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Fair Competition  
For Greater Good

**COMPETITION COMMISSION OF INDIA**

**Case No. 68 of 2013**

**In Re:**

**Shri Ghanshyam Dass Vij**

**Informant**

**And**

**1. M/s Bajaj Corp. Ltd.  
Mumbai**

**Opposite Party No. 1**

**2. Area Sales Manager  
M/s Bajaj Corp. Ltd.  
New Delhi**

**Opposite Party No. 2**

**3. Branch Manager  
M/s Bajaj Corp. Ltd.  
Panchkula, Haryana**

**Opposite Party No. 3**

**4. Branch Manager  
M/s Bajaj Corp. Ltd.  
Ambala, Haryana**

**Opposite Party No. 4**

**5. Sonipat Distributor (FMCG) Association  
Sonipat**

**Opposite Party No. 5**

**CORAM**

**Mr. Ashok Chawla  
Chairperson**

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

**Mr. Augustine Peter  
Member**

**Mr. M. S. Sahoo  
Member**



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**Appearances:** Shri R. D. Makheeja, Advocate for the Informant alongwith Shri Ghanshyam Dass Vij, Informant-in-Person.

Shri Pawan Sharma and Shri Anuj Shah, Advocates for M/s Bajaj Corp. Ltd. (OP-1) and OP-2.

Shri Robin Kumar, Advocate for Sonipat Distributor (FMCG) Association (OP-5) and its officials.

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

1. The present information has been filed under section 19(1) (a) of the Competition Act, 2002 ('the Act') by Shri Ghanshyam Dass Vij ('the Informant') against M/s Bajaj Corp. Ltd., Mumbai, ('the Opposite Party No. 1'/ Bajaj/ OP-1), Area Sales Manager, M/s Bajaj Corp. Ltd., New Delhi ('the Opposite Party No. 2'/ OP-2), Branch Manager, M/s Bajaj Corp. Ltd., Panchkula, Haryana ('the Opposite Party No. 3'/ OP-3), Branch Manager, M/s Bajaj Corp. Ltd., Ambala, Haryana ('the Opposite Party No. 4'/ OP-4) and Sonipat Distributor (FMCG) Association (Regd.), Sonipat ('the Opposite Party No. 5'/ SDA/ OP-5), a member of Haryana Distributors (FMCG) Association alleging *inter alia* contravention of the provisions of section 3 of the Act.

### **Facts**

2. Facts, as stated in the information, may be briefly noticed.
3. The Informant is a Sole Proprietor of M/s Durga Drugs & General Stores which is stated to be engaged in the business of sales and distribution of ayurvedic and general health products of various companies. The Informant has been working as a stockist/ distributor of Bajaj since 1986 selling and distributing its products which include *inter alia* hair oils.



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4. The Opposite Party No.1/ Bajaj is a company formed and incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of manufacture and sale of ayurvedic products and medicines. The Opposite Party No. 2 is Area Sales Manager of the Opposite Party No.1 based at Delhi. The Opposite Party No. 3 is Branch Manager of the Opposite Party No. 1 and is based at Panchkula, Haryana. The Opposite Party No. 4 is also Branch Manager of the Opposite Party No. 1 and is based at Ambala.
5. It is averred in the information that the orders for supply of goods of the Opposite Party No. 1 were required to be placed on the Opposite Party No. 3 and the supplies were made by him to the distributors. At present, the orders for supply of goods are required to be placed on the Opposite Party No. 4 and supplies are made by him. The Opposite Party No.5 is an association of distributors and stockist *etc.* (FMCG) of Sonipat and surrounding areas.
6. It is stated that the Informant placed an order with the Opposite Party No. 3 for supply of 36 cartons of "Almond Drops Hair Oil, 100 ml" on 06.09.2012. The Informant also paid a sum of Rs. 50,000/-(Rupees Fifty Thousand only) for this purpose through NEFT. However, no supply was made by the Opposite Party Nos.1, 2 & 3 against the said order and payment. In fact, it is alleged that the Opposite Party No. 3 refused to accept the aforesaid order which was sent to him by Regd. Post with A.D. dated 06.09.2012. Thereafter, a reminder was sent by the Informant to the Opposite Party No. 3 dated 12.09.2012 by Regd. Post with A. D. requesting him to supply the goods against the order dated 06.09.2012. The aforesaid reminder letter dated 12.09.2012 was returned back by the Postal Authorities with the remark "Refused".
7. It is further stated that the Opposite Party No. 5 is an association of distributors/ stockists of drugs/ products of various drugs and



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pharmaceutical manufacturing companies. Under the regulations of the association, it is mandatory for each distributor and retailer to become a member of the said association. No new stockist/ distributor is appointed by drugs and pharmaceutical companies unless the person desirous of becoming a stockist/ distributor becomes member of the said association and gets 'No Objection Certificate' (NOC) from the association. It is also incumbent for the manufacturing company to obtain an NOC from the association before appointing any distributor at Sonipat.

8. It is the case of the Informant that the Opposite Party Nos. 1, 2, 3 & 4 had proposed to appoint another distributor in place of the Informant and the Sonipat Distributor (FMCG) Association sought NOC from the Informant stating *inter alia* that he had nothing to do with the company and that he would have no objection if any other member of the association takes the distributorship of the company.
9. The Informant responded to the Opposite Parties stating that he had no objection to the appointment of another stockist; however, he should also be allowed to continue the business. As this was not acceptable to the Opposite Parties, the Informant refused to sign the NOC on the dotted lines. At this, the Informant was asked to resign from the membership of the association which the Informant did. As a result, the Opposite Parties refused to deal with the Informant and stopped the supply of goods.
10. The Informant has alleged that non-supply of goods by the Opposite Parties and withholding the amount paid by the Informant caused an appreciable adverse effect on competition, apart from the fact that the business of the Informant suffered greatly. The refusal of the Opposite Party No. 1 to supply the goods to the Informant is anti-competitive in terms of clause (b) of Explanation to section 3(4) of the Act. This action is also violative of section 3(4)(c) of the Act as there is only one



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exclusive dealer in the Sonipat Area.

11. The Informant avers that the Opposite Parties lodged a false complaint against it in connivance with M/s. Vinod Enterprises as it refused to give NOC alleging *inter alia* that the products of the Opposite Parties are being sold by the Informant outside the area allotted to it. It was further alleged that the Opposite Party Nos. 1, 2, 3 & 4 had decided to terminate the distributorship of the Informant. Accordingly, the Opposite Party Nos.1, 2, 3 & 4 stopped the supply of goods to the Informant.
12. The Informant has alleged that the conduct of the Opposite Parties in appointing exclusive dealer/ stockist for Sonipat Area and refusal to deal with the Informant (who is stated to be one of the oldest dealer/ distributor of the Opposite Parties) is anti-competitive in terms of the provisions contained in section 3 (4) (b) of the Act.
13. In view of the above, the Informant has alleged the following actions of the Opposite Parties as anti-competitive and violative of the provisions of the Act:
  - a) Refusal to deal with the Informant and refusal to supply the goods to him while appointing a new stockist in Sonipat Area.
  - b) Imposing condition on the stockist not to sell/ supply their products outside the Area allotted to stockist.
  - c) Entering into exclusive supply and/ or distribution agreement with the new distributor to the detriment of the Informant.
14. In addition to the above cited allegations, the Informant has alleged that various clauses of Bye-laws of Sonipat Distributor (FMCG) Association (Regd.) are also anti-competitive as these clauses cause appreciable



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adverse effect on competition in India.

15. Based on the above allegations and averments, the Informant has filed the instant information before the Commission seeking *inter alia* an inquiry against the Opposite Parties besides praying for the remedies as provided under the Act.

#### **Directions to the DG**

16. The Commission after considering the entire material available on record *vide* its order dated 26.11.2013, passed under section 26(1) of the Act, directed the DG to cause an investigation to be made into the matter and submit a report. The DG, after receiving the directions from the Commission, investigated the matter and after seeking extensions submitted the investigation report on 05.02.2015.

#### **Investigation by the DG**

17. It was concluded by the DG that the members of SDA agreed to certain bye-laws which restricted freedom of trade and limited competition amongst the distributors of FMCG products in the area of Sonipat. The association also enforced geographical area restriction on the members. The association enforced the requirement of NOC on newly appointed distributors before starting business of distribution of the products of any company. This practice was found to be limiting and controlling the supply and distribution of FMCG products in the area of Sonipat. Thus, such conduct of SDA was noted as anti-competitive within the ambit of section 3(3)(b) of the Act.
18. Further, the DG found that Bajaj indulged in the practice of allocating geographical area to its distributors and thus noted that it indulged in exclusive distribution agreement, which violates the provisions of



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section 3(4)(c) of the Act.

19. The DG also found that Bajaj indulged in the practice of stopping supply of goods to any deviant distributor and also restricted its distributor from supplying Bajaj products to retailers who came from area outside the territory allocated to the distributor by the company. However, such refusal to supply was noted as an outcome of the area restriction and was considered another aspect of the same practice. Thus, it was also concluded that Bajaj has indulged in refusal to deal, which violates the provisions of section 3(4)(d) of the Act.
20. Further, the DG also concluded that Bajaj has indulged in re-sale price maintenance which violates provisions of section 3(4)(e) of the Act.
21. Lastly, the DG identified the officer bearers of SDA as well as the officials of Bajaj for the purposes of section 48 of the Act.

#### **Consideration of the DG report by the Commission**

22. The Commission in its ordinary meeting held on 19.02.2015 considered the investigation report submitted by the DG and decided to forward electronic copies thereof to the parties for filing their respective replies/objections thereto. The Commission also decided to forward an electronic copy of the investigation report to the persons identified by the DG for the purposes of section 48 of the Act *i.e.*, the officials of OP-5 who, at the time of the contravention of the Act, were responsible for the conduct of the business of OP-5 for filing their respective replies/objections thereto. The Commission further directed such parties to appear for oral hearing on 08.04.2015 when the arguments of the counsel for OP-1 and the Informant were heard. It was pointed out by the counsel appearing for OP-1 that no positions such as OP-3 and OP-4 existed in Bajaj. On 22.07.2015, the Commission heard the submissions made by the counsel appearing on behalf of OP-5 and its officials.



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### **Replies/ Objections/ Submissions of the Parties**

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

#### **Replies/ objections/ submissions of OP-1 & OP-2**

24. OP-1 filed objections/ reply dated 08.04.2015 to the report of the DG. Further, it also filed an affidavit dated 25.04.2015 in reply to the affidavit of the Informant submitted during the course of hearing on 08.04.2015. Subsequently, written submissions dated 01.05.2015 were filed by the counsel appearing for OP-1. Earlier *i.e.* on 08.04.2015 the counsel appearing for OP-1 submitted before the Commission that his representation may also be considered for OP-2 as well.
25. It was contended that the conclusion of the DG against OP-1 was based merely on statements given by certain selective persons and without giving any opportunity to OP-1 to cross-examine the witnesses or to rebut the statements made. The findings were not even supported by the materials annexed to the report and therefore, the same are liable to be rejected. It was also argued that the DG had exceeded its power under the Act as he was only empowered to investigate and place the entire material gathered during investigation before the Commission whereas in the instant case the evidence has been wrongly appreciated and a conclusion drawn.
26. It was further contended that the investigation was not fair and that it was conducted with a pre-determined mind that OP-1 was guilty. It was submitted that the DG should have at least made an attempt to verify whether the statements recorded by him were factually correct or not in order to corroborate the said statements with the actual documentary evidence such as invoices, number of competitors operating in Sonipat area, the price at which the product was sold to retailers before and after



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the replacement of the Informant, *etc.*

27. It was denied that OP-1 had any agreement with any person as defined under section 3(4)(c), (d) and (e) of the Act. It was submitted that the bulk purchasers of OP-1 could sell the products at any price in any area and that there were no area restrictions. It was further submitted that the price suggestion was merely recommendatory in nature and that a bulk purchaser was free to sell the product at lower price.
28. It was stated that apart from the misbehaviour of the Informant with OP-1's staff, the other reason for stopping supply of products to the Informant was bad-mouthing by the Informant about the products of OP-1.
29. During the course of hearing before the Commission on 22.07.2015, the counsel appearing for OP-1 submitted before the Commission that he did not wish to press the application seeking cross-examination and as such the same was disposed of by the Commission.

*Replies/ objections/ submissions of OP-5*

30. OP-5 filed written submissions on 18.06.2015. It was submitted that OP-5 never intended to overrule the orders of the Commission in any manner and whatever has been done so far is in accordance with its bye-laws and constitution of the association. It was further submitted that the Informant has signed the contract at its own free will and for that OP-5 cannot be held responsible.
31. It was also denied that OP-5 has indulged in business of granting false NOCs. Further, it was also denied that the association has been doing any business of selling of NOCs in favour of any business entity.
32. It was stated that OP-5 does not have any balance sheet/ profit & loss accounts, hence the same were not made available to the Commission.



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33. It was submitted that OP-1 cannot use the NOC form since the signature of the ex-distributor, new distributor and representatives were missing; hence it was invalid. Also, OP-1 was never asked to stop the supply of goods to the Informant.
34. It was denied that any NOC was issued for or against the Informant. It was submitted that OP-5 only issued an NOC form and it does not interfere in the business between the company and distributors. It was further submitted that on the alleged NOC form the area of distribution was marked by OP-5 but that does not mean that OP-1 was asked to stop supply of goods. It was further mentioned that the Informant had himself given a written authority letter to OP-5 stating that in case of any dispute, OP-5 can give NOC to OP-1 to stop supply of goods in case he buys the goods from outside distributors. In view of the above, it was submitted that OP-5 be granted leniency and 100% waiver of penalty. Lastly, during the course of the hearing before the Commission on 22.07.2015, it was submitted by the counsel appearing on behalf of OP-5 that the association has stopped the practice of NOC since the Informant approached the Commission.
35. An almost similar reply/ written submissions were also filed by Shri Narender Goswami *i.e.* the President of OP-5 on 23.06.2015.
36. Shri Kamal Mehta of OP-5 also filed his reply/ written submissions on 18.06.2015 stating that he was never designated as General Secretary of OP-5 nor has he participated in the executive business and activities of OP-5. He has denied having dealt with any transaction of NOC or any dispute between companies and distributors in any manner. Therefore, it was submitted that the answering party cannot be held liable in the present matter. It was further stated by Shri Mehta that he was never an office bearer of OP-5 in any manner. Accordingly, he requested the Commission to remove his name from the matter.



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Replies/ objections/ submissions of the Informant

37. The Informant filed its affidavit dated 23.03.2015 besides filing its response dated 29.04.2015 to the reply/ objections filed by OP-1 to the report of the DG.
38. Apart from agreeing with the DG's conclusion, the Informant submitted that he has been dealing with OP-1's products since 1988 and has not criticized their products. Also, it was pointed out that there has been no incident of misconduct with the staff of OP-1 till date. It was further submitted that the allegation that his dealership was cancelled due to poor performance and bad mouthing of the product was false and fabricated. The Informant explained that he has been selling the product for more than 25 years and that the sales of the products have been consistent for years to the extent that OP-1 had issued 'Certificate of Excellence' to the Informant for the years 2009-10 and 2010-11 for having achieved 100% sales target.
39. The Informant also denied that he dealt with any Almond Hair Oil of Dabur India Ltd. during his tenure as stockist of OP-1 as alleged in OP-1's submissions.
40. It was submitted that OP-1 in connivance with OP-5 imposed and enforced the condition of area allocation and the same was done orally to avoid action under competition law. That OP-1 stopped the supply of products because the Informant was supplying products beyond its allocated territory.
41. In view of the above, the Informant prayed that the false allegations may be rejected and the DG's findings be accepted.



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### **Analysis**

42. On a careful perusal of the information, the report of the DG and the replies/ objections filed and submissions made by the parties and other materials available on record, the following issues arise for consideration and determination in the matter:

- (i) Whether the bye-laws of SDA/ OP-5 and its conduct are violative of the provisions of section 3(1) read with section 3(3) of the Act?
- (ii) Whether OP-1 has contravened the provisions of section 3(4) of the Act?

### **Issue No. (i) : Whether the bye-laws of SDA/ (OP-5) and its conduct are violative of the provisions of section 3(1) read with section 3(3) of the Act?**

43. At the outset, it needs to be examined as to whether bye-laws of SDA and the practice carried on or decision taken by it are in contravention of the provisions of section 3 of the Act. In this regard, it may be observed from the DG report that though the Informant described the association as registered, the DG's investigation revealed that SDA is an unregistered association. However, nothing turns upon this aspect as for applying the provisions of section 3 of the Act, it is not necessary for associations to be registered under the relevant laws.

44. From the DG report, it appears that SDA was initially an informal gathering of few distributors of FMCG products in Sonipat town only. The idea was floated around 2011 by some distributors of the town during an informal get together with the objective of securing the interest of the distributors against the arbitrary functioning of FMCG companies. The association could never be registered. There is no separate office of



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the association and its functions from the premises of M/s Narinder Kumar Varinder Kumar- a proprietary concern of Shri Narinder Kumar Goswami who is the President of the association- situated at New Sabzi Mandi, Kami Road, Sonapat, Haryana. Presently, the association appears to have 52 members. It may also be noted that the association does not operate any bank account and the fee and contributions are collected in cash by Shri Jeet, Cashier of the association.

45. From the bye-laws of the association, the following clauses were found by the DG to be anti-competitive:

1. *A new dealer before beginning any work with the Company shall have to seek permission letter (NOC) from the old dealer.*
2. *In case of transfer of any agency, a new dealer shall have to deposit one copy of the permission letter in the Office of the Association within a week.....*
6. *If any Company wants to appoint in the city any of its super stockiest or C & F Agent, and if any member of the SDA is working already as a stockiest of the Company, then it will be binding for the Company to appoint him as its stockiest.*
7. *If any party without obtaining NOC starts doing business then the Association shall impose a fine of Rs.2,500/- on such dealer and the products of that new party shall be binding for sale through transfer to the old party.*
8. *If any outside person or stockiest, enters into the authorized area of SDA member by violating the prescribed area for sale by the Company, then in this*



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*situation on the complaint of the affected party, such person or the concerned Company shall be prevented from doing so.....*

23. *In the event of any dispute of any Shopkeeper with any SDA member, the SDA on receipt of any written complaint from any of its member shall initiate appropriate proceedings after hearing their version of the shopkeeper. The shopkeeper in the event of not honouring the decision of the executive, can be blacklisted and according to which no member of the SDA shall have any business dealings with the said shopkeeper.*

46. From the above clauses, it may be observed that the member distributors of SDA entered into the agreement whereby and whereunder it was agreed that any new dealer before starting any work with a company shall have to seek permission (NOC) from the old dealer. Further, it is provided that if any party starts business without obtaining NOC, the association shall impose a fine of Rs. 2,500/- upon such dealer. Moreover, it was provided therein that if any outside person or stockist enters the authorized area of SDA member by violating the prescribed area for sale by the company then, on the complaint of affected party, such person shall be prevented from doing so.

47. It may be pointed out 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.



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48. Further, by virtue of the presumption contained in subsection (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 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.
49. 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 Parties.
50. The Commission notes that OP-5 is an association of distributors/ dealers of FMCG companies who are engaged in the supply of FMCG products to the consumers. Therefore, such members/ constituents fall squarely within the definition of 'enterprise' provided in the Act. Further, section 3(3) of the Act not only covers agreements entered into between enterprises or associations of enterprises but also the practices carried on or decision taken by any association of enterprises engaged in identical or similar trade of goods or provision of services. Thus, all actions and practices of OP-5 including laying down provisions for the operation of distributorship such as issuing NOC and geographical restriction squarely fall within the ambit of the expression 'decision taken by' an 'association of enterprises' under section 3(3) of the Act.



The Commission, therefore, holds that OP-5, being an association of its constituent enterprises, is taking decisions relating to distribution of FMCG products on behalf of the members who are engaged in similar or identical trade of goods and that such decisions taken by OP-5 as an association of enterprises are covered within the scope of section 3(3).

51. In view of the aforesaid backdrop of the statutory scheme, a plain reading of the above mentioned clauses of the bye-laws of the association would indicate that the members of SDA by agreeing to such bye-laws have disturbed the forces of free trade and limited competition amongst the distributors of FMCG products in the area of Sonipat. Besides, the association also imposed geographical restrictions upon the members doing business. The requirement to obtain NOC by a newly appointed distributor before starting of a business creates entry barriers besides limiting and controlling the supply of services.
52. It is no doubt true that the distributors/ dealers have the right to form associations or unions within the constitutionally circumscribed limits, yet their conduct and decisions including the rules which are binding upon the members have to abide by the laws of the land including the provisions of the Act. The Commission also notes that the competition law is not an impediment to appropriate trade association activities and members of such associations should be fully aware of the types of conduct the law proscribes when carrying out an association's programs and activities. Under the Act, trade associations face anti-trust risks under section 3 of the Act for entering 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.
53. In view of the above discussion, it is apparent that such bye-laws besides limiting/ controlling the supplies also allocated the markets and as such fall within the presumption engrafted by the statute under section 3(3)(b)



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and (c) of the Act. In the present case, OP-5 could not rebut the said presumption. It has not been shown as to how the impugned clauses resulted into accrual of benefits to consumers or made improvements in production or distribution of goods in question. Further, it could also not explain as to how the same did not foreclose competition. Resultantly, the Commission has no hesitation in holding that the above excerpted clauses of the bye-laws of OP-5 association are evidently in contravention of the provisions of section 3(1) read with section 3(3)(b) & (c) of the Act.

54. Adverting to the impugned conduct of the association, it may be noted that the DG, after examining the conduct of the association pursuant to and flowing from such restrictive clauses, concluded that the association actually enforced geographic area restriction upon the members. Besides, it was also noted by the DG that the association enforced the issue of NOC upon newly appointed distributors before starting their business of distribution in the products of a new company. Such practice/ conduct was found to be anti-competitive by the DG in terms of the provisions contained in section 3(3)(b) of the Act.

55. On perusal of the DG report, the Commission notes that the DG has examined the meetings register of the association which revealed that the association from the beginning had resolved on the requirement of its members to obtain NOC from previous member dealers prior to commencement of business. This decision appears to be reiterated in the subsequent meetings of the General Body held on 02.01.2011, 08.01.2011, 15.01.2011 and 10.04.2011. It was also noted by the DG that in the Executive Committee meeting of the association held on 22.07.2011 the form for NOC was approved and it was decided that from then onwards the forms for NOC will be given by the office of the association instead of the distributor on payment of Rs. 251/-. The DG also examined the various dealers of Bajaj products besides the President



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of the association to conclude that the association strictly enforced the area restriction over the dealers and made NOC mandatory for appointment of new dealers.

56. Specifically, it may be observed that the DG collected the following evidence during the course of the investigation on the issue of NOC:

(i) Minutes of the Meeting dated 15.01.2011: OP-5's members unanimously agreed if any person who decides to take up a new dealership/ distributorship has to seek an NOC from the old dealer.

(ii) Minutes of the Meeting dated 22.07.2011: The NOC form was approved unanimously by member of OP-5. It was also decided that from that day onwards, the said form will be given by OP-5 only.

(iii) Statement on oath of the President of OP-5, Shri Narinder Kumar Goswami: Admitted that OP-5 has issued several NOCs to companies like Parle Agro, Pepsi, Bajaj, *etc.* Further, it was stated that OP-1 had approached him for NOC for the appointment of a new distributor, M/s EMM KAY Traders, in Sonipat town.

(iv) Statement on oath of the Proprietor of M/s EMM KAY Traders, dated 08.07.2014: The above statement of the President of OP-5 was further confirmed by Shri Pawan Kumar, the Proprietor of M/s EMM KAY Traders wherein he stated that OP-1 had taken the NOC from OP-5 before shifting the distributorship to his firm and the same was done since the Informant had refused to issue the NOC.

(v) The NOC Book of OP-5: It revealed that OP-5 had issued NOCs to various FMCG companies for appointment of new dealers and cancellation of the earlier ones.

57. From the examination of the evidence collected by the DG, the



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Commission notes that the requirement of NOC is an essential condition for the appointment of a new dealer and replacing the old one. The incidents noted above also show that OP-1 had approached OP-5 for NOC in order to appoint new dealers. It is further noted from the minutes of the meeting dated 22.07.2011 that the obligation of obtaining NOC from the old dealer was changed and the same was to be obtained from OP-5. This was further confirmed by the president of OP-5 in his statement that several NOCs have been issued to companies like Pepsi, Parle, *etc.* Also, the records maintained in the NOC book of OP-5 have been scrutinized. Thus, it is clearly evident that OP-5 is limiting the source of supply or the access of the same by consumers in the market. In other words, it is controlling the supply chain through which FMCG products are made available in the market by requiring NOC prior to appointment of a new distributor by companies even though OP-5 has no legal or statutory authority to do so. If this was not enough, clause 7 of the bye-laws of OP-5 provides for penalty of Rs. 2500/- on the new dealer who fails to obtain NOC. Such rules also restrict the suppliers/ distributors competing with each other in the market since issuance of NOC also means that the old dealer has been replaced and he will no longer be allowed to sell the products of the company. It does not appear to enhance either efficiency or consumer welfare.

58. In view of the foregoing, the Commission notes that the conduct of OP-5 in the matter of issuance of NOC attracts the provisions of section 3(3)(b) read with section 3(1) of the Act as OP-5 is restricting the freedom of trade through its bye-laws, which has the effect of limiting or controlling the market or supply of goods in the market.
59. With regard to the imposition of geographical restrictions on the dealers/ distributors, the following evidence were collected by the DG:



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(i) From the NOC records maintained by OP-5 *i.e.* the NOC book, one of the reasons for cancelling the earlier dealership in case of NOC No. 7 was mentioned as '*selling in other distributor's area*'.

(ii) In the Executive Meeting dated 21.04.2011, OP-3 directed Shri Rajendra, Proprietor of M/s Ganpat Rai Naveen Kumar to refrain from selling products supplied by distributors located outside Sonipat.

(iii) Statement dated 20.06.2014: Shri Vinod Kumar, Proprietor of M/s Vinod Enterprise's complained before OP-5 against the Informant for selling OP-1's products in the area allocated to him.

60. The Commission observes from the above evidence that OP-5 has been dictating its members to limit their sale only in the areas allocated to them. The diktats of OP-5 are apparent in the form issued to the company wherein the reason for the issuance of the same was quoted as "*selling in other distributor's area*". Further, in the Executive Meeting dated 21.04.2011 a Proprietor, Shri Rajendra, was directed to refrain from selling products supplied by distributors located outside Sonipat and the complaint of M/s Vinod Enterprise to OP-5 was about the Informant selling in its allocated area as against the so-called agreed arrangement.

61. It is evident from the above that the rules imposed upon the dealers prevent, restrict and distort the competition in the market. The Commission notes that the provision that grants territorial protection to a dealer from all competition in the market indicates that the very object of the provision is anti-competitive in nature.

62. It is further noted that such non-compete obligation imposed on the dealers, who are potential competitors in the market, will not only lessen the competition but will also deter otherwise efficient entities into the market. Also, taking action against anyone who goes against the said



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provision within the geographical area is not only unreasonable but also anti-competitive in nature. Furthermore, it deprives the end-consumer of wider choice which would have been available in the market but for the bye-laws. Such case of entry barrier, competition foreclosure and non-accrual of consumer benefits are factors enumerated under section 19(3) of the Act to determine appreciable adverse effect on competition. As noted earlier, it may be pointed out that a bare reading of the statutory scheme would indicate that under section 3(3) of the Act, the presumption of appreciable adverse effect on competition has to follow once an agreement falling under clauses (a) to (d) of section 3(3) of the Act is found to exist. Therefore, the Commission holds that the impugned conduct pursuant to the bye-laws of OP-5 restricts the legitimate means of enhancing competition in the market.

63. In view of the above discussion and evidence gathered by the DG by way of minutes of the various meetings of the association and statements of the dealers as well as the President of the association which have not been controverted, it is evident that the association obliged the FMCG companies and the dealers to seek its approval before taking up any business of distribution, which created a barrier to entry in the market for new dealers as well as new companies. The prerequisite of NOC by the association, thus, foreclosed the competition by hindering entry of new players in the market. The association has also ensured that the dealers have exclusive area of supply and thereby has restricted competition. This primarily stops the dealer from selling products outside. This leads to reduction of choice and consequent benefit to consumers. Further, the area restriction appears to cause no improvement in the provision of services in the market or any other economic development.
64. Thus, the Commission is of considered opinion that the association actually acted in terms of its bye-laws which themselves are found to be anti-competitive, as noted and adumbrated *supra*, and thereby



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contravened the provisions of section 3(3)(b) & (c) of the Act.

65. Coming to the specific allegation, it is noted that the DG, after detailed investigation, concluded that OP-5, through its bye-laws restricted its members and compelled them to seek NOC prior to appointing any new distributor or replacing the existing ones. Further, the DG noted that OP-5 had forced the Informant to abandon the distribution of products of OP-1, thus, driving out an existing competitor from the market. That the prerequisite of NOC by OP-5 forecloses the competition by hindering entry of new players in the market and that OP-5 has also ensured that the dealers have exclusive area of supply and thereby restricted competition. Such practices primarily stop the distributor from selling products outside the area allocated to it. It was opined that such conduct was limiting and controlling the supply and distribution of FMCG products in the area of Sonipat, thereby contravening section 3(3)(b) of the Act.

**Issue No. (ii): Whether OP-1 has contravened the provisions of section 3(4) of the Act?**

66. The other aspect in the matter relates to the alleged conduct of Bajaj in having exclusive distribution agreement involving allocation of area and refusal to deal in terms of the provisions contained in section 3(4) of the Act.
67. It may be noted that Bajaj is engaged in manufacture and sale of FMCG products while distributors/ dealers/ bulk purchasers (who are members of the association in the case) distribute the products of various companies including those of Bajaj.
68. It is the case of the Informant, who was the dealer of OP-1 till August 2012, that OP-1 orally advised him not to sell the products outside the area of Sonipat town. As the Informant did not adhere to the advice, he



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was removed and replaced by another dealer.

69. The DG, after having examined the statements of the Informant, officials of OP-1 and other third parties, observed that OP-1 had allocated area of business to every dealer and did not want them to infiltrate into the territory of the other dealer. It was noted that there was a vertical restraint imposed on the distributors to supply the products in the area limited by the company and the arrangement was monitored and enforced by the sales staff of OP-1. After further examination of statements given by several market participants and the president of OP-5, the DG gathered that the reason for termination of dealership with the Informant was that the Informant was not abiding by the diktats of OP-1 to restrict supply to the area allocated to him. It was noted that OP-1 in its own submission indicated the same reason. Thus, OP-1 clearly did not want intra-brand competition of its products resulting into wanton price cutting. The DG was also of the view that OP-1 failed to substantiate the reason for stopping supply of its products to the Informant. Therefore, it was concluded that OP-1 indulged in the practice of allocation of geographical area to its distributors which amounted to exclusive agreement and thereby violated section 3(4)(c) of the Act. It was also opined that the conduct of OP-1 contravened section 3(4)(d) of the Act since OP-1 stopped the supply of goods to any deviant distributor and restricted its distributors from supplying Bajaj products to retailers who came from an area outside the territory allocated to the distributor by the company.
70. The DG stated that OP-1 had also indulged in resale price maintenance by prescribing rate at which its products were to be re-sold by the dealers to the retailers. It was further stated that in order to ensure that there was no intra-brand competition or price competition of its products, OP-1 imposed such vertical restrictions upon its dealers. Furthermore, OP-1's decision to terminate the dealership of the Informant, indicates that OP-1



was strict in enforcing its mandate. Based on the statements of various other market participants and the above analysis, the DG concluded that OP-1's conduct of imposing such vertical restraint *i.e.* resale price maintenance, is also in contravention of section 3(4)(e) of the Act.

71. The Commission has perused the material available on record including the evidence gathered by the DG during the course of the investigation. From the evidence collected by the DG, the Commission notes that though OP-1 has denied that it is not involved in any area allocation, the list of bulk purchasers provided by Shri Subhamay Chatterjee, authorized representative of OP-1 reveals otherwise. It is observed that the said list had areas mentioned specifically for each dealer and this was further confirmed by Shri Rakesh Nawal, Sales Representative of Bajaj, in his statement dated 12.01.2015 that OP-1 allocates areas amongst dealers. Furthermore, Shri Pawan Kumar, Proprietor of M/s EMM KAY Traders, admitted that OP-1 allocated Sonipat town to him and was directed by OP-1 to not supply the products outside Sonipat town. The statement of Shri Vinod Kumar in his complaint against the Informant and also the statement of Shri Manoj Sachdeva, GM Sales of OP-1 wherein he admitted that in case any bulk purchaser supplies OP-1 products in the area allocated to another bulk purchaser, the officers of OP-1 will ask them not to distribute the product further established the fact that the practice of allocating area by OP-1 was in vogue.

72. With regard to the issue of refusal to supply OP-1 products to the Informant, the Commission observes that some of the representatives of OP-1 cited misbehaviour, bad-mouthing and promotion of other competitors' products as the reasons. However, Shri Rakesh Narwal, Sales Representative of OP-1 specifically mentioned in his statement that the reason for stopping supply of products to the Informant was that the Informant was supplying products outside the territory. Furthermore, it is noted from the statement of Shri Manoj Sachdeva wherein he stated



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that OP-1 may stop supply of products in case the bulk purchaser deals in the area allocated to another one.

73. In view of the above, the Commission agrees with the DG that OP-1 has indulged in anti-competitive practices but whether such conduct has caused appreciable adverse effect in the market needs to be further analyzed which shall be done at a later stage in this order.
74. With regard to the next allegation of resale price maintenance by OP-1, the Commission notes from the evidence that Shri Pawan Kumar, Shri Manoj Kumar Sachdeva, Shri Rakesh Pratap Singh Rathore and Shri Rakesh Narwal, all the employees of OP-1 stated before the DG that OP-1 decides the margin of the products to be sold. Further, Shri Ravi Singhal who is a dealer of OP-1 products stated that OP-1 gives a suggested price of the products.
75. Before analyzing whether the alleged conduct of OP-1 caused appreciable adverse effect on competition, it will be important at this stage to appreciate as to what is exclusive distribution agreement and how it affects the market. Exclusive distribution agreement in broader sense means an arrangement between the supplier and distributor wherein the distributor sells the product/s within a defined area or to a particular group / category of customers. Such arrangements particularly affect intra-brand competition as they restrict entry of another player into the market. It may also affect the inter-brand competition since the outlets of distribution are limited thereby impeding competition amongst players engaged in several similar services. However, it may be noted that such arrangement can be objectively justified on certain grounds like protection from free riding, efficient management of sales of products, economic efficiency, *etc.*
76. The next angle which requires further understanding is the issue of



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refusal to deal/ supply wherein an enterprise, generally with stronger market power refuses to deal with its customers or suppliers. The obvious effect in such scenario is that the downstream market gets affected due to such refusal. It may also be noted that no enterprise is obliged to supply its products to any company/ supplier/ distributor. However, under certain circumstances, such conduct may attract the provisions of the Act which will depend on case to case basis.

77. The Commission further notes that the other factor that can militate against appreciable adverse effect is the doctrine of *de minimis*. The doctrine of *de minimis* deals with the concept wherein agreements of enterprises have insignificant effect on the market *i.e.*, it is unlikely to cause appreciable adverse effect on competition in the market. It is possible mostly in cases where the positions of the said enterprises are weak in the market.
78. The Commission may now proceed to analyse whether the impugned conduct of OP-1 had caused or was likely to cause appreciable adverse effect. From the evidence collected by the DG, it is clear that OP-1 has been allocating areas to its dealers and it is already opined above that the grant of territorial protection to a dealer from all competition in the market amounts to vertical restraint.
79. At this stage, it would be apposite to appreciate the market construct of FMCG products particularly the segment of hair oil. The Indian FMCG market offers a level playing ground for both domestic and international brands. Some of the major FMCG companies operating in India are ITC Limited, Hindustan Unilever Limited, Nestle India, Parle Agro, Britannia Industries Limited, Marico Limited, Godrej Consumer Products Limited (GCPL), Colgate-Palmolive (India) Pvt. Ltd, Procter & Gamble Co. (P&G), Anand Milk Union Limited (AMUL), *etc.* to name a few. In terms of hair oil categories, Marico is a leading FMCG Indian



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manufacturer providing consumer products and services in the areas of Health and Beauty. Its products include Parachute, Oil of Malaba, Hair & Care, Nihar, Shanti, *etc.* Other brands, apart from OP-1, include Dabur India Limited, Emami Ltd., Figaro, *etc.* This indicates that the market of hair oil is wide and consumers have various brands as options to choose from.

80. In view of the above noted market structure of FMCG products and particularly the hair oil segment in India, it appears that OP-1 does not have position of strength in this sector in comparison with other brands. Such arrangement, in the presence of several companies and considering the dynamic nature of the sector, is unlikely to affect the inter-brand competition in the market. As such, the impact of restrictions imposed by OP-1 would be negligible.
81. It should be noted that as per the provisions of section 3(4) of the Act, only agreements which cause or are likely to cause an Appreciable Adverse Effect on Competition (AAEC) on competition in India shall be within the discipline of section 3(1) of the Act. Hence, in order to determine if the agreements entered between OP-1 and the authorized dealers are in the nature of an 'exclusive distribution agreement' or 'refusal to deal' or 'resale price maintenance' under section 3(4)(c) and 3(4)(d) and 3(4)(e) of the Act respectively, the Commission needs to determine if such agreements cause an AAEC in the market based upon the factors listed in section 19(3) of the Act. It is pertinent to note that clauses (a)- (c) of section 19(3) deal with factors which restrict the competitive process in the markets where the agreements operate (negative factors) while clauses (d)-(f) deal with factors which enhance the efficiency of the distribution process and contribute to consumer welfare (positive factors). An agreement which creates barriers to entry may also induce improvements in promotion or distribution of goods or *vice-versa*. Thus, whether an agreement restricts the competitive process



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is always an analysis of the balance between the positive and the negative factors listed under section 19 (3)(a)-(f). Even considering the effect of the impugned agreement on the touchstone of factors elucidated under section 19(3) of the Act, the Commission is of the view that the DG has not been able to demonstrate satisfactorily that the impugned agreements are adversely affecting the competition in the markets. It is not conclusively borne out that the arrangements have either created entry barriers for new entrants or drove existing competitors out of the market, nor is there any appreciable effect on the benefits accruing to the ultimate consumers.

82. Considering the above factors, the Commission disagrees with the conclusion of the DG that the vertical restraints imposed by OP-1 on its distributors caused appreciable adverse effect on competition in the market which contravene section 3(4) of the Act. The DG has failed to analyze in its report that though OP-1 may be one of the leading brands in the FMCG industries, the fact remains that there is no dearth of products of other equally and better brands in the market. The DG has only looked into the sales, distribution model and other aspects of OP-1 and has left out market study of other players in the sector. In view of the above facts and analysis, the Commission opines that though OP-1 has imposed vertical restraints upon its distributors, the effect on the market has not been shown to have caused appreciable adverse effect on competition.
83. Having perused the material on record, the Commission is of considered opinion that no sufficient evidence has been gathered or analysis made by the DG to establish appreciable adverse effect on competition arising out of the impugned conduct of OP-1. There is no evidence whatsoever which is indicative of creation of barriers to new entrants in the market much less any material to suggest driving any existing competitor out of the market.



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84. The Commission has also taken note of the submissions made by OP-1 to the effect that the bulk purchasers of OP-1 could sell the products at any price in any area and that there was no area restrictions. Besides, the Commission has noted the submission to the effect that the price suggestion was merely recommendatory in nature and that a bulk purchaser was free to sell the product at lower price.
85. In view of the aforesaid discussion, no case of contravention of section 3(4)(c), 3(4)(d) and 3(4)(e) of the Act is made out against OP-1.

### **Conclusion**

86. Based on the above discussion, the Commission is of opinion that impugned act/ conduct of OP-5 is found to be in contravention of the provisions of section 3(1) of the Act read with section 3(3)(b) & (c) thereof. No contravention is established against OP-1 in respect of allegations under section 3(4)(c), 3(4)(d) and 3(4)(e) of the Act, as detailed above.
87. In view of the above, the Commission passes the following:

### **ORDER**

88. OP-5 and its office bearers are directed to cease and desist from indulging in the acts/ conduct which have been found to be in contravention of the provisions of the Act. Further, it is ordered that OP-5 association shall modify its bye-laws in light of the contraventions found and observations made by the Commission in this order so as to bring the same in accord with the provisions of the Act. Further, in exercise of the powers under 27(g) of the Act, the Commission directs OP-5 to put in place, in letter and in spirit, a 'Competition Compliance



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Manual' to educate its members about the basic tenets of competition law principles. It is hoped that the association shall play an active role in creating awareness amongst its members of the provisions of the Act through competition advocacy. Lastly, the Commission has also taken into consideration the submission made by the counsel appearing for OP-5 to the effect that the association has stopped the practice of NOC since the Informant approached the Commission. Accordingly, in the facts and circumstances of the present case, the Commission does not deem it appropriate to issue any further remedy.

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

Sd/-

**(Ashok Chawla)**  
**Chairperson**

Sd/-

**(S. L. Bunker)**  
**Member**

Sd/-

**(Augustine Peter)**  
**Member**

Sd/-

**(M. S. Sahoo)**  
**Member**

New Delhi  
Date: 12/10/2015