



**COMPETITION COMMISSION OF INDIA**

**Case No. 78 of 2012**

**In Re:**

**M/s Rohit Medical Store**

**Informant**

**And**

**Macleods Pharmaceutical Limited**

**Opposite Party 1**

**M/s FDC Ltd.**

**Opposite Party 2**

**M/s Cipla Limited**

**Opposite Party 3**

**Shri Sanjeev Pandit, President of HPSCDA**

**Opposite Party 4**

**Himachal Pradesh Society of Chemists and  
Druggists Alliance (HDSCDA)**

**Opposite Party 5**

**CORAM**

**Mr. Ashok Chawla**

**Chairperson**

**Mr. S L Bunker**

**Member**

**Mr. Sudhir Mital**

**Member**

**Mr. U.C Nahta**

**Member**



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### **Appearances:**

|                                |   |
|--------------------------------|---|
| For Informant                  | Advocate Mr. Kamran Malik,  |
| Macleods Pharmaceutical Ltd.   | Mr. Raju Ramachandran,<br>Sr. Advocate, Mr. Rishad A<br>Chowdhury, Advocate, Ms. Movita |
| M/s FDC Ltd.                   | Advocate Ms. Shwetasree Majumdar  |
| M/s Cipla Ltd.                 | Mr. R.C. Nair and Advocate Ms.<br>Avaantika Kakkar                                      |
| Shri Sanjeev Pandit and HPSCDA | Shri Sanjeev Pandit and Advocate<br>Mr. Balram Sharma                                   |

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

1. The present information was filed under Section 19(1)(a) of the Competition Act, 2002 ( hereinafter referred to as ‘the Act’) by M/s Rohit Medical Store (hereinafter referred to as ‘**Informant**’) against M/s Macleods Pharmaceuticals Limited (hereinafter referred to as **OP 1**), M/s FDC Limited (hereinafter referred to as **OP 2**), M/s Cipla Limited (hereinafter referred to as **OP 3**), Sh. Sanjeev Pandit (hereinafter referred to as **OP 4**) and Himachal Pradesh Society of Chemists and Druggists Alliance (hereinafter referred to as **OP 5**) (hereinafter collectively referred to as ‘**Opposite Parties**’) alleging, *inter alia*, contravention of the provisions of Sections 3 of the Act.
2. Facts of the case, as stated in the information, may be briefly noted:
  - 2.1 Informant alleged that Opposite Parties are engaged in anti-competitive practices of imposing the condition of obtaining No Objection Certificate (NOC) prior to the appointment of stockists in the state of Himachal



Pradesh. It is submitted that earlier the Monopolies and Restrictive Trade Practices Commission (MRTP Commission) passed an order in Cases No. 93/2008 and 102/2008 and held that seeking NOC prior to the appointment of stockist is anti-competitive and directed Himachal Pradesh State Chemists & Druggists Association to inform the same to all its members. Informant submitted that Himachal Pradesh State Chemists & Druggists Association changed its name to Himachal Pradesh Society of Chemists and Druggists Alliance i.e., OP 5 in order to avoid the compliance of the said directions of MRTP Commission issued in Cases No. 93/2008 and 102/2008. Informant, in the present case, alleged that OP 4 is continuing the proscribed conduct in complete disregard of the directions issued in such cases by compelling the pharmaceutical companies to obtain NOC from OP 5 prior to the appointment as stockist in the state of Himachal Pradesh.

2.2 As per the information, OP 1, a leading pharmaceutical company in the state of Himachal Pradesh, offered to appoint the Informant as its stockist. The Informant claimed to have completed all the formalities for such appointment except the condition of obtaining NOC from OP 5. It is alleged that the Informant received an email dated 02.09.2012 from OP 1 providing therein the details of the documents required for the appointment of stockist. As per the email, procurement of NOC from OP 5 was one of the documents required to be appointed as a stockist. It is further alleged that the Informant deposited a demand draft of Rs.4 lakhs and placed an order for the products worth Rs.1,56,731 with OP 1 on 01.10.2012, but OP 1 did not deliver the products. A fresh order was again placed by the Informant with OP 1, vide letter dated 18.10.2012, but again no deliveries were made. It is alleged to have been revealed by the Clearing and Forwarding Agent (CFA) of OP 1 that in the absence of NOC from OP 5, the ordered products will not be delivered. In order to



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establish this allegation, Informant has placed on record an audio CD purported to contain recorded telephonic conversation between OP 1 and OP 4 in this regard.

2.3 Similarly, OP 2 which is a leading company engaged in the business of manufacturing foods, drugs and chemicals also denied its stockistship to the Informant for want of NOC from OP 5.

2.4 Further, OP 3 is a leading pharmaceutical company having eight stockists in the state of Himachal Pradesh supplying its products to the stockists in the districts of Una, Hamirpur, Kanagra, Mandi, Shimla and Solan etc. But in Bilaspur district, it has made Informant as its stockist only for one division. Informant has alleged that in spite of repeated requests to OP 3, stockistship for other divisions was not given to it for want of NOC from OP 5.

### 3. **Order for DG investigation:**

3.1 After considering the facts, allegations and supporting documents filed by the Informant, Commission was of the *prima facie* opinion that OP 5 is regulating and controlling the appointment of stockists of pharmaceutical companies by mandating the requirement of NOC for appointment of stockist by any pharmaceutical company in the state of Himachal Pradesh. The conduct of OP 5 was *prima facie* found to be in violation of section 3(3)(b) read with section 3(1) of the Act and accordingly Commission issued a direction under section 26(1) of the Act to the Director General (DG) to investigate the matter.

### 4. **Investigation and Analysis by the DG**



- 4.1 During the course of investigation, the DG *inter alia* examined several emails and communications between the Informant and the Opposite Parties and the Opposite Parties *inter se*. The DG accordingly investigated the conduct of OP 5, the Association, OP 4, President of OP 5, along with the various pharmaceutical companies who purportedly denied stockistship and supplies of medicines to the Informant for want of NOC.
- 4.2 With regard to pharmaceutical companies i.e. OP 1, OP 2 and OP 3, the DG primarily relied on the emails/letters exchanged between the Informant and each one of them.
- 4.3 OP 1 denied all the allegations before the DG and submitted that it did not follow any guidelines/norms of OP 5 or any of its affiliated district associations for appointment of CFA/stockists. OP 1 contended that its decisions to appoint stockists were based on its marketing strategy and needs. OP 1 also tried to justify the non-supply of products to the Informant by citing a fire accident at its clearing & forwarding agency in Patna on 12.10.2012. However, the DG found the replies and submissions of OP 1 to be unconvincing and non-justifiable.
- 4.4 The DG placed reliance on certain evidence found during investigation to analyse the role of OP 1 in the alleged anti-competitive practices. Firstly, the DG relied on an email dated 02.09.2012 which was sent by an employee of OP 1 to the Informant intimating about the documents required for appointment of new stockist of OP 1 which included the requirement for obtaining an NOC from OP 5. The DG further took note of the fact that the orders for certain products placed by Informant were duly acknowledged by a Professional Sales Officer (PSO) of OP 1 by way of order form dated 01.10.2012 and receipt of order had also been



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communicated by CFA to Area Representative (AR) on 08.10.2012. The DG found that though the above said email dated 02.09.2012 was not sent from official email address of OP 1, it is possible that official emails are not available to field officials/representatives. The DG, therefore, construed this email sent by the employee of OP 1 to Informant as a valid communication from OP 1 to the Informant wherein the condition of obtaining and NOC was categorically specified.

4.5 Another piece of evidence relied upon by the DG was the recorded telephonic conversation and a certified copy of transcript of the said conversation between an erstwhile employee of OP 1 and OP 4. The DG opined that the said conversation confirmed that OP 4 was insisting OP 1 for the NOC required to be taken from OP 5 for appointment of stockist. Although OP 4 denied the voice in the recorded telephonic conversation as his voice, the DG relied on the call data record to corroborate the transcript of the recorded conversation. Accordingly, the DG concluded that the evidence on record substantiated the non grant of stockistship and non-supply of goods to the Informant by OP 1 on account of inability of the Informant to obtain an NOC from OP 5. This, the DG concluded, amounted to an 'agreement' between OP 1 and OP 5 as defined under section 2(b) of the Act.

4.6 The DG further concluded that since OP 1 and OP 5 does not operate on a similar level; the agreement between them cannot be covered under section 3(3). Similarly, the DG stated that since OP 1 and OP 5 are not vertically related to each other, an agreement between them cannot be looked under section 3(4) of the Act. However, the DG concluded that the conduct of OP 1 in refusing to deal with Informant in the absence of NOC from OP 5 amounts to a tacit agreement between OP 1 and the



stockist members of OP 5 under the aegis of OP 5 which contravenes the provisions of Section 3(4) (d) read with Section 3(1) of the Act.

4.7 With regard to OP 2, the DG relied upon the letters dated 18.11.2008, 06.01.2009 and 15.02.2009 which were sent by OP 2, through its Regional Managers (RMs), to OP 5. The DG found that through those letters, OP 2 requested OP 5 for grant of NOC for appointing stockists in Bilaspur. Although OP 5 denied receiving the above dated letters, the DG relied on the acknowledgment card of the postal department submitted by the Informant in this regard. However, since all the letters were sent by OP 2 to OP 5 pertained to the period prior to the notification of the Act i.e. 20.05.2009 and no evidence was found by the DG to infer that Informant continued to pursue the matter with OP 2 to secure stockistship post 20.05.2009, the DG concluded that that there was no contravention on the part of OP 2 which can be taken up under the Act.

4.8 With regard to OP 3, the DG took note of the letters placed on record by the Informant dated 20.08.2012 and 10.12.2012 which were sent by the Informant to OP 3, requesting it to grant stockistship for all its divisions. The Informant also placed on record a certificate dated 23.02.2012, issued by one Mr. Rahul Jain, Operations Head of OP 3, whereby Informant was appointed as stockist of 'Medicare Division' of OP 3. The DG perused the material placed on record furnished by the Informant and submissions made by OP 3. Due to lack of corroborative evidence, the DG concluded that contentions of the Informant that it was a stockist of OP 3 for its Medicare Division but denied stockistship for other divisions due to pressure exerted by OP 5 could not be substantiated. Accordingly, the DG concluded that the contravention of the Act on part of OP 3 was not established.



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- 4.9 With regard to allegations against OP 4 and OP 5, the DG investigated on whether OP 4, in the capacity of OP 5's President, was compelling pharmaceutical companies to grant stockistship in the state of Himachal Pradesh only to those persons who had obtained NOC from OP 5. Before the DG, OP 4 filed an affidavit denying any such compulsion of obtaining NOC from OP 5. Further, it was alleged that to ensure compliance with the order of the MRTP Commission in another case, OP 5 issued a circular dated 04.12.2009 informing its members regarding there being no requirement of NOC while appointing stockists in Himachal Pradesh. During investigation, OP 5 denied receipt of letter dated 12.07.2008 sent by OP 2 as well as letters dated 18.11.2008, 06.01.2009 and 15.02.2009 sent by the Informant regarding NOC for the appointment of Informant as a stockist of OP 2.
- 4.10 When OP 5 was directed by the DG to furnish copies of the Minutes/Resolutions of all the meetings of OP 5 including its Executive Committee Meetings, OP 5 expressed its inability to provide minutes of individual meetings held during last two years stating that no such records were kept. OP 5 submitted a copy of First Information Report (FIR) lodged by it on 29.05.2013 to show that most of the documents of OP 5 kept in its office had been stolen.
- 4.11 The DG noted that as per clause 19 of the Himachal Pradesh Societies Registration Act, 2006 under which OP 5 is registered; OP 5 was required to formally record minutes of all proceedings of every General body meeting and also every meeting of its Governing body. Further, as per clause 5 of its Memorandum of Association, OP 5 was under an obligation to record the minutes of the meetings and transactions of all meetings of the Executive body which shall be approved by the



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Executive body at the subsequent meeting. Therefore, the DG concluded that the contentions of OP 5 that it did not record minutes of its meetings appeared unconvincing.

4.12 During investigation, the DG also found certain documents and emails from various pharmaceutical companies, which contradicted the contentions and affidavit filed by OP 4 & OP 5 regarding non insistence of NOC to any pharmaceutical company for appointing a new stockists since December, 2009.

4.13 The email exchanged between pharmaceutical companies and OP 4 clearly showed that those pharmaceutical companies were seeking NOC from OP 4 (rather from OP 5) for appointing their stockists. The DG relied upon the said emails to conclude that OP 5 was controlling and limiting the supply of drugs and medicines in the market in the state of Himachal Pradesh by mandating the requirement of NOC for appointment of stockists in contravention of the provisions of Section 3(3)(b) read with Section 3(1) of the Act.

4.14 During investigation, the DG also found that substantial amounts were received by OP 5 reflected under the Accounting Head -Contribution Industry as evident in its Audited Balance Sheets & Income and expenditure statements for the last 3 years ended 31.03.2013. When sought clarification, OP 5 submitted that the amounts had been received by it as donation for purposes in line with its aims and objectives and had primarily been utilized for Product Information Dissemination (PID) and for continuing pharmacy education. However, the DG found that none of the pharmaceutical companies had in their remittance advices/letters sent to OP 5 stated that the amount remitted by them to OP 5 was a donation as had been stated by OP 5.



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4.15 Rather, the DG noted that payments had been sent by these parties to OP 5 intimating names of their new products launched in the state of Himachal Pradesh paid for @ Rs 2000/- per product. Some of the pharmaceutical companies also furnished copies of receipts issued by OP 5 disclosing the names of the products and acknowledging the payment received by OP 5 towards corpus PID. Though the pharmaceutical companies assured that such payments were made voluntarily to disseminate information about the company's new product launches, the DG suspected that in the garb of rendering Product Information Services (PIS) to pharmaceutical companies, OP 5 was restraining companies from launching their new products in the market without their approval. To investigate this suspicion, the DG further procured copies of the news bulletins from OP 5 and pharmaceutical companies for years 2011 to 2013, to examine whether such products were in fact published for which payments were made. It was found that information about several products for which payments were taken by OP 5 were not published in the bulletins of OP 5. This led the DG to conclude that such payments were a necessary requirement of OP 5 without which new products could not be launched by pharmaceutical companies in the state of Himachal Pradesh. The covering letters/remittance advices/inter office communications submitted by several companies also mentioned terms like NOC/approval with respect to the products being launched, further corroborating DG's conclusion.

4.16 On the basis of foregoing, the DG concluded that OP 5 was limiting or controlling the supply of drugs and medicines in Himachal Pradesh by dictating requirement of NOC for appointment of stockist in contravention of section 3(3) (b) read with section 3(1) of the Act.



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4.17 Further the DG concluded that OP 1 contravened section 3(4) (d) read with section 3(1) by refusing to deal with the Informant which can be construed to be an agreement between OP 1 and the stockist members of OP 5. As against OP 2 and OP 3, the DG found no contravention.

## 5. **Reply/Objections**

### **Reply/Objections of Informant in response to the DG Report**

5.1 The Informant submitted that OP 2 appointed the Informant as its stockist *vide* letter dated 12.02.2014 and is supplying the goods to it since May 2014. With regard to OP 3, the Informant argued against the finding of the DG. It is stated by the Informant that OP 3, deliberately and on the instructions of OP 5, did not appoint the Informant as stockist of all its divisions. The Informant wrote letters dated 20.08.2012 and 10.12.2012 to OP 3 requesting for being appointed as its stockist.

5.2 It is alleged that the Informant is being harassed by OP 5 since 2008. It is further submitted that the findings and conclusions of the DG report in respect of OP 4 and OP 5 may be accepted.

### **Reply/Objections of OP 1 in response to the DG Report**

5.3 OP 1 argued that the DG report is flawed on account of procedural as well as material infirmities. With regard to procedural flaws, it is submitted that the DG failed to observe the principles of natural justice, drew conclusions without any basis and relied on the evidence (audio recording) which is inadmissible as evidence under the Indian Evidence Act, 1872. It is further stated that the conclusions of the DG were



contrary to the material available on record. OP 1 urged that the email dated 02.09.2012, which was relied upon by the DG, was sent by an employee of OP 1 through his private email account and thus the same cannot be presumed to be sent with the consent of OP 1.

5.4 With regard to the recorded telephonic conversation, OP 1 stated that the said conversation was between OP 4 and an employee of OP 1 and it does not prove anything against OP 1. OP 1 also denied the liability for the conduct of its officials stating that the same as unauthorized. OP 1 alleged that it has appointed persons as stockist on many occasions without any NOC from OP 5. Further, the fact that supplies were made to the Informant during 2013 was also brought on record. OP 1 argued that the conclusion of the DG regarding tacit agreement between OP 1 and stockists, who are members of OP 5, is misconceived and hypothetical in nature.

5.5 Based on the above averments, OP 1 denied having contravened any of the provisions of the Act.

#### **Reply/Objections of OP 2 in response to the DG Report**

5.6 OP 2 filed a brief reply since the DG found no contravention against OP 2. It also submitted its financial statements.

#### **Reply/Objections of OP 3 in response to the DG Report**

5.7 In its written submissions, OP 3 submitted that the findings of the DG be accepted. OP 3 contended that the Informant never approached OP 3 for being appointed as a stockist of any division of OP 3. OP 3 alleged that the letters submitted by the Informant as evidence were never received by



it. Further, with regard to the certificate of appointment dated 23.02.2012 purportedly issued by one Mr. Rahul Jain, Operations Head of OP 3, it was stated by OP 3 that no such person was on the rolls of OP 3 in the said capacity at the relevant period and that 'Medicare Division' of OP 3 was not in operation in March, 2012. OP 3 averred that it never insisted its stockists on the requirement of NOC from OP 5 and that it had appointed stockists in the past without any NOC.

### **Reply/Objections of OP 4 & 5 in response to the DG Report**

5.8 OP 4 and OP 5 submitted a joint reply stating that the investigation report is flawed since the Informant produced false and fabricated documents to implicate them. It is alleged that the Informant tried to resort to frivolous litigation such as the present one in order to blackmail companies to appoint it as stockist. It is further submitted that the Informant is a stockist of 116 companies in Bilaspur.

5.9 It is argued that the DG investigation has been conducted in violation of the principles of natural justice and there has been total non-observance of substantive rules. It is also stated that the examination of the additional 18 companies by the DG, which were not reflected in the original information, is *ultra vires*.

5.10 OP 4 and OP 5 further alleged that there are many contradictions in the averments of the Informant to the effect that in the original information, it took the stand that OP 4 and OP 5 compelled the pharmaceutical companies to procure NOC from OP 5 in order to get appointed as stockist of multi-national companies. Later, the Informant took a different stand that there is no such compulsion for the appointment of stockist of small companies. It is submitted that the Informant itself



stated in its affidavit that it was denied the stockistship even though it was ready to make payments in this regard to OP 5. It is submitted by OP 4 and OP 5 that the DG report failed to take note of the fact that the Informant itself is trying to monopolize the business of pharmaceuticals in Bilaspur. OP 4 and OP 5 further submitted that the Informant had also filed another frivolous case (Case No. 11/2010) and succeeded in getting appointment as stockist for Novartis, FDC Ltd. and IPCA pharma companies.

## 6. Issues and Analysis

6.1 On a perusal of the report of the DG report and the replies/objections filed by the Opposite Parties and other materials available on record, the Commission is of the opinion that the following two issues needs to be considered in the matter:

*Issue 1: Whether the allegations against OP 5, as regards imposing condition of obtaining NOC from it prior to the appointment of stockists by the pharmaceutical companies and payment of PIS charges before the launch of their new product, are substantiated by the evidences available on record and if so, whether it amounts to contravention of section 3(3)(b) read with section 3(1) of the Act? Whether OP 4 is responsible under section 48 of the Act for the conduct of OP 5?*

*Issue 2: Whether the conduct of OP 1, OP 2 and OP 3, regarding denial of stockistship and supplies to the Informant for the want of NOC from OP 5, is substantiated by the facts and evidences available on record and if so, whether such conduct contravenes any provision of the Act?*



6.2 The abovementioned issues are dealt in detail in the light of the evidences as collected by the DG and the submissions made by the parties.

### **Issue No.1**

6.3 The Commission took note of the evidence placed on record with respect to allegations levelled against OP 5. The copies of the emails collected by the DG, which were exchanged between the pharmaceutical companies and OP 4, clearly show that the pharmaceutical companies were seeking NOC from OP 5 through OP 4 prior to the appointment of stockists. In one of the email, in the context of stockistship of M/s Shiva Enterprises for M/s Wockhardt Ltd. under the subject heading 'Request For NOC for additional stockiest at shimla Distt,' one Mr. Rakesh Ganjoo wrote to OP 4:

*"Dear Sanjiv ji,*

*.....But now since the market has expanded a lot, and for better business coverage there is a need for an additional stockiest in Distt shimla.*

*So it is requested to kindly approve and issue NOC as per the Rules of your associations,*

*An early action will be highly appreciated....."*

The above email was replied in the following manner by OP 4 on 19.05.2012 conveying his confirmation for appointing a new stockist:

*"Dear sir,*

*It gives me immense pleasure that to increase your sales in shimla you can appoint another stockiest"*

6.4 The above stated thread of emails is an illustration of several other similar emails placed on record which are not reproduced herein for the



sake of brevity. Such documentary evidence leads to the conclusion that OP 5 is still following the anti-competitive practice of imposing the condition of obtaining NOC from it prior to the appointment of any new stockist in the state of Himachal Pradesh.

6.5 Further, the transcript of the telephonic conversation between OP 1 and OP 4 indicates the existence of the practice of obtaining NOC from OP 5 prior to the appointment of any new stockist.

6.6 On the basis of evidences collected by the DG, it is quite apparent that OP 5 is indulging in anti-competitive practice of mandating an NOC prior to the appointment of stockists. Further, the PIS charge, required to be made to OP 5, before every launch of a new product by the pharmaceutical companies under the garb of dissemination of product information, is also anti-competitive. The Commission, in earlier cases, has held that the practice of taking PIS charge is anti-competitive. In this regard OP 4 and OP 5 argued that PIS charge is a part of donation which is made to disseminate the information of new products in the market. The justification provided by OP 4 and OP 5 fails to satisfy the Commission since the DG has found sufficient evidence to show that all the products for which PIS charges were collected were not even published in the news bulletin of OP 5. It is pertinent to mention here that Mr. S.R. Mehta, Director M/s Ind Swift Ltd., one of the pharmaceutical companies, revealed as follows:

*“We are not concerned when the publication was made and our main concern was to obtain the receipt of HPSCDA for the payment made prior to launching of new products to be shown if required to retailers.”*



6.7 Based on the report of the DG on this issue and the replies filed by the parties, the Commission is of the firm view that neither the products for which payments were made by pharmaceutical companies were published by OP 5 nor was there any timely dissemination of information about the new product proposed to be launched in the market. Thus, reasoning and explanations given by most of the pharmaceutical companies that the said payments were made to disseminate the information of new products to be launched in the market is untenable. The DG has rightly concluded that the pharmaceutical companies were probably trying to avoid any scuffle with OP 5. The Commission thus opines that OP 5 acted in contravention of 3(3)(b) read with Section 3(1) of the Act by limiting and controlling the supplies or provision of services by imposing a condition of PIS charge.

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

6.9 In view of the above, the Commission holds OP 5 liable for indulging in anti-competitive practices of imposing the condition of NOC for appointment of stockists and mandating payment of PIS charge in



contravention of the provisions of section 3(3)(b) read with section 3(1) of the Act.

6.10 The Commission, under section 48 of the Act, holds the persons responsible for the conduct of the company/association liable which is held to be in contravention of the provisions of the Act. As regards OP 4, it has been alleged by the Informant that OP 4, in the capacity of President of OP 5, compelled the pharmaceutical companies to grant stockistship only to those persons who produced NOC from OP 5 in the state of Himachal Pradesh and also instructed to stop supplies of the product to those who fail to produce NOC from OP 5. The Commission has taken note of the evidence collected by the DG against OP 4 in the form of emails exchanged between OP 4 and pharmaceutical companies whereby pharma companies sought NOC, which in a way amounts to obtaining prior approval for the appointment of stockists. Further, the recorded telephonic conversation (for which transcript has also been produced) between OP 1 and OP 4 shows confirmation from OP 4 to OP 1 obtaining prior approval for the appointment of stockists.

6.11 Considering the material placed on record, the Commission is of the opinion that OP 4, in the capacity of the President of OP 5, has also played an active role in ensuring that such anti-competitive mandates are followed. Thus, OP 4 is liable under section 48 of the Act for the contravention of the provisions of the Act.

### **Issue No. 2**

6.12 With regard to the liability of OP 1, the Commission notes that the email dated 02.09.2012, which has been relied upon by the DG to conclude liability of OP 1, was sent by Mr. Vipin Rana, an employee of OP 1 to



the Informant intimating about the requirements of the documents for the appointment of new stockist of OP 1 including NOC from OP 5. Thus the Commission finds no merit in the contention of OP 1 that the email was sent from personal email address of its employee for which OP 1 cannot be made liable. The fact that the email was sent through personal email account of an employee does not absolve the employer from its liability if the same is sent during the course of employment. The subject of the email viz. '*stockist format*', the title of the file attached with the email viz. '*STOCKIST\_Appointment\_FORMAT*' and the subject used in the attached file viz. '*Required documents for new stockiest appointment .....*' clearly show that the employee was acting on behalf of OP 1 in the course of his employment.

6.13 It is further noted that the transcript of the conversation between OP 1 and OP 4, submitted by the Informant, clearly indicates that OP 1 was enquiring as to whether NOC is required or not. OP 1 even stated that the supplies would be stopped if OP 4 suggested so. It can thus easily be construed as evidence of communication/understanding between OP 1 and OP 5 since OP 4 was acting in the capacity of President of OP 5.

6.14 At this juncture, the conclusions of the DG with regard to applicability of section 3 of the Act to the understanding/agreement between OP 1 and OP 5 may be noted. The DG observed that agreement between OP 1 and the OP 5 does not fall within the ambit of section 3(3) and section 3(4) of the Act as they are neither engaged in identical or similar trade of goods or provision of services nor operating at different stages or levels of the production chain in different markets because OP 5 is an association of enterprises which is not itself engaged in the supply and distribution of drugs and medicines in the market and OP 1 is a manufacturer of drugs and medicines. The DG in his investigation report has also concluded



that the refusal to supply the products to the Informant by OP 1 for the want of NOC from OP 5 can be construed to be an agreement between the OP 1 and appointed trade stockists of OP 5 in contravention of section 3(4) (d) read with section 3(1) of the Act as the effects of such agreement has caused an AAEC in the market.

6.15 The Commission disagrees with the conclusion of the DG on this aspect as there is nothing on record which shows that OP 1 appointed other stockists in terms of the diktats posed by OP 5 or that OP 1 acted in concert with other stockists to stop supplies to the Informant. Accordingly, the Commission is of the considered opinion that OP 1 is not liable under the provisions of section 3(4)(d) read with section 3(1) of the Act. The existence of an 'agreement' is a *sine qua non* for attracting liability under section 3 of the Act. Although tacit agreement/understanding etc. is also amenable to the scrutiny of the Commission, the same has not been established in this case by the evidences placed on record.

6.16 However, with regard to understanding/agreement between OP 1 and OP 5, the Commission has a different view. It may be relevant to note here that pursuant to Commission's decision in Dr. L.H. Hiranandani Case (Case No. 39 of 2012), the position is quite clear that an agreement, even if it is not falling under section 3(3) or 3(4) of the Act, is amenable to the jurisdiction of the Commission under section 3(1) if the same has an appreciable adverse effect on competition (AAEC). With that background in mind, the Commission considered the arrangement/understanding between OP 1 and OP 5. The telephonic conversations between OP 1 and OP 4 (on behalf of OP 5) and the conduct of OP 1 in not supplying drugs/medicines to the Informant can be construed as an agreement between OP 1 and OP 5. Therefore, OP 5's



instructions to OP 1 and OP 1's agreement to such instructions can be construed as an agreement which can be looked into under section 3(1) of the Act subject to establishment of AAEC of such agreement.

6.17 With regard to the AAEC, the Commission is of the view that pharmaceuticals companies like OP 1 may be having miniscule market shares individually; the Commission, however, is concerned about their ability to collectively affect the competition in the market. The Commission is concerned about the effect their action will have when seen in aggregation to the actions of their co-players in the market. The Commission has seen in number of previous cases involving chemists and druggists associations where the diktats of the Association are followed by the members without any hesitation. Even though OP 1 acted on the directions and threats of OP 5, the same cannot absolve it of its liability under the Act. OP 1 could have approached the Commission instead of complying with the directions of OP 5 which is in contravention of the provisions of the Act. Such refusal to deal with unauthorized stockists by multiple members of the Association (pharmaceutical companies like OP 1) may adversely and appreciably affect the competition in the market.

6.18 However, in the case at hand, the Commission opines that the material placed on record is not sufficient to conclude that the agreement between OP 1 and OP 5 had an AAEC on the market in India. Further since the Commission found no contravention vis-a-vis other pharmaceutical companies also i.e. OP 2 and OP 3 (as explained in following paragraphs), it is difficult to conclude that agreement between OP 1 and OP 5 in itself affected the competition in the market; especially when the details regarding market share, sales etc. of OP 1 are not available on record.



6.19 As regards OP 2, the Commission agrees that, in the absence of any substantial evidence available on record, it is difficult to bring its conduct under the ambit of the Act. The Act is prospective in nature and any agreement entered into prior to 20.05.2009 is not amenable to the scrutiny by the Commission unless its effect persists beyond 20.05.2009. The evidence on record is insufficient to prove that such effects persisted even after 20.05.2009 and therefore, no contravention of the provisions of the Act is established as against OP 2.

6.20 Further, on the basis of evidence collected by the DG and counter versions of OP 3 and Informant, the Commission is convinced that no contravention of the provisions of the Act is established as against OP 3. It is further to be noted that OP 3 submitted that as its standard practice, it executes agreements with its stockists for purposes of their appointment on its letterhead. The Commission perused the certificate adduced by the Informant. Although the certificate mentions the name of OP 3 and Medicare (its sub-agent) on the top of the certificate, it does not even mention the registered address of OP 3. The very tenor of the certificate appears doubtful. OP 3 further stated that it does not authorize any sub-agents or agents to appoint any stockist/wholesaler on its behalf. Also, the letters dated 20.08.2012 and 10.12.2012, which were purportedly sent by the Informant to OP 3, are without any address on it or any proof that they were actually sent to OP 3. On the basis of foregoing, Commission finds merit in the submissions made by OP 3 and opines that the allegations against OP 3 remain uncorroborated in the light of evidences placed on record.

### **ORDER**



7. In view of the above, the Commission directs OP 5 to cease and desist from indulging in the practices which are found to be anti-competitive in terms of the provisions of section 3 of the Act in the preceding paras of the order.
8. With regard to the penalty under section 27 of the Act, the Commission feels that the said anti-competitive conducts needs to be penalized in such a way so as to cause deterrence in future among the erring entities engaged in such activities. It has been noted by the Commission that many of the state and regional chemists and druggists associations have been indulging in anti-competitive conduct in spite of Commission holding such practices in violation of the provisions of the Act in similar cases. The Commission has also taken note of the earlier cases, Case No. 93/2008 and 102/2008, wherein MRTP Commission has passed orders against Himachal Pradesh State Chemists & Druggists Association to cease and desist from indulging in anti-competitive practice of imposing the condition of procuring NOC for appointment of stockist. Subsequently, the said association changed its name to the Himachal Pradesh Society of Chemists and Druggists Alliance (i.e., OP 5) probably to circumvent the directions of MRTP Commission. The Commission has also noted that OP 5 did not furnish the minutes of its Executive Committee meetings and thereby hindered the investigation process.
9. Keeping these aggravating factors in mind, the Commission feels it appropriate to impose a penalty on OP 5 at the rate of 10% of its receipts based on the financial statements filed by them as follows:



| <b>Year</b>    | <b>Turnover (in rupees)</b> |
|----------------|-----------------------------|
| 2011-12        | 35,77,840.19                |
| 2012-13        | 26,93,795.68                |
| 2013-14        | 16,91,041.00                |
| <b>Total</b>   | 79,62,676.87                |
| <b>Average</b> | 26,54,225.62                |

10. Resultantly, a penalty of Rs. 2,65,423/- (Rupees two lakh sixty five thousand four hundred and twenty three only)— calculated at the rate of 10% of the average receipts of OP 5 for three financial years is hereby imposed.
11. With regard to OP 4, the Commission is of the opinion that penalty under section 48 is warranted for his active involvement in execution of the anti-competitive practices carried on by OP 5. Accordingly, the Commission feels it appropriate to impose a penalty on OP 4 at the rate of 8% of its income based on the income tax returns statements filed by it as follows:

| <b>Year</b>    | <b>Income (in rupees)</b> |
|----------------|---------------------------|
| 2011-12        | 2,92,997                  |
| 2012-13        | 3,69,759                  |
| 2013-14        | 3,97,586                  |
| <b>Total</b>   | 10,60,342                 |
| <b>Average</b> | 3,53,447                  |

12. Resultantly, a penalty of Rs. 28,276/- (Rupees twenty eight thousand two hundred and seventy six only)— calculated at the rate of 8% of the average income of OP 4 for three financial years is hereby imposed.



13. The directions in para 7 above must be complied immediately. The amount of penalty imposed on OP 4 and OP 5 is directed to be deposited within 60 days from the date of the receipt of this order.
14. The Secretary is directed to inform the parties accordingly

Sd/-

**(Ashok Chawla)**  
**Chairperson**

Sd/-

**(S.L.Bunker)**  
**Member**

Sd/-

**(Sudhir Mital)**  
**Member**

Sd/-

**(U. C. Nahta)**  
**Member**

**New Delhi**  
**Dated: 29/01/2015**