COMPETITION COMMISSION OF INDIA

Case No. 26 of 2013

In Re:

M/s Bio-Med Private Limited **Informant**

And

Union of India
Through Deputy Assistant Director-General (Stores)
Medical Store Depot (DADG)
Ministry of Health and Family Welfare
Government of India
New Delhi **Opposite Party No. 1**

M/s GlaxoSmithKline Pharmaceutical Limited
Mumbai **Opposite Party No. 2**

M/s Sanofi, Mumbai **Opposite Party No. 3**

CORAM

Mr. Ashok Chawla
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

Appearances: None for the Informant.

Shri Ravinder Yadav, Assistant Depot Manager, GMSD for OP-1.

Shri Samir Gandhi, Ms. Hemangini Dadwal, Shri Indrajeet Sircar and Shri Kaizad Hazari, Advocates for OP-2.

Shri Rajshekhar Reddy, Ms. Sonam Mathur, Ms. Mansi Tewari and Ms. Yasmin Cama, Advocates for OP-3.

Order under Section 27 of the Competition Act, 2002

1. The present information has been filed under section 19(1)(a) of the Competition Act, 2002 ('the Act') by M/s Bio-Med Private Limited ('**Informant**') against Union of India through Deputy Assistant Director General (Stores), Medical Store Depot ('**DADG**'), Ministry of Health and Family Welfare, Government of India, New Delhi ('**OP-1**'); M/s GlaxoSmithKline Pharmaceutical Limited, Mumbai ('**OP-2**'); and M/s Sanofi, Mumbai ('**OP-3**'); alleging, *inter alia*, contravention of the provisions of sections 3 and 4 of the Act.

2. The Informant is a private limited company incorporated under the Companies Act, 1956 and is engaged in the business of manufacturing vaccines since 1972. In the period between 1972 and 1994, the Informant had been engaged in the business of manufacturing only veterinary vaccines. From 1995 onwards, the Informant has been engaged in the

business of manufacturing vaccines for human usage. It developed polysaccharide Quadrivalent Meningococcal Meningitis vaccines ('**QMMV**') in 2004. It is the only indigenous manufacturer of QMMV vaccines.

3. It is the case of the Informant that all varieties of vaccines manufactured by it were earlier imported at a substantially high price. The introduction of indigenously manufactured vaccines is stated to have resulted in huge saving of foreign exchange and relief to the patients. It also resulted in creating fair competition in the market leading to noticeable decrease in the price of the vaccines and easy availability thereof. It is further averred that prior to the introduction of meningitis vaccine by the Informant, OP-2 and OP-3 used to supply the vaccine in India.

4.It is stated that from the year 2002, OP-1 invites tenders every year for purchase of meningitis vaccine which is required to be administered upon the pilgrims who wish to go on annual pilgrimage of Hajj.

5. The Informant has alleged that OP-1 floated its tenders for the supply of meningitis vaccines for the years 2002-03 without asking for any qualifications with respect to annual turnover or manufacturing/ marketing experience of the bidders. It is, however, stated that OP-1 thereafter issued a tender for the year 2005-06 with two new conditions related to the eligibility of the participating bidders. These included a minimum annual turnover of Rs.10 crores (in any of the preceding three years) and a certificate showing the manufacturing and marketing experience of the bidders (in the three preceding three years). The Informant has further alleged that OP-1 once again modified the conditions in the year 2008 with respect to the turnover clause by requiring bidders to have a minimum turnover of Rs.20 crores in any of the preceding three years.

6. The Informant has stated that it achieved the said turnover target and participated in the tenders successfully. Thereafter, the Informant continued to participate in the tender process and competed successfully to become L-1 in the years 2009-10, 2010-11 by offering competitive prices. It is alleged that OP-1 again modified the tender qualification for the year 2011 by requiring the bidders to have a turnover of Rs.50 crores in any of the preceding three years. This condition was stated to have remained valid for the year 2012 also with a minor variation. The Informant alleges that in the year 2012, OP-1 sought the turnover for the years 2007-08, 2008-09 and 2009-10 unlike the 2011 tender where the turnover criterion was linked to the turnover of the three preceding years.

7. The Informant appears to be aggrieved by the aforesaid unilateral action of OP-1 in introducing and modifying the turnover conditions without any reasonable rationale and explanation. This conduct of OP-1 has been alleged by the Informant as abuse of its dominant position having disastrous consequences for the Informant as well as the Government of India and the Indian patients.

8. The other limb of the allegation of the Informant revolves around the alleged cartelization by OP-2 and OP-3. It is the case of the Informant that OP-2 and OP-3 have cartelized through bid rotations and geographical allocations (international) from the period 2002 to 2012.

9. Based on these allegations and averments, the Informant has filed the present information before the Commission seeking relief, *inter alia*, for issuance of a direction to the Director General ('**DG**') to investigate into the alleged abuse of dominant position by OP-1; to direct OP-1 to remove the restrictive conditions in the tenders; to investigate the marketing designs of OP-2 and OP-3 from 2002 to 2012 and to hold them guilty of cartelization in the market.

Directions to the DG

10. The Commission after considering the entire material available on record formed a *prima facie* opinion of contravention of the Act by OP-2 and OP-3 and accordingly, passed an order under section 26(1) of the Act directing the DG to cause an investigation to be made into the matter. The Commission, however, noted that OP-1 was not an enterprise under the Act and therefore, did not direct any investigation against OP-1. The DG investigated the matter and submitted the investigation report on 21.11.2014.

Investigation by the DG

11. At the outset, the DG has noted that OP-1 is not an enterprise in accordance with the provisions of Section 2(h) of the Act. However, with a view to understand the entire factual matrix surrounding the Informant's allegation that OP-1 had been changing the tender conditions in order to facilitate a cartel between OP-2 and OP-3, the DG has enquired into the decision-making policy of OP-1 in this regard.

12. The DG found that the changes in the conditions stipulated in the tenders issued by OP-1 were brought about pursuant to the decisions taken at the Ministerial level. Further, this decision of the Ministry was challenged by the Informant before the Hon'ble High Court of Delhi. Upon a detailed examination of the executive decisions, the Hon'ble High Court of Delhi noted that these were neither arbitrary nor unreasonable. Accordingly, the DG rejected the Informant's allegation detailed above. Pursuant to the directions of the Commission, the DG has conducted a comprehensive investigation into the conduct of OP-2 and OP-3. During the investigation, the DG has collected detailed information from OP-1, OP-2 and OP-3 relating to their business models, decision-making policies, *etc*.

13. The DG analyzed the technical and the price bids submitted by OP-2 and OP-3 in three tenders issued by OP-1 during July-August 2011 and found a clear bidding pattern that indicated the existence of a cartel between OP-2 and OP-3. The DG noted that OP-2 and OP-3 had mutually agreed to: (a) quote higher price bids, and (b) share the total tendered quantity in response to the tenders issued by OP-1 for the procurement of QMMV.

14. Finally, the DG has identified the persons in-charge of OP-2 and OP-3 who were responsible for the alleged contraventions of the Act for the purposes of section 48 of the Act.

Consideration of the DG report by the Commission

15. The Commission, in its ordinary meeting held on 09.12.2014, considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their replies/ objections thereto. The Commission also directed the parties to appear for oral hearing. Subsequently, arguments of the parties were heard by the Commission.

Replies/ Objections/ Submissions of the parties

16. The parties filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions.

Replies/ objections/ submissions of OP-2

17. OP-2 has denied the conclusions drawn by the DG in the DG report as rife with inconsistencies. As regards the observation that the Informant's non-participation was on account of the turnover criteria prescribed by OP-1, it has submitted that the DG has failed to appreciate that the primary allegation of the Informant was against the revision in the turnover requirement for the tender floated by OP-1 for the supply of QMMV in the

year 2011. It has been specifically emphasized that the change in the tender conditions of the 2011 tender was the sole reason for the Informant's non-participation. It has denied that the non-participation of the Informant was because of the conduct of OP-2.

18. The inference of the DG that the inability of the Informant to participate in the tender gave an opportunity for OP-2 and OP-3 to collude has been denied. OP-2 has submitted that the DG has completely overlooked that though the last date for submitting the tender was 25.07.2011, the Hon'ble Delhi High Court, *vide* its order dated 13.07.2011, had permitted the Informant to participate in 2011 QMMV tender. Moreover, the DG has failed to appreciate that ultimately it was the Informant and OP-3, who made supplies under the 2011 QMMV tender. OP-2 had no occasion to supply under the 2011 QMMV tender.

19. It has submitted that the DG has ignored the fact that there was a lack of *bonafide* on the part of the Informant. It has stated that if the Informant believed that OP-2 had indulged in bid rigging, then it would have approached the Commission in 2011 itself, and should not have waited for two years to file a complaint. It has alleged that it is very likely that the Informant had approached the Commission only to mask its failure to submit its price bid to OP-1 despite the order passed by the Hon'ble High Court of Delhi. Moreover, the Informant has made patently false allegations in an attempt to mislead the Hon'ble Commission, by stating that OP-2 had supplied the remaining quantity under the 2011 QMMV tender, despite being fully aware that OP-2 had no occasion to supply under the 2011 QMMV tender. OP-2 stressed that if the Informant was interested in sincerely pursuing the remedies available under the Act, it would have at the least been present for the oral hearing before the Commission on 19.02.2015.

20. As regards the existence of an 'agreement', OP-2 has submitted that the DG has failed to provide any evidence, direct or indirect, to establish the existence of an agreement or understanding between OP-2 and OP-3 to increase prices or limit supplies for the 2011 QMMV tender. It has further stated that the DG has failed to provide reasons for disregarding the facts and evidence provided to the DG by OP-2 in the course of the investigation.

21. It has been submitted that OP-2 is completely dependent on GlaxoSmithKline Biologicals S.A. ("GSK Belgium"), an affiliate entity belonging to the GlaxoSmithKline Group, for the supply of QMMV. OP-2 imports both single-dose packs of QMMV (for sale in the open market) and multi-dose packs of QMMV (exclusively for sale under the tenders floated by OP-1) from GSK Belgium at an arms' length price, determined in accordance with the relevant transfer pricing orders issued by the customs authorities. It is stated that GSK Belgium ordinarily supplies all multi-dose packs of QMMV in Global Export Packs (GEPs) which do not adhere to any country specific requirements. For GSK Belgium to supply QMMV doses, which are compliant with the conditions of the tenders floated by OP-1, OP-2 is required to provide substantial advance notice to GSK Belgium. However, the timelines afforded under the 2011 QMMV tender did not afford OP-2 sufficient time to intimate GSK Belgium for the supply of packs which adhered to the terms and conditions under the 2011 QMMV tender.

22. As regards the observation of the DG on the decision of OP-2 relating to the bid quantity in the 2011 QMMV tender, it has submitted that the DG has disregarded all its submissions and evidences placed on record. OP-2 claimed to have explained by way of evidence and email communication that in 2011, the scheduled delivery timeline of 35 days stipulated under the June 2011 tender (as opposed to an average of 57-64 days under the previous tenders) was not sufficient for it to supply QMMV to OP-1. OP-2

explained that it had to import and re-sticker the QMMV doses imported from GSK Belgium to make them compliant with stipulations contained in the June 2011 tender. Further, considering the risk of non-compliance with delivery timelines and associated penalties, OP-2 is said to have taken a calculated risk of quoting for only 100000 doses, *i.e.* the total number of doses it would be able to import and re-sticker within the supply delivery timelines. This was further evidenced by way of emails and is alleged to have been ignored by the DG.

23. It has further explained that OP-2 places its order for QMMV with GSK Belgium, only upon securing a supply order from OP-1 since it helps to minimize the chances of destroying stocks of ten-dose packs of QMMV, which cannot be sold in the open market.

24. OP-2 has contended that the DG has failed to appreciate that the first tender opened on 25.07.2011, was cancelled by the Integrated Purchase Committee (IPC) of OP-1 and that resultantly two subsequent rounds of re-tendering were conducted, wherein OP-2 was afforded a total of 11 days and 2 days, respectively to make supplies to OP-1. Given the drastically reduced timelines for supply, it was not possible for OP-2 to participate in the subsequent rounds of re-tendering held on 19.08.2011 and 29.08.2011.

25. As regards the observation of DG that the decision of OP-2 on bid price for the 2011 QMMV tender not being sustainable, OP-2 has submitted that an increase in price does not in itself lead to the inference of bid rigging. It has explained that in any event, OP-2 and OP-3 did not quote similar prices and did not increase their rates proportionately, for the DG to reach an adverse finding. OP-2 also claimed that DG has failed to consider that (a) the Informant too had significantly increased its prices from the preceding year in 2011; and (b) while the bid prices quoted in 2010 were exclusive of applicable taxes and duties whereas the bid prices quoted in 2011 were inclusive of applicable taxes and duties.

26. OP-2 has stated that the starting point for determining the bid price by it is the cost of importing supplies of QMMV on an arm's length basis. Therefore, the 'cost plus' approach followed by the DG has been argued to be wholly misplaced. It has pointed out that the local bidders benefit from local manufacturing processes and therefore, incur lower costs, but OP-2 being completely dependent on the import from its overseas manufacturers was significantly in a disadvantageous state in comparison. While OP-2 had been quoting competitive rates for OP-1 tenders, it specifically lowered its prices significantly in the years 2009 and 2010 in an attempt to compete effectively with the Informant. However, OP-2 was unsuccessful in winning the tender, despite bidding on minimal margins in the 2010 tender. Therefore, the prices quoted by OP-2 in 2011 were stated to have been adjusted to bring them in line with their pre 2009 price quotations.

27. As regards the observation of the DG that the market for manufacture and sale of QMMV is characterized by high entry barriers, OP-2 has submitted that the fact that the Informant being a generic drug manufacturer, has been able to compete successfully in tenders for QMMV despite having a turnover which is below INR 50 crore is in itself indicative of low entry barriers. It has contended that the DG has failed to note that the version of QMMV that is required under OP-1 tenders (polysacharide) has been replaced with a newer and high value conjugate version of the vaccine. Therefore, despite there being several manufacturers and suppliers of QMMV, only a limited number of suppliers participate in OP-1 tenders.

28. As regards the conclusion of the DG on certain entries dated 25.07.2011 from the register of OP-1, OP-2 has submitted that the entry made by its representative was separated by 10 minutes from the entry made by the representative of OP-3 and that even the representative of the Informant had signed in the same register as well. Similarly, in relation the entries

dated 19.07.2011 in the said register, the DG never sought a clarification from OP-2 representatives in the course of the deposition.

29. OP-2 has submitted that its average annual turnover for the years 2007 to 2010 was Rs.1923.9 crores. Therefore, there exists no possible economic or commercial rationale for OP-2 to collude with OP-1 in a market worth about Rs.3 crore, which amounts to around 0.1% of the total average turnover of OP-2 for the years 2007 to 2010. OP-2 has further stated that the value of the 2011 QMMV tender is negligible compared to its proceeds from open market sales of QMMV alone. OP-2 continued its participation in OP-1 tenders for the supply of QMMV till 2011, just to maintain its brand image and credibility. Based on the above, the allegation that OP-2 had indulged in bid rigging in relation to the 2011 QMMV tender has been denied.

30. In view of the foregoing, OP-2 has submitted that no penalty should be imposed on it on account of there being no established contravention of section 3(3) read with section 3(1) of the Act. It has also stated that the representatives of OP-2 cannot be held responsible under the provisions of section 48 of the Act.

Replies/ objections/ submissions of OP-3

31. OP-3 has submitted that the DG has merely relied upon the fact that there was an increase in the price bids submitted by OP-2 and OP-3 in 2011 to show coordination between the parties.

32. It has stated that the DG has committed a factual error. It has incorrectly arrived at a price increase of 39.44% by comparing the price of OP-3 in 2011 *i.e.*, Rs.2899 (which is inclusive of taxes) and the L-1 price in 2010 *i.e.*, Rs.1999. This has been denied as grossly inaccurate. Firstly, the DG has failed to note that the price in 2010 did not include the tax component,

whereas the price in 2011 is inclusive of tax; the actual increase in the price of OP-3 was only 14.75% in 2011. Secondly, the increase of 12.77% in the price bid submitted by the Informant was considered to be reasonable by OP-1 on account of inflation of 9-10% in 2011. It has submitted that the DG has incorrectly relied upon an increase in the price of OP-3 by 14.75% to draw an inference of collusion, when the procurer itself considered an increase of price by 12.77% to be reasonable.

33. As per OP-3, cost of manufacturing has been analyzed by the DG to show that in 2009, 2010 and 2012 the changes in the bid price did not correspond to the changes in the cost of manufacturing and thus there was no correlation between the two. It has explained that the cost of manufacturing includes the cost of semi-finished goods, packaging, labour, quality control, production support *etc*. That the price of vaccine does not depend only on its cost of manufacturing. It has been contended that there may be some occasions where in spite of a high cost of manufacturing, the price of the vaccine is kept low and *vice-versa* due to several other commercial factors.

34. OP-3 has submitted that the DG report states that if the market were competitive, OP-2 and OP-3 would have quoted in line with the bid prices in the previous year or at least in line with their own bids in the previous year. It has been denied as extremely unreasonable and unrealistic for the DG to expect that a company should match the L-1 price of the previous year, especially in the instant case where the Informant, being a local manufacturer enjoys a distinctive cost advantage over the importers of the vaccine such as OP-3.

35. Further, it has been averred that the fact that OP-3 lowered its price bid in the second round in 2011 to Rs.2754 has been completely disregarded. It was submitted that if OP-3 had known that it was the only bidder in the

second round and that OP-2 was no longer participating, it would have been obvious for it to increase its bid price substantially in the second round.

36. In relation to the DG's finding that the prices quoted by OP-2 and OP-3 in 2011 following the disqualification of the Informant indicated collusive behavior to earn super normal profits, OP-3 has submitted that it did not submit an exorbitant price bid. This, according to OP-3, demonstrated that it expected competition at least from OP-2. Further, the procurer itself considered the price quoted by the parties in 2012 and 2013 reasonable.

37. It has denied that the entry of the Informant resulted in a drop in prices of QMMV as incorrect since the table of all price bids relied upon in the DG report itself indicates that the prices of QMMV dropped substantially from 2002 to 2007 *i.e.*, even when the Informant was not present in the market.

38. It has alleged that the analysis of prices by the DG has been selective and incomplete. The DG has ignored many crucial facts while hastily concluding that the parties have colluded to increase their prices in 2011. The findings of the DG report have been denied by OP-3 as incorrect and baseless.

39. It has submitted that the DG has also failed to consider the fact that the Informant has attempted to disrupt the tendering process of OP-1 in the past. It has alleged, besides filing frivolous petitions, the Informant submitted its price bid along with the technical bid in 2012, which was in contravention of the rules. This deliberate disruption and the manner in which it has been internally perceived by OP-1 is stated to have been brought to the attention of the DG by Mr. D.S. Rao, Deputy Assistant Director General (Stores), Medical Store Depot Ministry of Health and Family Welfare, Government of India, New Delhi. However, this statement has not been considered by the DG and is not even mentioned in the DG

report. Despite the Court's order, dismissing the Informant's challenge to the minimum turnover requirement, the Informant is alleged to have again raised the same challenge before the Commission and has for good measure added that OP-3 colluded with OP-1 to have the qualifying criterion raised from Rs.20 crore to Rs.50 crore. Therefore, the allegation in relation to collusion amongst all the parties has been denied as absurd and grossly misplaced.

40. As regards implication of individual persons, it has been submitted that the DG has found no evidence to prove collusion between OP-2 and OP-3. Further, no evidence suggesting the involvement of the individuals identified by the DG for the purposes of Section 48 of the Act has been found by the DG. It has been stated that even after perusal of the entire internal email record of Shri Ashok Sharma, the DG failed to find even a shred of evidence implicating either OP-3 or the persons named in its report. It is averred that there has been no instance where Shri Ashok Sharma or any of the individuals mentioned in the report have met, discussed or interacted with any person from OP-2 in relation to the 2011 tender, nor is there the slightest evidence of sharing any sensitive commercial information with the latter.

41. As regards Dr. Stephan Barth, it has been submitted that Dr. Barth was not even an employee of OP-3 in 2011, and was not present in India at the relevant time. It has been stated that the casual manner in which the DG report holds Dr. Barth responsible for the unfounded violation by OP-3 reflects the superficial nature of the investigation.

Analysis

42. On a careful perusal of the information, the report of the DG and the replies/ objections/ submissions filed by the parties and other materials

available on record, the issue as to whether the provisions of section 3 of the Act have been contravened in the present case or not, arises for consideration and determination in the matter.

Whether the provisions of section 3 of the Act have been contravened in the present case?

43. Before proceeding to analyze the alleged contraventions, the Commission notes that *vide* its order dated 03.09.13 the conduct of OP-1 in respect of alleged contravention of the provisions of section 4 of the Act by it was not *prima facie* found to have been established and as such the DG was directed to conduct an investigation into the alleged contraventions of OP-2 and OP-3 relating to the tender issued by OP-1 in 2011 for the procurement of meningitis vaccine, *i.e.*, QMMV for hajj pilgrims.

44. With a view to appreciate the factual matrix in the present matter, set out below is a detailed chronology of the events:

(a) By way of background, as a general practice, OP-1 has been annually procuring QMMV vaccines for the hajj pilgrims on behalf of the government since 2002. For this purpose, OP-1 usually issues a tender every year in the month of May/ June scheduling the deliveries in the month of August/September. These tenders schedule the deliveries in a manner such that the hajj pilgrims could be vaccinated at least fifteen days prior to their departure for hajj.

(b) OP-2 has a long standing business relationship with OP-1 as OP-2 was the lone supplier of the vaccines in India in the period between 2002 and 2007. Further, with the advent of OP-3 and the Informant, bidding process initiated by OP-1 became more competitive and the Informant emerged as the major supplier to OP-1 in the period between 2008 and 2010.

(c) In line with its usual practice, OP-1 issued a tender on 25.06.11 for the procurement of 1,82,125 doses of QMMV. However, this time the tender conditions were revised such that only those bidders whose turnover had been INR 50 crores in any of the three preceding years, *i.e.*, 2007-08, 2008-09, 2009-10 remained eligible to participate in the said tender. Further, a new drug specification requirement - Indian Pharmacopoeia was introduced.

(d) Under the terms of this tender, 25.07.2011 was stipulated as the last date for submission of bids and the quoted bids were to be opened on the same day. Further, the qualified bidders were required to deliver the tendered quantities on 30.08.2011.

(e) On 13.07.2011, the Informant approached the Hon'ble High Court of Delhi challenging the new eligibility criteria relating to turnover. The Hon'ble High Court granted the relief to the Informant and allowed the Informant to submit a bid in response to the said tender. However, the Informant failed to submit its bid on time.

(f) As scheduled, on 25.07.2011, the bids were opened and the bids submitted by OP-2 and OP-3 were found responsive. While OP-2 quoted to supply 1,00,000 doses at Rs.3000.90 per 10 dose vial, OP-3 quoted to supply 90,000 doses at Rs.2899 per 10 dose vial.

(g) The IPC of OP-1 found the price quoted by L-1 (*i.e.*, Rs.2899) to be 39.44% higher than the last purchase price of the vaccine and therefore, decided to cancel the tender and invite a short term limited tender.

(h) On 17.08.2011, a limited tender was issued inviting bids from three suppliers, *i.e.*, the Informant, OP-2 and OP-3. However, there was

no change in the eligibility criteria relating to turnover and the drug specification requirement. This tender was scheduled to be opened on 19.08.2011 and the stipulated date of supply was 30.08.2011.

(i) OP-2 expressed its inability to supply under this tender on account of non-availability of stocks and the Informant failed to clear the technical rounds as it was rendered ineligible by the turnover related criterion. OP-3, the only eligible bidder, quoted to supply 90,000 doses at INR 2,754 per 10 dose vial. Accordingly, OP-3's bid was found to be responsive.

(j) After opening of OP-3's bid, OP-3 wrote a letter to OP-1 on 19.08.11 stating that it was in a position to supply the entire tendered quantity to OP-1, if it would accept vaccines with shorter shelf life.

(k) The IPC of OP-1 found that the stringent eligibility criterion resulted in disqualification of the Informant who had been one of its main suppliers in the past, thereby, reducing competition. Accordingly, a decision was made to cancel the second tender on the basis that there was a single qualified bidder.

(l) Thereafter, on 29.08.2011, another limited tender was issued for procuring 1,82,125 doses of QMMV. However, this time, the eligibility criterion pertaining to turnover and drug specification rules were relaxed in such a manner that the turnover criterion was reduced to INR 20 crores and the drug specification requirement was dropped. Further, this tender stipulated 30.08.2011 and 02.09.2011 respectively as the dates for opening the quoted bids and delivering the tendered quantity.

(m) In the meantime, OP-3, had approached the Hon'ble High Court of

Delhi against this retendering and relaxation in turnover condition on the basis that these were done to include the Informant. The Hon'ble High Court granted *ad interim* stay on any action in respect of the said tender.

(n) On 06.09.2011, the Hon'ble High Court decided that 90,000 doses would be supplied by OP-3 at the L-1 rate (to be decided later) while the remaining 92,125 doses were to be supplied by the L-1 bidder.

(o) On 08.09.2011, this tender was opened and the price bid of the Informant at INR 2373 per 10 dose was found to be the L-1 price. Even in relation to this tender, OP-2 refrained from participation. The Informant had quoted to supply the entire tendered quantity and OP-3 again quoted for 90,000 doses at INR 2754/- per 10 doses. Accordingly, the Informant was awarded the tender for supply of 92,125 doses at INR 2373 per 10 doses.

(p) On 15.09.2011, the Hon'ble High Court decided that OP-3 would receive the payment for supplying 90,000 doses at the L-1 rate (*i.e.*, the rate quoted by the Informant *i.e.* INR 2373 per 10 doses).

45. Reference may be had to the table below that shows the bids placed by each of the bidders in response to the three tenders issued by OP-1 in 2011:

Tender No. and date	**Tender Quantity (in doses)**	**Bio-Med (Informant)**		**GSK(OP-2)**		**Sanofi (OP-3)**	
		Quantity quoted (in doses)	**Price quoted (for 10 doses) Rs.**	**Quantity quoted (in doses)**	**Price quoted (for 10 doses) Rs.**	**Quantity quoted (in doses)**	**Price quoted (for 10 doses) Rs.**
No.1 25.06.2011	182125	Did not bid	Did not bid	100000	3000.90	90000	2899
Retender 1	182125	Disqualified	Disqualifie	Did not	Did not bid	90000	2754

17.08.2011			d	bid			
Retender 2 30.08.2011	182125	182125	2373/-	Did not bid	Did not bid	90000	2754

46. It may be noticed from the aforesaid that:

(a) In response to the first tender issued by OP-1 on 25.06.11, neither OP-2 nor OP-3 offered to supply the total tendered quantity. In fact, the bids were quoted in a manner such that the entire tendered quantity was almost equally distributed between OP-2 and OP-3. Further, the price bids submitted by OP-2 and OP-3 were such that OP-3 was L-1 and OP-2 was L-2. Not only were these bid prices similar, they were significantly higher than the previous tender's L-1 price. Accordingly, this tender was cancelled.

(b) In response to the second tender issued by OP-1 on 17.08.11, the Informant was disqualified, OP-2 did not bid and OP-3 initially quoted to supply 90,000 doses of QMVV at a substantially higher bid price (when compared to the previous year's tender). Therefore, OP-3 was the lone bidder in this tender. This led to the cancellation of this tender.

(c) Consequently, a third tender was issued. Given that the Informant had also participated in the third tender with competitive bids, the third tender was awarded to the Informant and OP-3 (as per the directions of the Hon'ble High Court) at the L-1 price which was much lower than the prices quoted by OP-3 in the previous two tenders issued by OP-1 in June 2011.

47. From the circumstances detailed above, it is clear that the conduct of OP-2 and OP-3 evidenced parallelism and collusive/ concerted action. At this stage, before delving further into the inquiry, it would be appropriate to notice a brief synopsis of the DG's findings.

48. The DG concluded that the conduct of OP-2 and OP-3 demonstrated that they were acting pursuant to an anti-competitive agreement. The DG has found that, upon the disqualification of the Informant, OP-2 and OP-3 colluded to divide the entire tendered quantities and to earn super normal profits by quoting significantly higher prices. The DG had given ample opportunities to OP-2 and OP-3 to produce evidence showing that they had individually and independently decided the quoted quantities and prices. However, they failed to produce any evidence that could establish that the offered quantities and prices were independently determined. On this basis, the DG reached its conclusion about the existence of an anti-competitive agreement.

49. On a careful consideration of the material on record, the Commission is of considered opinion that the existence of an anti-competitive agreement between OP-2 and OP-3 is clearly made out. In coming to this conclusion, the Commission has examined the various rival submissions of OP-2 and OP-3 together with all the justifications/explanations provided by them relating to their participation/ non-participation in the tenders issued by OP-1 in 2011. These have been dealt with in detail in the latter part of this order. As shown below, the Commission notes that the parties have failed to offer any plausible explanation to justify their conduct and all the explanations provided by them are nothing more than bald assertions which are not backed by any evidence whatsoever.

Business Justifications relating to quoted quantities

50. Pursuant to the directions of the DG, OP-2 submitted that the tender documents stipulated certain conditions, including, non-availability of stocks in the scheduled delivery timelines, shelf life criterion, labeling requirements, *etc*. which it found difficult to comply with in the given span of time. Accordingly, it submitted that it had only quoted for 1,00,000 doses which it considered to be a calculated risk in order to protect its brand

image and credibility in the market. OP-2 also claimed to have submitted certain internal emails and other documents, which in the opinion of OP-2, established independent decision making.

51. The Commission notes that in the period between 2002 and 2007, OP-2 had been the lone supplier to OP-1. Being the lone supplier, OP-2 had always quoted for and supplied the tendered quantity. Further, since the tenders are issued by OP-1, on behalf of the Government, for procuring QMMV vaccines for the benefit of hajj pilgrims, it is clear that the procurements take place on an annual basis. As a general matter, the tender is usually issued in May/ June with scheduled delivery in August/ September in order to ensure that the prospective pilgrims were vaccinated at least 15 days prior to their departure for Hajj (during August/ September every year). Accordingly, it is clear that the tender conditions are known well in advance and OP-2, being one of the past suppliers, knew about the delivery schedules even before the tender was issued in June 2011. Therefore, OP-2's claim that the tender conditions stipulated short supply timelines is without any basis as the delivery schedule is not only known in advance, it has also remained the same over the years.

52. The Commission would now examine the rationale put forth by OP-2, including, unavailability of stocks, labeling requirements, *etc.* In this regard, the relevant extracts of the internal communications submitted by OP-2 to the DG have been set out below.

> *' From: Sumer Dheri*
>
> *Sent: 29.06.2011, 11.32am*
>
> *To: Marc Dumont*
>
> *CC: HasitJoshipura; DaryllMascarenhas*

Subject: FW: Tender Enquiry No. 01/Meningitis Vaccine/2011-12/

Hi Marc,

If we have doses (183k in 10d vials), can we quote?'

……

'From: Marc Dumont

Sent: 29.06.2011, 4.27 pm

To: Sumer Dheri; DaryllMascarenhas

CC: HasitJoshipura; DaryllMascarenhas; Thomas Klerck; tendervxapprover@gskbio.com

Subject: FW: Tender Enquiry No. 01/Meningitis Vaccine/2011-12/

Hi Sumer,

I will already check about availability in allocation and ask for supply investigation. However, the formal response will be given via TAF.

Dear Daryll,

Please make sure you issue a TAF as per Bio process and send it to the address, I have added to this mail destinatory.

Thanks and best regards,

Marc Dumont

Director, Vaccines Tender Business Development, Supply & Operations

Emerging Markets'

……..

From: Shaista Desai

Sent: 22.07.2011, 5.35 pm

To: D. Anand

CC: B Thyagarajan; Sumer Dheri

Attachments: copy of Mencevax Price bid-22072011.xls

Dear Anand,

Please find attached the price bid. Please note that we need to quote for only 1,00,000 doses (1 Lakh doses).

Kindly submit a covering letter along with the quote, clearly stating the final price and quantity available (1 lakh doses)

Regards,

Shaista'

53. The email-chain above clearly shows that non-availability of 1,82,000 doses of the QMMV vaccines with GSK Belgium was not an issue. However, from the email dated 22 July 2011 containing details of the proposed bids, it is clear that a decision was made to quote for only 1,00,000 doses. The Commission notes that these internal communications do not support the justifications put forth by them and rather the same appear to be contrary to the claims made by OP-2.

54. Further, it is clear from the DG's analysis that OP-2 is the largest producer and supplier of the said vaccine on a world-wide basis. It is nearly 5 times the size of its nearest competitor in the market. Further, the production and supply data provided by OP-2 fail to substantiate its claim relating to supply side constraints at the relevant time.

55. It has been argued by OP-2 that the entire process involving (i) placing an order for the requisite number of doses with QMMV with GSK Belgium; (ii) importation; (iii) CDT clearance; (iv) stickering process in the manner prescribed above and finally transporting it to the DADG office in New Delhi, would have taken much longer and the 35 day period available to OP-2 to make supplies in the 2011 tender was completely insufficient.

56. According to OP-2's calculations even if it were to allot two minutes each to the process of un-packaging, stickering and re-packaging 1,82,125 QMMV doses and diluents respectively would take a minimum of 25 days for 8 workers to work in 2 batches for 12 hours per day. In this regard OP-2 has submitted a detailed calculation of time from the time of import to the point of delivery, including the time taken for stickering at Annexure – I in its reply dated 10.02.2015. further, OP-2 submitted a document titled 'Bid Quantity – Slide 2' during the oral hearing wherein a table has been provided detailing (a) time available; (b) fastest time taken by CDL, Kasauli; (c) time taken to re-sticker; and (d) total time taken thus arrived at in respect of the years 2008, 2009, 2010 and 2011.

57. It may be noted that OP-2 has calculated the time available from the 'bid opening date' to the 'date of supply' and not from the 'date of securing a supply order' to the 'date of supply. Admittedly, OP-2 places its order for QMMV with GSK Belgium, only upon securing a supply order from OP-1. As such, the calculations made by OP-2 regarding the time available run contrary to its own stated position and no reliance can be made thereon.

58. In fact, from the copy of the supply order forms placed by OP-2 at page 513- 516 of its reply dated 10.02.2015, the submissions made by it stand belied. It is noteworthy that in the year 2006 the supply order was dated 19.09.2006 with a stipulation to arrange the deliveries of 1,70,060 doses on or before 20.10.2006. Similarly, the year 2004 the supply order was dated

11.10.2004 with a stipulation to arrange the deliveries of 1,30,000 doses on or before 20.11.2004. Thus, it self-evident that the time available to OP-2 to complete the entire process including importation and stickering etc. and supply 1,70,060 doses and 1,30,000 doses in 2006 and 2004 respectively was only 32 days and 41 days. Despite, such time periods, OP-2 supplied the requisite number of doses (*i.e*. more than 1,00,000 doses) to OP-1 in 2006 and 2004. Clearly, OP-2 has previously managed to supply 1,70,060 doses in less time than the days available in the July 25, 2011 tender. In these circumstances, the plea taken by OP-2 that it took a calculated risk of quoting for only 1,00,000 doses, *i.e.* the total number of doses it would be able to import and re-sticker within the supply delivery timelines, stands falsified.

59. From the above, it is clear that the justifications/ explanations put forth by OP-2 are found to be incorrect, mutually contradictory and hence no reliance whatsoever can be placed thereon. On the contrary, the evidence provided by them clearly show that there were no supply constraints and the entire tendered quantity was available in stock with OP-2. Accordingly, the Commission holds that OP-2's claim of not quoting for the entire tendered quantity was on account of supply-side constraints is without any basis and is, therefore, liable to be rejected.

60. The Commission may now consider the explanation offered by OP-3 for quoting 90,000 doses against the total tendered quantity in the tender issued by OP-1 in June 2011. OP-3 has claimed that the inclusion of a new specification requirement, *i.e*., Indian Pharmacoepia, non-availability of the required shelf life, short supply time, labeling and packaging timelines due to flu season, *etc*. were the reasons for quoting lesser quantities.

61. As discussed above, the Commission notes that short supply timelines cannot be accepted as a reasonable explanation as the supply schedule

being closely connected with the Hajj pilgrimage is known well in advance to all the interested bidders. Further, the Commission notes that in response to the June 2011 tender, OP-3 only quoted for 90,000 doses while in response to the first retender, OP-3 offered to supply the entire tendered quantity including vaccines with shorter shelf life. The Commission notes that the conduct of OP-3 is inconsistent with the rational business conduct of any enterprise. If vaccines with shorter shelf life were already available with it during the June tender, it ought to have informed OP-1 about this at the time of opening of the said tender. Therefore, the simultaneous refusals of OP-2 and OP-3 to offer the entire tendered quantity without any rational basis when viewed together with OP-3's voluntary offer to supply the entire tendered quantity upon the withdrawal of OP-2 from the retender lead to a singular conclusion that OP-2 and OP-3 were colluding with each other to divide the entire tendered quantity.

62. In view of the foregoing, the Commission notes that OP-2 and OP-3 have failed to establish independent business decision-making. They have not produced any evidence either before the DG or before the Commission to substantiate their claims. In the absence of any evidence, the Commission notes that the assertions made by OP-2 and OP-3 are merely bald statements and also appear to be an afterthought to justify their illegal, collusive conduct.

63. In addition, the Commission notes that OP-2 and OP-3 have habitually bid for the entire tendered quantity in response to all the tenders issued by OP-1 to the exception of only the 2011 tenders where the Informant was excluded on account the turnover clause. Therefore, the Commission concludes that collusive conduct of the bidders is established in the present case.

Business justifications relating to increase in prices

64. As discussed earlier, the June 2011 tender was cancelled as the bid prices

were found to be significantly higher than the previous year's contract. The tender issued by OP-1 in 2010 was awarded to the Informant at INR 1999 plus the applicable taxes (*i.e.*, at a price of INR 2078.96). However, in response to the tenders issued by OP-1 in June 2011, while OP-2 had quoted INR 3000.90/- (inclusive of taxes) and OP-3 had quoted INR 2899/- (inclusive of taxes). Accordingly, the price bids of OP-2 and OP-3 are significantly higher than the previous tender's L-1 price.

65. Further, during the second round of tendering, OP-2 did not place any bid while OP-3 had quoted INR 2754/- (inclusive of taxes); even this bid was substantially higher than the previous tender's L-1 price (INR 2078.96 inclusive of taxes). Interestingly, under the third tender, where the Informant had also participated, OP-2 refrained from bidding and OP-3 supplied at INR 2373/- (inclusive of taxes). The fact that OP-3 supplied 90,000 doses of the vaccine at INR 2373/- against its initial price bid of INR 2899/- clearly demonstrates that the prices quoted in response to the tender issued in June 2011 were artificially inflated by OP-3. Given that the price bids submitted by OP-2 was even higher than that of OP-3, the Commission notes that OP-2 was also engaged in similar practices.

66. It has been vehemently argued by OP-2 that it imports supplies from GSK Belgium at a price determined on an arm's length basis, therefore, the 'cost' plus approach adopted by the DG to determine the cost of production of GSK Belgium is wholly misplaced. The Commission notes that OP-2, unlike the Informant or OP-3, does not have manufacturing facilities in India. However, the Commission observes that OP-2 has failed to produce even a single shred of evidence to explain the basis of calculation of the quoted bid price, which is very similar to that of OP-3. Given that OP-2 and OP-3 have failed to provide any rational explanation to justify the exorbitantly high prices quoted by them, the Commission holds that the conclusions of the DG have not been rebutted.

67. In view of the above discussion, the Commission notes that:

(a) Since 2002, the government has been procuring the QMMV vaccines for the Hajj pilgrims. During the period between 2002 and 2007, OP-2 was the lone bidder for the tenders and has single-handedly supplied the entire tendered quantity.

(b) Given that OP-2 was a past supplier for the government and had the capacity to meet the requirements stipulated under the tender, OP-2's claim that it was unable to meet the entire tender quantities on account of non-availability of stock, tight delivery schedules, labeling requirements, *etc*. do not hold water as discussed above.

(c) With the entry of the Informant in the market in 2004, the bidding process initiated by OP-1 became more competitive. As soon as the Informant became ineligible in 2011, both OP-2 and OP-3, instead of competing, substantially increased the prices and divided the tendered quantity amongst them.

(d) Further, OP-2 and OP-3 have not been able to establish any major increase in the cost of manufacturing the said vaccine. The limited pricing data furnished by them do not indicate any increase in the cost of production, exchange rates or any other input to justify escalation of prices.

(e) Further, the claims made by the OP-2 and OP-3 that the increase in prices was commensurate with the rate of inflation are without any basis. This is so because the bid price quoted by OP-3 (INR 2,343) in response to the tender issued by OP-1 in 2012 was even less than the L-1 price of the third tender issued in 2011. This demonstrates that these claims are nothing more than an afterthought to justify a collusive, anti-competitive conduct.

(f) Further, it is clear that in all the subsequent tenders issued by OP-1,

OP-3 has been the lone bidder as the Informant has been rendered ineligible and OP-2 has chosen not to participate. This indicates that, to the exception of the June tender of 2011, in all the subsequent tenders, where the Informant remained disqualified, OP-2 has not placed any bid and the entire tendered quantity has been supplied by OP-3.

(g) Additionally, the peculiar market conditions, including, the presence of only 3 suppliers of the QMMV vaccines together with the tendering process initiated by OP-1 make the market conducive to collusion especially since (i) the product is homogeneous; (ii) there is a fixed demand in the market (from OP-1's tender); and (iii) suppliers are repetitive bidders.

(h) The Commission also notes that DG has examined the visitor's register of the Government Medical Store Depot ("**GMSD**") and found that OP-2 and OP-3 visited the office of the GMSD on 25.07.2011, *i.e.*, the last date of submission of the tender document at 10.00 A.M. and 10.10 A.M. respectively. The DG also found that the entries in the visitor's register were made by the representatives of OP-2 and OP-3 with a black pen. The DG also noted that the representatives of OP-2 and OP-3 visited the GMSD Office even on 19.08.11. The Commission finds that the simultaneous visits made by the representatives of OP-2 and OP-3 to the office of GMSD demonstrate that both the competitors were in touch with each other.

(i) Further, the DG's finding that - as a general practice OP-3 prepared two separate price bids and submitted only one of these on the basis of participation of other bidders when viewed together with OP-3's admission that its executives visited the office of the procurer early on the last day of the bid submission to find out if the other bidders had participated unequivocally establish collusive behavior.

68. When viewed cumulatively the findings above establish the collusive conduct of OP-2 and OP-3 in violation of the provisions of section 3(3)(d) read with Section 3(1) of the Act.

ORDER

69. In view of the above findings, the Commission is of the considered view that the Opposite Party Nos. 2 and 3 have acted in contravention of the provisions of section 3(3)(d) read with section 3(1) of the Act. Furthermore, in terms of the provisions contained in section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.

70. On the aspect of penalty under section 27 of the Act, the Commission is of the view that the said anti-competitive conduct requires to be penalized to cause deterrence in future among the erring entities engaged in such activities. Accordingly, it is required that the degree of punishment is scaled to the severity of the violation.

71. On the issue of quantification of penalty, OP-2 has *inter alia* submitted that it has not been a party to any anti-competitive agreement since the time of the alleged contravention. OP-3 has *inter alia* submitted that factors such as first time offence, short duration of the alleged conduct and the continued support to OP-1 through regular participation may be considered. The Commission has noted the above submissions by OP-2 and OP-3. The Commission is also conscious of the effect of the collusive act upon public exchequer and public health in this case. Considering the totality of facts and circumstances of the present case including the size of the tender, nature of contravention as also the revenues generated from the product

under consideration, the Commission decides to impose a penalty on OP-2 and OP-3 at the rate of 3% of their turnover based on the financial statements filed by them. The amount of penalty on OP-2 and OP-3 is calculated as under:

S. No	**Name of the Party**	**Turnover/receipts during the year ended on 31.03.2008 (Rs.)**	**Turnover/receipts during the year ended on 31.03.2009 (Rs.)**	**Turnover/receipts during the year ended on 31.03.2010 (Rs.)**	**Average Turnover/receipts (Rs.)**	**3% of Average turnover (Rs.)**
1.	M/s GlaxosmithKline Pharmaceutical Limited, Mumbai	17,789,615,000	20,111,935,000	22,587,497,000	20,163,015,666.6	604,890,469.998
2.	M/s Sanofi, Mumbai	664,909,607	875,341,000	1,503,169,482	1,014,473,363	30,434,200.89

72. OP-2 and OP-3 are directed to deposit the amount of penalty within 60 days of the receipt of this order.

73. The Commission also directs OP-2 and OP-3 to cease and desist from indulging in the conduct which has been found to be in contravention of the provisions of the Act, as detailed in this order.

74. It is noted from the DG investigation that the DG has identified persons who were in charge and responsible to OP-2 and OP-3 for the conduct of their business during the time when the alleged act of contravention was committed for the purpose of determining liability under section 48 of the Act. So far as the individual liability of the officials of OP-2 and OP-3 in terms of the provisions of section 48 of the Act is concerned, the Commission, on consideration of the investigation report, forwarded the copies of the DG report to the parties including the identified officials for filing their respective reply/ objections. The identified persons, who were in charge and responsible for the conduct of the business of OP-2, have not

filed their replies yet in response to the DG report. The Commission, therefore, decides to pass an order separately in this regard after the proceedings are completed in respect of the persons so identified.

75. As noted in the order of the Commission dated 19.02.2015, the applications of OP- -2 and OP-3 seeking grant of confidential treatment to certain information as contained in their respective confidential versions of the replies to the investigation report, are being disposed of separately along with this order.

76. The Secretary is directed to inform the parties accordingly.

Sd/-

(Ashok Chawla)
Chairperson

Sd/-

(S. L. Bunker)
Member

Sd/-

(Sudhir Mital)
Member

Sd/-

(Augustine Peter)
Member

Sd/-

(U.C. Nahta)
Member

New Delhi
Date: 04/06/2015