



**COMPETITION COMMISSION OF INDIA**

**Case No. 54 of 2015**

**In Re:**

**Sudeep P.M. Informant No. 1**

**K.A. Sundaran Informant No. 2**

**XYZ (Confidentiality granted by Commission) Informant No. 3**

**Giri Nair Informant No. 4**

**And**

**All Kerala Chemists and Druggists Association Opposite Party**

**CORAM**

**Mr. S. L. Bunker  
Member**

**Mr. Sudhir Mittal  
Member**

**Mr. Augustine Peter  
Member**

**Mr. U. C. Nahta  
Member**

**Justice G.P. Mittal  
Member**



**Present:**

*For Informants*

Shri Aniruddha Deshmukh, Advocate

*For AKCDA, Shri A.N. Mohan Kurup (President, AKCDA),  
Shri Thomas Raju (General Secretary, AKCDA) and Shri OM  
Abdul Jaleel (State Treasurer, AKCDA)*

Shri Sajith P. Warriar, Advocate  
Shri K. Harshvardhan, Advocate  
Shri Chritarth Pali, Advocate  
Shri A.N. Mohan Kurup (President,  
AKCDA)

*For Thrissur District Unit of AKCDA,  
Shri V. Anver Baithul Noor  
(District President, Thrissur District) and Shri A.B. Rajesh  
(Treasurer of Thrissur District AKCDA):*

Ms. Nazia Hasan, Advocate  
Shri Sajith P. Warriar, Advocate

*For Kasargod District Unit of AKCDA and  
Shri Venugopala Sarpangala  
(District President, Kasargod District):*

Ms. Rajitha T.H., Advocate

*For M/s Alkem Laboratories*

Shri Manas Kumar Chaudhuri, Advocate  
Shri Aman Singh Baroka, Advocate

*For Intas Pharmaceuticals Ltd.*

Shri Samer V. Talwar, Advocate

*For Novartis India Ltd.:*

Ms. Krushika N Choudhary, Advocate

*For Zydus Cadila (Cadila Healthcare Ltd.)/  
German Remedies Ltd.*

Ms. Namita Sharma, Advocate

*For Wallace Pharmaceutical Pvt. Ltd.,  
Icon Life Sciences, USV Pvt. Ltd., and  
Unilex Lifesciences Pvt. Ltd.*

None



## **Order under Section 27 of the Competition Act, 2002**

1. Shri Sudeep P.M. (hereinafter, the 'Informant Party No. 1/IP-1'), Shri K.A. Sundaran (hereinafter, the 'Informant Party No. 2/IP-2'), XYZ [Confidentiality granted by Commission] (hereinafter, the 'Informant Party No. 3/IP-3'), and Shri Giri Nair (hereinafter, the 'Informant Party No. 4/IP-4'), approached the Commission with an application under Regulation 24 and 25 of the Competition Commission of India (General Regulations), 2009 (hereinafter, 'General Regulations'), on 09.06.2015 seeking impleadment as interveners, in *P.K. Krishnan v. AKCDA and Ors.* [Case No. 28 of 2014] (hereinafter, '*P.K. Krishnan case*') alleging that they have similar grievances. On 10.06.2015, the Commission considered the Intervener Application and decided to hear IP-1, IP-2, IP-3 and IP-4. On 18.06.2015, the Commission heard the IPs and decided to treat the Intervener Application dated 09.06.2015 as a separate information and proceed with the new case.
2. Briefly, the four IPs, who were stockists (wholesalers) in the State of Kerala, alleged that All Kerala Chemists and Druggists Association (AKCDA/OP) and its district level associations were mandating the requirement of a No Objection Certificate (NOC) prior to the appointment of any stockists, in contravention of the provisions of Section 3 of the Competition Act, 2002 (the 'Act'), despite cease and desist orders of the Commission in earlier cases involving similar issues. It was alleged that the aforesaid practice of NOC simply changed from written approvals to verbal threats and was also being given in the form of congratulatory/appreciation letters to avoid any sanctions under the Act. The Commission found merit in the allegations made by the IPs and directed the Director General (DG), *vide* an order dated 05.08.2015 passed under Section 26(1) of the Act, to investigate the matter and submit a



report. Accordingly, the DG report (confidential version) was submitted by the DG on 01.02.2016.

### **Findings of the DG**

3. The DG conducted its investigation relying upon the information, statements, documents *etc.* provided by the IPs and certain third parties, including wholesaler distributors and pharmaceutical companies. The observations and findings of the DG in its report are elucidated in the ensuing paragraphs.
4. The DG placed reliance on a show-cause notice dated 15.07.2014 submitted by IP-1 which was issued by AKCDA to IP-1 when IP-1 was appointed as a stockist of Cipla Ltd. in August, 2013 without obtaining NOC from AKCDA. The aforesaid notice was issued by AKCDA alleging anti-association activities on part of IP-1 and thereafter, AKCDA boycotted purchases from Cipla Ltd. and called upon all retail chemists to boycott purchases from IP-1. Shri Sreekumaran Nair, Depot Manager of Cipla Ltd. was examined in this regard by the DG who produced sales figures of Cipla Ltd. for the month of September, 2013 wherein a sharp decline in the sales in Calicut district, post-appointment of IP-1 as stockist was apparent.
5. IP-2 and IP-3 in their submissions alleged that AKCDA was indulging in practice of granting NOC for appointment of a firm as stockist/distributor on payment of money to AKCDA. It was stated that NOC is granted verbally or in the form of camouflaged congratulatory letters and thus, no documentary evidence may be found with regard to grant of NOC or enforcement of boycott/ dharna *etc.* IP-3 has further alleged that AKCDA receives payment in cash for issuing NOC which is not reflected in its account as separate bank accounts are maintained by AKCDA for this purpose. IP-4 alleged that due to pressure from AKCDA, Cadilla



Healthcare Ltd. and German Remedies Ltd. did not approve his application for stockistship.

6. The DG took into account the depositions made and the evidence adduced from the following wholesale distributors, to check the veracity of the allegations made against AKCDA:

a. Shri K.P. Raveendran, Partner, M/s Chithira Enterprises and Managing Partner, M/s Madhavi Pharma: Both his firms were members of AKCDA in District Kasargod of Kerala. He confirmed that despite guidelines of the Commission, AKCDA is much involved in creating entry barriers in the appointment of stockists in the form of issuing ‘congratulatory letters’ which are actually NOC letters. He submitted documentary evidence showing that his firm, M/s Chithira Enterprises, had applied for stockistship of Unilex Lifesciences Pvt. Ltd., the congratulatory letter for which was issued by AKCDA on 07.02.2015. Further, he applied for grant of stockistship of complete divisions of Sun Pharmaceuticals Industries Ltd. (“**Sun Pharma**”) *vide* letter dated 03.10.2013 and a follow up letter dated 01.09.2014 which was denied by AKCDA, followed by a verbal demand of cash payment for Rs. 2.5 lakh, allegedly made by Shri A.N. Mohan Kurup, State President, AKCDA. Shri Raveendran also produced a letter dated 06.02.2014, wherein application for stockistship of Novartis India Ltd. was made by M/s Madhvi Pharma to the District Secretary, AKCDA which was followed by a congratulatory letter issued on 07.02.2014 by AKCDA.

b. Shri Sivraman T.J., Proprietor, SRM Associates: In his statement before the DG, he admitted being a member of AKCDA in District Malappuram of Kerala, and an elected executive member from Edapal area of Malappuram District. He stated that on application for stockistship to Icon Life Sciences, he received a letter dated 15.11.2014 stating that his 5<sup>th</sup> point stockistship was approved and, if



required, he should obtain NOC from the Association (AKCDA). As Shri Sivraman did not apply for NOC, his cheque for an order was returned and his firm wasn't granted stockistship. Shri Sivraman also produced a letter dated 01.07.2015 from Dr. Reddy's Laboratories, wherein he was informed that benefits and privileges extended to other similarly placed stockists could not be extended to SRM Associates for want of NOC and intervention from AKCDA. Shri Sivraman also produced a letter dated 27.08.2015, attached with an internal email of Cadila Healthcare Ltd., containing a list of firms approved by AKCDA which further shows the control exercised by AKCDA on pharmaceutical companies for appointment of stockists.

- c. Shri C.R. Davis (also referred to as Shri Davis Cada), Partner, Cadas Medicals: He stated that he held the position of an executive member of AKCDA District Executive Committee in Thrissur District of Kerala. He submitted that as per AKCDA's norms if one stockist is appointed for one pharmaceutical company on receipt of money, then the same firm cannot be appointed as stockist for another company during that year. However, AKCDA has disregarded these norms in the last few years and approved appointment of stockists for more than one company in a single year in return for exchange of money. Shri Davis also provided details of a meeting of AKCDA held on 20.09.2015 in which grant of stockistship to wholesalers without the same being conveyed by the Steering Committee to the Executive Committee was discussed. Shri Davis submitted a list dated 04.09.2015 containing names of 17 firms who had paid money to the office bearers of AKCDA in Thrissur District. Shri Davis also stated that payments are mostly made in cash and are received by Shri A.N. Mohan Kurup, President, AKCDA, and also mentioned that a forgery was done by Shri A.N. Mohan Kurup, Shri V. Anver and Shri A.B. Rajesh in the name of District Secretary of Thrissur for grant of NOC



to M/s J.J. Brothers. Shri Davis also stated that annual accounts are presented in the District Executive Meetings, but such accounts only reflect recorded transactions of payments received through cheque. He further claimed that cash amounts received for purpose of NOC are pocketed by the office bearers.

- d. Shri K. Sivasankaran, Proprietor, M/s Pee Cee Medical Agencies: In his statement before the DG, he stated that he was the General Secretary of AKCDA from 2006 to 2008 and again from 2008 to 2010. At the time of deposition, he was an Executive Member of District Executive Committee of AKCDA in Thrissur District and Member of State General Council He revealed that a criminal case for financial irregularities was filed against Shri A.N. Mohan Kurup, and others at Ernakulam during September- October, 2007 due to which Shri A.N. Mohan Kurup resigned from the post of State President of AKCDA. In support of his contention, he produced copies of cheques, account opening form, AKCDA letters and statement of account of AKCDA in South Malabar Gramin Bank, Palakkad. On being questioned about the role and functions of AKCDA, Shri Sivasankaran stated that AKCDA operates and comprises of district units for all the 14 revenue districts of Kerala in which it practically controls and manages all trade related issues with manufacturers, government agencies or issues among members *inter-se*. He also confirmed that appointment of stockists is controlled by AKCDA through grant of permission in the form of NOC which initially used to be written, but now the same is being granted verbally in the form of congratulatory/ best wishes letters to the stockists and pharmaceutical companies. The incident of forging of signatures of Shri Jolly Stephan on NOC of M/s J.J. Brothers as stated by Shri C.R. Davis and practice of payment being received in cash for appointment



as stockist in multiple companies pocketed by the office bearers was also reaffirmed by Shri Sivasankaran.

- e. Shri Rony Paul, Partner, M/s J.J. Brothers: He submitted that after he was appointed as a stockist of IPCA Laboratories, he was told that he should obtain NOC from AKCDA as IPCA Laboratories was facing boycott from its existing stockists on directions of AKCDA. This matter was sorted out when Shri Gilroy Mathews, Manager of M/s J.J. Brothers made a payment of Rs. 3 Lakhs to AKCDA. Shri Paul also admitted to making payment of Rs. 10,000/- to AKCDA for obtaining NOC for the stockistship of Indoco Remedies Ltd. This payment was made upon receipt of an email dated 29.05.2014 from Shri Ajay Karajagi, Associate VP, Marketing, Indoco Remedies Ltd. instructing to complete the required formalities which meant obtaining NOC from AKCDA to enable supply.
- f. Shri Gillroy Mathews, Former Manager, M/s J.J. Brothers: Shri Mathews submitted an email dated 07.05.2015 sent by the Manager of USV Ltd. wherein an appreciation letter from AKCDA, a pre-requisite for obtaining stockistship, was requested. Shri Mathews claimed that he spoke telephonically with Shri A.N. Mohan Kurup about getting the appreciation letter for appointment. Shri Mathews also accepted that he had made a payment of Rs. 3 lakhs in cash to office bearers of AKCDA to obtain NOC for Blue Cross Laboratories Limited, but since he did not receive the NOC he attempted to get the cash back. He further admitted that payment of Rs. 3 lakh was made to Shri A.B. Rajesh, Treasurer of AKCDA, for NOC for stockistship of IPCA Laboratories. He also confirmed that if NOC was not obtained from AKCDA, different measures were taken by AKCDA to ensure that stockists make the payment.



7. To further substantiate the facts and evidence on record, the DG confronted the evidence so collected from the IPs and the wholesale distributors with various pharmaceutical companies who allegedly denied supplies to such wholesale distributors (including the Informants) for want of NOC under the threat of AKCDA. These responses are briefly summarised here under.
- a. Shri Sreekumaran Nair (Depot Manager of Calicut Depot of Cipla Ltd.): The statement and documentary evidence produced by him showed that when M/s Cipla Ltd. had appointed M/s Star Agencies, Calicut (IP-1) as its stockist in August 2013, all the existing stockists of Cipla in Calicut District had boycotted the purchases from Cipla Ltd., probably under the directions of AKCDA.
  - b. Shri K. Sujith Prasad, Regional Manager, Wallace Pharmaceuticals Pvt. Ltd.: He admitted that the appointment of distributor/ stockist was only done on receipt of NOC issued by AKCDA even though his company did not insist on such NOC. An offer letter dated 04.02.2015 was recovered from his email account wherein appointment of Kottayam Drug House was confirmed, valid on production of NOC from the concerned trade association. The aforesaid NOC for Kottayam Drug House was received by Shri Prasad from AKCDA in an email dated 10.02.2015 in the form of a congratulatory letter. The DG also confronted Shri Prasad with a letter dated 13.05.2014 issued by his company under his signatures offering stockistship to M/s Sunanda Associates valid on receipt of NOC from the respective trade association. The DG questioned Shri Prasad as to discontinuation of supply to M/s Sunanda Associates during August to December, 2014 due to non-receipt of NOC and intervention from Hon'ble Kerala High Court for supply to which Shri Prasad only replied that he does not recollect any such intervention.



- c. Shri T.K. Haridas, Branch Manager, Alkem Laboratories: Before the DG, Shri T.K. Haridas initially tried avoiding and circumventing the replies. However, with the documentary evidence emerging on record, revealing facts in contradiction to the depositions initially made by him, he accepted the facts on record. The DG discovered a few emails from his official email account wherein he has stated to another officials at Alkem Laboratories that verbal approval of AKCDA for appointment of M/s Sunanda Associates, Calicut is being awaited. In the said email, it is stated by Shri Haridas that President and General Secretary of AKCDA had requested to stop the supply due to some dispute between M/s Sunanda Associates and AKCDA at Calicut office. However, on being confronted with the said email, Shri Haridas stated that approval is pending from head office and denied having any such discussion with the President or any other official of AKCDA. Towards the end of his statement, Shri Haridas confessed to the fact that AKCDA plays a role in appointment of stockists by issuing NOC.
- d. Shri Joseph K Babu, Sr. Area Business Manager, Cadila Healthcare Ltd.:- In his statement before the DG, he produced an internal email of Cadila Healthcare Ltd. dated 17.10.2015 wherein city/headquarter wise list of stockists to be appointed was attached as received from AKCDA. Another email dated 25.08.2015 was submitted which contained the format for application for grant of stockistship which contained a provision regarding whether verbal approval is obtained from AKCDA or not. Even the revised format of appointments for stockists/ distributors of Cadila Healthcare Ltd. had to be submitted with 'verbal NOC approval'.



8. On the basis of the aforesaid facts and evidence collected during investigation, the DG concluded that AKCDA has been involved in the practice of grant of NOC by various means such as issue of a congratulatory letter or by way of verbal approval prior to the appointment of stockists by pharmaceutical companies. The DG further observed that NOC has been issued, at times, against payment of cash to the select office bearers of AKCDA. Instances were also found where AKCDA had issued list of stockists to whom distributorship of another division of a pharmaceutical company can be given. The DG further listed the following specific instances to substantiate the conclusions arrived at by its investigation:

- (i) Grant of stockistship by Wallace Pharmaceutical Pvt. Ltd. to Kottayam Drug House by way of a congratulatory letter.
- (ii) Grant of stockistship by Alkem Laboratories to Sabari Agencies by way of verbal approval from Shri A.N. Mohan Kurup, AKCDA President.
- (iii) Grant of stockistship by USV Pvt. Ltd. to Sabari Agencies by way of congratulatory letter.
- (iv) Grant of stockistship by Intas Pharmaceuticals Ltd. to Ideal Pharma Associates by way of letter of appreciation.
- (v) Grant of stockistship by Novartis India Ltd. to M/s. Madhavi Pharma by way of congratulatory letter.
- (vi) Extension of stockistship of Zydus Cadila by Cadila Healthcare Ltd. to various 'AKCDA parties'.
- (vii) Grant of stockistship by German Remedies Ltd. to M/s. Anu Pharma by way of congratulatory letter.
- (viii) Grant of stockistship by Unilex Lifesciences Pvt. Ltd. to M/s. Chithira Enterprises by way of congratulatory letter.
- (ix) Grant of stockistship by Cadila Healthcare Ltd. to M/s. J.J. Brothers by way of issue of NOC.
- (x) Non-grant of stockistship by Icon Life Sciences (a Division of Mesmer Pharmaceuticals) to SRM Associates due to non-issue of NOC by AKCDA.
- (xi) Certain instances of payment of cash by willing stockists to select office bearers for issue of NOC by AKCDA.

(emphasis supplied)



9. Based on the aforesaid evidence, the investigation concluded that AKCDA and two of its district units (Thrissur and Kasargod) have contravened the provisions of Section 3(3)(b) read with Section 3(1) of the Act. The DG also identified certain office bearers of these associations to be liable under Section 48 of the Act.
10. The Commission considered the investigation report of the DG on 08.03.2016 and observed that apart from AKCDA, the investigation report has brought out the role of certain district units of AKCDA, namely, Thrissur District unit of AKCDA and Kasargod District unit of AKCDA. Accordingly, the Commission decided that the investigation report be sent to all of them to provide them an opportunity to furnish suggestions/objections thereto with regard to their involvement in the present matter. The Commission also decided to forward the investigation report to the IPs as well as the following persons, identified by the DG to be liable under Section 48 of the Act:
- (a) Shri A.N. Mohan Kurup, State President, AKCDA
  - (b) Shri Thomas Raju, General Secretary, AKCDA
  - (c) Shri Om Abdul Jaleel, State Treasurer, AKCDA
  - (d) Shri V. Anver Baithul Noor, District President, Thrissur District, AKCDA
  - (e) Shri A.B. Rajesh, Treasurer, Thrissur District, AKCDA
  - (f) Shri Venugopala Sarpangala, District President, Kasargod District, AKCDA
11. Further, the Commission observed that the investigation also revealed the role of certain pharmaceutical companies in facilitating the NOC practice of AKCDA and directed that the investigation report also be sent to such pharmaceutical companies for receiving their suggestions/objections, thereto, if any:
- 1. Wallace Pharmaceutical Pvt. Ltd.
  - 2. Alkem Laboratories Ltd.



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3. USV Pvt. Ltd.
  4. Intas Pharmaceuticals Ltd.
  5. Novartis India Ltd.
  6. Zydus Cadila (Cadila Healthcare Ltd.)
  7. German Remedies Ltd.
  8. Unilex Lifesciences Pvt. Ltd.
  9. Icon Life Sciences (a Division of Mesmer Pharmaceuticals)
12. The Commission further provided an opportunity to the aforesaid recipients of the investigation report to present their submissions/arguments in an oral hearing. The written responses filed by these parties and their oral submissions made during the hearing held on 31.05.2017 are briefly summarised in the ensuing paragraphs.

***Replies/ objections/ submissions of the Parties to the Investigation Report***

**Informants/IPs**

13. Though the IPs did not file any formal written response to the investigation report, during the oral hearing held on 31.05.2017, the learned counsel for the IPs, Shri Aniruddha Deshmukh, argued at length. Shri Deshmukh submitted that the investigation report sufficiently brings out the anti-competitive practice of NOC being carried on by AKCDA and its affiliated district units. Emphasising on the adverse impact of the said NOC practice, Shri Deshmukh contended that if a stockist is banned, the whole distribution chain in the pharmaceutical sector gets affected. With regard to delineation of the relevant market, Shri Deshmukh submitted that although the DG, in its investigation report, has not categorically undertaken the exercise of defining a relevant market, there are clear references to a relevant market in the context of which the investigation has been carried out. It was contended that the conclusive paragraph of the DG Report specifically states that the anti-competitive conduct of AKCDA has resulted in limiting and restricting the ‘supply of drugs and medicines in the State of Kerala’, which is nothing but the



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relevant market. Thus, absence of formal delineation of a relevant market should not affect the findings of the DG, when such findings are clearly made with context to a particular relevant market.

14. Shri Deshmukh submitted that the investigation report clearly brings out certain specific instances where AKCDA has interfered with the appointment of stockists, which clearly demonstrate that it is only after receiving AKCDA's blessings in the form of NOC that pharmaceutical companies can appoint stockists in the State of Kerala. Supporting the finding with regard to involvement of individual office bearers in the said anti-competitive activities of AKCDA, Shri Deshmukh argued that AKCDA, its two District Associations (Thrissur and Kasargod) and their office bearers (hereinafter collectively referred to as the 'OPs') are hand in glove in perpetrating the NOC practice. None of the office bearers have been able to establish that they had distanced themselves from the alleged anti-competitive activities of AKCDA. Rather the fact that they chose to file a common response to the investigation report was indicative of their collusive actions. With regard to AKCDA's contention regarding absence of any appreciable adverse effect on competition (AAEC) in the market, Shri Deshmukh pointed towards the reduction in Cipla Ltd.'s sales after it was boycotted for appointment of M/s. Star Agencies (IP-1) as its stockist without obtaining NOC from AKCDA. It was contended that these multiple instances are indicative of the impact that such anti-competitive activities cumulatively bring to the market. Shri Deshmukh also submitted that the rampant anti-competitive activities of AKCDA have distorted the market and adversely affected the supply of medicines to the consumers in the State of Kerala.
15. Further, Shri Deshmukh also relied upon Alkem Laboratories' example where a stockist was appointed by it on the recommendation of AKCDA, though the evidence on record showed that that the Depot Manager of



Alkem Laboratories has stated that the stockist does not have good credentials.

16. It was argued that the statements given by various stockists and third-party distributors establish that money was being paid for seeking approval for appointment of stockists and bald denials by the OPs is insufficient to liberate it from the consequences of contravening the provisions of the Act.
17. Relying on various other instances of the procedure and modalities of stockist appointment in the investigation report, Shri Deshmukh vehemently argued that AKCDA was and has been indulging in the anti-competitive practice of mandating NOC prior to the appointment of stockists. Only the nomenclature has been changed, *i.e.* from formal NOC letters AKCDA has moved to congratulatory letters and/or verbal NOCs, to abuse the process of law and to avoid sanctions by the Commission. Based on these arguments, Shri Deshmukh prayed for a severe imposition of penalty upon AKCDA to create deterrence for indulging in such anti-competitive practices.

**AKCDA, its District Units at Thrissur and Kasargod and their respective office bearers**

18. AKCDA, its Districts Unit at Thrissur and Kasargod and their respective office bearers (OPs) filed a common response to the investigation report. They denied the allegations made by the IPs and the findings of the DG.
19. It was contended that the investigation done by the DG was biased, one-sided and completely influenced by the observations made by the Commission in previous cases concerning the same allegations. The DG chose disgruntled office bearers of AKCDA as witnesses who have either lost power to the present Office Bearers in the last election or form a



minority in AKCDA and their oral depositions have been relied upon by the DG without any corroborating evidence. The OPs further alleged that the DG posed leading questions to the office bearers of OPs during initial deposition which is not admissible.

20. It was submitted that the allegations regarding demand of cash by AKCDA office bearers for appointment of stockists were principally made by Shri David Cada who was a disgruntled Executive Member of Thrissur Unit, AKCDA. He produced a list of 17 stockists who allegedly paid money to obtain NOC and the DG, without examining most of these stockists, gave a finding against AKCDA without any corresponding corroborative evidence. It was alleged that out of these 17 stockists, person only in connection with one stockist viz., M/s J.J. Brothers have been examined. Also, there were discrepancies in the amounts referred to by Shri Gillroy Mathews, Ex-Manager of M/s J.J. Brothers and Shri Rony Paul, Partner, M/s J.J. Brothers in two successive statements.
21. Further it was argued that the DG has investigated only 22 individuals to arrive at a conclusion. The 22 individuals were spread over 4 IPs, 6 wholesalers, 5 pharma companies and 7 AKCDA members. None of the retailers have been examined which would have demonstrated that there has been no restriction on supply of pharmaceutical products in the State of Kerala during the period in question.
22. It was also argued that the allegations made by the IPs and the facts allegedly discovered by the DG in the present case were substantially similar to the allegations contained in the investigation report in *P.K. Krishnan* case. Therefore, the present case amounts to a second prosecution of the OPs for the very same infraction, which is impermissible in law. It was also claimed that after December 2013, since the issue of NOC was *sub judice* in a matter before the Commission, AKCDA discontinued the said practice. Presently, sometimes the



pharmaceutical companies only consult AKCDA as to the stockist's genuineness and credibility in the market. However, there is no mandatory requirement of NOC from AKCDA prior to the appointment of stockists.

23. It was contended that issuance of notice against the office bearers of AKCDA and its district units under Section 48 of the Act, before an adverse finding by the Commission against AKCDA, was illegal and contrary to the law.
24. Relying upon the Hon'ble Supreme Court decision in *Competition Commission of India v. Co-ordination Committee of Artists and Technicians of W.B. Film and Television and Ors.* (Civil Appeal No. 6691 of 2014, decided on 07.03.2017), the OPs argued that delineation of the relevant market is necessary before evaluating an allegation under Section 3 of the Act, which was lacking in the investigation report. The OPs have proposed the relevant market in the present case as '*market for pharmaceutical product in the State of Kerala at the whole sale level*' and have argued that AKCDA is not dominant in this relevant market. The OPs have furnished details of wholesalers and retailers obtained by them from the office of Drug Controller through an RTI application dated 14.03.2017, as per which the total number of wholesalers in the State of Kerala are 5561 and the total number of retailers in the State of Kerala are 12903. It was submitted that only 1533 wholesalers *i.e.* 27.5% of the total wholesalers and only 6637 retailers *i.e.* 54.89% of the total retailers in the State of Kerala are members of AKCDA. Relying on these numbers, the OPs argued that AKCDA does not have any significant market power to adversely affect the market.
25. The OPs also argued that NOC practice is a pro-competitive measure in as much as it was designed by the pharma associations across the country to check entry of spurious/sub-standard medicines into the market and to certify the credibility and genuineness of the stockists to the



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manufacturers. In this regard, the recommendations of Mashelkar Committee report were also relied upon by the OPs. It was further contended that nonetheless, obtaining an NOC, or any sort of permission from AKCDA, was not mandatory and/or a condition precedent for appointment of stockists by any manufacturer in the State of Kerala.

26. The OPs also sought to justify the NOC practice by submitting that it helps its members *i.e.* stockists, retailers and pharma companies – by providing a seamless flow of products through the demand and supply chain. It was submitted that NOC aids in (a) furthering local specification requirements, (b) providing adequate distribution facilities (c) reducing the costs incurred during transport substantially (d) making the demand-supply chain efficient benefit of which is passed on to the consumer.
27. The OPs stated that AKCDA acts as a watch-dog and helps to prevent incidences of entry of spurious/sub-standard medicines into the market in the State of Kerala. Office bearers function not for any pecuniary benefit, but, for the overall welfare of the pharma industry in the State of Kerala. It was also contended that the office bearers of AKCDA have their own respective businesses to run and manage and it was only for the larger interest of the industry that they undertook such strenuous additional activities of AKCDA.
28. It was stated that the practice of NOC was originally evolved to prevent entry of spurious/doubtful quality drugs purchased from unauthorized sources in the market as well as it was necessary for creating smooth business relationship and harmony. AKCDA argued that in law, there is no prohibition in manufacturers consulting an association of dealers in the matter of assessment of, the requirement in any area, the credibility of the person sought to be appointed, whether there are any complaints *etc.* The OPs contended that the agreement between the manufacturer on one hand and the association of dealers on the other, to appoint a particular number



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of stockists based on the exigencies and requirements of a particular company, by itself, does not amount to contravention of Section 3(3)(b) of the Act.

29. It was further submitted that the DG has failed to carry out any economic analysis in respect of the relevant market or point out any anti-competitive effect of the alleged practice of NOC in its report. Thus, assuming without admitting, that the practice of appointment of stockists based on NOCs results in limited number of stockists being appointed by the manufacturers, the same does not in any manner limit or control the supply of drugs in the market, so as to amount to contravention of the provisions of Act. Further, it was argued that in the present case, there is not even a shred of evidence that at the retail level any scarcity was faced either by the retailers or the consumers on account of restriction allegedly imposed by AKCDA.
30. At best, the only evidence that appeared to be relevant for this purpose was the purported fall in sales of Cipla Ltd. in September, 2013 in Calicut on account of boycott. This fact also would only be relevant if the Informant or the DG had produced data to demonstrate that there was scarcity in supply to either the retailers or the customers. In any event, as per the evidence of Shri Sreekumar Nair, Depot Manager, Cipla Ltd., Calicut the fall in sales was recovered in the subsequent month or in the same month from the adjoining territories to District Calicut, which implied that there was no substantial fall in the total sales of Cipla Ltd. because of the boycott.
31. Thus, even if it is assumed that NOC was mandatory and/or a condition precedent for appointment of stockists, there was no AAEC in the relevant market.



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32. The OPs also reiterated the preliminary objection with regard to jurisdiction and submitted that they reserve their right to agitate the same before an appropriate forum.
33. Besides these general arguments, the OPs also presented their response/objections to each of the specific instances relied upon by the DG, which are elucidated in the following paragraphs.
34. With regard to the evidence relating to grant of Wallace Pharmaceuticals Pvt. Ltd.'s stockistship to Kottayam Drug House, the OPs have submitted that the DG neither posed questions to Shri Raju and Shri Mohan in their vernacular language nor arranged for a translator. By not doing so, the DG has violated the principles of natural justice. Although the evidence showed that the stockists applied for NOC from AKCDA, the DG failed to establish that such request was made under coercion. Further, it was stated that AKCDA wrote a simple congratulatory email to Wallace Pharmaceutical Pvt. Ltd. which was wrongly taken as an evidence against it. It was also contended that the DG, without examining Kottayam Drug House, presumed the mandatory nature of NOC.
35. With regard to grant of stockistship by Alkem Laboratories to Sabari Agencies, the OPs argued that there was no proof tendered by Shri T.K. Haridas to show that NOC was a compulsion. Shri Haridas deposed before the DG that the mail dated 30.03.2015 was written by him to one Shri Johnson Mathew, stating that *"My field officers wanted an appointment of another stockiest therefore I told them to clear the matters with Shri A.N. Mohan."* It was further submitted that the letter dated 20.03.2015 did not depict any coercion – the extract read as *"we have discussed the matter with Mumbai, as recommended by the AKCDA"*. The OPs also sought to justify Shri Haridas' reply to the mail dated 18.07.2015 wherein he has categorically stated, *"yes after seeing this mail I confirm that the approval from AKCDA is a compulsion. This compulsion is on insistence"*



*of the field staff*”. It was argued that the above statement showed that it was the field staff that insisted upon approval from AKCDA.

36. With regard to grant of USV Pvt. Ltd.’s stockistship to Sabari Agencies, the OPs vehemently denied their involvement. It was submitted that in case there was a stoppage in supply to any stockists by a pharma company, the same could not be attributed to AKCDA’s interference. The DG has simply relied upon the congratulatory letter in possession of M/s J.J. Brothers written by AKCDA to USV Pvt. Ltd. and Sabari Agencies, without even examining persons from those two entities. It was further submitted that the DG had misquoted the reply of Shri A.N. Mohan Kurup to arrive at the conclusion though his statement clearly stated that he was not aware whether the congratulatory letter was issued before or after the appointment of Sabari Agencies as the stockists of USV Pvt. Ltd.
37. With regard to grant of Intas Pharmaceuticals Ltd.’s stockistship to Ideal Pharma Associates, the OPs submitted that Shri A.N. Mohan Kurup, President, AKCDA categorically informed Intas Pharmaceuticals Ltd. that there was no requirement of NOC when Intas Pharmaceuticals Ltd. requested him to authenticate the letter issued by the District Unit. It was submitted that many stockists have been appointed without an NOC in the past 3 years. It was further argued that this instance dates back to 21.08.2014 which period was covered by the investigation in an earlier similar case (*P.K. Krishnan* case) where investigation was conducted during 29.09.2014 to 31.03.2015, and thus, evidence pertaining to that period should not be considered for the purposes of ascertaining the allegations in the present case. Responding to the DG’s observation regarding contradictory statements given by Shri A.N. Mohan Kurup (*i.e.* claiming that NOC was optional and yet also justifying it), the OPs submitted that the objective was to disseminate information but since law does not permit mandatory NOC, the same is not mandatory anymore.



38. With regard to grant of Novartis India Ltd.'s stockistship to M/s Madhavi Pharma, the OPs responded that the DG has not cross examined the Secretary of Kasargod District Association to confirm the allegations regarding exchange of correspondence between M/s Madhavi Pharma and himself. Rather, the DG has shifted the burden on Shri A.N. Mohan Kurup to prove the negative. It was also alleged that the DG has not examined either Novartis India Ltd. (the manufacturer) or M/s Madhavi Pharma (the stockist) to arrive at a correct finding.
39. With regard to grant of extensions of stockistship of Cadila Healthcare Ltd., the OPs submitted that both the letters relied upon by the DG, *i.e.* letters dated 17.10.2015 and 22.08.2015, were internal communication. Just because they contain a list of stockists with the subject being 'AKCDA approved party list', it does not mean that AKCDA was involved in the matter. It was further submitted that the letter relied upon by Shri T.J. Sivaraman, SRM Associates, during his deposition was an internal communication which was denied for the want of knowledge. The OPs also stated that the issue was contractual in nature.
40. With regard to grant of stockistship by German Remedies Ltd. to Anu Pharma, the OPs argued that the congratulatory letter issued by AKCDA was not mandatory and the participation of AKCDA was largely pro-bono and recommendatory. Just because Shri A.N. Mohan Kurup did not take any action against Shri Venugopala for issuing a congratulatory letter, the same could not be held against him, especially when it was not even proved that a congratulatory letter was against the interest of the market. It was further submitted that the very fact that the company itself approached AKCDA for the appointment of stockiest showed that the NOC was voluntary. The OPs also objected to the fact that the DG has not examined persons from Anu Pharma (stockiest) or Novartis India Ltd. (Pharma company) to seek information regarding any pressure or mandate of NOC.



41. The OPs submitted that a letter issued for congratulating Unilex Life Sciences Pvt. Ltd. does not substantiate the allegation regarding grant of stockistship of Unilex Life Sciences Pvt. Ltd. to M/s Chithira Enterprises. Further, it was argued that the examination of any person from Unilex Life Sciences Pvt. Ltd. was not undertaken by the DG to ascertain whether obtaining the said letter was mandatory or not.
42. On the grant of stockistship by Icon Life Sciences to SRM Associates, the OPs submitted that the issue at hand was a contractual issue and the same did not require interference of the Commission. Also, as the approval of AKCDA was not mandatory, Shri Sivraman could operate in the market without the NOC like the majority of wholesalers in the market.

### **Findings of the Commission**

43. The Commission has perused the information, the investigation report and the suggestions/objections to the investigation report given by the parties and the oral submissions made by their respective learned counsel(s) in the hearing held on 31.05.2017.
44. The Commission notes that apart from assailing the findings of the DG on merits, the OPs have raised many procedural objections or preliminary issues in their response to the investigation report. Apart from the preliminary issues, the following main issues require determination in the present matter:

*Issue 1: Whether AKCDA and its district associations were mandating NOC prior to the appointment of stockists by pharmaceutical companies in the State of Kerala?*

*Issue 2: If the answer to Issue 1 is in affirmative, who are the individual*



*office bearers of the OPs who are liable under Section 48 of the Act for their respective anti-competitive conduct?*

45. Before going into the substantive issues, each of the procedural/preliminary issues raised by AKCDA, its District Associations and their officer bearers, through their joint response, are dealt with in the ensuing paragraphs.

#### **Preliminary issues regarding similarity of facts with an earlier case**

46. The OPs have alleged that the facts of the present case are identical to an earlier case *viz. P.K. Krishnan* case, wherein the Commission, *vide* its order dated 01.12.2015, has found AKCDA to be in contravention of the provisions of the Act. Thus, proceeding against AKCDA in the present case will only amount to punishing it again for the same contravention which is impermissible in law.
47. The Commission observes that AKCDA had raised this issue in its application dated 02.11.2016 also, while challenging the jurisdiction of the Commission in the present matter. The Commission had rejected AKCDA's plea regarding jurisdiction *vide* order dated 23.12.2016. With regard to AKCDA's specific objection on contravention found by the Commission against it in *P.K. Krishnan* case, the Commission had held that the *proviso* to Section 26(1) of the Act, under which cases before the Commission are clubbed, gives prerogative to the Commission to club two or more information(s) containing substantively the same subject matter; however, taking recourse to the same always is not mandatory. There can be cases where despite there being similar facts and allegations, the Commission may not direct clubbing of cases depending upon various reasons, such as the first case under investigation being at an advanced stage, the period of contravention being different, parties being different *etc.* The Commission had further clarified that at the stage of considering



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the intervention application of the IPs, the Commission has found the facts in this case to be different from the *P.K. Krishnan* case and, for this reason, the application for intervention filed by the IPs was considered a separate information. Further, in its order dated 23.12.2016, the Commission had elucidated that if, after hearing the parties on the investigation report, the Commission is convinced that the allegations and evidence relied upon by the DG against AKCDA in this case are found to be identical to that of *P.K. Krishnan* case, the decision shall be taken accordingly.

48. In view thereof, the Commission has considered the evidence as well as the period of investigation relied upon by the DG in the present case *vis-à-vis* the evidence that the Commission took into consideration while deciding the *P.K. Krishnan* case. It is true that the primary allegation in the present matter is similar to that in the earlier case (*P.K. Krishnan* case) *i.e.* the mandatory requirement of NOC from AKCDA prior to the appointment of stockists by the pharmaceutical companies. However, the records reveal that the period of investigation and the evidence relied upon by the DG in the two cases relate to different time periods, barring a few overlapping instances.
49. It is a matter of record that the main allegation in the *P.K. Krishnan* case pertained to 2013 to early 2014. The DG, during investigation, also relied upon certain additional evidence which pertained to the later part of year 2014 *e.g.* the email sent by Shri A. N. Mohan Kurup, President of AKCDA to Shri J. S. Shinde (President, AIOCD) on 01.12.2014 was relied upon to show how the appointment of stockists were being made with the approval of district/ State units of AKCDA. However, in the present case, most of the evidence relied upon by the DG pertain to 2014 or 2015. Thus, the present matter appears to be more of a case of continuing contravention. Even when AKCDA was under investigation in the *P.K. Krishnan* case, it was allegedly continuing with the



contravention. Further, the investigation of the DG points towards certain new facts in the present case *e.g.* payment of cash for issuance of NOC, involvement of district associations *etc.*, making it imperative to deal with the evidence gathered during investigation afresh in this matter.

50. Further, even though the Commission had not decided against AKCDA regarding the main allegation (mandatory NOC) until 01.12.2015, when the final order under Section 27 of the Act was passed in *P.K. Krishnan* case, it cannot plead ignorance. In many past cases, the Commission has unequivocally held NOC to be an anti-competitive practice having an effect of limiting and controlling the provision of drugs in the market. Considering the rampant prevalence of NOC and other anti-competitive practices despite orders of the Commission, the Commission decided to issue a press release. Accordingly, on 03.02.2014, a press release was issued by the Commission to all the chemists and druggists associations, operating at all India level, State level or district level, stating that penalties would be imposed on them if they are found to have committed the following anti-competitive practices:
- a. Issuance of No Objection Certificate or letter of consent for opening chemist shop/being appointed as stockists/distributor/whole-seller.
  - b. Compulsory payment of PIS charges by pharmaceutical companies/manufacturers for release of new drugs/formulations.
  - c. Fixation of trade margins at different levels of sale of drugs/medicines.
  - d. Issuance of instructions to chemists/ druggists/ shops/ stockists/ whole-sellers/ manufacturers restricting discounts on sale of drugs in retail or wholesale.
  - e. Issuance of boycott calls by the associations to their members against any enterprise for not following the instructions of associations.



51. The press release further mandated cease and desist against all such associations directing them not to indulge in any of the above-mentioned anti-competitive practices. Non-compliance of the orders of the Commission was specifically mentioned to attract severe penalties.
52. However, it is noted that despite such specific warning and instructions, many associations are still continuing with their conduct, which warrants intervention by the Commission. The Commission will analyse the evidence collected by the DG in the present case to ascertain whether AKCDA has indulged in the continuing contravention of the provisions of the Act which started with the series of events highlighted in *P.K. Krishnan* case and continued even while DG was investigating AKCDA's conduct in the present matter. Past trial and imposition of penalty does not give a right to the erring party to continue with the anti-competitive practice and go scot-free. Even during the investigation in *P.K. Krishnan* case, the DG was directed to find whether AKCDA was indulging in NOC practice or not. In the present case, the OPs cannot take this plea that the evidence relates to a period prior to 01.12.2015, when the order of the Commission was pronounced in *P.K. Krishnan* case. Even before the pronouncement of the Commission's order in *P.K. Krishnan* case, AKCDA ought to know about the anti-competitive nature of the mandatory NOC requirement, considering that investigation in *P.K. Krishnan* case took place in 2014- 2015 and the press release was issued by the Commission on 03.02.2014.
53. In this regard, the Commission further notes that Shri Thomas Raju, General Secretary, AKCDA, in his deposition before the DG on 30.11.2015, admitted that AKCDA was issuing congratulatory letters and he undertook that in future, he will not issue congratulatory letters as NOC. The relevant excerpt from his deposition is reproduced below:



**“Q31. Based on Exhibit-3 are you now accepting that a congratulatory letter is an NOC.**

**Ans. Yes, I undertake that from today onwards I will never issue even the congratulatory letters as NOC.”**

54. Considering the obstinacy of Chemists and Druggists associations in perpetrating the NOC practice which has been found to be opposed to the principles of competitive markets, it is all the more important to proceed with this matter. As stated earlier, past trial and imposition of penalty will not come to their rescue, if the OPs have continued with the anti-competitive practice. To determine whether the OPs have contravened the provisions of the Act, the evidence gathered by the DG in the present matter needs to be examined.

#### **Preliminary issue regarding choice of witnesses and DG’s biasness**

55. The OPs have heavily objected to the choice of witnesses by the DG arguing that the DG has chosen the disgruntled office bearers of AKCDA whose statements have been relied upon by the DG without any corroborating material on record. The Commission finds these arguments rather flimsy considering the diverse range and categories of persons investigated by the DG. The DG recorded statements of around 22 witnesses which included the IPs, third party wholesalers and distributors, and officials of pharmaceutical companies. Further, these statements were duly confronted to the officials of AKCDA and its District Associations. The DG also recorded statements of officials from pharmaceutical companies, on the documentary evidence collected during investigation. Having due regard to these facts and circumstances, the Commission finds no infirmity in the process of investigation followed by the DG. Further, the OPs objection regarding DG’s reliance on the depositions made by the disgruntled office bearers of AKCDA is found to be without merit as those



erstwhile office bearers were important witnesses. They were part of AKCDA and had first-hand information regarding the working of AKCDA and things happening within AKCDA.

### **Preliminary issue regarding Mashelkar Committee Report**

56. AKCDA has submitted that in view of the recommendations made in the Mashelkar Committee Report, the insistence of NOC by trade associations for appointment of distributors by pharmaceutical companies does not violate Section 3 of the Act. The Commission observes that this objection has already been raised by AKCDA while challenging the jurisdiction of the Commission *vide* application dated 02.11.2016. The Commission, *vide* its order dated 23.12.2016, has clarified that the said Committee was formed to examine all aspects relating to regulatory infrastructure for supply of drugs to combat the problem of spurious/sub-standard drugs in the country. There is no mention of the practice relating to grant of NOC by district/state/national level chemists and druggists associations in the said report. At the cost of repetition, the only recommendations given by the Mashelkar Committee report to pharma trade associations and AIOCD were as follows:

- a. Play a pro-active and visible role to contain the menace of spurious/counterfeit drugs.
- b. Develop a mechanism for identifying persons directly or indirectly involved in abetting the distribution of spurious, counterfeit or questionable quality drugs.
- c. Prepare a checklist for the guidance of members and widely publicise the same for information of all members.
- d. Sub Rule 3 of Rule 65 (4) of the Drugs and Cosmetics Rules requires that the retail supply of any drug shall be made against a cash/credit



memo. This condition of license should be strictly adhered to by all retail licensees.

- e. Every chemist/pharmacist is to act as a watchdog to prevent the entry of any spurious/doubtful quality drugs or those purchased from unauthorised sources or without proper bills in the supply chain.

57. The aforesaid recommendations of the Mashelkar Committee report are mainly aimed at combating the distribution of spurious, counterfeit and questionable quality drugs. These recommendations do not, in any manner, appear to suggest that the associations can undertake the task of mandating NOC prior to the appointment of stockists. The Commission finds no substance in this contention. The argument posed by AKCDA regarding its pro-active role in safeguarding the interest of consumers/patients through practice like NOC is nothing but an attempt to hide its anti-competitive activities under the garb of a pseudo protectionist approach. Thus, the OPs' reliance on Mashelkar Committee report is found to be misplaced.

#### **Miscellaneous preliminary issues**

58. The OPs have also raised issues with regard to the Commission's jurisdiction and initiation of proceedings under Section 48 of the Act against the office bearers of AKCDA and its District units before forming an opinion against the respective trade associations. These two objections have already been raised by AKCDA in its application dated 02.11.2016, while challenging the jurisdiction of the Commission in the present matter. The Commission has rejected both these pleas through a reasoned order, which is not repeated herein for the sake of brevity.

59. In view thereof, the Commission finds the preliminary objections raised by the OPs to be baseless and they are hence, rejected, being devoid of



merit. Having dealt with the preliminary objections, the Commission will now deal with the case on merits.

*Issue 1: Whether AKCDA and its district associations were mandating NOC prior to the appointment of stockists by pharmaceutical companies in the State of Kerala?*

60. The allegations raised by the IPs and the plethora of evidence collected during investigation unambiguously indicates that this is yet another case of alleged anti-competitive conduct by a State/District level chemists and druggists association which has come before the Commission for adjudication. The Commission is not only surprised with the extent of delinquency shown by these associations but also the obstinacy of the pharmaceutical companies in cooperating with their anti-competitive conduct, and not coming forward to assist the Commission in bringing about a fair and competitive environment for the supply of drugs in the market. Before the Commission, some of the pharmaceutical companies showed willingness to engage in deliberations with the Commission to devise solutions for bringing in fairness and competitiveness in the appointment of stockists and distribution of drugs/medicines, yet it is unfortunate that during investigation, they opted to take an evasive stand.
61. Be as it may, the Commission will follow its mandate and deal with the issues that have arisen in the present matter. In many past cases concerning similar practice (mandatory NOC) by regional or State level trade associations, the Commission has held such practice to be anti-competitive, in contravention of the provisions of Section 3(3)(b) read with Section 3(1) of the Act. Thus, the main issue before the Commission is whether AKCDA and the other OPs were mandating the requirement of NOC prior to the appointment of stockists in the State of Kerala.



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62. While defending their stand in the present matter, the OPs (AKCDA and its affiliate district associations, namely Thrissur and Kasargod) have resorted to three-pronged argument to counter the allegations of the IPs and the evidence collected by the DG. *Firstly*, the OPs have submitted that NOC is not mandatory in nature. It was stated that earlier there was a requirement of NOC prior to the appointment of stockists but ever since the Commission has held such a practice to be anti-competitive, the OPs are not insisting on the same. *Secondly*, the OPs have tried to justify NOC being a beneficial practice by stating various commercial and efficiency justifications for the same. It has been contended that because of the efficiency reasons, the pharmaceutical companies on their own volition approach AKCDA/its district associations for checking the antecedents of a stockist prior to its appointment, despite this practice not being mandatory in nature. *Thirdly*, the OPs have argued that even if the Commission reaches a conclusion that the OPs were mandating NOC, the said practice has not caused any AAEC in any market, owing to the limited number of stockists/retailers associated with AKCDA as its members.
63. As regards the first argument regarding the NOC being mandatory in nature, the Commission observes that during investigation, the DG has discovered evidence which not only reveals the role of AKCDA and its district associations in the appointment of stockists in general, but also highlights specific instances of denial of stockistship or supply of drugs because of the interference of AKCDA and its district associations. Various depositions comprising of statements of various stockists, third party wholesalers, officials of pharmaceutical companies and office bearers of AKCDA and its district associations, recorded by the DG, are self-explanatory with regard to the mandatory/necessary requirement of NOC in the State of Kerala. Relevant excerpts from such statements are produced in the following paragraphs.



64. Shri KP Raveendran, partner of M/s Chithira Enterprises and Managing Partner of M/s Madhavi Pharma, has been in pharma distribution business since 1987 and his firms are the distributions for Glaxo SmithKline Pharmaceuticals Ltd., Pfizer Ltd., Abbott Healthcare Pvt. Ltd. and Sun Pharma Laboratories Ltd. – Inca Division, Radiant Division, Urology Division and Solares Division. Both his firms, M/s Chithira Enterprises and M/s Madhavi Pharma are members of AKCDA in Kasargod District of Kerala. Considering his experience, the DG enquired from him the role of AKCDA in the appointment of stockists. His response, during deposition dated 13.10.2015, as reproduced below, is relevant in dealing with the first argument taken by the OPs.

***“Q5. Are your firms a member of All Kerala Chemists and Druggists Association (AKCDA)? What has been your experience in dealings with AKCDA?”***

*Ans. As regards our dealings with AKCDA, I state that even after the clear cut and explicit guidelines issued by the Competition Commission of India, AKCDA is still involved in creating entry barriers. This is done by issuing “Congratulation Letters” these days instead of NOC, which was issued earlier. To prove my contention, as evidence I am providing a copy of letter addressed to District Secretary, AKCDA Kasargod dated 31.01.2015, which was written when we were offered the distribution of M/s Unilex Lifesciences Pvt. Ltd. we paid an amount of Rs. 1500/- to AKCDA by Cheque No. 239511 dated 31.01.2015. Thereafter, we were provided congratulatory letter signed by the District Secretary of Kasargod District of AKCDA dated 07.02.2015, which was a kind of permission granted by the AKCDA for us to carry out the business of stockistship of Unilex Lifesciences Pvt. Ltd*



*under our firm M/s Chithira Enterprises. (Copy of both these letters is placed as Annexure S-5(i) to this report) ....Though AKCDA may contend that they are no longer controlling the trade by creating entry barriers in the form of NOC, I submit that instead of issuing NOC as was the practice earlier, now the only difference is in the nomenclature of the letter, i.e. the Congratulatory Letter. I am substantiating this point as AKCDA has no reasons to congratulate us/ our firm for being appointed as distributors. This letter is an indication to us, as well as to the pharma company, that we or our firm are approved by AKCDA for running our business further, it is emphasized that without this letter, neither the pharma company nor the trade will accept us as distributors, authorized by AKCDA. This is the situation at present in Kasargod district of Kerala.” (emphasis supplied)*

65. The aforesaid response of Shri KP Raveendran, who is in the business of distributing drugs in Kerala for almost 40 years, is self-explanatory of the role of AKCDA in appointment of stockists. The underlined portion of the aforesaid response fully negates the first argument taken by the OPs. It clearly states that even after the clear cut and explicit guidelines issued by the Competition Commission of India, AKCDA is still involved in creating entry barriers. It is evident that only the nomenclature has been changed from formal ‘NOC’ letter to ‘congratulatory’ letter.
66. In this regard, it may be relevant to reproduce the letter dated 06.02.2014 written by Madhavi Pharma addressed to the Secretary Kasargod, requesting him to issue NOC for stockistship of Novartis India Ltd.



67. The contents of the aforesaid letter, i.e. *Enclosed herewith please find the stockiest appoint form (offer letter) from Novartis India Ltd. and Cheque No. 3245472, dated 06.02.2014 for Rs. 10000 (Rupees Ten Thousand Only), drawn on Punjab National Bank, Kasargod. So we request that please issue NOC to take the stockiest ship of Novartis India Ltd., in Kasargod.*, clearly shows that NOC was a requirement for appointment of stockist.



68. Further, the response to this request given in the form of a congratulatory letter, issued by Secretary of Kasargod unit of AKCDA, is reproduced below:

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69. These letters are self-explanatory and require no further elaboration. If the practice of NOC was not mandatory, then where was the need for the



stockists to approach AKCDA or its district units for approval and in the absence of such mandate, why is AKCDA even responding to such letters seeking NOC. To obtain answers to such questions, Shri Venugopala, President, Kasargod District Unit of AKCDA was confronted with these evidences. The relevant excerpts of his statement are as follows:

***“Q38. I am showing Exhibit-7 which is a letter by M/s Madhavi Pharma to the Secretary, Kasargod asking “please issue NOC to take the stockistship of Novartis India Ltd.”. Please explain.***

*Ans. I am not responsible, I have not issued any paper or issued any NOC. The Secretary has actually done it. I have just seen Madhavi Pharma is asking for an NOC. But my Secretary has just issued a congratulatory letter.*

***Q39. So this proofs (sic) the point directly that NOC and congratulatory letter are the same since the congratulatory letter is issued by your Secretary one day after the request for the NOC.***

*Ans. I have not done it.*

***Q40. I am showing Exhibit-8 which is the congratulatory letter given by your Secretary of M/s Madhavi Pharma one day after Madhavi Pharma has requested for NOC. Is this correct.***

*Ans. He has asked for NOC and my Secretary has issued congratulatory letter.”*

70. The aforesaid response of Shri Venugopala shows that he attempted at relieving himself from the personal liability of the acts done by the Secretary of his association. Evidently, he has not denied about the



requirement of NOC, but rather pleaded ignorance of his personal involvement in the same. It is further noted that his plea that ‘*he has not done it*’, is only a bald contention without any supporting evidence.

71. The aforesaid exhibits were also confronted to the AKCDA President, Shri A.N. Mohan Kurup and he was also given an opportunity to cross-examine the witnesses which he refused. The relevant excerpt of his statement is as below:

***“Q10. So letter of appreciation was being given as or equivalent to NOC?”***

***Ans. Yes, the practice of giving letter of appreciation or NOC was there, not by us.”***

72. The DG has observed that though Shri Mohan, while accepting the fact that the NOC practice was prevalent, tried to retract the liability of AKCDA, he could not produce any evidence to substantiate. According to the statement of Shri Venugopala, President, Kasargod District Unit, Shri A.N. Mohan Kurup has a direct role in the issuance of congratulatory letters in lieu of the NOC and this practice was perpetrating under his aegis, and accordingly Shri Mohan was asked about the same in the following question:

***“Q50. I am showing you Exhibit-7 which is a letter from Madhavi Pharma to the Kasargod, Secretary asking him to issue NOC for stockistship of Novartis India. Exhibit-8 is a congratulatory letter by the AKCDA District Secretary to Madhavi Pharma. Exhibit-9 is a congratulatory letter by District Secretary, Kasargod to Chithira Enterprises. Please note that these documents are equivalent documents to the congratulatory letter/ NOC attributed to the State Association. Further, the Kasargod District***



***President has clearly stated that all this is done under your aegis.***

*Ans. I deny his statement which is not true.”*

73. Hence it is observed that though the various functionaries of AKCDA and its district associations have tried to shift responsibility, none of them has out-rightly denied the requirement of NOC being there. The aforesaid extracts from their statements clearly show that AKCDA and its Kasargod District unit was instrumental in the issuance of congratulatory letter in favour of M/s Madhavi Pharma for distributorship of Novartis India Ltd. in Kasargod District, which is actually NOC in disguise. The aforesaid evidence and depositions also reveal the active involvement of the office bearers of AKCDA and Kasargod district unit in such contravention.
74. Another statement, given by Shri Sivraman T.J., Proprietor of SRM Associates, Edapal, District Malappuram (Kerala), who has claimed that his firm has been in the pharmaceutical business for the last 30 years, revealed similar factual scenario. SRM Associates was the wholesale distributor of Sun Pharma Laboratories Ltd., Aristo Pharmaceuticals Pvt. Ltd., Blue Cross Laboratories Ltd., Glenmark Pharmaceuticals Ltd. etc. The following excerpts from Shri Sivraman’s statement are indicative of AKCDA’s indulgence in the alleged contravention:

***“Q5. Is your firm a member of All Kerala Chemists and Druggists Association (AKCDA)? What has been your experience in dealings with AKCDA?”***

*Ans. Yes, my firm is a member of AKCDA in Malappuram District of Kerala. I am also an elected executive member of AKCDA from Edapla area. However, I am never called for any district executive meeting by AKCDA because I am against the practice of donation for NOC and because I have also taken*



*stockistship without any NOC by AKCDA. As regard my dealings with AKCDA regarding the NOC, I have to state that I had applied for the stockistship of M/s Icon Life Sciences Chennai, vide our letter dated 06.11.2014 for Edapal area of Malappuram District. After negotiations my stockistship was also approved informally and I was told to get NOC from AKCDA. However, since I was not in favour of taking NOC from AKCDA as a matter of principle, I did not approach them. I received a letter dated 15.11.2014 for M/s Icon Life Sciences, Chennai clearly stating that they approved my appointment at 5<sup>th</sup> point stockist in Malappuram district and stated that the stocks would be supplied to me through their C & F agent M/s K.T. Kuruvila and Sons from Ernakulam as per the norms. This letter also stated that “if it is required we request you to take the NOC from your association”. This clearly implied that I was to get the NOC from AKCDA. However, I did not approach them and as a result I have not been given the stockistship of this company even till date. Orally, I have been informed that the stockistship cannot be given without an NOC from AKCDA.*

75. The above statement speaks about the role of AKCDA in appointment of stockists and evidences the sanctions faced by stockists not following the mandate of seeking NOC. It is clear that even after issuance of the letter from M/ Icon Life Sciences, stockistship was not granted to SRM Associates, owing to non-obtaining of the NOC from AKCDA. The stockists appointed by pharma companies were not finally approved to transact business, if they were not able to manage NOC from AKCDA. Further, it is evident that office bearers of AKCDA were demanding money to issue NOC. The OPs have objected to this statement contending that while recording Shri Sivraman’s statement, the DG took assistance of the IPs for translation, instead of an independent translator, which



significantly affected the independence of the entire investigation. In this regard, the Commission notes that the vast variety of witnesses echoing similar claims regarding the role of AKCDA in stockists' appointment corroborates the truthfulness of Shri Sivraman's statement. This statement clearly brings out the role of AKCDA and its Thrissur district unit in perpetrating the practice of NOC.

76. The DG also summoned Shri C.R. Davis to inquire about the role of AKCDA in the appointment of stockist. Shri C.R. Davis was an Executive Committee member of Thrissur district unit of AKCDA. The following portions of his statement are relevant for deciding the issue under consideration:

***“Q6. What is the role of AKCDA today?”***

*Ans. AKCDA is the association of all the retail chemists and the wholesalers in pharmaceuticals business/ trade. For retailers, the association sets guidelines for return of expired stock of pharmaceutical medicines. As for the wholesalers, it helps the business to operate smoothly with the pharmaceutical manufacturing companies. According to the AKCDA norms, one stockist, if appointed for one pharma company, is normally not allotted another company during that year. The AKCDA Steering Committee of Thrissur District, approves that appointment of wholesalers distributors/ stockist by accepting money (in cash) from the distributors/ stockists and grants them an NOC, which in writing or given orally. The approval in writing is in the form of a congratulatory letter. The decisions of the AKCDA are binding on them.*

*However, of late, the AKCDA is silently not adhering to its own norms and after taking money to approved the NOC, it has approved the appointment of a stockist for more them one*



*company in that year. For example, M/s Meenakshi Medical Agencies was given approval for M/s Cipla, Glenmark and some other companies during last year (2014-15). They (Meenakshi Medical Agency) paid rupees 27 lakhs to the district Steering Committee comprising of Shri A.N. Mohan (State President), Shri V. Anver (Thrissur President) and Shri A.B. Rajesh (Thrissur Treasurer) for getting these approvals.”*

(emphasis supplied)

77. Another person summoned by the DG was Shri K. Sivasankaran, Proprietor of M/s Pee Cee Medical Agencies, Thrissur (Kerala), who is a third party distributor and was also the Ex-General Secretary of AKCDA. His firm was engaged in the wholesale distribution business of pharmaceutical products. Some of the answers given by him are reproduced below:

**“Q7. What is the role of AKCDA these days?**

*Ans. AKCDA is the trade association of all the retail chemists and druggists, and the wholesale distributors of Kerala State, who are the members of the Association. It has more than 8000 members throughout the State (If repeated omit). The Association operates and companies of District units for all 14 revenue districts. The AKCDA practically controls and manages all trade related issues with manufacturers, Govt. agencies or among themselves i.e. between the retailers and stockists. It also controls the appointment of new stockists by granting the permission for new appointments.*

*These permissions were earlier granted in writing in the form of NOC. However, these days these permissions are generally verbal or in the form of congratulatory/ best wishes letters to*



the stockists and the pharma company. Any stockist appointed without AKCDA permission has to face non-cooperation from the Association side and even the manufacturing pharma company appointing such stockist face the consequences.

[.....]

There is another similar instance involving M/s Livisus Pharma, who appointed M/s Inter Pharma as one of their stockist without without AKCDA permission about one year back. At that time, AKCDA issued directions to all the retails chemists not to purchase from M/s Inter Pharma. This boycott continued for a long time spread over about 3-4 months. The owner of M/s continued for a long time spread over about 3-4 months. The owner of M/s Inter Pharma, Shri M.P. Joy contacted me to intervene and convince the chemists to cooperate with him, but because of the pressure of AKCDA not many chemist came forward to help him. Later on M/s Inter Pharma approached Shri A.N. Mohan and Shri V. Anver of AKCDA settled the issue by making payment.

**Q10: Do you often attend the meetings of Districts Executive Committee? When was the last meeting held and where it was held? Please give the particular details.**

Ans: I had attended one meeting of the District Executive Committee on 20.09.2015. This meeting was held at Hotel Noopura at Pazhayannur, Thrissur. Around 30 members had participated in this meeting.

As far as I remember, Shri A.B. Rajesh presented the accounts for previous one/ two months. As he read the accounts, Shri Davis Cada objected to the fairness of accounts and requested the Treasurer not to pass these accounts, since the accounts



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*presented seemed to be incorrect. He also referred to some examples by naming the parties and payments made by them.*

*Shri Davis Cada wanted the names of such parties for the information of the Executive Members but these names were not given and the issue was diverted. Later on, Shri A.N. Mohan said that it is important to keep records for the collections and transparency for the same, but all the transactions cannot be on record because these records can go to the Competition Commission of India.*

*Then Shri V. Anver explained that Steering Committee has decided to take necessary action against M/s JJ Brothers for having taken the stockistship of M/s USV Pharma without their permission and asked the Executive Committee for suggestions to propose action. The Executive Committee suggested to call the owners of JJ Brothers and decide the matter thereafter.”*

(emphasis supplied)

78. From the documentary evidence placed on record by Shri K. Sivasankaran and the aforesaid excerpts from his deposition before the DG, it is ample clear that the requirement of NOC was very much prevalent in the State of Kerala for appointment of stockists. Rather, it is apparent that AKCDA, knowing the anti-competitive nature of such a practice, devised ways to circumvent detection by the Commission. Further, in case of any appointment of stockist/ distributor without the NOC, AKCDA took action in the form of boycott, dharna etc. Also, the office bearers of AKCDA collected money to grant the NOC, which personally enriches them. The fact of issuance of the NOC is openly discussed and deliberated upon in the District Executive Committee meetings of AKCDA, though it does not form part of the minutes of the meetings. Further, attempts have



been made to evade creation of any kind of evidence, *e.g.* the formal NOC letter being replaced by ‘congratulatory letter’, transaction regarding taking of money for NOC was not being recorded in the accounts books *etc.*

79. During investigation in this matter, various witnesses have pointed towards the payment of money for issuance of NOC by AKCDA and its functionaries. Considering that the name of Shri A.B. Rajesh has been brought out by several witnesses in relation to the receipt of cash by AKCDA in lieu of issuance of the NOC, statement of Shri Rajesh, Treasurer of Thrissur district, AKCDA, was recorded by the DG. He was also questioned about the proceedings of the alleged meeting that took place in Hotel Noopura on 20.09.2015.
80. Though he denied accepting any money for issuance of NOC, yet the fact that he chose not to cross-examine the witnesses and accepted the contents of the meeting held on 20.09.2015, goes against him. The investigation also recorded statement of Shri O.M. Abdul Jaleel, Treasurer of AKCDA, wherein he accepted that money is paid for granting NOC for stockistship. These depositions not only establish a case against AKCDA and its Thrissur district unit, but also against their respective treasurers, namely Shri A.B. Rajesh and Shri O.M. Abdul Jaleel.
81. Another third party distributor summoned by the DG was Shri Rony Paul, Partner and authorised representative of M/s JJ Brothers. Shri Rony Paul stated that their firm was engaged in the wholesale business of pharmaceutical products and they were the authorized stockists of Sun Pharma Laboratories Ltd., Indoco Remedies Ltd., IPCA Laboratories Ltd. and USV Pvt. Ltd. Relevant extracts of his statement dated 29.10.2015 are reproduced below:-



***“Q5. You have handed us an exhibit labeled ‘Exhibit-1’ by Shri Rony Paul, duly signed by you, on page 8 which gives the agreement form of IPCA Laboratories for your appointment as a wholesaler on page – there is a question ‘Is an NOC/LOC required from Chemists Association? If yes, attach certified photocopy’. Please explain.***

*Ans. Prior to being appointed as wholesalers for any pharmaceuticals company, we have to obtain an NOC from the AKCDA, probably Mr. Rajesh and Mr. V. Anver. After supplying the medicines to us IPCA insisted that we get an NOC from AKCDA since the existing stockists of IPCA were boycotting purchase from them, probably under the directions of AKCDA. I then directed Mr. Gillroy Mathews, our Manager to sort out the matter with the AKCDA, which was done by paying Rs. 3 lakhs. Mr. Gillroy Mathews mentioned Mr. Rajesh and Mr. V. Anver.*

***Q6. Have you at any point been told to get an NOC by anybody?***

*Ans. Yes, by Intas Pharmaceutical somewhere in August/September, 2015. This was asked to our manager telephonically.*

***Q7. We are showing you Exhibit-2, submitted by you to us, which is an email from Mr. Biju Vijayan to you others. Please explain the email to us.***

*Ans: I think this is an email from Mr. Biju Vijayan of M/s Ajanta (Pharmaceuticals) asking us to give an NOC in the form of a congratulatory letter, like M/s Sunanda Enterprises has given to them. Page-3 of this mail is the congratulatory letter from AKCDA (NOC) page-2 is M/s Sunanda’s submission of the NOC to Ajanta Pharma. Pages-2 & 3 mentioned were*



*attachment to the email dated August 17<sup>th</sup>, 2015 (placed as Annexure-S-10(i) to this report).*

*Ajanta Pharma has asked us to do the same i.e. get an NOC from AKCDA, which we failed to arrange. Therefore, we do not have stockistship of M/s Ajanta Pharma.*

***Q9. AKCDA, as you are stating, asks for money to give the NOC. Is that correct.***

*Ans: Yes, they are taking big amounts to give the NOC.*

***Q11. We are showing you Exhibit-3 submitted by you to us, which is an email from Mr. Shinto Paul M, ABM, Corvette Team, Trichur. This email was sent to you firm on 6<sup>th</sup> May, 2015. Please explain the email to us.***

*Ans: This email is an NOC given by AKCDA.*

***Q12. What is Exhibit-4 which is an email submitted by you?***

*Ans: This is another NOC given by AKCDA.*

***Q13. What is Exhibit-5 submitted by you?***

*Ans: This is the appointment letter for distribution of our firm in Thrissur district by M/s Indoco Remedies Ltd. The reference in the letter regarding “Required formalities” implies that we need to submit the NOC. For this, we paid an amount of Rs. 10,000/- to AKCDA through our Manager.”*

(emphasis supplied)

82. From the documentary evidence placed on record by Shri Rony Paul and with due corroboration of facts emerged during investigation by his deposition, it is clear that the existing stockists/ distributors of M/s IPCA Laboratories boycotted it when the firm of M/s JJ Brothers was appointed



as authorized stockists without an NOC from AKCDA. In accordance with the situation, when M/s JJ Brothers tried to settle the matter with AKCDA at the Thrissur District unit, it had to pay Rs. 3 lakhs to the office bearers. M/s Ajanta Pharma, another pharma company also demanded an NOC of AKCDA in order to grant stockistship and had even sent a sample NOC to M/s. JJ Brothers which was submitted to the pharma company by another stockist, but M/s JJ Brothers failed to obtain NOC from AKCDA and accordingly, stockistship was not granted to M/s JJ Brothers. All these facts speak volumes about the role of AKCDA and its district associations play in the appointment of stockists. It is evident that the requirement of NOC was mandatory, involved payment of money and was backed by appropriate sanctions (e.g. boycott) in case of non-compliance.

83. Despite being given an opportunity to cross-examine any witness, Shri A.N. Mohan refused to do avail the same as evident from his response to Q. 83 which is replicated below:-

***“Q83. Another wholesaler has stated that an NOC from the AKCDA has to be obtained. Further he has stated that a payment of Rs. 3 Lakhs was made for the NOC (Reference in this question is to the statement taken on 29.10.2015 of Wholesale distributors of a pharmaceuticals. These details are in response to Q5). Would you like to examine all such persons who have made these statements and submitted evidences against AKCDA.***

***Ans. I deny the allegation and I don't need to examine anybody.”***

84. Further, the DG also recorded the statement of Shri Gillory Mathew, Ex-Manager of M/s JJ Brothers, the relevant extracts of which are reproduced below:



**“Q5. I am showing you Exhibit-1 which is signed by you and is an email to the Manager of M/s USV Ltd. on 07.05.2015 at 4.21 am wherein you have sent the letter of the AKCDA to the Manager. Please explain.**

*Ans. This is a request by M/s USV Ltd. for the appreciation letter from AKCDA, which is a pre-requisite for getting stockistship.*

**Q6. What is an appreciation letter?**

*Ans. AKCDA is appreciating JJ Brothers for stockistship of M/s USV Ltd. If appreciation letter is not there, M/s USV will not get the distribution of the company.*

**Q7. How did you get this appreciation letter?**

*Ans. I spoke telephonically to Shri Mohan who is the Vice-President of AKCDA. I told him we need an appreciation letter before the company can appoint us.*

*The company M/s Cadila Healthcare Ltd. had asked us earlier to get an NOC from AKCDA for getting Nephro Sciences Division. Shri Anver had given me this letter. Based on this letter, since USV insisted on a quick delivery of the AKCDA appreciation letter, I sent it as enclosed with this email.*

**Q8. You have made a statement on handing over Rs. 3 lakhs in cash to Shri Rajesh on behalf of Shri Anver, for which he refused to give you a receipt but which was meant for the NOC of M/s Blue Cross Laboratories. Is that correct?**

*Ans: Yes, I confirm. However, since they did not give us the NOC for stockistship of M/s Blue Cross Laboratories before quitting JJ Brothers, I tried to get this back. [...]*



*Similar request for money to give stockistship of M/s Lupin Ltd. was also made earlier and it was promised by Mr. Anver that he would arrange it within one month. On his promise, we paid Mr. Rajesh, Treasurer Rs. 4 lakhs after fixing the deal for Rs. 7 lakhs with Mr. Anver. However, the distribution was not given to M/s JJ Brothers and later on, on our insistence, Mr. Rajesh returned Rs. 4 lakhs, after one month, when the Lupin distribution was given to Leo Distributors.*

***Q10. Is there any case you can remember?***

*Ans. Yes, in the case of M/s Ajanta, we could not get stockistship, since we could not get the NOC from AKCDA. Before this, we had also paid Rs. 10,000 cash to the AKCDA for m/s Indoco Remedies.*

***Q12. Please sum up what the procedure is to be appointed a stockist in Kerala?***

*Ans. AKCDA permission after making payment is a must. In cases where stockists are appointed without an NOC/ appreciation letter/ permission of AKCDA, different means are taken by AKCDA so that the stockists is forced to pay them.*

***Q13. Who are the people in the AKCDA who are normally contacted for the NOC?***

*Ans. Shri Anver, Shri Rajesh and Shri A.N. Mohan.*

(emphasis supplied)

85. Upon going through the statement of Shri Gillory Mathew and the documentary evidence placed on record, it becomes crystal clear that the 'appreciation letter' given by AKCDA is nothing but a kind of approval/NOC for appointment of a stockist/ distributor by a pharmaceutical company. Shri Mathew admitted that he had sent NOC as



an attachment in an email to USV Pvt. Ltd., a pharmaceutical company, and the firm had also paid money so as to obtain NOC for appointment as a stockist by Indoco Remedies Ltd. The aforesaid excerpts also corroborate the fact that in the matters of appointment of stockist/distributor by a pharmaceutical company, AKCDA has control.

86. The statements of various stockists in the preceding paragraphs highlight the role of AKCDA in appointment of stockists. They have admitted paying money to the office bearers of AKCDA in order to obtain NOC for stockistship or in order to resolve the boycott by AKCDA members. It was also admitted that the money paid by the firms to the office bearers of AKCDA for NOC was not accounted for in the account books of AKCDA.
87. Besides aforesaid distributors/stockists, the DG also recorded the statements of various officials of pharmaceutical companies to expose the state of affairs with regard to appointment of stockists in the State of Kerala. Relevant extracts of the deposition of Shri Sreekumaran Nair, Depot Manager of Cipla Ltd., responsible for Calicut District, revealed the following facts:

***“Q7. It has come to light that Cipla Ltd. had appointed M/s Star Agencies as one of the stockists in Calicut district in August, 2013. Do you agree with this statement? At the time of the appointment of M/s Star Agencies as stockists did your company face any problem from All Kerala Chemists and Druggists Association (AKCDA)?***

***Ans. Yes, the company appointed Star Agencies as stockists in August, 2013. After the appointment of Star Agencies as stockists, all the trade stockists of Calicut district stopped purchasing goods from our company during the month of***



*September, 2013 and the sales of our company had drastically fallen by nearly Rs. 1 crore. This can be substantiated by the chart showing stockists-wise, month-wise sales figures of our company which I am submitting under my dated signatures today. It is clear from the statement that the total sales of the company to the trade stockists of Calicut district for the month of August, 2013 was Rs. 152.22 lakhs, which had reduced to Rs. 51.57 lakhs in September, 2013. The normal sales were resumed during October, 2013 and the company sold goods worth Rs. 183.77 lakhs. I am submitting a copy of all the statements for sales figures for the year 2013-14 and 2014-15 under my dated signatures.*

***Q8. What do you think was the reason for nearly all the trade stockists not purchasing the goods from Cipla Ltd. during September, 2013?***

*Ans. I think that all the existing trade stocks collectively were not ready to accept the appointment of new stockists M/s Star Agencies, therefore, all of them stopped purchasing goods from us during that month.*

***Q12. Do you think that this collective decision of the existing trade stockists might have been influenced by AKCDA or was taken under their directions?***

*Ans. This might be a possibility, but we have not received any communication in this regard from AKCDA, not did we have any information to that effect from any of the stockists. Therefore, we cannot say anything about it. But only the stockists of Calicut district had not purchased from the company during September, 2013.”*

(emphasis supplied)



88. Further, the deposition of Shri K. Sujith Prasad, Regional Manager, Wallace Pharmaceuticals Ltd. also reveals the role of AKCDA in appointment of stockists. The relevant extracts from his deposition are as follows:-

***“Q5. What is the role of All Kerala Chemists and Druggists Association (AKCDA) in appointment of new distributors? Is the new distributor required to take an NOC from AKCDA? How do you interact with AKCDA, as a company?”***

*Ans. The appointment of distributors/ stockists, which is called as OWs (our wholesalers) in our company, was earlier given only after an issuance of NOC by AKCDA. However, I want to make it clear that Wallace Pharma as a company never insisted for NOC by AKCDA for appointment of new stockists. It is the stockists, who were getting the NOCs from AKCDA at their end...*

*On demand, I had opened my email account which is used by me for my communication. After going through the mail inbox, I find that there were certain documents which related to the appointment of M/s Kottayam Drug House, Kottayam as a new stockists during the month of February, 2015. On demand, I had taken a print out of these documents and I am submitting a copy of these documents under my dated signatures today.*

*One being asked to give details of these documents, I am stating as follows:*



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- i. Offer letter dated 04.02.215 issued by our company under my signatures in favour of M/s Kottayam Drug House, Kottayam.
- ii. Kottayam Drug House letter dated 02.02.2015 addressed to me requesting for stockistship.
- iii. AKCDA letter dated 10.02.2015 addressed to our company with the subject "Appointment of M/s Kottayam Drug House, KDH Building, KK road, Kottayam as your accredited stockists".

**Q7. Please explain the offer letter dated 04.02.2015 of your company in favour of M/s Kottayam Drug House as mentioned at SI. No. (i) in the answer to question above.**

*Ans. On receipt of their request and on our own assessment we finalized the appointment of M/s Kottayam Drug House as our stockists/ distributors. The said offer letter dated 04.02.2015 communication this to M/s Kottayam Drug House and confirming them as the 5<sup>th</sup> stockist point at Kottayam district. This letter mentions that the offer letter was valid on producing of NOC from the concerned trade association. It is pertinent to mention here that the practice of NOC had been in vogue earlier also and the format of this letter had been a practice from earlier times, which is continued even today. However, the company does not insist on nor demands any NOC from our stockists these days. I confirm that this letter has been issued under my signatures.*

89. In this regard, the following letter dated 04.02.2015 issued by Wallace Pharmaceuticals Pvt. Ltd. to Kottayam Drug House in relation to the grant of stockistship is also relevant:



90. Shri Sujith Prasad admitted that Wallace Pharmaceutical Pvt. Ltd. had issued offer letters for appointment of stockists/distributors subject to being 'valid on submission of NOC from the trade association'. Although Shri Prasad took an evasive stand with regard to the interaction of Wallace Pharmaceutical Pvt. Ltd. with AKCDA directly, nevertheless the requirement of NOC was not out-rightly denied. Rather, he has stated that the stockists were submitting NOC/congratulatory letters along with the stockists appointment requests.
91. In this regard, the DG also summoned Shri Thomas Raju, General Secretary, AKCDA. During the course of recording of his statement, he opened his e-mail account and took extracts of certain documents, one of



which was a congratulatory letter dated 10.02.2015 issued by him in favour of Kottayam Drug House and addressed to Wallace Pharmaceutical Pvt. Ltd. The following excerpts from his statement are relevant:

***“Q23. Have you issued any letter (which could be an NOC, congratulatory letter or its equivalent or any written communication) to any stockists or about any stockists to any company?”***

*Ans. I have not issued any NOC but I have issued congratulatory letter appreciating the stockists.*

***Q24. Why?***

*Ans. Because some companies wanted me to certify the credibility, genuineness of some potential stockists.*

***Q31. Based on Exhibit-3 are you now accepting that a congratulatory letter is an NOC.***

*Ans. Yes, I undertake that from today onwards I will never issue even the congratulatory letters as NOC.”*

(emphasis supplied)

92. The aforesaid statement by AKCDA’s functionary unambiguously points toward the existence of NOC practice. The statement that ‘*I undertake that from today onwards I will never issue even the congratulatory letters as NOC*’ is futuristic in nature and is indicative that AKCDA was doing it at the time of recording of this statement.
93. The DG also summoned Shri T.K. Haridas, Branch Manager, Alkem Laboratories to enquire about the instances of Sabari Agencies and M/s Sunanda Associates being asked to obtain NOC prior to being appointed



as Alkem Laboratories' stockist. Relevant excerpts from his statement are reproduced below:

***“Q83. I am now showing you Exhibit-5 duly signed by you which talks of mail dated 18.07.2015 sent at 1.46 am from you to Mr. U.B. Ghugadare which talks of new stockistship to M/s Sabari Agencies with ‘verbal approval’ from Mr. A.N. Mohan, AKCDA President. Now do you accept that verbal approval is required from the AKCDA?”***

***Ans. Yes, after seeing this mail, I confirm that the approval from AKCDA is a compulsion. This compulsion is on insistence of the field staff.***

***Q84. I am now showing you Exhibit-6 duly signed by you, which is a mail dated 20.03.2015 at 2.40 am from you to Mr. Ajit Abraham, DSM, Alpha Cochin in which you inform him that the matter as recommended by the AKCDA has been discussed with Mumbai Head Office. Again I am asking you that the matter was recommended by the AKCDA for appointment of stockists. Please confirm.***

***Ans. On seeing this, I confess that the AKCDA gives its verbal approval which is not directly taken by me but is for stockistship appointment.***

***Q92. You are being shown Exhibit-9 which relates to the email forwarded by you to Ms. Aruna Kasare, Sr. Manger (Legal) at HO of you company. This mail is dated 21.12.2014. This mail discussed the Sunanda Enterprises issue which has been discussed in the***



*earlier part of these depositions. The relevant extracts of the communication are reproduced here, “We have not made any correspondence with this party except the order executed intimation to them for payments. We have not issued any letter to them for part supply or stoppage of supply. Part supply done as per the request of AKCDA, the same we have conveyed to our field staff to discuss with the party”. Please elaborate.*

*Ans. The communication is very clear. The whole thing was dictated by AKCDA.”*

(emphasis supplied)

94. Although Shri T.K. Haridas took an evasive stand and tried to avoid answering the questions posed by the DG, his response is corroborative of the statements of other stockists/third-party distributors regarding role of AKCDA in appointment of stockists. Certain facts were accepted by him upon confrontation with certain documents. It was admitted by him that NOC is indeed given by AKCDA in the form of ‘verbal approval’ so as to avoid issuing anything in writing which could be used against AKCDA. Shri T.K. Hairdas also tendered a copy of an AKCDA letter which was an actual NOC in favour of Drug Links, Kollam carrying recommendation of General Secretary of AKCDA.
95. During investigation, SRM Associates had placed on record copy of an email sent by Zydus Cadila, which contained the approval of AKCDA for some of the stockists of German Remedies Ltd. and Cadila Healthcare Ltd. (the two companies had since merged). The aforesaid email and other evidence was confronted to Shri Joseph K Babu, Senior Area Business Manager, Cadila Healthcare Ltd. The relevant extracts of his statement are as follows:



**“Q6. What is the role of All Kerala Chemists and Druggists Association (AKCDA) in appointment of new distributors? Is the new distributor required to take an NOC from AKCDA? How do you interact with AKCDA on behalf of the company?”**

*Ans. Earlier AKCDA use to issue written NOC for approving a stockist for new appointment of stockists/ distributors. However, of late, no written NOCs are given by AKCDA. They issue only verbal approvals, but I have not been directly communicated by them. To the best of my knowledge, new stockists are not required to take any written NOC from AKCDA or any local associations. AKCDA gives verbal approvals for new appointments.”*

96. The aforesaid excerpts further show that NOC was a mandatory requirement for appointment of stockists in the State of Kerala. Over the years, the association, because of the intervention by the Commission in other similar cases, had adopted other routes to circumvent detection and consequent liability. The Commission notes that the aforesaid statements and documents placed on record proves beyond any doubt that NOC practice was in existence in the State of Kerala and was a mandatory requirement prior to appointment of stockists. Although the office bearers of AKCDA and its district units have tried to portray that the congratulatory letter and verbal approvals are not the same as erstwhile NOC, the depositions given by various stakeholders negates the said plea. In one of the matters concerning the practice of NOC by another State level Association in the State of Karnataka, in Case No. 71 of 2013 (*M/s Maruti and Co. v. KCDA*), the Commission, while commenting on the adoption of benign nomenclatures by these associations, clarified *vide* order dated 28.07.2016, as follows:



*“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 anti-competitive conduct but rather have been repeatedly following the same. Instead of desisting from such an activity, the associations are mandating the NOC requirement, either verbally (in order to avoid any documentary evidence/proof) or under camouflaged congratulatory/intimation letters, with a view to hide their apparent anti-competitive behaviour behind these benign nomenclatures. It is a recognised principle of law that substance prevails over the form. By using benign nomenclatures, these associations will not be able to mislead the Commission or avoid the legal consequences of their anti-competitive conduct. Use of such nomenclature, viz., ‘Stockist Appointment Form’ instead of NOC, will also not alter the character of this document being an NOC in practice.”*

(emphasis supplied)

97. Thus, in view of the aforesaid discussion, the first argument taken by the OPs that NOC is not a mandatory requirement for appointment of stockists in the State of Kerala, does not hold any merit.
98. The second argument taken by the OPs is that the NOC is a beneficial practice and the same helps the pharmaceutical companies to verify the antecedents of the stockists prior to their appointment. Having regard to the statements of various stockists/distributors and the officials of the pharma companies, the Commission finds the OPs’ argument rather flimsy. Had NOC been beneficial in nature, there would have been no need to make it mandatory. Pharmaceutical companies would have followed it voluntarily without any compulsion. Thus, the finding of the



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mandatory nature of NOC, as established in the preceding part of this order, goes against the second argument taken by the OPs. Further, the evidence on record shows that the purpose of the NOC was to make illegitimate gains by demanding money by the office bearers of AKCDA and its District units, using their positions, at the disadvantage of consumers. Such practice also creates barriers to free and fair trade in the distribution of pharmaceutical products/medicines.

99. The third argument taken by the OPs is that the NOC practice does not cause any AAEC in the relevant market. The OPs have also objected that the DG has failed to define any relevant market. The IPs on the other hand have highlighted that although the DG has not categorically undertaken the exercise of defining the relevant market, yet there are clear references to a relevant market in context of which the investigation has been carried out. The Commission agrees with the IPs. The approach of the DG in his analysis and recording of statements shows that the DG had proceeded in the direction of investigating the practice of the NOC with respect to supply of drugs and medicines. Also, as the practices are connected with the actions of AKCDA, the investigation has been limited to the State of Kerala. The conclusive paragraph of the DG Report specifically says that the anti-competitive conduct of AKCDA has resulted in limiting and restricting the '*supply of drugs and medicines in the State of Kerala*' which is nothing but the relevant market. Thus, absence of formal delineation of a relevant market does not affect the findings of the DG when such findings are made in context to a particular relevant market.
100. The OPs have submitted that only 27.5% of the total wholesalers and 54.89% of the total retailers are members of AKCDA which implies that AKCDA does not have significant market power. This submission has been partly based upon their assertion that the NOC is not mandatory in Kerala, which has already been established to be otherwise by the Commission while dealing with their first argument above.



101. They have also submitted that the NOC does not create entry barriers and it is remedied by countervailing consumer interest, thereby causing non AAEC. In this regard, it may be noted that the practice of NOC falls under Section 3(3) of the Act being a practice carried upon by an association. The Commission has categorically held in various cases that the agreement/ practice/ decision established under Section 3(3) of the Act raises a presumption of AAEC, which has to be rebutted by the OP/ contravening party by proving the *proviso* to Section 3(3). The burden of proof is upon the OPs to show that there is no AAEC and there are efficiency justifications for enforcing the practice of NOC for appointment of stockists/distributors in the State of Kerala. Though the OPs have claimed that NOC was aimed at ensuring a seamless flow of products through the demand and supply chain, no evidence was furnished by the OPs to prove this claim. The OPs ought to have provided evidence to show how NOC has proved beneficial to the distribution channel and given the opportunity of free and fair trade to the pharmaceutical traders. It can be clearly seen that no evidence is produced by the OPs to show as to how the practice of NOC benefits the supply chain and/or the end consumer. The evidence found by the DG only shows as to how problems are created because of the said practice, such as boycott, payment of cash to AKCDA, allegation of misappropriation of accounts in AKCDA *etc.* Thus, just showing comparative numbers of wholesalers and retailers, who were AKCDA's members, will not absolve the OPs of the anti-competitive conduct which they have indulged in. Clearly, the OPs have not been able to rebut the presumption that arose against them.
102. Thus, the mandatory requirement of NOC, as alleged by the IPs in the present case, has been established by the evidence on record against AKCDA and its district units, *namely*, Thrissur and Kasargod. The Commission notes 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. In view of the foregoing, the Commission concludes that AKCDA and its district associations, *namely*, Thrissur and Kasargod, have contravened the provisions of Section 3(3)(b) read with Section 3(1) of the Act.

*Issue 2: If the answer to Issue 1 is in affirmative, who are the individual office bearers of the OPs who are liable under Section 48 of the Act for their respective anti-competitive conduct?*

103. Having found AKCDA and its district units at Thrissur and Kasargod 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.
104. 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.

105. Section 48(2) of the Act, on the other hand, attributes liability on the basis of the *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 AKCDA and its district associations at Thrissur and Kasaragod, are analysed in the following paragraphs to evaluate whether the evidence on record substantiates their liability for the anti-competitive conduct of their association.

**Shri A.N. Mohan Kurup, State President, AKCDA**

106. Shri A.N. Mohan Kurup held the position of the State President of AKCDA during the period of contravention. His duties involved being the overall in-charge of the affairs of AKCDA, being actively involved in the meetings, *etc.* The DG had confronted Shri A.N. Mohan Kurup with all the evidence collected against the association and him, which was denied by him. Such denial was made without production of any counter



evidence to challenge the veracity of the evidence offered by the IPs and various third parties. Further, the fact that Shri A.N. Mohan waived his right of cross-examination despite being given ample opportunity, only points to his involvement and also casts a serious doubt on the credibility of his denials. Shri A.N. Mohan has admitted to issuance of 'congratulatory' letter, which has already been established to be a benign nomenclature used for NOC, to Sabari Agencies for appointment as a stockist and admitted that it was a lapse on part of AKCDA. Another email dated 21.08.2014, which was recovered from the email account of Shri A.N. Mohan states the request made by Intas Pharmaceuticals Ltd. for authentication of the NOC which was issued by the district unit of AKCDA, to which Shri Mohan has stated that he has not replied to the mail in writing and denied the practice of letter of appreciation/ NOC.

107. Further, Shri A.N. Mohan admitted to forwarding letters containing appreciation of German Remedies Ltd.'s appointment of M/s Anu Pharma as stockist to Shri Venugopala, District President, Kasargod. It was further elaborated by him that NOC is not issued by AKCDA, but on the request of any member, appreciation/ congratulatory letters are issued and printed in the bulletin for information of retailers. The absence of any reply to the aforesaid mail in writing does not have any relevance after such an admission on his part. 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 AKCDA. Thus, the Commission holds him liable under Section 48(1) as well as Section 48(2) of the Act.

**Shri Thomas Raju, General Secretary, AKCDA**

108. Shri Thomas Raju held the position of the General Secretary of AKCDA during the period of contravention. Being in a position of responsibility,



he ought to have known the decisions taken by AKCDA during his tenure. Further, despite being given an opportunity, he has not been able to rebut his involvement. Thus, he is liable under Section 48(1) of the Act, being in-charge of and responsible for the affairs of AKCDA. Further, the Commission notes that the DG has found a letter dated 10.02.2015 from the email account of Shri Thomas Raju issued on the letter head of AKCDA to Wallace Pharmaceutical Pvt. Ltd. appreciating its efforts for appointing Kottayam Drug House as its stockist which bears the signatures of Shri Thomas Raju. Shri Thomas Raju denied issuing any NOC but admitted to issuing congratulatory letters. Further, he was also a signatory to many documents which have been relied upon by the DG as well as the Commission to find AKCDA's involvement in the contravention. Thus, he is liable under Section 48(1) as well as Section 48(2) of the Act.

**Shri O.M. Abdul Jaleel, State Treasurer, AKCDA**

109. With regard to Shri O.M. Abdul Jaleel, the Commission notes that in one of the past cases, namely *P.K. Krishnan* case, the Commission held that *'[t]he description of duties, however, suggests that Shri O. M. Abdul Jaleel was only the custodian of funds and responsible for keeping financial statements on behalf of OP 3 as the treasurer of OP 3. As such, the Commission does not deem it appropriate in the present case to penalise Shri O. M. Abdul Jaleel considering the nature of duties he was discharging'*. However, after having considered the evidence in this case, new facts have arisen. It has come to light that the NOC was issued in return for huge sums of money, which has been corroborated by the statements given by many stockists. Thus, being the custodian of funds, he cannot deny knowledge of the fact that the NOC is being issued in exchange for money. In his statement before the DG, Shri O.M. Abdul Jaleel admitted that money is accepted by AKCDA as consideration for issuance of NOC for stockistship, but has feigned ignorance when



questioned about the non-inclusion of such amount for NOC in the OP's accounts. In his statement, he has further admitted to the preparation of accounts and also stated that these accounts were approved by majority, despite objections. Shri Jaleel also admitted before the DG the incident of the Executive Committee meeting wherein Shri David Cada had raised objection to the amounts received for NOC being not recorded in the OP's books which led to commotion and heated argument between the members. 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 V. Anver Baithul Noor, District President, Thrissur, AKCDA**

110. Shri V. Anver Baithul Noor held the position of the District President, Thrissur District of AKCDA during the period of contravention. During his deposition before the DG, he took an evasive stand and also claimed ignorance on various issues raised by the DG. However, the Commission is of the view that the position of responsibility held by him raises a strong presumption of knowledge regarding the activities of the association. Such presumption can only be rebutted if the key position holder is successful in establishing the fact of distancing himself from the anti-competitive conduct carried out by his association. Evidently, Shri V. Anver has not been able to establish that. In view thereof, the Commission holds him responsible for the conduct of AKCDA's Thrissur District Association under Section 48(1) of the Act.

**Shri A.B. Rajesh, Treasurer, Thrissur District, AKCDA**

111. Shri A.B. Rajesh held the position of the Treasurer in Thrissur District Unit of AKCDA during the period of contravention. The Commission notes that various deponents, in their statements before the DG, took Shri A.B. Rajesh's name in relation to the receipt of cash by AKCDA in lieu



of the issuance of NOC. The DG also confronted him with such depositions and his statement was also taken with regard to various instances where his involvement was apparent from the material on record *e.g.* meeting held on 20.09.2015 in Hotel Noopura. Though he denied any knowledge of the involvement of cash for the issuance of NOC, the fact that he chose not to cross-examine the witnesses, and accepted the evidence of contents of the meeting held on 20.09.2015, proves his involvement. Further, he admitted to the incident of the Executive Committee meeting wherein Shri David Cada had raised objection to the amounts received for NOC being not recorded in OP's books which led to commotion and heated argument between the members. Based on the key position held by him, it can be inferred he was in-charge of and responsible for the conduct of AKCDA's Thrissur District, making him liable under Section 48(1) of the Act. Further, based on the evidence substantiating his active involvement in the contravention by his association, he is also held liable under Section 48(2) of the Act.

**Shri Venugopala Sarpangala Harsha Kripa, District President, Kasargod District, AKCDA**

112. Shri Venugopal Sarpangala Harsha Kripa held the position of the District President in Kasargod District of AKCDA during the period of contravention. With regards to an email dated 06.02.2015 addressed to the General Secretary, Kasargod containing request for issuance of NOC for stockistship Novartis India Limited on which a congratulatory letter was issued by the General Secretary, Kasargod on 07.02.2014, Shri Venugopala on being confronted denied any responsibility and has stated that the letter was issued by the General Secretary. Also, from his email account, two emails dated 16.04.2015 were obtained which contained congratulatory letter issued to German Remedies Ltd. for appointment of M/s Anu Pharma as their stockist. Shri Venugopala denied having any connection with it but later admitted that it was sent by Shri A.N. Mohan



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Kurup to be forwarded to M/s Anu Pharma. Shri Venugopala was also confronted with the congratulatory letter dated 07.02.2015 issued by him bearing his signatures to which he made an attempt to disassociate himself. Shri Venugopala admitted to the practice of NOC being enforced by Shri A.N. Mohan Kurup and AKCDA. Thus, his liability is made out on the basis of the position held by him in the Thrissur District Unit of AKCDA as well as his active involvement in perpetrating the NOC practice, under Section 48(1) as well as Section 48(2) of the Act.

113. Before parting with this order, the Commission also notes that investigation in the present matter also revealed the role of some of the pharmaceutical companies, who though were not actively involved in the NOC practice, but were passively cooperating with the erring chemists and druggists associations. The investigation report was sent to them for their comments. Before the Commission, most of them contended, rightly so technically, that since the DG has not found any contravention against them, they have no submissions to make to the investigation report as such. Some of them, as pointed earlier, showed willingness to work with the Commission in eradicating anti-competitive practices prevalent in the States/Districts in which they supply their medicines.
114. Ever since the notification of the relevant provision of the Act, *i.e.* Section 3 of the Act, the Commission is increasingly getting cases involving anti-competitive practices by chemists and druggists associations. The Commission has been actively taking up these cases because of the larger public interest involved. Many cases have highlighted the prevalence of practice of mandatory NOC prior to the appointment of stockists by pharmaceutical companies, in one form or the other. Earlier the NOC used to be formal, then it took the form of congratulatory letters or appreciation letters and in some cases, only verbal mandates were seen to be working well enough to ensure compliance.



115. The Commission is cognizant that to operate in a particular State/region, the pharmaceutical companies may find it convenient in the short run, and also mandatory, to follow the norms and practices of the existing trade associations. However, in the long run, the same will neither be in the interest of the pharmaceutical company nor in the interest of public at large. Appointment of stockists is the right of every pharmaceutical company and the same should be based on commercial wisdom and fair market practices. Practices like the NOC not only replace the commercial business decision of pharmaceutical companies by the decisions of these trade associations, but also affect the distribution chain by bringing inefficiencies in the distribution channels. In the present case, various instances of demanding huge monies for providing NOC has also come to light. Such monies add on to the cost of doing business for the pharmaceutical companies, which these companies will ultimately pass on to the consumers, resulting in the consumer paying more for a necessity good like medicine.
116. The Commission has issued several cease and desist orders against these chemists and druggists associations and imposed heavy penalties on them to discipline them. Further, to ensure that pharmaceutical companies are not obligated to route their appointment of stockists through such trade associations, the Commission even started seeking cooperation from them to understand the root cause and eradicate this practice. These initiatives by the Commission show the unequivocal intention to curtail any kind of anti-competitive conduct so as to bring a positive impact on the distribution of medicines. Succumbing to the mandate of local associations to avoid consequences such as boycott *etc.* will not serve any good. The Commission has highlighted in an earlier order also, that instead of surrendering to the demands of such association, the pharmaceutical companies can actually approach the Commission, wherein a proper and legal recourse to such problem lies.



117. In view of the aforesaid discussion, the Commission hereby directs the pharmaceutical companies, not only those who were part of the investigation in this case but also all other pharmaceutical companies who are facing issues of NOC or other such practices at the hands of the local/State level chemists and druggists associations, to come forward and cooperate with the Commission in bringing fair distribution of drugs. This will not only ensure lesser cost of appointment to the pharmaceutical companies but also competition on merit amongst various stockists who wish to be associated with these pharmaceutical companies, besides ensuring regular supply of medicines at affordable prices. Till the time pharmaceutical companies do not come forward and cooperate with the Commission, this goal may not be fully achieved.

### **ORDER**

118. Considering the findings elucidated in the earlier part of this order, the Commission finds that AKCDA and its district associations, *namely*, Thrissur and Kasargod, have indulged in anti-competitive conduct in violation of the provisions of Section 3 of the Act. Further, their office bearers, *namely*, Shri A.N. Mohan Kurup, State President, AKCDA; Shri Thomas Raju, General Secretary, AKCDA; Shri O.M. Abdul Jaleel, State Treasurer, AKCDA; Shri V. Anver Baithul Noor, District President, Thrissur District, AKCDA; Shri A.B. Rajesh, Treasurer, Thrissur District, AKCDA; and Shri Venugopala Sarpangala, District President, Kasargod District, AKCDA are found to be liable under Section 48 of the Act for the anti-competitive conduct of their respective associations. These OPs, along with their office bearers named above, are directed to cease and desist from indulging in the practices, which are found to be anti-competitive in terms of the provisions of Section 3 of the Act in the preceding paras of the order.



119. Section 27 of the Act 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, it is found that these associations are continuing to indulge in such practices. Only the nomenclature has changed, so as to circumvent detection and consequent liability under the provisions of the Act. Thus, it is necessary that this anti-competitive conduct is penalised to discipline not only the erring party for the said contravention, but to also create deterrence to prevent similar future contraventions of the Act. The Commission deems it appropriate to impose a penalty on AKCDA at the rate of 10% of its income based on the Income and Expenditure account for the financial years 2013-14, 2014-15 and 2015-16, as follows:

**AKCDA (Income in Rupees)**

| <b>Year</b>                               | <b>Income during the Year<br/>(in Rupees)</b> |
|---|---|
| 2013-2014                                 | 4 357782.60                                   |
| 2014-2015                                 | 5340256.44                                    |
| 2015-2016                                 | 4658332.46                                    |
| <b>Total</b>                              | <b>14356371.50</b>                            |
| <b>Average</b>                            | <b>4785457</b>                                |
| 10% of Average Income<br>(Penalty Amount) | 478545  |

120. Resultantly, a penalty of Rs. 478545/-, calculated at the rate of 10% of the average income of AKCDA, is hereby imposed on it.

121. With regard to its District Associations, namely Thrissur and Kasargod, the Commission is of the opinion that a penalty at the rate of 10% of their income based on the Income and Expenditure account for the financial years 2013-14, 2014-15 and 2015-16, as follows:



**Thrissur District Unit of AKCDA (Income in Rupees)**

| <b>Year</b>                               | <b>Income during the Year<br/>(in Rupees)</b> |
|---|---|
| 2013-2014                                 | 328540  |
| 2014-2015                                 | 701597  |
| 2015-2016                                 | 752887.50                                     |
| <b>Total</b>                              | 1783025                                       |
| <b>Average</b>                            | 594342  |
| 10% of Average Income<br>(Penalty Amount) | 59434   |

**Kasargod District Unit of AKCDA (Income in Rupees)**

| <b>Year</b>                               | <b>Income during the Year<br/>(in Rupees)</b> |
|---|---|
| 2012-2013                                 | 242475  |
| 2013-2014                                 | 609295  |
| 2014-2015                                 | 764927  |
| <b>Total</b>                              | 1616697                                       |
| <b>Average</b>                            | 538899  |
| 10% of Average Income<br>(Penalty Amount) | 53889   |

122. Resultantly, a penalty of Rs. 59434/-, calculated at the rate of 10% of the average income of Thrissur District Unit of AKCDA, is hereby imposed on it. Similarly, a penalty of Rs. 53889/-, calculated at the rate of 10% of the average turnover of Kasargod District Unit of AKCDA, is hereby imposed on it.

123. Considering the positions held by the following office bearers and their active involvement in the infraction by their respective associations, the Commission finds it appropriate to impose a penalty of 10% on them as tabulated below:



**Office Bearers of AKCDA, Thrissur District Unit of AKCDA, and  
Kasargod District Unit of AKCDA (Income in Rupees)**

| Year                                   | A.N. Mohan Kurup (President of AKCDA) | Thomas Raju (General Secretary of AKCDA) | OM Abdul (Jaleel, Treasurer of AKCDA) | V. Anver (President of Thrissur District Unit of AKCDA) | Rajesh A.B. (Secretary of Thrissur District Unit of AKCDA) | Venugopal a. S (President of Kasargod District Unit of AKCDA) |
|--|---------------------------------------|--|---------------------------------------|---|--|---|
| 2012-13                                | -                                     |  | -                                     | -   | 159929   | 500000  |
| 2013-14                                | 489975                                | 623054                                   | 1556683                               | 431234  | 177190   | 500000  |
| 2014-15                                | 491781                                | 403802                                   | 1874131                               | 965501.34   | 190702   | 240000  |
| 2015-16                                | 495940                                | 408603                                   | 2176430                               | 511530  | -  | -   |
| <b>Total</b>                           | 1477696                               | 1435459                                  | 5607244                               | 1908265.34  | 527821   | 1240000   |
| <b>Average</b>                         | 492565                                | 478486                                   | 1869081                               | 636088  | 175940   | 413333  |
| 10% of Average Income (Penalty Amount) | 49256                                 | 47848                                    | 186908                                | 63608   | 17594  | 41333   |

124. Resultantly, a penalty of Rs. 49256/- is imposed upon Shri A.N. Mohan Kurup, a penalty of Rs. 47848/- is imposed upon Shri Thomas Raju, a penalty of Rs. 186908/- is imposed upon Shri O.M. Abdul Jaleel, a penalty of Rs. 63608/- is imposed upon Shri V. Anver, a penalty of Rs. 17594/- is imposed upon Shri Rajesh A.B. and a penalty of Rs. 41333/- is imposed upon Shri Venugopala S. calculated at the rate of 10% of their respective incomes.



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

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

**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**  
**Dated: 31/10/2017**