COMPETITION COMMISSION OF INDIA

Case No. 97 of 2013

In Re:

Reliance Agency
8, Sakar Complex, Sanstha Vasahat,
Raopura, Vadodara – 390001, Gujarat **Informant**

And

Chemists and Druggists Association of Baroda (CDAB)
C/o Palak Medical Agency,
Opposite Madhvani Classes, Shiapura,
Raopura, Baroda – 390001, Gujarat **Opposite Party No.1**

Abbott India Ltd.
3-4, Corporate Park,
Sion-Trombay Road,
Mumbai – 400071, Maharashtra **Opposite Party No.2**

V.T. Shah, President of CDAB
C/o Bhagyoday Chemist,
B/3, Mahavir Park, Near Nalanda Water Tank,
Waghodia Road, Vadodara – 390017, Gujarat **Opposite Party No.3**

Alpesh Z. Patel, Secretary of CDAB
C/o Murti Medical and Provision Store,
GF–48/49, Arth Complex,
Akshar Chowk, Old Padra Road,
Vadodara – 390020, Gujarat **Opposite Party No.4**

Jasvantbhai P. Patel, President,
Federation of Gujarat State Chemists and
Druggists Association,
5th Floor, Hasubhai Chamber,
Near Town Hall, Madalpur,
Ahmedabad – 380006, Gujarat **Opposite Party No.5**

Federation of Gujarat State Chemists and Druggists Association
5th Floor, Hasubhai Chamber,
Near Town Hall, Madalpur,
Ahmedabad – 380006, Gujarat **Opposite Party No.6**

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. Justice G.P. Mittal
Member

Present:

For the Informant	Shri Nayan Raval, Ex-Partner, Informant Shri Manish Patel, Ex-Partner, Informant Shri Amit Gupta, Advocate Shri Anant A. Pavgi, Advocate
For OP 1, OP 3 and OP 4	Shri Avadhoot V. Sumant, Advocate Shri Bhargav Hasurkar, Advocate Shri Alpesh Patel, President, OP-1 Shri Bhavin Mangrolia, Member, OP-1
For OP 2:	Shri Akshat Kulshrestha, Advocate
For OP 5 and 6	Shri Prashanto Chandra Sen, Senior Advocate Shri Shivanshu Singh, Advocate Ms Gunjan Chowksey, Advocate Shri Shantanu Srivastava, Advocate Shri Jashvant P. Patel, President, OP-6 Shri Pradip Trivedi, Hon. Secretary, OP-6

Order under Section 27 of the Competition Act, 2002

The present information was filed before the Commission under Section 19(1)(a) of the Competition Act, 2002 ('**Act**') by M/s Reliance Agency (hereinafter, the '**Informant'**), against Chemists & Druggists Association of

Baroda (hereinafter, '**OP-1/CDAB**'), Abbott India Ltd., (hereinafter, '**OP-2**'), Shri V.T. Shah, President of CDAB (hereinafter, '**OP-3**'), Shri Alpesh Z. Patel, Secretary of CDAB (hereinafter, '**OP-4**') and Shri Jasvantbhai P. Patel, President, Federation of Gujarat State Chemists and Druggists Association (hereinafter, '**OP-5**'), (collectively referred to as the '**OPs**'), alleging contravention of the provisions of Section 3 of the Act.

2. The Informant alleged that OP-1, OP-3, OP-4 and OP-5, through their activities, limited and controlled the supply of drugs and medicines in the market through the practice of mandating 'No Objection Certificate' (NOC/ LOC) from concerned Chemists and Druggists Association, prior to appointment of stockists for supply of drugs and medicines. The Informant further alleged that OP-2, a pharmaceutical company, is an active participant in such anti-competitive practices along with other OPs as it willingly adhered to their directives. It was submitted that the OPs have blatantly disregarded the Commission's order dated 05.09.2012 passed in *MRTP Case No. C-87/2009/DGIR [Vedant Bio Sciences v. CDAB and Others]* by continuing their anti-competitive conduct.

3. The Informant had approached OP-2 for supply of medicines relating to treatment of diabetes manufactured by Novo Nordisk (India) Ltd. (hereinafter, '**Novo Nordisk**'), which was being marketed in India by OP-2. The Informant had submitted a demand draft for Rs. 7.51 lakh to OP-2 *vide* letter dated 25.05.2013, alongwith an order detailing the list of medicines required, but despite advance payment, no supplies were made to the Informant by OP-2.

4. When the Informant inquired about the reasons for non-supply, he was purportedly informed that OP-1 and its office bearers *i.e.* OP-3 and OP-4 had directed that goods should not be supplied to the Informant, and in case supplies were made, OP-1 would create problems for OP-2. It was stated that during a telephonic conversation one of the partner of the Informant firm, Shri Devang Dalia had with the Regional Manager of Novo Nordisk, Shri Jayker Dhruv, the Informant came to know that the supply of medicine and drugs to the Informant firm was discontinued due to pressure from OP-1 and that the Informant should

seek approval from OP-3, OP-4 and OP-5, in order to get the supplies. Further, OP-3 informed another partner of the Informant firm, Shri Nayan Raval, *vide* a telephonic conversation, that since Novo Nordisk was planning to appoint 2-3 stockists without approval of OP-1 and was dumping the goods, OP-1 had asked it not to supply goods to the Informant's firm.

5. Few other instances were also mentioned in the information to highlight the conduct of the OPs in this regard. It was highlighted that Novo Nordisk had refused to appoint M/s Stockwell Pharma as its additional stockist and sought evaluation from Surat Chemists and Druggists Association before appointing M/s Stockwell Pharma as its stockist. Another instance was cessation of supplies to M/s Patel Agencies who was appointed as a stockist by La Renon Health Care Pvt. Ltd.

6. The Informant further stated that despite the order of the Commission that payment of Product Information Service ('**PIS**') charges cannot be made mandatory, pressure was exerted by OP-1 whereby pharmaceutical companies could not introduce new products in the market without making a payment (PIS) to it. Further, the pharmaceutical companies could not introduce new products unless they agreed to give margins as per the *diktats* of OP-1. It was alleged that OP-1 even gave a call of protest by ordering a *bandh* on 10.05.2013 since it had not been paid favourable margins after the new Drug Price Control Order, 2013 (hereinafter, '**DPCO**') came into effect.

7. The Commission, being *prima facie* convinced that the OPs were acting in violation of Section 3 (3) read with Section 3 (1) of the Act, sent the matter to the DG for detailed investigation *vide* order dated 28.02.2014 passed under Section 26 (1) of the Act. Accordingly, the DG submitted a detailed report dated 30.09.2015 in the matter.

Observations and Findings of the DG

8. After a detailed investigation into the case and taking into consideration the e-mails/ letters exchanged, depositions of the witnesses, replies received from the parties *etc.*, the DG concluded that OP-1 was carrying on with the practice of insisting for NOC from pharmaceutical company prior to the appointment of a new stockist.

9. The DG relied upon a letter dated 07.07.2013 sent by M/s Medicure Agencies, a stockist of AIMIL Pharmaceuticals (India) Ltd. (hereinafter '**AIMIL'**), to the Commission wherein it was alleged that OP-1, through its President and Secretary *viz.* OP-3 and OP-4, was pressurising AIMIL, by asking its stockists not to purchase the company's goods and asking the retailers in Vadodara not to purchase the company's goods from M/s Medicure Agencies. The DG also relied upon an e-mail (undated) sent by one Shri Santosh Singh, the then Regional Sales Manager of AIMIL to its stockist M/s Medicure Agencies wherein, the Regional Sales Manager, AIMIL had written to stockist that OP-1 was asking AIMIL to take back the goods supplied to the said stockist. Shri Santosh Singh further stated in the e-mail that OP-1 was instructing the stockists in some districts of Gujarat not to purchase goods of AIMIL and calls were being made to boycott AIMIL in Gujarat.

10. When AIMIL was confronted by the DG with the said e-mail, it stated that the e-mail was sent by one of its employee who did not have any authority to send such e-mail and for this reason, his services were terminated *w.e.f.* 04.06.2014 on account of misconduct. The DG, however, did not find the explanation of the employee's lack of authority to send such e-mail plausible. The subject-matter of the said e-mail related to disruption of supply of the company's products for which the Regional Sales Manager is generally authorised. Therefore, the DG held that the said e-mail sent by the Regional Sales Manager was found to be sent on behalf of AIMIL, with its consent.

11. Further, the DG confronted the parties/ OP-3 with the transcripts of the telephonic conversations submitted by the Informant along with their audio recordings to the parties to the conversation. OP-3 admitted that the said conversation took place between him and Shri Nayan Raval, partner of Informant firm on the aforesaid date. The DG observed that from the content of the conversation it can be discerned clearly that OP-3 had advised the stockists of Novo Nordisk to pressurise the company with discontinuation of sale/purchase of its products, if it appoints new stockists without NOC from the local association.

12. Based on the aforesaid evidence, the DG came to the conclusion that despite the order of the Commission dated 05.09.2012, OP-1 continued to perpetrate its practices of limiting and controlling the supply of drugs in Vadodara and thus, had contravened the provisions of Section 3 (3) (b) read with Section 3 (1) of the Act.

13. A similar conversation took place between OP-5 and the Manager of Astrum Healthcare Pvt. Ltd. It was noted from the contents of the said conversation that OP-5 had stated that the Federation will resort to *bandhs* and protests. He was also adamant that every stockist should be appointed only after approval from the concerned association. Relying on this conversation, the DG found that the Federation of Gujarat State Chemists and Druggists Association (hereinafter, the '**Federation**') was also indulging in the practice of mandating NOC prior to the appointment of stockists.

14. As regards the allegations against OP-2 of having denied supplies of Novo Nordisk products to the Informant's firm on account of Novo Nordisk not having obtained NOC from the other OPs, the DG perused the Distribution Agreement ('**Agreement**') between OP-2 and Novo Nordisk. As per the Agreement, OP-2 was neither in a position to appoint the Informant's firm as a stockist of Novo Nordisk nor supply the products of Novo Nordisk to the Informant's firm, since it was not an authorised wholesaler of Novo Nordisk and also was not an authorised stockist of Novo Nordisk. Therefore, the DG concluded that OP-2 had a very limited role *vis-à-vis* allowing supplies to the Informant. OP-2 was bound by the terms of the Agreement it had with Novo Nordisk and as such, the Informant, by

placing an order along with advance payment, could not force OP-2 to make supplies to it.

15. During the investigation, additional documents/material were also filed by the Informant before the DG in support of the allegation that pursuant to the Commission's order dated 26.11.2013 passed in *MRTP Case No. C-87/2009/DGIR*, OP-2 denied supplies and stipulated unfair conditions. However, the DG observed that the conditions imposed by OP-2 were not unfair/ discriminatory and as such, the allegation of the Informant *vis-à-vis* OP-2 remained unsubstantiated. Further, the DG found that the contention of the Informant regarding denial of supplies by OP-2 were not supported by evidence.

16. Lastly, the DG examined the Informant's allegation against OP-1 and OP-5 of blocking the entry of new drugs in the market by insisting on payment of PIS charges. For the purpose of investigating this issue, the DG examined the audited annual accounts of OP-1 (2010-11, 2011-12 and 2012-13) as well as of the Federation (2011-12, 2012-13 and 2013-14). It was observed by the DG that substantial amount had been received by the Federation during each year under the head 'Advertisement Income'.

17. On being enquired, OP-5 admitted before the DG that these amounts have been received by the Federation from various pharmaceutical companies towards publication of advertisements of their products in its magazine '*Gujarat Aushadhi Jagat*.' OP-5 contended that the purpose of the publication was to make the chemists aware about the new products introduced by the pharmaceutical companies. OP-5 also contended that as per the DPCO requirements, a pharmaceutical company introducing a new product is under an obligation to disseminate information about the said product in the market, which is done through the Federation who passes on the information on the same through its publications in a cost effective manner. Further, it was argued that as PIS charge is not mandatory, the same cannot be considered as anti-competitive.

18. In order to enquire whether PIS charge is mandatory or not, the DG sought clarifications from a few pharmaceutical companies and such companies confirmed that the practice of publications/ advertisements were followed as a standard practice by all the pharmaceutical companies, though such publication was also serving the purpose of spreading awareness of their products amongst wholesalers and retailers in a cost effective manner. It was further revealed that as per the practice of local associations, new products are to be first advertised in the magazine before the same are purchased by stockists in Gujarat.

19. The DG noted that the publication, besides disclosing the price of the new drugs to the retailers, also disclosed details of the price sold to the stockists even though under Form V of DPCO 2013, only price to retailer or MRP is required to be disclosed. Thus, the DG was of the view that the advertisement/ publication by Federation/ OP-1 leads to disclosure of margins payable on new products. To verify the said proposition further, the DG recorded the statements of officials of some pharmaceutical companies, some of whom stated that they had discontinued availing the advertisement services of the Federation. However, the others confirmed that they were required to seek approval from the Federation in the form of publication in the magazine. Based on the statement made by the officials of the pharmaceutical companies, the DG concluded that the Federation was carrying on with the practice of mandating publication prior to the launch of new drugs/ products in Gujarat, thereby limiting and controlling the supplies or provision of services in contravention of Section 3 (3) (b) of the Act.

20. Thus, the DG found OP-1 and the Federation to have contravened the provisions of Section 3 (3) (b) read with Section 3 (1) of the Act for mandating NOC prior to the appointment of stockists. Further, the Federation was also found to be perpetrating the practice of mandating PIS charge prior to launch of new drugs in Gujarat in contravention of Section 3 (3) (b) read with Section 3 (1) of the Act. As regards the allegations of contravention against the respective Presidents of OP-1 and the Federation, namely OP-3 and OP-5, the DG opined that they were hand in glove with Association/ Federation and as such liable under Section 48 of the Act.

However, the DG was of the view that the allegations against OP-4, the then Secretary of OP-1, remained unproved.

21. The Commission considered the investigation report of the DG in its meeting held on 15.10.2015 and decided to forward the investigation report to all the parties including the Federation for their replies/ objections to the investigation report and directed them to appear for an oral hearing on 02.12.2015. On 02.12.2015, the Commission impleaded the Federation as OP-6 in the matter. Subsequently, OP-5 and OP-6 made a request seeking cross-examination of certain witnesses in the matter. The Commission directed OP-5 and OP-6 to file an application citing reasons as to why they wished to cross-examine those witnesses. On 03.12.2015, OP-5 and OP-6 filed a detailed application in this regard, which was considered by the Commission in its meeting held on 15.12.2015. The Commission found merit in the requests made by OP-5 and OP-6 in their application and accordingly their application was allowed.

22. OP-5 and OP-6 were allowed to cross-examine the witnesses as per their application and the DG was directed to conduct the cross-examinations and submit a report. After conducting the said cross-examinations, the DG submitted its report on 09.03.2016. Based on the cross-examination of witnesses, the DG observed that the findings of the investigation report do not change. Cross-examination of the Informant's partner by OP-5 and OP-6 did not alter the findings of the investigation report as no new facts had emerged from the cross-examination of Shri Nayan Raval, ex-Partner of the Informant firm, that could controvert the allegations made by the Informant in the information filed before the Commission or have any bearing on the findings of the investigation report. Further, cross-examination of other five witnesses also did not obliterate the findings in the investigation report with regard to the contravention on the part of OP-5 and OP-6.

23. On 21.04.2016, the Commission considered the report on cross-examination filed by the DG and decided to forward electronic copies of the same to the Informant as well as the OPs. The Commission directed the parties to file their suggestions/

objections to the investigation reports and appear for an oral hearing on 08.06.2016.

24. On 23.05.2016, OP-1, OP-3 and OP-4 pleaded that they may be allowed an opportunity to cross examine Shri Nayan Raval, ex-Partner of the Informant firm and Shri Jawahar Sharda, Partner of the Informant firm. *Vide* order dated 06.09.2016, the Commission dismissed their cross-examination request. Further, hearing on the investigation report and report on cross-examination filed by the DG was scheduled on 07.12.2016.

25. In the meanwhile OP-1, OP-3 and OP-4 filed a Special Civil Application, bearing no. 18107/16, before the Hon'ble Gujarat High Court, challenging the Commission's order dated 06.09.2016 whereby their request for cross-examination was rejected. *Vide* order dated 16.12.2016, the Hon'ble Gujarat High Court partly allowed the prayer of OP-1, OP-3 and OP-4 and allowed them to cross examine Shri Nayan Raval, ex-Partner of the Informant firm. The Hon'ble Gujarat High Court directed the parties to appear before the Commission on 28.12.2016, to seek a date for cross-examination. The Commission directed that the cross-examination of Shri Nayan Raval by OP-1, OP-3 and OP-4 be conducted on 30.01.2017. Accordingly, the cross-examination of Shri Nayan Raval by Shri Avadhoot V. Sumant, learned counsel for OP-1, OP-3 and OP-4, was conducted on 30.01.2017 and record of the same was sent to the parties for their submission/ replies.

26. The final hearing on the investigation report and report on cross-examination took place on 12.07.2017. The replies/ objections of the parties to the reports, both oral and written, are briefly discussed in the following paragraphs.

Reply/ Objections of the Parties to the Investigation Report

OP-1, OP-3 and OP-4

27. OPs-1, 3 and 4 filed a common response dated 21.12.2015 to the DG Report stating that the information filed by the Informant is entirely frivolous, *mala fide* and has been filed with an ulterior motive. It was alleged that Shri Nayan Raval, who is the main instigator behind the information filed against OP-3, left the Informant firm in the year 2015 and his Affidavit clearly states that the main reason for leaving the Informant firm is the information filed in the present matter. This casts a serious doubt on the integrity of the Informant firm as well as its partners, including its erstwhile partners. The principal complaint of the Informant is that OP-1 is limiting and controlling the supply of drugs in the market through NOC/ LOC requirement prior to appointment of stockists. The exact same allegation has been made by the Informant in its application dated 05.08.2013 filed under Section 42 of the Act in MRTP Case no. C-87/2009/DGIR.

28. It was contended that the main allegation of the Informant is with regard to the refusal to supply Novo Nordisk's products by OP-2. However, the Informant was neither appointed as a wholesaler of Novo Nordisk products nor did it place any evidence to show that it had applied for being appointed as a wholesaler/ stockist for Novo Nordisk products. Thus, there was no question of refusal of supply of goods to the Informant by OP-2 on account of any alleged pressure or otherwise by OP-1.

29. It was averred that the reliance placed by the DG on the transcript of the conversation held between OP-3 and the partner of the Informant firm as well as between the partner of the Informant firm and the official of Novo Nordisk is misplaced and they have no bearing on the case as there is no reference to OP-1 in any of the said conversations.

30. Further, it was stated that the associations play a fruitful role in furthering the interests of their members. Dumping of goods adversely affect the members of

OP-1 and, therefore, it is bound to enquire into such aspects, if it receives information about the same. The DG has erred in concluding that OP-1 has no role to play in regulating dumping of goods and that market forces will keep a check on the dumping of goods by a company and/ or stockist.

31. With regard to the email dated 08.07.2013 exchanged between AIMIL and the company stockist, it was alleged that the said email is concocted and the allegations made therein are completely baseless. It was argued that the DG has neither examined the said pharmaceutical company nor the stockist to establish the veracity of the email. The said pharmaceutical company has in fact clarified that the e-mail was sent by its Regional Sales Manager without its instructions. Further, there was no disruption in supply of goods or any boycott as alleged in the said email.

32. It was submitted that the DG, while investigating the allegation regarding supplies not being made to M/s Patel Agency by La Renon Healthcare Pvt. Ltd. due to the pressure of OP-1, found that the evidence on record did not substantiate the said allegation. This finding of the DG rather shows that isolated instances were picked up by the Informant to make baseless allegations, for which it should be held liable for civil as well as criminal liability.

33. With regard to the NOC practice, it was contended that the said practice is not a mandatory requirement and that stockists, chemists, wholesalers, and distributors in Vadodara/ Baroda are operating without there being any such NOC/ LOC. Further, with regard to PIS charge, OP-1 contended that the said allegation is against OP-5 and since OP-1 is not affiliated to OP-5, the same does not apply to it.

34. Further, it was stated that OP-3, the then President of OP-1, had exercised due diligence at all stages to prevent any contravention under the Act. It was also argued that since OP-1 is not a company, the provisions of Section 48 would not be applicable upon it.

35. Thereafter, based on the cross-examination of Shri Nayan Raval by OP-1, OP-3 and OP-4, response dated 21.04.2017 was filed by them. It was submitted that there is no documentary evidence establishing any merger or amalgamation of OP-2 and Novo Nordisk. Thus, the Informant's allegation that goods of Novo Nordisk were not supplied by OP-2 are wrong as these two entities are different. It was further alleged that the information has been filed by the partnership firm M/s Reliance Agency. However, throughout the proceedings, Shri Nayan Raval, who left the firm on 30.09.2014, has played fraud by unilaterally assuming himself to be an allegedly authorised person to act and represent the firm. Shri Nayan Raval has admitted the absence of any authority or competence to represent the Informant firm and, thus, he is accordingly required to be punished for abusing the process of law.

36. It was alleged that Shri Nayan Raval was admittedly the Vice President of OP-1 and his partner Shri Dahyabhai Patel has personal enmity and rivalry pursuant to losing the elections in the said association, which led to the filing of this frivolous information. The telephonic conversations were alleged to be deceitful as the original recordings have purportedly not been produced by Shri Nayan Raval. It was also alleged that Shri Nayan Raval was not a party to such telephonic conversations and while transcribing the same from Gujarati to English, he has unilaterally added some things which were based on his interpretation. Based on these assertions, it was averred that the cross-examination of Shri Nayan Raval confirms that the present proceedings are liable to be discarded in totality.

OP-2

37. Throughout the proceedings before the Commission, OP-2 maintained its stand that the investigation report of the DG did not find any substance in the allegations levelled by the Informant against OP-2 and thus, it does not wish to make any additional submissions unless the Commission decides to differ with the findings of the DG.

38. During the hearing held on 12.07.2017, the Commission sought certain clarifications which were verbally answered by the learned counsel for OP-2. It was submitted that OP-2 is a reputed pharmaceutical company, which markets and sells the products manufactured by it or its Affiliates; and also sells/ markets products manufactured by other pharmaceutical companies, including Novo Nordisk. OP-2 is a distributor of Novo Nordisk products and it supplies the said products as per the terms of the distribution agreement prevailing between them.

39. With regard to the order placed by the Informant, which as per the Informant remained unhonoured, it was stated that OP-2 referred to the list of active stockists of Novo products, wherein Informant's name was not mentioned. Thus, OP-2 had no option but to return the demand draft received from the Informant, with the direction to get in touch with the Regional Manager of Novo Nordisk. Further, when the Informant approached it again to become a stockist of Novo Nordisk, OP-2 sought instructions from Novo Nordisk and only as per Novo's instructions, the Informant was told that supplies can be made to it based on certain conditions such as standard term on method of delivery of products, return policy on expired products *etc*. It was also clarified by the learned counsel for OP-2 that the demand draft for supply order of Novo products are accepted by OP-2 in its name *i.e.* Abbott India Ltd.

40. In addition, OP-2 clarified that such restrictions were only with regard to Novo Nordisk products and since the Informant has been an authorised stockist of OP-2, regular supplies were being made to it even prior to 2013. Based on these assertions, OP-2 prayed that the findings of the DG be accepted with regard to OP-2.

41. Pursuant to the oral hearing, OP-2 filed confidential version of its written submissions dated 11.10.2017. However, in view of the conclusion of arguments in the oral hearing held on 12.07.2017, the Commission, *vide* its order dated 31.10.2017, decided not to take the said submissions on record at such belated stage.

OP-5 and OP-6

42. OP-5 and OP-6 filed a common response to the investigation report dated 21.12.2015. At the outset, it was argued that OP-5, the President of OP-6, was falsely arrayed as one of the OPs by the Informant and all the allegations levied against OP-5 in the information are totally baseless, fabricated and, thus, vehemently denied. It was highlighted that the information does not contain any allegation against OP-6, and OP-5 had been wrongly dragged into the matter with ill-motives.

43. It was alleged that initially, the Informant filed an application dated 05.08.2013 under Section 42 of the Act against OP-1 for non-compliance of the order dated 05.09.2012 passed by the Commission against OP-1 in *MRTP Case No. C-87/2009/DGIR*. The application dated 05.08.2013 had been disposed of *vide* order dated 26.11.2013.Thereafter, on similar facts and incidents, the Informant filed the present information against similar parties with only OP-5 arrayed as a new party which is untenable as the same is barred by '*res judicata*' as provided under Section 11 of the Code of Civil Procedure, 1908 ('**CPC**').

44. OP-5 and OP-6 also alleged the *mala fide* intent of the Informant. It was stated that Shri Nayan Raval is a partner in another concern namely '*Apna Dawa Bazar*' that has filed another case against similar parties bearing Case No. 72 of 2014 which is pending adjudication before the Commission. Thus, by the aforesaid conduct of the Informant, *i.e.* filing frivolous complaints/ information against OP-6 and its office bearers and pharmaceutical companies, it has become clear that the Informant is trying to get its illegitimate demands fulfilled by using the Commission as a tool to threaten pharmaceutical companies.

45. It was submitted that the DG has failed to establish how the conduct of OP-5 and OP-6 amounts to a contravention of Section 3 (3) (b) of the Act. Section 3 (3) looks into *"[a]ny agreement entered into between enterprises or associations of enterprises engaged in identical or similar trade of goods or provision of services"*. However, in the instant case, there is no question of trading of any

goods or provision of any services, much less by the persons engaged in identical or similar trade or provision of services. Thus, there arises no question of giving any finding against OP-5 and OP-6 under Section 3 (3) (b) of the Act, as the same do not fall under its ambit.

46. It was alleged that only on the basis of transcript of one single telephonic conversation between OP-5 and the manager of Astrum Health Care Pvt. Ltd., the DG has held OP-5 and OP-6 guilty of a contravention under the Act. The said transcript is between OP-5 and a manager of Astrum Healthcare Pvt. Ltd. wherein they are referring to a wholesaler named Manish Medical Agency. The said transaction is in relation to different parties and the Informant is nowhere involved. It was also argued that the Informant had conspired with others and is using the said recorded conversation against OP-6 for building a false and concocted case against it.

47. It was further submitted that OP-6 has always worked for the betterment and welfare of the chemists and has always tried to resolve the grievances suffered by the chemists. It was submitted that OP-5 and the Manager of Astrum Healthcare Pvt. Ltd. used to speak regarding the pending issues of the stockist of Amdavad as OP-5 also held the position of Chairman in the Amdavad Chemists Association, at that relevant time. The Amdavad (Ahmedabad) Chemists Association received letters from certain pharmaceutical distributors about their grievances with Astrum Healthcare Pvt. Ltd. on various issues and therefore, OP-5 felt a need to speak with the Manager of Astrum Healthcare Pvt. Ltd. to redress those grievances. It was contended that while deposing before the DG, OP-5 submitted the aforesaid complaints in support of his defense; however, the DG neither annexed the said complaints along with his investigation report nor mentioned about the same in his report. It was further averred that the said telephonic conversation does not establish anything, especially because OP-5/ OP-6 never refused the supply of products of Astrum Healthcare Pvt. Ltd. to Manish Medical Agency and the said products are still being supplied to Manish Medical Agency. Further, OP-6 relied upon the recommendations of Mashelkar Committee Report

and contended that the DG failed to appreciate that the conduct of OP-6 was in conformity with the directions given by the said committee.

48. It was alleged that the DG ignored the invoices issued by the pharmaceutical companies against the supply of medicines made to the Informant, which were furnished by OP-5 in its reply dated 16.08.2015. The said invoices clearly showed that there was no disruption of supply of medicines pursuant to the said telephonic conversation, which is the only evidence placed on record by the Informant against OP-5. It was also submitted that the DG has disregarded critical clarifications given by OP-5/ OP-6 and has only considered few points to reach the unjustified conclusion against OP-5/ OP-6.

49. On the issue of alleged disruption of supplies by OP-2, it was alleged that OP-2 has nowhere mentioned in its reply that there has been any sort of involvement of OP-5 or OP-6 in the appointment of stockists/ distributors in the State of Gujarat as alleged by the Informant. Further, the learned counsel on behalf of OP-2 in *MRTP Case No. C-87/2009/DGIR* has categorically made a statement on oath that there is no role of OP-6 in the appointment of stockists. Despite that the DG has held OP-5 and OP-6 liable without any evidence. Further, the DG has chosen to ignore the replies given by other pharmaceutical companies which clearly show that neither OP-6 nor its office bearers had issued any instructions, guidelines *etc.* in making NOC/ LOC mandatory for appointment of a distributor/ stockist in the State of Gujarat. Further, the DG, in its report, has absolved OP-2 from the purview of the Act but has held OP-6 guilty of contravening the provisions of the Act, who was not even directly alleged to be guilty by the Informant.

50. As regards the alleged blocking of entry of new drugs into the market by insisting PIS charge, it was submitted that the DG has erroneously concluded that OP-6 is carrying on the said practice and thereby limiting and controlling the supply of goods or provision of services in contravention of Section 3 (3) (b) read with Section 3 (1) of the Act. The DG has recorded statements of various companies, however, it has intentionally incorporated the replies and statements of only those companies/ officials in its investigation report which support its adverse

conclusions/ findings against OP-5 and OP-6. It was submitted that the officials of majority of the pharmaceutical companies have categorically stated that the advertisement services of OP-6 enables the pharmaceutical companies to create awareness amongst the wholesalers, retailers and consumers about their new products and helps in an efficient and cost effective method of information dissemination about new products. Thus, the common opinion gathered on the said issue shows that such publication creates awareness of new drugs in the market and helps in passing the information of new products at the grass root level. However, despite such revelations by the pharmaceutical companies, the DG has concluded against OP-5 and OP-6.

51. It was further submitted that the DG's observation that the information published in the magazine of OP-6 does not contain any information related to the composition of the products may not be of much relevance as it is a general practice in the industry that the prescription of the doctor includes the brand name of the medicines and not composition of the same. OP-6 is fruitfully serving the purpose of disseminating the brand name of the product along with other information by way of publishing the same in its magazine so as to reach the market in an acceptable way, as per the general practice. It was also alleged that the DG had asked leading questions to the officials of pharmaceutical companies, which are not good in law.

52. With regard to the e-mail dated 23.10.2013 sent by an official of Cipla Ltd. to OP-5 seeking NOC, it was contended that the said e-mail does not give any inference that the supply of the medicines/ products are subject to the approval of OP-5 or OP-6. Based on the aforesaid submissions, OP-5 and OP-6 prayed that the conclusions of the DG against OP-5 and OP-6 be dismissed.

53. In response to the report of the DG on cross-examination of witnesses, OP-5 and OP-6 filed a common response dated 18.06.2016. It was contended that the statements of the Informant and other witnesses during their examination-in-chief cannot be relied upon as the conduct of the DG during the process of cross-examination of the witnesses and Shri Nayan Raval (deposing on behalf of the

Informant) was completely reprehensible and against the basic principles of law and natural justice. It was stated that the DG has a pre-conceived notion towards OP-5 and OP-6 and the DG acted like the Informant's lawyer during the course of cross-examination defending the DG's previous stand taken in the investigation report dated 30.09.2015, instead of playing the neutral role of an investigating agency appointed by the Commission.

54. It was argued that the recording of statements of the witnesses during the examination-in-chief was not done in a fair and transparent manner as some of the witnesses have stated during their cross-examination that the DG had a general discussion with them on various issues and subsequently generated a statement and made them sign it. Further, in case of certain witnesses, the discussion did not happen in English language; however, later they were made to sign the statement that was recorded in English and the words used in the statement were not the exact words used by them in their examination-in-chief. It was, thus, alleged that the DG himself generated the statements of the witnesses and used terminologies and phrases to suit his pre-conceived notions against OP-5 and OP-6 to frame an investigation report in consonance with the allegations of the Informant.

55. Besides the aforesaid general objections, OP-5 and OP-6 also provided their specific replies/ objections with regard to each of the witnesses they cross-examined, which is briefly summarised in the following paragraphs.

Shri Nayan Raval, Ex-Partner of the Informant Firm

56. It was stated that OP-5 and OP-6 had requested for cross-examination of the Informant; therefore at the outset, the presence of Shri Nayan Raval, who had already left the Informant firm at that relevant time, for cross-examination is questionable. Shri Nayan Raval had categorically stated that the reason for his retirement from the Informant firm was the restriction placed by one of the partners, *namely* Shri Jawahar Sharda, for not going to the Commission for any further case. This casts a doubt regarding the *bona fide* of the information filed by the Informant firm. It was submitted that Shri Nayan Raval gave contradictory

answers. At one place he has stated that OP-2 has all the rights to supply products and on the other hand, he is making an allegation that without the permission of OP-6, no pharmaceutical company can supply goods to any existing or new stockist.

57. It was submitted that Shri Nayan Raval has misled the Commission into believing that cause of action still exists when he has already accomplished his ulterior motives behind filing frivolous complaints against pharmaceutical companies and OP-5 by becoming the stockist of more than 22 pharmaceutical companies in a span of just 2 years. Shri Nayan Raval, when asked about the number of NOCs he has taken from OP-6 for his firm M/s Reliance Medical Agency to become stockist of various pharmaceutical companies, failed to give a satisfactory reply. The very fact that his firm has become the stockist of more than 20-22 companies in a span of just 2 years shows that the alleged practice of seeking NOC from OP-6 does not exist at all.

58. It was also stated that the investigation process adopted by the DG suffers from legal deformities as the DG has relied upon the telephonic conversations submitted by the Informant without obtaining any certificate regarding admissibility of electronic records as provided under Section 65B of the Indian Evidence Act, 1872.

Shri P.K. Pathak, CEO & Managing Director of Delcure Lifesciences Ltd.

59. It was argued that the DG has given an incorrect interpretation to the statement of Shri P.K. Pathak during the cross-examination. The answers to question nos. 11, 25 and 26 in cross-examination clearly show that the company *i.e.* Delcure Lifesciences Ltd. is not facing any difficulty in launching its product in the market and it is solely the company's right to launch its products in the market without there being any role of OP-6 in launching of the products.

60. It was argued that the DG, while drawing his conclusions, ignored the answers given by Shri P.K. Pathak that the company relied upon the advertisement services

offered by the Chemists and Druggists Association as their second mode of business, which definitely spreads awareness in the market and also that publication in the magazine is a general industry practice.

Shri Prakash D. Naringrekar, CFO & Company Secretary of Themis Medicare Ltd.

61. It was contended that the DG gave an incorrect interpretation to the statement of Shri Prakash D. Naringrekar by ignoring the material facts that emerged from his cross-examination, with a view to justify the findings given in the investigation report. It was submitted that Shri Prakash D. Naringrekar categorically stated that the company, at present, is not facing any difficulty in launching its products in the market and they are not paying any NOC or advertisement charges to OP-6. Shri Prakash D. Naringreker made it clear that "*as far as stockists are concerned, we depend upon their financial capability and market credibility."* Further, Shri Prakash D. Naringrekar also stated that there was such restriction from OP-6 but only beyond a certain number of stockists being appointed, that too 10 to 15 years back. Based on this, OP-5 and OP-6 contended that an obvious corollary of his statement shows that this restriction is not there for the last 10-15 years.

Shri Sandeep Nair, General Manager of Arinna Lifesciences Pvt. Ltd.

62. It was submitted that Shri Sandeep Nair has stated in his cross-examination that the earlier statement given by him on 20.07.2015 was majorly in English and the statement did not mention the exact word to word points told by him to the DG, though the statement contained the substance of his deposition. OP-5 and OP-6 contended that this statement in his cross reveals that the earlier statement of Shri Nair, as provided in the investigation report, is not an exact true copy of the statement given by him. Therefore, *prima facie* the earlier statement of Shri Nair, as reproduced by the DG, cannot be considered as a reliable piece of evidence against OP-5 and OP-6.

63. It was submitted that Shri Sandeep Nair stated that the company has not faced any difficulty in launching its products in Gujarat so far. He also confirmed that he has not faced any resistance from OP-6 in introducing the company's products, even when the same have not been published in the '*Chemist News*'.

64. Shri Sandeep Nair further stated that *"it is correct that by providing the product information in the magazine Chemist News, the information reaches at the retail level in the most effective manner".* Further, he stated that *"[y]es, definitely we spread the information about our products in the market through the magazine chemist news which is being circulated to all the registered chemists and druggists in a short span of time".* The DG, however, allegedly ignored all these submissions and gave an adverse finding.

Shri Shankar Subramaniam, GM Distribution of Micro Labs Ltd.

65. It was averred that cross-examination of Shri Shankar Subramaniam reveals that while recording his earlier statement, the DG only asked a few questions and had a general discussion with him and thereafter, the DG generated a statement and made him sign it. Shri Shankar Subramaniam has categorically stated that by publishing the product information in '*Chemist News*', published by OP-6, the company makes the retailers aware of its new products and it is solely for the benefit of the company. Further, he also stated that providing information by way of 'PIS' is useful for the company for dissemination of information to the retail market in an easy and effective manner.

66. It was further contended that Shri Shankar Subramaniam clearly stated that the company is under no obligation to get its new products published in the '*Chemist News*' and it is totally the company's discretion to approach OP-6 for publishing information of its new products.

67. It was also stated that in the last five to six years, there has not been a single instance in the State of Gujarat where OP-6 has shown any reluctance to the company or where any of the company's products were boycotted or supply of the

company's products were stopped. Shri Shankar Subramaniam stated in unambiguous words that *"the product launch is managed by the company, Federation has no role to play"* and that *"there is no requirement to take NOC from the Federation, as they are not the relevant legal authority to give the NOC*".

Shri Rahul Dokania, Ex RSM of Salud Care (India) Pvt. Ltd.

68. It was submitted that Shri Rahul Dokania in his cross-examination has clearly stated that he was comfortable in Hindi language and at the time of his examination-in-chief, the questions were asked to him in Hindi language and he also replied to the same in Hindi. However, he was made to sign a statement translated and generated by the DG in English thereby containing the language and words of the DG. He also stated that "*he discussed many things with the DG but all of it is not completely mentioned in the statement."* Based on this, OP-5 and OP-6 contended that Shri Dokania signed a statement, without completely understanding its true meaning which was a statement generated by the DG, on the belief that it conveyed the essence of the statements actually given by him.

69. Further, it was argued that the cross-examination of Shri Rahul Dokania makes it clear that he had given his earlier statement before the DG on the basis of his experience in Kolkata and he was not aware of the process and procedures in relation to launching of the products, mode of distribution of the products, payments, and various other questions related to the methods adopted by the company in the State of Gujarat.

Informant

70. The Informant agreed with the findings of the DG with regard to all the OPs, except OP-2. With regard to OP-2, the Informant submitted that the DG found out during investigation that OP-2 was neither in a position to appoint the Informant as a stockist for the products of Novo Nordisk independently nor could it supply the products of Novo Nordisk to the Informant. However, no enquiry was made into the conduct of Novo Nordisk. The DG has wrongly limited its enquiry to OP-

2, whereas it ought to have investigated the conduct of Novo Nordisk also for imposition of unfair conditions and refusal to supply.

71. It was also argued that the investigation failed to bring out as to how the products of Novo Nordisk, which were earlier denied to the Informant by OP-2, were made available to it for supply, after the filing of the information with the Commission. Further, no independent verification was made as to whether the stance taken by OP-2 is correct or merely a ploy to cover its illegal acts. Also, no enquiry has been conducted as to whether the terms and conditions of supply to all the distributors are uniform or not or whether such terms/ conditions have been fixed as per the mandate of OP-1.

72. The DG failed to consider the letter of OP-2 dated 10.01.2014 asking the Informant to collect Novo Nordisk's products through its C & F agent in Ahmedabad, which is contradictory to its reliance placed on Article 6 "Limited Authority" of the Agreement it had with Novo Nordisk.

73. During the oral hearing, the Informant further argued that its application dated 05.08.2013 under Section 42 of the Act is different from the present information. Further, it was submitted that the order in *MRTP Case No. C-87/2009/DGIR* of the erstwhile Hon'ble Competition Appellate Tribunal ('**CompAT**'), setting aside the Commission's order dated 05.09.2012, is on a technical issue and not on merits.

Findings of the Commission

74. The Commission has perused the information, the investigation report, the report on cross-examination, including the records of cross-examination, and the suggestions/ objections to such reports given by the parties as well as the oral submissions made by their respective learned counsel (s) in the hearing held on 12.07.2017.

75. The main issues that require determination in the present matter are as follows:

Issue 1*: Whether OP-1 and OP-6 were mandating the requirement of NOC prior to appointment of stockists by pharmaceutical companies, in contravention of the provisions of the Act?*

Issue 2*: Whether the allegation against OP-2 of having denied supplies of Novo Nordisk products to the Informant on account of it not having obtained NOC from the other OPs is substantiated by evidence?*

Issue 3*: Whether the allegations against OP-1 and OP-5 regarding blocking the entry of new drugs in the market, by insisting on payment of PIS (Product Information Service) charges are substantiated by facts and evidences?*

Issue 4*: In the event of investigation concluding the contravention of the provisions of the Act by OP-1 and/ or OP-6, whether the persons identified in the investigation are complicit in the said contravention.*

76. The Commission notes that besides objecting to the findings of the DG on merits, the OPs have also raised many procedural objections or preliminary issues in their response to the investigation report and report on cross-examination. Thus, before delving into the afore-formulated substantive issues, each of the procedural/preliminary issue raised by the OPs are dealt with in the ensuing paragraphs.

Preliminary issue regarding similar issues being raised in an earlier application under Section 42 of the Act

77. The Commission notes that OP-1, OP-3 and OP-4 as well as OP-5 and OP-6 have raised a preliminary objection regarding the present case being barred by the doctrine of *res judicata*. It has been alleged that the issues raised by the Informant in the present matter are substantially similar to those raised by the Informant in the Section 42 application filed by it in *MRTP Case No. C-87/ 2009/ DGIR* titled *Vedant Bio-Sciences, Baroda v. Chemists and Druggists Association, Baroda* with

regard to non-compliance of the order dated 05.09.2012 passed by the Commission under Section 27 of the Act. The said application was decided by the Commission on 26.11.2013 and the present information has been filed by the Informant on 25.11.2013, *i.e.* one day prior to the disposal of the Section 42 application on 26.11.2013, raising substantially the same issues as were raised in that Section 42 application.

78. Doctrine of *res judicata* is embodied under Section 11 of the Code of Civil Procedure, 1908 which reads as follows:

> *"**Res judicata.-** No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit' between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."*

Hence, the basic ingredients as stated in Section 11, required to be fulfilled for the application of the said doctrine are as under:

a. Matters in issue in the case at hand must have been directly and substantially in issue in the former case;
b. Parties in present case and former case must be the same, or claiming under some common party and litigating under the same title;
c. Court deciding former case must be competent to try the case in which substantially issue has been subsequently raised; and
d. The former case must be heard and finally decided by the Court which heard it.

79. The Commission observes that in the present case, though the first three ingredients as stated above may stand fulfilled, the fourth ingredient that the former case must be "*heard and finally decided"* does not stand fulfilled. The

Section 42 application filed by the Informant in *MRTP Case No. C-87/ 2009/ DGIR* was decided on 26.11.2013 holding as follows:

> *"The controversy is limited to compliance of the order of the Commission. It is directed that Novo Nordisk shall file an undertaking before the Commission that it shall not refuse supplies or stop supplies to any stockist/ seller of pharmaceutical products/ drugs/ medicines on the grounds of the person/ enterprise not being a member of an association of stockists, druggists, chemists of an area, or for not having an NOC/ LOC from such association. This undertaking is to be given irrespective of the allegations of the Applicant – Reliance Agency. The undertaking shall be filed within 10 days from today.*
>
> (emphasis supplied)
>
> *In case the supply of drugs is refused by Novo Nordisk to any chemist/ druggist/ stockist without cogent reasons, or otherwise than for commercial reasons, it will be presumed that the supply has been refused for the reason of the person not being a member of the association, or for not possessing NOC/ LOC, and it will be considered a violation of the orders of the Commission.*
>
> *An Affidavit has been filed by the Chemists and Druggists Association of Baroda in terms of the last order of the Commission."*

80. A bare perusal of the above-stated order shows that the issue raised in the Section 42 application of the Informant whether the practice of refusal of supply of drugs for the want of NOC is still being carried on or not by the Chemists and Druggists Association of Baroda was not decided on merits. The application was simply disposed of by the Commission with a direction to the pharmaceutical company involved *i.e.* Novo Nordisk to file an undertaking before the Commission that it shall not refuse/ stop supply of drugs to any stockist/ seller on the ground of such person/ enterprise not being a member of an association of stockists, druggists or chemists of the area, or for not having an NOC from such association. It was clearly stated in the order that such undertaking has to be given irrespective of the allegations of the Applicant. Hence, it is evident that all the ingredients required

for the application of the doctrine of *res judicata* do not stand fulfilled in the present case. Therefore, such preliminary objection raised by the OPs cannot be accepted.

81. Moreover, since the order of the Commission dated 05.09.2012 passed under Section 27 of the Act which formed the very basis for the Section 42 application filed by the Informant has been set aside by the Hon'ble CompAT in Appeal No. 140 of 2012 on 18.11.2016, the Section 42 proceedings in that case have become infructuous. In view of the same as well, the objection raised by the OPs loses significance and would have no bearing on the proceedings of the present case.

Preliminary issue regarding locus/ bonafide of the Shri Nayan Raval or the Informant

82. It is noted that the OPs have raised objections with regard to the *bona fide* of Shri Nayan Raval, who as per them was the main instigator behind the information filed by the Informant firm. It is stated that the information has been filed with ill-motives and Shri Nayan Raval has used the process under the Act to threaten pharmaceutical companies to appoint him/ his firm as their stockist. The Commission does not find any merit in these objections.

83. The proceedings before the Commission are inquisitorial in nature and as such, the *locus* of the Informant is not as relevant in deciding whether the case filed before the Commission should be entertained or not. As long as the matter reported to the Commission involves anti-competitive issues falling within the ambit of the Act, the Commission is mandated to proceed with the matter. Further, it may be noted that as per the scheme of the Act, it is not necessary that there must be an informant to initiate an inquiry or investigation. The Commission is entitled to even proceed *suo motu* or on any reference being made by the Central Government or State Government or any Statutory Authority. Thus, the Commission is more concerned with the facts and allegations highlighted in the information rather than the *locus* of the person who provided such information.

84. The purpose of the Act is to prevent practices having an adverse effect on competition in India, to promote and sustain competition in the markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in the markets. Towards that end, the Commission is more concerned with the fair functioning of the market and the motives with which the informant has come to the Commission is subservient to that objective. The OPs have themselves admitted that the Commission has already decided an earlier case (*MRTP Case No. C-87/2009/DGIR*) involving similar issues and the Section 42 application in that matter was on the same facts. Though that order has been set aside by the Hon'ble CompAT on 18.11.2016 on technical grounds, the fact that the Informant was facing issues pursuant to such practices being carried on needed an investigation to ascertain if the practices are still in existence and if the stockists/ distributors similar to Informant are also facing similar restraints.

85. Further, OP-5 and OP-6 have also objected to the presence of Shri Nayan Raval in the cross-examination of the Informant firm, in view of the fact that he has left the firm in September, 2014. This objection has already been dealt with by the Commission in its order dated 06.09.2016, wherein the request made by OP-5 and OP-6 to cross-examine the present as well as erstwhile partners of Informant firm was made. The relevant excerpts of the same are reproduced below:

> "***28.*** *With regard to the fresh request made by OP-5 and OP-6 for further cross-examination (re-examination of Shri Nayan Raval), the Commission has analysed this request as well in light of the provisions laid down under Regulation 41 (5) of the General Regulations. On 15.12.2015, the Commission had categorically directed the DG to allow cross-examination by OP-5 and OP-6 as per their application dated 03.12.2015. Thereafter, the DG had allowed cross-examination and the common counsel for OP-5 and OP-6, Ms. Gunjan Chowksey conducted the cross-examination of all the witnesses named in the application dated 03.12.2015. On behalf of the Informant, Shri Nayan Raval deposed in cross-examination. His cross-examination took place on 03.02.2016 and the transcript of the cross-examination, appended to the Report of the DG on cross-examination, bears the signature of all the persons present, including Ms. Gunjan*

Chowksey as counsel for OP-5 and OP-6. It is observed that the first 10 questions posed by Ms. Gunjan Chowksey revolved around the role of Shri Nayan Raval, his association with the Informant, the names of other partners of the Informant etc. Thereafter, Ms. Chowksey proceeded to ask questions related to facts of the case. It is startling that Ms. Chowksey, despite having known that Shri Nayan Raval is not currently a partner of the Informant, did not ask any questions regarding his authority to depose on behalf of the Informant and rather proceeded to cross-examine him, without any objection or agitation. It was neither objected during the cross-examination nor challenged thereafter, that Shri Nayan Raval is incapacitated to depose on behalf of the Informant. Further, no request was made to the DG or the Commission by OP-5 and OP-6 at that stage to seek cross-examination of any other partner of the Informant.

[….]

***30.** It is a matter of record that none of the partners of the Informant, whose cross-examination is sought by the OPs, deposed before the DG during investigation. However, pursuant to the request made by OP-5 and OP-6 in their application dated 03.12.2015, the Commission allowed cross-examination of the Informant along with other witnesses. The Informant, being a partnership firm, cannot be cross-examined, otherwise than through its partners. Of all the partners of the Informant firm, Shri Nayan Raval has been closely related to the present case. The Affidavit accompanied with the information filed under Section 19 (1) (a) of the Act was sworn by him. Throughout the investigation, he has been the linking point between the DG and the Informant. All the documents/ information, which have been relied upon by the DG, were filed by him on behalf of the Informant. Considering these circumstances, the Commission is of the view that there is no infirmity in his cross-examination, despite his retirement from the Informant firm in September, 2014.*"

86. In view of the foregoing discussion, the Commission hereby rejects the objections raised by the OPs with regard to the *locus* of the Informant in the present matter

as well as the deposition of Shri Nayan Raval pursuant to his retirement from the Informant firm.

Preliminary issue regarding the scope of investigation

87. OP-5 and OP-6 have stated that the DG has absolved the original party (*i.e.* OP-2), against whom the main allegation of refusal to supply was under consideration, and instead found contravention against the newly impleaded party (*i.e.* OP-6). The Commission after consideration of the facts on record, finds no merit in this objection for the reasons recorded hereunder.

88. Relying on the judgment passed by the Hon'ble Supreme Court in *Competition Commission of India v. Steel Authority of India Limited, (2010) 10 SCC 744*, the Commission has held in many cases that the proceedings before the Commission being inquisitorial in nature, the Commission is not required to confine the scope of inquiry to the parties whose names figure in the information. The purpose of filing information before the Commission is only to set the ball rolling as per the provisions of the Act. The scope of inquiry is much broader and the Commission is not restricted in its inquiry to investigate only the parties arrayed in the information as the 'Opposite Parties'. The Commission being an expert body is clothed with a duty to prevent practices having an adverse effect on competition in the markets, and is mandated by law to examine the issues in a holistic and not in a piecemeal manner. If during investigation, the DG discovers that apart from the parties named in the information, there are other persons/ entities also involved in the alleged contravention, the DG is not restrained to limit its investigation. To hold otherwise would render the purpose of investigation infructuous and incomplete. Further, in view of the *prima facie* direction of the Commission, under Section 26 (1), given *vide* order dated 28.02.2014, the intention becomes rather clear:

> *"**11.** [....] The Director General has to investigate the matter for violation of any provisions of the Act. The investigation is not to be limited to the Opposite Parties names in the present matter but*

also be in respect of any other person/association/enterprise found to be violating the Act."

89. The aforesaid direction makes it clear that the scope of investigation was not limited to the parties arrayed in the information. Thus, the objection of OP-5 and OP-6 is dismissed. Having dealt with the preliminary issues, the main issues are dealt with in the ensuing paragraphs.

Issue 1: Whether OP-1 and OP-6 were mandating the requirement of NOC prior to appointment of stockists by pharmaceutical companies, in contravention of the provisions of the Act?

90. In many past cases concerning the conduct of regional/ district/ State level Chemist and Druggist Associations, the Commission has held that the practice of mandating NOC prior to the appointment of stockists results in limiting and controlling the supply of drugs in the market and it amounts to an anti-competitive practice, in violation of the provisions of Section 3 (3) (b) read with Section 3 (1) of the Act. Requirement to seek NOC is a hindrance that dissuades new/existing stockists to enter/expand in a market and this practice amounts to an entry barrier for the pharmaceutical stockists. Appointment of a new stockist should be the exclusive right of the pharmaceutical company, without any interference by a third party. Any influence or interference with the choice of a distributor of a pharmaceutical company would restrict its freedom to do business with persons of its choice. Such interference not only disrupts the distribution chain, but also results in limiting and controlling the supply of drugs in the market, as many-a-times the *diktats* are sanctioned by consequent boycott of the pharmaceutical company not following the directions of the association (s).

91. In order to ascertain whether OP-1 and OP-6 were indulging in such practice or not, the Commission finds it appropriate to analyse the evidence gathered by the DG during the investigation in the light and the objections raised by the parties.

92. It is noted that the DG relied upon a letter dated 07.07.2013 sent by a stockist of AIMIL, namely M/s Medicure Agencies, to the Secretary of the Commission wherein it was highlighted that OP-1 was pressurising the pharmaceutical company by asking its stockists and retailers in Vadodara not to purchase the company's goods from M/s Medicure Agencies. There is also an email sent by the Regional Sales Manager of AIMIL to its stockist M/s Medicure Agencies, wherein the said stockist was intimated that OP-1 was asking AIMIL to take back the goods supplied and instructing the stockists in some districts of Gujarat not to purchase goods of AIMIL. The Commission notes that when clarification on the said email was sought from AIMIL, it stated that the email was sent by its employee Shri Santosh Singh, without being authorised to do so, and the services of the said employee were terminated *w.e.f.* 04.06.2014 due to this misconduct.

93. Firstly, it is pertinent to note that AIMIL has not disputed the authenticity of the said e-mail. Further, AIMIL has contended that Shri Santosh Singh's services were terminated because of this e-mail, which shows that e-mail was indeed sent by him to M/s Medicure Agencies. Thus, Commission finds that the existence of the e-mail is not a matter of dispute. As per the material available on record, Shri Santosh Singh was the Regional Sales Manager, who generally looks after the sales/ distribution of the company's products. It is the basic rule of agency that a person employed for a position of a generally recognised character has the full apparent authority to carry out the functions which a person in such position would be expected to do. All such acts done by the agent in such normal course of things binds the principal. Thus, the response of AIMIL that Shri Santosh Singh sent the email without its instructions is of no consequence, especially when AIMIL has not been able to provide any plausible justification or show any personal motive to explain why Mr. Santosh Singh had send such email with regard to the supply of the company's products.

94. The Commission further notes that the DG has relied upon the transcript of a telephonic conversation dated 29.05.2013 held between the Partner of the Informant firm, *viz*. Shri Nayan Raval, and OP-3. In the said conversation, OP-3,

on being enquired by the Informant's partner, told that despite OP-3 stopping the sale/ purchase (of Novo Nordisk products) and despite the assurance that no new stockist would be appointed, it had been learnt from the market that Novo Nordisk was going ahead with the appointment of 2-3 stockists. The DG confronted this statement to OP-3 who unequivocally confirmed the conversation and its transcript. The relevant extract of his statement is reproduced below:

> "***Question 8.*** *I am playing a CD before you, containing a conversation, purportedly held between you and Mr. Nayan Raval, partnter in M/s Reliance Agency on 29.05.2013. Pl. confirm whether the voice in the CD is yours.*
> ***Ans:*** *Yes, I confirm the conversation on the CD is between me and Mr. Nayan Raval, partner in M/s Reliance Agency.*
> ***Question 9.*** *I am producing before you the transcript of the conversation held between you and Mr. Nayan Raval, partner in M/s Reliance Agency on 29.05.2013. Please sign the transcript as a confirmation of being a true record of the conversation held.*
> ***Ans.*** *Yes, I have read the transcript and signing it as a confirmation that it is true record of the conversation held between me and Mr. Nayan Raval, partner in M/s Reliance Agency on 29.05.2013."*

95. The Commission notes that OP-3 has not denied this telephonic conversation. Rather OP-1, OP-3 and OP-4, through their common response tried to justify it citing welfare functions undertaken by OP-1 to safeguard the interest of its members. It has been stated that pharmaceutical companies like Novo Nordisk resort to dumping of goods which is neither in the interest of the company nor its stockists. However, given the fact that pharmaceutical companies, as per industry practice, also take back their unsold expired goods from their stockists, the argument relating to dumping of goods does not hold good in this case. Further, in the event Novo Nordisk or any other pharmaceutical company appoints more stockists than is required and oversupplies the products, the said products supplies would eventually become expired goods and would have to the taken back by the company. As such, the companies would be compelled by market forces to align their production and supplies according to the demand in the market and appoint new stockist based on their own commercial requirement.

96. The Commission finds that by self-proclaiming its role and responsibility as guardian of its members, associations like OP-1 interfere in the free play of market forces and create disruptions in the supply chain through which drugs and medicines reach the consumers. The Commission does not deny the role and importance of a trade association in furthering the legitimate interests of its members; however, if under the garb of furthering legitimate interests, the associations impose restraints upon the pharmaceutical companies in the appointment of new stockists under the threat of stoppage of sale/ purchase of pharmaceutical products by its existing stockists, such practices would amount to limiting and controlling supplies in the market.

97. Therefore, the email dated 08.07.2013 exchanged between an official of AIMIL and the company's stockists and the telephonic conversation that was held between OP-3 and a partner of the Informant firm, establish that OP-1 was indulging in anti-competitive practice of mandating NOC. Thus, the Commission holds OP-1 responsible for mandating the requirement of NOC prior to the appointment of stockists which resulted in limiting and controlling the supply of drugs and medicines in Vadodara. Thus, it is held that OP-1 has contravened the provisions of Section 3 (3) (b) read with Section 3 (1) of the Act.

98. The Commission further notes that a telephonic conversation was held between OP-5 (the then President of OP-6) and an official of a pharmaceutical company *namely* Astrum Healthcare Pvt. Ltd., wherein OP-5 had purportedly objected to the appointment of a stockist by the said company and directed the company to stop supplies and recall the goods delivered to the said stockist failing which the business of the company would be stopped in Gujarat and the company would be penalised. As per the conversation, the company had been advised by OP-5 not to give anything in writing to the stockist that OP-6 had restricted the supply of goods. Further, it was stated that before appointment of stockist, the company should have met OP-5. The company had also been directed to either stop supplies to the new stockist or to change its C & F agent.

99. Based on the aforesaid telephonic conversation between OP-5 and the official of Astrum Healthcare Pvt. Ltd., the Commission holds that OP-6 was carrying on the practice of NOC/ approval required to be taken from it prior to the appointment of new stockists by pharmaceutical companies. The fact that the pharmaceutical company was advised by OP-5 not to give anything in writing further shows that OP-5 was fully aware of the legal position. However, despite that, he did not refrain from pursuing the anti-competitive practice of NOC/ approval in the matter of appointment of new stockists. During investigation, when confronted with the said evidence, OP-5 confirmed the said conversation but tried to justify the same by stating that the said conversation was an attempt to resolve the issue related to dumping of goods by the pharmaceutical company. The Commission does not find merit in the justifications offered by OP-5. As discussed earlier, such issues should be left to be dealt with by pharmaceutical companies. Imposition of restraint upon pharmaceutical companies for appointment of new stockists, under the threat of disruption of supplies, adversely intervenes with the competitive landscape and cannot be said to be in the interest of members of OP-6. The said practice amounts to limiting and controlling supplies in the market.

100. In view of the foregoing, the Commission finds that OP-6 is carrying on the practice of NOC/ approval required to be taken from it prior to the appointment of a new stockist by pharmaceutical companies, resulting in limiting and controlling the supply of products/medicines in Gujarat. Thus, OP-6 is also found to be in contravention of the provisions of Section 3 (3) (b) read with Section 3 (1) of the Act.

Issue 2: Whether the allegation against OP-2 of having denied supplies of Novo Nordisk products to the Informant on account of it not having obtained NOC from the other OPs is substantiated by evidence?

101. During investigation, the DG inspected the Distribution Agreement entered into between OP-2 and Novo Nordisk, and discovered that ('**Agreement'**) OP-2 was the only distributor of Novo Nordisk products. It was neither in a position to

appoint the Informant as a stockist for Novo Nordisk products nor supply products of Novo Nordisk to the Informant who was not an authorised wholesaler of OP-2. Thus, the fact that the order and the demand draft sent by the Informant on 30.05.2013 to OP-2 was returned with an advice to get in touch with the officials of Novo Nordisk cannot be seen as an attempt by OP-2 to mandate NOC from any association. The Commission finds the submissions made by the learned counsel for OP-2 plausible that OP-2 cannot be faulted for advising the Informant to approach the Regional Manager of Novo Nordisk for supplies. Under the Distribution Agreement, OP-2 had a limited role in the supply it Novo Nordisk products to the authorised stockists of Novo Nordisk and the Informant was not an authorised stockist. Thus, OP-2's response, which was based on the instructions received from Novo Nordisk, cannot be held against it.

102. The Commission further observes that pursuant to the filing of the information, the Informant submitted certain additional documents to substantiate its allegations against OP-2. One of the evidence is a letter dated 16.12.2013 issued by OP-2 to the Informant. The Informant has alleged that *vide* the said letter, OP-2 denied supplies and imposed discriminatory conditions on it. The Commission finds it imperative to reproduce the screen-shot of the said letter as under:

Abbott India Limited
B-2, Kanchan Pharma House,
Near Ghanshyam Estate,
National Highway No. 8
Aslali - Ahmedabad - 382 427

Registered Office:
3-4, Corporate Park,
Sion Trombay Road,
Mumbai 400 071. India

Tel : (02718) 261 470 / 1270 / 1370
Fax : (02718) 262 070
E-mail : webmaster@abbott.co.in
Site : www.abbott.co.in

(22)

Annexure-22.

Date: 16 Dec. 2013

To
M/s Reliance Agency
8, Sakar Complex,
Sanstha Vasahat,
Raopura, Vadodara – 1.

Dear Sir,

As you must be aware, you are a registered stockist for our Abbott products and we supply our products to you from time to time. We are now in receipt of you order, along with the demand draft for products of Novo Nordisk India Private Limited ('**Novo**'). We wish to inform you that as we are mere distributors of Novo products, as per our practice, we forwarded your purchase request to them for necessary advice. Novo has instructed us as follows:

In order to ensure quality, adequate and efficient supply of Novo products in the region, Novo has a network of stockists who are currently stocking Novo products. Novo products are sufficientiy available in the market and to their knowledge there is no shortage of any of Novo products. Given below is the list of some of the stockists whom you may directly approach for sourcing your requirement on the prevailing commercial terms;

(1) DINYAR MEDICAL STORES

(2) R K MEDICINES

(3) ALLIED TRADE CORPORATION

(4) JAIN PHARMACUETICALES

(5) ASHOK PHARMA AGENCY

(6) VISHAL MEDICAL

However, if you still wish to purchase the Novo products directly from us, following process will be applicable;

(1) A separate order comprising of only those Novo products which are manufactured, marketed or otherwise distributed by Novo should be sent. Kindly note, that the purchase order should expressly confirm that your drug licenses is valid and not revoked or expired;

(2) Upon receipt of the order, an invoice value for the quantity of Novo products ordered will be provided (subject to availability at that point in time at the warehouse);

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Abbott
A Promise for Life

(3) While we have already received your demand draft for Rs. 1,50,000 (One Lakh Fifty Thousand only), upon receipt of the invoice, you will be required to provide a demand draft for the value of the invoice along with 25% of the invoice value towards the security deposit;

(4) Novo products will be made available for pick up within seven (7) days of receipt of valid demand draft of appropriate value, subject to availability of stocks at the warehouse and realisation of the demand draft;

The following terms shall apply to any purchase order you may place with us:

(a) You will be notified of delivery date and you should arrange your own transportation (which is suitable for the purpose of transporting the Novo products being supplied) and insurance for collecting the Novo products from the warehouse. If you fail to take the delivery of the Novo products on the appointed date, it is presumed that the order is withdrawn and we will refund the amount paid with no interest within two weeks, subject to deduction of 5% of the invoice value towards handling charges;

(b) Novo products once sold shall not be taken back under any circumstance as it is completely your decision to purchase Novo products based on your own estimate of the demand;

(c) The normal return of expired Novo products from the market does not exceed about 2.5% of the average monthly sales of the Novo products. Production planning of Novo products is made by Novo inter alia keeping this market trend in mind. Since, there is no shortage of Novo products in the market, if there is any increase in market returns beyond 2.5% of the monthly sales from the existing buyers put together in a month, it will be presumed that such additional returns are on account of the supplies made by you to the retailers who were already having the inventory of Novo products. We will accordingly adjust the excess return claims from your security deposit amount and will refund the balance amount at the end of two years from the date of receipt of the demand draft. We shall provide you with a certificate of claim adjustment issued by a chartered accountant appointed by us and his decision will be final and binding on both of us. The balance amount, which becomes refundable to you after two years, will carry a simple interest rate of 07.5% per annum from the date on which it becomes refundable until refunded to you;

(d) All other terms and conditions contained in the invoice shall apply to the sale. In the event of any conflict between this letter and the invoice, terms of this letter will prevail over the terms of the invoice;

(e) Novo products are for sale in India only and not for export purposes;

(f) Supply of Novo products to you does not authorise you to represent in any manner to any third party as representative or agent of Novo or Abbott;

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(g) You will be solely and exclusively responsible for ensuring compliance with necessary storage requirements of each of the Novo products and all applicable laws and regulations;

(h) Subject to the exclusive jurisdiction of the Courts at Mumbai only.

Also, since you are placing the purchase order for the first time for Novo products, following documents should be submitted along with the Purchase Order:

1. Passport copies of the proprietor or all the partners or directors, as the case may be, and authorised signatories of the firm.
2. If the residential address is outside Mumbai, complete residential address along with local phone numbers.
3. Latest passport size photographs of proprietor or all directors or all partners, as the case may be and authorised signatories.
4. PAN Card Copy of the firm.
5. VAT and Sales Tax Registration Copy.
6. PAN Card copy of the proprietor or all the individual partners, as the case may be.
7. Certification of signature by a reputed bank where the firm has an account, certifying the signatures of all authorised signatories.
8. Authorisation Letter for the authorised signatory, signed by all the partners.
9. Partnership Deed duly notarised.
10. Copy of latest valid Drug License.

We thank you for evincing interest in Novo products and look forward to hearing from you.

Thanking you,
For **Abbott India Limited**

Authorized Signatory

103. A plain reading of the aforesaid letter shows that the appointment of stockists of Novo Nordisk is done by Novo Nordisk itself and OP-2 was acting on the instructions received from Novo Nordisk. Further, OP-2 has simply advised the Informant to procure goods from the existing stockists of Novo Nordisk or in case it wishes to procure goods directly from OP-2, to abide by certain conditions would be applicable. These conditions the Informant found discriminatory. First, the Informant was required to pick up the goods from OP 2's warehouse; and second, the goods once sold would not be returnable. The DG opined that such conditions were reasonable as the Informant was not one of the appointed distributors or wholesalers of OP-2 and therefore, it cannot anticipate similar treatment as offered to such distributors/ wholesalers. The DG further observed that the Informant was informed in advance that Novo Nordisk goods are sufficiently available in the market through its existing stockists and the Informant could procure the same at its own risk. Therefore, the Informant, who voluntarily chose to deal in Novo Nordisk products, should have been ready to accept such condition. The Commission agrees with the DG's findings and does not find the conditions unreasonable or discriminatory as such and accordingly holds that the

evidence on record does not substantiate the allegations of the Informant against OP-2.

104. Before parting with this issue, the Commission notes that OP-1 has objected that the DG has not investigated Novo Nordisk despite finding that OP-2 was acting on the instructions of Novo Nordisk. In this regard, the Commission is of the view that, as a matter of fact, the Informant was not an appointed stockist of Novo Nordisk. Thus, instructions on the part of Novo Nordisk to its distributor, *i.e.* OP-2, to intimate the Informant to either purchase the goods from its existing stockists or to procure the goods from OP-2/ Novo by accepting certain conditions does not seem to suggest any ill-motive. Further, given the fact that the DG has not investigated Novo Nordisk during investigation and the Commission has not provided it an opportunity to present its submissions to the Informant's objections during the hearing in the matter, it will be against the principles of natural justice to deliberate any further on this issue.

Issue 3: Whether the allegations against OP-1 and OP-5 regarding blocking the entry of new drugs in the market, by insisting on payment of PIS (Product Information Service) charges are substantiated by facts and evidences?

105. With regard to this issue, the DG has relied upon the audited annual accounts of OP-6 which showed that substantial amounts had been received by it during 2011-12, 2012-13 and 2013-14 under the head '*Advertisement Income*'. Before the DG, OP-5 admitted that these amounts were received from various pharmaceutical companies for publication of their products' advertisements in OP-6's magazine. The DG further sought responses from the pharmaceutical companies and recorded the statements of officials of some pharmaceutical companies. Based on their statements, the DG concluded that OP-6 was indulging in the practice of mandating a PIS charge prior to the launch of new drugs in Gujarat and as such the conduct of OP-6 was limiting and controlling the supply of goods in contravention of Section 3 (3) (b) of the Act.

106. Dissatisfied with the findings of the DG, OP-5 and OP-6 sought cross-examination of the officials of pharmaceutical companies, and also the Informant, whose statements were relied upon by the DG while reaching its findings, which was allowed by the Commission. Though the DG opined that the cross-examination did not change the findings of the investigation, it is the claim of OP-5 and OP-6 that the cross-examination revealed that the publication was not mandatory in nature and the same was opted by the pharmaceutical companies to publicise their products in a cost effective manner.

107. The Commission notes that there is no doubt that OP-6 was accepting payments (PIS) for publication of product advertisements from the pharmaceuticals companies, as the said fact has been admitted by OP-5 in his deposition. The only question that requires determination is that whether the said payment was mandatory in nature or not. If the said practice of seeking a PIS charge is found to be mandatory, it serves as a channel/ way to limit and control the market and OP-6 would be liable under the provisions of Section 3 (3) (b) read with Section 3 (1) of the Act for mandating a practice resulting in limiting or controlling the supply of products (medicines) in the market.

108. To enquire about the nature of the said practice *i.e.* whether it was mandatory or otherwise, the DG recorded the statements of the officials of the pharmaceutical companies. The Commission observes that most of the statements given by the pharmaceutical companies or their officials reveal that there was a 'standard practice' of paying a particular amount to OP-6 for the publication of newly introduced products (medicines) in Gujarat, which was followed by all pharmaceutical drug manufacturing companies. The relevant excerpts of the said statements, along with their cross-examination are elucidated in the ensuing paragraphs:

Shri P.K. Pathak, CEO and Managing Director of Delcure Lifesciences Ltd.

109. During his statement, Shri P.K. Pathak was asked whether approval of OP-1 or OP-6 is mandatory, prior to the launch of new products. The relevant excerpts of his statement are reproduced below:

> *"**Q7.** Is it necessary for the company to take the approval of Federation of Gujarat State Chemist & Druggists Associations (FGSCDA) and/or Chemist & Druggist Association of Baroda (CDAB) prior to launch of new products and what are the implications if, such approval and payment as per the prescribed fee of FGSCDA and/or CDAB is/are not made?*
> ***Ans.** There is practice that prior to launching new products, information about the same in the form of advertisement is to be provided to FGSCDA and it has never been the case that new product have been launched without advertising in their Monthly Magazine. Since, we have always availed the advertising services being rendered by FGSCDA. It is not possible to foresee as to what would be the implications if, payment for advertisement is not made."*

110. During his cross-examination, the learned counsel for OP-5 and OP-6 asked him questions regarding the procedure followed by the DG while recording his initial statement, the veracity of the statement so recorded and the experience Shri P.K. Pathak has in the pharma industry to answer the questions pertaining to mandatory nature of the PIS charge. Shri P.K. Pathak categorically explained that though the company, Delcure Lifesciences Ltd. was incorporated in Gujarat in 2013, he has been in pharma business for almost 30 years. Shri P.K. Pathak also affirmed that his statement before the DG was truly recorded and signed by him after reading.

111. A plain reading of his statement and cross-examination statement confirms that publication of new products, prior to their launch, are published in OP-6's magazine as a matter of industry practice. Even on being repeatedly asked during cross-examination whether the publication helps the pharmaceutical companies in creating awareness of the newly launched products, Shri P.K. Pathak stated that he was unaware of the effectiveness of such practice. Shri P.K. Pathak also

confirmed that in none of the instances has his company launched any products without publication in the OP's magazine. Shri P.K. Pathak was also asked various questions based on his earlier statement before the DG dated 21.07.2015 to which he gave consistent responses.

112. When the learned counsel for OP-5 and OP-6 asked Shri P.K. Pathak if by 'practice' he meant the obligation which the company has to follow to meet DPCO requirement, he responded that DPCO was only a part of the above practice and this was how the industry functioned. Shri P.K. Pathak also stated that provision of information was mandatory as per DPCO, even though DPCO did not state that it has to be done only in the said manner. The learned counsel further enquired if in case of non-publication in the magazine the company faced any kind of resistance from OP-6, to which Shri P.K. Pathak stated that he has already admitted that it has never been the case that the company had not published information in the magazine.

113. From the statement of Shri P.K. Pathak and his cross-examination, it can be seen that though the learned counsel for OP-5 and OP-6 tried to establish that publication of product advertisements by the company in OP-6's magazine was only in the interest of the company, his replies did not corroborate such contention. It is apparent that the learned counsel for OP-5 and OP-6 asked many leading questions and also asked questions having broad connotations. In this regard, the Commission agrees with the observations made by the DG from Shri P.K. Pathak's reply that launch of products was the company's individual right and there was no role of responsibility for OP-6 cannot be construed as absolving OP-6 since launch of a product is a wide term and cannot be limited to its marketing alone. Further, the very fact that a person having considerable years of experience categorically stated that prior to launch of new products, information about the same in the form of advertisement is to be provided to OP-6 and it has never been the case that new products has been launched without advertising in OP-6's monthly magazine, shows that such a requirement was indeed mandatory in nature.

114. In view of the foregoing, the Commission concludes that the replies of Shri P.K. Pathak were consistent during statement before the DG and during cross-examination, and as such no new facts have emerged during his cross-examination that could affect/ negate the findings of the DG, as alleged by OP-5 and OP-6.

Shri Prakash D. Naringrekar, CFO and Company Secretary of Themis Medicare Ltd.

115. The DG also summoned Shri Prakash D. Naringrekar, CFO and Company Secretary, Themis Medicare Ltd. to inquire about the nature of payments made by pharmaceutical companies to OP-1/OP-6 prior to launch of new drugs in Gujarat. The following portions of his statement are relevant for deciding the issue under consideration:

> *"**Q7.** Is it necessary for the company to take the approval of Federation of Gujarat State Chemist & Druggists Association (FGSCDA) and/or Chemist & Druggist Association of Baroda (CDAB) prior to launch of new products and what are the implications if, such approval and payment as per the prescribed fee of FGSCDA and/or CDAB is/are not made?*
> ***Ans.*** *Till about one and a half years ago, our company as per industry practice was paying the prescribed amount for advertisement to FGSCDA which may have served the purpose of deemed consent of FGSCDA for launching of any new products in Gujarat. Our company has however discontinued making payments to the said federation since last about one and half years. Without availing the above services of FGSCDA being rendered in the form of advertisements, it was difficult for us to launch and effectively market new products in the state of Gujarat. After the various orders passed by CCI, we have stopped paying for advertisements to the FGSCDA.*
> ***Q9.** Is it correct to state that without payment towards product information dissemination services to FGSCDA, pharmaceutical companies like yours cannot launch new products in the state of Gujarat?*

Ans. *I am not aware about other companies; however, as far as Themis is concerned we in the past faced resistance from FGSCDA and its members in launching and distributing a new product, if our company did not avail their advertisement services. It however served some purpose of spreading information about our new products to the stockist and chemists.*

Q10. *Considering that only product name, price and tax details etc. are being published by FGSCDA in its bulletins, please explain how is your company complying with the requirements of DPCO which besides other details, also requires composition of the product to be disclosed in Form V and how in the absence of such important information, it can be claimed that product information is being disseminated amongst Stockists and retailers through FGSCDA.*

Ans. *As I already explained above, we were following the industry practice solely for the purpose of meeting the requirements of FGSCDA.*

Q11. *Please explain why in the absence of composition of products being published by FGSCDA in its bulletins, it should not be presumed that payments made by the company to FGSCDA were a necessary requirement prior to launching of new products in Gujarat.*

Ans. *Yes it was a necessary requirement prior to launching of new products in Gujarat."*

116. During Shri Naringrekar's cross-examination, the learned counsel for OP-5 and OP-6 asked about the process adopted by the DG, whether his statement was properly recorded or not and went on to enquire about his company, the process of product launch and the requirement of NOC prior to such launch *etc.* Shri Prakash D. Naringrekar told that his company Themis Medicare Ltd. was incorporated in Gujarat in 1969 and that he has been associated with the company since 07.11.1994. He submitted that he knew fairly well about the process adopted by the company for launch of a new product, and initially the company had faced some problem in this regard as well. Shri Naringrekar further stated that as the company manufactured prescription drugs, advertisement for the same was not permissible under law, and the company's medical representatives met doctors, stockists and retailers to make the product known in the market.

117. The Commission finds that the submissions/ objections made by OP-5 and OP-6 to the records of cross-examination of Shri Prakash D. Naringrekar are divorced from the actual answers given by him. Some of the questions raised and answers given by him during his cross-examination in this regard are reproduced below:

> *"**Q15.** Do you face any difficulty in launching your product in the market?*
> ***Ans.** At present no. But earlier yes.*
> ***Q16.** What is the mode of advertisement adopted by your company for selling its products?*
> ***Ans.** Our products are prescription products and advertisement are not allowed under the law.*
> ***Q18.** When do you start sale of your product in the markets, just after manufacturing or after sometime? Do you require to go through some process before bringing the product in the market?*
> ***Ans.** After we manufacture the product, the same is dispatched to Themis Distributors for further distribution to our stockists. Before that we are required to take a NOC from the Federation of Chemists and Druggists Association of Gujarat.*
> ***Q19.** Do you have any document to substantiate your above reply?*
> ***Ans.** Yes we pay fee by demand draft to the Federation along with product information as per their format. They call it advertisement.*
> ***Q20.** Do you have anything in writing from the Federation mentioning NOC?*
> ***Ans.** There is nothing is writing like NOC, but this is an industry practice of being imposed on the manufactures.*
> ***Q28.** Is it correct that now you are not getting your product information published in Chemist News?*
> ***Ans.** Now we are not paying any NOC or advertisement charges to the Federation.*
> ***Q31.** I say that even when you have not got your product published in Chemist News you have not got any resistance from the Federation?*
> ***Ans.** Consequent to passing certain orders by CCI and as a result of IDMA and other manufacturers associations discontinuing with their earlier agreements with Chemists Associations/ Federation we are not paying any advertisement or NOC charges and are now not facing any resistance from Federation.*

Q38. *In your earlier statement before CCI you have stated against Q.No.11 that, 'yes it was a necessary requirement'. Can you please tell us what the necessary requirement you were referring to in your answer? Is it the payment for the advertisement or providing the advertisement itself was necessary?*

Ans. *Payment was necessary for obtaining the NOC by whatever term they may use for it like advertisement. May be the advertisement might have been seen by some stockist and retailers and they may have become aware of the product.*

Q40. *Is launching of the product solely the company's individual jurisdiction?*

Ans. *Launching of a product commences from conceptualizing and manufacturing the product which thereafter is brought to the market for which earlier we were required to take permission from the Federation to market the product effectively through stockists and retailers."*

118. From Shri Prakash D. Naringrekar's statement, it is clear that before dispatch of newly launched products to the distributors, the company is required to take NOC from OP-6. Despite OP-5 and OP-6 repeatedly questioning about the way of advertisement of the company's products, Shri Prakash D. Naringrekar confirmed that the products of Themis Medicure Ltd. are prescription drugs which cannot be legally advertised. He also stated that OP-6 uses the term 'advertisement' for the NOC, which is not in writing, for launching new drugs in Gujarat. The learned counsel for OP-5 and OP-6 specifically questioned whether by 'industry practice', Shri Naringrekar meant to state that pharmaceutical industry asked for publication of the products in magazine, to which Shri Naringrekar stated that pharmaceutical industry consisted of manufacturers, wholesalers, stockists, Federations/ Associations *etc*. and manufacturers did not ask for publication of the advertisements.

119. The Commission notes that on being enquired about whether they are currently paying for publication of product information, Shri Prakash D. Naringrekar stated that the company was 'now' not paying any NOC or advertisement charges to the Federation. However, there is no clear indication as to what he meant by the term 'now'. In this regard, the Commission finds it imperative to point out that during

his examination-in-chief, he mentioned that '*[t]ill about one and a half years ago, our company as per the industry practice was paying the prescribed amount for advertisement to FGSCDA which may have served the purpose of deemed consent of FGSCDA for launching of any new products in Gujarat*.' His statement was recorded on 16.07.2015, which means that approximately till January 2014, the company was paying PIS charge to OP-6 prior to launch of new products in Gujarat.

120. The Commission further notes that during cross-examination, the learned counsel for OP-5 and OP-6 tried to establish that publication was done to ensure DPCO compliance. However, Shri Prakash D. Naringrekar has clarified that DPCO requirements were fulfilled by filling the prescribed Form-V with NPPA. As such, his cross-examination rather confirms the statement given by him initially and the claim of OP-5/ OP-6 that the DG has incorrectly interpreted his statements by ignoring the material facts that emerged from his cross examination, with a view to justify the findings given in the investigation report dated 30.09.2015, is found to be without any merit.

121. It is further relevant to point out that Shri Prakash D. Naringrekar, during his examination-in-chief, stated that the payment was necessary, though it may have '*served some purpose of spreading information about our new products to the stockist and chemists*'. Throughout their submissions/ arguments, OP-5 and OP-6 have relied upon similar assertions by the pharmaceutical companies to establish that the publication was beneficial for the pharmaceutical companies. Whether the said publication was beneficial or not is not an issue for determination before the Commission. From competition law perspective, the relevant issue is whether OP-6 has made the said publication (payment of PIS charge) prior to launch of new products by the pharmaceutical companies in the market mandatory or not. The response of Mr. Naringrekar shows that the manufacturers' associations stopped paying for publication after the passing of adverse orders by the Commission with regard to PIS issue. If the same was actually beneficial, it remains unexplainable as to why the pharmaceutical companies stopped paying for such publication in

the recent years. Mr. Naringrekar, in his cross-examination, has clarified that "*[c]onsequent to passing certain orders by CCI and as a result of IDMA and other manufacturers associations discontinuing with their earlier agreements with Chemists Associations/Federation we are not paying any advertisement or NOC charges and are now not facing any resistance from Federation*". This response speaks volume regarding the kind of resistance the companies were facing earlier on account of non-payment of '*advertisement*' or '*NOC charges*'. The fact that manufacturers' associations discontinued with paying '*advertisement*' or '*NOC charges*' rather shows that such payment was indeed mandatory in nature.

Shri Sandeep Nair, General Manager of Arinna Lifesciences Pvt. Ltd.

122. Another witness whose testimony was relied upon by the DG while investigating the present issue was Shri Sandeep Nair, General Manager of Arinna Lifesciences Pvt. Ltd. The relevant excerpts from his statement are reproduced below:

> ***"Q7.*** *Is it necessary for the company to take the approval of Federation of Gujarat State Chemists & Druggists Association (FGSCDA) and/ or Chemists & Druggist Association of Baroda (CDA) prior to launch of new products and what are the implication if, such approval and payment as per the prescribed fee of FGSCDA and/or CDAB is/ are not made?*
> ***Ans.*** *Yes, it is necessary for us to take the NOC of FGSCDA prior to launching any new product in Gujarat. This NOC is deemed to be granted by way of publication of our product information in their magazine 'Chemists News', for this we are required to submit product information and make payments to FGSCDA on their prescribed format titled 'Application for Advertisement'. The prescribed fee per product per strength and per pack size is Rupee 2000/-. If we do not take NOC from FGSCDA, the company cannot launch its new products as stockists will not entertain us for our new products. Copy of the Application for Advertisement duly received by FGSCDA serves the purpose of an NOC granted by FGSCDA.*
> ***Q10.*** *Considering that only products name, price and tax details etc. are being published by FGSCDA in its bulletins, please*

explain how is your company complying with the requirement of DPCO, 2013 which besides other details, also requires composition of the product to be disclosed in Form V and how in the absence of such important information, it can be claimed that product information is being disseminated amongst Stockists and retailers through FGSCDA.

Ans. *We on our part provide product composition details to the FGSCDA for publication. However, as stated above without the NOC of FGSCDA granted in the form of product advertisement in their magazine, we are unable to launch new products."*

123. During Shri Sandeep Nair's cross-examination, the learned counsel for OP-5 and OP-6 asked questions pertaining to the process adopted by the DG, whether the statement of the witness was duly recorded or not, the benefits of publication of products in OP-6's magazine *etc*. The witness submitted that product information in OP-6's magazine ensured that information reached at the retail level in an efficient and effective manner and such publication helped the company to advertise products to chemists and druggists in a short span of time.

124. However, he also confirmed the answers given by him during his examination-in-chief. Shri Sandeep Nair confirmed his reply in the statement before the DG wherein he had stated that it was necessary for the company to take NOC of OP-6 prior to launch of new products in Gujarat, and that the company could not launch its products as the stockists would not deal with the company in the absence of such approval/ NOC. This clearly shows that Shri Sandeep Nair did not redact from or contradict his statement given on 20.07.2015 in so far as NOC, which was nothing but approval subject to payment of PIS charge, that was required to be taken from OP-6.

125. The Commission notes that Shri Sandeep Nair's reply that publication of product information in OP-6's magazine is the most effective and efficient way to reach up to the retail level and is beneficial to the companies does not lead to any conclusion regarding NOC/ permission required to be taken or not from OP-6 before launching of new products in Gujarat. The publication might be serving

some purpose, but, as clarified earlier, mandating a practice which may be found to be beneficial by some/all will not change the character of that practice from 'mandatory' to 'voluntary'. There is a difference between people following a practice because it is beneficial and people following a practice because of its mandatory nature and finding it beneficial also.

126. The Commission further notes that the statement of Shri Sandeep Nair was recorded on 20.07.2015 wherein he was enquired about the requirement of NOC from OP-6 prior to launch of new products in reference to a period when the company had newly entered the market. Thus, his subsequent response during cross examination that the company did not face any resistance from OP-6 even if the company's products were not published in the magazine in reference to the period post-initiation of the investigation, is not enough to substantiate that the company never faced any resistance from OP-6 when it launched its product without getting its information published in the magazine of OP-6.

127. The Commission further notes that the learned counsel for OP-5 and OP-6 had confronted Shri Sandeep Nair with certain invoices/receipts to establish that products had already been supplied by the company to its stockists prior to the payment for advertisement being made, thereby showing that the products could be launched even before the alleged NOC was granted by OP-6. However, in this regard, the DG observed that the aforementioned invoices reflect supply of only 6 of 15 products for which application for advertisement was made by the company. Out of the 6, only one invoice with date mentioned as 12.12.2013 reflecting supply of one of the above-mentioned 6 products is dated prior to the date of application for advertisement (30.12.2013) whereas all other invoices are dated post the application (06.01.2014). Further, the draft enclosed with the application for advertisement was taken on 24.12.2013 itself, which is prior to supply of products invoiced on 06.01.2014. Therefore, the DG concluded that receipt of application for advertisement at its end, acknowledged by OP-6 on 24.01.2014 and payment receipt issued on the said date by OP-6, does not imply that products could have been launched in the market even before the alleged NOC was granted by OP-6.

Based on the facts and material on record, the Commission agrees with the findings of the DG in this regard.

Shri Shankar Subramaniam, GM Distribution of Micro Labs Limited

128. Another witness whose testimony was relied upon by the DG while investigating the present issue was Shri Shankar Subramaniam, GM Distribution of Micro Labs Limited. The questions and answers from his statement, relevant to the issue under examination, are reproduced below:

> **"Q7.** *Is it necessary for the company to take the approval of Federation of Gujarat State Chemist & Druggists Association (FGSCDA) and/or Chemist & Druggist Association of Baroda (CDAB) prior to launch of new products and what are the implications if, such approval and payment as per the prescribed fee of FGSCDA and/or CDAB is/are not made?*
> ***Ans.*** *We require permission from the concerned Government Authorities prior to launch of any product. The FGSCDA requires us to publish information of new products in their monthly newsletter for which the prescribed fee is payable per product. We have paid for the Product information Services (PIC) to FGSCDA till 2013-14, however, we have stopped making payment to FGSCDA, thereafter.*
> ***Q10.*** *Is it correct to state that without payment towards product information dissemination service/ advertisement to FGSCDA, your company cannot launch new product in the state of Gujarat?*
> ***Ans.*** *There was some resistance from trade association like FGSCDA, if requisite charges towards PIS were not paid to them prior to launch of new product. As stated above, we have however, stopped making payments from 2014-15.*
> ***Q11.*** *Considering that only product name, price and tax details etc. are being published by FGSCDA in its bulletins, please explain how is your company complying with the requirements of DPCO, 2013 which besides other details, also requires composition of the product to be disclosed in Form V and how in the absence of such important information, it can be claimed that product information is being disseminated amongst Stockists and retailers through FGSCDA*

Ans. *We are meeting the requirements of DPCO by circulation of Form V, through our distributors and stockists. As far as FGSCDA is concerned the payments were being made to meet their requirements of PIS prior to launch of new products.*

Q14. *Is it thus correct to infer that payments are necessarily required to be made to FGSCDA for the company's new product launches irrespective of their publication or not by FGSCDA in its news bulletins and your company cannot launch it products in Gujarat without the approval of FGSCDA deemed to have been granted through product advertisement services?*

Ans. *Yes, it was a practice of making payments towards PIS prior to launch of any new product by our company."*

129. During his cross-examination, Shri Shankar Subramaniam stated that he was deposing on behalf of Micro Labs Limited, a company which had commenced business about 20 years back and that he had joined the company 8 years back. Shri Shankar Subramaniam stated that his statement dated 21.07.2015 was recorded in English in the form of a general discussion wherein few issues were raised by the officer-in-charge to which he had answered. He did not know whether it was in a question and answer manner and later on a statement was generated and signed by him, but the statement did not import the exact language and the emphasis. He further stated that the discussion that took place covered many points, some of them did not find mention in the statement. However, Shri Shankar Subramanian stated that he had read his statement and signed it after reading.

130. Shri Shankar Subramaniam stated that under the drug rules, a company was not supposed to advertise its products by any channel, but through circulation of product price list, literature to wholesalers and chemists was given and through Form-V price list they were being informed. Shri Shankar Subramaniam also affirmed that the company provided product information in '*Chemist News*' published by the Federation to make the retailer aware of its products. A lot of process both in marketing and sales was required to be completed before the product could actually be sold in the market. Shri Shankar Subramaniam further affirmed that publication in '*Chemist News*' was for the benefit of the company as

its purpose was to make retailers aware of the product and to provide information on product pricing, tax structure and margins.

131. Shri Shankar Subramaniam submitted that invariably publication of products was done except for some products (Specialty Products) which the company did not get published. He also stated that it was not possible for him to give the exact number of products launched by the company in Gujarat since 2013. He further mentioned that the company was not facing any kind of resistance from the Federation for launch of new products in Gujarat or in their sale or distribution.

132. Shri Shankar Subramaniam stated that product registration charges referred to the charges paid to the Federation towards Product Information Services which were Rs. 2000/- per product. He further stated that provision of such information was useful for dissemination of the information into the retail market in an easy and effective manner. On being asked whether payment of PIS charges was compulsory for each and every product launched by the company, Shri Shankar Subramaniam responded that though it could not be called compulsory, this was the practice or custom for last several years.

133. Shri Shankar Subramaniam also stated that products could be launched prior to payment of PIS for publishing product information in '*Chemist News*' and PIS could be paid at a later date. Shri Shankar Subramaniam affirmed that Rs. 2,000/- was a small amount as compared to the benefit the company got by getting the product information circulated in the retail market at large.

134. The Commission has perused the examination-in-chief of Shri Shankar Subramaniam, along with his cross-examination record. It is observed that the reply of Shri Subramaniam that his company had not faced any reluctance/ resistance from OP-6 in the last few years cannot be construed in favour of OP-6 as the company, as per his own admission, had got information of all of its products published in the magazine. The reply of Shri Subramaniam that payment for advertisement being a practice or custom for the past several years does not lead to a conclusion that the payment was voluntary.

Shri Rahul Dokania, Ex RSM of Salud Care (India) Pvt. Ltd.

135. The DG also summoned Shri Rahul Dokania, Ex RSM of Salud Care (India) Pvt. Ltd. to inquire about the nature of payments made by his pharmaceutical companies to OP-1/OP-6 prior to the launch of new drugs in Gujarat. The relevant portions of his statement are reproduced below:

> ***"Q5.*** *As per your letter dated 30.04.2015, it has been informed by you that the amount of Rs. 74000 was remitted to FGSCDA which requires advertisements of newly launched products in their magazine 'Chemists News' before the products are purchased by the stockists of Gujarat. Is it thus correct to state that without availing the advertisement services of FGSCDA it is not possible for your company to launch new products in Gujarat?*
> ***Ans.*** *Yes, it is not possible because stockists do not purchase our products unless payment is made to FGSCDA for its above services of advertisement.*
> ***Q8.*** *Is it correct to state that advertisement of new products in 'Chemist News' serves the purpose of a deemed approval of Federation of Gujarat State Chemist & Druggist Association (FGSCDA) and/or Chemist & Druggists Association of Baroda (CDAB) prior to launch of new products and what are the implications if, such approval and payment as per the prescribed fee of FGSCDA and/or CDAB is/are not made?*
> ***Ans.*** *Yes, the duly acknowledged application form for advertisement on which product information is provided to FGSCDA serves as a deemed approval since without such payment, stockists do not accept the new products of the company for further sale to retailers.*
> ***Q11.*** *Is it thus correct to infer that payments are necessarily required to be made to FGSCDA for the company's new product launches irrespective of non-publication of product composition by FGSCDA in its news bulletins and your company launch its products in Gujarat without the approval of FGSCDA deemed to have been granted through product advertisement services?*
> ***Ans.*** *So far, our experience has been that without making payments for advertisement in the magazine of FGSCDA, Stockists have not agreed to buy our products."*

136. During his cross-examination, Shri Rahul Dokania stated that he was currently not working with Salud Care (India) Pvt. Ltd. ("**Salud India**") and had left the said company in November, 2015. He stated that he was not aware of that company's incorporation and company had commenced business in Gujarat sometime in August, 2013 and he had joined the company in Kolkata in January, 2013. He further stated that he had joined Salud Care India Pvt. Ltd. as its RSM (Regional Sales Manager) and had shifted to Gujarat only in May, 2013. Prior to that, he was working as RSM in Salud India at Kolkata. He further submitted that the answers given by him were based on his knowledge and business practices in West Bengal, and as such, he had no knowledge of the practices prevailing in Gujarat.

137. The DG mentioned that perusal of the statement of Shri Rahul Dokania dated 03.08.2015 revealed that specific questions were raised during his examination-in-chief against which he gave specific answers. Thus, his repeated assertion during his cross-examination that he does not know about Gujarat only indicates that the witness has turned hostile.

138. The Commission is of the view that merely because Shri Rahul Dokania has been stated by the DG to have turned hostile during his cross-examination, his entire testimony before the DG and the answers given by him in his examination-in-chief to the DG cannot be ignored. The Hon'ble Supreme Court has time and again held that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not make him an unreliable witness so as to exclude his evidence from consideration altogether. Evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record. [Reference may be made to *Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389; Rabinder Kumar Dey v. State of Orissa, (1976) 4 SCC 233; Syed Akbar v. State of Karnataka, (1980) 1 SCC 30l; Khujji @ Surendra Tiwari v. State of Madhya Pradesh, (1991) 3 SCC 627; State of U.P. v. Ramesh Mishra and Another, (1996) 10 SCC 360; Koli Lakhman Bhai Chanabhai v. State of Gujarat, (1999) 8*

SCC 624; K. Anbazhagan v. Superintendent of Police and Another, (2004) 3 SCC 788 and *Vinod Kumar v. State of Punjab (2015) 3 SCC 220*]

139. The Commission, in view of the above-stated law well-settled by the Hon'ble Supreme Court, holds the opinion that in view of the categorical answers given by Shri Rahul Dokania to the DG in his examination-in-chief as regards the mandatory nature of charges to be paid for advertising new products in the State of Gujarat, his entire statement in examination-in-chief to the DG cannot be discarded merely because he retracted from his statement in his cross-examination, and his original statement can be relied upon by the Commission as it is supported by other supporting evidence on record.

140. The Commission notes that apart from the aforesaid statements, the DG has also relied upon certain emails to establish the practice of PIS charge as perpetrated by OP-6 in the State of Gujarat. The email dated 23.10.2013 sent by an official of Cipla Ltd., to OP-5 (jppatel_fgsdo@yahoo.co.in) is reproduced in verbatim below:

> *"Dear Pooja Madam,*
>
> *As discussed pls give me NOC status for below mentioned products whether it is clear or not,*
>
> *1) Urifast 50dt*
> *2) Nadibact Plus Cream*
> *3) Vitomin 3 60 K tab*
> *4) Setracide b cream*
> *5) Ibugesic plus suspension*
> *Hope for your favorable reply.*
>
> *Regards,*
> *Falgun*
> *Cipla ltd.*
> *Aslali Ahmedabad"*

141. Further, another email dated also 17.04.2014 sent by Jignesh Thakkar (jignesh24.cadila@gmail.com) to OP-5 (jppatel_fgsdo@yahoo.co.in) and OP-6 (fgscda.main@yahoo.com) under the subject heading '[a]dvertisement approval

for Cadila Pharma-Nibbana div' is self-explanatory. The contents of the email are reproduced below:

> *"Respected Sir,*
>
> *Here with please find form V clearing margins for stockist and chemist which is 10 and 20 per cent respectively. All are non DPCO products. Please issue the NOC for same. Hoping your favorable response,*
>
> *Regards,*
> *Jignesh Thakkar,*
> *ABM, Ahmedabad,*
> *Cadila Pharma (Nibbana div)"*

142. Further, there are other emails also *e.g.* email dated 05.05.2014, 08.05.2014, 30.10.2014 and 31.10.2014, exchanged between officials of Cadila Pharmaceuticals Ltd. under the Subject Headings 'FW : CALCIROL-CT Form V & Calculation for PTS, PTR for NOC and FW' and 'CALCIROL-CT Form V & Calculation for PTS, PTR for NOC'. The fact that these were sent under the stated subject headings seeking NOC shows that NOC was a requirement.

143. The above mails were followed by a mail dated 31.10.2014 wherein an official of Cadila Pharmaceuticals Ltd. was requesting one of the functionaries of OP-6, Ms Bintu Madam, for NOC. This email was responded to by one Ms. Pooja, from the email ID of OP-5 carrying the email signature of OP-5, stating that the demand draft sent for NOC was expired.

144. Subsequent to the above email, there are certain trailing mails, one of them being sent by Mr. Pramod Kumar Rajput, Cadila Pharmaceuticals Ltd. dated 06.11.2014 to OP-5 under the subject heading 'NOC Cheque for Gujarat', which is relevant with regard to the issue under consideration. The same is reproduced below:

> *"Dear Jassu Bhai,*
>
> *JSK!*

It's as per our visit and meeting with you at your goods office along with Mr. Kaushik das Gupta related to Old Cadila Matter and also giving your approval of new product launch.

Since you have yourself given your valuable clearance and NOC to bill products on 30th October itself, still C&S is sending mail to CD finance that he has not received it from you office.
Where you had clear cut directed to Nilesh Bhai, that if still he feel any problem, he can call you and confirm that it's being approved by you.

We have also conveyed them that the signing authority was not available at your office, one he will come it will be submitted an same message was conveyed by Bintu mam, hence personally fell that there is no ambiguity on your words for NOC and all must respect it.

If still C&S feel any doubt, through this mail, I am requesting him to confirm from Bintu Madam, if he doesn't trust then from You.. that all new products got clearance of NOC from your office for billing on 31st October.

This is all related to this.

With best regards,
PKR"

145. The aforesaid emails clearly show that PIS charge was mandatory in the State of Gujarat and it was not possible for the pharmaceutical companies to launch their products in the market without paying for the publication of their products to OP-6. The statements of the officials of pharmaceutical companies re-confirm that such practice was mandated by OP-5/OP-6. OP-5 and OP-6 have tried to establish that the publication was beneficial for the pharmaceutical companies. It has already been clarified above that the Commission is examining as to whether OP-6 was mandating publication (payment of PIS charge) prior to the launch of new products by pharmaceutical companies. If OP-6 has made it mandatory, the fact that the said mandated practice also had beneficial effects, will not change the anti-competitive nature of such practice. OP-6, as an association, cannot self-appoint itself as the guardian of the pharmaceutical companies, to decide what is beneficial for them. If the publication is so beneficial, the same should be left to the discretion of the pharmaceutical companies to decide whether they wish to

advertise their products or not. Further, the fact that many pharmaceutical companies stopped paying for publication (PIS charge) after passing of adverse orders by the Commission with regard to the PIS issue, negates OP-6's assertion regarding its beneficial nature.

146. In view of the aforesaid observations, the Commission concludes that OP-6 was carrying on the practice of making introduction of new products in the market subject to payment of PIS charge and its approval, thereby limiting and controlling supplies in the market, in contravention of Section 3 (3) (b) read with Section 3 (1) of the Act. It may be noted that though it has been stated hereinabove that the statement of Shri Rahul Dokania, Ex RSM of Salud Care (India) Pvt. Ltd. cannot be disbelieved merely because of the statement made by him during his cross-examination, yet even if the same is excluded from consideration, conclusion of the Commission with regard to the contravention by OP-6 would remain the same.

Issue 4: In the event of investigation concluding contravention of the provisions of the Competition Act, 2002, by any of the OPs, identification of persons who are complicit in the said contravention.

147. Having found OP-1 and OP-6 to be responsible for the contravention of the provisions of Section 3 of the Act, the next issue is to determine whether the office bearers of these associations, as identified by the DG, are liable under the provisions of Section 48 of the Act.

148. Section 48 (1) of the Act provides that where a person committing contravention of any of the provisions of this Act is a company (including a firm or an association of individuals), every person who, at the time such contravention was committed, was in charge of, and was responsible for the conduct of the business of the company/firm/association, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. Further, the *proviso* to Section 48 (1) of the Act entails that such person shall not be liable to any punishment if he proves that the contravention was committed without his

knowledge or that he had exercised all due diligence to prevent the occurrence of such contravention. Thus, Section 48 (1) of the Act is triggered when the party in contravention is a company (including a firm or an association of individuals) and a person/individual officer/ office bearer is found to be in-charge of, and responsible for the conduct of the business of the contravening company/ firm/ association at the relevant time. Once Section 48 (1) of the Act is triggered, it is for such person/officer/office bearer to then prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention, in order to be absolved of liability under Section 48 (1) of the Act.

149. Section 48 (2) of the Act, on the other hand, attributes liability on the basis of *de-facto* involvement of an individual. It states that "*[n]otwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly*". In light of the provisions contained in Section 48 (1) and 48 (2) of the Act, the role of the office bearers of OP-6 and OP-1 is analysed in the following paragraphs to evaluate whether the evidence on record substantiates their liability for the anti-competitive conduct of their respective associations.

Shri Jashvant Patel (OP-5), State President of OP-6

150. Shri Jashvant Patel held the position of the State President of OP-6 during the period of contravention. His duties involved being the overall in-charge of the affairs of OP-6, and presiding over its meetings in addition to other duties mentioned in the constitution. With regard to the issue of NOC for appointment of stockists, OP-5 has accepted the telephonic conversation relied upon by the

Commission to find contravention against OP-6. Further, with regard to the issue of PIS charges, the DG had discovered many emails from the email account of OP-5, wherein NOC/ approval of products to be launched in the market were discussed. Those emails were duly accepted by OP-5. Thus, based on these evidences, it can be safely concluded that besides his liability under Section 48 (1) of the Act for the position held by him, he is also liable under Section 48 (2) of the Act for his active involvement in the contravention found against OP-6. Thus, the Commission holds him liable under Section 48 (1) as well as Section 48 (2) of the Act.

Shri V.T. Shah (OP-3), President, OP-1

151. Shri V.T. Shah held the position of the President of OP-1 during the period of contravention, as per his position he was the overall in-charge of the affairs of OP-1. Being the President, he was in-charge of and responsible for the conduct of business of OP-1. Moreover, in his capacity as the then President of OP-1, he had the responsibility of resolving disputes *inter se* between the members of OP-1and those between the members and the pharmaceutical companies. Therefore, he ought to have known the decisions taken by OP-1 during his tenure and it is inconceivable that any anti-competitive practices could have been carried on without his knowledge. Further, OP-3 has accepted and confirmed the telephonic conversation and its transcript held between OP-3 and Shri Nayan Raval, ex-Partner of the Informant firm. Such evidence clearly shows his direct involvement and connivance in the infringement by OP-1. Besides bald denials, OP-3 has not been able to controvert the evidence confronted by the DG to him. Thus, his liability is made out on the basis of the position held by him as well as his active involvement in perpetrating the NOC practice, under Section 48 (1) and Section 48 (2) of the Act.

Shri Alpesh Z. Patel (OP-4), Secretary, OP-1

152. With regard to OP-4, the Commission notes that he held the position of Secretary of OP-1 during the period of contravention. The DG, however, was of the opinion

that evidence on record does not substantiate his liability under Section 48. The Commission also observes that there is nothing on record to suggest his actual or perceived knowledge regarding the anti-competitive activities of OP-1. Therefore, in view of the insufficiency of evidence, he cannot be held liable under Section 48 of the Act.

ORDER

153. In view of the discussions elucidated in the earlier part of this order, the Commission finds that OP-1 and OP-6 have indulged in anti-competitive conduct in violation of the provisions of Section 3 (3) (b) read with Section 3 (1) of the Act. Further, their respective erstwhile Presidents, *namely*, Shri V.T Shah, OP-3 (President, OP-1) and Shri Jashvant Patel, OP-5 (President, OP-6) are found to be liable under Section 48 of the Act for the anti-competitive conduct of their respective associations. OP-1 and OP-6, along with their office bearers, are directed to immediately cease and desist from indulging in the said practices, which have been found to be anti-competitive in terms of the provisions of Section 3 of the Act as mentioned in the preceding paras of the order.

154. Section 27 of the Act also empowers the Commission to impose monetary penalties on the erring parties. The Commission notes that despite several orders of the Commission proscribing the anti-competitive practices of state and regional chemists and druggists associations in, *inter alia*, mandating NOC for appointment of stockists and demanding PIS charges prior to launching of new drugs in the market, these associations are continuing to indulge in such practices. It is necessary that the conduct of these associations is commensurately penalised to discipline not only the erring parties for the said contravention, but also create deterrence to prevent similar contraventions of the Act by others. Subsequently, the Commission hence, deems it appropriate to impose penalty on OP-1 and OP-6, at the rate of 10% of their respective incomes based on their Income and Expenditure account for the financial years 2011-12, 2012-13 and 2013-14, as follows:

OP-1 and OP-6

Year	Income of OP-1 (in Rupees)	Income of OP-6 (in Rupees)
2011-12	243275	12099808
2012-13	2207056	11605334
2013-14	807317	9641346
Total	3257648	33346488
Average	1085883	11115496
10% of Average Income	108588	1111549

155. Resultantly, a penalty of Rs. 1,08,588/- and Rs. 11,11,549/-, calculated at the rate of 10% of the average income of OP-1 and OP-6, respectively, is hereby imposed upon them.

156. Further, in view of the finding of the Commission with regard to OP-3 and OP-5, a penalty calculated @10% is hereby imposed on their respective incomes for the financial years 2011-12, 2012-13 and 2013-14.

OP-3 and OP-5

Year	Income of OP-3 (in Rupees)	Income of OP-5 (in Rupees)
2011-12	167204	356000
2012-13	650874	649000
2013-14	203377	859327
Total	1021455	1864327
Average	340485	621442
10% of Average Income	34048	62144

157. Resultantly, a penalty of Rs. 34,048/- and Rs. 62,144/-, calculated at the rate of 10% of the average income of Shri V.T. Shah and Shri Jashvant Patel, respectively, is hereby imposed upon them.

158. The aforesaid parties are directed to deposit the amount of penalty within 60 days of the receipt of this order.

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

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

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

New Delhi
Date: 04/01/2018