COMPETITION COMMISSION OF INDIA

Case No. C-175/09/DGIR/27/28-MRTP

In Re:

The Belgaum District Chemists and Druggists Association	**Informant**

And

Abbott India Ltd.	**Opposite Party No. 1**
Karnataka Chemists and Druggists Association	**Opposite Party No. 2**
Geno Pharmaceuticals	**Opposite Party No. 3**
All India Organisation of Chemists And Druggists	**Opposite Party No. 4**

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. S. L. Bunker
Member

Mr. U. C. Nahta
Member

Mr. Justice G. P. Mittal
Member

Appearances during the final hearing on 19th April 2016:

(i) Mr. Aman Raj Gandhi, Advocate for OP-1.

(ii) Dr. Vijay Kumar Aggarwal, Advocate with Mr. Ankush Walia and Mr. Param Tandoon, Advocates for OP-4.

Order under Section 27 of the Competition Act, 2002

1. The present matter was transferred to the Competition Commission of India (hereinafter referred to as the "**Commission**") by the erstwhile Director General of Investigation and Registration, Monopolies and Restrictive Trade Practices Commission (hereinafter referred to as "**DGIR**") under Section 66(6) of the Competition Act, 2002 (hereinafter referred to as the "**Act**").

Facts

2. The Belgaum District Chemists and Druggists Association (hereinafter referred to as "**BCDA**" or the "**Informant**") filed a complaint before erstwhile DGIR on 19th August, 2009, alleging that Abbott India Ltd. (hereinafter referred to as "**OP-1**") and Geno Pharmaceuticals (hereinafter referred to as "**OP-3**") stopped supply of essential medicines to some of its members on the ground that they have to first obtain '*No Objection Certificate*' (hereinafter referred to as "**NOC**") from All India Organisation of Chemists and Druggists (hereinafter referred to as "**AIOCD**" or "**OP-4**") or from Karnataka Chemists and Druggists Association (hereinafter referred to as "**KCDA**" or "**OP-2**"); and due to such conduct, supplies of essential medicines have been restricted. In support of its contention, the Informant had also filed copies of its letters dated 16th June 2009 and 25th July 2009 addressed to **OP-3** and **OP-1**, respectively.

3. Consequent upon the repeal of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as '**MRTP Act**'), the erstwhile DGIR transferred the said complaint to the Commission under Section 66(6) of the Act with the observation that at that stage, the alleged practice appeared to be a restrictive trade practice of refusal to deal.

Directions to the Director General:

4. The Commission, after considering the materials available on record, *vide* its order dated 29th June, 2010, passed under Section 26(1) of the Act, directed the Director General (hereinafter referred to as the "**DG**") to cause an investigation to be made into the matter.

Investigation by the DG:

5. After a detailed investigation into the allegations and replies provided by the parties, DG submitted the investigation report on 8th November, 2010. The DG found that KCDA and AIOCD have indulged in actions and practices that are anti-competitive in nature. The DG concluded that Opposite Parties through their guidelines, rules and regulations coupled with their anti-competitive conduct contributed to appreciable adverse effect in the market for pharmaceutical products, in contravention of the provisions of Section 3(3)(a) and Section 3(3)(b) of the Act. The findings of the DG, in brief, are as follows:

5.1. The investigation revealed that one M/s Choudhary Medical Agency wrote a letter dated 10th May, 2009 to the Informant informing that OP-1 has refused supplies to it stating that there have been telephonic orders from KCDA to not supply medicines till NOC from KCDA is obtained. A similar letter dated 22nd September, 2009 was written by one M/s Basaweshwar Pharma to the Informant, with copy to KCDA, stating

that Elder Pharma Limited stopped billing it for want of NOC from KCDA. Further, the Secretary of the Informant submitted copies of two letters to the DG regarding appointment of M/s Patil Pharmaceuticals and General Merchants as the stockist of Eli Lilly and Company (India) Private Limited (hereinafter referred to as "Eli Lilly"). Eli Lilly, through its letter dated 15th July, 2010, *inter alia*, informed that it is pleased to offer stockistship to M/s Patil Pharmaceuticals and General Merchants for Belgaum territory under the condition that it will procure and provide NOC from its Local Association and KCDA. KCDA, through its letter dated 20th July, 2010, *inter alia,* suggested Eli Lilly to appoint M/s Patil Pharmaceuticals and General Merchants as its stockist and inform KCDA after appointment, so as to communicate to the members of KCDA about the new stockistship/ distribution point.

5.2. The investigation further revealed that there has been an understanding between AIOCD, Indian Drug Manufacturers' Association (hereinafter referred to as "**IDMA**") and Organisation of Pharmaceutical Producers of India (hereinafter referred to as "**OPPI**"), through Memorandum of Understandings and Agreements (hereinafter referred to as "**MoUs**") amongst them, which shows that: (a) the appointment of stockists by pharmaceutical companies is controlled by Associations under the overall control of AIOCD; (b) trade margins of stockists and retailers have been fixed; and (c) a system of product information service has been introduced for which a charge is collected by the Associations from the pharmaceutical companies who want to introduce new medicines in any territory. The DG also found that a policy for supply of medicines to hospitals/nursing homes has been evolved whereby there can be no direct supply to any private doctor, dispensary, nursing homes or to anybody who has not been approved by AIOCD. The investigation also found that AIOCD circulated a summary of MOUs

entered into between AIOCD, IDMA and OPPI from 1982 *vide* its letter dated 12th May, 2009. The said letter, *inter alia,* solicits the co-operation of the recipients to have better co-ordination in implementation of the understanding reached between the trade and industry on various issues through different MOUs signed between AIOCD, IDMA and OPPI. The DG concluded that these MOUs are in contravention of Section 3(1) read with Section 3(3) of the Act as it has put a limit on the supply of pharma products and in the absence of such restrictions, the pharma companies could have appointed more wholesalers leading to more supplies in the market. In particular, the DG has concluded that the norms and guidelines adopted by AIOCD regarding appointment of new/additional stockists and fixing of trade margins amounts to contravention of Section 3(3)(a) and Section 3(3)(b) of the Act respectively.

5.3. However, DG accepted the justification offered by OP-1 and OP-3 for non-supply of medicines to the members of the Informant and has not found them indulging into any anti-competitive conduct.

Supplementary Investigation by the DG:

6. Upon considering the investigation report on 2nd December, 2010 and 9th February, 2011, the Commission was of the view that further investigation is required before reaching a conclusion in the matter. Therefore, the Commission directed the DG to conduct further investigation and gather material regarding its finding on determination of price and limiting/controlling of supply of medicines. The DG was also directed to collect financial information necessary to determine appropriate penalties for AIOCD, KCDA and the active members of KCDA, in case the Commission finds that there has been an infringement of the provisions of the Act by them.

7. Pursuant to the directions of the Commission, DG issued notices to KCDA, *inter-alia,* directing it to furnish information regarding its balance sheet and profit & loss account for the last three years. Since KCDA did not comply with the directions of the DG, Commission, *vide* order dated 3rd May, 2011, initiated penalty proceedings against KCDA under Section 43 of the Act. Subsequently, *vide* another order dated 5th October, 2011, the Commission initiated Section 43 proceedings against the executive members of KCDA. Aggrieved therefrom, KCDA and its office bearers filed Writ Petitions (W.P. Nos. 19759, 19760, 20485-20489 of 2011) before the Hon'ble High Court of Karnataka impugning the aforesaid notices of the DG and the proceedings under Section 43 of the Act.

8. While the aforesaid Writ Petitions were awaiting disposal, DG submitted its supplementary investigation report on 20th April, 2011 with the observation that it could not obtain the financial statements of KCDA and its members in view of the pendency of the Writ Petitions. The findings in the supplementary investigation report were regarding the relationship between AIOCD and KCDA; limiting and controlling of supply of medicines; and determination of price of medicines. Brief details of the findings of the DG are as follows:

8.1 On the relationship between AIOCD and KCDA, DG found that AIOCD is the apex body of wholesalers and retailers of pharmaceuticals at all India level. Below AIOCD, there are Associations of wholesalers and retailers at the state level which are affiliated to AIOCD. Further, there are Associations at district level which are affiliated to the concerned State Associations. The DG reiterated that the MoUs entered into between AIOCD, OPPI and IDMA since 1982 prescribe the guidelines and norms regarding margins at the level of wholesalers and retailers, and for appointment of new and additional stockists. The DG noted that the said guidelines

and norms show the collective intent of the members of AIOCD. The DG further noted that AIOCD possesses the ability to control the affairs of state and District Level Associations and any member Association that does not follow the norms of AIOCD is boycotted and penalised. The DG has found that KCDA is also an affiliated body of AIOCD like other State Associations and it also follows the restrictive and anti-competitive norms and guidelines formulated by AIOCD.

8.2 On the issue of limiting and controlling of supply of medicines, DG found that the guidelines and norms prescribed by AIOCD and followed by KCDA impose restrictions on two accounts. *Firstly*, NOC or Letter of Cooperation (hereinafter referred to as "**LOC**") from the state Chemists and Druggists Association is necessary for the appointment of new stockist or additional stockist. If the Association does not grant NOC/LOC, new or additional stockist cannot be appointed. *Secondly*, pharma companies cannot introduce a drug in a territory unless it pays certain amount to the State Chemist and Druggist Association towards services in the name of Product Information Service (hereinafter referred to as "**PIS**") or Prescribed Product Information Index (hereinafter referred to as "**PPII**"), purportedly for the purpose of advertisement of the drug. The DG drew support from the MoUs entered between AIOCD, OPPI and IDMA, and extracts from the website of KCDA to suggest that the aforesaid practice was in vogue. The DG further pointed that the said norms and guidelines restrict the number of stockists to be appointed by pharma companies since they prescribe that only two stockists can normally be appointed in one revenue district.

8.3 As regards the determination of price, the investigation revealed that margins for wholesalers and retailers, with respect to non-scheduled

drugs, are fixed at the time of giving PPII/PIS approval by KCDA. The DG found that the margin of retailers and wholesalers have been fixed at 20 percent and 10 percent respectively. The DG concluded that in the course of providing PIS approvals, KCDA prescribed the margins for wholesalers and retailers, which not only has the effect of fixing margins but also the effect of determining the sales price of non-scheduled drugs.

8.4 Based on the above, the DG found the practices and conduct of AIOCD and KCDA to be in contravention of the provisions of Sections 3(3)(a) and 3(3)(b) of the Act.

9. The Commission considered the supplementary investigation report in its meeting held on 3rd May, 2011. Since the supplementary report did not contain the financial statements of the parties, the Commission sent back the supplementary report to the DG with the direction that a revised supplementary report should be submitted after obtaining relevant financial information/statements. Subsequently, the DG filed revised supplementary report on 22nd September, 2011, *inter alia,* with the request that the main investigation report submitted on 8th November, 2011 and the supplementary investigation report submitted on 20th April, 2011 be considered as full and final as the Office of the DG has exhausted all efforts to collect the financial statements of KCDA without resulting in any outcome. The Commission considered the request of the DG and allowed the same *vide* order dated 5th October, 2011.

10. *Vide* a common judgement and order dated 11th November, 2011, the Hon'ble High Court of Karnataka disposed of the earlier mentioned Writ Petitions filed by KCDA and its Office Bearers with directions to the Petitioners therein to file their preliminary objections before the Commission. It was also ordered

that if the Commission comes to the conclusion that it has the jurisdiction in the matter, it can proceed further in accordance with the law.

11. In view of the directions of the Hon'ble High Court of Karnataka, the Commission, *vide* order dated 8th December, 2011 directed KCDA to file its preliminary objections within two weeks and appear for an oral hearing on 22nd December, 2011. However, none appeared on behalf of KCDA on 22nd December, 2011. Therefore, on the basis of materials available on record, including the written objections of KCDA, the Commission, *vide* order dated 22nd December, 2011 concluded that the preliminary objections raised by KCDA regarding the appropriateness of the transfer of the case to the Commission, applicability of the provisions of the Act and inquiry under Section 26(8) of the Act were devoid of merit. Aggrieved therefrom, KCDA filed another Writ Petition before the Hon'ble High Court of Karnataka (W. P. No. 2882/2012) challenging the order dated 22nd December, 2011 of the Commission, *inter-alia,* on the ground that the impugned order was passed without hearing the Petitioner (*i.e.* KCDA). Subsequently, v*ide* order dated 23rd June, 2015, the Hon'ble High Court of Karnataka quashed the order dated 22nd December, 2011 of the Commission and directed the Commission to hear KCDA and thereafter, pass appropriate orders in accordance with the law. After hearing KCDA on its objections regarding the transfer of the case from the DGIR to the Commission and the law to be applied to the instant proceedings, the Commission passed a detailed order dated 17th December, 2015, *inter-alia,* holding that the matter was correctly transferred to the Commission and it has jurisdiction to apply the provisions of the Act.

Consideration of the investigation reports:

12. After disposing of the preliminary objections raised by KCDA, the Commission, in its meeting held on 14th January, 2016, considered the main investigation report filed by the DG on 8th November, 2010 and the

supplementary report filed by the DG on 20th April, 2011. The Commission decided to forward copies of the said reports to all the parties for filing written objection/submissions latest by 16th February, 2016. The parties were directed to appear for an oral hearing on the said investigation reports on 25th February, 2016. Accordingly, the directions of the Commission were communicated to the parties *vide* letter dated 22nd January, 2016. KCDA (OP-2) and AIOCD (OP-4) were also required to file copies of their audited balance sheet and profit and loss account for the financial years 2006-07, 2007-08 and 2008-09, latest by 16th February, 2016, to enable the Commission to hear them on merits as well as on the quantum of penalty in the event the Commission finds the said OPs guilty of contravention of the provisions of the Act.

13. The Informant and OP-4 filed their respective written submissions on 12th February, 2016 and 23rd February, 2016 respectively. OP-2 filed its financial statements for the financial years 2006-07, 2007-08 and 2008-09 on 24th February, 2016. OP-2 also moved an application dated 19th February, 2016 seeking additional time of six weeks to file its objections in the matter and fpr adjournment of the oral hearing. Acceding to the said requests, the Commission, *vide* order dated 25th February, 2016, allowed OP-2 to file objections/suggestions latest by 31st March, 2016. The Commission adjourned the oral hearing as a result to 19th April, 2016. It was also made clear to the parties that no further request for adjournment would be entertained. However, OP-2 and OP-3 did not file any written submissions despite due service of notices.

14. The Commission heard OP-1 and OP-4 on 19th April, 2016. None appeared on behalf of the Informant, OP-2 and OP-3 despite due service of advance notices. Therefore, the Commission decided to pass an appropriate order in due course on the basis of materials available on record. The Commission further allowed

OP-1 to file its written submissions latest by 30th April, 2016. Accordingly, OP-1 filed its written submissions on 28th April, 2016.

15. Details of the replies, objections and contentions of the parties advanced during the oral hearing are summarised below:

Reply of the Informant

15.1 The Informant filed its written submission dated 12th February, 2016 in response to the investigation reports. The Informant submitted that OP-1 and OP-3 have resumed supplies to the concerned retailers located at Athani, Gokaka and Chikkodi. It further submitted that, on its own it never insisted for NOC/LOC or collected any money from the pharmaceutical companies.

Reply of OP-1

15.2 OP-1 has filed its written submission on 28th April, 2016, *inter alia,* supporting the findings of the DG that the supplies were temporarily suspended because of a procedural requirement and internal review and that there was no anti-competitive conduct on its part.

Reply of OP-4

15.3 OP-4 filed objections dated 23th February, 2016 to the investigation reports of the DG, wherein it was submitted that the Indian Pharmaceutical Industry evolved gradually from virtually no industry presence to a highly sophisticated, knowledge based and full-fledged industry with a robust growth from INR 5,000 crore turnover in 1990 to over INR 1 lakh crore turnover in 2009-10. It has further submitted that the Indian pharmaceutical industry is now the third largest

producer of medicines in the world in terms of volume. According to OP-4, the growth of industry was not possible without proper understanding between Associations of the pharmaceutical manufacturers, pharmaceutical wholesalers and/or retailers.

15.4 OP-4 contended that the distribution channel adopted by most of the major pharmaceutical companies in India prior to 1980 was by appointing sole super stockists (monopoly) for a state or a region. It further contended that the pharma companies adopted several unethical practices *vis-a-vis* the wholesalers/retailers of pharmaceutical products such as termination of stockists without valid reason, dumping of stock, demanding advance payments with deposits, non-settlement of claims arising out of leakage/breakage/ expiry of medicines, non-availability of fast moving medicines, misuse of bank guarantee and blank cheques provided by retailers as a security, *etc*. To address these practices, a joint convention of all Local Associations of retailers and wholesalers was called to form a single association of all State Associations and keeping identity of the member Associations intact. This has resulted in the establishment of OP-4 in 1975 as a society under the West Bengal Registration Act, 1961.

15.5 OP-4 further submitted that the first MoU entered into by OP-4 with OPPI and IDMA was in 1982. OP-4 claimed that it was able to break the monopoly of super stockists by persuading the pharma companies to appoint authorised stockists first at the district level and then at the market places within the district. OP-4 further claimed that the positive impact of its MoUs with IDMA and OPPI is that each pharma company has a network of thousands of stockists appointed across India which has in-turn resulted in value addition services by stockists

such as serving retailers by way of door-booking, providing credit periods, settling issues of leakage/ breakage/ expiry and replacement of slow-moving stock. As a result of these, essential medicines were made available even in the remotest areas of the country and at the lowest possible prices.

15.6 It has been claimed by OP-4 that the demand for branded medicines is created by the pharma companies with the active promotion and assistance by doctors. The retailers and wholesalers have no role in creation of the demand for such medicines. Further, branded medicines prescribed by doctors cannot be substituted by chemists/retailers as per Section 65(11-a) of the Drugs and Cosmetics Rules, 1945.

15.7 OP-4 submitted that agreements/MoUs dated 27th April, 1982 and 18th August 1984 between OP-4 and OPPI were challenged in 1987 by erstwhile DGIR under the erstwhile MRTP Act and an application under Section 10(a)(iii) of the erstwhile MRTP Act was filed before the erstwhile MRTP Commission. The Commission (MRTP) had, *vide* its order dated 16th August 1991, *inter alia,* held that the MoUs did not amount to a restrictive trade practice within the meaning of clauses (d) and (e) of Section 33(1) of the MRTP Act. OP-4 has also placed reliance on the orders of the Competition Appellate Tribunal (hereinafter referred to as the "**Tribunal**") in *DGIR* versus *IDMA and Others* (Order dated 24th November, 2009 in RTPE No. 1 of 2005) and *DGIR* versus *OPPI and Others* (Order dated 30th September, 2015 in RTPE No. 152/1986) to substantiate that the MoUs between OP-4, IDMA and OPPI regarding appointment of additional stockists, discounts and trade margin do not amount to restrictive trade practices under the MRTP Act.

15.8 OP-4 further submitted that various committees of the Government regarding Indian pharmaceutical industry have recognised the role and significance of OP-4 and that the report of Mashelkar Committee (2003), appointed to look into the regulatory infrastructure and the problem of spurious and sub-standard drugs in the country, sought to implement certain actions through OP-4. Furthermore, Dr. Kelkar Committee (1987), appointed to look into the trade margin structure, recommended that trade margin for wholesalers should be fixed after mutual discussion between trade and industry. OP-4 also claimed that it made submission dated 5th March, 2003 to the National Council of Applied Economic Research for the purpose of its study on pattern of trade margin in pharmaceutical industry. In its meeting with the Minister for Petroleum and Chemicals, OP-4 recommended that trade margins for retailers should be increased to 20 percent and to wholesalers, it should be 10 percent.

15.9 On the investigation report filed by the DG, OP-4 contended that the DG has violated the principles of natural justice as the investigation report does not contain copies of the information and the order dated 26th June 2010 of the Commission under Section 26(1) of the Act.

15.10 With regard to the non-supply of medicines by OP-1 and OP-3, OP-4 submitted that it had no role to play in such non-supply. OP-4 pointed out that DG has not found any contravention by OP-1 or OP-3.

15.11 OP-4 claimed that the DG has not considered crucial submissions made by it through reply dated 24th August, 2010. Some of these include (i) role of OP-4 in preventing unethical practices by pharma companies and distributors; (ii) safeguarding the consumers from spurious and fake drugs; (iii) OP-4 did not interfere with the supply of medicines in any State including Karnataka and it did not give any

NOC for appointment of stockists; and (iv) pharma companies not providing price list of medicines to retailers as required under Clause 15(2) of the Drugs and Cosmetics Act, 1940 and therefore, OP-4 and its affiliates were requested to provide information to their members through the bulletin and circulars.

15.12 On findings against KCDA regarding NOC practice for appointment of stockists, OP-4 submitted that the DG has violated the principles of natural justice by not testing the veracity of letters regarding NOC placed at Exhibits 1 to 3 of the main investigation report, details provided in preceding para 5.1, by either sending the same to the OPs for their comments or recording the statement of the Informant or of any third party including the concerned pharmaceutical companies. OP-4 submitted that analysis of these three exhibits do not suggest its involvement in the NOC practice. OP-4 also pointed out that some of the letters referred to in the investigation report have not been annexed thereto. These include letter dated 25th June, 2010 of the Informant to the Secretary of the Commission, letter dated 13th July, 2009 of Shri Devi Medical Distributors, Athani and letter dated 19th February, 2010 of United Stores.

15.13 Coming to the findings of DG between paras 6 and 11 of the investigation report regarding the MoUs entered into between AIOCD, OPPI and IDMA, it was contended that the DG has gone beyond its brief as the complaint and the order under Section 26(1) is limited to the non-supply of essential medicines to certain members of the Informant for want of NOC/LOC from KCDA or AIOCD.

15.14 OP-4 submitted that every pharma company has a statutory obligation under Drug Pricing Control Order, 1995 (hereinafter referred to as "**DPCO**") read with Section 3 of the Essential Commodities Act,

1955, to provide price list of products to all wholesalers and retailers. However, it is practically not possible or cost effective for a pharma manufacturer to provide the price list of every new drug and revised price list of existing drugs to each of the wholesalers and retailers. Therefore, in larger public interest, an industry wide practice was evolved whereby the State level Chemists and Druggists Associations began to publish the price list of drugs in their periodical bulletin so as to facilitate the pharma companies in discharging their statutory obligation. This service of information dissemination at a nominal one-time payment charge for new drug is known as Product Information Service (PIS). OP-4 relied upon the order dated 11th June, 2012 in *Varca Druggist & Chemist & Others* versus *Chemist and Druggist Association of Goa* [MRTP case no. C-127/2009/DGIR(4/28)] and the order dated 19th February, 2013 of the Commission in *Santuka Associates Pvt. Ltd.* versus *AIOCD and Others* [Case No. 20/2011], to suggest that mere collection of PIS charges is not anti-competitive unless there is a compulsion on the pharmaceutical companies to seek PIS approval before introducing the drugs in any territory.

15.15 OP-4 sought to justify NOC practice stating that it acts as a benchmark to ensure that adequate quantity of drugs are available in the market and quality is not compromised. OP-4 claimed that NOC practice has evolved to prevent entry of spurious/doubtful quality drugs purchased from unauthorised sources. OP-4 contended that there is no prohibition in law on manufacturers to consult an Association regarding credibility of the person sought to be appointed as stockist. Any discussion in this regard between a manufacturer and a State Association does not in any manner amount to an anti-competitive practice and that by itself, cannot be said to contravene the provisions

of Section 3(3)(b) of the Act. OP-4 has further contended that there has to be a reasonable volume of business for a stockist and manufacturer to operate efficiently and it has been found that indiscriminate appointment of stockists by the manufacturers resulted in ruining of existing stockists, wastage of stock and disruption of supply, even though there were no complaints against the functioning of such stockists. OP-4 relied upon the recommendations of Mashelkar Committee regarding action by the pharmaceutical industry to allude that NOC/LOC practice is required to keep a check on spurious drugs. OP-4 further relied upon the judgment dated 30th October, 2015 of the Hon'ble Tribunal *in Chemist & Druggists Association, Ferozepur* versus *Competition Commission of India* (Appeal No. 21 of 2014) wherein the Order of the Commission regarding NOC/LOC practice was set aside as it was not found mandatory for all to obtain NOC/LOC as a condition precedent for appointment of a distributor in light of the fact that as many as 90 stockists were operating in Ferozepur district without obtaining NOC/LOC.

15.16 On the findings of the investigation regarding fixing of trade margins, OP-4 submitted that Para 19 of DCPO fixes trade margin of 8 percent and 16 percent for stockists and retailers respectively for scheduled formulations and therefore, the same cannot be termed as anti-competitive. Since DPCO did not fix margin in respect of non-scheduled formulations, a little higher trade margin of 10% for wholesalers and 20% for retailers has been agreed between manufacturers and stockists/retailers. OP-4 claimed that the MoUs and agreements entered into between AIOCD, OPPI and IDMA do not prohibit giving higher trade margin and the fixation of minimum trade

margin does not in any way affect competition amongst the manufacturers.

15.17 OP-4 objected to the approach adopted by DG on the issue relating to trade margin due to incorrect understanding of the concept and its implication on the price. OP-4 has submitted that in the absence of fixation of minimum trade margin, profits of manufacturers alone are likely to increase and there is no guarantee that the price of the drug would decrease or more discounts would be offered to the consumers. Thus, fixation of minimum trade margin does not amount to determination of price in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act. OP-4 has also relied upon the Order dated 16th August 1991 of the erstwhile MRTP Commission in RPTE no. 369 of 1987 to submit that agreements between sellers and purchasers are permissible in law and such agreements or contracts are not covered by the provisions of the erstwhile MRTP Act.

15.18 OP-4 further contended that lesser margins to retailers and wholesalers would discourage them from giving discounts to customers otherwise. It was also claimed that trade margins have been playing an important role since 1982 to maintain a level playing field in the pharmaceutical industry. Placing reliance on the minutes of meeting of Kelkar Committee held on 1st December, 1987, OP-4 submitted that the said committee recommended that the trade margin for wholesalers should be fixed after mutual discussion/agreement between trade and industry. Finally, OP-4 concluded that trade margins were regulated by the trade and industry under the supervision of the Government and in the absence of such discipline in trade margin, either quality would be compromised or unjustified profiteering by manufacturers would take place.

15.19 Relying upon the decision of the Commission in *Shamsher Kataria* versus *Honda Siel Cars India Ltd. & others,* OP-4 submitted that the determination of restriction to competition is made after an analysis of the positive and negative factors listed under Section 19 (3) of the Act. OP-4 claimed that the DG has come to the wrong conclusion that the MoUs have appreciable adverse effect on competition. It was submitted that purpose of NOC was to ensure the credibility of the stockists and it was never a condition precedent for the appointment of stockist. Also, there is no evidence to suggest that the NOC practise led to shortage of medicines in the market. With regard to PIS issue, OP-4 submitted that the same is towards compliance of the requirements of the Drugs and Cosmetics Act, 1940 as discussed above and PIS charge is only a nominal payment on voluntary basis to compensate the expenses incurred towards printing and circulation of the bulletins. As regards the allegation of fixation of trade margin, OP-4 claimed that the same is necessary for smooth functioning of the Indian pharmaceutical industry and 4 percent higher trade margin to retailers, in case of non-scheduled drugs, is beneficial for the growth and profit of retailers and as a result, medicines are available across the nation. Based on these submissions, OP-4 contended that its conduct with regard to NOC, PIS charges and fixation of trade margin does not cause any appreciable adverse effect on competition.

15.20 OP-4 also raised the following objections regarding the supplementary investigation report filed by the DG: (a) the supplementary investigation report does not contain the order of the Commission that directs supplementary investigation; (b) the supplementary investigation was submitted to the Commission on 19th April, 2011 but web page of KCDA enclosed as Exhibit 1, which

elaborates KCDA's policy for stockist appointment and PIS charges, was downloaded only on 19th April 2011; (c) the circulation dated 12th May 2009 of AIOCD, enclosed as Exhibit 2 to the supplementary investigation report is already available in the main investigation report and thus is not a new evidence collected pursuant to the supplementary investigation; and (d) audit report of AIOCD, enclosed as Exhibit 10 in the supplementary investigation report has not been used by the DG. Therefore, OP-4 requested that these should not be treated as additional evidences.

15.21 OP-4 has finally referred to the earlier order of the Commission under Section 27 of the Act in Case No. 20 of 2011 (*In Re: Santuka Associates Pvt. Ltd. and AIOCD and Ors*.) imposing penalty on OP-4, along with directions not to indulge in practices that were found to be in contravention of the provisions of the Act. OP-4 has also pointed out the observation of the Commission regarding OPPI and IDMA resolving to terminate or not-renew their MoUs with OP-4. OP-4 further submitted that the Commission also did not levy penalty on it in Case No. 30 of 2011 (*In Re: M/s Peeveear Medical Agencies and AIOCD and Ors.*) and Case No. 41 of 2011 (*M/s Sandhya Drug Agency and Assam Drug Dealers Associateion and Ors.*) in view of the penalty levied in Case No. 20 of 2011.

Analysis and findings of the Commission

16. The Commission has perused the main investigation report, the supplementary investigation report, suggestions/objections of the parties and other material available on record including the oral arguments made by the parties. On consideration of the aforesaid, the following issues arise for determination in the present matter:

Issue 1: *Whether the conduct of AIOCD (OP-4) pursuant to its agreements/ MoUs entered into with OPPI and IDMA is in contravention of Section 3(1) read with 3(3) of the Act?*

Issue 2: *Whether OP-2 was: (a) mandating NOC prior to the appointment of stockist by pharmaceutical companies?; (b) mandating pharmaceutical companies to pay PIS charges before launching of new drugs?; and (c) prescribing PPII thereby determining the trade margin of the wholesalers and retailers? If so, whether such practices constitute contravention of the provisions of Section 3(1) read with Section 3(3) of the Act?*

Determination of Issue No. 1

16.1. Both in the main and supplementary investigation report, DG has, *inter alia,* concluded that the practice and conduct of AIOCD is in contravention of the provisions of Section 3(3) of the Act. In the main investigation report, DG has reproduced the excerpts of the circular dated 12th May, 2009 of OP-4 and its tripartite MoUs/Agreements with OPPI and IDMA to suggest that OP-4 adopts the following policies that are restrictive and anti-competitive in nature:

(a) NOC by State and District Chemists and Druggists Association is a necessary pre-requisite for appointment of stockists/ additional stockists by the pharmaceutical companies;
(b) Availing of PIS from the State Association and paying charges therefor is mandatory for pharmaceutical companies to launch any new drug; and
(c) fixation of trade margins for wholesalers and retailers.

The DG has concluded that the guidelines/ policies of OP-4 mandating NOC for appointment of stockist is in contravention of the provisions of Section 3(3)(a) of the Act and that the fixation of trade margin of wholesalers and retailers is in contravention of Section 3(3)(b) of the Act.

16.2. In the supplementary investigation report, DG has noted that the guidelines/norms of OP-4, followed by OP-2, impose restriction on two accounts: firstly, no new stockists or additional stockists could be appointed without the NOC/ LOC of the concerned State Association; and *secondly*, no pharmaceutical company can introduce a pharma drug in a territory unless it pays certain amount to the association in the name of PIS or PPII charges. These conditions according to the DG amount to contravention of the provision of Section 3(3)(a) and Section 3(3)(b) of the Act respectively.

16.3. Since the allegations in the case relate to Section 3(3), it is relevant to look into the said provision, which reads as under:

> "*Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which –*
>
> *(a) directly or indirectly determines purchase or sale prices;*
> *(b) limits or controls production, supply, markets, technical development investment or provision of services;*
> *(c) ……..*
> *(d) ……..*

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

16.4. For the purpose of appreciation of applicability of relevant provisions relating to anti-competitive agreements, it is useful to consider various elements of Section 3 of the Act in detail. Section 3(1) of the Act prohibits and Section 3(2) makes void all agreements by any association of enterprises or persons in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of services which cause or are likely to cause appreciable adverse effect on competition within India. Therefore, if any agreement restricts or is likely to restrict the competition, then it will fall foul of Section 3 of the Act.

16.5. Further, Section 3(3) of the Act applies not only to an agreement entered into between enterprises or associations of enterprises or persons or association of persons or between any person and enterprises but also with equal force to any *practice carried on or decision taken by any association of enterprises or association of persons* including cartels, engaged in identical or similar trade of goods and provision of services which has the purpose of directly or indirectly fixing prices, limiting output or sharing markets or customers. Once existence of the prohibited agreement, practice or decision enumerated under Section 3(3) is established, then a rebuttable presumption is raised that such conduct has an appreciable adverse effect on competition and is therefore, anti-competitive. In such a situation the burden of proof shifts on the Opposite Party to show that the impugned conduct does not cause an appreciable adverse effect on competition.

16.6. The Commission now proceeds to determine whether adoption and implementation of the clauses of the impugned agreement/MoUs by OP-4 amounts to contravention of Section 3(3) of the Act. At the outset, Commission notes that the DG has not found any evidence except the circulation dated 12th May, 2009 of OP-4 to suggest that it adopts anti-competitive and restrictive policies regarding appointment of stockists and fixing of trade margins. All along the final hearing, learned counsel appearing for OP-4 maintained that the impugned MoUs/agreements have been terminated by OPPI and IDMA. Despite repeated queries of the Commission regarding adoption and implementation of the impugned clauses of the agreements/ MoUs by OP-4, the learned counsel did not clarify the position of OP-4 with respect to the requirement of NOC and fixation of trade margins. Instead, he sought to justify the PIS charges, requirement of NOC for appointing stockists and fixation of trade margin on the basis of historical evolution of OP-4, recommendations and deliberations of various committees formed by the Government and the compliance requirements of DPCO. It was further contended that the legality of the impugned MoUs/agreements and issues involved in the case are likely to be impacted by the outcome of the appeals filed against the orders of the Commission in Case No. 30/2011 (*Peeveear Medical Agencies, Kerala Vs AIOCD & Ors.*) and Case No. 41/2011 (*Sandhya Drug Agency Vs Assam Drug Dealers Association & Ors.*).

16.7. In the absence of any evidence to show that OP-4, after the enforcement of the substantive provisions of the Act *i.e.* 20th May, 2009, has consciously pursued any requirement/ conduct that falls foul of Section 3(3) of the Act, OP-4 cannot be found guilty of contravention of the said provision. The only piece of document relied upon by the DG to suggest contravention by OP-4 is its circulation

dated 12th May, 2009 of its MoUs/agreement with OPPI and IDMA. However, no other material has been brought on record by the DG or the Informant to demonstrate that OP-4 has determined the price or limited/controlled supply, *etc.* after the enforcement of the provisions of Section 3 of the Act. Nevertheless, the Commission finds it appropriate to clarify certain aspects relating to the requirement of NOC, PIS charges and fixing of trade margins in view of the stand taken by OP-4 in its written submissions dated 23rd February, 2016 and also during the oral hearing held on 19th April, 2016. *Firstly,* the Commission is in agreement with OP-4 that mere collection of PIS charges by OP-4 or any of its affiliated Associations would not amount to contravention of the provisions of Section 3(3) of the Act. It is a welcoming effort if Chemists and Druggists Associations offer PIS to facilitate compliance of the requirements of DPCO. However, where PIS charge is collected as a mandatory prerequisite to launch a pharma drug in a particular territory, it becomes an obstacle for entry of the drug into the market. Such a limitation and restriction imposed by associations of chemists and druggists will be in contravention of the provisions of Section 3(3)(b) read with Section 3(1) of the Act.

16.8. *Secondly*, OP-4 has contended that the NOC requirement is a benchmark to ensure that adequate quantity of drugs are available and such a practice prevents entry of spurious drugs from unauthorised sources. Recommendations of the Mashelkar Committee Report were also referred to suggest that the NOC practice is to keep a check on spurious drugs. However, neither in its reply nor during the final hearing, OP-4 asserted anything about the methodology adopted by OP-4 or the State Associations for prevention of entry of spurious drugs as a consideration while granting the NOC. A perusal of the recommendations of the Mashelkar Committee Report would show

that they have recognised the role of OP-4 and other trade associations in preventing distribution of spurious drugs. But the recommendations do not, in any manner, appear to suggest that the Associations can arrogate to themselves the task of mandating NOC/LOC prior to the appointment of stockists. Thus, the contentions of OP-4 regarding NOC practice are not justified and such a practice restricts entry of new stockists and thereby limits the supply of medicines in the market, in contravention of Section 3(3)(b) of the Act. This position is consistent with the Orders dated 14th March 2016 of the Tribunal in Appeal No. 17/2016 (*All Kerala Chemists and Druggists* versus Competition *Commission of India and Ors.*) wherein the Hon'ble Tribunal has confirmed the decisions of the Commission that NOC practice by Chemists and Druggists Association is in contravention of the provisions of Section 3(3)(b) of the Act.

16.9. *Lastly*, on the issue of trade margins, Commission notes that OP-4 sought to justify fixation of trade margin for non-scheduled drugs, by it or its affiliated Associations, on the premise that such determination/fixation does not affect the competition between the pharmaceutical manufactures. OP-4 has further contended that there is no prohibition for manufacturers to offer higher trade margin and the reduced trade margin would only result in higher profits to manufacturers and does not either guarantee lower MRP or discounts to customers. The Commission observes that regulation of trade margin of a product, the price of which is also regulated may result in reduced price for the consumers. However, regulation of margin without regulation of either the selling price of manufacturers or the retail selling price is not likely to result in reduced price for consumers. Bench marking prices and/or trade margin is likely to eliminate price competition. The Commission has dealt with several

cases from pharma industry where the State Chemists and Druggists Associations were found to be fixing purchase and sale price of wholesalers of medicines. In the absence of such determination, the price for wholesalers and retailers would have been an outcome of market forces such as nature of the medicine- proprietary or generic, extent of competition amongst pharmaceutical companies in the concerned therapeutic category and the extent of wholesalers and retailers available in the particular region. However, if margins of wholesalers and retailers are fixed, in absolute terms or in ranges, by their Association, either at the national level or regional level, the same is likely to eliminate price competition at wholesale and retail levels of the market, which in-turn will restrict the benefits that may otherwise accrue to the consumers in terms of price or service. Such a determination by the Associations of Chemists and Druggists will fall within the mischief of Section 3(3)(a) of the Act. Further, such determination is likely to restrict competition amongst wholesalers and amongst retailers, which would otherwise prevail in a free market.

16.10. OP-4 has argued that the outcome of its appeals against the Commission's orders in *Peeveear Case* and *Sandhya Drugs Case* will have implication on the issues in this case. It is most relevant to note that the Hon'ble Tribunal, while disposing of the said appeals, *vide* its recent judgment dated 9th December 2016, has *inter alia* clarified that "*if the Commission receives any fresh information or suo-moto comes to know that the respondents or any other similarly situated persons have/has resorted to anti-competitive practices like mandatory NOC, then this order shall not prevent it from ordering an investigation under Section 26(1) of the Act and take appropriate decision in accordance with law*."

Determination of Issue No. 2

16.11. The instant case originated from the Informant's allegation that OP-1 and OP-3 have refused to supply drugs to the members of the Informant as they were not having NOC from OP-2 or OP-4. However, DG has concluded in the main investigation report that there is no contravention by OP-1 and OP-3 and there is merit in their assertion that temporary suspension of supply of medicine is due to the non-submission of the demand draft/ cheque or periodic internal review and not on account of want of NOC from OP-2 or OP-4.

16.12. The Commission notes that the following correspondence regarding NOC practice by OP-2 have come on record during the investigation:

(a) Letter dated 10th May, 2009 of M/s Choudhari Medical Agencies to the Secretary of the Informant stating that OP-1 stopped supplies for want of NOC from OP-2. The letter, *in verbatim*, is reproduced hereunder:

"To

The Secretary
Belgaum District Chemist and Druggist Association

Dear Sir

Sub: Non Supply of Stocks from Abbot India Ltd

We are the stockist for Abbott India Ltd (A Proof of Invoice is enclosed). Now suddenly the company has stopped supplies stating orally that some lady from Karnataka Chemists and Druggists Association (Lalitha) telephones and asks to stop supplies for want of NOC.

Please do the needful urgently and inform the company to restart supplies.

Thanking you

For Choudhari Medical Agencies"

(b) Letter dated 22nd September, 2009 of M/s Basaweshwar Pharma to the Secretary of the Informant stating that Elder Pharma Limited stopped supplies for want of NOC from OP-2. The letter*, in verbatim*, is reproduced hereunder:

"*To*

The Secretary
Belgaum District Chemist and Druggist Association
Belgaum

Sub: Supply of Elder Pharma Ltd

Sir,

As we are stockist of Elder Pharma Ltd., since last May-2008, & we had no problem with the company up to last month, but in this month they have stoped the billing, for the sake of Noc, which is required from Karnataka Chemist Druggist Association,, but we have given the Noc of our Belgaum Dist Association & Karnataka Chemist Distributors Association.

So kindly go through this & start our billing

Kindly co-op & Kindly do the needful."

(c) Letter dated 15th July, 2010 of Eli Lilly to M/s Patil Pharmaceuticals & General Merchants offering stockistship subject to the condition that it will procure NOC from Local Association and OP-2. The letter, *in verbatim*, is reproduced hereunder:

"To,

Patil Pharmaceuticals & General Merchants
1462, Despande Galli,
Belgaum-590002

Sub: Offer letter for Stockistship

Sir,

With reference to your letter dated 12.07.2010 in which you have requested us to become our stockist for Belgaum territory. In this regard we are please to offer you our stockistship in the said area under the condition that you will procure & provide us with NOC from your local association & KCDA, Bangalore affiliated with AIOCD to become our stockist & will accept the terms and conditions of our agreement.

Sincerely Yours'

For Eli Lily & Company of India Pvt Ltd."

(d) Letter dated 20th July, 2010 of OP-2 to Eli Lilly stating that it suggests to appoint M/s Patil Pharmaceuticals & General Merchants as stockist and inform OP-2 after appointment, so as to communicate to the members of OP-2 about the new stockist. The letter, *in verbatim*, is reproduced hereunder:

"*To*

Eli Lily and Company (I) Pvt. Ltd.
Bangalore

Respected Sir,

Sub: Stockist Appointment Suggestion

We learnt from your letter that, you want to appoint stockist in Belgaum District, as per your request we have discussed with concerned District Association and suggested you to appoint your preferred stockist ***M/s. Patil Pharmaceuticals & Gen. Merchants, Belgaum.***

Kindly inform to KCDA after the appointment, so as to communicate our members about new stockistship/distribution point.

Thanking you,"

16.13. Although DG has made reference to letter dated 13th July, 2009 of M/s Shri Devi Medical Distributors, Athani and letter dated 19th February, 2010 of M/s United Store, both expressing concerns about the NOC practice being adopted by OP-2, copies of the same have not been found in the main investigation report.

16.14. Pursuant to the direction of the Commission to conduct supplementary investigation and collect additional evidence concerning determination of price and limiting/controlling of supply of medicines, DG, *inter alia,* submitted a copy of the webpage of OP-2 regarding stockistship appointment. From this, it is evident that citing reference to the MoUs between OP-4, IDMA and OPPI, OP-2 had adopted a policy for appointment of stockists whereby new pharmaceutical companies are normally allowed to appoint only two stockists in one revenue district. This appointment could also be done only after obtaining cooperation/consent letter from OP-2. It has been stated in the policy that such a practice is necessary to avoid black listed parties but the meaning and scope of 'black listed parties' was not clarified. In case of existing companies, the policy specified NOC from OP-2 as a must for adding, deleting or changing of stockists. The relevant extract of the policy is reproduced as under:

> ***"4. STOCKISTSHIP APPOINTMENTS****:*
>
> *As per the MOU all the companies have to inform the affiliated State Associations before appointing of any new stockist to respective State Association. All the companies are supposed to give updated list of their stockists in Karnataka to KCDA. Our norms & procedures in appointment of new stockist are as follows:-*
>
> ***I. NEW COMPANIES:***

Have to approach KCDA with following details in the prescribed format.

a. Company profile
b. Proposed names and addresses of C&F/CA/SS in the State.
c. Marketing plans in Karnataka, Numbers of districtwise stockists required in the state.
d. Compliance of PPII Norms.

On receipt of the above information, KCDA will issue cooperation/consent letter and company can appoint stockist of their choice. We only request to avoid black listed parties in the mutual interest. Take guidance of the District Association and follow their norms if any. Normally two stockists are allowed in one revenue district.

II. Existing Companies: Addition/Deletion/change over of stockists etc.

The company should inform KCDA in prescribed format with details of addition/change/deletion of Stockists Districtwise. KCDA will scrutinise and give consent to respective the company in consultation with concerned District Association; No company shall appoint any stockists in the State by taking NOC only from District Association/existing Stockists of the District. (State Association NOC is must). Change in constitution of firm of the stockist is treated as new / change of appointment."

16.15. The correspondence discussed above suggests that certain member of the Informant had faced problems of non-supply of drugs / medicines for want of NOC from OP-2. In addition, letter dated 15th July 2010 of Eli Lilly & Company (India) Pvt. Ltd. and the letter dated 20th July, 2010 of OP-2 clearly indicate the fact that stockistship was offered by the said company subject to the condition that OP-2 grants NOC. These, read in conjunction with the web page of OP-2 regarding stockistship appointment, establish the fact that OP-2 had mandated its NOC as a necessary pre-requisite for appointment of stockist by any pharma company in the territory of the State of Karnataka.

16.16. While dealing with the various cases in the past [Case No.C127/2009/MRTPC *Varca Drugs & Chemists & Ors*. versus *Chemists & Druggists Association Goa);* Suo moto Case No. 05 of 2013 *(In re: Collective boycott/refusal to deal by the Chemists & Druggists Association, Goa, M/s Glenmark Company and M/s Wockhardt Ltd. etc.);* and Case No. 28 of 2014 *(Mr. P.K. Krishnan* versus *Mr. Paul Madavana & Ors.)*], which are not reproduced in detail herein for the sake of brevity, Commission has held that such practice of mandating NOC as a pre-requisite for appointment of stockists amounts to limiting and restricting the supply of pharmaceutical drugs in the market, in violation of the provisions of Section 3(1) read with Section 3(3)(b) of the Act. Monetary penalties have also been imposed on the erring regional and District level Chemists and Druggists Associations who were found to be perpetrating the anticompetitive conduct.

16.17. Despite various orders by the Commission in similar cases with respect to this behaviour of Chemists and Druggists Associations, these Associations have not abstained from indulging in such an anti-competitive conduct. Instead, they have been repeatedly following the same. The Commission observes that the practice of mandating NOC prior to the appointment of stockists results in limiting and controlling of the supply of drugs in the market and amounts to anti-competitive practice, in violation of the provisions of Section 3(1) read with Section 3(3) (b) of the Act. Thus, in view of the foregoing, Commission concludes that OP-2 has contravened the provisions of Section 3(1) read with Section 3(3)(b) of the Act.

16.18. Coming to the issue of PIS / PPII charges, Commission notes that the DG has relied upon the webpage of OP-2 to suggest that pharma companies have to avail PIS/ PPII services for the purpose of

launching any new drug. The details provided therein prescribe charges for availing PPII services both before and after the launch of drugs. The DG further relied upon the receipt issued by OP-2 to Ranbaxy Laboratories Ltd. evidencing payment of PPII charges and a letter dated 20th March, 2009 of Embiotic Laboratories (P) Limited to suggest that it is usual for pharmaceutical companies to pay PIS/ PPII charges as and when any product is launched. Although these materials indicate that PIS/PPII services were provided by OP-2, nothing has been brought out by the investigation or is otherwise available on record to show that payment of PIS charges is a mandatory pre-requisite to launch new drugs. In the absence of any material suggesting compulsion on the pharmaceutical companies to seek PIS/ PPII publication, before introducing the drugs in any territory, mere offering of PIS/ PPII services cannot be regarded as limiting or controlling supply of drugs. Accordingly, no contravention of Section 3(3) of the Act is established against OP-2 in this regard.

16.19. As regards fixation of trade margins by OP-2, Commission notes that the DG has relied upon PPII published by OP-2 in its bulletin/publication *viz*. INFO-MAIL, January 2011 to conclude that OP-2 had determined the trade margins of wholesalers and retailers, which ultimately has the effect of determination of sale price of drugs in the market. As per the details provided in the said publication, KCDA fixed the cost of wholesalers and retailers with respect to various pharmaceutical products mentioned therein. This in effect amounts to determination of the price at which the pharmaceutical companies should sell their products to wholesalers and the price at which the wholesalers should sell those products to their retailers. Although the maximum retail price of pharmaceutical products is normally fixed by the manufacturers, determination of price for wholesalers and retailers by the Chemists and Druggists Associations can have no justifiable explanation but being an attempt to discipline the price

competition amongst wholesalers at one end and amongst retailers on the other. Elimination of such competition restricts the freedom of wholesalers and retailers in deciding the price at which they have to sell pharmaceutical products to their customers. In the absence of fixed trade margins, competition amongst wholesalers and retailers would have forced them to reduce their trade margins resulting into sale of pharmaceutical products at prices below the maximum retail price. Thus, it is concluded that fixation of trade margins for wholesalers and retailers by OP-2 has resulted in determination of the sale and purchase price of wholesalers and purchase price of retailers, which ultimately impacts and determines the sale price of the pharmaceutical products, that would have otherwise been determined by the market forces. In view of the above, it is established that the determination of trade margins for wholesalers and retailers by OP-2 is in contravention of the provisions of Section 3(1) read with Section 3(3)(a) of the Act.

17. In view of the above, the Commission passes the following:

ORDER:

19. In view of the findings elucidated in the earlier part of this order, Commission directs OP-2 to cease and desist from indulging in the practice of mandating NOC as a prerequisite for appointment of stockist and fixing of trade margins for retailers and wholesalers, which have been held to be anti-competitive in terms of the provisions of Section 3(1) read with Section 3(3) of the Act.

20. Section 27 of the Act empowers the Commission to issue such other order or direction as it may deem fit in case of contravention of the provisions of Section 3 or 4 of the Act. It is evident that the legislature has conferred wide discretion upon the Commission in the matter of taking requisite action against contravention of the said provisions of the Act including imposition of penalty under Section 27 (b). While considering the issue of imposition of penalty, Commission takes into account the peculiarity of facts and totality of circumstances involved. In this

regard, the Commission notes that recently a penalty of Rs. 860321/- was imposed upon OP-2 in a matter involving similar allegations *i.e*. NOC practice for appointment of stockist (Case No. 71/2013 titled *M/s Maruti & Company* versus *Karnataka Chemists & Druggists Association & Others*). The period of contravention in the said case was subsequent to the period of investigation in the instant matter. In view of these, the Commission refrains from imposing any monetary penalty in the present case. Nevertheless, it is clarified that any future repetition by OP-2 of the conduct that are found herein as contravention of the provisions of Act, will be taken seriously and proceeded with in accordance with the provisions of the Act.

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

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(U. C. Nahta)
Member

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

New Delhi
Date: 02/03/2017