**Opposite Party No. 4**'/ '**OP-4**') (OP-1, OP-2, OP-3 and OP-4 are hereinafter collectively referred to as the '**Opposite Parties**'), alleging contravention of the provisions of Section 3 of the Act.

2. Facts, in Brief

- 2.1 The information was filed for the alleged contravention by the Opposite Parties in denying the supply of drugs to the Informant for want of a No Objection Certificate (hereinafter, '**NOC**') from OP-1.
- 2.2 The Informant was appointed as a stockist for the Diabetes Care Division of OP-4 on 05th June 2013 in Bangalore. However, the Informant was allegedly not supplied with drugs against an order placed by it with OP-4 in August 2013, as it failed to obtain an NOC from OP-1. It was alleged that OP-3, the Regional Sales Manager of the Diabetes Care Division of OP-4 (i.e. Mr. Amit Kumar Dhiman) directed the Informant to obtain an NOC from OP-1 as a precondition for commencing the supply of drugs from OP-4 to the Informant.
- 2.3 When the Informant sought clarification from OP-1 for non-supply of drugs over the phone on 16th July 2013 and 18th July 2013, OP-2 (the President of OP-1) allegedly directed the Informant to obtain an NOC from OP-1 before commencing the business. It has thus been alleged that OP-1 and OP-2, in collusion with OP-3 and OP-4, were insisting that the Informant obtain an NOC from OP-1 as a precondition for supply of drugs to be made to it. The Informant has further claimed that it had placed an order dated 24th August 2013 with OP-4 for supply of life saving drugs, through speed post, against which no supplies were made by OP-4. In support of its claim, the Informant has produced a covering letter dated 26th August 2013, addressed



to OP-4, which contained the order dated 24th August 2013 placed with OP-4.

- 2.4 Based on the aforesaid allegations and averments, the Informant has, *inter alia*, prayed for an investigation by the Director General (“DG”) against the Opposite Parties for contravention of the provisions of the Act.
- 2.5 After considering the material available on record, the Commission was of the opinion that there existed a *prima facie* case of contravention of the provisions of Section 3 of the Act. Accordingly, *vide* order dated 03rd October 2013 passed under Section 26(1) of the Act, the DG was directed to cause an investigation into the matter and submit a report. In compliance with the said directions, the DG has submitted the investigation report dated 27th March 2015 (hereinafter, the ‘**Main Investigation Report**’).
- 2.6 The Main Investigation Report was sent to the parties pursuant to the Commission’s order dated 21st April 2015 and they were directed to appear for an oral hearing on 09th June 2015. On 09th June 2015, the matter was adjourned to 09th July 2015, pursuant to OP-2’s request for adjournment. OP-2 had filed an application dated 07th July 2015 with the Commission requesting cross-examination of all those witnesses whose statements had been relied on by the DG in the Main Investigation Report. On 09th July 2015, the counsel appearing for OP-2, *inter alia*, pressed his application and submitted that the DG, in the Main Investigation Report, has relied on the statements given by individuals who happen to be the political rivals of OP-2. It was alleged that the statements given by these witnesses are not only incorrect, but are wrong, vague and without material particulars. The counsel appearing for OP-4 and its concerned officials, also requested for cross-examination of the Informant at the hearing held on 09th July 2015, submitting that the DG had declined their request dated 06th June 2014 in this regard.



- 2.7 After hearing the aforesaid parties and considering the material on record, the Commission, *vide* its order dated 09th July 2015, allowed the request of OP-2 and OP-4 and directed the DG to conduct cross-examination as sought by them; and submit a report on the same. The DG has submitted a report, dated 26th November 2015, further to the cross-examination of these witnesses (hereinafter, the ‘**Report on cross-examination**’).
- 2.8 The observations and findings of the Main Investigation Report as well as the Report on cross-examination are entailed herein below.

3. Observations and Findings of the DG

- 3.1 After a detailed investigation of the facts, including the emails/letters exchanged, minutes of the meetings, depositions by witnesses, *etc.*, the DG has found that OP-1 is carrying on the practice of insisting for NOC prior to a pharmaceutical company supplying drugs to its newly appointed stockists. According to the DG, this practice being carried on by OP-1 amounts to limiting and controlling the supply of drugs and medicines in Karnataka and is in contravention of the provisions of Section 3(3)(b) read with Section 3(1) of the Act. The DG has further found that OP-4 denied supplies to the Informant, at the instance of OP-1, in spite of having appointed the Informant as its distributor. Such an arrangement/understanding between OP-1 and OP-4 has been found to be an anti-competitive agreement, which has caused an appreciable adverse effect on competition (“AAEC”) in the market, in contravention of the provisions of Section 3(1) of the Act.
- 3.2 The DG’s investigation has revealed that the Informant was appointed as a Stockist of OP-4 on 05th June 2013. On 17th July 2013, OP-4 (through its official) sent an email, bearing the subject ‘*NOC Request Letter to KCDA*’, to the Informant (through email address: depotbangalore@lupinpharma.com), with a copy to Mr. Nishant Ajmera,



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the Regional Distribution Manager of OP-4. This email contains an attachment titled '*NOC Request.pdf*', which is a copy of the letter dated 05th June 2013, sent by OP-4 (through OP-3) to OP-1, furnishing details of all of OP-4's existing stockists and informing OP-1 about the appointment of the Informant as its new stockist. In the said letter, a request is also made to OP-1 to inform all its members about the new appointment of the Informant '*so that they can start dealings with newly appointed stockist*'.

- 3.3 On 18th July 2013, the Informant has responded to OP-4 by email bearing the same subject heading, viz., '*NOC Request Letter to KCDA*'. This email contains an attachment titled '*Application form for Stockiest (1).doc*'. The attachment is a blank template form, addressed to OP-1, vide which the applicant (pharmaceutical company) intimates its desire to appoint a stockist to OP-1 and seeks the feedback/opinion of OP-1 on the antecedents of such stockist prior to the stockist's appointment.
- 3.4 As per the DG, the letter dated 05th June 2013 sent by OP-4 to OP-1 (which is attached to the email dated 17th July 2013 sent by OP-4 to the Informant), is nothing but an NOC sought by OP-4 from OP-1 prior to commencing supplies to a newly appointed stockist, in this case, the Informant. The DG has also observed that this clearly evidences that, without the consent/intimation of OP-1 to its existing members, a newly appointed stockist would not be entertained by the existing members of OP-1.
- 3.5 The DG has also taken into account the copy of the Informant's order dated 24th August 2013 placed with OP-4 along with the covering letter dated 26th August 2013, vide which the Informant has claimed to have placed an order for drugs with OP-4 through speed post. OP-4 and its officials have denied receiving this order. However, the Informant has furnished a copy of the Acknowledgement Slip of the Postal Department dated 27th August 2013 bearing no. EK297655914IN as evidence of dispatch of the said letter



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& order to OP-4. The DG has also sought confirmation of delivery against the said Acknowledgement Slip from the Department of Posts, Bangalore. The postal department has confirmed the delivery of the aforesaid speed post dated 27th August 2013 to OP-4 on 28th August 2013. In view of said confirmation, the DG has concluded that such order was sent by the Informant and duly received by OP-4.

- 3.6 On being confronted about the order dated 24th August 2013 placed by the Informant, Mr. Amit Kumar Dhiman (OP-3) and Mr. Nishant Ajmera, Regional Distribution Manager of OP-4, denied receipt of the said order by their distribution team. Mr. Nishant Ajmera has further stated that NOC was not demanded by OP-4. OP-3 and Mr. Nishant Ajmera have also stated that the Informant called OP-4 and enquired whether OP-1 was informed about his appointment as a stockist. Upon this, an official of OP-4 (*i.e.* OP-3) had sent an email dated 17th July, 2013 to the Informant, attaching the letter dated 05th June 2013 which was sent by OP-4 to OP-1, at the behest of the Informant.
- 3.7 OP-4 has maintained that the Informant has placed no order with it until January 2014. However, the DG has found this to be highly improbable, given that the Informant is an existing and established stockist of OP-4 for its Eli Lilly product range. The DG has found it unlikely that the Informant did not place any order with OP-4 for more than six months after its appointment as a distributor of Diabetes Care Division of OP-4 in June 2013. In short, OP-4's contention that the Informant did not place any order until January 2014, has not been accepted by the DG.
- 3.8 Based on the aforesaid evidence, the DG has concluded that the evidence on record establishes the Informant's allegations regarding non-supply of goods by OP-4 to it on account of the Informant's inability to obtain an NOC from OP-1.



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- 3.9 The DG further examined the Informant's allegations against OP-1 and OP-2, of restraining pharmaceutical companies from supplying drugs to newly appointed stockists without obtaining NOC from OP-1. It has been observed by the DG that the letter dated 05th June 2013 sent by OP-4 to OP-1, is a 'Stockist Appointment Form' designed by OP-1 which was available on OP-1's website until 13th November 2013. This was removed subsequently during the course of the ongoing proceedings. The Stockist Appointment Form required pharmaceutical companies to furnish information about their existing as well as newly appointed stockists to OP-1, with a request to intimate the same to OP-1's members, so that they could start dealing with the newly appointed stockists.
- 3.10 On confrontation, OP-2 has stated that though the letter dated 05th June 2013 was in the format (of a Stockist Appointment Form) prescribed by OP-1, it was not mandatory. OP-2 has submitted that pharmaceutical companies use the Stockist Appointment Form voluntarily to submit such requests to OP-1. On the basis of evidence collected during investigation, the DG, however, has found that the pharmaceutical companies were mandatorily required to furnish details of their existing/appointed stockists to OP-1, as per the format prescribed by OP-1. Moreover, the tenor of the intimation to OP-1 at the time of new appointment, *i.e.*, the request that such intimation be sent to all members of OP-1 '*so that they can start dealing with newly appointed stockist*', demonstrates that such an intimation to OP-1 is mandatory for the pharmaceutical companies before commencing supplies to newly appointed stockists.
- 3.11 Further, the DG has taken note of the Minutes of the Working Committee (WC) and Managing Committee (MC) meetings of OP-1 held between 2010-2013 wherein anti-competitive decisions/discussions, such as, complaints of non-obtaining of NOC by pharmaceutical companies prior to appointment of stockists, decisions to be taken against pharmaceutical companies pursuant to such conduct, *etc.*, took place. Relying on these



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minutes, the DG has concluded that OP-1 was limiting the supply of drugs in the market and controlling the supply chain through which drugs and medicines are made available in the market. It is also found by the DG that OP-1 used to compel unwilling members to participate in bundhs and take punitive actions against pharmaceutical companies not complying with its directions, even at the cost of causing disruption in the supply chain of medicines/drugs.

3.12 Besides the minutes of these meetings, the DG has also examined the letters exchanged between OP-1 and various pharmaceutical companies which clearly bring out the practice of seeking permission/opinion/approval of OP-1 before appointment of a new stockist. The DG has observed that the format in which two pharmaceutical companies, viz., M/s MSD Pharmaceuticals Pvt. Limited (*vide* letter dated 21st December 2010) and M/s GlaxoSmithKline Pharmaceuticals Limited (*vide* letter dated 21st December 2010) requested OP-1 to look into the antecedents of the proposed stockists prior to their appointment, were identical to the Stockist Appointment Form attached to the e-mail dated 18th July 2013 sent by the Informant to OP-4. The identical Form used by all these pharmaceutical companies to intimate the appointment of a new stockist to OP-1 proves that the Form was devised by OP-1. The responses sent by OP-1, from time to time *vide* letters dated 28th December 2010, 06th September 2011, 05th January 2012 and 26th June 2012, in response to such requests of pharmaceutical companies, are also worded identically. The DG has also taken cognizance of certain news articles wherein the issue of OP-1 indulging in the practice of mandating NOC from it prior to supply of medicines was reported.

3.13 Based on the above facts and analysis, the DG has held that OP-1, by making NOC mandatory prior to supplies being made by pharmaceutical companies to their newly appointed stockists, has contravened the provisions of Section 3(3)(b) read with Section 3(1) of the Act. The DG



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has further opined that the conduct of OP-4 in refusing to supply its products to the Informant, at the instance of OP-1, can be construed to be an agreement within the meaning of Section 2 (b) of the Act, between OP-4 and OP-1 and has found such agreement to have caused AAEC, in contravention of the provisions of Section 3(1) of the Act.

3.14 During the course of investigation, the DG has also identified the following officials and office bearers of OP-1 and OP-4 who are in charge of and responsible for the affairs/business of their respective association/company:

- i) OP-2 viz. Mr. K.E. Prakash, President of OP-1;
- ii) OP-3 viz. Mr. Amit Kumar Dhiman, Regional Sales Manager of OP-4;
and
- iii) Mr. Nishant Ajmera, Regional Distribution Manager of OP-4.

3.15 The findings of the DG on cross-examination are briefly discussed herein under.

3.16 From the cross-examination of Mr. Sardar Mal Surana (authorized representative of the Informant) by OP-2 and OP-4, the DG has opined that no new facts have emerged during the cross-examination to contradict/obliterate/alter the findings of the Main Investigation Report, as regards the conduct of OP-2, OP-4, including their respective officials. Despite asking various questions during the cross-examination, OP-2 and OP-4 were not able to bring out any evidence to absolve themselves of the anti-competitive activity found by the DG. Further, the counsel of OP-4 and its officials were not able to establish that there was no AAEC caused by their refusal to supply to the Informant.

3.17 The cross-examination of Mr. D.S. Guddodgi by OP-2 has revealed that Mr. Guddodgi was the Vice President of OP-1 from the year 1992/1994 to 2000, and thereafter, he was elected as the President of OP-1. According to



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him, he was the President up to 2012. Although Mr. Guddodgi has denied having knowledge about the activities of the Managing Committee of OP-1 post 2012, the DG has found a letter/circular dated 25th April 2013 issued by OP-1 under the signature of Mr. Guddodgi as the President of OP-1. During cross-examination, Mr. Guddodgi confirmed the contents and his signature on the aforesaid letter as President of OP-1. But he could not clarify as to how the same was issued by him in 2013 when, according to his reply to an earlier question during cross-examination, he has stated that he was the President of OP-1 only till 2012. Mr. Guddodgi has further stated that the then Secretary of OP-1, Mr. K. E. Prakash (OP-2), had forced him to sign NOC documents. On being questioned whether he had apprised the Managing Committee of OP-1 about such coercion by OP-2, Mr. Guddodgi has stated that the responsibility of informing the Managing Committee was of the Secretary *i.e.* OP-2. The DG has observed that this explanation given by Mr. Guddodgi is not satisfactory. Rather, the DG has found Mr. Guddodgi to be responsible for and complicit in the anti-competitive conduct of OP-1 of requiring NOC.

3.18 OP-2 also cross examined other witnesses relied upon by the DG, *viz.*, Mr. Raghunatha Reddy R., Mr. Bhanu Prakash and Mr. V. Hari Krishnan. Through their cross-examination, OP-2, *inter alia*, tried to establish that they had consulted with each other prior to deposing before the DG. The DG observed that though the cross-examination brought out the fact that the Informant and these three witnesses, *viz.* Mr. Raghunatha Reddy R., Mr. Bhanu Prakash and V. Hari Krishnan, were acquainted with each other, such acquaintance is insufficient to disregard their depositions during investigation.

3.19 The cross-examination of Mr. A.K. Jeevan by OP-2 reveals that Mr. A.K. Jeevan had been associated with OP-1 since 1997. Prior to being elected as Secretary of OP-1 in May 2013, he was holding the position of Vice President of OP-1 for two terms and, briefly, as Acting President of OP-1



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for one month. Mr. A.K. Jeevan has admitted that he was aware of the activities of OP-1 and had participated in all the meetings of the Managing Committee. On being questioned about the purpose of the Stockist Appointment Form, he has stated that he was aware of its purpose and that it was OP-2 who was handling the NOC system. Mr. A.K. Jeevan also submitted that OP-2 was responsible for changing the format of the Stockist Appointment Form from time to time.

- 3.20 During cross-examination, in response to a clarification sought by OP-2's counsel as to whether Mr. A.K. Jeevan had any evidence to substantiate that OP-2 was seeking NOC after May 2013 (at the time when Mr. K.E. Prakash and Mr. A.K. Jeevan were elected as the President and Secretary, respectively, of OP-1), Mr. A.K. Jeevan replied that NOC was being asked for by OP-2 telephonically. The DG has noted that this clearly establishes that Mr. A. K. Jeevan was aware of the NOC practice being perpetuated even after his election as Secretary of OP-1 in May 2013.
- 3.21 The DG also observed that, despite his contention of not having been given the charge of Secretary of OP-1 after his election in May 2013, the said issue was formally raised by Mr. Jeevan at OP-1's meeting only after a lapse of more than 1 ½ years, in November/December 2014.
- 3.22 The DG has concluded that by virtue of the positions held by Mr. Guddodgi and Mr. A.K. Jeevan from time to time, it is implausible that they were not aware of the NOC practice being carried out by OP-1. They were found to be responsible and complicit in the anti-competitive practice of NOC being carried out by OP-1.
- 3.23 The Main Investigation Report and the Report on cross-examination, both were sent to the parties and their office bearers/officials who were identified as being in charge of and responsible for the affairs of the Opposite Parties *vide* orders of the Commission dated 21st April 2015 and



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22nd December 2015, respectively. They were directed to file objections/suggestions to the said reports of the DG and were provided with opportunity to present their case during the oral hearings before the Commission on 10th February 2016 and 19th February 2016. The Opposite Parties, including the individuals identified by the DG as being in charge of and were responsible for the affairs/business of the Opposite Parties were also directed to file their audited financial statements or income details including copies of income tax return, as the case may be, to enable the Commission to hear them on merit as well as on the quantum of penalty in the event the Commission were to find the Opposite Parties guilty of violation of the provisions of the Act.

4. Reply/ Objections of the Parties

4.1 The Commission heard the counsels of the Informant and the Opposite Parties, including the persons identified by the DG as responsible under Section 48 of the Act, during the ordinary meeting of the Commission held on 19th February 2016. The replies/objections to the Main Investigation Report as well as on the Report on cross-examination were taken on record and considered by the Commission. Bereft of details, their contentions are summarized below.

Reply/ Objections of the Informant

4.2 During the oral hearing, the Informant has reiterated the allegations made in the information regarding insistence of NOC and non-supply of drugs by OP-4 against the Informant's order dated 24th August 2013, for want of NOC. It was submitted that the Informant was appointed as a stockist of OP-4 in June 2013. It could not place any order with OP-4 till August 2013, as OP-3 and OP-4 were insistent on obtaining NOC from OP-1. Even the order placed by it in August 2013, through speed post, remained unexecuted. In response to OP-4's contention that the order placed on 24th



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August 2013 was a deviation from the normal practice of placing orders through emails, the Informant explained that it was because of OP-4's default that it could not place the orders. The Informant clarified that the normal practice is that, after the appointment of a stockist, the pharmaceutical company sends a medical representative to take orders and to communicate the mode in which future orders are to be placed. Though the Informant had the email address of OP-4 for placing orders for Eli Lilly products, the same could not have been used by the Informant for placing orders for Lupin's products, unless so instructed by OP-4. According to the Informant, the supplies were denied to it till January 2014 for want of NOC.

- 4.3 Based on these submissions, the Informant prayed that the findings of the DG be accepted and the Opposite Parties be penalised for contravening the provisions of the Act.

Reply/ Objections of OP-1 and Mr. A.K. Jeevan

- 4.4 A common reply has been filed on behalf of OP-1 and Mr. A. K. Jeevan. It is submitted by them that the Informant has made no allegation against OP-1 and Mr. A.K. Jeevan. It has been further contended that although Mr. A.K. Jeevan has been the Secretary of OP-1 since 26th May 2013, OP-2 never gave him the charge of the Association. It was only after 29th December 2014 that the matter was settled and Mr. A. K. Jeevan started functioning as the Secretary of OP-1. It is submitted that, prior to this date, Mr. A.K. Jeevan never had any knowledge or possession of any of the documents or papers of OP-1. It is submitted that during the investigation, the DG showed some letters to Mr. A.K. Jeevan which were forged/manipulated by OP-2. He submitted that he was not aware of such letters and in that regard, a police complaint has been lodged against OP-2 on 02nd April, 2015 in Kalasipalyam police station.



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- 4.5 It has been claimed that subsequent to the police complaint, OP-2 handed over the documents to the incoming treasurer of OP-1 *vide* letter dated 17th June 2015. It is submitted that the perusal of the letter would show that OP-2 was in custody of the documents prior to that date and, thus, any act done by OP-2 should not be attributed to OP-1 or to Mr. A.K. Jeevan. Mr. A.K. Jeevan has stated that even during cross-examination, he had clarified that he did not sign any document and that he was not aware of OP-1's activities, as OP-2 did not hand over the charge of the association/OP-1. It is reiterated that neither OP-1 nor he ever insisted on the requirement of NOC prior to the appointment of stockist by the pharmaceutical companies and thus, there is no contravention of the provisions of the Act by them. This, as per him, has been clearly brought out during the investigation by the DG.
- 4.6 Based on the foregoing, OP-1 and Mr. A.K. Jeevan prayed that the findings of the Main Investigation Report be accepted with regard to OP-2 and the matter be dropped against them.

Reply/ Objections of Shri K.E. Prakash i.e. OP-2

- 4.7 OP-2 has, *inter-alia*, filed written suggestions/objections dated 25th June 2015 and 05th February 2016 in response to the Main DG Report and Report on cross-examination and has also argued at length during oral hearing held before the Commission on 19th February 2016. OP-2 has denied all allegations relating to his involvement in any of the anti-competitive activities as alleged in the information.
- 4.8 OP-2 has submitted that, in order to establish that the practice of obtaining NOC from OP-1 prior to appointment of stockist was prevalent, the DG has relied on statements/ minutes of the meetings pertaining to the years 2010 and 2011, and letters circulated in the years 2010, 2011 and 2012. However, the DG has failed to appreciate that OP-2 had become the



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President of OP-1 only on 26th May 2013. Prior to that, Mr. D.S. Guddodgi was the President of OP-1. Further, pursuant to the elections of OP-1, all the officer bearers including the newly elected Secretary (Mr. A.K. Jeevan) had taken charge in the Managing Committee meeting held on 26th May 2013. It is claimed by OP-2 that the minutes of the said Managing Committee Meeting relied upon by the DG were wrong, incorrect and fabricated.

4.9 OP-2 has objected to the DG's placing reliance on the statements made by various witnesses on the ground that they were interested witnesses having political rivalry with OP-2 and, thus, their statements could not be relied upon. It is stated that the elections for the Managing Committee of OP-1 took place on 19th May 2013. Mr. D.S. Guddodgi was heading the opposing panel and he lost the elections against OP-2 which led to the political rivalry between them. This, as per OP-2's submissions, materially impacts the credibility of their statements. OP-2 claims that the DG has failed to examine the credentials of the witnesses in this regard and, has in fact not disclosed the identity of the witnesses, while recording their statements.

4.10 He has submitted that the DG, in the Main Investigation Report, has not examined the role of office bearers, especially, Mr. D.S. Guddodgi during whose Presidentship (of KCDA) the alleged NOCs were issued. There is no evidence to establish that OP-2 indulged in the practice of demanding NOCs, considering that he became the President on 26th May 2013. Further, OP-3/OP-4 have categorically stated that no NOC was sought/demanded by OP-1 or OP-2 prior to appointment of the Informant *i.e.* Maruti & Co. It is highlighted that the Informant was appointed as a stockist by OP-4 on 05th June 2013 without NOC. Further, attention has been drawn to the letter dated 13th October 2013 by OP-2 clarifying that the Informant was duly intimated that there is no requirement of obtaining NOC and the pharmaceutical companies/manufacturers are free to



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select/deal with their business partners/stockists. It is further pointed out by OP-2 that pharmaceutical companies, on voluntary basis, inform OP-1 after appointing a new stockist and that there is no compulsion by OP-1/OP-2 in this regard.

- 4.11 It is claimed by OP-2 that, subsequent to the Commission's order in Case no. 20/2011 (*Santuka Associates Pvt. Ltd. vs. All India Organization of Chemists and Druggists and Ors.*) and other similar cases; AIOCD and OP-1 had sent letters dated 18th April 2013 and 25th April 2013 respectively, conveying/reiterating that no NOC would be required for appointment of stockists; discounts can be given at liberty; there is no requirement of giving Product Information Service (PIS) charges and that there would be no boycott of pharmaceutical companies on this ground.
- 4.12 It has been further submitted by OP-2 that the DG has wrongly relied on news reports, disregarding the legal position laid down by the Hon'ble Supreme Court of India that newspaper reports cannot as such be relied upon as evidence.
- 4.13 OP-2 clarified that the call for bandh/strike by AIOCD and other associations was not in relation to NOC or PIS charge. The strike, called on 10th May 2013 by AIOCD, did not pertain to any anti-competitive issues but rather, against the unjustified government policies and their impact on the fraternity of dealers engaged in the distribution of medicines. It was contended that both OP-2 and OP-1 have in no way prohibited any party from conducting the businesses. Belgaum District Chemist & Druggist Association (BDCDA) was suspended from the Managing Committee on a demand and consensus amongst the members of the Managing Committee. OP-2 (alone) cannot be held to be involved in anti-competitive activity based on such collective decision. Further, it has been argued that suspension of an association, which is not engaged in



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production and supply of goods, cannot in any manner amount to limiting and controlling supplies in the market and denial of freedom of trade.

- 4.14 *Vide* his submissions dated 05th February 2016, OP-2 has reiterated his earlier contentions and denied the allegations relating to his involvement in any anti-competitive activity during his association with OP-1. It is highlighted that the investigation as well as cross-examination conducted by the DG is pre-determined in nature. It is submitted that the DG asked OP-2 to re-establish the need for cross-examining the Informant, despite the Commission having allowed the same. This act of DG in questioning the very grant of cross-examination to OP-2 amounts to gross insubordination. The DG has disallowed some pertinent questions during cross-examination and did not object to the witnesses referring to the DG report.
- 4.15 It is submitted that the DG failed to duly incorporate the fact that the Informant and witnesses are acquainted with each other. It is further submitted that the rivalry between OP-2 and the Informant/witnesses is the primary reason for OP-2 to seek their cross-examination and the cross-examination established the same. Further, the cross-examination conducted by OP-2 has brought many contradictions regarding certain facts, thus reducing the probative value of their testimony.
- 4.16 OP-2 has submitted that the cross-examination has brought out that the testimonies of various witnesses, including the Informant, consisted of various bald allegations without any documentary evidence. Further, there are inconsistencies in the statements made by such witnesses and some of the questions remained unanswered by the witnesses. Further, Mr. A.K. Jeevan admitted that there has been a political rivalry between Mr. D.S. Guddodgi and OP-2. Further, Mr. D.S. Guddodgi's statement that OP-2 issued a circular to all its members on 25th April 2013 was challenged by OP-2 stating that the said circular was signed by Mr. D.S. Guddodgi as



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President of OP-1. It is argued that the conclusion reached by the DG fails to recognize that there is no substantial evidence provided by any of the witnesses (including Mr. D.S. Guddodgi) to show that OP-2 is propagating the alleged NOC practice despite there being documentary proof provided by OP-2 to the contrary.

- 4.17 For the reasons stated above, OP-2 has stated that the DG has wrongly concluded that OP-2 is complicit in the contravention of the Act on part of OP-1. It is, hence, prayed that his name should be struck-off from the array of parties and he should be absolved from any liability under the Act.

Reply/ Objections of OP-4, Mr. Amit Kumar Dhiman (i.e. OP-3) and Mr. Nishant Ajmera

- 4.18 Common replies have been filed with the Commission on behalf of OP-4, Mr. Amit Kumar Dhiman (i.e. OP-3) and Mr. Nishant Ajmera on 29th May 2015 and 09th February 2016. It has been claimed that since the Informant is an existing Stockist of OP-4 for Eli Lilly products since 2011, it cannot be said that OP-3 and OP-4 have caused barriers to entry for the Informant in the market.
- 4.19 OP-4 has denied receipt as well as contents of the letter dated 26th August 2013, containing the alleged order dated 24th August 2013, sent by the Informant. OP-4 also highlighted that the alleged order dated 24th August 2013 was not for life-saving drugs as claimed by the Informant. OP-4 has argued that the Informant had a long relationship with it for its Eli Lilly products since 2011 and that the Informant was fully aware of the process of placing orders. Even then, in deviation to the normal practice, the said order was sent by post to OP-3 (Regional Sales Manager), instead of the distribution team. OP-4 has also stated that the Informant did not consider it necessary to follow it up with OP-4 for execution of the order,



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considering that the order was for life saving drugs. Further, OP-4 has stated that the acknowledgement from the postal authorities with regard to the letter dated 26th August 2013 does not prove that it contained the order dated 24th August 2013.

- 4.20 OP-4 has further averred that even otherwise, non-supply of products against the alleged order can at the most be regarded as an internal administrative delay in the supply of products which could have been mutually sorted out. The delay in the supply of a single order cannot be considered as refusal to deal under the Act. The conclusion drawn by the DG in this regard is thus untenable.
- 4.21 With regard to the emails dated 17th July 2013, OP-4 has submitted that it was on the Informant's request that it had sent this email to the Informant with the subject line, "NOC Request letter to KCDA" containing an attachment titled "NOC Request.pdf". OP-4 has averred that the DG has wrongly inferred that the attachment titled "NOC Request.pdf" was an NOC sought by OP-3/OP-4 from OP-1 prior to commencing supplies to the appointed Stockist. If it was intended to solicit the consent from OP-1 before commencing supplies, there was no reason for OP-4 to supply diabetic products in January 2014 to the Informant without the NOC from OP-1.
- 4.22 OP-4 has challenged the genuineness of the Informant in filing the present information. The Informant is aggrieved because of non-supply of the order dated 24th August 2013 and filed an information dated 06th September 2013 with the Commission on 13th September 2013. It is argued that such an information has been filed in less than 15 days of placing the alleged 24th August 2013 order. This, as per OP-4, is probably a tool employed by the Informant to plot a case against OP-3 and OP-4, when the basic grievance of the Informant is, *prima facie*, against its own Association *i.e.* OP-1 and OP-2. It is highlighted that the Managing



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Director of the Informant was a member of the Managing Committee of OP-1 as district representative during the year 2011-13 and, therefore, the Informant would have participated in the practice of NOC, if any.

- 4.23 It is submitted that OP-4 does not operate at the same level of production chain as OP-1 and as such their conduct cannot be seen under Section 3(3) of the Act. It is stated that OP-4 merely communicates with OP-1 about the new appointments to encourage the members of OP-1 to deal with the newly appointed Stockist and such intimation cannot be regarded as seeking an NOC from OP-1.
- 4.24 OP-4 has further submitted that though the Commission has investigated and penalized the chemists and druggists associations in the past for NOC, none of these decisions have been against any pharmaceutical company. Further, it is stated that no other pharmaceutical company was investigated by the DG despite such companies also following the same practice of intimating OP-1 about the appointment of new stockists.
- 4.25 It is submitted that the evidence collected by the DG is inadequate to prove an “agreement” or any meeting of minds under Section 3(1) of the Act. The DG has incorrectly held that the refusal to supply by OP-4 at the instance of OP-1 can be construed to be an agreement between OP-4 and OP-1 under Section 2(b) of the Act, when a number of other orders have been continuously executed by OP-4. Further, the DG has not been able to establish that there was an AAEC. OP-4 has argued that there are approximately 18,000 pharmaceutical manufacturers in India and approximately 50,000 distributors in India competing with each other. Therefore, OP-4 does not enjoy any market power to refuse to supply drugs to a distributor. OP-4 has 29 distributors/stockists for Bangalore and there are numerous other distributors of generic products appointed by the competitors of OP-4. OP-4 has also stated that in most of the brands ordered by the Informant, it has a very low market share because of the



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existence of various other competitors. Hence, there is no foreclosure of competition due to sufficient number of players in the market. Hence, the DG's conclusion that the agreement is causing AAEC is devoid of merit in the absence of corroborative evidence.

- 4.26 With regard to the liability of individual officers under Section 48 of the Act, it is submitted that the DG has not specifically investigated the role of OP-3 and Mr. Nishant Ajmera who have submitted on oath that they never demanded any NOC from the Informant. It is further submitted that the direction of the Commission at the very preliminary stage to the DG to investigate the role of persons under Section 48 of the Act has prejudiced the mind of the DG against them. Therefore, the conclusions of the DG in this regard are liable to be rejected.
- 4.27 With regard to the Report on cross-examination, it is submitted that the DG has failed to appreciate the new facts that emerged from the cross-examination that have a strong bearing on the case.
- 4.28 Relying on the cross-examination of Mr. Sardar Mal Surana (authorized representative of the Informant), OP-4 has stated that his statement clearly reveals that no orders for supply of the products upon OP-4 had ever been placed through post, barring the order in question which OP-4 has not received. Further, OP-4 has highlighted that Mr. Surana admitted the receipt of supply against order sent by email dated 11th January 2014 and all further orders by the Informant, thus there cannot be any grievance of refusal to supply to it. OP-4 also stated that the deposition of the Informant clearly shows that the market for pharmaceutical supply, distribution and retail is highly fragmented with the presence of large number of players.
- 4.29 OP-4 has submitted that the cross-examination of various witnesses including that of Mr. Bhanu Prakash, Mr. Raghunatha Reddy R., Mr. A.K. Jeevan, Mr. D.S. Guddodgi and Mr. V. Hari Krishnan has revealed that



this matter has been borne out of issues between OP-1/OP-2 and the Informant and/or personal rivalry between OP-2 and the witnesses.

- 4.30 Based on the aforesaid, OP-4, Mr. Amit Kumar Dhiman (*i.e.* OP-3) and Mr. Nishant Ajmera, prayed that the Main Investigation Report and the Report on cross-examination be rejected.

Reply/ Objections of Mr. D.S. Guddodgi to the DG Report

- 4.31 Mr. D.S. Guddodgi has submitted that the *prima facie* order was based on the information filed by the Informant against certain specific opposite parties named in the information and not against him. Further, it is stated that the information relates to the alleged contravention of the provisions of the Act, if any, after 05th June 2013, when he was not associated with OP-1.
- 4.32 Mr. D.S. Guddodgi has submitted that he was not elected as a member of the Managing Committee in the Annual General Meeting of OP-1 held on 19th May 2013 and thus any contravention by OP-1 after the said date cannot be attributed to him. It is also highlighted that in the Main Investigation Report, the DG has not recorded any finding to the effect that he was incharge of and responsible for the conduct of the business of OP-1. Thus, he cannot be held responsible under Section 48 of the Act.
- 4.33 With regard to the Report on cross-examination, it is submitted that the DG has not specifically recorded what new evidence/documents have been brought on record against Mr. D.S. Guddodgi, which were not available while preparing the Main Investigation Report. It is further submitted that the DG has also failed to state the grounds on which Mr. D.S. Guddodgi has been held responsible for and complicit in the past anti-competitive conduct of OP-1.



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- 4.34 Mr. D. S. Guddodgi has also challenged the act of the DG in not issuing any notice to him before recording the adverse findings against him. This, as per Mr. D. S. Guddodgi, is against the *prima facie* order of the Commission whereby the DG was directed to give opportunity of hearing to such persons in terms of Section 48 of the Act.
- 4.35 Besides, Mr. Guddodgi has brought on record certain mitigating factors for the consideration of the Commission, namely, his old age, the fact that the present case is the first case against him, he was not impleaded as an opposite party by the Informant, he cooperated with the investigation throughout despite his old age and that the Main Investigation Report did not record any finding against him.
- 4.36 In view of the above facts, he has prayed that the findings of the cross-examination report of the DG *vis-à-vis* him be rejected.

5. Findings of the Commission

- 5.1 The Commission has perused the information, the Main Investigation Report as well as the Report on cross-examination and the suggestions/objections to the DG reports made by the parties and other material available on record.
- 5.2 On a consideration of the aforesaid material, the following issues arise for determination in the present matter:

Issue 1: Whether OP-1 is mandating NOC prior to the appointment of stockist by pharmaceutical companies? Whether the allegations levelled by the Informant regarding refusal to supply by OP-4, on account of the practice carried on by OP-1, has been substantiated by the evidence available on record?



Issue 2: Whether there was any anti-competitive understanding or arrangement between OP-1 and OP-4, in contravention of the provisions of Section 3 of the Act?

Issue 3: If the answer to Issue 1 and 2 are in affirmative, whether the individual office bearers/officials of OP-1 and/or OP-4 are liable under Section 48 of the Act for their respective anti-competitive conduct?

The Commission's findings on each of the above issues is set out below:

Issue 1: Whether OP-1 is mandating NOC prior to the appointment of stockist by pharmaceutical companies? Whether the allegations levelled by the Informant regarding refusal to supply by OP-4 on account of the practice carried on by OP-1 has been substantiated by the evidence available on record?

5.3 This matter originated from the Informant's allegation that OP-4 has refused to supply it with drugs against the order dated 24th August 2013 placed with OP-4. The Informant claims that such refusal was on account of not obtaining an NOC from OP-1. Throughout the course of the proceedings, the issue whether the order dated 24th August 2013 was received by OP-4 has been a matter of dispute. Despite this fact being a triggering event for filing of the present information, the larger issue herein remains and that is in regard to the practice of chemists and druggists associations mandating NOC prior to the appointment of a stockist by pharmaceutical companies. Accordingly, the main issue identified is whether OP-1, as an association of enterprises, is carrying on such a practice. But the refusal to supply by OP-4 against the Informant's order dated 24th August 2013, which has been alleged to be resulting from this practice, has been dealt with first in the following paragraphs.

5.4 The Informant was appointed as a stockist by OP-4 for its Diabetes Care Division in June 2013. The letter dated 05th June 2013 sent by OP-3



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(Regional Sales Manager of OP-4) to President of OP-1 establishes this fact. In this letter, OP-4 informed OP-1 of its existing stockists and also intimated OP-1 of its appointment of the Informant as a new stockist for its Diabetes Care Division. Prior to this appointment, the Informant had been an approved stockist of Eli Lilly & Company. As OP-4 had entered into a collaboration with Eli Lilly & Company for the marketing and sale of Eli Lilly's insulin related products since 2011, the Informant had been a stockist of OP-4 for Eli Lilly's insulin related products since 2011. However, the appointment of the Informant as a stockist for Lupin's Diabetes Care Division products was later in June 2013.

5.5 Thereafter, the Informant claims to have placed an order dated 24th August 2013 with OP-4 for its Diabetes Care Division's products, along with a covering letter dated 26th August 2013 through speed post. The DG confronted the officials of OP-4 with the Informant's order along with the cover letter to confirm receipt. Mr. Nishant Ajmera, Regional Distribution Manager of OP-4, denied receipt of the Informant's order dated 24th August 2013 and stated that the first order placed by the Informant with OP-4 for its Diabetes Care Division products was only on 11th January 2014, which was supplied by OP-4 to the Informant on 13th January 2014. To verify the Informant's claim, the DG sought confirmation from the Department of Posts, Bangalore of the delivery of this speed-post item to OP-4. The Department of Posts, Bangalore, has confirmed that the speed post dated 27th August 2013 bearing no. EK297655914IN was delivered to OP-4 on 28th August 2013. It also provided a duly stamped delivery slip which was signed by an official of OP-4, which is a vital piece of evidence confirming delivery and receipt of the speed post by OP-4.

5.6 Though OP-3 and Mr. Nishant Ajmera denied receipt of the order dated 24th August 2013, they have not refuted the confirmation received from the Department of Posts, Bangalore. In his statement before the DG dated 25th February 2015, OP-3 submitted the following:



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'To the best of my knowledge this order was not received so it was not executed.

But to re-check the records I request you to provide a copy of this letter, order and dispatch details to me. And after re-checking I will inform you by 02.03.2015.'

5.7 As per the DG's records, OP-3 did not furnish such information, as promised, by 02nd March 2015. This weakens the veracity of OP-3's claim and lends credibility to the Informant's allegations against OP-4.

5.8 Further, Mr. Nishant Ajmera, in his statement dated 02nd March 2015, submitted the following:

'As far as I remember this order was not received by our distribution team, because of that it was not serviced, NOC was not demanded, so the presumption appears to be incorrect.'

5.9 The above statements of OP-4's officials are visibly bald statements and are in the form of mere denials, unsupported by any evidence to the contrary against the delivery confirmation received from the Department of Posts, Bangalore.

5.10 Since OP-4 could not counter the delivery confirmation received from the Department of Posts, Bangalore, it has resorted to oral arguments rebut this point. During the oral submissions, OP-4 argued that even if the speed-post item dated 27th August 2013 was received by it, it cannot be concluded with full certainty whether this was an order, a greeting card or a blank envelope. OP-4 further submitted that the cross-examination of the Informant brings out that the Informant has been placing the orders for Eli Lilly's range of products through various modes, such as email, fax and personal contact, since 08th August 2011. It has thus been argued by OP-4 that the order dated 24th August 2013 was in deviation from the Informant's normal practice for placing orders and that this deviation could not be adequately explained by the Informant.



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5.11 In response, the Informant's counsel has submitted that, typically after appointment, pharmaceutical companies send their medical representatives to take orders from newly appointed stockists and these representatives intimate the mode for placing future orders to the stockist. The Informant has stated that no such medical representative was sent by OP-4. Accordingly, as per the Informant, the email address meant for placing orders for Eli Lilly products could not have been used by the Informant to place orders for products of OP-4's Diabetes Care Division.

5.12 The Commission notes that the Informant was a stockist of OP-4 since 2011 for Eli-Lilly products. Being an old stockist, he would be aware of the procedure for placing orders. It is likely that because OP-4 did not send its medical representative to the Informant for procuring the first order for Lupin's Diabetes Care division (and for providing the relevant email address on which future orders for this division could be placed), the Informant decided to opt for another medium (speed post) for placing the order dated 24th August 2013. Even if it is a deviation from normal practice, as has been submitted by OP-4, change in the mode of placing order through speed post and not through emails cannot be inferred to mean that the order dated 24th August 2013 was not placed by the Informant. The confirmation from the Department of Posts is in itself a vital evidence and this has remained uncontroverted throughout the proceedings. OP-4 has neither been able to controvert the receipt of the speed post nor could it establish that the speed post was merely a "greeting card" or "blank envelope", as argued during oral submissions. Further, the argument taken by OP-4 that the alleged order dated 24th August 2013 was not for life-saving drugs, weakens OP-4's contention that it never received the said order. In the absence of any evidence to the contrary, it is established that the order dated 24th August 2013, along with the cover letter dated 26th August 2013, was sent by the Informant to OP-4 and this was received by OP-4 on 28th August 2013. Following from this, it is clear that OP-4, having received the order dated 24th August 2013, did not



supply drugs to the Informant.

- 5.13 The Informant has alleged that the reason for such refusal to supply was on account of not obtaining NOC from OP-1. In this regard, the contents of the cover letter dated 26th August 2013, which was sent by the Informant to OP-4 along with the order dated 24th August 2013, are relevant. The letter, in verbatim, is reproduced hereunder:

“Sir,

Sub: Request to supply stock as per enclosed order.

As per order/letter dated 05-06-2013 you have appointed Maruthi & Company as your stockiest in order to have better sales in the District. Subsequently to said appointment you have not sent your representatives to book and Collect the orders for supply of stocks.

When contacted, you asked me to furnish NOC from the Karnataka Chemists & Druggists Assn ® Bangalore, but NOC is not required as per law and the order passed by the competition commission of India.

As there is urgent requirement of life saving drugs and other medicines, I have herewith enclosed a detailed order for supply of the stocks as mentioned therein. I am ready to make the payment as per prevailing practice either through DD or cheques.

I request your goodself to immediately supply the stocks as per the enclosed order and also intimate regarding mode of payment.

Thanking you,

*Yours Sincerely
(Sardar Mal Surana)”*

- 5.14 The contents of the cover letter clearly bring out that the Informant, despite being appointed as a stockist, was not able to procure life-saving drugs on account of not obtaining NOC from OP-1.



- 5.15 As per the Main Investigation Report, the webpage of OP-1 displayed a Form titled ‘*Stockist Appointment Form*’ until 13th November 2013. The letter dated 05th June 2013 from OP-4 (through OP-3) to OP-1 also contained the same Form titled ‘*Stockist Appointment Form*’, as appearing on OP-1’s website. This Stockist Appointment Form was subsequently removed from the OP-1’s website during the course of investigation. The tenor of the Stockist Appointment Form clearly shows that it was used by pharmaceutical companies (in this case OP-4) to inform OP-1 of OP-4’s existing and newly appointed stockists, with the request that this information be passed onto OP-1’s members so that they could start dealing with the new appointee.
- 5.16 Although OP-2 has contended that this Stockist Appointment Form was not a mandatory requirement to be submitted to OP-1, the fact that the letter dated 05th June 2013 was forwarded by OP-4 to OP-1 under the subject heading, “*NOC Request letter to KCDA*” is, in and of itself, evidence that an NOC was being sought by OP-4 from OP-1. Further, the phrases used in the said Form, “*so that they could start dealing with the new appointee*” conclusively proves that such intimation is a pre requisite and, thus, mandatory for a proposed stockist to be able to deal with the members of OP-1.
- 5.17 Minutes of a few meetings of the Working Committee (WC) and Managerial Committee (MC) of OP-1 held during 2010 to 2013 also demonstrate that OP-1 was actively indulging in the practice of mandating NOC for dealing with newly appointed stockists. The relevant excerpts from such meetings are reproduced in verbatim below:

Minutes of WC meeting dated 27th June 2010

Shri Shivraj Patil of Bidar complained on Wanburry Limited about the appointment of Ganesh Agencies, Bidar as a stockist without NOC from



KCDA. (emphasis supplied)

Minutes of WC meeting dated 25th July 2010

Mr. Rangaswamy complained that many companies are not taking concurrence of KCDA for stockist appointment. The house discussed on letters received from some of the Bangalore wholesalers complaining about not getting NOC for stockist appointment from companies.
(emphasis supplied)

Minutes of MC meeting dated 08th January 2012

Sri Javed of Mysore informed that Cipla said to have decided not to appoint the stockists suggested by the KCDA. Mr. Manjunath of Mysore said that in his case, Cipla has applied for the NOC of the Association. Shri Shivraj Patil said that he has denied to take stockistship of Cipla as they have not availed NOC of KCDA and asked them get the NOC prior to his appointment. Mr. Satyanath complained that Cipla has started reducing margins of their products one by one and requested that they dealt accordingly. Mr. K.E. Prakash informed that misdeeds of Cipla has come to the notice of all and matter is being dealt with by South Zone.
(emphasis supplied)

Minutes of MC meeting dated 26th May 2013

Shri Gangadhar Turumandy of Belgaum, strongly condemned the action of Shri N.G. Kulkarni who was provoking chemists not to take part in the bundh call of AIOCD and pleaded for the strong action against him..... As his statements were found not convincing, President declared that Belgaum District Chemists and Druggists Association is suspended from Managing Committee for his anti-association activities.

- 5.18 These minutes are self-speaking and require no elaboration. It is apparent that OP-1 was regularly discussing issues of erring pharmaceutical companies who have failed to obtain an NOC from OP-1 prior to appointing new stockists. A collective reading of these minutes leads to the inference that OP-1 was indulging in the practice of mandating NOC prior to the appointment of stockists by pharmaceutical companies. Such an NOC, to be obtained from OP-1, was mandatory and that is why it could be raised as complaint by members of OP-1 at MC and WC



meetings.

- 5.19 During investigation, certain letters/communications exchanged between various pharmaceutical companies, stockists and OP-1, were also collected. One such letter dated 05th August 2010, sent by M/s Sun Pharmaceutical Industries Ltd. to Bangalore District Chemist and Druggists Association (a district level association affiliated to OP-1) contains the following contents:

‘Kindly arrange to issue necessary NOC for the following stockists who have applied for our stockistship...’ (emphasis supplied)

- 5.20 Further, another letter dated 10th December 2010, sent by M/s MSD Pharmaceutical Pvt. Ltd. to the Informant offering its stockistship at Bangalore, stated as follows:

‘Further to your acceptance to the terms and conditions of our company, we hereby offer you the stockistship for Chronic Care Division. However, this offer is subject to obtaining the necessary permission ‘no objection certificate’ from your local association. Please furnish the same to the undersigned to confirm this appointment.’ (emphasis supplied)

- 5.21 Yet another letter dated 21st December 2010, sent by M/s MSD Pharmaceutical Pvt. Ltd., pursuant to the above stated letter, to OP-1, through fax, stated as follows:

‘We are glad to inform you that we wish to appoint M/s Maruti & Company & Mahaveer, Bangalore District as our stockist with immediate effect and hereby furnish following details for your information. We will be very much obliged if you kindly look in to the antecedents of the new stockist whom we are going to appoint and give us your opinion at your earliest and oblige.’ (emphasis supplied)

- 5.22 In response to the letter dated 21st December 2010, OP-1 (under the signature of OP-2) sent a letter dated 28th December 2010 to M/s MSD



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Pharmaceutical Pvt. Ltd. wherein the following was communicated:

‘We have received your letter informing us your wish to appoint M/s Maruti & Co., Bangalore as stockist of your esteemed company and also you have requested us to give our opinion after enquiring about their antecedents. In this respect, we are glad to inform you that we made a proper enquiry about M/s Maruti & Co., Bangalore and opine that they are having good market coverage and having decent dealings with other companies. Hence you may appoint them as stockist of your esteemed company.’

- 5.23 As mentioned, there are several similar letters which were collected during the course of the DG’s investigation and form part of the Main Investigation Report (e.g. letter dated 21st December 2010, sent by M/s Glaxo SmithKline Pharmaceuticals Ltd. to OP-1 requesting for NOC; letter dated 06th September 2011 sent by OP-1 to M/s Merck Ltd.; letter dated 05th January 2012 sent by OP-1 to M/s Lupin Ltd.; and letter dated 26th June 2012 sent by OP-1 to M/s Serdia Pharmaceutical India Pvt. Ltd). It is observed that all the letters issued by OP-1 referred to above are under the signature of OP-2.
- 5.24 The contents of all these letters are found to be similar. Requests have been made by pharmaceutical companies to OP-1 to check the antecedents of their newly appointed stockists and the response(s) of OP-1 to these requests state that OP-1 has checked the market coverage of these stockists. Neither OP-1 nor OP-2 has contested any of these letters or their content.
- 5.25 A plain reading of the above letters/correspondences (including those obtained during investigation but not reproduced herein for the sake of brevity) clearly establishes that the practice of obtaining NOC from OP-1 prior to the appointment of a stockist (or prior to initiation of supply to a newly appointed stockist) has been in existence since 2010. The language used in the correspondences has been camouflaged so as to give an



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impression that such letters were meant for checking the antecedents and market coverage of a newly appointed stockist. However, when read in entirety, their true spirit is amply revealed. It is apparent that these letters, regardless of the expression used, are nothing but NOCs through which the pharmaceutical companies seek prior permission of associations (such as OP-1 in this case) for appointment of new stockists.

5.26 Based on the evidence discussed in the preceding paragraphs, it is established that OP-1 has indulged in the practice of mandating NOC prior to the appointment of stockists by pharmaceutical companies. Nothing material has been brought on record to contest the findings of the DG's investigation or to contend that OP-1 has not indulged in the practice of mandating/issuing NOC. On the contrary, it has, *inter alia*, been admitted that "...From day one Mr. K.E. Prakash is handling the system of NOC in KCDA and he kept on changing the format of the form from time to time". Although OP-1 has sought to project OP-2 to be responsible for the impugned conduct, does not take away from the fact of an admission that OP-1 has been indulging mandating NOC for appointment of stockists in the State of Karnataka. Political rivalry amongst the members within an association would, in no manner, absolve the liability of the association, on the pretext that the impugned conduct was pursued at the behest of any particular office bearer or class of persons responsible within an association. In other words, an association cannot evade its liability under the provisions of the Act by attributing the impugned conduct to any particular office bearer(s). The evidence on record is sufficient to establish that OP-1 has contravened the provisions of the Act by mandating the requirement of NOC for appointment of stockists by pharmaceutical companies.

5.27 OP-2 has objected to DG's reliance upon certain newspaper articles stating that these have no evidentiary value. However, such newspapers articles have only been relied upon as corroborative evidence by the DG. There is



sufficient direct evidence in this case establishing the involvement of OP-1 in the anti-competitive practice of mandating NOC. As such, even if these newspaper reports were not taken into account, the findings of the DG's investigation would not change.

5.28 While dealing with various cases in the past [Case No.C-127/2009/MRTPC (*Varca Drugs & Chemists & Ors. v. Chemists & Druggists Association Goa*); Case No. 20/2011 (*M/s Santuka Associates Pvt. Ltd. v. All India Organization of Chemists and Druggists and Ors.*); Case No. 30 of 2011 (*M/s Peeveear Medical Agencies, Kerala v. AIOCD and others*); Suo moto Case No. 05 of 2013 (*In re: Collective boycott/refusal to deal by the Chemists & Druggists Association, Goa, M/s Glenmark Company and M/s Wockhardt Ltd. etc.*); and Case No. 28 of 2014 (*Mr. P.K. Krishnan v. Mr. Paul Madavana & Ors.*), which are not reproduced in detail herein for the sake of brevity], the Commission has held that such practice of mandating NOC as a pre-requisite for appointment of stockists amounts to limiting and restricting the supply of pharmaceutical drugs in the market, in violation of the provisions of Section 3(1) read with Section 3(3)(b) of the Act. Monetary penalties have also been imposed on the erring regional and district-level chemists and druggists associations who were found to be perpetrating the anti-competitive conduct.

5.29 Despite various orders by the Commission in similar cases with respect to this behaviour of chemists and druggists associations, these associations have not abstained from indulging in such anti-competitive conduct but rather have been repeatedly following the same. Instead of desisting from such an activity, the associations are mandating the NOC requirement, either verbally (in order to avoid any documentary evidence/proof) or under camouflaged congratulatory/intimation letters, with a view to hide their apparent anti-competitive behaviour behind these benign nomenclatures. It is a recognised principle of law that substance prevails over the form. By using benign nomenclatures, these associations will not



be able to mislead the Commission or avoid the legal consequences of their anti-competitive conduct. Use of such nomenclature, viz., 'Stockist Appointment Form' instead of NOC, will also not alter the character of this document being an NOC in practice.

5.30 Thus, the allegation of the Informant regarding the refusal to supply by OP-4 on account of the NOC practice carried on by OP-1 has been found to be substantiated by evidence available on record. The Commission observes that the practice of mandating NOC prior to the appointment of stockists results in limiting and controlling of the supply of drugs in the market and it amounts to an anti-competitive practice, in violation of the provisions of Section 3(1) read with 3(3) (b) of the Act. Thus, in view of the foregoing, the Commission concludes that OP-1 has contravened the provisions of Section 3(1) read with Section 3(3)(b) of the Act.

Issue 2: Whether there was any anti-competitive understanding/arrangement between OP-1 and OP-4, in contravention of the provisions of Section 3 of the Act?

5.31 One of the objections raised by OP-4 is that OP-1 and OP-4 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 supply and distribution of drugs and medicines in the market in which OP-4, as a manufacturer of drugs and medicines, is active. OP-1 and OP-4 are neither horizontally placed nor vertically related in the production chain. However, even if an agreement does not fall under Sections 3(3) or 3(4) of the Act, it can still be examined under the parent prohibition set out under Section 3(1) of the Act. With that background, the conduct of OP-4 has been analysed to see whether there has been an arrangement/understanding between OP-1 and OP-4 within the meaning of the prohibition set out under Section 3(1) of the Act.



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- 5.32 At the cost of repetition, few pertinent facts merit restatement. The Informant was appointed as a stockist of OP-4 in June 2013. Thereafter, the Informant claims that he could not place an order for drugs with OP-4 from June 2013 to August 2013 on account of OP-4's failure to send its medical representative to take orders from the Informant or to provide the Informant with the requisite email details for placing future orders. The Informant placed an order dated 24th August 2013 along with a covering letter dated 26th August 2013 which was sent to OP-4 *vide* speed-post item dated 27th August 2013. This order was received by OP-4 but drugs remained unsupplied to the Informant. Thus, there was a refusal to supply drugs on the part of OP-4 to the Informant and the Informant could not get the supply for drugs/medicines from OP-4 until January 2014.
- 5.33 The emails dated 17th July 2013 and 18th July 2013 exchanged between the Informant and OP-4 under the subject heading '*NOC Request Letter to KCDA*' indicate that OP-4 required the Informant to obtain an NOC from OP-1 and that the subsequent refusal to supply by OP-4 (against the Informant's order dated 24th August 2013) was on account of the Informant's failure to procure an NOC from OP-1. Further, the letter dated 05th June 2013 from OP-4 to OP-1 (contained as an attachment to the email dated 17th July 2013 from OP-4 to the Informant) reaffirms that the practice of NOC by OP-1 had been continuing as a mandatory requirement for pharmaceutical companies (in this case OP-4) to commence supply of drugs to its stockists. The contents of the letter which state that members of OP-1 are to be informed '*so that they can start dealings with newly appointed stockist*' demonstrate that the letter was a request by OP-4 for an NOC from OP-1 to commence supplies to the Informant.
- 5.34 In their common reply, OP-4 and its officials have submitted that the e-mail dated 17th July 2013 was sent at the behest of the Informant. It has been submitted that the letter dated 05th June 2013 addressed to OP-1 was to intimate OP-1 about the appointment of the Informant as a stockist and



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the same should not have been regarded as a demand for NOC by the DG. It has been further submitted that the e-mail was not a legally drafted document and the subject line was worded casually.

5.35 The arguments/justifications offered by OP-4 and its officials fail to impress the Commission. Initially, OP-4 and its office bearers have denied receipt of any order/letter dated 24th August 2013. When they could not validly confront the confirmation of delivery by the Department of Posts, Bangalore, they have turned to denying the contents of the speed post (it could be “greeting card”/“blank envelope”). Their varying defenses, when seen in totality, are bald denials sans any substantive evidence to controvert the DG’s conclusions. They were provided with ample opportunity, before the DG as well as before the Commission, to provide any evidence to absolve their liability, but have failed to do so. The body of evidence discussed earlier, when viewed in totality, is sufficient to establish that OP-4 denied the supply of drugs to the Informant for want of NOC from OP-1. The conduct of OP-4, whether voluntary or under the influence of OP-1, in perpetrating the anti-competitive decisions/practices of OP-1, amounts to entering into an agreement/understanding between OP-1 and OP-4 within the meaning of Section 2(b) of the Act. Such an understanding/agreement between them is liable for scrutiny under Section 3(1) of the Act.

5.36 Chemists and druggists associations existing in different regions and states have been unabashedly indulging in the practice of mandating NOC requirement prior to the appointment of stockists. 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 cases that chemists and druggists associations have made NOC 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 a market and this practice amounts to an entry barrier for the pharmaceutical stockists. It



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must also be to the great distaste of pharmaceutical companies of being required to procure NOC before appointment of a new stockist. Besides the pecuniary considerations of the business, influence or interference with the choice of a distributor of a pharmaceutical company would restrict their freedom to do business with persons of their choice. A pharmaceutical company would wish to select distributors/stockists of their preference, without interference by a third party. However, it is observed in various cases that pharmaceutical companies are succumbing to the practice of seeking NOC, in acquiescence with associations. The fact that the impugned practice is being followed by the pharmaceutical company at the instance of the association makes the pharmaceutical company also culpable for participation in the anti-competitive activity. The Commission is unable to fathom the reason behind these pharmaceutical companies in not exercising the option of reporting such anti-competitive acts to it (Commission). Instead, by cooperating with the NOC requirement of the associations, pharmaceutical companies come to be perceived as perpetrators of such anti-competitive practice. Needless to say, such practices under the diktat of the associations, restrict the supply of goods or services in the market, thereby distorting the forces of fair play. This behaviour has been continuing despite stringent orders in the past; yet these perpetrators have not shown inclination to desist from such anti-competitive practices.

- 5.37 In the instant case, it cannot be ruled out that OP-4 might have acted under the influence of OP-1 in insisting for NOC prior to commencing supplies to the newly appointed stockist. However, the same cannot absolve it from liability under the Act for its anti-competitive arrangement/understanding/coordination with OP-1. The existence of any such pressure/influence by OP-1 ought to have been reported by OP-4 to the Commission. This matter assumes further significance in light of the Commission's various orders denouncing the practice of mandating NOC as anti-competitive. Instead of informing the Commission about the anti-



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competitive practices of OP-1, OP-4 chose instead to join hands with OP-1 in implementing the NOC requirement. Thus, OP-4, by virtue of this arrangement/understanding with OP-1, also becomes liable for the consequences of the anti-competitive effects that the NOC requirement has on the market. Such an agreement ultimately has an adverse impact on competition in the overall market for supply of medicines and drugs. In view of this, the Commission holds that OP-4 and OP-1 have entered into an anti-competitive arrangement/understanding/coordination in violation of the prohibition contained in Section 3(1) of the Act.

5.38 Before parting with Issue 2, it is appropriate to deal with some of the objections raised by OP-4. In its written submissions, OP-4 has contended that continuous supply of pharmaceutical drugs to the Informant from January 2014 onwards proves that it has never sought NOC from OP-1 prior to initiation of supply. This argument is unacceptable. It is admitted that regular supplies were initiated only from January 2014, which is after the filing of the information with the Commission. OP-4 has asserted that it was not aware of the filing of the present information with the Commission in January 2014. However, such an assertion does seem to hold much weight. Moreover, the initiation of regular supplies from January 2014, cannot absolve OP-4 from its past egregious conduct of refusing to supply pharmaceutical drugs to the Informant prior to filing of the information.

5.39 Another contention which OP-4 has raised is with regard to the *mala-fide* intention of the Informant in filing the information. In this regard, it is imperative to note 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 and further assessed by the Commission, the locus of the Informant will have no bearing on the determination of contraventions of the Act by the Commission. OP-4 has argued that the fact that the Informant filed the information in less than 15



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days of placing the order dated 24th August 2013 creates a suspicion that he was motivated by ill-intent. It is also urged that the Informant never followed up on this order, but instead chose to file an information before the Commission. The Commission is not impressed with this argument. The Informant, even after his appointment in June 2013, could not place any order with OP-4 for want of NOC. The emails dated 17th July 2013 and 18th July 2013 indicate to the requirement of NOC. Further, the cover letter dated 26th August 2013 (discussed above), also highlights the Informant's difficulty of not being able to place any order with OP-4 from June 2013 to August 2013. Thus, the order dated 24th August 2013 is to be seen in addition to these events and not as a starting point or stand-alone instance of refusal to supply.

5.40 In result thereof, the Commission concludes that there was an anti-competitive arrangement/understanding between OP-4 and OP-1 in violation of Section 3(1) of the Act.

Issue 3: If the answer to Issue 1 and 2 are in affirmative, whether the individual office bearers/officials of OP-1 and/or OP-4 are liable under Section 48 of the Act for their respective anti-competitive conduct?

5.41 Having found OP-1 and OP-4 to be responsible for the contravention of the provisions of Section 3 of the Act, the next issue is whether the office bearers of OP-1 association and officials of OP-4 are also liable under the provisions of Section 48 of the Act.

5.42 Section 48(1) of the Act provides that where a person committing contravention of any of the provisions of this Act is a company (including a firm or an association of individuals), every person who, at the time the contravention was committed, was in charge of, and was responsible for the conduct of the business of the company/firm/association, shall be deemed to be guilty of the contravention and shall be liable to be



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proceeded against and punished accordingly. Further, the proviso to Section 48(1) of the Act entails that such person shall not be liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the occurrence of such contravention. Thus, Section 48(1) of the Act is triggered when the party in contravention is a company (including a firm or an association of individuals) and a person/individual officer/office bearer is found to be in-charge of, and responsible for the conduct of the business of the contravening company/firm/association. Once Section 48(1) of the Act is triggered, it is for such person/officer/office bearer to then prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention, in order to be absolved of liability under Section 48(1) of the Act.

5.43 Section 48(2) of the Act, on the other hand, attributes liability on the basis of the *de-facto* involvement of an officer. It states that '*[n]otwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly*'. In light of the provisions contained in Section 48(1) and 48(2) of the Act, the role of the office bearers of OP-1 and officials of OP-4 are analysed to evaluate whether the evidence on record substantiates their liability for the anti-competitive conduct of their association/company.

5.44 In the Main Investigation Report, the DG found OP-2, President of OP-1, to be responsible for the conduct of affairs of OP-1. As per his statement before the DG, OP-2 has been holding key positions in OP-1 since



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November 2007. He was working as the General Secretary of OP-1 from 30th November 2007 till 25th May 2013. Thereafter, on 26th May 2013, he was given the charge of 'President' of OP-1. In his written submissions, OP-2 has argued that the DG has relied upon wrong/fabricated minutes of the Managing Committee meeting dated 26th May 2013. On comparison of the allegedly fabricated Minutes dated 26th May 2013 with the Managing Committee meeting minutes submitted by OP-2, it is seen that the minutes of the Managing Committee meeting dated 26th May 2013 relied on by the DG and the one submitted by OP-2 are identical, apart from the fact that OP-2 has not submitted the attendance sheet along with the said minutes, which is annexed with the minutes relied upon by the DG.

5.45 Before the DG, OP-2 has submitted that, as per OP-1's byelaws, he presided over the WC and MC meetings of OP-1. Further, the minutes of the OP-1's meetings held on 27th June 2010, 25th July 2010 and 08th January 2012 show that OP-2 attended the meeting in the capacity of Secretary/MC member. In these meetings, complaints relating to pharmaceutical companies appointing stockists without obtaining NOC from OP-1 have been deliberated upon. Thus, by virtue of the positions held by OP-2 as Secretary/MC member in these meetings of OP-1, it is seen that OP-2 was in charge of and responsible for the contravening conduct of OP-1. Given his position in these meetings, it is not only improbable but impossible that OP-1 could have carried out the anti-competitive practice of mandating NOC without his knowledge or involvement.

5.46 Further, there is ample evidence on record to show that OP-2 was actively involved in the anti-competitive conduct carried on by OP-1. At the time when OP-4 refused supplies against the Informant's order dated 24th August 2013 at the behest of OP-1, Mr. K. E. Prakash (*viz.* OP-2) was its President. Importantly, most of the letters establishing OP-1's liability for contravention of Section 3 of the Act (discussed at paragraphs 5.22 and



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5.23 above) were signed by OP-2 in the capacity of Secretary. Letter dated 06th September 2011 to M/s Merck Ltd., letter dated 05th January 2012 to M/s Lupin Ltd. and letter dated 26th June 2012 to M/s Serdia Pharmaceutical India Pvt. Ltd., each sent by OP-1 under the signature of OP-2, are examples showing OP-2's active involvement in the contravention. The genuineness of these letters has not been challenged by OP-2. In view of the foregoing, the Commission has no hesitation in holding that the impugned conduct of OP-1 has taken place with the consent and connivance of OP-2. Thus, OP-2 is deemed to be guilty under Section 48(2) of the Act for the contravention of Section 3 of the Act by OP-1.

- 5.47 The Report on cross-examination has identified Mr. D.S. Guddodgi, the former President of OP-1, and Mr. A.K. Jeevan, Secretary of OP-1, as being responsible for and complicit in the anti-competitive practice of NOC being carried on by OP-1. Their role in the anti-competitive practice of OP-1 mandating NOC has accordingly being examined.
- 5.48 In his objections to the investigation reports, Mr. D.S. Guddodgi has stated that the information relates only to the OP-1's conduct post 05th June 2013. However, the *prima facie* order of the Commission passed under Section 26(1) of the Act, directing investigation by the DG into the anti-competitive practice of the Opposite Parties of NOC requirement for stockist appointment, was not limited to the sole instance of OP-4's refusal to supply to the Informant in August 2013 as alleged in the information.
- 5.49 Mr. D.S. Guddodgi held positions of 'President' and 'Vice- President' of OP-1. His argument that the anti-competitive practices of OP-1 post-2012 were going on without his knowledge is not acceptable. During his cross-examination by OP-2, it has been revealed that Mr. D.S. Guddodgi was the Vice President of OP-1 from 1992/1994 to 2000 and thereafter, he was elected as the President of OP-1. The minutes of the WC/MC meetings of



OP-1 held on 27th June 2010, 25th July 2010 and 08th January 2012, reveal that Mr. D.S. Guddodgi presided over these meetings as “President” of OP-1:

- (a) the minutes of the WC meeting held on 27th June 2010 record “*Shri Shivraj Patil of Bidar complained on Wanburry Limited about the appointment of Ganesh Agencies, Bidar as a stockist without NOC from KCDA*”;
- (b) the minutes of WC meeting held on 25th July 2010 record “*Mr. Rangaswamy complained that many companies are not taking concurrence of KCDA for stockist appointment*”; and
- (c) the minutes of MC meeting dated 08th January 2012 record “*Sri Javed of Mysore informed that Cipla said to have decided not to appoint the stockists suggested by the KCDA ... Shri Shivraj Patil said that he has denied to take stockistship of Cipla as they have not availed NOC of KCDA and asked them get the NOC prior to his appointment*”.

In each of these meetings of OP-1 discussing the practice of NOC and complaining of erring pharmaceutical companies that failed to procure NOC prior to stockist appointment, Mr. D.S. Guddodgi was present as the ‘President’ of OP-1.

- 5.50 Though Mr. D.S. Guddodgi has denied knowledge of the activities of OP-1’s Managing Committee post-2012, a letter/circular dated 25th April 2013 issued by OP-1 is found to bear his signature as the ‘President’ of OP-1. *Vide* this letter, Mr. D.S. Guddodgi intimated OP-1’s members about the Commission’s previous orders with respect to the non-requirement of NOC for appointment of stockists. The fact that this letter was issued under the signature of Mr. D.S. Guddodgi as ‘President’ of OP-1 contradicts his contention that he was not involved in the affairs OP-1 post 2012. Further, the explanation offered by Mr. D.S. Guddodgi, of himself being coerced by OP-2 to sign the NOC letters, is not found to be convincing. Based on the evidence identified above, the Commission concludes that Mr. D. S. Guddodgi was actively involved in the impugned



NOC practice and that such practice was carried on with his connivance. The Commission, therefore, holds Mr. D. S. Guddodgi liable under Section 48(2) of the Act, for the contravention of Section 3 of the Act by OP-1.

5.51 Further, from the cross-examination of Mr. A.K. Jeevan by OP-2, it has emerged that Mr. A.K. Jeevan has been associated with OP-1 since 1997. Prior to being elected as Secretary of OP-1 in May 2013, he held the position of Vice President of OP-1 for two terms, and briefly, the position of its President. During his cross-examination by OP-2, Mr. A.K. Jeevan has deposed as follows:

“Q. 22. ... How is it possible that you were not aware of the said [Stockist Appointment] Form and its purpose despite been [being] associated with KCDA as its Vice President, Acting President and now Secretary?

Ans22. From day one Mr. K. E. Prakash is handling the system of NOC in KCDA and he kept on changing the format of the form from time to time

“Q. 23. ... Were you aware of the purpose of the Stockist Appointment Form?

Ans23. Yes”

5.52 It is thus apparent from the depositions above that Mr. A. K. Jeevan was aware of the activities undertaken by OP-1 in relation to mandating NOC and that he also admitted that he was aware of the purpose of the ‘Stockist Appointment Form’. Further, he is seen to have attended:

(a) the WC meeting held on 25th July 2010, as ‘Vice President’ of OP-1;
and

(b) the MC meeting held on 08th January 2012, as ‘MC Member’, of OP-1.

The relevant excerpts of these meetings have been reproduced in paragraph 5.49 above and are not reproduced herein for the sake of brevity. It is pertinent to note that he has not controverted these facts.



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- 5.53 Mr. A.K. Jeevan has instead contended that he was not given the charge of Secretary of OP-1 until November/December 2014. However, it is observed that he did not raise any objection to having not been given the charge of Secretary for more than 1½ years, despite being elected as Secretary of OP-1 in May 2013. This raises doubts as to the credibility of his statement. In support of his claim, Mr. A.K. Jeevan has pointed out that he had lodged a police complaint against OP-2 for affixing his signature without his knowledge. This complaint is not in English. In this regard it is noted that these letters, where scanned signatures of Mr. A.K. Jeevan were allegedly affixed without his knowledge, are not relied upon by the Commission. The evidence on record in the form of the minutes of WC/MC meetings dated 25th July 2012 and 08th January 2012 (discussed at paragraph 5.49 above) wherein his presence is recorded as ‘Vice-President’/‘MC Member’ are sufficient to prove that the NOC practice was being carried on with his full knowledge and connivance. Further, he has admitted to being aware of the purpose of the Stockist Appointment Form. It is hence concluded that the NOC practice of OP-1 was carried on with the knowledge and consent of Mr. A.K. Jeevan and he is accordingly held liable under Section 48(2) of the Act, for the contravention of Section 3 of the Act by OP-1.
- 5.54 In view of the observations made in the preceding paragraphs herein, it is held that Mr. D.S. Guddodgi, Mr. A.K. Jeevan and Mr. K. E. Prakash (*i.e.* OP-2) were actively involved and complicit in the anti-competitive practice of OP-1 in contravention of the provisions of the Act and that such contravention has taken place with their connivance. They are accordingly held liable for their involvement in the anti-competitive practice of OP-1 under Section 48(2) of the Act and are, therefore, deemed to be guilty of the contravention of Section 3 of the Act.
- 5.55 The Commission has also taken note of the ‘*Rules and Regulations of the Karnataka Chemists and Druggists Association (Regd) Bangalore*’, as submitted by OP-1 before the DG. The ‘*Rules and Regulations of the*



Karnataka Chemists and Druggists Association (Regd) Bangalore clearly specify that the affairs of the Association (*i.e.* OP-1) shall be conducted by the Managing Committee (MC) and that absolute control over the affairs of the Association shall vest with the Working Committee (WC). Most of the WC and MC meetings, relied upon by the Commission to arrive at a finding of a contravention of Section 3 by OP-1, were held when Mr. D.S. Guddodgi was the President, Mr. A.K. Jeevan was the Vice-President and Mr. K. E. Prakash (*i.e.* OP-2) was the Secretary of OP-1. These positions of responsibility held by these individuals within OP-1 highlight their role in the impugned NOC practice and anti-competitive activities of OP-1. Though all these three office bearers have attempted to either shirk or shift their responsibility on each other for the conduct of OP-1, each of them is found to be in charge of and held to be responsible for the affairs of OP-1. They are, thus, deemed to be guilty of the anti-competitive conduct of OP-1. In addition to their active involvement in the anti-competitive conduct of OP-1 which makes them liable under Section 48(2) of the Act, they are also held to be liable under Section 48(1) of the Act by virtue of the positions held by them in OP-1, at the time when the anti-competitive conduct found to be in contravention of the provisions of the Act took place. They being Secretary/President/Vice-President for various time period, as stated earlier, coupled with their active involvement, shows that they were in-charge of and responsible for conducting the affairs of OP-1. Given the position held by each one of them at OP-1's WC and MC, it is not possible that OP-1 could have carried out the anti-competitive practice of mandating NOC without their knowledge. They failed to produce any evidence to demonstrate that the contravention was committed without their knowledge. Rather, the Commission has found their active connivance in the commission of the contravention.

- 5.56 Based on the foregoing, the Commission holds Mr. D.S. Guddodgi, the former President of OP-1, Mr. A.K. Jeevan, the Secretary of OP-1 and Mr. K.E. Prakash (OP-2), the President of OP-1, guilty under Sections 48(1)



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and 48(2) of the Act and holds each of these individuals to have contravened the provisions of Section 3 of the Act.

5.57 With regard to the liability of the officials of OP-4 under Section 48 of the Act, the DG has found Mr. Amit Kumar Dhiman, Regional Sales Manager of OP-4 and Mr. Nishant Ajmera, Regional Distribution Manager of OP-4, to be liable for the anti-competitive conduct of OP-4. These officials were directly dealing with the Informant and were aware of the requirement of NOC. The emails dated 17th July 2013, sent by OP-4 to the Informant, under the subject heading, '*NOC Request letter to KCDA*' along with the attachment '*NOC Request.pdf*', was copied to Mr. Nishant Ajmera. The said email contained an attachment titled, '*NOC Request.pdf*', which was the letter dated 05th June 2013, signed by Mr. Amit Kumar Dhiman. Further, the cover letter dated 26th August 2013 accompanying the Informant's order dated 24th August 2013 placed with OP-4 was addressed to the Regional Sales Manager (Mr. Amit Kumar Dhiman at the relevant time). All these establish the involvement of Mr. Amit Kumar Dhiman and Mr. Nishant Ajmera in insisting for NOC of OP-1 and in refusing supplies to the Informant. This amply proves that the contravention was committed with their consent. Thus, they are liable under the provisions of Section 48(2) of the Act for their active involvement in the contravention of the provisions of the Act by OP-4.

5.58 In view of the foregoing, the Commission concludes that Mr. Nishant Ajmera and Mr. Amit Kumar Dhiman are responsible and complicit for the anti-competitive conduct of OP-4 and hence, liable under Section 48(2) of the Act for contravention of Section 3 of the Act by OP-4.

ORDER

6. Section 27 of the Act empowers the Commission to issue such other order or direction as it may deem fit in case of contravention of the provisions of Section 3 or 4 of the Act. Further, where a contravention of the Act is



committed by a company, including a firm or other association of individuals, the Commission may proceed under Section 48 of the Act to hold and penalise the individuals guilty of the said contravention.

7. In view of the findings elucidated in the earlier part of this order, the Commission directs OP-1, OP-4 and their office bearers/officials, found to be responsible under Section 48 of the Act, to cease and desist from indulging in the practice of mandating NOC, which has been held to be anti-competitive in terms of the provisions of Section 3 of the Act.
8. Despite several orders of the Commission proscribing the anti-competitive practices of state and regional chemists and druggists associations in *inter alia* mandating NOC for appointment of stockists, it is found that these associations are continuing to indulge in these practices. Thus, it is necessary that this anti-competitive conduct is penalised to discipline not only the erring party for the said contravention, but to also create deterrence to prevent future contraventions of the Act. Accordingly, the Commission deems it appropriate to impose a penalty on OP-1 at the rate of 10% of its income based on the Income and Expenditure account for two financial years filed by it with the Commission. Since OP-1 has provided its financial statements for only two years (2012-13 and 2013-14), instead of three years sought from it, the quantum of penalty has been calculated accordingly, as follows:

OP-1 (Income in Rupees)

Year	Income during the Year (in Rupees)
2012-2013	9152484
2013-2014	8053928
Total	17206412
Average	8603206
10% of Average Income (Penalty Amount)	860321

9. Resultantly, a penalty of Rs. 8, 60,321/-, calculated at the rate of 10 % of



the average income of OP-1, is hereby imposed on it.

10. With regard to the individual liability of the office bearers of OP-1 in terms of the provisions of Section 48 of the Act, the Commission deems it appropriate to impose a penalty at the rate of 10% of their income based on the income tax returns (ITRs) filed by them as follows:

Office Bearers of OP-1 (Income in Rupees)

Year	K.E. Prakash	A.K. Jeevan	D.S. Guddodgi
2011-2012	Not Submitted	-	3722224
2012-2013	Not Submitted	542525	4618370
2013-2014	Not Submitted	548141	5190740
2014-2015	Not Submitted	590972	-
Total		1681638	13531334
Average		560546	4510444.67
10 % of Average Income(Penalty Amount)		56055	451044

11. Considering their active role in contravention, a penalty of Rs. 56, 055/- and Rs. 4, 51, 044/-, calculated at the rate of 10 % of the average income of Mr. A.K. Jeevan and Mr. D.S. Guddodgi, respectively, is hereby imposed upon them.
12. The Commission notes that OP-2 *i.e.* Mr. K.E. Prakash did not furnish his income tax returns despite specific directions and sufficient notice given by the Commission at the time of forwarding the investigation report *vide* notice dated 27th April 2015 and at the time of forwarding the cross-examination report *vide* notice dated 06th January 2016. As the requisite information is not on record, the Commission decides to deal with this separately.
13. With regard to OP-4, the Commission observes that the refusal to supply is for a brief period only, *i.e.*, from August 2013 to January 2014. Though this does not absolve OP-4 of its liability for contravention of the Act, yet it



mended its ways and, thus, this may be taken as a mitigating factor in terms of imposition of penalty on OP-4. Considering the same, the Commission is of the opinion that a penalty at the rate of 1% of its turnover based on the financial statements filed by it would meet the ends of justice. The same is calculated as follows:

OP-4 (Income in Crore Rupees)

Year	Turnover /Income during the Year (Rs. in Crores)
2011-2012	5388.32
2012-2013	7145.82
2013-2014	9354.76
Total	21888.9
Average	7296.3
1% of Average Turnover (Penalty Amount)	72.96

14. Resultantly, a penalty of Rs. 72.96 crores, calculated at the rate of 1% of the average turnover of OP-4, is hereby imposed on it.
15. With regard to the officials of OP-4, the Commission is of the considered view that a penalty under Section 48 of the Act at the rate of 1% of their respective income based on the income statements filed by them would be appropriate:

Officials of OP-4 (Income in Rupees)

Year	Amit Kumar Dhiman (in Rupees)	Nishant Ajmera (in Rupees)
2012-2013	417044	598996
2013-2014	561831	920489
2014-2015	556370	998367
Total	1535245	2517852
Average	511748	839284
1% of Average Income(Penalty Amount)	5117	8393

16. Resultantly, a penalty of Rs. 5, 117/- and Rs. 8, 393/-, calculated at the rate of 1% of the average income of Mr. Amit Kumar Dhiman and Mr. Nishant Ajmera, respectively, are hereby imposed upon them.



सत्यमेव जयते



17. The aforesaid parties are directed to deposit the amount of penalty within 60 days of the receipt of this order.
18. The Secretary is directed to inform the parties accordingly.

**Sd/-
(Devender Kumar Sikri)
Chairperson**

**Sd/-
(S. L. Bunker)
Member**

**Sd/-
(Sudhir Mital)
Member**

**Sd/-
(Augustine Peter)
Member**

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

**Sd/-
(Justice G. P. Mittal)
Member**

New Delhi

Dated: 28/07/2016