



COMPETITION COMMISSION OF INDIA

Case No. C-87/2009/DGIR

In Re:

Vedanta Bio Sciences, Vadodara
B/2, Arunachal Society,
Subhanpura,
Vadodara-390023

Informant

And

Chemists and Druggists Association of Baroda
Palak Medical Agency,
Shop No. 1, Shree Sai Complex,
Near Madhvani Classes, Shiyapura,
Raopura, Baroda-390001

Opposite Party

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Appearances:

For the Informant

Mr. Amit Gupta, Advocate

For the Opposite Party

Mr. Shamik Sanjanwala, Advocate
Mr. Sunil Kumar, Advocate



Order under Section 27 of the Competition Act, 2002

1. The present order will dispose of the case that had initiated on a complaint dated 28.04.2009 filed by M/s Vedant Bio-Sciences, Baroda (hereinafter, the '**Informant**'), before the Director General (Investigation & Registration), Monopolies & Restrictive Trade Practices Commission [hereinafter referred to as '**DG (IR), MRTPC**'] alleging that the Chemists and Druggists Association of Baroda (hereinafter, the '**Opposite Party**'/'**OP**'/'**CDAB**') has indulged in restrictive trade practices.
2. The allegation contained in the aforesaid complaint/information are enlisted below, in brief:
 - (i) The OP, an unregistered body, is imposing unfair conditions in sale of pharmaceutical products of different companies.
 - (ii) The OP has formulated guidelines for its members which require any person including a member to obtain permission/NOC (No-Objection Certificate) prior to becoming a stockist of a particular company.
 - (iii) The OP forced additional/new stockists not to sell products of a pharmaceutical company unless NOC is obtained by the existing stockist from the OP.
 - (iv) The OP insists on procuring NOC from it before a pharmaceutical company launches new products, without which the company is not allowed to launch new product.
 - (v) A circular dated 02.03.2009, was issued by the OP, wherein permission has been granted to some distributors to become stockists of certain pharmaceutical companies, which indicates that procurement of such NOC is necessary.



(vi) The OP was also engaged in fixation of margins for pharmaceutical products.

3. After receiving the complaint, the DGIR, MRTPC undertook a preliminary investigation into the allegations made in the complaint. However, the case was transferred to the Competition Commission of India (hereinafter, the '**Commission**') by MRTPC under the provisions of Section 66(6) of the Competition Act, 2002 (the '**Act**'). The Commission after forming a *prima-facie* opinion, *vide* order dated 18.06.2010, directed the office of Director General (hereinafter, the '**DG**') to conduct investigation into the matter.

Findings of the DG

4. After carrying out detailed investigation, the DG submitted its investigation report (hereinafter, the '**Main Investigation Report**') on 02.11.2010. The DG was of the view that the evidence gathered during investigation established that the OP was insisting upon seeking its NOC before any pharmaceutical company could appoint a stockists and was also engaged in fixation of trade margins for wholesalers and there have been payments towards advertisements before launching of new products by pharmaceutical companies. Based on the analysis of the evidence gathered during the course of proceedings, it was concluded by the DG that the circulars issued by the OP and practices adopted by it were restrictive and anti-competitive in nature in terms of the provisions of Section 3(3)(a) and Section 3(3)(b) of the Act.
5. After consideration of the report and other material available on record, the Commission was of the view that further investigation into certain aspects, *e.g.* evidence regarding agreement/decision/practice among members of the alleged cartel, data/evidence to show that the alleged cartel led to determination of prices, nexus between AIOCD, CDAb and



its members *etc.*, was necessary in order to arrive at a proper conclusion. Accordingly, the Commission directed the DG to investigate further into the matter and submit a supplementary report.

6. In light of the directions given by the Commission, the DG conducted further investigation and submitted its report on 04.03.2011 (hereinafter, the '**Supplementary Investigation Report**'). The DG found that All India Organisation of Chemists and Druggists (hereinafter, the '**AIOCD**') is an apex body of wholesalers and retailers of pharmaceutical companies at all India level under which the State level and regional associations operate. The Supplementary Investigation Report further revealed that OP/CDAB is a regional association affiliated to AIOCD through its State level association, *namely* Federation of Gujarat Chemists and Druggists Association (hereinafter, the '**Federation**'). The report further stated that AIOCD entered into a Memorandum of Understanding (hereinafter, the '**MoU**') with the Organisation of Pharmaceutical Producers of India (OPPI) and Indian Drugs Manufacturers Association (IDMA) in 1982, prescribing certain guidelines and norms regarding margins at the level of wholesalers and retailers.
7. Further, the evidences collected during the course of supplementary investigation, including statements of certain persons, supplemented the findings in the Main Investigation Report and indicated that associations not only limited and controlled the supply of drugs in the market through a system of PIS approvals, but also limited and controlled the number of players through imposition of mandatory NOC from them for appointment of stockists in their areas of operations. The DG further found that the associations, through their guidelines and norms, used to fix margins for the wholesalers and retailers, which had the effect of determination of sale prices of drugs in the market. These practices and conduct of the OP were found to be violative of the provisions of Section



3(3)(a) and 3(3)(b) of the Act. Hence, the DG concluded that the findings reached in the Main Investigation Report against the OP were supported by the additional evidence gathered during supplementary investigation.

8. Based on the investigation reports of the DG, the Commission passed an order (majority) dated 05.09.2012 wherein it was found that the OP was imposing the requirement of mandatory NOC and was also fixing margins for the wholesalers and retailers by enforcing the norms laid down by AIOCD. The same was found to be in contravention of the provisions of Section 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act. Accordingly, the Commission imposed a monetary penalty of Rs. 53, 837/- on the OP, in addition to cease and desist directions, under Section 27 of the Act. There were also separate and dissent orders by some of the Members of the Commission, which are not detailed herein for the sake of brevity.
9. The aforesaid orders of the Commission were challenged by the OP before the erstwhile Hon'ble COMPAT, *inter-alia*, on the following grounds:
 - (i) The findings of the DG were not based on any tangible evidence and the investigating officer completely misread the documents received/collected during the investigation. Further, the submissions made by the OP were allegedly not taken into account by the DG while reaching conclusions on various aspects *e.g.* nexus between AIOCD and the OP; trade margins being fixed *etc.*
 - (ii) The Commission had failed to appreciate the objection of the OP that the investigation conducted by the DG was vitiated due to violation of the Competition Commission of India (General) Regulations, 2009 (hereinafter, the '**General Regulations**') as also the principles of natural justice in as much as the DG relied upon the documents and affidavits filed by the Informant without giving an



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opportunity to the OP to cross-examine the deponents of the affidavits and without confronting the OP with the documents sought to be used to support the allegation of contravention of Section 3 of the Act.

10. *Vide* its order dated 18.11.2016, the erstwhile Hon'ble COMPAT set aside the Commission's order on a procedural issue *viz.* that the order was signed by certain Member(s) and Chairperson who had not heard the parties. Thus, the order of the Commission was held to be vitiated due to violation of the principles of natural justice and was quashed. While remitting the matter back to the Commission, the erstwhile Hon'ble COMPAT *inter-alia* gave the following directions:

“41. In the result, the appeal is allowed. The impugned order is set aside and the matter is remitted to the Commission for passing appropriate order in accordance with law.

42. The appellant shall be free to file an appropriate application before the Commission for grant of leave to cross-examine the persons, whose affidavits were filed by Respondent No. 1 during the course of investigation or to whom questionnaire was sent by the Addl. DG. If any such application is filed, then the Commission shall decide the same in accordance with law.

43. If, after hearing the parties, the Commission comes to the conclusion that the investigation conducted by the Addl. DG is vitiated due to violation of principles of natural justice and/or the provisions of the Regulations, then it may remand the case to the DG for conducting fresh investigation into the allegations levelled by Respondent No. 1 and pass final order after giving opportunity to the appellant to contest the adverse findings, if any, recorded in the fresh investigation report.”

11. On 05.07.2017, the matter was listed before the Commission for considering the order of the erstwhile hon'ble COMPAT. The Commission decided to hear the parties on the investigation reports of the



DG on 03.08.2017, which was later adjourned to 19.09.2017 at the request of the OP.

12. On 19.09.2017, both the parties appeared before the Commission through their respective learned counsel. The learned counsel for the OP pressed its application dated 15.09.2017 and argued that the information filed by the Informant is liable to be dismissed. Further, the OP sought leave of the Commission to file an application seeking cross-examination of various witnesses relied upon by the DG, which was allowed by the Commission. On 26.09.2017, the OP filed an application seeking cross-examination of 34 witnesses.
13. On 10.10.2017, the Commission heard the learned counsel for the OP and allowed the OP's request, with regard to all the witnesses except Mr. Sureshbhai Doshi (who had since passed away); Mr. V.T. Shah, Mr. Kartik Doshi, Mr. Jayesh Shah and Mr. Alpesh Z. Patel (as their statements were not on record); and Mr. Vijay Kumar Mann (an erstwhile office manager of the office of the DG who conducted the questionnaire-based survey), *vide* its order of the same date. Thus, the Commission allowed cross-examination of 28 witnesses, comprising of 20 witnesses who had filled the questionnaire survey and 8 witnesses who had deposed before the DG through oral statement or affidavit. Accordingly, the DG was directed to conduct cross-examination of the persons allowed by the Commission and submit a report on the same.
14. After conducting cross-examinations, the DG submitted its report on cross-examination to the Commission on 25.05.2018. The cross-examination of 26 witness, out of the 28 witnesses allowed by the Commission, was conducted. Cross-examination of Mr. Hemang Rameshbhai Trivedi could not take place as he had left for Canada for good. Another witness, Mr. L. S. Khandelwal was stated to be suffering



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from cancer. Though he presented himself to be cross-examined on one occasion, the counsel of the OP did not appear on the said date. Thereafter, he was stated to be hospitalised because of which his cross-examination could not be conducted.

15. The DG noted that out of 8 witnesses who had deposed on oath and whose depositions were relied upon by the DG and the Commission while passing the earlier order dated 05.09.2012, only 7 witnesses could be cross-examined. The DG noted that no contradictions could be brought out during cross-examination in case of 5 such witnesses, and their depositions were upheld without any deviation. With regard to one witness, the DG noted that the witness had confirmed the fact that the statement tendered by him on oath was tendered voluntarily and nothing had been misstated or falsely stated therein, though he tendered the statement at the behest of Mr. Dahyabhai Patel. The only one witness, who had contradicted in his stance during cross-examination, also could not substantiate the contradictions.
16. As regards 20 witnesses, who had responded to the survey questionnaire, 19 witnesses were cross-examined by the counsel of the OP. Even in their case, the DG observed that the cross-examination resulted in contradictions of unverifiable category/ creating doubts in only 3 cases. Further, in case of one witness, namely Mr. Babubhai Patel, the DG noted that the evidence is rendered unreliable. Therefore, in at least 15 cases, the evidence was fully substantiated and was found to be completely reliable.
17. Based on the aforesaid, the DG opined that the observations and findings given in the investigation reports, including the supplementary investigation report, were found to be factually correct *i.e.* contravention of Section 3(3)(a) and (b) of the Act made out against the OP.



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18. On 02.08.2018, the Commission considered the report on cross-examination filed by the DG and decided to forward an electronic copy of the same to the Informant as well as the OP for their suggestions/objections. The parties were further directed to appear for an oral hearing on the investigation reports of the DG, including the report on cross-examination, on 18.09.2018.
19. On 18.09.2018, the OP as well as the Informant appeared before the Commission through their respective learned counsel. The learned counsel for the Opposite Party pressed its request for extension of time for filing response to the report on cross-examination and sought adjournment of oral hearing. The Commission considered the request of the OP and decided to allow the same. The OP was directed to file its response, if any, latest by 01.10.2018 and serve a copy to the Informant, in advance. The Informant was directed to file its suggestions/objections to the cross-examination report and its replies to the submissions made by the OP, if any, latest by 08.10.2018 and provide a copy in advance to the OP. The parties were further directed to appear for an oral hearing on the investigation reports of the DG, including the report on cross-examination, on 24.10.2018. These directions were communicated to the respective legal Counsel for the parties during the hearing. However, for administrative reasons, the Commission decided to postpone the said hearing to 14.11.2018.
20. On 24.10.2018, Informant as well as the Opposite Party moved separate applications seeking adjournment of hearing scheduled on 14.11.2018. On 02.11.2018, the Commission considered the aforesaid applications by circulation and decided to reschedule the hearing on 20.12.2018.



21. On 19.11.2018, the OP filed an application requesting for the hearing date to be preponed or postponed on the ground that the arguing counsel had personal difficulty and was not available in Delhi.
22. On 29.11.2018, the Commission considered the aforesaid application and decided to prepone the hearing to 13.12.2018. On 13.12.2018, the parties appeared before the Commission through their respective learned counsel and argued at length. The Commission heard the parties and decided to pass appropriate order in due course. The parties were given liberty to file brief synopsis of their respective arguments by 26.12.2018. In response thereof, the OP filed detailed written submissions on 24.12.2018.

Replies/ Objections of the Parties

23. The Commission has heard the counsel of the Informant and the OP on 13.12.2018. Further, the Main Investigation Report, Supplementary Investigation Report and report on cross-examination, along with the replies/objections of the parties on them, have been considered by the Commission. Bereft of details, the contentions of the parties are summarized in the ensuing paragraphs.

Reply/ Objections of the Informant

24. During the oral hearing held on 13.12.2018, the learned counsel for the Informant submitted that the investigation of the DG has supported Informant's contentions and the documentary evidence is self-speaking in the present case. The learned counsel also relied upon the Commission's earlier order dated 05.09.2012 and contended that the erstwhile Hon'ble COMPAT had set aside the said order on mere procedural lapses and not on merits. Further, the circulars and letters placed on record have not been denied by the OP. The learned counsel for Informant further placed reliance on Section 91 and 92 of the Indian Evidence Act, 1872 to contend



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that the evidentiary value of documentary evidence prevails over oral evidence in case of conflict between the two. Further, the learned counsel also relied upon the recent orders of the Commission wherein the OP and its State level association, *namely* the Federation have been held liable for perpetrating the practice of mandatory requirement of NOC from it prior to the appointment of stockists by pharmaceutical companies.

25. The Informant further submitted that there has been no contention/request by the OP with regard to production of additional evidence or non-consideration of earlier evidence collected by the DG prior to 10.10.2017 and the said contention is thus barred by Regulation 43 of the CCI (General) Regulations, 2009. The Informant claimed that there is no need for DG to go to pharmaceutical companies to collect evidence when the letters are admissible under Section 91 and 92 of the Indian Evidence Act, 1872. The Informant also cited the decision of Hon'ble Supreme Court in *Excel Crop. Care Limited vs. Competition Commission of India and Ors.* [2017(6) SCALE 241], wherein it was stated that the DG is empowered to take evidence as per Regulation 41 of the General Regulations based on the directions received from the Commission in a matter. During investigation, the DG has the power to record evidence and it includes power to record evidence in a free and fair manner.
26. The learned counsel for the Informant further contested the OP's claim regarding investigation being biased against members of its elected body during 2007-2009. The OP had pleaded that the DG has only investigated the conduct of OP pertaining to 2007 to 2009 and has overlooked the following years (*i.e.* 2010 onwards) simply because Mr. Dahyabhai Patel became President of CDAB/OP post the year 2010. The Informant refuted this averment by submitting that the Commission has in various other cases already passed order against the OP and other chemists and druggists associations based in Gujarat, under Section 27 of the Act, for



anti-competitive conduct post the year 2010. Thus, according to the Informant, this contention of the OP is misplaced.

Reply/ Objections of the Opposite Party/CDAB

27. On receipt of the report on cross-examination, the OP filed submissions dated 17.09.2018, raising preliminary objections relating to the observations and findings given by the DG in its report on cross-examination. It was submitted that the DG in its cross-examination report has concluded at several places that the cross-examination or the answers given by the witnesses do not shake or affect the veracity of the evidence and no material contradictions are brought out, and that the findings of the Commission in the earlier order passed under Section 27 of the Act dated 05.09.2012 stands confirmed by the evidence on record. The OP has challenged such observations by stating that the Commission is entrusted with judicial or *quasi-judicial* functions, and therefore, only the Commission (acting on the judicial side) has the powers to conclude or decide on the sanctity or otherwise of the evidence, and as to the effect of the cross-examination on the evidence available on record. The DG's office acts as an investigating authority, and is not empowered to give its observations/findings by giving a report on the cross-examination. Thus, the OP submitted that the report on cross-examination report dated 25.05.2018 filed by the DG is beyond its jurisdiction, and needs to be taken off the record.
28. In the hearing dated 13.12.2018, the learned counsel for the OP contended that the oral evidence led by witnesses in the matter makes it clear that the dispute between the Informant and the OP was in the nature of a political dispute in as much as some of the persons espousing the case of the Informant had lost the elections to get elected as office bearers of the OP during the period 2007-2010, and they have thus, filed a vexatious



information alleging anti-competitive practices against the OP, for the said period. The OP further argued that this case has stemmed from the political rivalry between two rival factions of the OP, a fact which has also been brought and admitted by various witnesses in the cross-examination. Thus, the information was motivated and filed at the behest of two erstwhile office bearers of the OP, namely Mr. Jawahar Sharda and Mr. Dahyabhai Patel, who had lost in the said election of the OP in 2007.

29. Further, the learned counsel for the OP argued that the investigation has not been conducted in a manner to allow impartial, objective and independent evidence to come on record. The evidence is selective, and given by a certain set of individuals who were acting against the Association and its office bearers, during 2007 to 2010, only for political reasons. In his cross-examination, it has been admitted by Mr. Feroze Patel that the motive of Mr. Dahyabhai Patel and Mr. Jawahar Sharda behind asking him and others to give statement before the Commission was that although they had won the election, many of their allies had lost election.
30. The learned counsel for the OP challenged the authenticity of the oral testimonies and questionnaires relied upon by the DG claiming that the DG has recorded statements of and got the questionnaires filled by interested persons. It was further contended that the DG has relied on documents which are in Gujarati, without an accompanying English translation. To a query raised by the Commission, as to why documentary evidence *viz.* certain circulars issued by the OP to its members, as also the MOU between AIOCD and IDMA, alone would not be sufficient to establish violation of the provisions of the Act, the OP submitted that oral evidence would be necessary to prove the contents of certain letters, which have been relied upon by the DG in its investigation reports against the OP.



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31. With respect to para 7 of the circular dated 02.03.2009, issued by the OP (in Gujarati and translated version of which was submitted by the Informant along with the information), the OP suggested that the word “*manjuri*” appearing therein should not be interpreted as a permission or NOC by the association rather it was a permission given by the pharmaceutical company to the new stockists.
32. The learned counsel for the OP further contended that the OP was intervening only to the extent to ensure that more appointment of stockists by the pharmaceutical company should not have resulted in over-supply of drugs in the market, giving rise to an imminent danger of expired and spurious drugs being available in the market, without any proper checks and control. The OP, as an association, merely facilitated the pharmaceutical companies in checking the antecedents of newer players who wanted to get appointed as stockists in the district, by collecting and providing a background check of such persons and any action taken on that behalf ought not to be construed as mandating a requirement of NOC on its part. Therefore, the circulars issued by the OP, should be construed as being facilitating in nature and not in the nature of being coercive, as was being suggested by the Informant. Relying on these assertions, the OP argued that a practice is pernicious only if it is accompanied by a component of insistence/ compulsion, which is not the case in the present matter as taking NOC from the OP/CDAB is purely voluntary in nature.
33. In this regard, the learned counsel for OP placed reliance on the decision rendered by erstwhile Hon’ble COMPAT in *Chemists Druggists Association, Ferozpur v. CCI & Anr*, Appeal 21 of 2014 and Appeal 22-28 of 2014 (decided on 30.10.2015), wherein issue pertained to whether the Ferozpur Chemists and Druggists Association had violated the provisions of the Act by making the NOC practice mandatory before any



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stockist was appointed by the pharmaceutical company. The Hon'ble COMPAT held that Ferozpur Association had neither taken a policy decision nor issued circulars making NOC/ LOC mandatory for appointment of distributors/stockists in Ferozpur District. It was observed by the Hon'ble COMPAT that the pharmaceutical companies insisted on NOC of Ferozpur Association in the said case to avoid any disputes at a later stage with wholesaler/ stockist. It was also observed that the NOC was sought by the company itself from the Ferozpur Association before appointing the stockist and the same couldn't be construed as a mandatory imposition. Based on these observations, the erstwhile hon'ble COMPAT held that the conclusion of the Commission that there was an insistence of NOC/LOC was not supported by facts and liable to be set aside.

34. With respect to para 16 and 18 of the circular dated 10.11.2009, issued by the OP in Gujarati, it was contended that translated version as provided by the Informant, is at variance with the translated version supplied by the OP. The OP contended that the language employed in para 16 and 18 of the translated version supplied by it did not exhibit any coercion on the part of the OP, but was in the nature of a persuasion or indication. Thus, it was submitted that there being interpretational differences, this evidence cannot be relied upon by the Commission.
35. Challenging the authenticity of the questionnaire survey conducted and relied upon by the DG, the OP contended that questionnaires were given to certain persons, who had affinity with the Informant. There was no public notice given by the DG in the district, seeking interested persons to come forward and then have their statements recorded. Thus, the witnesses were not independent and were under the control, influence and tutelage of the Informant and of connected persons thereto. This, as per the OP, was evident from the fact that Mr. Dahyabhai Patel, illegally and contrary to the rules of the OP, rewarded all the persons who had given



statements and/ or filled questionnaire survey before the DG, by co-opting them to the Managing Committee and by also appointing them to the Subcommittee of the OP. Thus, there was *quid pro quo* on the part of such persons. Further, the questionnaire circulated by the DG was in English, whereas it has become evident during cross-examination, that some of the respondents to the questionnaire were not conversant with English language.

36. The DG though has relied on letters stated to have been written by pharmaceutical companies mentioning about the practice of requirement of NOC, it has not independently examined the officers of those pharmaceutical companies who had issued such communications. In the least, the DG ought to have taken the statements or evidence produced by OP into account and dealt with the same. The DG ought to have approached the said individuals, firms or companies, whose document or statements were produced by the OP in its earlier submissions and should have inquired from them and taken statements/evidences from them. The DG ought to have independently checked with Wallace India as to which association was referred to in its letter. Further, the DG has relied on a letter dated 29.06.2010 of Zydus Cadila to hold OP responsible for mandating NOC. However, as per the OP, it is not clear as to why the DG did not investigate Cadila when it could have helped in establishing the veracity of the said letter. The OP also contended that Mr. Dahyabhai Patel had drafted all these letters.
37. With regard to fixation of trade margins, the learned counsel for the OP contended that the margins of 8% for wholesalers and 16% for retailers for the scheduled drugs were set as per DPCO guidelines and as such they do not violate the provisions of the Act. It was averred that as an association, the OP/CDAB has to see that the stockists are getting the specified margins and are not exploited by the pharmaceutical companies.



With respect to non-DPCO drugs, margin of 10% for wholesalers and 20% for retailers was argued to be the industry norm and necessary for survival of retail chain. The OP also argued that the DG has made no investigation as to how the said margin (*i.e.* 10% to 20%) leads to an appreciable adverse effect on competition. However, the OP simultaneously argued it only protects its members and that there was no evidence that the OP fixed margins. Relying on the contents of the circular dated 02.03.2009, the OP contended that the said circular does not show that there was any insistence or coercion on the part of the OP to fix trade margins.

38. Based on the aforesaid submissions, the OP sought exoneration from the present proceedings. In the alternative, the OP also contended that even if the Commission finds a contravention against it, the penalty so imposed by the Commission should not exceed the penalty imposed by the Commission *vide* its order dated 05.09.2012. While the erstwhile Hon'ble COMPAT set aside the Commission's order dated 05.09.2012, the penalty imposed in the said order was not challenged by the Informant and as such now the OP should not be penalised for preferring an appeal. The OP also averred that since the Informant has alleged prevalence of the impugned practices only during 2007-2009, there is no occasion for the Commission to pass a cease and desist order at present. The same remedy has now become infructuous and will serve no purpose.

Findings of the Commission

39. The Commission has perused the information, the Main Investigation Report, the Supplementary Investigation Report as well as the Report on Cross-Examination and the suggestions/objections to these reports made by the parties and other material available on record.



40. On a consideration of the aforesaid material, the following issues arise for determination in the present matter:

Issue 1: Whether the OP was mandating NOC prior to the appointment of stockist by pharmaceutical companies in contravention of the provisions of Section 3(1) read with Section 3(3)(b) of the Act?

Issue 2: Whether the OP was fixing the trade margins for wholesalers or retailers in contravention of the provisions of Section 3(1) read with Section 3(3)(a) of the Act?

41. The Commission notes that besides objecting to the findings of the DG on merits, the OPs have also raised preliminary objections in its submissions dated 17.09.2018. Thus, before delving into the substantive issues, the preliminary issues raised by the OPs are dealt with in the ensuing paragraphs.
42. The OP has contended that the report on cross-examination dated 25.05.2018 filed by the DG is beyond the scope of its jurisdiction, wherein the DG has drawn conclusions and inferences against OP upon cross-examination of witnesses. It has been argued that the DG ought to have just recorded the proceedings of cross-examination without giving its opinion on such cross-examination, which should be left solely to the determination of the Commission having quasi-judicial powers.
43. The Commission notes that when the OP had approached the erstwhile Hon'ble COMPAT in appeal against the Commission's order dated 05.09.2012, passed under Section 27 of the Act, the main ground of appeal was that during investigation, the DG had not given any opportunity to the OP for cross-examination of witnesses on whose testimony/evidence reliance was placed. The decision of the Hon'ble COMPAT *vide* which



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the matter was remitted back to the Commission also recorded that the OP shall be free to file an appropriate application before the Commission for grant of leave to cross-examine the persons, whose affidavits were filed by the Informant during the course of investigation or to whom questionnaire was sent by the DG and if any such application is filed, then the Commission shall decide the same in accordance with law.

44. In consideration of such directions, the Commission had allowed OP the opportunity to cross-examine certain witnesses. As a matter of fact, the findings of the DG in the Supplementary Investigation Report heavily emphasized on the affidavits, oral testimonies and questionnaire survey. Thus, in order to assess the impact of cross-examination on such findings, it was necessary for the DG to analyse and reflect upon the veracity of affidavits, oral testimonies and questionnaire survey. Since the DG is the investigating authority which gathers evidence so as to assess anti-competitive conduct as alleged against an Opposite Party, it becomes imperative upon the DG to evaluate through its own analysis the relevance/ evidentiary value of a testimony/deposition/documentary evidence based upon cross-examination conducted before it.
45. As per the scheme of the Act and regulations made thereunder, the DG is duty bound to record its findings on each of the allegations made in the information, together with all the evidences or documents or statements collected during investigation [Regulation 20(4) of the CCI (General) Regulations, 2009]. Upon cross-examination, whether such findings, as stated in the investigation report(s), still stands or not needs to be first seen by the DG, on the basis of cross-examination conducted. In the absence of such analysis, the evidentiary value of the affidavits, oral testimonies and questionnaire survey may not be ascertainable.



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46. Further, such findings of the DG, including its analysis on cross-examination, are not final in nature and are not binding upon the Commission. It is the prerogative of Commission to then consider the allegations and evidence gathered by the DG in the light of the objections/suggestions received from the parties and accordingly pass an order on merits. The function of adjudication of the matter on merits vests with the Commission which is not bound by the findings of the DG in the investigation report. Moreover, the report of the DG on cross-examination was also forwarded to parties for their response or submissions or objections. As the OP was given ample opportunity, during final hearing, to rebut such findings before the Commission and present countering evidence, no prejudice seems to have been caused as such to the parties. Therefore, the objection of the OP that drawing conclusions on the basis of cross-examination by the DG is *ultra-vires* is without any merit and is, hence, rejected.
47. Having dealt with the preliminary objection, the Commission now proceeds to examine the main issues in the present case.

Issue 1: Whether the OP was mandating NOC prior to the appointment of stockist by pharmaceutical companies in contravention of the provisions of Section 3(1) read with Section 3(3)(b) of the Act?

48. In many past cases concerning the conduct of regional/ district/ State level chemists and druggists associations, the Commission has held that the practice of mandating NOC prior to the appointment of stockists results in limiting and controlling the supply of drugs in the market, contravening Section 3(3)(b) read with Section 3(1) of the Act. By mandating an NOC requirement as a pre-requisite for appointing a stockist by pharmaceutical companies, the chemists and druggists associations discourage new/existing stockists to enter/expand the market amounting to an entry



barrier for them. Appointment of a new stockist should be the exclusive right of a pharmaceutical company, without any interference by any third party. Any influence or interference with the choice of a distributor, to take decisions based on its commercial consideration and business requirements, by a pharmaceutical company would restrict its freedom to do business with persons of its choice. Such interference not only disrupts the distribution chain, but also results in limiting and controlling the supply of drugs in the market, as many-a-time the *diktats* are sanctioned by consequent boycott of the pharmaceutical companies not following the directions of the association(s).

49. Though the present matter dates back to an information filed in 2009, nevertheless the aforesaid observations of the Commission made in later cases involving similar allegations are pertinent to this matter too. The OP has not denied the existence of the practice of seeking NOC in literal sense, but has vehemently contended that the said practice was voluntary in nature and there was no coercion by the OP on any of the stockists or pharmaceutical companies. Further, it has been submitted that the OP was acting in order to safeguard the interest of its members. The OP has also contended that the DG has relied upon statements/replies to questionnaires given by certain interested persons who were furthering the cause of the Informant and its allies, because of some political rivalry between the two rival factions of the OP (CDAB). The OP further submitted that the cross-examination has shaken the veracity of the affidavits, oral testimonies and questionnaire survey and in the absence of reliable evidence, a finding of contravention against it is not made out, based on such oral evidences.
50. The Commission finds it imperative to address the contention of the OP to arrive at a finding in the present matter. The Commission has considered the argument of the OP regarding the political rivalry between



the OP and the Informant being the basis of filing the present information. It has been argued that the matter is politically motivated by one political group against the elected body of OP in the period 2007-09. It is the contention of the OP that Mr. Jawahar Sharda and Mr. Dahyabhai Patel have filed this case through the Informant firm to target the office bearers of the OP who held office during the period 2007-09 and to whom the aforesaid persons lost elections. It was also contended in this regard that in an attempt to further their own political agendas, a certain set of individuals had provided documents/ given testimonies stating that allegations pertain to the body appointed during 2007-10 only and no such anti-competitive practice has been alleged post-2010.

51. The Commission is unable to find any merit in this objection and has already dealt with this issue in detail in *M/s Reliance Agency v. CDAB and ors.* (Case No. 97 of 2013, decided on 04.01.2018). This case also pertained to similar allegations against the OP and similar objection was raised by CDAB challenging the *locus/motive* of the Informant in filing the information. While dismissing the objection of the OP, the Commission clarified that the proceedings before the Commission are inquisitorial in nature and as such, the *locus* of the Informant is not central in deciding whether the case filed before the Commission should be entertained or not. As long as the matter reported to the Commission involves anti-competitive issues falling within the ambit of the Act, the Commission is mandated to proceed with the matter. Further, the Commission observed that as per the scheme of the Act, it is not necessary that there must be an informant to initiate an inquiry or investigation. The Commission is entitled to even proceed *suo motu* or on any reference being made by the Central Government or State Government or any Statutory Authority. Thus, the Commission is more concerned with the facts and allegations highlighted in the information regarding existence or



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perpetuation of any anti-competitive conduct rather than focusing on the *locus* of the person who provided such information.

52. The Commission observes that the object of the Act is to prevent practices having an adverse effect on competition in India, to promote and sustain competition in the markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in the markets. Towards that end, the Commission is more concerned with the fair functioning of the market and the underlying intent of the Informant in approaching the Commission is secondary to that objective. Thus, though it may be factually correct that a political rivalry between rival factions may have played a role leading to a revelation of the alleged anti-competitive conduct in the present matter; however, as long as such revelation is based on cogent evidence, the information/case cannot be quashed for want of benign motive. While the Commission does not encourage sham/pretentious information filed to settle scores between the parties, however, if there is merit in the anti-competitive conduct being reported to the Commission, the *bonafide*/locus/motive of an informant will become subservient to the duty of the Commission to ensure fair functioning of the markets. Thus, the Commission finds it necessary to examine the evidence collected by the DG to ascertain whether the allegations are supported by evidence on record.
53. The Commission notes that the documentary evidence relied upon by the DG in the present case, with regard to aspect of NOC, comprises of 2 circulars, *viz.* circular dated 02.03.2009 and circular dated 10.11.2009. Further, the Informant has placed reliance on the excerpts from an MoU executed in 1982 between AIOCD and OPPI and IDMA which were circulated to the regional associations, including the OP, on 12.05.2009 which shows that appointment of stockists is controlled by the associations under the overall control of AIOCD and also that the trade



margins have been fixed, pursuant to it. There is also an evidence in form of a letter dated 29.06.2010 to Zydus Cadila, a pharmaceutical company of Ahmedabad has also been placed on record to substantiate the allegation that the association interferes in the process of appointment of stockist/ distributors by a pharmaceutical company. In addition, there are statements on affidavit of certain individuals, besides the questionnaire survey relied upon by the DG.

54. The circular dated 02.03.2009, issued by the OP, is necessary in this regard. A screenshot of the English translation of the said circular is reproduced below for reference:

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55. Para 7 of the aforesaid circular reveals the anti-competitive conduct being perpetrated under the aegis of OP during the said time period. In the hearing before the Commission dated 13.12.2018, the OP had contended that the circulars relied upon by DG are in Gujarati and their translation has not brought out the correct meaning and context of the content in which they were issued by the OP. The OP has submitted that word ‘*manjuri*’ appearing in para 7 of the circular has been incorrectly interpreted by the investigation as ‘permission/NOC’ from it. It was argued that even though the literal translation of the word ‘*manjuri*’ would be ‘permission’, it does not mean NOC and no undue influence/coercion is used by the OP in matters of appointment of stockists by pharmaceutical companies. It was also argued that the permission referred to in the said circular is permission by pharmaceutical companies and not by the OP.
56. On consideration of the context of the circular dated 02.03.2009, the Commission is unable to accept such explanation provided by the learned counsel for the OP. The word ‘*manjuri*’ translated from Gujarati means ‘permission’ only, and publication of such contents in a circular issued by OP makes it apparent that the OP has provided its permission which in substance means NOC in respect of mentioned appointments therein. It is also understood that such expression is used in the circular in order to convey to the members of the OP that compliance to its practices has been undertaken in that regard.
57. In the matter of *In Re: M/s Maruti Company, Bangalore and Karnataka Chemists & Druggists Association & Ors.*, (Case no. 71 of 2013 decided on 28.07.2016), the Commission had categorically clarified that usage of benign nomenclature will not help the associations to avoid the consequences under the Act. It was found by the Commission that the associations were mandating their NOC requirements either verbally (in



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order to avoid any documentary evidence/ proof) or under camouflaged congratulatory/ intimation letters, with the object of hiding such apparent anti-competitive conduct behind benign nomenclatures. However, in spite of such tactics adopted by the association, the Commission penalised the association for conduct which in substance amounted to mandatory NOC.

58. Therefore, the word '*manjuri*', in the present case, which evidently means permission and its usage in a circular (dated 02.03.2009) meant to be circulated to the chemists and druggists located all over the district of Baroda in the State of Gujarat clearly lead to a conclusion that it was meant to convey OP's no-objection or NOC in respect of the entities mentioned in para 7 of the circular dated 02.03.2009 and not otherwise as claimed by the OP.
59. Further, the stand of the OP that the '*manjuri*' referred to in the circular is the permission by pharmaceutical companies to stockists cannot be accepted in as much as the OP has not produced any evidence to this effect. Nor has the OP been able to explain why the pharmaceutical companies were giving information to the OP about NOC/permissions they have granted to their respective stockists, if at all that was the case. Also, the usage of words *i.e.* '*Permission is Granted to following Companies to Conduct Activity/Work*' clearly specify, firstly, that this permission was a camouflaged form of 'NOC' by the OP; and secondly, the companies could not have initiated their activity/work without such permission, meaning thereby that the NOC was mandatory in nature. Thus, the argument of the OP that the practice was purely voluntary in nature is not supported by evidence on record. Moreover, the other cases against CDAB (OP in the present case also) dealt by the Commission (*namely*, Case No. 97 of 2013, Case Nos. 65, 71 & 72 of 2014 and 68 of 2015) also established that the OP was indulging in the practice of mandating NOC prior to the appointment of stockists. Though these other



cases pertained to subsequent time periods, they serve as corroborative reference for a conduct which is similar against the same OP and which practice has been perpetuated in one form or the other. Before parting with the findings with regard to this circular, the Commission clarifies that though this circular pertained to a period prior to 20.05.2009 (date on which the relevant provisions of the Act were notified), this circular was a part of the continuing conduct on the part of OP which continued post 20.05.2009. The evidence discussed henceforth reveals the evidence post 20.05.2009, which is relevant to understand the continuing nature of the alleged anti-competitive conduct executed through the circular dated 02.03.2009.

60. In this regard, the circular dated 10.11.2009 issued by the OP is also of relevance. The Informant had submitted following English translation of the relevant paras from this circular to the DG, most important being paras 16 and 18 thereof.

“16. We have successfully stopped the new people/ parties retail outlet on the basis of survey of existing old shop & hampering the business of existing members this is the way we have taken care of our members.

[...]

18. In spite of the demand of our members we have not granted permission to start sub-stockist category of the business to certain elements even though this trend is followed in whole Gujarat.”

61. The aforesaid para 16 clearly reveals that the OP had tried to interfere with the fair functioning of the market by stopping new stockists/chemists from entering in its area with the purported aim to safeguard the interest of its existing members. Such act hinders the entry of new stockists and thus, impede the fair functioning of the distribution chain through which



drugs are made available to the end consumer. Further, para 18 indicates that the OP denied permission for appointment of sub-stockists to pharmaceutical companies despite the said practice being in existence in the other parts of Gujarat, and thus, interfered with the commercial decisions which ought to have been left to the wisdom of commercial entities only.

62. Interestingly, during the hearing held on 13.12.2018, the learned counsel for the OP did not challenge the issuance of this circular (dated 10.11.2009). Rather an alternative English translation was put forth before the Commission. As per the said alternative English translation, paras 16 and 18 are as follows:

“16. By taking information of purchasing of members of institution, by standing retail shops, by breaking the elements destroying activities of old members maintain interest of members.

[...]

18. Even affairs of sub stockiest going on without restriction in whole Gujarat, even after demand of members of institution not granted permission to the sub stockiest in larger interest of members.”

63. The Commission notes that though the two alternative translations of para 16 and 18 as are placed before it are different in form yet the essence and substance of both the translations is similar. The aforesaid para 16 also indicates that the OP broke ‘*the elements destroying the activities of old members*’ to ‘*maintain interest of members*’. Further, para 18 also connotes that permission for appointment of sub-stockists not granted ‘*in larger interest of members*’. Thus, irrespective of which translation is relied upon by the Commission, the conclusion follows that the OP was interfering with the appointment of stockists as well as sub-stockists; the



decisions which should be left to the commercial wisdom of the pharmaceutical companies and their prospective stockists.

64. The Commission notes that while justifying the aforesaid circulars, the OP vehemently argued that it was acting in the interest of its members. The Commission has clarified in various previous cases that trade associations provide an important platform for betterment of a particular trade, for establishing code of conduct, for laying down standards for fair trade, for facilitating legitimate co-operative behaviour in case of negotiations with government bodies *etc.* However, when the activities of the trade association transgress the thin line between legitimate trade activities and anti-competitive practices, the competition regulator is well within its jurisdiction to interfere and take cognizance of such anti-competitive actions/practices. Such situation has clearly arisen in the present case, warranting an action by the Commission. The circulars dated 02.03.2009 and 10.11.2009 reveal the anti-competitive conduct of the OP.
65. The aforesaid inference is further supported by the terms of the agreement and MoUs entered into between AIOCD on one hand and OPPI and IDMA on the other. The following excerpts from MoU executed between AIOCD-IDMA-OPPI (circulated on 12.05.2009) as reproduced by DG clearly depict the nexus and anti-competitive conduct.

“(1) Stockiest Policy

(i) Appointment of Stockist:

The company will appoint stockiest only in consultation with State/District association and as per the guidelines laid down by State Association. Such appointed stockiest will work for the area for which they are appointed. Wherever there is only one stockiest of the company in the district, the second stockiest can be appointed in consultation with state/district association, however the second stockiest should be a bonafide member of the association. Company



will not appoint any Additional stockiest for any new division formed or created, it will be given to the any existing stockiest of the company.

(ii) Discontinuation of stockiest:

(a) a regular defaulter in payment

(b) dealing in spurious medicines

(c) not keeping adequate stock or is not serving the market properly or not submitting regular stock and sales statement.

In such circumstances company will approach, State/District Association with proper documentation and written application. State/District Association will consider the request of the company, and then looking into the facts of the application will try to resolve the issue. If they wish to consider the request of the company then State/District can allow additional or replacement of the stockists to the company as per the set norms of State/District Association.”

66. It is apparent from the aforesaid excerpts of the MoU that the OP was following the mandate given by AIOCD and ensuring that the anti-competitive practices so prescribed are followed in the area of its operation, *i.e.* Baroda/Vadodara.
67. Further, the Commission also notes that the letter dated 29.06.2010 sent by the OP to Zydus Cadilla, a pharmaceutical company demonstrate the interference of the OP in the process of appointment of stockist/distributors by a pharmaceutical company.
68. The Commission further observes that apart from collecting documentary evidence, the DG also recorded statements of various persons to ascertain whether the alleged anti-competitive conduct was perpetrated by the OP. Mr. Nayan Raval, Partner, M/s Reliance Agency, in his statement before the DG on 31.01.2011 stated that he had filed an affidavit in proceedings against the OP wherein it was stated that CDAB/OP was demanding Rs. 1,51,000/- for supply of drugs of Abbott India Limited. It was further



submitted by Mr. Nayan Raval that he was a co-opted Vice President of the OP in 2007 but had resigned from the said position when he came to know about the OP's practice of insisting on NOC. Mr. Nayan Raval also submitted that due to his protests, he had to face consequences in the form of a boycott call to his firm and others such as M/s Ganesh Pharma, M/s Saurashtra Agencies, M/s Amit Agencies and Reliance Medicare Pvt. Ltd.

69. With respect to norms and guidelines of AIOCD, the Federation and the OP, Mr. Nayan Raval submitted that pharmaceutical companies are necessarily required to take NOC from the OP to market their products in a particular territory and the Associations also fix traders margins. The number of stockist to be appointed by a pharmaceutical company is also decided by the OP, as per the statement of Mr. Nayan Raval.
70. The cross-examination of Mr. Nayan Raval was conducted by the learned counsel for the OP on 08.01.2018. During the said cross examination, the learned counsel questioned about the position held by Mr. Nayan Raval with the OP, which was already on record. Further, while answering a question, Mr. Nayan Raval stated that he knew Mr. Dahyabhai Patel, who is currently his partner in the business. Upon the learned counsel for the OP seeking Mr. Nayan Raval to produce a document or point out a page number in the existing documents which showed demand of money by the OP, Mr. Nayan Raval stated that a verbal demand was made in this regard by the OP and an affidavit to that effect was submitted by him during investigation.
71. The Commission observes that the learned counsel for the OP objected to the affidavit submitted by Mr. Nayan Raval during investigation stating that it had not been notarised. The DG after cross-examination, however, concluded that the responses of the witness maintained the veracity of the evidence available on record.



72. Upon perusal of Mr. Nayan Raval's cross-examination, the Commission observes that he has maintained his responses in cross-examination which are not at variance with the original statement rendered before the DG. It is a fact that the affidavit dated 18.12.2009, annexed with the Main Investigation Report, is not notarized. However, the Commission is of the view that this fact alone cannot invalidate the contents of the affidavit as the person who made the affidavit has affirmed that he only made and signed it. Thus, it is only a technical defect, which does not affect the veracity of the statement.
73. Another witness whose statement was relied upon by the DG and the Commission while passing the earlier order dated 05.09.2012 is Mr. Jawahar Sharda, Ex-Partner, M/s Ganesh Pharma Agency and Vice President of the OP in 2010-11. In his statement before the DG dated 15.02.2011, he stated about certain practices adopted by the OP, such as issue of NOC for appointment of stockist by drug companies, which were restrictive and anti-competitive in nature. Mr. Jawahar Sharda stated that after he became Vice-President, things improved but the OP was still obliged to follow the dictates of AIOCD and the Federation on the issue of margins and PIS, which were restrictive in nature. He also confirmed the prevalence of NOC practice for appointment of stockists. He alleged that the OP was determining how many stockists will be appointed in a particular territory, it used to fix trade margins, restrict supplies in the market *etc.* In support of his contentions, Mr. Jawahar Sharda furnished a letter dated 14.04.2009, addressed to the Informant and evidence (receipt from the OP dated 05.02.2009) in relation to penalty of Rs. 30,000/- imposed on M/s Ameer Enterprises as they had sold injections of Zuventus without taking NOC from the OP. Mr. Jawahar Sharda also stated that trade margins were fixed as per norms of the OP, *i.e.*, 10% for wholesalers and 20% for retailers. Mr. Jawahar Sharda also stated that AIOCD is the



apex body and the State level and district level associations are affiliated to AIOCD, and that they all comply with norms and guidelines prescribed by AIOCD.

74. In his cross examination by the learned counsel for the OP on 13.03.2018, Mr. Jawahar Sharda stated that he is engaged in pharmaceutical business since 1987 and became member of the OP in 1997. Reiterating the assertions from his original statement, he stated that during 2007 to 2010, all anti-competitive practices and threats were carried out by the OP to wholesale community, and the same continued even during 2010 to 2013, after which such anti-competitive practices stopped. Mr. Jawahar Sharda agreed with the learned counsel for the OP that the trade margins in case of non-DPCO products should be higher and manufacturers of such products have high margins, and Ministry of Health was approached to increase margins for both wholesaler and retailer. However, due to pressure from manufacturer's fraternity, AIOCD has not increased margins till date. Giving an account of the mandatory nature of the anti-competitive practices carried out by the OP, Mr. Jawahar Sharda stated that in 2010, his firm was boycotted by the OP and to effectuate such boycott, the OP ordered discontinuation of supply of certain products from some pharma companies. Based on the responses given during his cross-examination, the DG concluded that evidences tendered by Mr. Jawahar Sharda were not politically motivated as alleged by the OP. Also, Mr. Jawahar Sharda confirmed that allegations against the OP were not made with *malafide* intentions and were fully backed by evidence.
75. A collective reading of Mr. Jawahar Sharda's statement and the responses given by him during his cross-examination establishes the anti-competitive conduct perpetrated by the OP. It has been confirmed that the OP was indulging in NOC practice and that trade margins were being fixed by the OP.



76. Further, the DG relied upon the statement of Mr. Jitendra Kachhi, Partner, Shreeraj Medical Agencies, dated 31.01.2011. During his deposition, Mr. Kachhi stated that the OP was demanding Rs. 2,50,000/- to issue NOC for supply of drugs of Pfizer India Limited. It was further submitted that the norms and guidelines of AIOCD, the Federation and the OP are restrictive in nature, that the OP fixes margins, and decides the number of stockists that could be appointed by a pharmaceutical company. Mr. Jitendra Kachhi submitted a CD during investigation which contained recorded conversation between him and C&F agent of Intas Pharmaceuticals which showed that company had stopped supplies to his firm at the insistence of the OP. During his cross-examination, Mr. Kachhi stated that the OP doesn't harm those who are not complying with its norms but tries to talk and convince the manufacturer to keep the margins as per norms. Mr. Kachhi stated that he had filed affidavit dated 18.12.2009, on guidance from Mr. Dahyabhai Patel and Mr. Nayan Raval and that they had prepared the affidavit which was signed by him. Mr. Kachhi also stated that Mr. Dahyabhai Patel had got the Informant (M/s Vedant Bio Sciences) to file the present case against the OP. He further stated that the Informant was not giving margins of 10% and 20% as per norms as it believed that the said margins were wrong. Further, Mr. Kachhi denied that the OP was insisting on NOC or that there was boycott of any firm which did not follow guidelines given by the OP. With regard to specific instances mentioned by Mr. Kachhi in his original statement dated 31.01.2011 before the DG, it was stated that both those instances were a result of misunderstandings, and supply was made to him after some time. Mr. Kachhi also agreed with contention of the learned counsel for the OP that statement given by him 31.01.2011 was for political reasons at the instructions of Mr. Nayan Raval, Mr. Dahyabhai Patel and Mr. Jawahar Sharda to target the OP's body elected during 2007 to 2010.



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77. Based on the aforesaid cross-examination, the DG concluded that the Mr. Kachhi had turned hostile inasmuch as he had changed his stance to contradict the evidence tendered by him in his statement dated 31.01.2011.
78. The Commission observes that, apparently, the stance taken by Mr. Kachhi during his cross-examination is in contradiction to the evidence on record. The witness denied having faced any problems from the OP and stated that his earlier statement was based on misunderstood facts. He has claimed that the affidavit was prepared by Mr. Nayan Raval and Mr. Dahyabhai Patel and he only signed it. However, the Commission notes that though the affidavit may have been prepared by Mr. Nayan Raval and Mr. Dahyabhai Patel, it was signed by Mr. Kachhi. Mr. Kachhi has not alleged that the said affidavit was signed by him under duress or inducement or that his signatures were forged.
79. The Commission observes that the learned counsel for the OP has disproportionately focussed on establishing that the information filed was politically motivated. The Commission has already dealt with this issue in detail and does not find it necessary to reproduce those observations here. Suffice to say that this fact alone, that the information stemmed from a political rivalry, is not sufficient to render the information misleading or infructuous as long as there is cogent evidence indicating anti-competitive conduct by the OP.
80. The DG also recorded the statement of Mr. Haresh Pamnani, Proprietor of M/s J&J Pharma. During his statement before the DG dated 14.02.2011, Mr. Haresh Pamnani stated that the OP demanded Rs. 2000 per product per category from the manufacturers before any new product is marketed in a particular territory. Mr. Haresh Pamnani also submitted



copy of letter of Krupa Agencies wherein it was asked to obtain NOC from the OP for selling products of J&J Pharma.

81. During his cross examination, Mr. Pamnani maintained his stand and denied that the witnesses were briefed to give tutored answers. The DG observed that the learned counsel for the OP raised issues, which were irrelevant to the investigation and not germane to the evidence on record. The witness also confirmed that statement tendered by him was not a result of any discussion/ meeting and denied the contention that false allegations were made against the OP. Upon perusal of his cross-examination, the Commission agrees with the finding of the DG that the witness has maintained his responses in cross-examination.
82. Another witness whose statement was recorded by the DG is Mr. Shailesh C. Shah, Partner, Ashok Medical Agencies. During his cross-examination, Mr. Shailesh Shah mentioned about the practices of NOC and PIS being carried on by the OP during the years 2007-2010. Mr. Shailesh Shah stated that the OP had issued call of boycott for those who opposed its policies. Further, the OP refused NOC to Ashok Medical Agencies for supply of drugs of Kamron, Ahmedabad, and penalty of Rs. 5000/- was imposed for not following its diktats.
83. During his cross examination, Mr. Shailesh Shah stated that he came to Delhi to give his statement and he did not have any discussion in this regard with Mr. Dahyabhai Patel or Mr. Jawahar Sharda. He further confirmed the practice of NOC for new appointments being carried on by the OP during 2007-2010. Mr. Shah also confirmed that his statement was not politically motivated and was tendered voluntarily having understood the questions fully well. The DG concluded that cross-examination of Mr. Shah could not shake the foundation of evidences. The Commission is in agreement with DG that the witness has maintained his responses in cross-



examination. Further, the witness has unequivocally confirmed the existence of NOC practice by the OP. Also, the boycott of his firm on the instance of the OP shows the clout of the OP in Baroda district to get its mandates followed.

84. The DG also relied upon the statement of Mr. Feroze Patel. In the statement before the DG dated 14.02.2011, he stated that the practice of NOC, PIS and Fixation of margins were being carried out by the OP. Mr. Feroze Patel stated that he was asked to pay Rs. 51,000/- for NOC to supply drugs of Himalaya Drug Company, which was paid by him through cheque. He also wrote a letter dated 12.02.2008 to this effect to Eastern Zone of the State level association *i.e.* the Federation, which was submitted during investigation.
85. During his cross-examination by the learned counsel for the OP, Mr. Feroze Patel stated that he was asked to give statement before the DG by Mr. Dahyabhai Patel and Mr. Jawahar Sharda as many people were not aware about the Commission, and there were political reasons behind giving such statement. Mr. Feroze Patel, however, stated that he did not make any false statement before the DG but he was asked by Mr. Dahyabhai Patel to state certain specific things. Mr. Feroze Patel also stated that information was filed due to political reasons and the Informant did not know about the Commission and Mr. Jawahar Sharda told the Informant about it.
86. Upon perusal of the cross-examination of Mr. Feroze Patel, the Commission is of the view that the learned counsel for the OP once again has focussed on the political rivalry being the basis of filing of the information. The Commission has already dealt with this issue and does not feel the need to reiterate it again. The Commission notes that Mr. Feroze Patel has stated that the letter was drafted by Mr. Dahyabhai Patel



and that he was asked to specifically state certain things before the DG. Such defense may not be fully acceptable considering that Mr. Feroze Patel has neither alleged duress nor alleged misrepresentation. He is expected to have understood the ramifications of his statement given before the DG and the letter that he signed. Also, he categorically stated that Mr. Dahyabhai Patel did not ask him to give any false statement, he only asked him to specifically mention certain things. In such a scenario, the Commission does not agree with the OP that his statement has become entirely unreliable.

87. The aforesaid evidences, both oral and documentary, clearly reveal that indeed the OP was indulging in imposing the requirement of NOC prior to appointment of stockists. The OP had raised serious objections to the statements recorded as well as questionnaire survey conducted by the DG. During the hearing held on 13.12.2018, the learned counsel for the OP also highlighted another questionnaire survey purportedly conducted by the OP and enclosed with its earlier submissions filed on 05.05.2011. As per the OP, the results of this questionnaire survey are contradictory to the results of the survey conducted by the DG. The Commission is not fully convinced with the objections taken by the OP with regard to the questionnaire survey. However, in view of the objections raised by the OP, the Commission decides not to rely on the said questionnaire survey. Notwithstanding, the existence of cogent documentary evidence available on record establishes the case against the OP. Moreover, the Statements, along with their cross-examination, do not further the case of the OP as highlighted in the foregoing paragraphs. Though the OP has highlighted certain contradictions in relation to one or two witnesses, the Commission notes that the majority of the deponents have confirmed their original statements in the cross-examination and the veracity of which has not been whittled down in any manner. Rather they have confirmed the anti-competitive practices carried out by the OP.



88. Before parting with this issue, the Commission finds that the learned counsel for OP placed reliance on the decision rendered by erstwhile Hon'ble COMPAT in *Chemists Druggists Association, Ferozpur v. CCI & Anr*, Appeal 21 of 2014 and Appeal 22-28 of 2014 (decided on 30.10.2015), to further its case. In this regard, the Commission notes that in all the cases pertaining to NOC practice, the Commission has categorically laid down that the NOC practice falls foul of the provisions of the Act only when it is mandatory in nature. In the *Chemists Druggists Association, Ferozpur v. CCI & Anr* case, the Hon'ble COMPAT held that Ferozpur Association had neither taken a policy decision nor issued circulars making NOC/ LOC mandatory for appointment of distributors/stockists in Ferozpur District. Rather, the pharmaceutical companies were found to be insisting on NOC of Ferozpur Association in the said case to avoid disputes with wholesaler/ stockist at a later stage. Thus, since the erstwhile Hon'ble COMPAT did not find the evidence sufficient to support the conclusion of the Commission that there was an insistence of NOC/LOC, the order of the Commission was set aside. As far as the present matter is concerned, as highlighted in the foregoing paragraphs, the documentary evidence is self-speaking and unambiguously brings out the anti-competitive nature of the conduct of the OP. The OP has mainly objected to the questionnaire survey and the oral testimonies. Though the objections of the OP are not fully tenable as such, even accepting such objections, will not absolve the OP of its liability. Even if the objections raised by the OP with regard to the questionnaire survey and oral testimonies are accepted, the Commission is convinced of the existence of anti-competitive conduct on the part of the OP based on cogent documentary evidence available on record. It is evident that the OP was mandating the imposition of NOC prior to appointment of stockists.



89. Based on such evidence, the Commission is of the view that the practices carried on by the OP has resulted in limiting and controlling the supply of drugs in the market in the Baroda district, in violation of provisions of Section 3(3)(b) read with Section 3(1) of the Act.

Issue 2: Whether the OP was fixing the trade margins for wholesalers or retailers in contravention of the provisions of Section 3(1) read with Section 3(3)(a) of the Act?

90. The Commission notes that besides mandating the requirement of NOC prior to the appointment of stockists by pharmaceutical companies, the OP was also involved in the fixation of trade margins of the non-DPCO drugs which had the potential to determine the sale price of drugs.
91. The circular dated 02.03.2009 and the other evidence dealt with in Issue 1 also confirms the practice of fixation of trade margins for non-scheduled/non-DPCO products by the OP to the tune of 10% for the wholesaler and 20% for the retailers. The Commission observes that the OP has not denied fixation of such margins. Rather the OP has tried to justify the adequacy of such margins for the betterment of wholesalers/retailers. Further, it has been argued that these margins are as per industry norms and that the DG has not investigated whether such margins led to any adverse impact or not.
92. The Commission finds no merit in any of these contentions raised by the OP. Even if the margins are as per industry norms and for the betterment of the wholesalers/retailers, the association is not within its legitimate right to impose the said margins on wholesaler or retailers. It should be an independent commercial decision of every entity in the vertical chain to decide the margin it wants to secure or pass on from the upstream entity or the downstream entity, respectively. Further, the decisive criteria is not whether the said practice was for the benefit of wholesalers/retailers or



not but whether the association replaced an entity's independent commercial decision by its own decisions. If many entities independently find a certain percentage as the appropriate margin and voluntarily decide to adopt it, it may not be a competition issue but if they collude/decide together or if an association decides on behalf of such entities and mandates that such entities are required to follow it, it will amount to a contravention of the provisions of the Act. Further, the contention that it was an industry norm and purportedly prescribed by AIOCD would not absolve the OP from its liability under the Act. Even if the trade margins of 10% (for wholesalers) and 20% (for retailers) are not fixed by the OP but were prescribed by AIOCD, there is evidence that the OP was ensuring that this anti-competitive practice is scrupulously followed by its members. The following excerpts (Para 5 and 6) from the circular dated 02.03.2009 are relevant in this regard:

5) Member Friends, below listed companies did not have Margins as per Norms so we have discussed with such companies & did Margins as per Norms. Names of such companies are listed below:

[...]

6) To set the Margins as per Norms W/S. Members have cooperated us & we at Association Thank them all. The Margins as per Norms should be 20% after deducting VAT in Non-DPCO Products & 16% after deducting VAT in DPCO Products. Other than above listed companies any companies you find not giving Margins as per Norms inform in writing to Kartikbhai Doshi, Secretary.

93. The aforesaid excerpts clearly demonstrates that the OP was ensuring that the fixed margins were followed by all the companies. Further, through



this circular, the OP had also appealed to its members to report about any company which was not following the fixed margins.

94. At this juncture, the Commission finds it apposite to highlight that during cross-examination of most of the witnesses on the issue of fixation of trade margins, the learned counsel for the OP tried to establish that such practice was benign and was for the betterment of the stockists/wholesalers/retails. The learned counsel for the OP focused on the adequacy of margins whereas the main issue is fixation of margin which is potentially anti-competitive. Further, the learned counsel also tried to get answers/statements from the witnesses to purportedly establish that the information filed by the Informant was based on incorrect beliefs. The following answer to a question raised by the learned counsel for the OP to Mr. Jintender Kachhi is interestingly relevant in this regard:

“Q41. Were false allegations made in the complaint by Vedant Biosciences?”

Ans. Vedant Biosciences was not giving margins of 10% and 20% as per norms and they felt they are not required to give these margins. That is the reason they made this allegation thinking that these margins of 10% and 20% are wrong.”

(emphasis supplied)

95. The aforesaid answer clearly shows the understanding of Mr. Kachhi regarding the conduct which can be potentially anti-competitive. The aforesaid answer shows that the filing of information by the Informant was in response to imposed norms of the OP which the Informant was not willing to follow. This, as per Mr. Kachhi was wrong. The Commission notes that the OP has tried to extract statements from the witnesses during cross-examination to assert its claim that fixation of trade margins was not anti-competitive. However, Commission’s opinion would be guided



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by the provisions of the Act and not by perception of any witness(es). Neither OP nor any of the witnesses cross-examined by the OP have denied the existence of fixed trade margins.

96. Lastly, the contention of the OP that DG ought to have examined the adverse impact of the fixed trade margins is ill-founded. The fixation of wholesale and retail margins, directly or indirectly, leads to a determination of sale price of drugs, which is in contravention of Section 3(3)(a) read with Section 3(1) of the Act. As per the scheme of the Act, the contravention under Section 3(3) of the Act are presumed to have an appreciable adverse effect on competition ('AAEC'). Thus, the DG was not under an obligation to prove the impact/effect of such practice. Rather it was for the OP to demonstrate the pro-competitive benefits, if any, of such practice and that such benefits outweighed the anti-competitive effects, which the OP had failed to establish. Fixation of trade margins has the potential to determine sale prices and in the absence of any redeeming virtue established by the OP, such practice falls foul of the provisions of Section 3(3)(a) read with Section 3(1) of the Act.
97. As stated already, the Commission is not averse to the formation and legitimate functioning of trade association to provide incentives and benefits of its members and also to act in protection of their interests. However, such freedom cannot be used as a cloak to curtail the free flow of goods in the market or the determination the prices/output in the market. The concerned practices, namely the NOC practice and the fixation of trade margins, affect the supply chain and lead to the determination of the price of drugs in the vertical chain.
98. Thus, in light of the totality of facts and evidence available on record, as discussed above, the Commission finds the conduct of OP to be anti-competitive and in contravention of the provisions of Section 3(3)(a) and



3(3)(b) read with Section 3(1) of the Act for mandating the requirement of NOC prior to appointment of stockists and for fixing the trade margins.

ORDER

99. 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.
100. In view of the findings elucidated in the earlier part of this order, the Commission directs the OP to cease and desist from indulging in the practice of mandating NOC and fixation of trade margins, which has been held to be anti-competitive in terms of the provisions of Section 3 of the Act. During the oral hearing held on 13.12.2018, the learned counsel for the OP vehemently contended that since the period of investigation pertains to 2007-2010, an issuance of cease and desist order in the present case has become infructuous. The Commission finds this argument rather flimsy and theoretical in nature. The information in the present case was filed in 2009, the investigation took place in 2010 (Main Investigation Report) and 2011 (Supplementary Investigation Report) and the final order of the Commission was passed on 05.09.2012. Thus, the allegations as well as investigation was limited to the conduct that took place prior to 2010. Thus, *vide* order dated 05.09.2012, the Commission directed the OP to cease and desist the conduct found to be in contravention during the said period i.e. 2007-2010.
101. It is a matter of record that there have been cases before the Commission involving same conduct against the very same OP in subsequent years too which continued the same anti-competitive conduct, *namely* mandatory NOC practice besides others. The evidence in future cases in the form of emails and other documents and tape recordings revealed that the anti-competitive conduct(s) in question continued, albeit in different



camouflaged forms. Also, despite several orders of the Commission proscribing the anti-competitive practices of State and regional chemists and druggists associations in Gujarat, the Commission continues to receive cases highlighting similar conduct.

102. Thus, the Commission finds it imperative to issue cease and desist order even in the present case, to once again reiterate that the Commission deprecates such a conduct and its perpetration in any form by those responsible, be it the associations, stockists/distributor/wholesaler/retailer and the pharmaceutical companies.

103. Further, it is necessary that such anti-competitive conduct is penalised to discipline the erring party for the said contravention. Accordingly, the Commission deems it appropriate to impose a penalty on the OP at the rate of 10% of its relevant income based on the income and expenditure account for three financial years filed by it for the relevant years during the earlier proceedings before the Commission. Accordingly, the quantum of penalty has been calculated, as follows:

OP/CDAB

Year	Relevant Income during the Year (in Rupees)
2006-07	3,55,301
2007-08	3,74,065
2008-09	2,52,361
Total	9,81,727
Average	3,27,242
10% of Relevant Average Income (Penalty Amount)	32,724



104. Resultantly, penalty of Rs. 32,724/-, calculated at the rate of 10% of the relevant average income of OP, is hereby imposed on it.
105. The aforesaid party is directed to deposit the amount of penalty within 60 days of receipt of this order.
106. The Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi
Dated: 15/01/2019