

**BEFORE THE COMPETITION COMMISSION OF INDIA, NEW DELHI**

**In Re: MRTP Case No. C-87/2009/DGIR**

**Informant:** Vedant Bio Sciences through Advocate D.P.Pandey & Maneesh Dubey

**Opposite Party:** Chemists & Druggists Association of Baroda through Advocate Nikhil Goel & Sayid Mazoor

**Date of decision: 5<sup>th</sup> September, 2012**

**ORDER**

**1. BACKGROUND**

- 1.1 This case was initiated on a complaint dated 28.04.2009 filed by Shri Uday Joshi, Authorised Signatory of Vedant Bio – Sciences, Baroda (hereinafter referred to as the “Informant”), before the Director General (Investigation & Registration), Monopolies & Restrictive Trade Practices Commission [hereinafter referred to as “DG(IR)”] alleging that the Opposite Party, namely, Chemists & Druggists Association of Baroda (hereinafter referred to as “CDAB” or “Association”) is indulging into restrictive trade practices.
- 1.2 The Informant has claimed that he is a Baroda based distributor of few pharmaceutical companies and sells pharmaceutical formulations of the companies through promotion and distribution.
- 1.3 The allegations contained in the complaint / information, in brief, are as below:
- (i) CDAB is an unregistered body and is imposing unfair conditions in sale of pharmaceutical products of different companies.



- (ii) CDAB has formulated guidelines for its members which require any person including a member to obtain permission / NOC before which he can become a stockist of a particular company.
- (iii) CDAB forces the additional/new Stockist not to sell the products of a pharmaceutical company unless NOC is obtained from the existing Stockist of that pharmaceutical company operating in that area.
- (iv) CDAB insists on procuring NOC before a pharmaceutical company launches new products or appoints new Stockist. In case such NOC is not obtained, then the company is not allowed to launch new product or appoint new Stockist.
- (v) A circular dated 02.03.2009 was issued by CDAB, wherein permission has been granted to be Stockists or take work for some pharmaceutical companies, which indicates that NOC is a must to do business.
- (vi) CDAB is also engaged in fixing margins for pharmaceutical companies.
- (vii) NOC has to be procured for several aspects like launch of new company products, appointment of new Stockist or addition of Stockist.
- (viii) CDAB charges Rs. 2000/- per product from all companies who want to launch new product in the market. These charges are collected towards the advertisements in their magazine called 'Chemists News'. Price structure of each product is controlled through this advertisement and without detailed price structure, the products are not allowed to be launched.

1.4 The Informant had prayed to remove the hurdles forced by All India Organisation of Chemists & Druggists (AIOCD) through its State Unit/ CDAB



in pharmaceutical business which, as per Informant, would help the prices of medicines come down by at least 20%.

- 1.5 After receiving the complaint, the DGIR, MRTPC undertook a preliminary investigation into the allegations made in the complaint and sought certain information from the Informant which was duly provided by him.
2. At this stage, consequent upon the repeal of Monopolies and Restrictive Trade Practices Act, 1969 (the MRTP Act) the case was transferred to the Competition Commission of India (the Commission) under section 66 (6) of the Competition Act, 2002 (the Act).
3. The Commission, after considering the material on record formed an opinion that there existed a *prima facie* case and vide order dated 18.06.2010 referred the matter to the Director General (DG) for conducting investigation. In pursuance of the direction of the Commission the DG conducted investigation and submitted the investigation report dated 04.11.2010 to the Commission.
4. During the course of investigation the DG gathered facts out of primary and secondary sources, collected evidences by sending questionnaire to the concerned parties including information providers, analyzed the evidence/facts gathered in light of the information supplied to the Commission and recorded the statements of information providers as well as members of CDAB. The DG examined issues relating to practice and decision of the Association to find whether (a) the CDAB is insisting



upon obtaining no-objection before any concern is appointed as distributor/stockist by any pharmaceutical company (b) the Association is also deciding upon price margins for wholesalers (c) the Association is also charging any amount towards launch of new products in the name of advertisements and if so whether such conduct fall foul of the provisions of the Act.

## 5. Findings of DG Report

5.1 As per the report of the DG, evidence gathered during investigation established that the Association was not only insisting upon seeking its NOC before any pharmaceutical company could appoint a wholesaler but it was also fixing trade margins for the wholesalers and there have been payments towards advertisements, donations.

5.2 Based on the analysis of the evidences gathered in course of proceedings, it was concluded by the DG that the circular issued by CDAB 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.

6. The DG report was considered by the Commission in its meeting held on 02.12.2010. After considering the report and other material available on record, the Commission was of the view that further investigation into certain aspects was necessary in order to arrive at a proper conclusion. Accordingly, the Commission directed the DG to



submit a supplementary report after analysing evidence on the following aspects:

- (i) Evidence regarding the agreement, practice and decision amongst members of the alleged cartel to limit /control prices.
- (ii) Evidence and data, on the basis of facts, figures and market survey, to show that the alleged cartel has actually determined the sale prices of drugs.
- (iii) Further evidence, including data, in support of the finding that CDAB has limited or controlled supply of drugs.
- (iv) Evidence relating to actual supply and movement of drugs in the market, the actual margins charged at various stages of the supply/ distribution chain, the discounts, if any, given with reference to the margins laid down in the guidelines.
- (v) The nexus between All India Organisation of Chemists & Druggists (AIOCD) and CDAB and specific evidence about the members of CDAB, who have participated actively in the operation of the alleged cartel.
- (vi) Full financial information necessary to determine appropriate penalties for AIOCD, CDAB and the active individual members of CDAB, in case the Commission finally finds that there has been an infringement of any provision of the Act by the Associations and their members.

7. In the light of the directions given by the Commission the DG conducted further investigation and submitted a supplementary investigation report dated 04.03.2011 which was considered by the Commission in its meeting held on 10.03.2001. The Commission vide its order dated 10.03.2011 decided to send a copy of the investigation report to the



parties for filing their replies / objections to it. The parties were also directed to appear for oral hearing, if they so desire, either personally or through their authorised representatives.

## 8. Supplementary Investigation

The findings of DG's supplementary investigation report can be summarized as under:

### 8.1 Relationship and Nexus between AIOCD and CDAB

8.1.1 As per DG report AIOCD is an apex body of wholesalers and retailers of pharmaceutical companies at All India Level. Below AIOCD, there are Associations of wholesalers and retailers at the State Level in the States. These State Associations are affiliated to AIOCD. Further, there are Associations at the District Level also, which are affiliated to State Level Associations. CDAB established in 1937 is a District Level Association of Gujarat. It is ultimately affiliated to AIOCD through Federation of Gujarat State Chemists and Druggists Association, which is a State Level Association in Gujarat and follows the norms of AIOCD.

8.1.2 The report further stated that AIOCD entered into MoU with Organization of Pharmaceuticals 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. Among others, guidelines and norms for appointment of new and additional stockists have also been prescribed. No pharma drug company can conduct business with wholesalers and retailers, unless it follows the guidelines and norms of AIOCD, which



have been formulated by the members of AIOCD - a body of wholesalers and retailers together. The guidelines and norms show the collective intent of the members of AIOCD. The guidelines/norms of MoU are revised from time to time.

8.1.3 As per the DG report the guidelines of AIOCD, which are being followed by State Level Associations like Federation of Gujarat State Chemist and Druggist and District Level Associations like CDAB, limit and control supplies of drugs and number of wholesalers/stockists in the market and fix margins for wholesalers and retailers which ultimately has the effect of determination of sale price of drugs in the market. AIOCD is in position to control the affairs of State and District Level Associations and these Associations cannot deviate from the guidelines/norms of AIOCD. If pharma companies do not follow the norms/guidelines of associations, their normal business operations get hampered. In case members of Associations at National, State or District Level, do not follow the guidelines and norms, they are boycotted and even penalized.

8.1.4 According to DG report the common denominator of all these Associations as is evident from the statements of persons recorded by DG is that all of these are following norms / guidelines which are restrictive and anti-competitive in nature.

8.2 **Issue of limit and control on supply of pharmaceutical drugs in the market**

8.2.1 The DG has concluded that guidelines/norms prescribed by AIOCD are found to be restrictive and anti-competitive in nature since they ultimately have the effect of controlling and limiting supply of drugs



in the market. The restriction is imposed on two counts; one, no pharmaceutical company can introduce a pharmaceutical drug in a territory, unless it pays certain amount to the Association in name of PIS (Product Information Service) purportedly for the purposes of advertisement and second, before appointment of any new stockist or additional stockist, the association grants no-objection in name of NOC/LOC (Letter of Cooperation). If the association does not grant NOC, no new or additional stockist can be appointed.

8.2.2 The DG has further reported that without getting NOC from the Association, stockists cannot get supplies from pharmaceutical companies in order to sell their products in the market. If the dictates of the Association are not followed, then call of boycott is given by the Association and the stockists not following the dictates of the Association are also penalized. The DG has found this practice as anti-competitive and restrictive. As per DG report the *modus operandi* followed in respect of PIS is that a drug company has to get drugs approved for their launch in a particular territory by the Associations. The Associations charge Rs. 2000 per drug before it can be launched in a particular territory. Moreover, amount of Rs. 2000 is not only charged per drug, but also, per category of that drug. If a drug comes under different categories- say, 100g, 500g, 1 kg pack, for each such category of that drug, the drug manufacturing companies will have to pay Rs.2000. Thus, the DG has concluded that Associations not only restrict number of players, but also restrict introduction of new drugs in the market.



8.2.3 As per the DG report, the CDAB, through enforcing guidelines and norms laid down by the AIOCD as well as by actual conduct limits supply of drugs and number of players in market since without NOC of the Association, no person/enterprise can be appointed as wholesaler and stockist at Vadodara, Further, if product NOC in form of PIS approval is not given, companies will not be in a position to supply drugs. Citing the depositions of persons recorded during investigation the DG has reported that certain drugs are not available in Vadodara because PIS approval has not been given. Further, as per the DG report additional stockist in a particular territory eventually restricts the number of players in the market and in turn also limits or control supply of drugs. The system of PIS approval for introduction of drugs in a particular territory and taking money for that also leads to obstruction in the supply and availability of drugs. The DG has concluded that these practices followed by boycott of those firms which do not follow the dictates of Association and imposition of penalties on them, establish that the practices and conduct of CDAB are restrictive and anti-competitive.

### 8.3 Issue of determination of margins

8.3.1 The DG has reported that besides exercising their control over the number of stockists and number of products, the Association(s) are also involved in the fixation of margins and ultimately determination of sale price of drugs as far as non-controlled drugs are concerned. As per the DG report, there are broadly two categories of drugs



under Drug Price Control Order (DPCO) 1995 for the purpose of price fixation/revision and monitoring. These are scheduled drugs (drugs under price control) and non-scheduled drugs which are out of price control. National Pharmaceutical pricing Authority (NPPA) fixes/revises prices of 74 Scheduled bulk drugs and formulations based on them. In the case of non-scheduled medicines, trade margin is normally given by the industry themselves. The DG has noted that it is in this category of drugs the trade Associations of wholesalers and retailers are deciding on the margins, which has been fixed at 20% for retailers and 10% for wholesalers.

8.3.2 On the basis of the evidence furnished in course of proceedings the DG has concluded that the norms and guidelines of the Association which prescribe the margins for wholesalers and retailers, not only has the effect of fixing margins, but also result into determining the sales price of drugs. The margins of drugs for wholesalers and retailers are determined by the Association(s) at the time of giving PIS approval for introduction of drugs in a particular territory. The circular dated 02.03.2009 of CDAB also indicates that margins and prices are determined by the Association. The determination of margins and system of PIS has the effect of increasing the cost of the drug manufacturing companies, ultimately putting burden on the end consumers.

8.4 **Whether practices of CDAB are restrictive and anti – competitive.**

8.4.1 After analyzing the evidence the DG has concluded that practices of CDAB on the lines of AIOCD and Federation of Gujarat State



Chemist & Druggist Association are anticompetitive and restrictive in nature and are violative of provisions of Section 3(3) (a) and 3(3) (b) of the Act, 2002.

9. The matter was further considered by the Commission in its meeting held on 19.05.2011 wherein Mrs. Krishna Swamy, Advocate and Shri Meenesh Dubey, Advocate alongwith Shri Jawahar Sharda and Jitender Kachadhi for Informant and Shri Avdhoot V. Sumant, Advocate alongwith Shri Alpesh Z. Patel and V. T. Shah for CDAB appeared before the Commission and made oral submissions.
10. The Commission had also directed the DG to collect and submit financial details in respect of CDAB and its active members to the Commission. The DG vide notes dated 10.06.2011 and 13.07.2011 requested the Commission to extend the time for collecting and submitting financial information of the active members of CDAB as they had not furnished the information sought by DG on the pretext that Shri Alpesh Z. Patel, Secretary of CDAB had filed a special civil application before Hon'ble Gujarat High Court challenging the order of the Commission asking for personal financial details of the members.
11. The matter was again taken up by the Commission on 13.09.2011 in which the Commission considered the DG's letter dated 05.09.2011 recommending initiation of proceedings under section 43 of the Act against the executive members of CDAB who had failed to furnish their



profit and loss account and balance sheet in compliance of DG's direction. Thereafter, the matter was considered by the Commission in its meeting held on 28.09.2011 in which the final supplementary report of the DG dated 14.09.2011 was considered by the Commission. The Commission vide its order dated 28.09.2011 had noted that DG vide his letter dated 17.03.2011 asked the executive members of CDAB to furnish their profit and loss account and balance sheets by 23.03.2011. However, the details were not filed by them. Later on, financial details of CDAB were filed vide letter 14.04.2011. Financial information in respect of four executive members viz., Shri Yusuf H. Patel, Shri Jawahar Sharda, Bhavin Mangrolly and Shri Daxit Patel was also filed. The other executive members of CDAB did not furnish financial details even after two reminders dated 04.04.2011 and 26.04.2011 issued by the DG. The Commission also noted that some executive members of CDAB had challenged the directions of the DG before the Hon'ble High Court of Gujarat by filing two Special Civil Applications, however, at that time no stay or interim order was granted by the Hon'ble High Court in those matters.

12. After considering all the facts and circumstances of the matter, the Commission, found that prima facie there had been non-compliance, without any reasonable cause, of the directions given to CDAB by the DG under Section 36 (2) read with Section 41(2) of the Act and, therefore, decided to issue notices to the said executive members of CDAB under Section 43 of the Act, to show cause within 15 days from



the date of receipt of the notice as to why penalty for the above mentioned violation should not be imposed upon them. The Commission also decided that these executive members of CDAB, if they so desire, may also avail the opportunity of being heard in person or through their authorized representatives on 15.11.2011. The Commission also decided to send copies of the DG investigation report to all the executive members of the CDAB for filing their reply / objections within two weeks from the receipt thereof.

13.The matter was again taken up by the Commission in its meeting held on 30.11.2011 in which Shri Shamik Sanjanwala, Advocate appeared for the executive members of CDAB, namely, Shri Alpesh Patel, Shri Vrajesh Shah, Shri Vipun Shal, Shri Harshadbhai Shah, Shri Hitendra Patel, Shri Sunil Patel, Shri Kirtibhai Joshi, Shri Umeshbhai Joshi, Shri Jayesh Shah, Shri Sapnesh Shah, Shri Pareekshit Patel, Shri Pinesh Shah, Shri kartik Doshi, Shri Bhavin Mangloria, Shri Dixit Patel, Shri Dayabhai N. Patel and Shri Manish S. Shah. He filed a fax copy of the order dated 11.11.2011 passed by Hon'ble Gujarat High Court in Special Civil Application No. 10039 of 2011 and requested for adjournment of hearing to enable him to file replies to the DG report and show cause notices issued under section 43 of the Act which was acceded to by the Commission.

14.Thereafter, the matter was considered in Commission's meeting held on 21.12.2011 in which Shri Shamik Sanjanwala, Advocate informed



that Hon'ble Gujarat High Court had disposed off his client's Special Civil Application directing them to file application before the Commission challenging its jurisdiction. The Commission granted the time to move application within 3 weeks time and directed him to appear for oral hearing on 31.01.2012. Shri Shamik Sanjanwala, Advocate, in Commission's meeting held on 08.05.2012 filed an application alongwith the copy of order dated 04.05.2012 passed by the Hon'ble Gujarat High Court in Special Civil Application no. 6391 of 2012 and requested for adjournment of the case. The Commission, after perusing the order of the Hon'ble Gujarat High Court directing status quo with regard to production of records of individual office bearers, deferred the matter.

15. In view of the order passed by the Hon'ble Gujarat High Court the Commission has decided to dispose of this matter so far as it relates to the practices and conduct of the CDAB. The Commission shall pass appropriate orders in respect of the members of CDAB as and when the Hon'ble Gujarat High Court decides the Special Civil Application no. 6391 of 2012. It is also pertinent to mention here that although in the supplementary investigation, the role and conduct of AIOCD and Federation of Gujarat State Chemist & Druggist Association were also examined by the DG, but since they were not made the subject matter of inquiry before the Commission and copy of DG reports were not supplied to them the present order is confined to the role and conduct of the CDAB only.



**16. Reply of CDAB to the DG reports**

CDAB filed its reply to the DG report on 05.05.2011. The gist of the reply filed by CDAB is noted as under:

16.1 The CDAB has submitted that investigation conducted by the office of DG and consequential reports suffer from serious and inherent contradictions which are attributable to the process of investigation being carried out in violation of fairness and propriety. The CDAB has contended that the present complaint, leading to the preparation of the report is completely ill motivated and misconceived and accordingly, deserves to be dropped. CDAB has further submitted that the reports are based on the completely non existing facts and hence are suffering from serious and apparent deficiencies the salient features whereof are as under:

**Plea on NOC**

16.2 As per the CDAB, the gist of allegations and investigation in the first report refers to some alleged permission required to be obtained from CDAB for appointment of stockist. This action has been ultimately found to be anti-competitive and this finding therefore, has resulted into the present proceedings. CDAB has contested the findings of the DG on the issue of NOC. The submissions made by the CDAB are noted in the following paras.

16.3 It has been submitted that the DG in his report had observed that after year 2010 when the new Executive Committee came into power the alleged practice of seeking NOC had been stopped. CDAB has contended that contrary to the findings of DG such practice never existed.



16.4 CDAB has contended that not a single copy of the alleged NOC required to be issued by CDAB had been placed on record either by the stockist or the pharmaceutical companies. Thus, as per CDAB, the allegation is based on some assumption without any actual and concrete evidence. The letters written by any person or company does not constitute reliable evidence and the principles of fairness and natural justice require thorough and in-depth investigation which could find at least one letter of permission or NOC issued by CDAB. Thus, CDAB submitted that absence of any direct evidence is fatal and necessitates more thorough and wide investigation in the matter. The CDAB has contended that it has nothing to do with the process of any company appointing or selecting the stockiest.

**Nexus with AIOCD**

16.5 As per CDAB, the relationship has been investigated between two juristic inanimate persons and therefore an existence of relationship or affiliation pre requires some legal document in the form of constitution or regulation requiring inter-linkage through either membership or payment of affiliation fee or through some formal process maintained between two bodies. CDAB has emphatically denied any sort of "affiliation" to anybody whatsoever much less AIOCD and had stated that the major part of the report imputed the alleged activities of AICOD to the CDAB and DG report on this count is liable to be rejected.

16.6 CDAB has submitted that the whole process of investigation is seriously infested or controlled by persons having personal grudge or



dispute with CDAB. It has further submitted that there are personal disputes cropped up between previous and present office bearers and are being attempted to be settled by using the forum of Commission.

16.7 As per CDAB, the analysis of frame and structure of first report of DG shows that it is completely devoid of any facts and relevant matter except an exhibition of some general knowledge resorted to by DG. CDAB had submitted that the aforesaid frame and contents of law speaks of complete absence of any reasoning or analysis of facts and hence even the conclusion of DG report has become generic which shows the misconception of law and fact founded on confusion on the part of DG as DG has failed to apply and appreciate the law and fact with a focus and specific attention to the relevant matters and documents exclusively applicable to CDAB.

16.8 As per CDAB, the supplementary report has dealt with the alleged relationship between AIOCD and CDAB. CDAB has submitted that the finding of such a connection is based on the statement of Shri Jawahar Sharda who is having organizational enmity with CDAB and his statement has been relied like a gospel truth. CDAB has also taken the plea that the DG ought to have at least enquired from the office of AIOCD regarding the alleged "affiliation". Thus, as per CDAB, the whole investigation is oriented with the singular source of evidence as gathered from the group of persons having enmity and disputes with CDAB. CDAB has further contended that the reliance on the materials with reference to AIOCD and their activities is wholly irrelevant as neither CDAB is party to that nor in any way such material was



subjected to an objective disclosure to CDAB which is ex-facie violation of principles of fairness and natural justice.

17. **REPLY ON MERITS**

- 17.1 As per CDAB, the DG had relied upon the website and some alleged document executed by AIOCD, but absolutely no effort has been made to find out any legal or administrative document to identify or establish the affiliation or formal association between two formal bodies. CDAB had submitted that DG's employing terminology "as would be evident from the statement" and "in the course of investigation it has been gathered", are sufficient to prove that DG did not even bother to find out any document which is fundamental and prerequisite condition to establish any affiliation or formal association between two juristic persons.
- 17.2 As per CDAB, the aforesaid facts are sufficient to show that investigation is wholly deficient and this kind of situation requires more objective and fact oriented investigation as the report of DG is more of an opinion based on the perception of DG.
- 17.3 As per CDAB, the DG has relied upon inherently and fundamentally deficient perception that CDAB is affiliated with AIOCD like a servant Association and it follows every alleged guideline as issued by AIOCD. CDAB has contended that the basic premise itself is imaginary as CDAB is neither under administrative nor legal nor any other nature of control of AIOCD and CDAB is an independent Association having its own independent legal and administrative control, policy and existence.



- 17.4 As per CDAB, the DG had carried out the investigation only by relying upon the statements and questionnaire recorded from the persons having personal grudge with the new committee. CDAB has submitted that the alleged PIS has no privity with CDAB. It has been argued that as the existence and privity of the PIS itself is not confirmed, such document cannot be relied upon for preparing report without bothering as to how such document can have any bearing against CDAB. As per CDAB, the DG who had relied upon PIS presumed that such document is generated, issued, circulated and enforced by CDAB whereas in fact CDAB does not have even remote relationship with such document.
- 17.5 CDAB has submitted that even statement of Shailesh C. Shah refers to the fact that the body is not now insisting for the NOC. It was also admitted that the District Level Association is not having any privity with the alleged process of NOC. As per CDAB, the DG while investigating had relied upon Exhibit II without either reading or applying his mind to the contents thereof. CDAB had contended that it may be appreciated that document on face of it confirms the fact of Ashok Medical Agency of Shailesh Shah having given donation to CDAB. As per CDAB, on the said document on the bottom there is an overwriting apparently caused by Shailesh Shah while inserting a line written which appears to be in his own handwriting that "the penalty charged by the Association for not following their dictate". DG had relied upon such document by not giving any weightage to the printed word donation and by ignoring the fabrication. CDAB has also



highlighted the fact that the document was generated in the year 2008 and Shri Shailesh Shah did not raise any complaint in this regard till 2011. As per CDAB the aforesaid factual position is applicable to document Exhibit - 14 also and the DG has taken it as a proof of penalty by conveniently ignoring the word donation.

17.6 As per CDAB, statements of Shri Nayan Rawal and Firoz Patel relate to alleged PIS or NOC, but unfortunately the whole investigation report does not bring forth even one single document which can even remotely be considered as NOC. CDAB has submitted that various statements had been accepted on their face value without any actual investigation. CDAB in this regard has mentioned the allegation made by Shri Uday Joshi who had alleged that powder manufactured by Abbot India Ltd is not available in Gujarat because of some whimsical restriction by CDAB. As per CDAB this allegation is absolutely false as the said drug is available easily and openly in market and CDAB had submitted document in support of this fact.

17.7 As per CDAB the DG had relied upon certain circulars and straightaway reached to adverse conclusion. In this regard, CDAB has contended that principles of natural justice and fairness require that where any document or contents thereof are sought to be relied upon against any person, then such person should be provided an opportunity to explain especially when the contents do not indicate any illegality or wrong.

17.8 CDAB further submitted that investigation report observes that CDAB is practically following all the practices and / or the directions



of AIOCD whereas in fact it is not the case at all as there is an inherent absence of any privity between CDAB and AIOCD.

17.9 As regards issue of determination of margin, CDAB submitted that the margins are fixed by the Government notifications. As per CDAB, the Indian Pharmaceutical Guide shows that the margins are required to be maintained by the companies. As an Association, it is duty of CDAB to ensure that its members are not cheated upon by the Companies. Accordingly, as per CDAB, in a peculiar case where a manufacturing company is not adhering to the margins prescribed, a representation is made on behalf of the members, which cannot be said to be Anti-Competitive.

17.10 Lastly, the CDAB has prayed that the report of the DG dated 02.11.2010 and 03.03.2011 in case no. MRTP-87/2009/DGIR may be rejected and consequently the case be dropped. The CDAB has alternatively requested that an order to reinvestigate the matter may be issued with direction to maintain and uphold the principles of legality, fairness, natural justice in the larger interest of truth, legality and substantial justice.

18. **Reply of Informant to the DG reports**

The Informant filed its reply to the DG report on 13.05.2011. The gist of the reply is as under:

18.1 The Informant has submitted that the objections raised by Shri V. T. Shah of CDAB in their preliminary objections are illogical and are



based on their unfair whims to either misguide the Commission or kill the time.

18.2 As per the Informant, the claims of CDAB on NOC, PIS and Trade Margins are completely vague and illogical. Regarding the claim of the CDAB that statement of Informant as recorded by DG regarding Ensure Powder was wrong, the Informant has submitted that the bill copy of M/s Bhavna Sales submitted by the CDAB to prove that Ensure Powder is being sold in the market is dated 04.04.2011, whereas the Informant's statement was recorded on 31.01.2011. Thus, as per the Informant the said bill dated 04.04.2011 carries no weight.

18.3 As per the Informant, the claim of CDAB regarding no relationship with State Federation or with AIOCD is contradictory in itself. The Informant, in this regard, had enclosed a circular of State Federation confirming affiliation to AIOCD. As per the Informant, the circular dated 10.11.2009, placed at Exhibit No. 17 of first report, reveals that they had passed the benefits to Associations of other towns like Godhra, Bharuch & Surat. The Informant has contended that such benefit can be passed to other Associations only if they all are covered under one roof i.e. State Federation. Even the copies of "Chemist News" were provided to their members as per Para no. 11 of the same Exhibit.

## ISSUES

19. The Commission has carefully considered the issues raised by the Informant, the evidence gathered by the DG in his investigation reports



as well as the replies / submissions filed by the CDAB and the Informant to the DG report. After thorough perusal of the said documents Commission finds that following issue arises for consideration and determination by the Commission in the matter:

- I. Whether the conduct and practices of CDAB are anti – competitive and in violation of Section 3 of the Act?

20. **Determination of Issue No. 1**

**Whether the conduct and practices of CDAB are anti-competitive and in violation of Section 3 of the Act?**

20.1. DG has concluded that the practices and conduct of CDAB are violative of provisions of section 3(3) (a) and 3(3) (b) of the Competition Act, 2002. The CDAB has denied indulging into anti-competitive practices whereas, the Informant has agreed with the conclusion drawn by the DG.

20.2. Since the DG has found that the CDAB has infringed the provisions of section 3(3)(a) and 3(3)(b) of the Competition Act, 2002 the relevant sub-section (3) of section 3 of the Act may be looked into which reads as under:

*“Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association*



*of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which –*

*(a) directly or indirectly determines purchase or sale prices;*

*(b) limits or controls production, supply, markets, technical development investment or provision of services;*

*(c) .....*

*(d) .....*

*shall be presumed to have an appreciable adverse effect on competition.*

20.3. For the purpose of proper appreciation of applicability of relevant provisions relating to anti-competitive agreements, it is useful to consider the various elements of section 3 of the Act in some detail. Section 3(1) of the Act prohibits and section 3(2) makes void all agreements by association of enterprises or persons in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of services which cause or likely to cause appreciable adverse effect on competition within India.

20.4. It is evident from the above that if any agreement restricts or is likely to restrict the competition then it will fall foul of section 3 of the Act.

20.5. Further, section 3(3) of the Act applies not only to an agreement entered into between enterprises or associations of enterprises or persons or association of persons or between any person and enterprises but also with equal force to the practice carried on or decision taken by any association of enterprises or association of persons including cartels, engaged in identical or similar trade of goods



and provision of services which has the purpose of directly or indirectly fixing prices, limiting output or sales, or sharing markets or customers. Once existence of prohibited agreement, practice or decision enumerated under section 3(3) is established there is no further need to show an effect on competition because then a rebuttable presumption is raised that such conduct has an appreciable adverse effect of competition and is therefore anti-competitive. In such a situation burden of proof shifts on the opposite parties to show that impugned conduct does not cause appreciable adverse effect on competition.

20.6. The next question which needs examination is whether the CDAB, which is an Association of chemists and druggists at the District Level, is covered under the category of entities enumerated in section 3(3) of the Act.

20.7. In this respect the definition of 'enterprise' as provided in section 2(h) assumes significance and which runs as follows:-

*"enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services of any kind ..... but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central*



*Government dealing with atomic energy, currency, defence and space.*

20.8. The Commission notes that the CDAB, established in 1937, is registered under the Bombay Public Trust Act, and is an association of wholesalers and retailers of Baroda district in the State of Gujarat. It is noted that the DG has analyzed the relationship and nexus between AIOCD and CDAB in his investigation report. As per the report of DG, AIOCD is an apex body of wholesalers and retailers of pharmaceutical at All India Level. Below AIOCD, there are Associations of wholesalers and retailers at the State Level in the States. These State Associations are affiliated to AIOCD. Further, there are Associations at the District Level also, which are affiliated to State Level Associations. The DG has observed that the CDAB is ultimately affiliated to AIOCD through Federation of Gujarat State Chemists and Druggists Association, which is a State Level Association in Gujarat and follows the norms of AIOCD.

20.9. Therefore, there is no dispute as to the fact that constituent members of CDAB are stockists and retailers of pharmaceutical companies who are engaged in the supply of pharma products to the consumers. Therefore, they fall squarely within the definition of 'enterprise' provided in the Act. Further, sub-section (3) of section 3 of the Act not only covers agreements entered into between enterprises or associations of enterprises but also the practice carried on or decision taken by any association of enterprises engaged in identical or similar trade of goods or provision of services. There is no denying the fact that



CDAB is an association of enterprises whose constituent members are engaged in identical or similar trade of goods.

20.10. The Commission, therefore, holds that since CDAB is taking decisions relating to distribution and supply of pharmaceutical products on behalf of the members who are engaged in similar or identical trade of goods, the practices carried on, or decisions taken by CDAB as association of enterprises are covered within the scope of section 3(3).

20.11. It is noted by the Commission that the investigation by DG has found the acts, conduct and practices on part of CDAB as anti-competitive on various counts. Therefore, it is necessary to examine the evidence available on record in respect of such infringements in order to arrive at a conclusion.

#### **Limiting and controlling the supply of pharmaceutical drugs**

20.12. It is observed by the Commission that DG while analyzing the nexus between CDAB and AIOCD has concluded that CDAB being a District Level Association affiliated to AIOCD through the Federation of Gujarat State Chemists and Druggists Association follows the guidelines/norms prescribed by AIOCD. These guidelines have been found to be restrictive and anti-competitive in nature by DG since they ultimately have the effect of controlling and limiting supply of drugs in the market.

20.13. The Commission also notes that though the CDAB has vehemently denied that it is affiliated to AIOCD or it is following or enforcing the norms set out in the MoU or Guidelines of AIOCD but there is ample evidence on record to establish these facts contrary to the claims made by it. The statements of wholesalers including the office bearers of CDAB



recorded by the DG as well as information available on the website of AIOCD bear clear testimony to the nexus between these Associations operating at different levels. This 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.

(1) *Stockist Policy*

(i) *Appointment of Stockist:*

*The company will appoint stockist only in consultation with State/District association and as per the guidelines laid down by State Association. Such appointed stockist will work for the area for which they are appointed. Wherever there is only one stockist of the company in the district, the second stockist can be appointed in consultation with state/district association, however the second stockist should be a bonafide member of the association. Company will not appoint any Additional stockist for any new division formed or created, it will be given to the any existing stockist of the company.*

(ii) *Discontinuation of stockist:*

- (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 stockist to the company as per the set norms of State/District Association.*

20.14. The nexus is rooted in the MoU as shown above and this fact is further corroborated by the persons involved in the trade of supply and distribution of pharma products. The following statement of Hemang Trivedi, *proprietor* of Amit Agencies recorded on 14.02.2011 is a clear pointer to the fact that CDAB is following the Guidelines and norms set by the apex body AIOCD:

**Q.3** *In your views, how the practices of Chemist and Druggist Association, Baroda are anti-competitive and restrictive in nature?*

**Ans.3** *AIOCD has entered into MOU with big drug companies by virtue of which margins of wholesalers and retailers are fixed. This is as regards non-PCD companies, which means such companies which are established companies and do not require propaganda for their sales like Abbott, Ranbaxy etc. This MoU was first entered in the year 1982 and is amended from time to time. There is no MoU of AIOCD with smaller /PCD companies. However, margins are fixed by AIOCD for the wholesalers and retailers in these cases also on the lines of MoU entered with non-PCD*



companies. CDAB follows the rules and regulations, MoU of AIOCD and State level Association of Gujarat wherein margins are fixed for both wholesalers and retailers as stated above. This is done at the time of taking approval of marketing of drugs in a particular territory. This is commonly known as PIS approval. The PIS is collected in the name of advertisements published in the magazines like Chemist News. For PIS, Rs.2000 per product per strength is charged per state of India which harms the manufacturers. In case, PIS is not charged, the price of drugs may go down since that would mean that the companies will have to bear lesser expenditure than being incurred at present. The companies may pass on the benefit to consumers in case they are not being asked to pay for PIS. This practice also restricts freedom of trade of manufacturers.

20.15. Even otherwise if the conduct and acts of CDAB are scrutinized independently, it is borne out that CDAB is not only insisting for seeking its approval in form of NOC in case any new or additional Stockist is sought to be appointed by any pharmaceutical company but it is also not allowing any Stockist to sell any pharma products for which NOC was not obtained from it. In view of the cogent evidence available on record in the form of documents and oral statements as shown in the following paras the arguments taken by the CDAB that there is no direct evidence to substantiate the findings and the conclusions drawn by the DG are



merely based on assumptions and conjectures have no substance and cannot be accepted.

20.16. The Commission notes that the fact that NOC is insisted upon by the Association, both for introduction of new products as well as for new players (stockists) was corroborated by Shri Suresh Kantilal Doshi, partner of Saurashtra Agencies in his statement recorded before DG. Relevant extracts on this aspect are quoted as under:

**Statement of Suresh Kantilal Doshi recorded on 15.02.2011**

*" Q.3 In your views, how the practices of Chemist and Druggist Association, Baroda are anti-competitive and restrictive in nature?*

*Ans.3 CDAB is a body of wholesalers and retailers at Vadodara. This association was established in 1937. I was secretary of the association since 1999 till 2007. Thereafter, a new committee of the association was appointed on 16<sup>th</sup> September 2007 and remained in office till May 2010. The Committee was dominated by retailers. The new body started insisting for taking their NOC before any company could appoint stockiest in Baroda. During my time, NOC was not insisted upon. However, the new committee under V.T. Shah, President, Jayesh Shah, Treasurer, Hasmukh Desai, chairman of Coordination Committee, Kartik Doshi, Secretary, started the practice of issuing NOC. To issue NOC, the new association, which took over in September 2007, started taking money from stockiest. This practice was anti-competitive and restrictive in nature. NOC was issued only to select few who used to give money to the members of the association in order to restrict competition. Further, it was stipulated that no benefit*



should be passed on to the retailers, till the retailer becomes a member of the association. In May 2010, a new committee under Dahyabhai N.Patel and Jawahar Bhai Sharda was elected. This body is now not insisting for taking their NOC. "

"Q. 7 Can you furnish evidences and data to show that the activities of the members of the association/guidelines of the association have led to limit or control of supply of drugs in the market?

Ans. 7 Yes. Without PIS, no company can sell drugs in market. Further, company has to take NOC for appointment of wholesaler/stockist (including additional stockist) in a particular territory from the associations. The associations had charged huge amount from wholesalers/companies for NOC for appointment of wholesalers by the companies. In my case, Chemist and Druggist Association, Baroda under President, VT Shah, had given a call of boycott since I was opposing their policies. This boycott was verbal and retailers were contacted by the association to boycott and not to purchase from my firm-Saurashtra Agencies. I had to suffer loss of about 30% during 2007-09. I had earlier got submitted an affidavit before your office to support that call of boycott was given in my case by the association. In one case, the association got Ashok Pharmaceutical Agency of Baroda appointed as additional stockiest of Intas Pharmaceuticals in around April 2009. There were four other existing stockiest of Intas at Baroda. In



order to promote sales of Ashok Pharma, the members of association asked C&F of Intas not to supply to two existing stockiest namely-Shreeraj Medical Agencies and Shreyas distributors. Their supplies were stopped after 21.05.2009. Against that the two petitioners have filed case in Court of Civil Judge. Vadodara. The association vide a letter wrote to the C&F of company, M. V. Enterprises,- not to make supplies to Shreeraj Medical Agencies and Shreyas distributors. The letter is not available with us. However, on telephone, it has been confirmed by officers of Intas that the association had written a letter not to make supplies to Shreeraj Medical Agencies and Shreyas distributors. In order to get that letter, Court of Civil Judge-has also been requested in the petition of Shreeraj Medical Agencies and Shreyas distributors. A copy of petition is submitted. I am also giving you a list of products which are not available in Gujarat because for these products companies have been denied NOC (PIS) from the association at State Level. The NOC (PIS) is given by (the State level association to drug companies, while NOC is given to wholesalers or companies either by state level associations or CDAB for appointment of stockiest of a particular company. "

20.17.The Commission further notes that the fact that Association not only controls introduction of drugs but also the appointment of stockist is also confirmed by the statement of Shri Hemang Trivedi, proprietor of Amit Agencies. The statement also brings out in focus that any deviant



behaviour is not tolerated and the Association ensures that such entity is not allowed to operate freely. The relevant extract of the statement of Shri Trivedi recorded by the DG is reproduced as under:

**Q.6** *Can you furnish evidences and data to show that the activities of the members of the association/guidelines of the association have led to limit or control of supply of drugs in the market?*

**Ans.6** *Yes. Without PIS no company can sell drugs in market. Further, company will have to take NOC for appointment of wholesaler/stockist (including additional stockist) in a particular territory from the associations. The associations charge huge amount from wholesalers/companies for NOC for appointment of wholesalers by the companies. In my case, CDAB under President, VT Shah, had given a call of boycott since I had not agreed to pay them money for grant of NOC from the association in respect of supply of drugs of Company - Wallace Pharma. I am submitting copies of letter from Wallace in which it was written that I was to obtain NOC from the association for becoming their stockiest. Similar letters from Beimel Pharma are also submitted. The earlier association demanded Rs.30,000/- from me for NOC for subscription of shares of a company-Fraternity of Gujarat Safe Chemist and Distributor Alliance (FGSCDA) Limited, which was floated by the earlier association. I am also submitting a copy of affidavit stating the association had demanded money. This was towards grant of NOC for Wallace Pharma and for share subscription of FGSCDA Limited. Since I did not pay money and*



*questioned their decision to take NOC for supply of drugs of Wallace, the association canvassed at level of all retailers to boycott products of my concern. The association through its practice of granting NOC for taking stockiest ship of any drug company, attempts to restrict supplies in the market. My firm suffered for one year in the year 2009-10. NOCs are usually not given in written form. The companies ask for NOC (as for example - Wallace and Bennet in my case) and thereafter the associations verbally grant approval to the drug companies or C&F agents of the drug companies. In case of Wallace, I have tendered cheques in name of company for supply of drugs on my appointment as stockist of the company. However, since Federation of Gujarat State Chemists and Druggists Association and earlier President of CDAB, Mr. V.T. Shah, had not granted NOC, I am still not getting supplies from Wallace. This is a proof that the associations restrict supply of drugs in the market. "*

20.18. The Commission also notes that the statements of Shri J. N. Kachhi, partner of Shreeraj Medical Agencies, Shri Sailesh Chandrakant Shah, partner of Ashok Medical Agencies, Shri Jawahar Sharda, partner Ganesh Pharma, Shri Nayal P.Raval, partner Reliance Agency, Shri Firoz Patel, partner Allied Trade Corporation, Shri Harish Panmani, Proprietor J. J. Pharma, Shri Uday Joshi, partner of Vedanta Bio-Sciences also lend support to the findings of the DG that CDAB through its practices and conduct, which are restrictive and anti-competitive, limits and controls the supply of pharmaceutical drugs in the market.



20.19. In the light of overwhelming evidence available on record the plea taken by CDAB that there is no direct evidence to support the findings of the DG loses its steam.

20.20. Furthermore, it is noted by the Commission that in the reports of the DG, instances have been quoted where the pharma companies had stopped supplying drugs to wholesalers because NOC of the Association was not obtained. The reports of the DG also highlighted the cases where penalties had been imposed upon the stockist for their not obtaining NOC from the Association. The Commission notes that the case of Shri Jawahar Sharda, the partner of Ganesh Pharma is a glaring example of the restrictive nature of practices adopted by the CDAB. Mr Jawahar Sharda was restricted from supplying drugs in the market since he had purchased drugs from the Informant without taking NOC from the Association. Mr Jawahar Sharda has cited the case of Ameer Enterprises on which a penalty of Rs. 30,000/- was slapped since it had sold injections of Zuventus without taking NOC from the Association. The relevant excerpts from the statement of Shri Jawahar Sharda given before DG are reproduced here under:

*Statement of Jawahar Sharda, Vice President of CDAB recorded on 31.01.2011*

*"Q.3 It has been alleged by Uday Joshi of Vedant Bio-Sciences that Chemist and Druggist Association, Baroda (CDAB) had asked you not to sell drugs of Vedant Bio-Sciences in the year 2009? Is it true?"*



**Ans.3** Yes. The association had asked my firm not to sell drugs of Vedant Bio-sciences and also to purchase the drugs from that concern, since Vedant Bio-Sciences had not obtained NOC from the association. Since I did not abide, the association gave a call to the retailer chemists of boycott of products of my firm. As a result my firm could not sell to the retailers and suffered loss monetarily and mentally. I am giving you a letter dated 14th April 2009 written to Vedant Bio-Sciences as evidence to this effect. I had to apply before Commissioner of Police, Vadodara and Home Ministry of Gujarat. After these complaints, although they continued to boycott my products, the door to door campaign against my firm to each and every retailer stopped. I was also not getting products from FDC Limited because of the pressure from the association since I had cooperated with Uday Joshi. The association restricted supplies of drugs to my firm as result of which drugs could not be made available in the market. I am also giving these papers as evidence.

**Q.11** Can you furnish evidence and data to show that the activities of the members of the association / guidelines of the associations have led to limit or control of supply of drugs in the market?

**Ans. 11** I have furnished you a letter dated 14.04.2009, addressed to Vedant Bio-Science to support this. My firm Ganesh Pharma was restricted to supply drugs to the market if it purchased drugs from Vedant Bio-sciences, without taking NOC. If the stockists do not take NOC, associations will impose penalties. In case of Amee



*Enterprises, penalty of Rs. 30, 000 was imposed since they had sold injections of Zuventus without taking NOC from association.*

*This proof has already been submitted to your office.*

- 20.21. The Commission also takes note of the statement of Shri Nayan P. Raval, partner of Reliance Agency, Vadodara who had stated that the association through its activities attempts to limit or control supply of drug in the market and also issue NOC/LOC for appointment of Stockists. Mr. Raval has also stated that there are restrictions in direct supplies to hospitals, dispensaries, patients and the doctors.
- 20.22. Similarly the DG report also refers to letter of Mr Feroze Patel, dated 12.02.2008 stating that not only NOC was required for selling products of Himalaya Drug Company by his firm but also the Association demanded huge money in lieu of grant of NOC. Not taking kindly to the protest made by Feroze Patel a call of boycott was given by the CDAB resulting into losses for him. In support of his assertion he has filed a CD containing recorded conversation between him and C&F of Ajanta Pharma along with free hand English translation. Likewise, another letter dated 29.6.2010 addressed by Secretary of CDAB to Zydus Cadilla further lends credence to the fact that the Association issues NOC/LOC for appointment of stockist.
- 20.23. Even a cursory glance at the circular dated 02.03.2009 issued by CDAB after its executive committee meeting discloses that the CDAB is engaged in granting permission to the wholesalers and stockists to supply drugs of pharmaceutical companies. The relevant portion of



English translation of the circular dated 02.03.2009 (issued in Gujarati) in this context finding place in the supplementary DG report is as under:

*(7) Members Friends, Permission is Granted to following Companies to Conduct Activity/ Work.*

- *Ashok Pharma is allowed to work for Sun Pharma.*
- *R.K.Medicine, Ashirwad Traders & Allied Trade are granted permission to be stockist of USV.*
- *Allied & J.K.Dist. are the stockists for Datun Lab.*
- *Allied & Shreyas are the stockists for Pink Healthcare*
- *Asha Medical & Santram Medical are the stockists for Advantage Lab.*
- *Allied & P. Ambalal are the stockists for Enrich Pharma.*
- *Ashok Pharma & Reliance Agency are stockists for Rhythm Pharma.*
- *Harsh Pharma is Second stockist for Hamps Bio Pvt. Ltd.*
- *Amit Ag. Balaj Medical are the stockists for ABC Neutraceutical.*
- *Ashirwad & Baroda Agency are the stockists for Zen Life S.*
- *J. V. Corp. & Ashok Medical are stockists for Kamron lab.*
- *Ashok Medial & Neelkanth Medical is stockists for Rose Lab*
- *Harsh Pharma is Second stockist for Hamps Bio Pvt. Ltd.*
- *Amit Ag. Balaj Medical are the stockists for ABC Neutraceutical.*
- *Ashirwad & Baroda Agency are the stockists for Zen Life S.*
- *J. V. Corp. & Ashok Medical are stockists for Kamron lab.*



- *Ashok Medial & Neelkanth Medical is stockists for Rose Lab*

20.24. The Commission also notes from the DG report that unless a firm is a member of CDAB, it cannot have any normal commercial relationship with the other members of Association, creating barriers in terms of doing business. In this regard, a circular dated 10.11.2009 (Exhibit-27 of the supplementary DG report) brings out that unless a concern becomes member of CDAB, it cannot transact business with other members of the Association. Relevant excerpts of the circular dated 10.11.2009 is as under:

*"We have successfully stopped the new people/parties from opening retail outlet in order to protect our members. This is the way we have taken care of our members."*

*"In spite of the demand of our members, we have not granted permission to start sub-stockist category of the business to certain elements"*

*"We have successfully inhibited/reduced the success of non-members and of chain-stores by depriving them of the benefits like expiry/breakage, leakage settlement, delivery, discounts etc."*

20.25. Based on above analysis of the evidence the Commission is in agreement with the findings of DG that CDAB, controls and limits the supply of drugs in the market in the Baroda district. The Commission finds that without getting NOC from the association, companies cannot supply and sell drugs manufactured by them in the market nor a wholesaler can become stockist of any pharmaceutical company. The



Commission is also of the view that there had been instances where the drug companies had stopped supplying drugs to wholesalers since the Association was insisting for taking its NOC. Further, if a stockist did not follow the dictates of the CDAB, penalty was imposed upon it.

20.26. After considering the entire evidence in its entirety as discussed above the Commission agrees with the following conclusions drawn by the DG:

- (i) The guidelines and practice of issuing NOC for appointment of a new or an additional stockist in a particular territory eventually restrict the number of players in the market and in turn also limits or control supply of drugs.
- (ii) CDAB, through guidelines and actual conduct is limiting supply of drugs as without obtaining NOC from the Association no Stockist is allowed to sell any new drug in the market.
- (iii) The boycott of those firms which do not follow the dictates of Association and imposition of penalties on them, establish that the practices and conduct of CDAB are restrictive and anti-competitive.

20.27. The consequential inference which flows from above findings is that if the practice of NOC is done away with, there would be more supply of drugs in the market and resultantly more availability of the drugs to the common man.



20.28. In the light of the foregoing analysis the Commission comes to the conclusion that the conduct and practices of CDAB are limiting and controlling the supply of drugs in the district of Baroda in the state of Gujarat in violation of provisions of Section 3(3)(b) read with Section 3(1) of the Act.

**Issue of PIS Approval**

20.29. On the issue of charging fee from the drug manufacturing companies for new medicines / formulation in the name of PIS on the pretext of publishing the information regarding the medicine / formulation in the Chemist News Bulletin, Commission finds that the evidence discloses that PIS approval is given by the State Federations / State Unit of AIOCD, and therefore, the liability for the same cannot be fixed upon CDAB which is a District level association.

**Issue of determination of margins**

20.30. The Commission also notes that that besides exercising their control over the number of stockists and number of products, the CDAB is also involved in the fixation of margins leading to determination of sale price of drugs so far as non-controlled drugs are concerned. There are broadly two categories of drugs under DPCO 1995 for the purpose of price fixation/revision and monitoring. These are scheduled drugs (drugs under price control) and non-scheduled drugs which are out of price control. NPPA fixes/revises prices of Scheduled bulk drugs and formulations based on them. In the case of non-scheduled medicines, trade margin is normally given by the industry themselves. It is in this



category of drugs that trade Associations decide upon the margins - which has been fixed 20% for retailers and 10% for wholesalers.

20.31. The Commission is of the view that the trade margins fixed by the Association(s) ultimately have the effect of determination of sales price of drug for the end consumer. It is borne out from the record that this practice has its origin in the MoU between AIOCD – IDMA (Indian Drug Manufacturers' Association) and OPPI (Organisation of Pharmaceutical Producers of India) and the State & District Level Associations follow and enforce the norms set by the AIOCD.

20.32. The fact that the CDAB is following and enforcing the norms laid down by the apex body becomes evident from the perusal of the following excerpts of the circular of the CDAB dated 02.03.2009:

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

*1) Ace Lab. 2) Vibrant Pharma 3) Ravi Pharma 4) Medoz Pharma 5) Bennet Pharma 6) Ambrossia 7) Panzer 8) Mars Remedies 9) Pharmadent 10) RPG 11) Mediforce 12) Xcel Lab 13) Satyam Healthcare 14) French Formulation 15) Healthcare Formulation 16) GIPL 17) Parry Lab. 18) Vasu Healthcare 19) Sienna Formulation.*

*6) To set the Margins as per the 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 Kartikbahi Doshi, Secretary."*



20.33. This fact is reinforced from the statement of Shri Jawahar Sharda, Vice President of CDAB. Shri Sharda in his statement had submitted as under:

*"Q.9 Can you furnish/Do you have evidences regarding the agreement, practices or any decision amongst the members of the Chemist and Druggists Association,, Baroda to limit/control prices, if any?"*

***Ans.9** The MOU of AIOCD which was first executed in 1982 and continues till date is clearly anti-competitive since by that trade margins and prices are fixed. The MoU also attempts to determine the appointment of stockists by companies and control the affairs of the stockist and drug companies. The same is followed by CDAB also."*

20.34. It has also been shown by the DG that the margins to retailers are charged on MRP and not on price to retailer basis. The Commission notes that the DG has established this fact by giving the actual mechanism employed in determining the MRP. Further, the calculations given by Shri Uday Joshi also show that the sale price of the drugs would be reduced for the consumers if the margins are not fixed by the Association.

20.35. On the basis of the evidence as analysed above the Commission holds that the CDAB is fixing the margins for the wholesalers and retailers by enforcing the norms laid down by the AIOCD and which has the effect of determination of sale prices of drugs in the market in



violation of the provisions of Section 3(3)(a) read with Section 3(1) of the Act.

**Order under section 27 of the Act**

21. As the Commission has found that the CDAB has violated the provisions of Section 3(3)(a) & 3(3)(b) read with Section 3(1) of the Act, the Commission, keeping in mind the benefit of common man and the freedom of trade, proceeds to pass suitable orders under section 27 of the Act against the CDAB including penalty.
22. CDAB vide letter dated 14.04.2012 had submitted its Profit & Loss Account and Balance Sheet for three years which was annexed with the second supplementary DG report dated 13.09.2011 as Annexure-I. From the Profit & Loss Accounts and Balance Sheets it is noted that CDAB had the following Annual Income during 2006-07, 2007-08 & 2008-09:

| Financial Years | Receipts/Gross Annual Income (in Rs.) |
|-----------------|---------------------------------------|
| 2006-07         | 7,31,505                              |
| 2007-08         | 5,27,607                              |
| 2008-09         | 3,56,008                              |

23. Thus, Commission after considering the facts and circumstances of the instant case deems it appropriate to impose penalty @10% of the average of the receipts for financial year 2006-07, 2007-08 & 2008-09 (in respect of which the figures are available with the Commission) on



CDAB. Therefore, in exercise of power under Section 27(b) of the Act, the Commission imposes penalty on CDAB computed as follows:

|                                             |                   |
|---------------------------------------------|-------------------|
| Annual Income during the Year 2006-07       | : Rs. 7,31,505.00 |
| Annual Income during the Year 2007-08       | : Rs. 5,27,607.00 |
| Annual Income during the Year 2008-09       | : Rs. 3,56,008.00 |
| Average of the Annual Income                | : Rs. 5,38,373.00 |
| 10% of the Average of the Annual Income     | : Rs. 53,837.30   |
| Penalty (Rounded off to the nearest number) | : Rs. 53,837.00   |

24. Accordingly, the Commission passes the following orders, under Section 27 of the Act:

- (i) The CDAB and its members are directed to cease and desist from indulging in and following practices which have been found anticompetitive in violation of Section 3 of the Act in the preceding paras of the order.
- (ii) The CDAB is further directed to file an undertaking that practices with respect to fixing of trade margins of pharma products, non appointment of a stockist or wholesaler from amongst the non-members of CDAB, requirement of No Objection Certificate from the CDAB for appointment of stockist or wholesaler and limit on number of stockist of pharmaceutical companies have been done away within 90 days from the date of receipt of the order.
- (iii) A penalty of Rs. 53,837 is also imposed on CDAB. The penalty shall be paid by CDAB within 90 days from the date of receipt of the copy of this order.



25. Secretary is directed to send a copy of this order to the concerned parties for compliance immediately.

Sd/-  
Member (G)

Sd/-  
Member (AG)

Sd/-  
Member (T)

Sd/-  
Chairperson

Certified True



*P. Gahlaut*  
06/09/2012  
P. GAHLAUT  
Assistant Director  
Competition Commission of India  
New Delhi