



COMPETITION COMMISSION OF INDIA

Case No. 60 of 2012

In Re:

M/s Arora Medical Hall, Ferozepur

Informant

And

**1. Chemists &Druggists Association,
Ferozepur (CDAF)**

Opposite Party No. 1

2. Shri Chaman Lal Kakkar, President, CDAF

Opposite Party No. 2

3. Shri H.C. Gupta, Vice-President, CDAF

Opposite Party No. 3

4. Shri A.K. Gupta, Vice-President, CDAF

Opposite Party No. 4

5. Shri Shyam Lal Kakkar, Secretary, CDAF

Opposite Party No. 5

6. Shri R. S Bakshi, Joint Secretary, CDAF

Opposite Party No. 6

7. Shri Ashwini Garg, Treasurer, CDAF

Opposite Party No. 7

8. Shri Gurpreet Singh, PRO, CDAF

Opposite Party No. 8

CORAM

**Mr. Ashok Chawla
Chairperson**

**Dr. Geeta Gouri
Member**

**Mr. Anurag Goel
Member**



Mr. M. L. Tayal
Member

Mr. Justice (Retd.) S.N. Dhingra
Member

Mr. S. L. Bunker
Member

Appearances: Mr. Sandeep Kumar Passi, Advocate for the informant
Mr. Vikram Sobti and Mr. Karan S. Chandhiok, Advocates
for the opposite party No. 1
Ms. Vaishali Kakra, Advocate for the opposite party Nos. 2
to 8

Order under Section 27 of the Competition Act, 2002

Facts

1. The information in the present case has been filed by M/s Arora Medical Hall, a registered partnership firm engaged in the business of wholesale trade of medicines in Ferozepur, Punjab through its partner Mr. Rajesh Arora (hereinafter referred to as 'the informant') under section 19(1)(a) of the Competition Act, 2002 (hereinafter referred to as 'the Act') against Chemists & Druggists Association, Ferozepur (hereinafter referred to as 'the opposite party No.1'/'CDAF') and its office-bearers (the opposite party Nos. 2 to 8) alleging *inter alia* contravention of the provisions of sections 3 and 4 of the Act.

2. It has been stated in the information that the informant holds the wholesale dealership of a number of companies like Ranbaxy, Abbott Solvey, Abbott Piramal, Abbott India, Ozone, Sun Pharma, Alkem, Alkem Gencare, Hetero, Johnson & Johnson, Glenmarks – Gracewel, Pfizer, Pfizer Pharmacia, Cutic, Leeford, Canvarzys, Inuida, Apex Labs, Organon, MSD, Fullford, Modi-



Mundi, Biocon, Macleods *etc.* and accordingly, it distributes and sells medicines of these companies to the retailers in Ferozepur District.

3. The informant has alleged that the opposite party No.1 *i.e.* CDAF has made it mandatory for any chemist/ druggist, who wishes to take distributorship for medicines of a company in Ferozepur city, to take a No Objection Certificate (NOC) and Letter of Credit (LOC) from it by making a payment of Rs. 2100/- per company. The informant states that it objected to the said rule in 2010, because of which it was expelled from the primary membership of CDAF.

4. The informant has further stated that CDAF was waiting for an opportunity to kill the competition in the pharmaceutical drugs supply market in Ferozepur since 2010. Taking adverse note of an error committed by the informant in some of the bills of the retailers, CDAF circulated a letter on 22.05.2012 among its members for a general body meeting to be held on 23.05.2012 to discuss the above said issue. On coming to know about the issue, the informant immediately approached those retailers and issued credit notes for the same. But, CDAF dragged the issue to defame the informant. The informant has stated that it was never called to attend the said meeting even though the agenda of the meeting was against it.

5. As per the information, CDAF has passed a resolution on 26.05.2012 to boycott the informant. The contents of the boycott resolution include:

(a) CDAF has given 2-3 days' time to the informant to clear his position before taking further action.

(b) CDAF has resolved to boycott the informant.

(c) CDAF has directed its members to stop purchasing goods from the informant immediately and also warned that if any chemist defied this decision, it will be fined Rs. 11, 000/-.



(d) Directed the members not to make pending payments of the informant without checking the bills.

(e) Directed all the whole-sellers to stop dealings with the particular retailers who continue to purchase goods from the informant.

6. It is alleged that the above said acts of the opposite parties are in violation of the provisions of sections 3 and 4 of the Act as the activities of the opposite parties are not only creating barriers to new entrants in the market but also driving existing competitors out of the market.

7. On the basis of the above averments and allegations, the informant has prayed to the Commission seeking *inter alia* the following reliefs:

(i) To pass an order for investigation into the matter;

(ii) To pass an order for granting interim relief in the matter;

(iii) To direct the opposite parties to pay the costs and damages suffered by the informant; and

(iv) Any other order which the Commission may deem fit.

Directions to the DG

8. The Commission after considering the entire material available on record *vide* its order dated 30.10.2012 directed the Director General (DG) to cause an investigation to be made into the matter and to submit a report.

Investigation by the DG

9. In pursuance of the direction of the Commission, an investigation was done by the DG into the matter and an investigation report dated 10.06.2013 was submitted to the Commission. The DG report was considered by the Commission in its meeting on 20.06.2013.



10. The investigation found the decisions and practices of the opposite parties to be in contravention the various provisions of the Act. A summary of the findings are noted below:

(i) The decisions taken by the opposite parties in their Extra Ordinary Meeting held on 26.05.2012 as circulated *vide* circular dated 27.05.2013 have the effect of limiting and controlling the supply of drugs and medicines in Ferozpur district of Punjab.

(ii) The opposite parties by taking the said decisions have restricted the freedom of trade of not only the informant, but also of other wholesalers and retailers in Ferozpur as well as pharmaceutical companies supplying their products in the said market.

(iii) The decisions taken by the opposite parties have the effect of driving out existing competitors from the market.

(iv) The opposite party No. 1 is engaged in the practice of necessarily requiring NOC to be taken from it prior to appointment of a new/ additional stockist in Ferozpur which has the effect of limiting and controlling the supply of drugs and medicines in Ferozpur.

(v) By indulging in the practice of non-grant of NOC to non-members, the opposite party association is foreclosing the market for such non-members.

11. Based on these findings, it was concluded by the DG that the opposite parties have violated the provisions of section 3(1) read with section 3(3)(b) of the Act.

Consideration of the DG report by the Commission

12. The Commission in its ordinary meeting held on 20.06.2013 considered the investigation report submitted by the DG. It was observed by the Commission that the DG has not investigated the role of individual office bearers of the Managing Committee/ Executive Body of CDAF in decision making and accordingly, the DG was directed to cause further investigation on that aspect.

Supplementary Investigation by the DG

13. The DG undertook further investigations on the issues as highlighted in the order of the Commission dated 20.06.2013, as noted *supra*.

14. Based upon supplementary investigations, the DG, after giving opportunities to the office-bearers, submitted a supplementary investigation report dated 31.07.2013 wherein it was concluded that besides CDAF, its office-bearers/ Executive Committee members (the opposite party Nos. 2 to 8) by taking decisions and perpetuating practices of the association that were found to be anti-competitive, were equally complicit in the said decisions and practices.

Consideration of the Supplementary Investigation report of the DG by the Commission

15. The Commission in its ordinary meeting held on 14.08.2013 considered the supplementary investigation report. The Commission *vide* its order of even date directed that an electronic copy of the DG report be forwarded to the informant. It was also ordered that the DG report and the supplementary report be provided to the CDAF and its members for submitting their written submissions. The matter was thereafter considered by the Commission in its meetings held on 26.09.2013 and 15.10.2013. The Commission heard the advocates of the informant, CDAF and its office-bearers on the DG report and



the supplementary DG report and decided to pass an appropriate order in due course.

Replies/ Objections/ Submissions of the parties

16. On being noticed, besides making oral submissions, the parties filed their respective replies/ objections to the report of the DG.

Replies/ objections/ submissions of CDAF

17. CDAF filed detailed comments/ objections to the investigation reports (main/ supplementary). It was stated that CDAF is a voluntary trade association having 215 members, who are engaged in the wholesale and retail business of sale/ purchase of drugs and medicines in the district of Ferozepur, Punjab. There are no prescribed rules or guidelines issued to the members for conducting their business and the functioning of CDAF is merely restricted to safeguard the interests of wholesalers and retailers, specially the micro, small and medium scale units against any discriminatory or unfair practices of big pharmaceutical companies. It is not mandatory to become a member of CDAF in order to undertake business activities in Ferozepur or its adjoining areas, neither does CDAF restrict or regulate the business practices of its members *i.e.* both wholesalers and retailers in any manner.

18. CDAF is affiliated to the state level association of Punjab *i.e.* Punjab Chemist Association (PCA), which, in turn, is affiliated to All India Organization of Chemists & Druggists (AIOCD). It was further submitted that CDAF functions as per the rules, regulations and guidelines of PCA and AIOCD. CDAF has never been and is not, in any manner, involved in the conduct or management of the affairs or day-to-day operations of any of its members. CDAF has always been a law-abiding organization, which has pursued legitimate objectives on behalf of its members. It has not undertaken any activity or conduct, which is, in any manner, violative of any provision of the Act or any



other law for the time being in force. CDAF has always conducted all its affairs within the parameters of all applicable laws/ rules/ regulations. As a trade association, CDAF carries on legitimate and positive functions on behalf of the wholesalers and retailers of drugs and medicines, which *inter alia* include:

- (i) Educating members about new products and other advances in the pharmaceutical industry;
- (ii) Identifying potential problems between the pharmaceutical companies, wholesalers and retailers, and strive to mediate using a common platform;
- (iii) Endeavour to assist in local issues like police harassment, red stamp, and local conflicts between the retailers and the wholesalers of drugs and medicines in the district of Ferozepur.
- (iv) Acting as an advocate before governmental bodies in relation to issues directly and indirectly impacting the pharmaceutical industry; and
- (v) Holding of meetings amongst members for welfare activities.

19. Challenging the findings of the DG, it was submitted that CDAF is not, as recorded in the DG report, engaged in any anti-competitive activity, which in any manner limits, controls or attempts to control the supply of drugs and medicines in the district of Ferozepur.

20. It was pointed out that the informant has constantly resorted to vexatious litigation/ proceedings against CDAF and its office-bearers and the instant proceeding represents another attempt on part of the informant to abuse the process of law. The informant has regularly levelled unsubstantiated and motivated allegations against CDAF and its office-bearers in the past with the ulterior motive of protecting its unfair trade practices. Given the nature of the inquiry being undertaken by the Commission, the DG, during the course of its



investigation, ought to have verified the background and credentials of the informant. By failing to do so, the investigation undertaken by the DG is rendered incomplete and one-sided.

21. Referring to the chronological details, it was submitted that in 2005, CDAF initiated disciplinary action against the dictatorial practices of the informant on the basis of complaint received by retailers. The DG failed to consider the letter dated 16.07.2005 issued by CDAF to some pharmaceutical companies, wherein it was stated that the informant being the sole stockist (wholesaler) of the said companies in Ferozpur city, was misusing its monopoly of the company's products. It was further stated that practice of the pharmaceutical company to appoint one wholesaler for about 300 retailers led to dictatorial behaviour of the informant towards the retailers. With the sole purpose of increasing competition in the wholesale market of such drugs, it was requested that the pharmaceutical company may consider appointing more wholesalers for covering 300 retailers in Ferozpur. It was stated that only after the informant tendered an apology to CDAF *vide* letter dated 06.12.2007, the suspension imposed on the informant was revoked.

22. It is further submitted that subsequently, after being given repeated warnings by CDAF, the informant was expelled from the membership of CDAF *vide* letter dated 09.06.2010 issued by the Chairman, Disciplinary Action Committee for using profane language in the meetings of CDAF.

23. Moreover, it was also pointed out that some members (retailers) of CDAF have filed a First Information Report (FIR) on 01.09.2012 against the informant at Police Station, Ferozpur City, under section 420 of the Indian Penal Code, 1860 and section 66(1) of the Information Technology Act, 2000 stating that the accused *i.e.* the informant had issued inflated computerized bills to certain retailers, without deducting the amount for expired drugs and medicines returned by such retailers. This was despite the fact that the billing



software automatically deducts the amount for expired medicines returned to the informant, meaning thereby, that the informant had intentionally tampered with the billing software in order to commit a fraud upon un-suspecting retailers.

24. It was averred that keeping in mind the role played by CDAF in resolving disputes amongst wholesalers and retailers, certain retailers brought the unscrupulous activities of the informant to the attention of the association. The retailers alleged that the informant had defrauded them by inflating invoices issued to such retailers; and refusing to credit the value of expired drugs and medicines that were returned to the informant.

25. The issues raised by the retailers were brought up in the General Body Meeting held on 23.05.2012. The General Body Meeting of CDAF is open to attendance by all members of the association (*i.e.* wholesalers and retailers); and decisions at such meetings are taken by way of majority vote. At this meeting, the members of CDAF decided to accord two-three days to the informant to clear his position before any further decision is taken. For this purpose, CDAF also requested two independent visiting fellow chemists from Fazilka to mediate the matter.

26. It was alleged that the informant in his usual high-handed manner dismissed the efforts of CDAF to resolve the matter. Despite efforts to reach out to him, the informant chose not to respond to CDAF or the visiting fellow chemists.

27. Elaborating further, it was stated that having left with no choice, an Extra Ordinary meeting was held on 26.05.2013 where the members of CDAF decided to discipline the informant by:

(a) Making a call for a boycott of the informant and stop purchasing goods from him;



(b) Requesting members to clear the informant's invoices upon checking their bills; and

(c) Requesting wholesalers to stop dealings with those retailers that continue to purchase goods from the informant.

28. It was sought to be highlighted that the decision of CDAF was taken at the behest of retailers and not by any wholesaler. In other words, it was suggested that the dispute arose between the parties that interacted on the vertical chain and not between parties that were horizontally related. Moreover, it was pointed out that CDAF, being a voluntary association, enforces its decisions through moral suasion and does not dictate or curtail the commercial freedom of its members.

29. It was submitted that the present information by the informant is in retaliation to the disciplinary action initiated by CDAF as well as the FIR lodged by the retailers. The DG report is inherently flawed in as much as the DG has completely overlooked these critical facts, which were submitted by CDAF. In view of the same, it was submitted that the DG report, if relied upon by the Commission, would lead to grave miscarriage of justice.

30. Assailing the report of the DG, CDAF submitted that the DG report contains baseless and unsubstantiated conclusions against CDAF without having due regard to the context and factual background prevailing in the pharmaceutical industry and role of trade association at the district level. Any investigation/ analysis carried out without reference to the correct context/background renders such investigation/ analysis incomplete. Therefore, the incomplete and unsubstantiated findings recorded in the DG report ought to be set aside by the Commission.

31. Challenging the finding of the DG that, CDAF being an association of enterprises engaged in identical or similar trade of goods or provision of



services, the decision taken by CDAF squarely falls within the ambit of section 3(3) of the Act, it was submitted that the finding is flawed, incorrect and hence denied. It was submitted that CDAF comprises of wholesalers and retailers as its members, who operate at different levels or stages of the production chain in different markets for supply of drugs and medicines. The wholesalers supply drugs and medicines to the retailers, which, in turn, operate in the market of sale of drugs and medicines to the final consumers. Thus, both wholesalers and retailers operate in different markets for supply of drugs and medicines and cannot be said to be engaged identical or similar trade of goods, as provided under section 3(3) of the Act.

32. Moreover, the DG admits that the informant being a wholesaler of drugs and medicines is part of the supply and distribution chain through which various drugs and medicines manufactured by pharmaceutical companies are channelized in the market of such products in the district of Ferozpur and adjoining areas. Also, the informant has stated that 90% of its sales are to retail chemists (members of the association) and therefore the present case can only be assessed under section 3(4) of the Act, which cover vertical agreements.

33. Thus, it was sought to be canvassed that CDAF is not an association of persons/ enterprises engaged in identical or similar line of business. The members of CDAF are wholesalers and retailers operating in different markets and hence engaged in a vertical relationship strictly governed under the provisions of section 3(4) of the Act.

34. Keeping the aforesaid vertical relationship between the wholesalers and retailers in mind, it was submitted that the decision of CDAF to boycott the informant cannot be adjudicated under the provisions of section 3(3) of the Act.

35. It was also submitted that the argument that section 3, as opposed to sections 4 and 6, does not refer to a 'relevant market' and thus no relevant



market needs to be defined merits rejection. Competition can be said to exist only in a defined market. Similarly, the decision of an association to boycott a wholesaler would not affect the market for retailers, if there were sufficient options available with the retailers to purchase such medicines. Also, the decision of an association not to grant a 'No Objection Certificate' (NOC) to one of its members (wholesaler) would not fall foul of section 3(3), of the Act in the event such NOC is easily attainable from other (neighbouring) areas that form part of the same relevant geographical market and, therefore, cannot be said to have any effect on competition. Accordingly, it was argued that a relevant market must be defined even in cases falling under section 3(3) of the Act.

36. Further impugning the findings of the DG, it was contended that the DG report has completely failed to substantiate that the impugned steps/ actions taken by the CDAF are demonstrative of the collective intent and concerted behaviour of CDAF to distort competition. The DG report has completely failed to take into account certain critical factors prevailing at the time of the impugned action of CDAF to boycott the informant. It was submitted that all the retailers, who are members of CDAF, objected to the abusive conduct of the informant in not refunding the inflated/ tampered bills raised by the informant, without deducting the amount for expired medicines returned by the retailers. In this connection it was pointed out that in order to resolve the issue, CDAF in its General Body meeting held on 23.05.2012 provided 2-3days time to the informant to settle the accounts of the retailers. However, the informant refused to discuss the matter with CDAF or clear his position.

37. It was therefore submitted that the impugned action of CDAF to boycott the informant was taken only upon deliberation with the retailers, who were suffering due to the abusive and fraudulent conduct of the informant. The DG has failed to analyse the impact of the fraudulent act of the informant on the local business of sale/ purchase of medicines in the city of Ferozpur.



38. Furthermore, it was argued that the DG report completely failed to prove existence of the alleged fact as to whether the impugned action of CDAF has led to limiting or controlling the production or supply of drugs and medicines in the district of Ferozepur. In this regard, it was stated that there are no restrictions placed on retailers of Ferozepur to purchase the drugs and medicines from the aforesaid neighbourhood towns like Faridkot, Kotkapura, Talwandi Bhai, Mudki, Guruhasahai, Jalalabad, Fazilka and Abohar, thereby ensuring unrestricted supply of medicines in the district of Ferozepur. Moreover, the wholesalers, including the informant, are free to obtain the NOC from the aforesaid neighbouring towns and sell their drugs and medicines in the district of Ferozepur. In fact, the informant received an NOC from the District Chemist Federation, Jalalabad for its appointment as a stockist/ wholesaler for M/s Merck Limited. Thus, there is evident supply-side substitutability between Ferozpur and the neighbouring areas of Faridkot, Kotkapura, Talwandi Bhai, Mudki, Guruharsahai, Jalalabad, Fazilka and Abohar, rebutting the claim of the DG that there is disruption in the business activities of the informant or other retailers of Ferozepur.

39. Joining issues on the practice of NOC, at the outset, it was submitted that the practice of NOC was evolved on the recommendation of Mashelkar Committee appointed by the Union Health Ministry of the Government of India which had recommended that the chemists and pharmacists through association should act as 'watch dog' to prevent entry of spurious/ doubtful quality drugs of those purchased from unauthorized sources and had specifically reiterated that AIOCD should play an active role to educate their members and to co-operate with regulatory authorities to eliminate sale of spurious and sub-standard drugs by their members.

40. It was further submitted that in the instant case, the practice of issuing NOC to new/ additional stockists was undertaken at the behest of the pharmaceutical companies, who were demanding NOC of CDAF, prior to



appointment of a new or additional stockists. Placing reliance on a letter dated 25.03.2013 issued by M/s Merck Limited, it was submitted that pharmaceutical companies insist on NOC/ LOC from persons desiring to obtain the distributorships of the companies. From the replies filed by the pharmaceutical companies before the DG also, it was argued that pharmaceutical companies demand NOC from the trade associations for appointment of additional/ new stockists.

41. Explaining the rationale behind NOC, it was submitted that the pharmaceutical companies seek an NOC from the concerned chemists and druggists association to avoid unhealthy competition and prevent creating excess supply in the market. The presence of excess supply might lead to expired medicines being left with the additional stockists, affecting their investment and business. The said practice also harms the stockists, whose investment is blocked, as the recovery from pharmaceutical companies is a time consuming process. In other words, NOC is used as a tool to create an efficient distribution chain in a given district and restrict the potential conflicts between the pharmaceutical companies and the stockists, in the event of excess supply.

42. Without prejudice to the above, it was reiterated that the decision of CDAF not to grant NOC to its member/ non-member (wholesaler of medicines) does not preclude the wholesaler to obtain the required NOC from the pharmaceutical company directly or Chemist and Druggists Associations of the neighboring areas like Faridkot, kotkapura, TalwandiBhai, Mudki, Guruharsahia, Jalalabad, Fazilka and Abohar. It was therefore submitted that there is no restriction on the wholesaler to supply medicines of pharmaceutical companies, obtained from neighbouring areas of Ferozpur, to the retailers situated in Ferozpur.

43. Putting in challenge the finding of the DG that non-grant of NOC to those parties who are not members of CDAF, has the effect of foreclosure of the



marker for such interested parties, it was submitted that the finding is without any factual or legal basis and therefore lacks merit. The NOC process is entirely voluntary and initiated at the behest of the pharmaceutical companies or stockists. Further, it is not necessary to become a member of CDAF, in order to do business in Ferozpur. The wholesalers, who are not members of CDAF, are free to approach the pharmaceutical companies directly and seek for appointment as stockists. CDAF does not in any manner prevent or restrict the freedom of wholesalers to perform their business activities in Ferozpur City or Ferozpur Cantt. areas. Nor does it impose any fetters on wholesalers or retailers in the relevant market of district of Ferozpur and adjoining areas. The DG further failed to investigate the ground realities, as there was no NOC/ LOC requirement in the cases of mergers and acquisition of Abbott-Solvay, Pfizer-Wyeth, Abbott-Piramal, Abbott-Nicholas and Pfizer-Pharmacia. The stockists of any one of such pharmaceutical companies have been receiving drugs and medicines of the acquired/ merged entity, without the requirement of fresh NOC from CDAF. In view of this fact, it is apparent that the DG investigated the entire matter with a pre-determined mind-set and failed to analyse any fact/ argument contrary to its biased view.

44. Without prejudice to the above, it was submitted that there are a large number of stockists/ wholesalers in Ferozpur, who are selling drugs and medicines to retailers without obtaining NOC from the CDAF. The best example of such practice is the informant, who admits of being the biggest wholesaler in Ferozpur, even when the informant was expelled from the membership of CDAF in 2010, on behavioural grounds. In addition, there are various instances of distributors of pharmaceutical companies operating without any NOC from CDAF. The DG further refused to acknowledge and take into account the submission of various office-bearers who have stated that CDAF has no objection if the pharmaceutical company appoints an additional/ new wholesaler, without an NOC.



45. It was also argued that the DG admitted that CDAF is guided by the motive to protect the interest of its members and the rules and regulations of the State Level Association *i.e.* Punjab Chemists Association (PCA), which clearly stipulates the practice of NOC/ LOC (Article 17 of the Rules and Regulations of PCA). Therefore, it was prayed that alleged practices may kindly be viewed in light of the *bona fide* intentions and good faith exhibited by CDAF in discharging its duties.

46. To sum up, CDAF argued that the DG failed to establish the effect of limiting and controlling the supply of drugs and medicines in Ferozepur because of the alleged practices of issuance of NOC by CDAF, prior to appointment of new/ additional stockists in Ferozepur. This is particularly so, since the refusal of CDAF to grant an NOC to its member does not preclude the wholesaler to obtain the required NOC from the Chemist and Druggists Associations of the neighbouring areas, and sell its drugs and medicines to the retailers in Ferozepur.

47. Lastly, CDAF submitted that various types of conduct as set out in section 3(3) merely raise a presumption of Appreciable Adverse Effect on Competition (AAEC) being caused in the market. It does not establish an outright violation. The parties are free to adduce arguments to rebut the presumption and the Commission is statutorily bound to examine the factors under section 19(3) of the Act. Since section 3(3) of the Act merely raises a presumption in relation to the conduct and given the fact that the Act is an effect based legislation, it is open to the parties to adduce evidence which demonstrates that their alleged conduct does not in fact cause an AAEC.

48. It was submitted that the DG failed to consider the factors provided under section 19(3)(a),(b),(c) and (d) of the Act which demonstrate that the competition in the industry has not been affected, at all. Moreover, factors listed under section 19 (3)(e) and (f) of the Act are efficiency defences, which may be considered, to mitigate the appreciable adverse effect on competition. Thus,



detailed analysis of each of the factors under section 19(3) will demonstrate that the conclusions drawn in the DG report are unsustainable. Further, assuming without admitting that even if a case under section 3(3) of the Act is made out, it was submitted that there was no AAEC in the market.

49. On 22.10.2013, CDAF filed additional submissions to corroborate its submissions.

50. Furthermore, *vide* the said additional submissions CDAF submitted that it wishes to act as vehicle to promote pro-competitive activities amongst its members and develop best practices guidelines for its members to create awareness of acceptable and unacceptable behaviour under the Act. In order to initiate this process, CDAF *suomoto*, undertakes to discontinue with the practice of issuance of NOC for appointment of new/ additional stockists and utilize the amount collected by issuance of NOC towards welfare needs of the association and its members in general. CDAF further undertakes that it is not participating in any anti-competitive activity under the Act, at present and will continue to abide by all the provisions of the Act. It was, however, submitted that nothing contained in these additional submissions should be construed as being an admission to any of the allegation(s) as is sought to be wrongly alleged in terms of the provisions of the Act, or waiver of any or all rights available to it in law.

Replies/ objections/ submissions of office-bearers of CDAF

51. The office-bearers of CDAF filed joint preliminary submissions dated 14.10.2013 to the reports of the DG. It was argued that a bare reading of section 48(2) of the Act reveals that it fixes liability on each one of those persons, who at the time of contravention, being committed by a company, were responsible for the conduct of the business of the company. The company has been defined in explanation to section 48 of the Act itself, and this definition does not include 'association of enterprises or persons'. It was submitted that the Parliament in its



wisdom, seems to have deliberately excluded ‘association of enterprises or persons’; and only included ‘association of individuals’ in the explanation of section 48 of the Act. It is also pertinent to note that elsewhere; the Parliament intended to include ‘association of enterprises’ or ‘association of persons’ *i.e.* under section 3(3) and section 27 of the Act, the Parliament has expressly used such terms to the exclusion of ‘association of individuals’. Thus, this exclusion of ‘association of enterprises or persons’ shows that the Parliament did not contemplate the office-bearers of the association to be covered under the provisions of section 48 of the Act.

52. Further, reliance was also placed upon the separate order of Member S.N. Dhingra, passed in *Varca Druggist & Chemist and others. v. Chemists and Druggists Association, Goa* (MRTP C-127/2009/DGIR4/28) and *M/s Santuka Associates Pvt. Ltd. v. All India Organization of Chemists and Druggists and Ors.* (Case No. 20 of 2011), wherein it was observed that company has been defined in explanation to section 48(2) of the Act as a body corporate or a firm or association of individuals-however, association of enterprises has not been considered as a company.

53. In light of the said observations, it was stated that the office-bearers of CDAF would not be covered under section 48 of the Act and hence no penalty is leviable on the office-bearers.

54. Without prejudice to the above, it was also submitted that in order to attract the provisions of section 48(2) of the Act, it is necessary that the company in question must be held to be in contravention of the provisions of the Act. Once the said condition is fulfilled, only then can the director, manager, secretary or other officer of such company be held to be guilty thereunder. It was argued that in the present case, till now there are no findings of the Commission against CDAF contravening the provisions of the Act. Thus, no action can be



initiated against the office-bearers of CDAF till such time that the association, *i.e.* CDAF is held guilty of contravention of the Act.

55. Based on the preliminary submissions on the grounds of jurisdiction of the Commission stated above, it was prayed that the proceedings against the office-bearers of CDAF be dismissed, or in the alternate, stayed till conclusive findings of the Commission in relation to the conduct of CDAF is arrived at.

56. Lastly, it was caveated that nothing contained in the preliminary submissions of the office-bearers should be construed as being an admission of any allegations that have been levelled against the office-bearers in the DG report and the supplementary report. Each of the office-bearers reserves its rights to file additional comments/ response to the DG report and the supplementary report.

Analysis

57. The Commission has perused the information, reports of the DG, objections of the opposite parties to the report of the DG and other material available on record. The Commission also heard the counsel for the appearing parties.

58. The issue projected in the present information lies in a very narrow compass.

59. The informant *i.e.* M/s Arora Medical Hall, Ferozepur- a registered partnership firm- who is engaged in the wholesale business of drugs and medicines in Ferozepur district of Punjab has filed the instant information against CDAF alleging contravention of the provisions of the Act. It is the case of the informant that CDAF has made it mandatory for any chemist/ druggist, who wishes to take distributorship for medicines of a company in Ferozepur city,



to take an No Objection Certificate (NOC) and Letter of Credit (LOC) from it by making a payment of Rs. 2100/- per company. It is alleged in the information that as the informant objected to the said rule in 2010, it was expelled from the primary membership of CDAF.

60. The informant further alleged that CDAF was waiting for an opportunity to kill the competition in the pharmaceutical drugs supply market in Ferozpur since 2010. Taking adverse note of an error committed by the informant in some of the bills of the retailers, CDAF circulated a letter on 22.05.2012 among its members for a general body meeting to be held on 23.05.2012 to discuss the above said issue. On coming to know about the issue, the informant immediately approached those retailers and issued credit notes for the same. But, CDAF dragged the issue to defame the informant. The informant has stated that it was never called to attend the said meeting even though the agenda of the meeting was against it. As per the informant, CDAF passed a resolution on 26.05.2012 to boycott the informant. A circular containing the decisions was issued on 27.05.2012.

61. The Commission has very carefully perused the circular dated 27.05.2012 issued by CDAF. For the felicity of reference, the relevant portion is extracted below:

... [a]n extraordinary meeting of the executive under the chair of President was held on 26.05.2012. Following decision were taken for the Association and it was decided that these decisions are implemented most seriously right from the date of this Circular by each and every chemist.

1. It was decided in the General Body Meeting held on 23.05.2012 to give M/s Arora Medical Hall time for 2-3 days to clear his position before taking further action. He has not responded to our call so far.



2. Absolute Boycott with M/s Arora Medical Hall, Ferozepur city. He is not member of our Association and gone to the extent to compromise our dignity in scandals.

3. Stop purchasing goods from him immediately. No more dealings with him immediate effect. Any chemist defying this decision will be fined Rs.11,000/-.

4. Till further orders, you are requested not to make him pending payments after you check the bills.

5. All the whole-sellers are further requested to stop dealings with the particular retailer who continue purchasing goods from M/s Arora Medical Hall.

62. From a plain reading of the circular, it is evident that a decision to boycott the informant was taken by CDAF in its Extraordinary Meeting held on 26.05.2012. The said decision was further circulated by CDAF to its members. This aspect has neither been disputed nor denied by the opposite parties in their respective replies, though diverse reasons were given in support of the decision.

63. Furthermore, the above decisions taken by CDAF were also being implemented by it in letter and spirit. This is evident from the fact that some office-bearers including the President of CDAF have during recording of statement confirmed that penalty had been imposed by CDAF on a retailer (M/s Sonia Medical Store) in January 2013 for defying its directives and continuing dealings with the informant.

64. In response, it was submitted on behalf of CDAF that all the retailers, who are its members, objected to the abusive conduct of the informant in not refunding the inflated/ tampered bills raised by the informant, without deducting



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the amount for expired medicines returned by the retailers, as detailed earlier. In this connection, it was pointed out that in order to resolve the issue, CDAF in its General Body meeting held on 23.05.2012 provided 2-3 days time to the informant to settle the accounts of the retailers. However, the informant refused to discuss the matter with CDAF or clear his position. It was therefore submitted that the impugned action of CDAF to boycott the informant was taken only upon deliberation of the retailers, who were suffering due to the abusive and fraudulent conduct of the informant.

65. It is not in dispute that CDAF is an association of enterprises engaged in similar trade as far as the issues projected in the present information are concerned. The Commission is of opinion that the decision taken by CDAF in its meeting held on 26.05.2012 and as circulated *vide* its circular dated 27.05.2012 amounts to limiting and controlling supply in the market of drugs and medicines. Further, from the tenure of the decision, it appears that non-membership of the association was an important consideration for CDAF to take the impugned decision. From a cumulative reading of the decisions taken in the meeting as recorded in the circular, the Commission has no hesitation in holding that the same have the effect of not only limiting and controlling the supply of goods and provision of services but also driving existing competitors out of the market.

66. This is also strengthened from the figures submitted by the informant whereby it has been pointed out that its sales in Ferozpur for the period after its boycott by CDAF *i.e.* from 01.06.2012 to 31.03.2013 and during the corresponding prior period *i.e.* 01.06.2011 to 31.03.2012 had declined to Rs. 39.71 lakhs from Rs 223.18 lakhs.

67. The other aspect which needs to be examined in the present case relates to the stipulation by CDAF regarding NOC/ LOC.



68. The informant has alleged that the opposite party No.1 *i.e.* CDAF has made it mandatory for any chemist/ druggist, who wishes to take distributorship for medicines of a company in Ferozpur city, to take an NOC and LOC from it by making a payment of Rs. 2100/- per company. The informant states that it objected to the said rule in 2010, because of which it was expelled from the primary membership of CDAF.

69. It is not in dispute that CDAF issued a circular dated 15.04.2006 wherein the decision taken by the Executive Committee of CDAF in its meeting held on 13.04.2006 was recorded. For the felicity of reference, the same is quoted below:

During EC meeting on 13.04.2006 held at M/s H.C. Medical Agencies, Ferozpur, it was decided after debated and discussions unanimously to receive N.O.C. fees. Now Rs. 2100/- will be charged for taking N.O.C for each Co. any wholeseller who added new Co. is liable to pay Rs. 2100/- for added each Co. and then start its supply to trade.

70. From a bare reading of the circular, it is apparent that supplies cannot start without obtaining NOC. CDAF, while conceding that NOCs are being issued by it, has contended that the same was being done at the instance of the pharmaceutical companies who were demanding NOC of CDAF prior to appointment of a new or additional stockist. This plea, besides being misconceived and of no bearing, also stood contradicted from the statements recorded by the DG of the office-bearers of the opposite party association itself, wherein the office-bearer sought to rationalise the requirement of NOC.

71. Moreover, it is the case of CDAF itself that it is guided by the motive to protect the interests of its members and the Rules and Regulations of the State level Association *i.e.* Punjab Chemists Association (PCA) which stipulate the



practice of NOC/ LOC. The relevant Article 17 of the Rules and Regulations of PCA in this regard may be excerpted :

the District President/ General Secretary/ Office bearers of the District Chemists Association is authorized to issue LOC for the appointment of a stockist by the company in their district. In case of any dispute, if arises, the President/ General Secretary of Punjab Chemists Association is authorized to issue the LOC.

72. Based on the evidence collected by the DG, it is safe to conclude that CDAF has been following a practice of requirement of NOC prior to appointment of a new/ additional stockist in Ferozepur, which has the effect of limiting and controlling the supply of drugs and medicines in Ferozepur.

73. On a careful examination and analysis of the material on record, the Commission holds that the impugned conduct, as detailed above, of the opposite party association is anti-competitive in as much as it limited/ controlled the supply/ provision of goods/ services being in contravention of the provisions of sections 3(3)(b) read with section 3(1) of the Act.

74. The Commission notes that in terms of the provisions contained in section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void. Further, by virtue of the presumption contained in sub-section (3), any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or



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association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

75. Thus, in case of agreements as listed in section 3(3) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition; the onus to rebut this presumption would lie upon the opposite party.

76. In the present case, the opposite party association could not rebut the said presumption. It has not been shown by the opposite party association how the impugned conduct resulted into accrual of benefits to consumers or made improvements in production or distribution of goods in question. Further, the opposite party could not explain as to how the said conduct did not foreclose competition.

77. Resultantly, the Commission is of the view that the impugned conduct of the opposite party association is anti-competitive being in contravention of the provisions of sections 3(3)(b) read with section 3(1) of the Act.

78. At this stage, it may be noted that the Commission in its order dated 20.06.2013 observed that the DG has not investigated the role of individual office-bearers of the Managing Committee/ Executive Body of CDAF in decision making and accordingly, the DG was directed to cause further investigation on that aspect.



79. In the supplementary investigation report, the DG, after according opportunity to the office-bearers, concluded that besides CDAF, its office-bearers *viz.* Shri Chaman Lal Kakkar, President, Shri H.C. Gupta, Vice President, Shri A.K. Gupta, Vice President, Shri Shyam Lal Kakkar, Secretary, Shri R.S. Bakshi, Joint Secretary, Shri Ashwani Garg, Treasurer and Shri Gurpreet Singh, PRO (who are the opposite party Nos. 2 to 8) by taking decisions and perpetuating practices of the association that have been found to be anti-competitive, are equally complicit in the said decisions and practices.

80. The said office-bearers in their common reply have taken a preliminary objection that the provisions of section 48 of the Act (dealing with the liability of the persons in-charge of the company) are not attracted. The office-bearers have not disputed the findings of the DG on merits reserving their right to file additional response.

81. The Commission is of opinion that irrespective of the plea taken by the office-bearers or its merit, in the factual scenario of the present case, it is evident that the office-bearers are parties to the impugned decision of the association.

82. In this scenario, the provisions of section 27 of the Act are themselves sufficient to hold the office-bearers guilty of contraventions without the aid and assistance of the provisions of section 48 of the Act. As per the provisions of section 27(b) of the Act, where after inquiry, the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.



ORDER

83. In view of the above discussion, the Commission directs the opposite parties to cease and desist from indulging in such anti-competitive practices which have been found to be anti-competitive in terms of the provisions of section 3 of the Act in the preceding paras of this order.

84. As regards penalty under section 27 of the Act, the Commission notes that such anti-competitive acts and conduct need to be penalized which could act as a deterrent in future for any other association/ office-bearers which/ who engages in such type of actions. The impugned act of the opposite parties, apart from contravening the provisions of section 3 of the Act, interfered with the freedom of trade, which the Commission is bound to ensure and sustain in the markets.

85. On the quantum of penalty, the Commission considers that severity of penalty should be proportionate to the severity of infraction. Thus, proportionality requires that the level of punishment should be scaled relative to the severity of violation. Here, it can be reiterated that CDAF is the apex body of chemists and druggists having full control over the stockists/ retailers of drugs and medicines in the district of Ferozepur. It is evident that CDAF because of its position is able to continuously engage in limiting and controlling the supply and market of the drugs and pharmaceutical products by insisting upon NOC for appointment of stockists *etc.* It cannot be doubted that had these practices not been there, the consumers/ patients at large would have been benefited from the competition and consequential attended benefits arising therefrom in the markets. As the impugned conduct of the opposite parties had limited and controlled the supply of drugs putting in jeopardy the lives of patients, the conduct of CDAF needs to be sternly dealt with. No mitigating factors were pleaded or are otherwise found to be present in the present case.

86. Taking into consideration the above factors, the Commission has bestowed its thoughtful consideration on the issue of quantum of penalty. Considering the totality of facts and circumstances of the present case including the nature of contravention, the Commission decides to impose a penalty on the opposite parties at the rate of 10% of their respective average turnover which has been calculated as per the financial statements of Income/ Receipts filed by the association/ office-bearers before the DG:

S. No.	Name	Income/ Receipts	Income/ Receipts	Income/ Receipts	Average of Income/ Receipts	Penalty @10% of Average Income/ Receipts
1.	CDAF	Rs. 1,62,385 (Period ending 31.12.2009)	Rs. 1,60,574 (Period ending 31.12.2010)	Rs. 1,31,110 (Period ending 31.12.2011)	Rs. 1,51,356.33	Rs. 15,135.63
2.	Shri Chaman Lal Kakkar, President	Rs.5,128,591.69 (Year ended on 31.03.2010)	Rs.7,166,894.80 (Year ended on 31.03.2011)	Rs. 6,20,6815.50 (Year ended on 31.03.2012)	Rs. 6,16,7433.99	Rs. 6,16,743.39
3.	Shri H.C. Gupta, Vice-President	Rs.2,30,10,341.23 (Year ended on 31.03.2010)	Rs.2,32,70,576.89 (Year ended on 31.03.2011)	Rs. 2,64,63,261.35 (Year ended on 31.03.2012)	Rs. 24248059.823	Rs. 24,24,805.98
4.	Shri A.K. Gupta, Vice-President	Rs.66,29,233.22 (Year ended on 31.03.2010)	Rs.70,21,158.72 (Year ended on 31.03.2011)	Rs. 65,58,616.37 (Year ended on 31.03.2012)	Rs. 6736335.77	Rs. 6,73,633.57
5.	Shri Shyam Lal Kakkar, Secretary	Rs.3986795 (Year ended on 2009-10)	Rs. 3090670 (Year ended on 2010-11)	Rs. 4087036 (Year ended on 2011-12)	Rs. 3721500.3	Rs. 3,72,150.03
6.	Shri R. S Bakshi, Joint Secretary	Rs.4560447.21 (Year ended on 31.03.2010)	Rs. 5335550.44 (Year ended on 31.03.2011)	Rs. -	Rs. 4947998.825	Rs. 4,94,799.88
7.	Shri Ashwini Garg, Treasurer	Rs. 4316603 (Year ended on 31.03.2010)	Rs. 4683783.17 (Year ended on 31.03.2011)	Rs. 4330600 (Year ended on 31.03.2012)	Rs. 4443662.056	Rs. 4,44,366.20
8.	Shri Gurpreet Singh, PRO	Rs. 4651644.7 (Year ended on 31.03.2011)	Rs. 5375524 (Year ended on 31.03.2012)	Rs. -	Rs. 5013584.35	Rs. 5,01,358.43

87. The directions contained in para 83 above must be complied with immediate effect and the opposite parties are also directed to file undertakings to this effect within a period of 30 days from the date of receipt of this order.

88. The Commission also directs the opposite parties to deposit the penalty amount within 60 days of receipt of this order.

89. Before concluding, one more aspect, arising out of the present proceedings, requires to be addressed by the Commission. As held by the Commission, the impugned conduct of CDAF is anti-competitive in as much as it limited/ controlled the supply/ provision of goods/ services being in contravention of the provisions of sections 3(3)(b) read with section 3(1) of the Act. CDAF in its response *inter alia* pleaded that it is guided by the motive to protect the interests of its members and the Rules and Regulations of the State level Association *i.e.* Punjab Chemists Association (PCA), to which it is affiliated to, which stipulate the practice of NOC/ LOC. The relevant Article 17 of the Rules and Regulations of PCA in this regard which was excerpted may be noted again:

The District President/ General Secretary/ Office-bearers of the District Chemists Association is authorized to issue LOC for the appointment of a stockist by the company in their district. In case of any dispute, if arises, the President/ General Secretary of Punjab Chemists Association is authorized to issue the LOC.

90. On a plain reading of the said article, it is evident that CDAF was following the practice of requirement of NOC prior to appointment of a new/ additional stockist in Ferozpur, as 'authorized' by PCA.

91. The issue of grant of NOC also came up before the Commission in other cases as well. In *M/s Santuka Associates Pvt. Ltd. v. All India Organization of Chemists and Druggists (AIOCD) & Ors.*, Case No. 20 of 2011, the Commission *vide* its order dated 19.02.2013 found such conduct anti-competitive and directed AIOCD to *inter alia* file an undertaking that the practices carried on by it and its members regarding grant of NOC for appointment of stockists, fixation of trade margins, collection of PIS charges and boycott of products of pharmaceutical companies have been discontinued within 60 days from the date of receipt of the order.



92. In such a scenario, the Commission taking note of the observations recorded by the DG while examining the role of PCA on the issue *vide* its order dated 11.12.2013 issued notice to PCA seeking its response to the report of the DG and also granted opportunity of oral arguments. Despite notice, no reply was filed or arguments addressed. The Commission received only a letter dated 03.01.2004 by one Shri Surinder Duggal describing himself as 'Hon. Gen. Sec. PCA' wherein it was stated that he has been nominated by PCA for 'secretaryship' w.e.f. 15.12.2013. Further, it was also stated therein that Shri Surjeet Mehta, stated to be the President of the association, is out of India for last about 20 days and is to come back after 20.01.2014. Shri Duggal also noted in the letter that he does not have any knowledge about the subject matter.

93. As no reply was submitted or any time was sought to do the needful, the Commission decided to proceed against the association in light of the material available on record.

94. In the result, the Commission holds that Article 17 of the Memorandum of Association of PCA, as noted above, is violative of the provisions of section 3(3)(b) read with section 3(1) of the Act as it limits/ controls the supply/ provision of goods/ services in the markets. Accordingly, the Commission directs PCA to cease and desist from insisting upon NOC/LOC before appointment of a stockist by the companies and to delete Article 17 from its memorandum forthwith. It is also ordered that PCA shall file an undertaking to this effect within a period of 60 days from the receipt of this order.

95. It is ordered accordingly.

96. The Secretary is directed to inform the parties including PCA accordingly.



**Sd/-
(Ashok Chawla)
Chairperson**

**Sd/-
(Geeta Gouri)
Member**

**Sd/-
(Anurag Goel)
Member**

**Sd/-
(M. L. Tayal)
Member**

**Sd/-
(S.N. Dhingra)
Member**

**Sd/-
(S. L. Bunker)
Member**

New Delhi

Date: 5/2/2014