NON CONFIDENTIAL VERSION AS PER REGULATIONS

BEFORE THE

COMPETITION COMMISSION OF INDIA

Case No. 22 of 2010

Kapoor Glass Private Limited : Informant

Against

Schott Glass India Private Limited - Opposite Party

Date of Order: 29.3.2012

Order under Section 27 of the Competition Act, 2002

1. Background and Profile of the parties

1.1 Information under the provisions of section 19(1) (a) of the Competition Act, 2002 (Act) was filed on May 25, 2010 by Kapoor Glass India Private Limited (hereinafter Kapoor Glass or the informant) alleging certain anti-competitive acts by Schott Glass India Private Limited (hereinafter Schott Glass...
India or the Opposite Party or the OP). The information brings out allegations of various anti-competitive practices by Schott Glass India in the market of ‘neutral USP-1 borosilicate glass tubes’ and ‘glass ampoules’ made out of such glass tubes in India.

1.2 Neutral USP-1 borosilicate glass tubes are made out of borosilicate glass, which is a special type of glass with unique properties. Due to its low thermal expansion co-efficient and high resistance to chemical reaction, borosilicate glass tubes are used to make glass ampoules, vials, cartridges, syringes which are primary packaging material for liquid injectables and drugs by the pharmaceutical industry. Pharmaceutical companies generally specify the standards or quality/source for borosilicate glass tubes which may be used to make glass tubes ampoules, since the molecules in liquid injectables tend to leach with the surface of the glass container in which they are stored over a period of time, which may result in a change in their chemical composition, in turn resulting in reduced potency. This may also result in discharge of alkali from the glass container into the medicinal solution which might pose significant safely related concerns for the patients being administered with the liquid drugs packed in such glass containers. Only such borosilicate glass tubes which conform to United States Pharmacopoeia-I standard and are neutral with alkali release of less than 1.0 ml are recommended. Borosilicate glass can either be amber or clear depending upon the drug it is being used for. Since certain drugs require very low exposure to light, these are packaged in amber borosilicate glass.
Profile of Schott Glass India Private Limited – The Opposite Party

1.3 Schott Glass India is a wholly owned subsidiary of Schott Glaswerke Beteiligungs – GmbH, Germany ("Schott GmbH"), which in turn, is a wholly owned subsidiary of Schott AG, Mainz, Germany. Schott AG is the ultimate parent company of the Schott Group. The Schott Group is owned by the Carl-Zeiss-Foundation, Germany.

1.4 Schott Glass India Pvt. Ltd., as a wholly owned subsidiary of Schott glaswerke Beteiligungs GmbH, Germany (Schott Germany) is engaged in the production of ‘neutral USP-I borosilicate glass tubes’ in India used for the purposes of manufacturing ampoules, vials, cartridges and glass syringes (Containers) for the filling of liquid injectables. Schott Glass India was registered as a Private Limited Company in the State of Maharashtra, India in December 1997 and in January 1998, it acquired the assets of M/s Bharat Glass Tubes Ltd., one of the existing Indian producers of borosilicate glass tubes at that time. The Tubing Division of Schott Glass India is located in Jambusar, Gujarat and sales division in Mumbai. The tubing division of Schott Glass India is part of its group business unit ‘Pharma’. The ‘Pharma’ business unit of Schott Group consists of business segments; ‘Tubing’ which manufactures and sells borosilicate glass tubes for pharmaceutical and technical applications for pharmaceutical use, and; ‘pharmaceutical packaging’ which manufactures and sells containers made out of Type I glass tubes.

1.5 Schott Glass India manufactures two qualities of borosilicate glass tubes, i.e. (i) Fiolax, (in clear version) with alkali release of 0.38 ml of $\text{H}_2\text{SO}_4$ 0.02 N per 10g powered glass and (ii) the basic Neutral Glass Clear (NGC) and Neutral
Glass Amber (NGA) with alkali release of 0.50 ml which fulfills the USP – Type I standards. NGC and NGA tubes are produced exclusively for Indian market, while Fiolax clear is produced for Indian market as well as for export.

1.6 In May 2008, Schott group through Schott Pharmaceutical Packaging GmbH ("Schott Packaging") a subsidiary of Schott Germany, entered into a Joint Venture agreement with a downstream ampoule manufacturer Kaisha Manufacturers Pvt. Ltd. ("Kaisha") to integrate operations of Schott in India vertically with downstream glass containers manufacturing business, now known as Schott Kaisha Private Limited. Thus since the year 2008, Schott India, through the JV of its related group company, Schott Packaging has been engaged in the business of producing both borosilicate Glass tubes and glass ampoules in India. The unit of Kaisha is situated at Daman.

**Profile of Kapoor Glass Private Limited - The Informant**

1.7 The informant is a private limited company engaged in the business of producing glass ampoules, vials and dental cartridges (collectively referred as Containers) which are used by the Pharmaceutical industry as primary packaging materials for filling and dispensing of liquid injectables (drugs). The key component used in the manufacture of containers is neutral borosilicate glass tubes. Till the year 2008 Kapoor Glass had a presence also in the upstream business of manufacturing of neutral borosilicate glass tubes. Now it is engaged only in business of manufacturing ampoules, vials and other containers out of these tubes.
2. Information

2.1 The facts and allegations as mentioned in the information, in brief, are as under;

2.1.1 As per information, Indian Industry for ‘neutral USP-I borosilicate glass tubes’ has always been a concentrated one, wherein the developments can be seen in three distinct time periods- a) prior to the entry of OP in 1998, b) period between 1998 and 2008 and c) period from 2008 till date.

2.1.2 The informant has stated that prior to the entry of the OP there were five producers of ‘neutral USP-I borosilicate glass tubes’ in India, namely Seraikella Glass Works Ltd, Bharat Glass Tubes Ltd., Twincity Glass India Pvt Ltd., Triveni Glass Ltd. and Kapoor Glass (India) Pvt Ltd (the informant itself). Seraikella Glass exited the market around 1996, Bharat Glass was acquired by the OP in 1998 and Twincity exited the market in 2007 followed by Kapoor Glass in 2008. Triveni has been taken over by the Nipro Glass India Ltd. in March 2010. Thus at present the OP and Nipro Glass India Ltd. remain the only producers of ‘neutral USP-I borosilicate glass tubes’ in India. There is however considerable difference in the quality of the neutral USP Type -I borosilicate glass tubes of the OP as compared to the tubes manufactured by Triveni/Nipro India.

2.1.3 The informant has submitted that since there are only two domestic producers of these tubes in India, most of the domestic demand is met by them, and only a portion of demand is met by way of imports from China and other countries like Germany, Italy and Japan. However, imports have remained low because cost of imports from countries other than China is nearly 30-35% higher than the domestic variants. Since the profit margins in
the industry are low, the glass ampoules manufacturers do not resort to imports. Although the cost of imports from China is lower than other countries, given the difference in quality, most organized pharmaceutical companies do not prefer to use glass ampoules made from Chinese glass tubes.

2.1.4 According to informant, the quality of glass tubes produced by Triveni / Nipro is of higher expansion and is not acceptable to the most pharmaceutical companies. As a result, the glass ampoules manufactures in India including the informant are forced to rely on the OP to meet their demand because OP is the only player who is producing high quality ‘Neutral USP Type I Borosilicate Glass Tubes’.

2.1.5 According to informant, although most manufacturers of ‘Neutral USP Type I Borosilicate Glass Tubes’ in the world are also engaged in the business of making glass ampoules and other containers, there are several independent manufacturers also in the market who are procuring these tubes from upstream suppliers for manufacturing of the ampoules/other containers.

2.1.6 It has been stated that for its business of manufacturing glass ampoules and other containers, the informant is dependent entirely on the OP. Since most Indian pharmaceutical companies have already stabilized their products with glass ampoules made out of Tubes manufactured by the OP, container manufacturers like the informant have no option but to use the tubes of the OP only.
2.1.7 According to informant on 14.05.2008, one of the ampoule manufacturers, Kaisha Manufacturers Pvt. Ltd. entered into a Joint Venture Agreement with Schott Packaging, subsidiary of Schott Germany. Schott Packaging is holding 50% of shares in Kaisha and with this arrangement, the OP has now become vertically integrated with a large downstream ampoule manufacturing company.

2.1.8 The informant has delineated relevant market for assessment of competition in the case as ‘Neutral USP Type I Borosilicate Glass Tubes in India’. In this market, according to informant, Schott India holds a position of dominance in accordance with the provision of Section 4 of the Act. The informant has also brought out that the OP has a dominant presence in the Indian market having a market share of about 67% in 2009.

2.1.9 According to informant, the anti-competitive practices being carried out by the OP can be divided into two broad categories; (a) practices affecting the state of competition in the market for ‘Neutral USP Type I Borosilicate Glass Tubes’ in India and (b) practices affecting the state of competition in market for downstream product of glass ampoules and other containers.

2.1.10 At the upstream level, the informant has alleged that the OP has adopted a practice of unfair and discriminatory pricing of ‘Neutral USP Type I Borosilicate Glass Tubes’. Initially, it started selling the tubes at a cost lower than its cost of production as well as prevailing prices in international market, in order to drive out the existing competitors in the market including the informant and two other concerns, Twincity and Triveni. This resulted in significant financial losses for the informant and ultimately led to their ouster.
from the market. The other two tube manufacturers also suffered financial losses. After the exit of the informant, once the OP was able to establish its position of dominance, it gradually started to increase its prices for its tubes. In its attempt to establish its dominance, the OP also started hiring key managers of the informant. The predatory hiring of employees of the informant was resorted to since the OP failed to acquire the business concerns of the informant and since it was also realized that the informant, which was engaged in business of making both tubes and ampoules could pose significant competition to the OP. Due to this, the production of the informant came to a halt and affected its competitiveness as a viable ampoule manufacturer.

2.1.11 It has been alleged that the OP is not only charging unfair prices but it is also granting loyalty rebates and discounts in order to prevent the shift of ampoule manufacturers to imports and to ensure that ampoules manufacturers use glass tubes of the OP only. The informant has brought out that under quantity discount scheme, the OP provides certain discounts depending upon the quantity of ‘Neutral USP Type I Borosilicate Glass Tubes’ purchased by glass ampoules manufacturers. Under loyalty discount scheme, initially the discount was given if an ampoule manufacturer used to purchase at least 80% of its total requirement from Schott. In addition, the ampoule manufacturers were to promote the sale of Schott brand and also required to sell the ampoules at prices suggested by the OP. The OP has now stipulated that it would give discounts to ampoule manufacturers depending upon the conditions that they meet their entire requirement for the tubes from it.
2.1.12 According to informant, the OP requires that ampoule manufacturers will not engage in making ampoules on temporary “job work arrangement basis” and in this manner, it ensures complete loyalty from the ampoule manufacturers. It also refuses to deal with such ampoule manufacturers who make ampoules using tubes from other sources.

2.1.13 In addition to above, the informant has alleged that the OP also requires that in order to avail tubes at discounted rate, the ampoule manufacturers must agree to furnish a bank guarantee of Rs. 70 lac. According to the informant, this would lead to complete foreclosure of competition in favour of the OP.

2.1.14 The informant has further brought out that in addition to the aforesaid two types of discount schemes, the OP also has been granting a special discount to certain favoured ampoule manufacturers like its own JV, Kaisha, Klasspack Pvt. Ltd. and Tubeglass Containers Pvt. Ltd. By granting special discounts to Schott Kaisha, the OP is engaged in the practice of discriminatory treatment of its customers.

2.1.15 According to informant, the OP is the only manufacturer of the amber variant of ‘Neutral USP Type I Borosilicate Glass Tubes’ which account for about 30-35% of the entire market for glass ampoules including ampoules made out of clear variant of such tubes. The OP using its dominant position in amber variant of the tubes is driving out competitors from the market of clear variant by making the supply of amber tubes to ampoule manufacturers contingent on the procurement of the clear tubes from no other source but the OP only.
2.1.16 Due to the anti-competitive practices of the OP, while most ampoule manufactures have shown a minimum growth rate, Schott Kaisha's growth has been significant, garnering considerable market share.

2.1.17 The informant has alleged that the practices of the OP of charging unfair prices, granting quantity discounts and loyalty rebates are inconsistent with the provisions of Section 4 (2) (a) of the Act. Further, hiring of the informant’s employees in order to strengthen its market share in the downstream market for glass ampoules is in violation of the Section 4 (2) (e) of the Act. It has also been alleged that its practice of refusal to deal with glass ampoule manufactures may be inconsistent with the provisions of Section 3 (4) of the Act.

Reliefs sought

2.2 The informant sought the following reliefs from the Commission:

2.2.1 To issue interim orders under Section 33 to restrain Schott from abusing its position of dominance, including by offering its discount scheme by engaging in unfair or discriminatory pricing; or

2.2.2 To issue interim orders under Section 33 asking Schott to extend the same terms of discounts and rebates to all ampoule manufacturers without any discrimination on the basis of loyalty or any other criteria;

2.2.3 To issue interim orders under Section 33 to restrain Schott from continuing with its anti-competitive agreements for refusal to deal;

2.2.4 To issue orders for fines and penalties for abuse of dominance and entering into anti-competitive agreements.
2.2.5 Issue orders under Section 27 of the Act for breaking up of the joint
venture company between Schott and Kaisha.

Prima Facie Opinion

3. The Commission upon examination of the facts of the Information passed an
order under section 26 (1), on July 6, 2010 recording its opinion that there
exists a prima facie case, and directed the Director General to investigate into
the matter.

Proceedings under Section 33

3.1 The informant in order to substantiate its allegations in support of its plea
for interim relief made additional submissions on 07.07.2010, 09.07.2010
16.08.2010.

Reply of Opposite Party

3.2 The reply of the OP to the proceedings under section 33 received by the
Commission on August 27, 2010 and oral submissions made on 30.09.2010, in
brief, are as under:

3.2.1 Its entry into the glass tubing industry in India was by way of acquisition
of assets belonging to Bharat Glass Tubes Limited in the year 1998. As part of
such acquisitions, it acquired the production facilities that Bharat Glass had
used for manufacture of Neutral Glass Tubes of Clear Variant (NGC) and
Neutral Glass Tubes of Amber Variant (NGA). Thereafter, it made financial and
technological investments to improve the standards of these production
facilities. Its efforts in this direction enabled it to manufacture higher quality
NGC as compared to the other manufacturers of NGC and also NGA in India.
3.2.2 The OP in its reply argued that the allegations made by the informant against it and its affiliates were completely false and baseless and had in fact been made with the malicious objective of harming its reputation.

3.2.3 The OP also submitted that the cause of action, if any, and the exit of the informant from the borosilicate glass tubes market, occurred prior to coming into effect of section 3 and 4 of the Act. Therefore, as a matter of law, the allegations of the informant pertaining to the alleged practice of the OP cannot be entertained under the Act.

3.2.4 As per the submissions of the OP, the exit of the informant from the glass tubing industry was not attributable to any anti-competitive practices by Schott India as alleged. According to OP, the Competition Act is not intended to offer protection to players like the informant who cannot compete in a market due to poor business skills and lack of technology to ensure high quality standards. In this regard, the OP has also brought out that as per hearsay statement, there was a fire at informant’s production facilities which resulted in extensive damage to the facility that was in use to manufacture borosilicate glass tubes. On account of that, the informant had to stop production of glass tubes several times due to technical reasons resulting in higher costs which they might not have been able to absorb and eventually had to shut down.

3.2.5 It was also submitted by the OP that the glass tubes imported from China, which were similar to the quality of glass tubes manufactured by the informant might have given severe competition to the informant and this could have adversely affected its tubing business.
3.2.6 The informant also filed a rejoinder to the reply of the opposite party on 22.09.2010 and filed further submissions on 30.09.2010 in which apart from substantiating its allegations further, it also requested the Commission to pass an order under Section 33.

4. After giving due consideration of oral and written submissions from both the parties, the Commission decided not to pass any restraining order under section 33.

5. Findings of DG (Director General)

5.1 The DG submitted his report of investigation on March 14, 2011. The DG investigated the matter with respect to the following three major issues:

(a) Whether the OP has a dominant position in the market of ‘neutral USP – I borosilicate glass tubes’?

(b) Is so, whether the OP has abused its dominant position in the relevant market by adopting various exclusionary and exploitative practices in contravention of the provisions of Section 4 of the Competition Act, 2002?

(c) Whether the OP has abused its dominant position in the upstream market of ‘neutral USP – I borosilicate glass tubes’ to drive out the competitors from the downstream market for ampoules, vials, dental cartridges etc. in contravention of the provisions of Section 4 of the Competition Act, 2002?
5.2 In order to examine the issues framed above, questionnaires were sent by DG to the informant, Opposite Party, Nipro Glass Private Ltd. (the only other manufacturer of ‘neutral USP – 1 borosilicate glass tubes’ in India at present), nineteen customers of such tubes (ampoule manufacturers who account for purchase of over xxx% of the total domestic sale of the OP ) who were named as major players in the said market by the Informant, Opposite Party and the Pharmaceutical companies and also to seven top pharmaceutical companies in India, who are the purchasers of glass ampoules as primary packaging materials for filling and dispensing of liquid injectables.

5.3 In addition to examination of the replies, documents, transcripts of certain audio recordings received from the informant and other parties, the statements of the President and ex-employees of the OP, the informant, principal officers of the major glass ampoule manufacturers (out of both ‘favoured’ and ‘disfavoured’ customers of the OP) and Managing Director of Schott Kaisha ( the JV) were also recorded by DG.

5.4 The different pharmacopeia standards, namely the United State Pharmacopeia, the European Pharmacopeia and the Indian Pharmacopeia, prescribing the procedure for testing of glass ampoules were also perused by the DG. Response from two of the international competitors of the OP and import data were also obtained and analyzed.
DG's findings on Relevant Product Market

5.5 Upon appraisal of the issue of substitutability of borosilicate glass tubes, DG took into account the two major aspects of 'characteristics' and 'intended use' of the tubes under consideration. DG concluded that the unique characteristics of the 'neutral USP -I borosilicate glass tube' and its intended purpose to store liquid injectables with a requirement of retaining the safety, quality and efficacy of liquid injectables stored in these containers makes it a non-substitutable product. As the product has no substitute and as there is no commercial scope or possibility for the consumers to interchange the product by any other product, the demand for neutral USP I Borosilicate Glass Tubes, according to DG, is not price elastic.

5.6 On supply side substitutability, DG concluded that the production of 'Neutral USP -I borosilicate glass tube' being a very complex process requiring specialized technology, knowhow, huge capital investment, high gestation period and running costs, is not easily substitutable keeping in view the supply side constraints.

5.7 Based on the analysis of demand substitutability and supply substitutability of "Neutral USP -I Borosilicate Glass Tubes', DG has concluded that there is no alternative to "Neutral Borosilicate USP -I Borosilicate Glass Tubes' for the purpose of manufacture of glass ampoules and other containers.
5.8 DG extended the analysis further to delve into the different sub-categories of 'Neutral Borosilicate USP -I Borosilicate Glass Tubes'. According to DG, within the broad product category of Neutral Borosilicate USP Type I Glass, there are variations in the USP values & expansion levels of the glass tube manufactured by different manufacturers. There are five broad sub categories of the product under consideration, which compete within their respective competitive space, as under:

- Fiolax Clear - Neutral Glass Clear tubes in the range of expansions below 6.0
- Fiolax Amber - Neutral Glass Amber tubes in the range of expansions below 6.0
- Neutral Glass Clear (NGC) - in the range of expansion between 6.0-6.5
- Neutral Glass Amber (NGA) – in the range of expansion between 6.0 to 6.5
- Neutral Glass Clear tubes having expansion ranges higher than NGC & NGA but within the standards prescribed as USP Type I.

5.9 DG has further brought out that Fiolax Clear and Fiolax Amber in the range below 6.0 expansions are the most advanced versions of 'neutral borosilicate glass tubes'. These are sold at prices much higher than the other categories. The international manufacturers (Gerresheimer, Amcor, NEG and Neubor) only produce glass tubing of this expansion range. Fiolax is produced by the Opposite Party largely for export market. These are also used by converters and the pharma companies in India for exporting their respective products.
5.10 According to DG, NGC and NGA tubes are most widely used 'neutral USP -I borosilicate glass tubes' in India. While the tubes with lower expansion range can be used in place of tubes with higher expansion range, the converse is not true. The fifth sub- category has expansion in the range higher than NGC & NGA but still within the standards prescribed as USP -Type I. They are cheaper than the other sub categories and glass tubes imported from China generally fall within the sub-category. These are not being marketed by the Chinese manufacturers themselves in India and are being imported into the country by various importers.

5.11 Having regard to the above facts on record, the DG has concluded that while the distinctions between the various sub categories of 'neutral USP -I borosilicate glass tube' may be borne in mind while analyzing and understanding the position of dominance of the OP, the relevant product in this case for the upstream market is "neutral USP -I borosilicate glass tube'. According to DG, this definition of relevant product market, as also given by the informant, has been concurred by the OP. The relevant product for the downstream market has been determined by the DG as "ampoules, vials, dental cartridges and other containers" made from 'neutral USP -I borosilicate glass tubes'.

**Relevant Geographic Market**

5.12 While determining the relevant geographic market, the DG has considered the contention of the informant that since the conditions of
competition for the supply and demand for the relevant product "neutral USP -1 borosilicate glass tubes" are homogeneous in the whole of India, therefore, the entire Indian market be considered as the relevant geographic market. Further, DG also considered that even though OP asserted that the relevant geographic market was not limited to India given that the relevant product was procured by various converters in India from other countries, particularly China, it has submitted that since the appreciable adverse effect on competition is to be examined with respect to India, the relevant geographic market could be taken as India.

5.13 DG based on examination of various aspects relating to sourcing of 'neutral USP -I borosilicate glass tubes' and submissions of the informant and the OP has determined the relevant geographic market for the given relevant product in the present case as 'India'.

Relevant Market

5.14 In view of the analysis with regard to the relevant product and geographic market as above, the DG concluded that the relevant market in the instant case is the market for 'neutral USP -I borosilicate glass tubes for the upstream market and ampoules, vials, dental cartridges and other containers for the downstream market in the whole of India'.

DG's Assessment of Dominance

5.15 Having determined the relevant market, the DG assessed the dominance of the OP in the relevant upstream market of "neutral USP -I borosilicate glass
tubes in India" in accordance with the definition of dominance provided in explanation (a) to section 4 and the factors prescribed in section 19(4) of the Act.

5.16 After studying the marketing mechanism deployed by the manufacturers of the relevant product in India, DG has brought out that the manufacturers, namely, the OP and Nipro Glass India do not engage agents or intermediaries to market and sell their products. Neither of them has any agreement or understanding with any of the pharmaceutical companies having a bearing on their procurement of glass containers, viz; ampoules, vials and dental cartridges. Therefore, the market for the relevant upstream product is a seller's market and manufacturers do not strive for earning the patronage of the customers. Further, given the poor quality of the products manufactured by Nipro and insignificant volumes of import from major international players, the products of OP are preferred by the pharmaceutical companies. As a result of the prevailing market structure and the capability of the OP to meet the requirement of the ever growing market, DG has concluded that the OP enjoys a position of dominance in this market.

5.17 DG has also reported that market share of the OP in terms of sales quantity was 61.49% in 2009-10. In terms of sale value, the market share of the OP was 81.17% in 2009-10. Thus, the OP by far holds the largest market share in the Indian market for ‘neutral USP -I borosilicate glass tubes’. The DG has further stated that the market share is even more pronounced in the specific product segments of NGA, Fiolax Amber and Fiolax Clear of the relevant product. The market shares in these three segments are 93%, 97% &
87% respectively for 2009-10 and the OP has a virtual monopoly in product segments in the range of NGA, Fiolax Amber & Fiolax Clear.

5.18 In the segment of Amber tubes, DG has brought out that while Triveni, the only other manufacturer of the relevant product in India, had got production capacity in respect of such tubes, their production has been insignificant since 2008. As regards import of amber tubes, this is on a low scale as the Indian pharma companies use the lighter shade produced by the OP in India and not the darker shade produced by the other international manufacturers like Gerresheimer or Neubor. Therefore, import of amber tubes from them is limited and is only against the specific requirement of the pharma companies for such products.

5.19 Upon assessment of the size and resources of the OP, DG has brought forth that Schott Group, a multinational group headquartered in Germany, is in the business of developing and manufacturing specialty materials for more than 125 years. One of the business units of Schott Group is Pharma which consists of two business segments, namely, tubing and pharmaceutical packaging. The business segment ‘Tubing’ manufactures and sells borosilicate glass tubes mainly for pharmaceutical use and also for technical applications. It has six production sites all over the world. The OP manufactures borosilicate glass tubes only for pharmaceutical use. The business segment ‘Pharmaceutical Packaging’ manufactures and sells containers made out of Type-1 Glass Tubes. The OP manufactures glass tubes
and Schott Kaisha, the JV of Schott Packaging, a group concern of Schott AG, of which the OP is a fully owned subsidiary converts such tubes into containers.

5.20 Thus, the Schott Group together with the OP is present both in the manufacture of glass tubes and conversion of glass tubes into containers in India and is therefore a vertically integrated enterprise within the meaning of clause (h) of Section 2 of the Act read with explanations (a) & (b) to Section 5 of the Act.

5.21 DG has also brought out that Schott Group’s global sale is of 2.85 billion euros (2009-10), with manufacturing sites and sales offices in 42 countries. With a production capacity of more than 130,000 tons and production sites in Europe, South America and Asia, Schott Tubing is one of the leading manufacturers of glass tubing worldwide. According to DG, from the statements of the converters, it becomes evident that the worldwide resources of Schott Group have always been available to Schott India, which even on its own has resources far more than any of its competitors in India.

5.22 In order to assess the relative position of strength of the OP vis-à-vis its competitors in the relevant market, DG has submitted that the size and importance of the competitors of the OP in India are not of material significance. Nipro, the other player in the upstream relevant market has a far less production capacity as compared to the OP. Further, Nipro has no presence whatsoever in the product segment equivalent to Fiolax grade of the OP.
5.23 From the import data, DG has noted that the total quantity and value of imports are not significant and as such do not create any competitive pressure on the OP. As regards Chinese imports, DG has concluded that they are of a much inferior quality than that of the OP and cater to the requirements of low end and specific pharmaceutical segments.

5.24 DG has also brought out that Schott Group is also a dominant player in the global market of the relevant product and on account of the strong business relationship; neither Amcor nor Gerresheimer is in a position to exercise any competitive pressure on the OP in India.

5.25 According to DG, being part of the global conglomerate Schott AG, the OP has enormous economic power qua its competitors. Its economic power is buttressed by the fact that it has got full range of product line and has the ability to supply the converters from any of its global locations at Indian prices, which provides tremendous economic strength and power to it.

5.26 DG further alluded to the statements of converters wherefrom he has concluded that consumers are very heavily dependent on the OP. According to DG, the consumers are also heavily dependent on the OP for their requirement in view of the quality, product range, consumer preference for its products and its ability to make timely and adequate supplies.
5.27 According to DG, the dominance of the OP in the relevant market also stems out from the fact that entry in the market is not easy since glass tube manufacturing is a highly specialized field requiring very advanced technology. Further, it also involves heavy capital investment, huge running cost and high gestation period. Investment for an additional tank (manufacturing plant for the relevant product) makes business sense only if there is a demand for at least 3000 MT of the same. The aforesaid acts as a barrier for a new entrant or for an existing manufacturer to invest in an additional tank.

5.28 DG has also submitted that requirement of stability studies creates another significant entry barrier. Pharma companies do not easily opt for new sources of the material used for manufacturing glass ampoules/vials as they have tested stability with existing sources. In addition, import duty on neutral borosilicate glass tubes of approximately 10% also acts as a significant barrier to entry.

5.29 According to DG, there is no countervailing buying power of glass ampoule manufacturers in India, which impairs the competition in relevant product market in India since the glass ampoule industry comprises of several small manufacturers which are family owned or family run enterprises. They do not have requisite financial power to pose any challenge to the OP.

5.30 On the issue of allegations of abusive acts and conduct of the OP qua raising its prices after engaging itself in predatory pricing prior to 2008 and ousting its competitors from the market, DG has reported that the reply / data
furnished by the OP shows that the increase in its prices post 2008 was related to the increase in its manufacturing cost and cannot be said to have been resorted to for recouping losses incurred earlier on account of its predatory pricing. As regards the issue of excessive and high prices, there are no standards to judge as to what can be stated to constitute excessive or high. There cannot be any threshold limit for determining the same; the price that a customer is willing to pay depends on the value which he ascribes to a product and nothing can be said to be excessive till such time there are buyers willing to pay the price of the product. In other words, the market forces can alone determine as to whether the products are being offered or sold at excessive and high prices. In any case, an enterprise is free to price its products and there is no legal restrain on him. In view of the same, the allegation of the IP in this regard has not been found substantiated by the DG.

5.31 As regards the allegation that the exit of the competitors of the OP from the market is attributable to the alleged predatory conduct of the OP, though the reasons for the exit of the competitors from the market have not been specifically investigated, DG has stated that there is no evidence to substantiate the allegation of the IP that the same was on account of any alleged predatory pricing on the part of the OP. The exit of the erstwhile competitors of the OP from the relevant market could be on account of their inability to manage their own business for a variety of internal reasons like their inability to maintain or produce quality products, inability to manage finances or cash flows etc. It could also be on account of their inability to match the product superiority of the OP, its superior marketing strategies, the preference of the consumers for its products etc. DG, has therefore, submitted
that there is no evidence to support the allegation that the exit of the competitors of the OP was on account of its alleged predatory prices. Accordingly, DG has concluded that the mischief in terms of provisions of sub clause (ii) of clause (a) of sub section 2 of Section 4 is not attracted on the issue in the case.

5.32 On the issue of allegations of informant that the OP tried to destabilize it by pursuing a policy of predatory hiring of its key personnel who were operating at the high speed imported lines of the IP and also by predatory hiring of its managerial staff, DG has stated that while Schott Kaisha was in need of additional manpower in view of its increasing production needs, there were difficulties for the informant to retain its employees due to its declining production and deteriorating financial condition. It is also likely that this would have caused a serious apprehension in the minds of the employees of the informant about their future. Therefore, it appears that the employees chose to move out of the informant out of their free will, choice and in order to protect and enhance their livelihood.

5.33 As regards the submissions of the Informant that his unit located approximately 200 Km. away from Schott Kaisha was targeted for hiring of the employees and there was no such hiring from the factories of the converters located within 15-20 Km. of the factory site of Schott Kaisha, DG has brought out that it is not known whether there were any similar push factors for the employees of the nearby converters to move out and join Schott Kaisha. In view of the same, DG has submitted that the allegation regarding predatory hiring of the employees against the OP is not substantiated.
5.34 As regards allegations of unfair and discriminatory conditions or price in the sale of glass tubes, DG has noted that they are premised on the two major issues; discriminatory discount policy of the OP and the alleged bundling of amber tubes, which account for 30-35% of the entire market of glass ampoules with the clear variants using the unique market power that OP enjoys in the amber segment.

5.35 As regards discount policy of the OP, DG has noted that the OP grants two types of discounts to the converters, namely, target discount and functional discount. There are various slabs of target discount, ranging from 2% to 12%, which are based on quantities purchased by the converters from the OP, which is given only on purchase of NGC and NGA tubes and the purchase of Fiolax are reckoned only for the purpose of determining the slab. However, Schott Kaisha, the JV of the OP is given target discount on purchase of NGC and NGA as well as on Fiolax tubes which no other converter is granted. Further, target discount is given to the converter on a quarterly basis on receipt of certificate of sales as specified by the OP and upon full payment of invoices raised in the said quarter. However, the same is paid to the JV on a monthly basis.

5.36 As regards grant of functional discount and bonus to the converters, DG has submitted that they are subject to fulfillment of the certain conditions viz; that the converters will promote Schott tubing by purchasing the agreed quantity in the particular year of agreement, the converters will not use or convert Chinese tubing and will provide all information and proof in this regard.
and that the converters will maintain "Fair Pricing" of ampoules vials for Schott tubing.

5.37 DG has also reported that from the year 2010, the OP has required the converters to sign its Trade Mark Licence Agreement and Marketing Support Agreement in order to get functional discount. The OP grants functional discount at the rate of xxx%, however, the converters have stated that there are variations in the grant of functional discounts. The OP in its discount statement has furnished details which show that the JV has been granted discount of xxx% on NGC, xxx% on NGA and xxx% on Fiolax Clear in 2008-09 and xxx% on NGC and NGA and xxx% on Fiolax clear in 2009-10. The converters who have signed the TMLA of the OP namely Tube Glass, Klass pack and LISA have been given the discount at rate of xxx% on NGC and NGA and nil on Fiolax clear in 2008-09. In 2009-10, Tube Glass has been granted xxx% discount on NGC & NGA and Klasspack and LISA have been given xxx% discount on NGC & NGA. They have not been given any discount on Fiolax clear. All other converters have been given discount ranging from xxx% to xxx% on NGC and NGA only in the years 2008-09 and 2009-10. JV has also been granted xxx% bonus by Schott Germany for materials supplied from outside India for the years 2008-09 and 2009-10 as per the long term supply contract with the JV.

5.38 Based upon analysis of discount structure, DG has concluded that the discount policy has not been uniformly applied by the OP even in terms of its declared policy and it has led to persistent price discrimination where the same commodity has been sold at different prices to different customers.
despite identical cost. The unfair and discriminatory discount policy of the OP, according to DG, contravenes the provisions of Section 4(2) (a) of the Act.

5.39 It has also been stated that apart from Schott Kaisha no other converter has been granted any discount on purchase of Fiolax tubes. Further, only Schott Kaisha has been granted discount on procurement of Fiolax tubes from Schott GmbH, Germany. This conduct of the dominant enterprise, i.e. the OP, contravenes the provisions of Section 4(2) (a) of the Act. Whereas all converters were given target discount on quarterly basis and the functional bonus on yearly basis, Schott Kaisha was given both the target discount and the functional discount on a monthly basis. Thus, applying dissimilar condition and price on similar transactions, the OP has abused its dominant position and has contravened the provisions of Section 4(2) (a) of the Act.

5.40 According to DG, the discount policy of the OP coupled with its Sale Purchase Agreement with converters, so as to account for nearly all their requirements of glass tubes from the OP, is aimed at foreclosure of competition in the relevant market and is a per se abuse in terms of section 4 of the Act. The policy of functional bonus is also 'loyalty/fidelity inducing' which forecloses the market for its competitors from the demand perspective. The two discount policies result in a kind of tie-in sale which forecloses the market for the international manufacturers. That the discount policy followed by the OP has indeed foreclosed the Indian market for its international competitors is evident from the facts that neither imports in any significant measure (except the import from China) has taken place nor any international
manufacturers have entered the Indian market despite its huge potential and growth. Thus, the discount policy of the OP also contravened the provisions of Section 4(2)(c) of the Act as its practices have led to denial of market access.

5.41 DG has further submitted that the discount policy of the OP is also intended to cause secondary line injury by causing dissimilar financial impact/injuries to the converters other than its joint venture in the downstream market for ampoules, vials etc. As a result of dissimilar cost there is no level playing field in the downstream market. Thus, the OP by virtue of its discount policy has abused its dominant position in the relevant market for 'neutral USP-I borosilicate glass tubes' to protect the downstream related market for ampoules/vials through its joint venture, in violation of the provision of Section 4(2)(e) of the Act.

5.42 DG has also further investigated the terms of the Trade Marks Licence Agreement (TMLA) in particular to assess its impact on the competitive conditions in the relevant markets. The DG also appraised the validity and significance of the 'mixing risk' which the OP provided as the rationale for taking recourse to the TMLA. According to DG, the terms of TMLA have been unilaterally determined by the OP, more particularly Schott AG, as it seeks to be an agreement between Schott AG on one part and the respective converters on the other. The terms of the TMLA are grossly unfair, one sided and heavily loaded in favour of the Schott group. The unfair and oppressive conduct of the OP is evident from the fact that it seeks to reduce the
converters (who do business with the OP on a principal to principal basis and are not its agent) to the status of a contract manufacturer of the OP.

5.43 According to DG, though the TMLA does not specifically debar a converter from using tubes of other manufacturers, but read with the Sale Purchase Agreement & the Marketing Support Agreement which are required to be signed by converters, it becomes very clear that the OP has severely restrained use of tubes other than that of Schott. Further, in order to discipline and enforce its will on the converters, the OP through its TMLA, has sought to acquire the legal right to enter the premises of the converters and inspect the contract products and/or the manufacture thereof and/or to check the compliance by the converters. In terms of the purported agreement, the decision as to whether the converters have breached the terms of the TMLA (by mixing the tubes of Schott with others or using the trademark of Schott on products made out of non Schott tubes etc) is to be unilaterally determined by the OP.

5.44 DG has reported that upon such unilateral determination of breach of the terms of the TMLA by the OP, the purported agreement seeks to bind the converters into paying such damages as shall be determined by the OP. It has been stated by various converters that the OP sought to obtain a bank guarantee of Rupees Seventy Lac to ensure the payment of damages.

5.45 DG after going through the details of TMLA has concluded that the terms of the TMLA, along with the Marketing Support Agreement and the Sale
Purchase Agreement of the OP/Schott AG, attracts the mischief contained in Section 4(2) (a) (i) & (ii) of the Act.

5.46 DG has also examined the TMLA from the point of view of its alleged foreclosure effect on the relevant market. In this regard, DG has observed that even though the Chinese products do not compete with the products of the OP, it nonetheless limits the scope of the OP from being the only source of supply of 'neutral USP -I borosilicate glass tubes' to the converters. If the converters could be blocked from using Chinese imports, then all segments of the market would have to perforce meet their requirements from OP alone.

5.47 DG has further added that under the garb of its legitimate right to protect its trademark and to ensure that its brand is not misused by the converters, the OP has raised the bogey of 'mixing risk' as mentioned earlier. That its stated apprehension is a mere camouflage, intended to foreclose the market by preventing the converters from using 'neutral USP -I borosilicate glass tubes' from other sources imported from China is evident from the fact that it has never come across even a single incident of its so called 'mixing risk' till date. On this issue, DG also referred to the statement of President, Schott India in which it has been submitted that the company has not come across any instance in India when the informant or any other converter has been found to have indulged in mixing of Schott tubes with tubes made by other manufacturers, including the imported Chinese tubes, for manufacture of ampoules, vials and other containers.
5.48 DG has also brought out that the OP has introduced a practice of putting a dotted line on its NGC tubing to differentiate its tubing from other suppliers. Such marking differentiated the NGC of Schott from those of other manufacturers and enabled it to identify if there was any fraudulent 'mix up'. In view of the same, there was no rationale for the OP to impose its onerous, one sided and unfair TMLA on its converters. DG, in this regard, also relied upon the statements of the converters who unequivocally turned down the possibility of such 'mix up' on the ground that in case a converter tried to mix, the same would be detected as different glass tubes having different chemical composition, which would create problem at the pharma end at the time of sealing having regard to their different softening points.

5.49 Having regard to the facts and statements gathered in course of investigation, DG has submitted that there is neither any evidence of 'mix up' nor any scientific rationale, technical possibility, feasibility for mixing of the glass tubes of the OP with that of Chinese imports. Accordingly, DG has concluded that its TMLA and other related agreements as also its discount policy were only intended to foreclose, limit and restrict market, deny market access to the converters operating in the relevant market. TMLA has the effect of limiting or restricting the ‘market therefor’ which attracts the mischief contained in Sections 4 (2) (b) (i) of the Act. Further, the TMLA results in denial of market access for the converters operating in the relevant market as they are prevented from sourcing their requirement from any other source which attracts the mischief contained in Sections 4 (2) (c) of the Act.
5.50 DG also carried out investigation in order to examine the alleged discriminatory practices of the OP and its impact on the downstream market of ampoules. In this regard, DG submitted that it was evident from the balance sheets of the several converters that the JV of OP has grown much more than the other converters operating in the downstream market. A marked increase in the profitability of Kaisha has also been observed comparing the pre-JV and post-JV periods. In view of DG, such growth could not be attributed to any efficiency on the part of the JV as claimed by the OP and the profits of Schott Kaisha were a direct result of the favourable terms granted to it by the OP.

5.51 The favourable treatment to the JV was examined by the DG by way of analyzing the terms and conditions of the Long term Tubing Supply Agreement which was entered into by Schott Rohrglass, Gmbh, Schott Glass India and Kaisha. In accordance with the terms of the agreement, it was observed by the DG, that the prices for supply of tubes to Schott Kaisha remained static between xxx and xxx, while the other converters were charged higher prices for the tubes supplied by the OP during the same period. DG has submitted that in terms of the ‘Long Term Tubing Supply Agreement’ the prices at which the tubes have been supplied to the JV by the OP has remained fixed for xxx year (i.e. up to xxx) at the level of xxx prices. During this period the other converters have faced approximately xxx% rise in prices of the glass tubes from the OP. The ‘Long Term Tubing Supply Agreement’ also provides that even after xxx, the percentage price increase will apply to the JV only on prices prevalent on xxx whereas the same will apply to the other converters on prices
prevalent on xxx. Thus the said agreement provides for differential pricing for the JV in perpetuity.

5.52 Further, clause (3) in the agreement under the heading of 'Deliveries, Payment Terms and Prices', as per the DG, provided for a continuing discriminatory treatment to the other converters of Schott to the advantage of Schott Kaisha since as per the clause (3) of the agreement, the OP is under contractual obligation to make uninterrupted supplies to its JV. While Schott Kaisha has been getting assured, regular and timely supplies of the required sizes of tubes the same have been denied to other converters. This resulted in loss of business for them and also led to a situation where they have remained uncertain about their supplies and have had to carry huge inventories. It was further brought to the notice of the DG by the other converters that the position of preference and priority of Schott Kaisha was also canvassed and promoted before the pharmaceutical companies by the OP.

5.53 DG also observed that Schott Glass has forced other converters to supply tubes not below the prices charged by Schott Kaisha. Its JV has sent emails to inform a converter regarding its prices for a particular pharma company so as to ensure that the said converter does not charge price lower than its prices, and in effect, to withdraw from supplying to the said pharma company.

5.54 According to DG, the OP also threatened some converters with stoppage of supplies to them when they chose to undertake job work for a pharma company, which imported glass tubes from NEG Japan. That the threat of
stoppage of supplies has been real is evident from the fact that the converters were forced to withdraw in the matter which shows that the OP has abused its position to favor its JV- Schott Kaisha.

5.55 Based upon investigation carried out by him, DG has concluded that the OP has grossly abused its dominant position in the upstream relevant market which has led to a situation where the level of competition in the downstream market has been distorted to work in the favor of its Joint Venture.

5.56 According to DG, the OP has taken steps to allocate the various pharma companies to the respective converters and to fix and co-ordinate the prices which a converter could charge so as to help its JV grow much more than the other converters without any extra effort or efficiency on the part of the JV. The said act on the part of the OP, according to DG, attracts the provision of Section 4 (2) (e) of the Act. Since the practices of the OP in favour of the JV has also resulted in limiting and restricting the market for the converters and has led to denial of market access to them, the same also attracts the provision of Section 4 (2) (b) & (c) of the Act.

5.57 DG has also submitted that the terms of the JV agreement are inconsistent with the provisions of the Competition Act 2002. The OP has stated that it has given the favourable terms to its JV Schott Kaisha on account of the agreements it has entered into while formalizing the JV. The favourable terms given by the OP, which is a dominant enterprise in the upstream market, to its vertically integrated JV Company, operating in the downstream market, contravenes several provisions of the Competition Act 2002. In this regard DG has stated that section 60 of the Competition Act states as under:
The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.'

5.58 According to DG, in view of the above, even if these agreements are enforceable inter se between the contracting parties in terms of the Indian Contract Act, they are voidable in terms of the Competition Act 2002 to the extent they are inconsistent with it.

5.59 As regards allegations by the informant that the OP leverages its monopoly in the Amber segment to ensure full line enforcement of its products on the converters, DG has brought out that the OP has itself stated that its market share in the NGA is 93% and in Fiolax Amber is 87%. Therefore, in terms of its market share in these product segments it is evident that it has the power to leverage sale of amber tubes being contingent upon sale of clear tubes. The statements of the converters that the OP leverages such power in the amber segment to enforce sale of clear tubes finds force when the same is viewed along with the TMLA and discount policy of the OP which are intended to achieve full line enforcement.

5.60 According to DG, the OP deals with the converters on a principal to principal basis. As such, the converters are independent to make their choice as to the source from which they would buy amber tubes and from whom they would buy clear tubes. The sale and purchase of clear tubes and amber tubes are distinctly different and by their nature or usage have no connection with each other. Thus, in terms of the market power of the OP, its TMLA and discount policy, and the statements of the converters it is evident that the OP
has been making the sale of amber tubes contingent upon the converters buying the clear tubes from it, which attracts the mischief contained in Section 4 (2) (d) of the Act.

5.61 As regards allegation of denial of market access to the informant, DG took note of the response of the OP that the informant previously attempted to intentionally infringe Schott’s trademarks and fraudulently pass borosilicate glass tubes manufactured by Schott Glass India. The OP also produced a copy of an order for printing fake labels of ‘NGC SCHOTT’ and ‘Made in India by Schott Glass India Pvt. Ltd.’, under the signature of Director, Kapoor Glass. In view of this, OP blacklisted the informant and decided not to enter into any supply arrangements with it. However, the informant contested the stand taken by the OP and stated that Schott India refused to deal with it vide its letter dated 05.04.2001, whereas the incident of alleged attempt of infringement of Schott’s refusal to deal with the informant and the alleged incident took place at a later date.

5.62 DG has noted that the informant further explained its conduct stating that the labels of Schott India were affixed on the consignment of ‘Schott India tubes’, which it had obtained from another ampoule maker because of Schott India’s refusal to supply to it. It was stated by the informant that as some of their customers had stabilized their formulations with Schott tubes, they required ampoules made out of Schott tubes only. On account of this, they were forced to procure Schott tubes from other ampoule makers, to whom Schott India was supplying to and who had excess stock of such tubes, in order to retain its customers in the market for ampoules. These ampoule markers
however decided to supply Schott tubes to the informant on 'no names' basis and after removing the labels in order to avoid getting noticed by Schott.

5.63 Having regard to the explanation furnished by the informant as above, DG has observed that it is evident that the informant has indulged in unauthorized usage of the trademark of the OP. However, the culpability of the informant regarding such unauthorized usage of trademark of the OP has to be viewed in the background of the facts of the case that such usage was only in respect of the products of the OP, which for reasons best known to OP was not being supplied to the Informant.

5.64 DG has submitted that it is significant to note that the OP has stated that it has strong reasons to believe that Kapoor Glass has attempted to affix labels stating ‘NGC SCHOTT’ and ‘Made in India by Schott Glass India Pvt. Ltd.’ on its own products but has not given any evidence in this regard that the informant was trying to pass off its own products as those of Schott. Thus, the issue herein for the OP was not of fraudulently passing off of the products of the others as those of Schott but essentially of unauthorized usage of its labels. There are legal remedies available for unauthorized usage of labels and trademarks and if the OP has not taken legal recourse for such infringement for such a long period it cannot be allowed to refuse supply of ‘neutral borosilicate USP Type I glass tubes’ to the informant, more so when the OP is in a dominant position and the informant has exited the said upstream relevant market since the year 2008.
5.65 In view of the aforesaid, according to DG, its explanation not to deal with the informant on the ground that a party cannot be forced to supply its products to a person who has by previous actions shown disregard for the intellectual property rights of such party and has in fact attempted to defraud through misrepresentation, other players in the vertical supply chain, is not sustainable.

5.66 According to DG, the OP continues to deny the products manufactured by it to the informant which shows that the OP is indulging in the abusive conduct of its position of dominance in the relevant market which attracts the mischief as contained in Section 4(2) (c) & (e) of the Act. Despite its refusal to deal, the informant has still managed to somehow operate in the downstream market for ampoules & vials. However, its capacity to operate in the said market is severely limited on account of OP’s refusal to supply the tubes to it. Schott tubes have no alternative for the leading pharma companies, and for high end therapeutic market segment & export markets and therefore refusal to make supplies to the informant, amounts to denial of market access and an attempt to protect its JV in the downstream market. The OP, being the dominant enterprise in the upstream market has a responsibility to ensure level playing field to all the parties operating in the downstream market.

5.67 DG, having investigated the case, has also formed the view that Schott AG was fully responsible for the abusive conduct of its wholly owned subsidiary Schott Glass India Pvt. Ltd.(the OP) which had an appreciable effect on competition in the upstream and the downstream relevant markets in India since the operations of the OP and the JV form part of the same strategy of the
parent company to further its interests in the relevant market. In this regard, DG has also relied upon the statement of President, Schott India in which inter-alia, it has been stated, “we work closely in consultation with my boss, who is the head of Tubing Division which is under Schott Pharmaceutical Systems and other colleagues who are at corporate of Pharma Tubing business at Germany. Major decisions concerning pricing, discounts, melting process, production, quality, branding of our products, investments in the country, employment of functional heads of different departments...are taken in joint consultation with the Corporate Headquarter of Tubing Division of Germany.... On a formal basis there is a monthly telephonic conference call to review performance vis-a-vis the monthly performance objectives / goals and balance score card objectives.”

5.68 To substantiate his aforesaid arguments, DG has also submitted that on perusal of the copy of the TMLA, it was found that the said agreement is between Schott AG, Germany and the respective converters. The price circulars as also the discount offers are issued by Schott AG, Germany. Further, according to DG, the response of Shri Mohan Joshi, the President of the OP is also relevant in this context which reads as under:

‘.........Firstly, though I have signed the long term supply agreement of the JV with Schott Kaisha, all decisions including pricing of the supplies to JV were taken by the corporate office in Germany of Schott and I was associated at the very end for my signature and the necessary documentation.’
5.69 In view of the above, DG has concluded that it is established that Schott AG is fully responsible for the abusive conduct of its wholly owned subsidiary Schott Glass India Pvt. Ltd. (OP) which has an appreciable effect on competition in the upstream & downstream relevant markets in India. The OP, the JV and the parent company Schott AG form part of the same enterprise in terms of clause (h) of Section 2 & explanations (a) & (b) to section 5 of the Act. As such the conduct of the Schott AG attracts the provisions of Section 32 of the Act and the parent company is fully responsible for the conduct of the OP, which has abused its dominant position in violation of Section 4 (1) of the Act.

6. Submissions of Parties to the findings of DG

6.1 In view of the confidentiality claimed by the parties on specific information and data, DG submitted his report in both confidential and non-confidential versions. The report of investigation was sent to the parties seeking their response on the same and further process of inquiry was undertaken in accordance with the provisions of the Act and relevant regulations thereunder.

Submissions of the Opposite Party

6.2 The OP submitted its written replies to the report of DG on 10.09.2011. In addition, it also made oral submissions during inquiry proceedings before the Commission. A summary of oral submission was also submitted. In addition, a reply in response to the questionnaire was also submitted vide letter dated 04.11.2011. The OP has brought out that the report of DG is hasty and contradictory and suggests a preconceived disposition against Schott. In fact all the adverse findings seem to be based on statements made by certain
Converters (without any cross examination) who are clearly conflicted as they are directly interested in an adverse ruling against Schott Glass India. The submissions of the OP on various issues, in brief, are as under:

6.3 The OP has agreed before DG that the relevant product market in this case would be ‘neutral USP-1 borosilicate glass tubes’. However, it has contended that the relevant geographic market is not limited to India given that the borosilicate glass tubes are procured by Converters in India from other Asian countries, particularly from China. Further, the pharma companies located in India have the ability to import Borosilicate Glass Tubes from foreign manufacturers for processing by Indian converters.

6.4 The OP has also contended that the relevant market is competitive given the fact that imports of the borosilicate glass tubes into India are increasing and its own market share is declining. The DG Report also shows a decrease in its market share and an increase in imports (excluding imports from Schott Germany). Further, market share of Triveni Glass Limited, a competitor of the OP, increased from 12% in 2008 to 14% in 2009. Even the informant in the Information has stated that the market share of Triveni Glass had increased from 12% in 2008 to 14% in 2009. In 2010, Triveni Glass sold its tube glass business to a Japanese company, Nipro, the total sales of which were worth Rs. xxx Crore for the year ending March 2011. Nipro has also recently acquired majority of shares of Tube Containers Limited, an Indian converter. The entry of Nipro, both in glass manufacturing segment as well as in conversion business reflects a competitive environment in both the upstream and downstream markets.
6.5 The findings of DG regarding major international manufacturers carving different geographical domains for themselves is baseless, without any evidence and unwarranted.

6.6 As DG has noted in his report, the exit of the erstwhile competitors of the OP from the relevant market could be on account of their inability to manage their own business for a variety of internal reasons like their inability to maintain or produce quality products, inability to manage finances or cash flows etc. It could also be on account of their inability to match the product superiority of the OP, its superior marketing strategies, the preference of the consumers for its products. Given the said statement, there remains no doubt that while there is a state of healthy competition in the relevant market; it is because of mismanagement by some manufacturers that they exited from the relevant market. The DG after confirming in his report that the exit of certain domestic competitors was not on account of any alleged practices of the OP but could be because of inability to manage business, produce quality products, and manage finances or inability to match its quality and marketing standards, cannot also conclude that domestic suppliers have had to shut their tubing business consequent upon its entry.

6.7 According to OP, it is not correct on part of DG to say that requirement of stability studies creates entry barriers for any new entrant in the market since most of the pharma companies contacted by the DG have stated that despite
stability studies, change from a borosilicate glass tubes manufacturer to another was feasible.

6.8 The OP has submitted that DG has reported that various sources of borosilicate glass tubes do not impose any significant competitive pressure on it. However, if this were the case, there would have been no requirement by it to offer any discounts. Given the fact that it offers discounts on its borosilicate glass tubes is clear evidence of competition in the relevant market. The fact that it has to offer discounts in the first place to its customers is indicative that it cannot afford to be oblivious to competition.

6.9 According to OP, discrimination as a legal concept is unequal treatment of equally placed parties. Thus, different discounts when given to different persons who are unequal cannot, per se, be treated as discriminatory or unfair. Schott Kaisha has been by far its largest customer. No other converter can match the volume of orders that Schott Kaisha places on Schott Glass India. Schott Kaisha was the leader in the Ampoule industry even before the joint venture with Schott was put in place.

6.10 Any allegation suggesting directly or indirectly that Schott Kaisha garnered significant market share only because of the terms at which it is supplied tubes by the OP in India is false. The terms of supply to Schott Kaisha were negotiated by Schott Kaisha with it in a competitive environment using its countervailing buyer power, being its largest customer independent of the JV arrangements. Despite the terms offered by it to Schott Kaisha, price at
which Schott Kaisha supplies Ampoules to pharma companies is at competitive arm's length price. As a matter of fact, Ampoules supplied by Schott Kaisha are not priced lower than Ampoules supplied by other converters. Hence, the terms offered to Schott Kaisha are not used to cause any appreciable adverse effect on competition in India.

6.11 The OP has also denied all such allegations that Schott Kaisha has been assured of regular and timely supplies, while it has deliberately stopped or delayed supplies to other converters so as to provide Schott Kaisha with a competitive advantage. Whenever a shortage in supply of borosilicate glass tubes has occurred, it immediately provided the same from manufacturing sites in other countries. It has also denied that its officials have canvassed Schott Kaisha in front of the pharma companies. In fact no pharma company in its statement to the DG has stated that the OP canvassed for Schott Kaisha.

6.12 Contrary to the conclusions reached by the DG in his Report, it is highly incentivized to supply borosilicate tubes to all converters and keep all such converters satisfied. First, the production tanks required for manufacturing borosilicate glass tubes must produce certain minimum quantities in order to protect these major investments from damage and to justify the energy costs required to run such production tanks. Then, loss of business from any other converter could potentially affect its capability to profitably run a production tank. The converters have countervailing powers against it since it cannot afford to lose the business it gets from them. Its sales teams are incentivized
to sell more borosilicate glass tubes to converters (other than Schott Kaisha) since they receive incentives on sales made to such converters.

6.13 It is incorrect on part of DG to say that it holds the other industry players at ransom in terms of prices and supplies since DG himself has also concluded that its quality and reliability are unsurpassable and cites that as the main reason for preference towards its products. Schott Glass India can never hold the pharma companies (which are the industry giants) to ransom in terms of prices or supplies.

6.14 The OP has also denied any allegations that pursuant to a meeting called by it, converters were required to supply Ampoules to pharma companies at prices which are not below the prices charged by Schott Kaisha. According to OP, the customers of the converters are the pharma companies over whom they have no control.

6.15 The OP has also submitted that the allegation that its discount policy ensures that the prices of its borosilicate glass tubes for converters remain lower than the cost of imported borosilicate glass tubes manufactured by international competitors, thereby, foreclosing the Indian market for international competitors is misconceived, inconsistent with and contrary to other statements in the DG’s report. The report of DG itself has mentioned that due to its superior product quality and marketing strategies, the other competitors had to exit the market. Moreover, existence of international competitor Nipro shows that there is no foreclosure of competition. Further,
supply high quality products at low prices in the form of discounts is pro-competitive as being beneficial for consumers and cannot be called anti-competitive.

6.16 According to OP, the findings of DG that TMLA has restrained the use of borosilicate tubes of other manufacturers are incorrect. It has stated that its concerns raised on passing off and mixing are genuine as opposed to DG’s findings. The TMLA helps it to mitigate the risk of converters mixing Ampoules made from borosilicate glass tubes supplied by it with those made from inferior quality borosilicate glass tubes imported from China. The converters acquire the right to display Schott logo and brand as part of materials they use to market and supply Ampoules to pharma companies. Under the TMLA Schott acquires the right to inspect the premises of converter to ensure that its brands are not being abused. The OP has further stated that it also executes a Marketing Support Agreement pursuant to which the converters agree to promote it and its products and services to enhance their own business with its active co-operation.

6.17 Schott also benefits through the promotion of its brand by the converters in their marketing and packaging materials. It agrees to pay the converters certain sums on a quarterly basis for that purpose. The discount and payment made to converters who have executed the TMLA and the Marketing Support Agreement is the functional discount offered by it to such converters. There is no discrimination in offering such functional discounts and similar functional discounts are offered by it to all converters who have executed the TMLA and
the Marketing Support Agreement. Functional discount is a method by which it can significantly mitigate the concerns it has for Ampoules made from inferior quality borosilicate glass tubes being passed off as made from its borosilicate glass tubes. While it makes an extra payment as consideration to those converters which enter into the marketing support agreement to co-promote its brand and products, regular volume discount and supplies are available to all converters, even if they may choose not to enter into the Marketing Support Agreement.

6.18 The OP has further brought out that the practice of incorporating a dotted line was an effort made by it to eliminate the passing off/mixing risk. Despite the dotted line on its NGC borosilicate glass tubes, many pharma companies, particularly smaller ones are not aware of this identification mark. It also had a comparable mark on its Fiolax brand of borosilicate glass tubes. However, pharma companies did not appreciate the resultant markings on the Ampoules since these markings caused problems with their automated optimal defect control and resulted in waste for them. Therefore it had to discontinue such markings.

6.19 The OP has also denied the allegation of leveraging the amber segment to make sale of NGA contingent upon purchase of NGC. The OP has stated that this was a completely false allegation based on statements of just 3 Converters. No written evidence, whatsoever has been found to substantiate this allegation. Further after already acknowledging that its product is clearly
distinguishable and preferred on account of its high quality and reliability, there is no reason why it would even indulge in such a practice.

6.20 As regards denial of supplies to the informant, the OP has submitted that given the previous attempts to intentionally infringe Schott’s trademarks and to fraudulently pass off borosilicate glass tubes manufactured by the informant as borosilicate glass tubes manufactured by Schott Glass India, it is reluctant to supply its borosilicate glass tubes to the informant. A party cannot be forced to supply its products to a person who has by previous actions shown disregard for the intellectual property rights of such party and has in fact attempted to defraud through misrepresentation, the other players in the vertical supply chain.

6.21 Nowhere is there a denial in the report of DG that the informant committed a fraud and nothing can justify a fraud. The fact that it did not take legal action against the informant does not change this. It would be very unfair to force it to deal with informant under any circumstances. The informant has shown its hostility towards it very publicly and blatantly. Further, clearly there are other manufacturers in the market apart from it and therefore its refusal to supply borosilicate glass tubes to informant does not affect its ability to manufacture Ampoules. Further, DG does not seem to have investigated into the manner in which the informant conducts its Ampoules business and what its standing is in the market qua quality, reliability and credibility as these are clearly factors that would affect business of any entity.
6.22 The OP has brought out that while DG in his report has concluded that Schott Kaisha is vertically integrated with Schott group, he has not been able to show any adverse implication on competition in the upstream and downstream markets as a result of the same. Schott Glass India continues to compete with its competitors in the upstream market to get orders from converters. It therefore offers discounts to them to procure orders from them. The terms and conditions offered by it to Schott Kaisha are not used to undercut other converters on the prices of ampoules or in any other way adversely affect the downstream market of ampoules. Further the competition regime in European Union recognizes that benefits available between vertically integrated enterprises are not to be seen as anti-competitive unless such benefits are in fact being used to cause adverse effects on competition, which is clearly not the present case.

6.23 According to the OP, based upon the fact that TMLA is between Schott AG and respective converters, DG has incorrectly concluded that Schott AG could be responsible for the alleged abuse of dominance by Schott Glass India. Since the Schott brand is owned by Schott AG, in legal terms, the right to display the same can only be granted by Schott AG. Hence Schott AG is the party / to the TMLA. Given that Schott Glass India is a wholly owned subsidiary of Schott GmbH, which, in turn, is a wholly owned subsidiary of Schott AG; it is natural for Schott India to discuss its strategies and policies with Schott GmbH. It is also expected that Schott GmbH being the shareholder of Schott Glass India would share its experience and support Schott Glass India. That it is a pure technicality that Schott AG is a party to the TMLA because Schott AG
technically owns the brands. To use this technicality and ignore the overall arrangement and scheme is a gross error and should be disregarded.

Submissions by the Informant

7. The informant also made written submissions dated 30.08.2011 and 02.09.2011 on the findings of DG. A summary of oral submissions made on 30.09.2011 was also submitted on 10.10.2011. The informant also submitted some additional materials vide its letter dated 27.10.2011. The submissions made by the Informant, in brief are as under:

7.1 The informant has endorsed the findings of DG on relevant market, dominance and abuse of position of dominance by the OP through its various practices. However, on the issue of investigation of allegations of unfair price, the informant has observed that the DG has confined his analysis of ‘unfair prices’ only to the examination of the manufacturing costs of Schott India to reach a conclusion that the increase in its prices was related to the increase in its manufacturing cost and therefore the OP cannot be said to have resorted to the practice of recouping losses incurred earlier on account of predatory pricing. The DG has erred by confusing "predatory price" with "unfair price" while the latter is not confined to the former and in doing so, has rendered the language used in Section 4(2) (a) (ii) totally redundant. The informant has submitted that it was incumbent on the DG to first determine whether the margin earned by OP (i.e. difference between production cost and price) was excessive. Thereafter, it was imperative for the DG to enquire further and check whether the prices that were charged by the Schott Group had any reasonableness. The informant accordingly requested the Commission to set
aside the findings of the DG on this issue and to find out separately that the Schott Group had in fact indulged in charging excessive prices.

7.2 The informant has further brought out that while dealing with the issue of predatory hiring, DG has failed to appreciate the intention behind such hiring. The informant was singled out for such treatment because it was engaged in the business of making both borosilicate glass tubes as well as glass ampoules and could pose significant competition to the Schott Group's operation in India. Once Schott Group's bid to acquire the informant failed, it began to hire its key workers. It is not correct that the employees approached the Schott Group since they were not being paid by the informant. Such predatory hiring harms the ability of the informant to produce goods and is prohibited under Section 4(2) (b) (i). Both Schott Group and Kaisha have the requisite in-house expertise and skills to make ampoules and vials and the act of Schott India of poaching employees of the informant only, amounts to predatory hiring.

7.3 Expressing its agreement on the findings of the DG on the other issues like discriminatory discounts being offered by the OP, bundling of amber glass tubes with clear tubes, leveraging of dominance in the tubes market to protect the downstream ampoules conversion market, refusal to deal with the informant and the culpability of Schott AG in the matter, the informant urged that the highest level of penalty leviable under the Act be imposed on Schott Group for abusing its dominant position and resulting massive losses to the informant and other converters.
8. Issues for Determination

8.1 The Commission has carefully gone through the information, investigation report of DG and replies of both the informant and the Opposite Party on the findings of DG. Having considered all the materials available on record, the Commission observes that the issues for determination in the case are as under;

a) On the basis of facts involved in the case, what is the relevant market in the case?

b) Is Opposite Party having a position of dominance in the relevant market in terms of provisions of section 4 of the Act?

c) If answer to b) is in affirmative, is there any case of abuse on the part of the OP in terms of the following acts and conduct, which, if established, may be said to be violative of various provisions of section 4(2) of the Act;

i) Whether the OP has indulged in the act of predatory pricing in violation of provisions of section 4(2)(a)(ii) of the Act?

ii) Whether the OP has imposed unfair and discriminatory conditions or price in the sale of neutral USP-I borosilicate glass tubes through its discount policies, Trade Mark Licence Agreement, Marketing Support Agreement and Sale Purchase Agreement in contravention of the provisions of section 4(2)(a)(i) and (ii) of the Act?
iii) Whether the aforesaid policies of OP are exclusionary and limit and restrict the market in violation of provisions of section 4(2)(b)(i) and are also causing denial of market access in terms of section 4(2)(c) of the Act?

iv) Whether the OP has leveraged its position of dominance in relevant upstream market of neutral USP-1 glass tubes to enter into or protect the relevant downstream market of ‘Containers, i.e., ampoules, vials, dental cartridges and syringes made out of ‘neutral USP-I borosilicate glass tubes’?

v) Whether the OP has engaged in the practice of making the sale of amber tubes contingent upon converters buying clear tubes from it in contravention of provisions of section 4(2)(d) and any other provisions of section 4 of the Act?

vi) Whether the OP has refused to deal with informant as has been alleged, denying market access to it and if yes, has the OP contravened the provisions of section 4 (2) (c) of the Act?

vii) Whether the OP has indulged in the practice of predatory hiring of employees of the informant and if yes, can the practice be called inconsistent with the requirements under section 4(2)(e) of the Act? Further, can this act be said to be violative of provisions of section 4 (2)(b)(i) since it is limiting and restricting the ability of the informant to produce goods as alleged by the informant?
9. Determination

Issue 1

9.1 On the basis of facts involved in the case, what is the relevant market in the case?

Relevant Product Market

9.1.1 The Commission notes that DG in his Report has concluded that ‘neutral USP-I borosilicate glass tube’ is the relevant product market as the same is not substitutable either from demand or supply side because of unique properties of the product viz; least reaction gradient with chemicals and low alkali release. Neutral USP-I borosilicate glass tubes and the ampoules, vials and other containers made thereof conform to the various pharmacopeia standards including that of the US Pharmacopeia which is the most widely accepted in terms of the standards and stringency of the test that it prescribes. However, DG has also brought out that based on the USP Type-I test values & thermal coefficient of expansion as also the colour of the tubes there are five sub-categories of the relevant product;

(1) Fiolax Clear equivalent - i.e. Neutral Glass Clear tubes in the range of expansions below 6.0 (which is commonly known in the trade circle as 60 expansion);

(2) Fiolax Amber equivalent - i.e. Neutral Glass Amber tubes in the range of expansions below 6.0 (which is commonly known in the trade circle as 60 expansion);
(3) Neutral Glass Clear tubes (NGC) in the range of expansions between 6.0 and 6.5 which is commonly known in the trade circle as 60 - 65 expansions);

(4) Neutral Glass Amber tubes (NGA) in the range of expansions between 6.0 to 6.5 (which is commonly known in the trade circle as 60 - 65 expansions);

(5) Neutral Glass Clear tubes having expansion higher than NGC & NGA but within the standards prescribed as USP-Type I.

9.1.2 According to DG, distinctions between the various sub categories of ‘neutral USP-I borosilicate glass tube’ are of immense significance in analyzing & understanding the position of dominance of the OP in the relevant market.

9.1.3 DG has also concluded that whereas ‘neutral USP-I borosilicate glass tube’ is the relevant product for the upstream market, the relevant product for the downstream market is ampoules, vials, dental cartridges and other containers made from ‘neutral USP-I borosilicate glass tubes’.

9.1.4 The Commission notes that the OP has agreed with the findings of DG that the relevant product market would be the neutral borosilicate glass tubes (i.e. glass tubes meeting the UPS-Type I standards). It has also been stated that pharma companies only prescribe the use of neutral borosilicate glass tubes for the purpose of ampoules in their purchase orders to the converters.

9.1.5 The informant has also brought out that the DG’s analysis is technically accurate and in accordance with market realities. The informant has further brought out that there is no reason for the Commission to consider any
alternate definition of the relevant product market since the OP itself does not dispute the definition adopted by the DG.

9.1.6 On a careful consideration of facts of the case, findings of DG, the averments of the informant and the OP, the Commission notes that it is necessary to appreciate the competitive interplay between the various colour and quality variants of the products involved in order to preclude any possibility of misestimating the market power of the enterprise under inquiry. In this regard, the apparent distinction between the sub categories in terms of ‘colour/share’ and ‘expansion range’ merits an appraisal of whether they can be reasonably viewed as substitutes and as constituents of the broad relevant product market of ‘neutral USP-I borosilicate glass tubes.

9.1.7 The Commission further observes that the distinction between the different quality variants of tubes stem from the variation in expansion limits, albeit within the range permissible under USP Type I standards. The prices of these variants too are different. The question that is critical in concluding substitutability between these variants is whether they sufficiently constrain prices of each other. In view of the price-sensibility of the Indian market and in absence of anything substantive made available by DG or the parties that conclusively rules out the competitive interaction between the different quality variants of the glass tubes under consideration, clear demarcation of distinct markets for each quality variant of tubes appears implausible. The Commission, therefore, feels it pertinent to keep the ambit of the relevant product market in concurrence with the DG.
9.1.8 However, the Commission also notes from the available facts that for storing light sensitive formulations, containers, i.e., ampoules, vials or dental cartridges, made of amber tubes are used while for other light non-sensitive formulations containers made from clear/white tubes serve the purpose. This makes it clear that the end use of amber tubes is distinctly different from that of clear tubes. A change in price of amber tubes for a given quality cannot presumably have any impact on the demand of clear tubes of the same quality or vice versa. Therefore, the Commission holds that amber tubes and clear tubes cannot be concluded to be interchangeable and inclusion of both in the same relevant market appears unreasonable.

9.1.9 Bearing in mind the non-substitutability between the two colour variants of neutral USP-I borosilicate glass tubes as discussed above, the Commission is of the view that relevant product market in the current case must be categorized broadly into two upstream relevant product markets, namely a) Market for “Neutral Clear USP-I Borosilicate Glass Tubes’ and b) Market for ‘Neutral Amber USP-I Borosilicate Glass tubes’.

9.1.10 Accordingly, the downstream relevant product market(s) in the case would be a) Market for ‘containers, i.e., ampoules, vials, dental cartridges and syringes made out of ‘Neutral Clear USP-I Borosilicate Glass Tubes’ and b) Market for ‘containers, i.e., ampoules, vials, dental cartridges and syringes made out of ‘Neutral Amber USP-I Borosilicate Glass Tubes’.

Relevant Geographic Market

9.1.11 The Commission notes that the OP has disputed the delineation of geographic market by the DC, contending that the relevant geographic market
is not limited to India given that the borosilicate glass tubes are procured by converters in India from other Asian countries, particularly from China. Further, the pharma companies located in India have the ability to import borosilicate glass tubes from foreign manufacturers for processing by Indian converters.

9.1.12 The Commission also notes that the relevant geographic market as has been determined by the DG as India, inter-alia on the grounds that the conditions of competition for supply and demand of ‘neutral USP-I borosilicate glass tube’ are homogeneous in the whole of India. Further, requirement of the relevant product by the downstream players are sourced primarily from within the country; the imports from foreign manufacturers constituting a very insignificant portion of the supply for the Indian market. DG also considered that the demand of goods from the foreign entities are distinctly different and not homogeneous with respect to that of the domestic supplier(s) on account of the fact that the foreign suppliers manufacture the neutral clear USP-I borosilicate tubes only of different expansion range. Even their amber variants are different and not preferred by the Indian buyers. Further, foreign manufacturers, other than the OP, do not have any manufacturing plant in India and are not in a position to ensure uninterrupted timely supply and require a much higher lead time.

9.1.13 The Commission observes that the above arguments of DG, taken in conjunction with the fact that the Indian market for the relevant products is characteristically different from the global market in terms of demand patterns, market structure and consequently the competitive conditions,
supports a reasonable conclusion that the relevant geographic market for the relevant products is India. Moreover, in accordance with the provisions of explanation (a) to section 4 of the Act, the dominance of an enterprise, is required to be tested in relevant market in India and therefore relevant geographic market, if is determined by taking areas outside India, would not give a correct assessment of dominance of enterprise in question. Accordingly, the Commission holds the relevant geographic market in the case as ‘India’.

Relevant Market

9.1.14 The Commission accordingly concludes that the relevant upstream markets in the case are a) Market for ‘Neutral Clear USP-I Borosilicate Glass tubes in India’ and b) Market for ‘Neutral Amber USP-I Borosilicate Glass tubes in India’. The relevant downstream market accordingly would be a) Market for ‘Containers, i.e., ampoules, vials, dental cartridges and syringes made out of ‘Neutral Clear USP-I Borosilicate Glass Tubes’ in India and b) Market for ‘Containers, i.e., ampoules, vials, dental cartridges and syringes made out of ‘Neutral Amber USP-I Borosilicate Glass Tubes’ in India.

Issue 2

9.2 Is Opposite Party having a position of dominance in the relevant market in terms of provisions of section 4 of the Act?

9.2.1 The Commission observes that dominance has been defined in explanation (a) to section 4 of the Act in the following terms;

"Explanation – For the purposes of this Section, the expression:-
a) “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to -

i. operate independently of competitive forces prevailing in the relevant market; or

ii. affect its competitors or consumers or the relevant market in its favour.”

9.2.2 The Commission observes that independence in the context of dominance does not mean absence of any other player in a relevant market, but that the enterprise whose dominance is being ascertained has market power and is in a position to influence competitive forces to its own advantage and to the detriment of others. The Act, therefore, does not prescribe any structural definition of dominance in terms of a defined threshold of market share alone. What is required, instead, is to give due regards to the other factors in addition to market share as mentioned in section 19(4) of the Act in order to assess or test whether an enterprise is in a position to operate independent of competitive forces or can affect its competitors or consumers in its favour in a relevant market. Accordingly, in order to assess the dominance of the OP in the relevant market in the instant case, besides relative market share, the Commission considers it imperative to analyse various other factors listed in section 19(4) of the Act.
Market Share

9.2.3 As regards market share in the upstream relevant market for “Neutral amber USP-I borosilicate glass tubes’, the Commission notes that as per the submissions of the Opposite Party, its market share in India is around 93% in the NGA range of tubes and 87% in the branded Fiolax range in 2009-10. As revealed by the submissions, the only other Indian competitor Nipro (Triveni) had been producing amber tubes till 2009 albeit in insignificant volumes vis-à-vis the total domestic demand. Nipro reportedly has resumed its production of amber tubes recently, the volume nonetheless, are in no manner comparable to that of the OP. Furthermore, a significant portion of import of amber tubes in India is accounted for by the imports from Schott AG, group concern to which the OP belongs, from its various locations.

9.2.4 The Commission also notes that in the relevant market of “Neutral Clear USP-I borosilicate glass tubes’ in India, the opposite party’s market share, as per its submission, stood at 42% in 2009-10 and 38% in 2007-08. In the branded Fiolax category, it went up from 91% in 2007-08 to 97% in 2009-10. The clear variants of the tubes are being supplied also by Nipro (Triveni) and over the last few years Chinese imports too have made inroads into the Indian market. However, their share is less than that of the OP. On the other hand, the alternative sources of Fiolax clear tubes are imports from international manufacturers of countries like Italy, Japan albeit in small volumes.

9.2.5 The market share data compiled by the DG, which includes all the sub-categories of borosilicate glass tubes produced by Schott India shows that Schott India’s share in Indian market for clear and amber tubes including both
Fiolax and NGC/NGA varieties in terms of sales value has declined marginally from 83% in 2007-08 to 81% in 2009-10.

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9.2.6 On the basis of aforesaid, the Commission observes that the OP is a market leader having the largest market share in each of the two upstream relevant markets - amber and clear glass separately and 61.49% in terms of quantity and 81.17% in terms of value in the broader upstream market of ‘neutral USP-I borosilicate glass tubes’ in India. In contrast, its nearest competitor has a share in the broader market of 13.09% and 7.81% respectively.

9.2.7 The Commission notes that in other jurisdictions like EU, the European Court of Justice (ECJ) has held that large market shares are in themselves evidence of existence of a dominant position [case of Hoffmann-La Roche & Co AG v Commission (Case 85/76)]. It was also held therein that an undertaking
which has a large market share and holds it over for some time has a position of strength.

9.2.8 The Commission further notes that in the case of United Brands and Co and Continental vs. Commission (Case 27/76), UBC was considered by the Courts in EU to be dominant, considering that its share was almost twice that of the largest competitor. In that case, the ECJ had held 45% of the market share also to be sufficient for establishing dominance. The European Courts have also presumed dominance where an undertaking holds a market share of 50% or more (Case C-62/86, AKZO v. Commission).

9.2.9 The Commission observes that the market share of the OP in the instant case in the upstream relevant market(s) far exceeds its nearest competitor and has remained significantly high over a period of three years as per the data compiled by DG as brought out in para 9.2.5 above. This is indicative of position of strength of the OP in the relevant market(s) in the question.

9.2.10 The Commission further observes that Schott Pharmaceutical Packaging GmbH ("Schott Packaging") a subsidiary of Schott group, to which the OP also belongs, entered into a Joint Venture agreement with a downstream ampoule manufacturer Kaisha Manufacturers Pvt. Ltd. ("Kaisha"), the biggest Indian ampoule manufacturer in 2008, to integrate its operations vertically with downstream ampoule manufacturing business. In JV, the Schott group is having 50% of the equity shares. In the financial statements of the OP, Schott Kaisha is shown as its subsidiary. In sales terms, Schott Kaisha was far ahead of other players in downstream market in the year 2009, constituting almost half of the sales in the downstream market among the all converters
whose sales figures are reported and available. The JV has not given details as regards its market share. However, since sales on any enterprise are good proxy of its market share, it cannot be denied that the JV enjoys a position of being market leader. Moreover the reply of OP dated 10.09.2011 also brings out in clear terms that Schott Kaisha is market leader in downstream market of ampoules etc. Thus, since the year 2008, OP together with JV, Schott Kaisha, a related group concern is engaged in the business of producing both borosilicate glass tubes and glass ampoules and in addition to upstream market(s) they also enjoy a position of a strength in downstream relevant market(s).

9.2.11 The Commission observes that market share of the OP in upstream relevant market(s) itself is indicative of its dominance. Although the JV has not given market share in definitive terms during the proceedings before DG, it indeed is a market leader in terms of sales, which shows its superlative market share in the downstream market(s). However, the Commission observes that in addition to the market share, other factors listed in section 19(4) of the Act also require assessment in order to take proper account of the degree of dominance or otherwise of the OP or the JV in the relevant market(s).

9.2.12 Therefore, the Commission finds it fit to take cognizance of other factors listed in section 19(4) of the Act also for assessment of dominance in the case.
Size and resources of the enterprises

9.2.13 The Commission notes from the report of DG that OP and Schott Kaisha are part of Schott Group which is a multinational group headquartered in Germany and is in the business of developing and manufacturing specialty materials for more than 125 years. One of the business unit of Schott Group is Pharma which consists of two business segments, namely, ‘Tubing’ and ‘Pharmaceutical Packaging’. The business segment of ‘Tubing’ manufactures and sells borosilicate glass tubes mainly for Pharmaceutical use and also for technical applications and has six production sites all over the world (Germany, Czech Republic, Spain, Brazil and India).

9.2.14 Further, as per the Business Report for Financial Year 2009-10 on its website, Schott Group’s global sales is of 2.85 billion Euros and has 17,500 employees worldwide and has manufacturing sites and sales offices in 42 countries. With a production capacity of more than 130,000 tons and production sites in Europe, South America and Asia, Schott Tubing is one of the leading manufacturers of glass tubing worldwide. Schott Pharmaceutical packaging, which has entered into the joint venture in India as Schott Kaisha Private Limited, is one of the world’s leading supplier of parental packaging for the Pharmaceutical industry. It has more than 600 production lines in 14 countries worldwide producing more than 7 billion syringes, vials, ampoules, cartridges and special articles of tubing glass or polymer.

9.2.15 The Commission notes that the size and resources of the OP and its group companies provides it tremendous market power in relevant upstream market(s) due to which it has been able to deploy huge resources in terms of
investment and has also got the ability to market its products widely. The size and resources of the Schott group available to the JV also make it a dominant player in relevant downstream market(s).

Size and importance of the competitors

9.2.16 Based upon the findings of DG and available materials on record, the Commission notes that the size and resources of the competitors of the OP and JV in India are not very significant. The only domestic manufacturer, Nipro, has a production capacity of only xxx tons against xxx tons of the OP in upstream market. Further, it has started production only from March 2010 and has no presence in the product segment equivalent to the Fiolax grade (both clear and amber) manufactured by the OP. The turnover (sales) figure of the OP is also much more than Nipro, its single domestic competitor.

9.2.17 As regards the other major tube manufacturers in the global market, like Gerresheimer and Amcor, from details on record, the Commission notes that the total quantity and value of imports from these entities are not significant in relevant geographic market and as such do not create any competitive pressure on the OP. Similarly, the size and resources of ample manufacturers in downstream market are also far less in comparison with the JV, Schott Kaisha because of not only sales and profitability but also since it has all the expertise, resources of Schott group at its disposal.
Economic power of the enterprise including commercial advantage over competitors

9.2.18 The Commission notes that superior size and resources of the OP and JV in both upstream and downstream market(s) give them superlative economic power qua their competitors. They have been able to invest huge sums of money in augmenting their facilities because of its huge resources at their command. The fact that the OP has a full range of product line and it is in a position to supply the convertors from any of global locations of the Schot group at Indian prices as reported by the DG gives it a huge commercial advantage over any of the competitors and contributes to its position of dominance in relevant market in India. Consequently, its JV also has distinct advantage due to the fact that it can get supplies and resources not only from the OP but also from Schott Pharmaceutical Packaging GmbH ("Schott Packaging") a subsidiary of Schott Germany.

Advantage of OP being vertically integrated

9.2.19 As brought out in the preceding paras, Schott group, to which the OP belongs, is vertically integrated with a downstream market player in India, namely, Schott Kaisha Pvt. Ltd. which is in the business of manufacturing ampoules, vials, syringes and cartridges from USP type – I borosilicate Glass tubes. Schott Kaisha Pvt. Ltd., a Joint venture company in which Schott Packaging GmbH holds 50% of the shares, enjoys position of market leader in downstream market(s). The said joint venture company, in operation since 2008, has been buying almost all its requirements from the OP and Schott Rohrglass GmbH, Germany, another group concern since FY 2008-2009. The
Commission finds that the vertical integration of the Schott group with the JV, largest converter in downstream relevant market(s) in India is helping the OP in commanding a huge and unrivalled market power in relevant upstream market(s) in India.

**Dependence of consumer**

9.2.20 The Commission notes from the findings of DG and statements of various converters recorded in course of proceedings that as consumers they are heavily dependent on the OP for their requirements in view of its product range, preference of pharmaceutical companies for its products and lack of viable alternative options as on date. In particular for the amber tubes, converters and pharmaceutical companies are nearly entirely dependent on Schott as they are the only suppliers of the tubes in preferred shades to the Indian market. Further, due to the fact that sales of JV is almost half of the top existing converters, pharma companies in downstream market are also to a large extent dependent upon getting ampoules, vials, syringes etc.

**Entry Barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers.**

9.2.21 The Commission observes that heavy capital requirement, huge running cost, high gestation period and economies of scale in the production of the upstream relevant products as identified by the DG are the significant entry barriers in the relevant market. The requirement of stability tests by the
pharma companies also comes in the way of easy entry in both upstream and downstream market(s) as even the submissions of the OP reveal that the pharma companies shall take a minimum time of 3–6 months before they can decide and choose any product. Moreover, this would also require considerable investment, which in face of availability and acceptability of the products of the OP may act as deterrence for the pharma companies to conduct any stability test on new products. In this regard, import duty of 10% on the tubes, also acts as one of the constraints to make gainful entry in the market(s). These entry barriers make the position of OP and JV a formidable one in both upstream and downstream relevant market(s), particularly in light of their huge resource size and commercial advantage vis-à-vis their competitors.

**Countervailing Buying Power**

9.2.22 Dominance of any enterprise may get challenged by presence of countervailing power in the relevant market. In this regard, the Commission observes that the consumers in downstream relevant market(s), leaving aside the JV, Schott-Kaisha, consists of several small converters who individually lack the requisite size or financial strength to exercise countervailing buying power on the OP. In fact, they are dependent upon the OP for their supplies and cannot exert disciplinary force on OP.

9.2.23 The Commission also observes that it cannot be said that the aims and objectives of the OP and the JV are solely subservient to any social obligation. They also have not acquired position of dominance as a result of any statute or by virtue of being a Government company. Rather their position of dominance
is on account of their financial strength and other resources which have given them significant market power in relevant market(s).

9.2.24 On a collective consideration of the factors as brought out in the foregoing paragraphs, the Commission holds OP and the JV, Schott Kaisha, dominant in the respective upstream and downstream relevant market(s) as determined in para 9.1.14, in terms of section 19(4) of the Act read with explanation (a) to section 4 of the Act.

9.2.25 Having considered dominance, the Commission proceeds to examine allegations against the OP on various issues listed in para 8.1 (c) to determine whether it has also contravened provisions listed in section 4(2) of the Act which are associated and concerned with abusive acts and practices on part of a dominant enterprise in a relevant market. The Commission holds that language of section 4(2) makes it clear that there shall be abuse of dominant position, if an enterprise has engaged in various acts and practices listed therein, meaning thereby that the legislature has cast a special duty on a dominant enterprise not to engage in certain prohibited acts and practices. Therefore, in the instant matter, if the OP is found to be engaged in the acts and practices listed in section 4(2), there is no need to conduct a further analysis of their impact on the market.

9.2.26 However, since in course of proceedings, the OP has justified many of its alleged acts stating that they do not have anti-competitive effects, the Commission in addition to determination whether the OP has indeed committed the impugned acts has also assessed them with respect to impact
on competition in the backdrop of the competitive construct in the relevant market(s).

**Issue 3: Determination of allegations of abuse against the OP**

**Sub - Issue I. Whether the OP has indulged in the act of predatory pricing in violation of provisions of section 4(2)(a)(ii) of the Act?**

9.3 The informant has alleged that in order to force the existing Indian producers of neutral USP Type I Borosilicate glass tubes out of the market, Schott Germany initially pursued a policy of selling tubes at much lower prices which left little choice for the Indian tube manufacturers to continue on their own resulting in Bharat Glass selling its assets and production facilities to the OP. In support of its contention it has enclosed circular dated 29.10.1999 of Schott Germany and details of Fiolax tubes imported from Schott Germany vis-a-vis their prices by various Indian companies during 1997-1998.

9.4 After acquisition of Bharat Glass, till 2008, the OP sold USP Type-I neutral borosilicate glass tubes to the downstream containers manufacturers at extremely low prices. As per the allegation, the prices of Schott tubes were significantly low as compared to its cost of production as well as the prevalent prices in the international market and were predatory in nature in order to drive out the competitors in the Indian market, namely, Kapoor Glass India Pvt. Ltd (the informant), Twin city and Triveni.

9.5 It has further been stated that owing to the severe price undercutting by the OP, the existing manufacturers suffered significant losses and ultimately had to exit the market.
9.6 The OP has contested the claims of the informant stating that it has never indulged in predatory pricing.

9.7 The Commission also notes that DG has examined the contesting claims of both the parties. DG did not consider necessary to call for the data regarding the cost of production of the OP in the early years of its commencement of production in India because the alleged act of predatory pricing prior to the commencement of the enforcement provisions of the Act i.e. 20.05.2009 cannot be a subject of investigation unless and until such conduct of alleged predatory pricing continued even after that.

9.8 DG has also reported that the issue of predation cannot precede the determination of the fact of dominance. The case that the OP / Schott AG enjoyed a position of dominance in the relevant market even before starting production in India or even till such time the other domestic manufacturers were operating as its competitors in India has neither been alleged by the IP nor is borne out of the facts on record. According to DG, the OP can only be said to have enjoyed a unique position of market power post 2008 when it could strengthen and fortify its position after the exit of its competitors, its augmentation of production capacities and its JV with Schott Kaisha besides other factors which have given it a position of strength.

9.9 The OP in its replies has also brought out that allegations prior to the notification of provisions of section 4 of the Act cannot be made subject matter of inquiry.

9.10 On the basis of aforesaid, the Commission observes that it is clear from submission of all parties including the report of DG that allegations of
predatory pricing pertain to a period when the enforcement provisions of the Act were not notified. There is no evidence or allegation on record that such an act of alleged predation has continued even after the date of notification of the enforcement provisions.

9.11 The informant in its various submissions and in its response to the rejoinder filed by the OP in course of proceedings before the Commission has also brought out that ‘Kapoor Glass has consistently maintained and submitted that some of Schott India’s practices such as sale of ‘neutral USP Type-I boro silicate glass tubes’ at prices below cost or predatory prices were carried out till the year 2008 and are no longer in existence’.

9.12 In view of foregoing, the Commission holds that the allegation of predatory prices against the OP is not legally tenable.

9.13 The Commission notes that it has also been alleged that after the exit of competitors of the OP from the market and particularly the exit of the informant in 2008, the OP increased its prices drastically to recover the losses it had been incurring on account of its predatory pricing in the earlier years. It has also been stated that such extremely high prices are unfair and discriminatory.

9.14 The OP has contended that Schott Glass in the year 2008 raised its price of boro silicate glass tubes across the entire world since there was an increase in energy costs all over the world. It has also stated that apart from the cost of energy, the cost of raw materials, precious metals and personnel, all of which affect the prices of boro silicate glass tubes, had also increased. The Commission notes that the said stand of the OP has also been mentioned in its
price circulars dated 9.1.2008 and 26.7.2008. In the price circular of Schott dated 09.1.2008, it has been stated as under:

"We are constrained to revise our prices due to increase in production related inputs specially Borax Penta Hydrate and fuel prices, together which contributes significantly to tubing costs. On neutral glass clear and amber tubing a price increase of 10% approx. and on Fiolax clear a price increase of 3% approx. need to be done over our existing prices."

9.15 The informant has contested the claim of the OP stating that it can been seen from balance sheet of OP itself for the period immediately preceding the year 2008 and thereafter, that there has been no significant increase in energy or raw material cost. Further, Schott uses PNG to fire its furnaces and the price of PNG in India is not subject to global fluctuations (because it is fixed by the Government as part of the administered price mechanism) and therefore, assertion of the OP that it had to increase its tube prices because of the increased cost of energy is false and misleading.

9.16 DG in his findings has reported that increase in the prices by the OP was related to the increase in its manufacturing cost and cannot be said to have been resorted to for recouping losses incurred earlier on account of its predatory pricing. DG has also submitted that there are no standards to judge as to what can be stated to constitute excessive and high prices. There cannot be any threshold limit for determining the same; the price that a customer is willing to pay depends on the value which he ascribes to a product and nothing can be said to be excessive till such time there are buyers willing to pay the price of the product and the market forces can alone determine as to whether
the products are being sold at excessive prices. In view of the same, DG has concluded that the allegation of the Informant in this regard is not found substantiated.

9.17 On a careful consideration, the Commission observes that the allegation of excessive price of tubes is inextricably linked with allegations of practice of predatory pricing followed by the OP till 2008 since it has been alleged that once the OP acquired position of dominance, it started raising its prices to recoup its losses. Once the evidences on record and investigation by DG do not establish that the OP had engaged in act of predation, the Commission observes that it cannot be concluded that rise in prices of tubes by the OP for the period after 2008 were with a purpose to recoup the losses suffered on account of predatory pricing.

Sub-Issue 2: Whether the OP has imposed unfair and discriminatory conditions or price in the sale of neutral USP-I borosilicate glass tubes through its discount policies, Trade Mark Licence Agreement, Marketing Support Agreement and Sale Purchase Agreement in contravention of the provisions of section 4(2)(a)(i) and (ii), of the Act?

9.18 The Commission notes that the facts mentioned in the information, various submissions of parties concerned and report of DG, would show that the OP offers two kinds of discounts to the downstream players or converters of the upstream relevant products; (i) Target discount and (ii) Functional discount.
9.19 As per discount policy of the OP furnished to the Commission and to the office of DG, target discount is a form of volume based discount, whereby varying rates of discount are offered by the OP to the converters/ampoule manufacturers at the following rates on the quantity of ampoules and vials and other products fabricated out of the Clear Glass Tubes (NGC) and Amber Tubes (NGA) purchased from them and sold to the pharmaceutical companies and other purchasers, in an Indian financial year:

**Quantity of tubing purchased (in MT)**  
**Rate of discount effective from**  
**1.10.2001**

<table>
<thead>
<tr>
<th>Quantity of tubing purchased</th>
<th>Rate of discount</th>
</tr>
</thead>
<tbody>
<tr>
<td>76 to 150</td>
<td>xxx percent</td>
</tr>
<tr>
<td>151 to 400</td>
<td>xxx percent</td>
</tr>
<tr>
<td>401 to 600</td>
<td>xxx percent</td>
</tr>
<tr>
<td>601 to 900</td>
<td>xxx percent</td>
</tr>
<tr>
<td>901 &amp; above</td>
<td>xxx percent</td>
</tr>
</tbody>
</table>

**Quantity of tubing purchased (in MT)**  
**Rate of discount after 2007**

<table>
<thead>
<tr>
<th>Quantity of tubing purchased</th>
<th>Rate of discount</th>
</tr>
</thead>
<tbody>
<tr>
<td>250 to 500</td>
<td>xxx percent</td>
</tr>
<tr>
<td>501 to 750</td>
<td>xxx percent</td>
</tr>
<tr>
<td>751 to 1000</td>
<td>xxx percent</td>
</tr>
<tr>
<td>1001 to 1500</td>
<td>xxx percent</td>
</tr>
<tr>
<td>1501 &amp; 2000</td>
<td>xxx percent</td>
</tr>
<tr>
<td>More than 2000</td>
<td>xxx percent</td>
</tr>
</tbody>
</table>
9.20  The discount scheme, in form of a quantity slab-discount rate menu, is made available to the converters at the beginning of the transaction period. The OP issues credit notes for discounted amount on a quarterly basis on receipt of certificate for sales and full payment of invoices raised in the relevant quarter. Target discounts are applicable only on basic value of NGC, NGA and the sale of Fiolax (Clear and amber) tubes is reckoned only for the purpose of calculation of the target quantity slabs.

9.21  The Commission notes that the OP also offers another kind of discount to its customers, which is the so-called functional discount, which in terms of its sales-purchase agreement for the year 2007-2008 onwards with the converters, was conditional upon the following:

(i) That converters will promote Schott tubing by purchasing the agreed quantity in the particular year of agreement;

(ii) That the converters will not use or convert Chinese tubing and will provide all information and proof in this regard;

(iii) That the converters will maintain ‘Fair Pricing’ of ampoules and vials for Schott tubing.

9.22  Upon fulfillment of the above conditions, the OP used to offer xxx% functional bonus to its converters from 2007-2008 till 2010 on the basic value of purchase of NGC, NGA & Fiolax clear tubing supplied by the OP at the end of the financial year. From the year 2010, the OP has required the converters to sign its Trade Mark Licence Agreement and Marketing Support Agreement in order to get functional discount.
9.23 Under Trade Mark Licence Agreement (TMLA) with the converters, the OP acquires the right to inspect the premises of the converter to ensure that its brands are not being abused. There is stipulation attached for payment of damages of Rs Seventy (70) Lac in case of infringement of its trademark by the converters (in course of proceedings the OP has submitted that it proposes to delete this part from the agreement).

9.24 The converters who sign TMLA are given royalty free right to display the Schott logo and brand as part of the materials they use to market and supply ampoules to pharma companies.

9.25 Along with TMLA, Marketing Support Agreement is also executed, pursuant to which the converters agree to promote the OP and its products for which the converters are paid a certain sum on a quarterly basis. The relevant portion of Market Support Agreement is brought out below;

“1. XYZ will actively promote SCHOTT and its products and services with materials as set out in Exhibit 1 to enhance its own business in India in close cooperation with SCHOTT.

2. SCHOTT will reimburse XYZ upto _____ Rupees on a quarterly basis, depending upon agreed activities.”

9.26 The OP before DG and also in course of inquiry proceedings before the Commission has admitted that the target based discount has been devised based on cost efficiency consideration since the process of melting glass and manufacturing borosilicate glass tubes from various raw materials is a continuous process which requires the production tank to be continuously at high temperatures and functioning at all times.
9.27 It has also been submitted that substantial energy costs are incurred to bring a production tank to the required temperature at which glass tubes can be manufactured and energy costs have to be continuously incurred to keep the production tanks running at the relevant temperatures without any interruptions.

9.28 Given the specific nature of tube manufacturing process, the OP has further submitted, any instability in load or demand may lead to heavy damage to the production tank causing the manufacturer to incur losses. Therefore, it is to ensure stability in demand and incentivize large purchases that the target discount system has been put in place.

9.29 The OP has also submitted that the discounts on its tubes are offered to meet out competition from imports and new players in the market (Nipro-Triveni) since it cannot afford to be oblivious to the competition.

9.30 As regards its loyalty/functional discounts the OP has submitted that they are offered to mitigate the risk of converters mixing ampoules made from borosilicate glass tubes supplied by the OP with those made from inferior quality borosilicate glass tubes imported from China.

9.31 The Commission has carefully gone through the report of DG and submissions of various parties on different dates. The Commission notes that conduct of a dominant enterprise in upstream market may give rise to competition concern if through that conduct it enforces an unfair and discriminatory discount on the products sold to the players (converters) in the downstream market wherein the JV, which is a subsidiary and controlled by common group is also competing and is in fact a market leader. This is because
an unfair and discriminatory discount policy giving preferential treatment to its related entity in downstream market will mean higher purchase price for the other competing players as a result of which they cannot compete on even terms.

9.32 The Commission, on the basis of the findings of DG, notes that Schott Kaisha, the JV has received the following discounts from the OP and Schott Rohrglass, Germany (group concern to which the OP also belongs) during the last three years;

<table>
<thead>
<tr>
<th>Discount / Rebate Tube Type</th>
<th>Schott Glass (I) Pvt. Ltd</th>
<th>Schott Rohrglas GmbH</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2008-09 % discount</td>
<td>2009-10 % discount</td>
</tr>
<tr>
<td></td>
<td>2008-09 % discount</td>
<td>2009-10 % discount</td>
</tr>
<tr>
<td>Target</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>NGC</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>SFA</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>SFC</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>Functional Bonus</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NGA</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>NGC</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>SFA</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>SFC</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>Bonus</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NGA</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>NGC</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>SFA</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>SFC</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>Others</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NGA</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>NGC</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>SFA</td>
<td>xxx</td>
<td>xxx</td>
</tr>
<tr>
<td>SFC</td>
<td>xxx</td>
<td>xxx</td>
</tr>
</tbody>
</table>
9.33 The Commission observes that the other downstream ampoule manufactures are not evenly placed as far as quantum of discount is concerned, a fact which has not been disputed by the OP. In this regard, statements of certain ampoule manufacturers recorded by DG as reproduced below also assume significance;

(a) **Statement of Dr. Anil Aggarwal, MD, M/s. Mak Ampoules Pvt. Ltd.:**

7. **What are the different types of discounts you have been receiving from Schott Glass? Does SGI give equal treatment to all the converters as far as discounts are concerned?**

**Ans:** We get two types of discounts viz quantity discount and loyalty discount, the latter now being called functional bonus. The loyalty bonus is fixed at 8% and quantity discount is based on quantity lifting i.e. 2% for 250 MT, 4% for 500 MT and so on as per SGI’s discount slabs. SGI does not give equal treatment to all the converters as far as discounts are concerned. Preferred converters like its own JV Schott Kaisha, Klasspack and Tube glass are given higher discount and discount even on Fiolax tubes on which they do not give discount to others including us. This is discriminatory and unfair and thus SGI uses its financial muscle to disrupt fair competition in the market which is detrimental to our business interests.

8. **What do you have to say about the joint venture of Schott India with Kaisha? How has it affected the existing converters?**

**Ans. First of all SGI gives priority in making supplies of raw material to its JV namely Schott Kaisha.** For instance it has happened that whereas our
requirement for a particular size of tube has not been met, but their JV Schott Kaisha has been supplied the same. As a result we have lost business. Furthermore, the supply of raw materials to us remains uncertain and we have to carry huge inventories to meet the requirement of our customers. As stated above SGI’s discount is hugely discriminatory. Whereas Schott Kaisha gets a discount of approximately 32% (as told to us by Shri Nishant Desai an ex-employee of Schott and currently working for Nipro). We get a discount of 12%...”

(b) **Statement of Shri Krishan Mehra, Partner, M/s Kishore Industries:**

‘6. What are the different types of discounts you have been receiving from Schott Glass?

Ans. The same is enclosed for the last three years vide my letter dated 6.12.2010 being handed over to you now. It is mentioned that Schott gave us royalty discount for the period October, 2001 to March 2002 @ 4%. From the year 2002-2003 till the year 2006-2007 it did not give any discount to me because they were alleging that we are buying tubes from other sources. However, after a lot of persuasion and effort, they agreed to give me only 33.33% of the due amount which I have already submitted vide my response dated 21.9.2010 as Annexure-VII. They took an undertaking from me that we will not raise the issue regarding functional bonus any longer and will continue to promote Schott tubing.

7. Does Schott India grant uniform discount to all the ampoules converters?

Ans. As far as my knowledge goes, it is not same for all the converters. Some converters are being favoured by more discount and uninterrupted
deliveries. I can state that in cases where I have been granted 4% discount, Indian Scientific Glass Industries has been granted 6% discount as is known to me my interaction with the Shri Khemka, owner of Indian Scientific Glass Industries. It is a general practice of Schott India to grant differential discount to favour few of the converters as a part of its policy to divide and rule and ultimately to favour it JV, Schott Kaisha.

8. What do you have to say about the joint venture of Schott India with Kaisha? How has it affected the existing converters?

Ans. Ever since Schott India has entered into JV with Kaisha, known as Schott Kaisha, there is no level playing field for the existing converters either in terms of the discounts offered or the deliveries of Tubes. Schott is understood to be giving huge discount to its JV which enables it to penetrate the market for supplies of ampoules/vials in competition to the other converters. Further, if any of the existing converters are in direct competition with Schott Kaisha then Schott India would curtail the supplies of Glass Tubes for that converter. As a result of this practice of Schott India even the Pharma companies hesitated in placing orders on converters other than Schott Kaisha to ensure uninterrupted supplies of ampoules/vials to them.....”.

(c) Statement of Shri Sandeep Khemka, Partner, M/s. Indian Scientific Glass Industries and Director of Khemka Glass Products Pvt. Ltd.:

7. What are the different types of discounts you have been receiving from Schott Glass and why do you state in your reply dated 22.9.2010 that SGI has some unfair and discriminatory trade policies in this regard?
Ans: We have been receiving target discount and functional bonus from Schott Glass. A copy of the Ledger of the SGI showing the discounts given to us from April, 2007 to March, 2010 is handed over to you. You may recall that vide Annexure VI of our reply dated 22.9.2010 we had submitted the details of discount availed year wise by us. The Functional bonus has now been withdrawn w.e.f. 1st April, 2010 as we have refused to sign their Trade Mark Licence Agreement. As per our knowledge SGI has been giving more discounts to some converters and they have also been giving them priority in supplies. As a result of this, there is unfair competition amongst the Ampoule manufacturers.

7(a). What do you have to say about the joint venture of Schott India with Kaisha? How has it affected the existing converters?
Ans: As stated above, this is resulting in unfair competition as they are given more discounts and priorities in supplies. .....”.

(d) Statement of Shri Anil Kumar Gupta, Managing Director of Adit Containers Pvt.Ltd.:

‘3. Could you please elaborate regarding the said practices of Schott, in short SGI, which you consider as anti competitive responsible for stunted growth of the manufacturers of ampoules/vials?
Ans. The anti competitive practices of SGI can be stated as follows:
1) Giving differential discounts without any objective criteria to chosen few converters..................

‘9. What are the different types of discounts you have been receiving from Schott Glass?
Ans. The discount statement is handed over to you now in terms of your direction in the summons. The first two pages are the discounts that we have availed and the remaining five pages are the relevant extract of our ledger account wherein these discounts have been reflected. Though the discount from the year 2007-08 till 30.9.2010 has been stated as target discount, this should be read as quantity and loyalty discount put together. The discount prior to 2007-08 was termed by SGI as only Target discount.

10. How do you state that SGI indulges in discriminatory discount vis-à-vis the ampoules converters?

Ans. We have information that SGI offers discounts to Schott Kaisha far in excess of its declared discount policy. Whereas, Schott Kaisha gets a discount of 32%, no other converter gets a similar discount. It is pertinent to mention that in terms of its declared discount policy, there is no slab higher than 12% for quantity discount and 8% for loyalty discount which makes it a total of 20%. As a result, the converter in competition to Schott Kaisha cannot compete as there is no level playing field. When we confronted Vice President Sales of Schott by our e-mail dated 21.10.2010 regarding the discount even on Fiolax to Schott Kaisha, which is outside the purview of the discount policy of SGI, we were informed vide their e-mail reply dated 18.11.2010 that they cannot comment on the price structuring they apply in relation to their affiliated company Schott Kaisha. It may be noted that they did not deny that Schott Kaisha is being given discount of 32% even on Fiolax which no
other converter is getting. They further informed us that no discount is available for Fiolax.....

11. What do you have to say about the joint venture of Schott India with Kaisha? How has it affected the existing converters?
Ans. With Schott Kaisha getting much heavier discount (32%), uninterrupted supply of tubing, supply of tubing during the time of shortages and the marketing support given by SGI it can only mean extremely unfavourable business conditions for us.

(e) Statement of Shri Rakesh Srivastava, General Manager, Solar Marketing Gujarat Borosil Ltd. and ex-General Manager of the OP and ex-General Manager Schott Kaisha:

‘5.....The target discount and the functional discount at its maximum could be 20% for any converter but for Schott Kaisha it was more than this perhaps on account of their JV. I do not remember the exact discount being given to Schott Kaisha but I remember it was effectively given a higher discount as such data were required to be filled in SAP system of SGI.’

9. What discounts were given by Schott on Fiolax tubes and which converters were getting these discounts?
Ans. On Fiolax tubing only Schott Kaisha was getting discounts and no other converter was granted this discount. It would be relevant to mention here that though no discount was granted on Fiolax tubing to any other converter, every purchaser was allowed to add the total quantity of Fiolax tubing purchased to the total quantity of NGC/NGA
procured for the purpose of determination of the respective target slab, but the actual discount would be only on the basic price of the NGC/NGA procured from SGI.”

9.34 The Commission, on the basis of details of discounts given to the JV as brought out in Para 9.32 and statements of the converters as above, observes that discount offered by the OP to its related concern (JV -Schott Kaisha) is more and on more favourable terms as compared to other converters. In percentage terms, while discount to JV has been given upto xxx%-xxx%, the other converters can avail discount upto xxx% only.

9.35 Further, the Commission also observes that while the target discount is given only on purchase of NGC and NGA and the purchase of Fiolax is reckoned only for the purpose of determining the slab for other converters, the JV of the OP is given target discount on purchase of NGC and NGA as well as on Fiolax. Target discount is given to the converters on a quarterly basis on receipt of certificate of sales as specified by the OP and upon full payment of invoices raised in that quarter. However, the same is paid to the JV on a monthly basis. The percentage target discount is determined on the basis of quantity agreed for procurement in a year by the converters. In case, the quantity purchased is less than the slab, then the lower slab discount is given. Discounts are not given separately on amber and clear tubes but the discounts are bundled together.

9.36 On the lines of target discount, dissimilar conditions have also been imposed on grant of functional discount. While functional discount is given on
yearly basis to the converters, it is given on monthly basis to the JV. The OP also granted functional discount to the converters subject to fulfillment of conditions till 2010 that converters would promote Schott tubing by purchasing the agreed quantity in the particular year of agreement. The grant of functional discount is now linked with converters signing Trade Mark Licence Agreement. The JV, Schott Kaisha also got bonus of xxx% from Schott Rohrglass GmbH Germany for materials supplied from outside India for the year 2008-09 and 2009-10, which others do not get.

9.37 The Commission observes from aforesaid that it is apparent that the OP is following a dissimilar and discriminatory discount policy towards the converters vis-a-vis the JV - Schott Kaisha. The OP is discriminating not only on quantum but also on conditions of discounts. The fact that the converters who are dependent upon the OP for its supplies particularly for Amber Tubes have come out in open against the OP reflects upon the unfairness of the prevalent anti-competitive practices in the relevant market.

9.38 The OP has also admitted that it offers a more favourable quantity and functional discounts to Kaisha than what it offers to other converters and has justified the same on the grounds that no other converter can match the volume of orders that Schott Kaisha places on Schott Glass India. The OP has also argued that the discount is given on Fiolax tubes only to Schott Kaisha since being a strong downstream player it had negotiated hard and in order that it does not lose its valued customer it had relented and agreed to give discount on Fiolax also, which is not available to any other converter.
9.39 According to OP, even though the conditions of discount are different for JV than other converters, the ampoules supplied by Schott Kaisha are priced not less than and are even higher than ampoules supplied by other converters and as such do not cause any appreciable adverse effect in the market. Further, the favourable terms operating between Schott Glass India and Schott Kaisha do not affect the ability of other borosilicate glass tubes manufacturers to compete for supplying borosilicate glass tubes to other converters in India and also do not affect the converters’ ability to compete in supplying borosilicate glass tubes to pharma companies.

9.40 The OP has also brought out that discount schemes are not unusual in the glass tubing industry world over, including in India and its target discount is based on the quantities purchased from it and that such discount is demanded by all customers and granted in consideration of the economies of scale which are generated by higher purchase volumes. That even the IP was offering discount schemes to its customers till such times it was in the business of glass tubing industry.

9.41 The Commission observes that target discount on its own may not be always anti-competitive. However, if conditions for giving such discount are dissimilar then it will cause anti-competitive effects in the market. This is particularly applicable in this case wherein different sets of conditions have been made applicable for grant of discount between vertically integrated downstream JV and other converters in downstream market due to which the competing downstream players are not in a position to compete effectively. Since discriminatory and dissimilar conditions have been imposed on other
converters in the downstream market as compared to the JV by the OP for grant of discount, the competitive construct of the market gets distorted.

9.42 On the basis of the facts on record the Commission observes that it is not disputed that both the structure (quantum) and policy (conditions) of discount is evidently dissimilar for the JV as compared to other converters. The discount policy has not been uniformly applied by the OP and has led to a sort of price discrimination where the same commodity has been sold at different prices to different customers despite identical cost for the OP.

9.43 The Commission further observes that the converters were also to sign Sale Purchase Agreement with the converters for availing discount, the clause 2 of which was as under:

‘Schott Glass India appreciates commitment .................... for not using or converting Chinese tubing and providing all information & proof in this regard.’

9.44 The OP also executes Supply Agreement with the converters annually under which the converters are required to purchase the agreed quantity of glass tubes from the OP. The Supply Agreement is so designed so as to ensure maximum quantity of sale of the glass tubes of the OP and to reduce the ability of the converters to meet their requirement of the glass tubes from any other source. The terms of Supply Agreement as submitted by some converters before DG bring out as under:

1. Right in the beginning of the F.Y., the converters have to agree to purchase a minimum quantity of tubes from the OP.
ii. Discount is to be applicable only for NGC and NGA quantity.

iii. Group discount as certain percentage on total purchase of NGC and NGA is given.

iv. If quantity purchased is more, higher slab discount will be given, and if less, the lower slab is applicable.

v. The OP will provide assistance to the converters signing supply agreement to achieve this volume.

9.45 The Commission further observes that functional discount of OP is contingent upon the converters signing the Trade Mark Licence Agreement (TMLA), which according to the OP is to deal with the problem of the ‘mixing risk’ of its products with the inferior quality Chinese imports.

9.46 The Commission observes that TMLA, Supply Agreement and the Marketing Support Agreement are intended to achieve the objective of ensuring that the converters only promote and use Schott tubes.

9.47 The Commission finds that with its discount polices the OP has tried to bind the converters with it by giving incentives to purchase a minimum quantity right in the beginning of a year and paying discount only at the end of the year depending upon actual quantity procured.

9.48 The Commission also observes that terms of the TMLA are one sided and heavily loaded in favour of the OP and even contains provisions that it may reduce the converters to perform the task of contract manufacturing for the OP. Although as contended by the OP, TMLA does not specifically debar a converter from using tubes of other manufacturers, read with the Sale
Purchase Agreement, Supply Agreement & the Marketing Support Agreement which are required to be signed by converters, it becomes very clear that the OP has severely restrained use of tubes other than that of Schott.

9.49 The OP through its TMLA has also sought to acquire the legal right to enter the premises of the converters for inspection and to check the compliance by the converters. In terms of the agreement, the decision as to whether the converters have breached the terms of the TMLA is to be unilaterally determined by the OP.

9.50 Upon such unilateral determination of breach of the terms of the TMLA by the OP, TMLA seeks to bind the converters into paying such damages as shall be determined by the OP (although the OP now proposes to do away with this as per its submissions). Thus, the terms of TMLA, along with the Marketing Support Agreement and the Sale Purchase Agreement of the OP are unfair for sale of its products.

9.51 That the discount policy of the OP is intended to maintain its dominance in upstream relevant market is evident since its discount policy coupled with its ‘Sale Purchase Agreement’, ‘Supply Agreement’ and ‘Marketing Support Agreement’ with the converters, forces the converters to procure nearly all their requirements of glass tubes from the OP in order to get favourable terms. The target discount, functional discount read with TMLA and Marketing Support Agreement is loyalty inducing to the detriment of other upstream market players.

9.52 As far as target discount is concerned, a converter has to first express its requirement right in the beginning of the year on which target discount is
fixed. The final discount depends upon the actual off take and if initial commitment is not fulfilled, they are given lower discount. In such a condition, a converter will try to reach its annual target given to it to get higher discounts. This would in turn bind them to get supplies from the OP only since procurement from any other source would mean lower discounts than agreed upon earlier by the OP. Consequently, the other manufacturers/suppliers operating in upstream market might be adversely affected. As the Commission has observed in earlier part of this order, target discount is not bad on its own; however, if certain conditions are imposed which restrict other players from effectively competing in the market, then such target discounts shall have anti-competitive effects.

9.53 Further, the converters after signing TMLA will virtually be forced to procure all tubes from the OP only because of inherent fear of inspection of its premises by the OP and payment of damages in case the OP finds them using products not in compliance of terms of the agreement. As per Marketing Support Agreement also, the OP remains committed to the promotion of products of OP.

9.54 The Commission observes that the discount policy of the OP puts severe restraints on competitive market structure in the relevant upstream market having effect of foreclosure of competition. The Commission, in this regard, observes that the informant and Twincity having exited from the market and Bharat Glass acquired by the OP, only Nipro-Triveni remains its competitor in upstream domestic market.

9.55 Thus, for the OP now what it wants is that it remains somewhat insulated of competition from Nipro-Triveni and also imports from other countries. It is
for this reason that they have incentivized the converters to bind them through its aforesaid policies. The transcript of recorded conversation in a meeting on 22.02.2010 between representatives of the OP and the converters submitted by the informant before the DG would show that discount policies and Marketing Support Agreement of the OP are basically designed with a purpose to promote its products and to thwart competition in the upstream market. The conversation reveals that on the lines of strategies of any player exercising dominance in a market, the downstream players (converters) are barred from selling among each other in order to prevent possible arbitrage due to differential discounts arising out of such transactions and remain dependent upon the supplies from the OP only.

9.56 The Commission also observes that in addition to the upstream market, the discount policy of the OP is also intended to impair competition in downstream market and inflict injuries upon the converters other than Joint venture- Schott Kaisha. Due to lower discounts, the converters face dissimilar costs as compared to the JV which is impacting their profit margins. The margins of converters have been affected severely also because of Long Term Tubing Supply Agreement of SCHOTT Rohrglass GmbH and the OP with SCHOTT Kaisha which had mandated as under;

"3. Deliveries, Payment Terms and Prices

(3) SCHOTT shall deliver the PRODUCTS as per the prices and conditions set out in PTR 2007 – 12 – 18 attached as Exhibit xxx a and PTI 2007 – 12 – 18 attached as Exhibit 2 b hereto. The current prices of the PRODUCTS are shown
in the Exhibits xxx a and b attached hereto. The price increase for the Financial Year ending xxx will be xxx% of the appropriate SCHOTT price increase for the Indian market which will become effective from xxx and until xxx there will be no further price increase. After xxx, the percentage price increase which SCHOTT applies regularly for other customers in the Indian market (i.e. addition to the price for other customers as of March xxx) will also apply to Kaisha. For example, for the Financial Year ending xxx the percentage price increase which is applied to other customers in India on the price for them as of xxx will be applied to the prices for Kaisha as on xxx.”

9.57 Thus, the increase in prices of Tubes for the JV were to remain at a lower level till xxx after the financial year 2008-09 since the prices were not to be raised even if price of glass tubes were increased for other converters. Percentage increase after xxx was to be made applicable to Kaisha, the JV only on the base price of xxx. Further, after conclusion of Long Term Supply Agreement, another agreement was concluded in which it has been stated as under:

“As long as Kaisha is our biggest customer in India and only under this condition Kaisha will be given price advantage of 10% with regard to other Indian converters who purchase a comparable product portfolio from SCHOTT. In the event, that Kaisha ceases to be our biggest customer in India, we will discuss with Kaisha about a change of the price advantage. If no agreement can be reached, we will discuss about a reduction of the minimum quantities to be purchased under the Long-Term Tubing Supply Agreement.”
9.58 Thus, a perpetual price benefit has been given to Schott Kaisha, the JV. The investigation by DG has brought out that there has been increase in the cost of tubes of OP due to various factors like energy cost after 2008. Consequently their price for converters also registered an increase except for JV which was protected by Long Term Tubing Supply Agreement. Increase in prices of tubes of OP for converters other than the JV has been reported upto 27% during 2008 -11 by DG on the basis of the details furnished by the converters.

9.59 In analyzing the impact on the downstream market, the Commission feels that cognizance needs to be taken of the competitive construct of the market and the nature of competition among the converters. The facts and materials brought on record show that Schott Kaisha is the largest tube converter in India followed by other players like Tube Glass Containers Pvt. Ltd. and Klasspack Pvt. Limited. The rest of the market is fragmented across several small players.

9.60 It has been submitted that prices of containers are negotiated between the converters and pharmaceutical companies on one to one basis. The converters are also constrained on their final sale price since the OP had mandated them to maintain a ‘fair price’ and they are not supposed to charge a price different than the JV.

9.61 The Commission observes that OP has stated that the ‘favourable terms’ given to the JV Schott Kaisha do not cause any appreciable adverse effect on any of the other converters in India as the ampoules supplied by Schott Kaisha to pharma companies are priced higher or similar (not below) in comparison
to the prices charged by the other converters. DG has also reported that the prices charged by Schott Kaisha are similar to the prices charged by other converters making supplies to a particular customer.

9.62 The Commission further observes that the letter dated 21.02.2011 of Adit Containers Pvt. Ltd. and the letter dated 22.02.2011 of Indian Scientific Glass Industries in this regard to the DG are relevant wherein it has been stated that the landed prices of glass ampoules of Kaisha and the price of ampoules manufactured by them remains same. It has also been stated that the cost of glass tubes account for 50-60% of the selling price of the finished products.

9.63 The relevant extract of letter dated 21.02.2011 of Adit Containers addressed to DG giving details about the same is reproduced as under;

“In general there is no price difference between the glass ampoules and vials supplied by us and Schott Kaisha Pvt. Ltd. to the pharmaceutical customers where we are common suppliers for identical products. It is the practice of the pharmaceutical companies to compare the landed prices of glass ampoules net of modvat for various suppliers. In case if there is any price advantage accruing to the pharmaceutical company on account of supplies from advantage accruing to the pharmaceutical company on account of supplies from backward areas / tax havens the benefit for the same is given to the vendor. The price difference accrued to the pharmaceutical company is added to the basic price of the supplier who is supplying to the pharmaceutical company.

In our case we are common suppliers with Schott Kaisha at two pharmaceutical companies namely Korten Pharma Pvt. Ltd. who is procuring various sizes of glass ampoules for onward supply to Novartis. Our landed price is almost
similar as that of Kaisha even though Kaisha is getting a higher basic price of 4% (on account of the fact that the manufacturing unit of Kaisha is based in Daman which enjoys a tax holiday). Similar situation exists with yet another customer Aristo Pharmaceutical Ltd. where both of us are supplying 3.5 ml clear vials.

In both the cases Schott Kaisha and we supply glass ampoules and vials using Schott Glass tubes. This situation prevails even though Schott Kaisha receives a much higher discount compared to us which puts us at a clear disadvantage compared to Schott Kaisha in terms of profit. As glass tube is the single largest cost element in our costing there is a wide disparity between in the final profits we derive from supplying the same product using the same tube and getting the same final price.”

9.64 The fact that pharma companies in practice do not grant differential prices to their suppliers of Glass Ampoules and Vials when purchasing identical products also gets clear from letter dated 22.02.2011 of Indian Scientific Glass Industries to DG in which it has been stated as under;

“Pharmaceutical companies in practice do not grant differential prices to their suppliers of Glass Ampoules and Vials when purchasing identical products. However, in case if one of their supplier is from tax paying area and other supplier is from backward area the pharmaceutical company increases the basic price of the supplier who is supplying from backward area to the extent of the Sales Tax element.

For example in case of Sanofi Aventis Schott Kaisha and our company both supply 2ml and 5ml Amber Ampoules using Schott Tube, Schott Kaisha
Ampoules do not command any higher price than us on account of quality. Schott Kaisha is paid a higher price only to the extent of sales tax (around 4%) which is in view of the fact that Schott Kaisha is located in a backward area of Daman where they have been granted a tax holiday for a certain period.

In our industry tube cost is the biggest item in our cost of production and accounts for nearly 50-60% of the selling price of our finished products. In view of the substantially higher discount given to Schott Kaisha we are put to a great disadvantage and results in very low margin compared to our competitor Schott Kaisha. As a result of this our growth is severely affected and hence needs your intervention to set right the situation.”

9.65 The Commission on the basis of records of investigation notes that the aforesaid statements of the two converters are also supported by the purchase orders of Schott Kaisha and Adit Containers in respect of sale to Korten Pharmaceuticals Limited which show that the prices of ampoules charged by both these entities are almost similar, albeit the price of ampoules of Kaisha are slightly on a higher side.

9.66 The Commission observes that since Kaisha receives much higher discounts on tubes (input cost) and price of ampoules (final product) remains the same, a variation in the profits on sales of ampoules for Kaisha and the converters is bound to occur. In this regard, the Commission notes that vide submissions dated 04.11.2011, the OP has given details of price benefits and discounts offered to Kaisha and other parties for the year 2008-09, 2009-10 and 2010-11 as under;
<table>
<thead>
<tr>
<th>Name of Converter</th>
<th>F. Y. 08 - 09</th>
<th>F. Y. 09 - 10</th>
<th>F. Y. 10 - 11</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Functional</td>
<td>Price Benefit</td>
<td>Total</td>
</tr>
<tr>
<td>Schott Kaisha</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
</tr>
<tr>
<td>Tube Glass</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
</tr>
<tr>
<td>Lisa</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
</tr>
<tr>
<td>ISGI</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
</tr>
<tr>
<td>Kishore</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
</tr>
<tr>
<td>Adit</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
</tr>
<tr>
<td>Bombay Glass</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
</tr>
<tr>
<td>Ambika</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
</tr>
<tr>
<td>Klasspack</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
</tr>
<tr>
<td>MAK</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
</tr>
<tr>
<td>Kapoor</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
</tr>
<tr>
<td>Asgits</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
</tr>
<tr>
<td>Snoway</td>
<td>XX</td>
<td>XX</td>
<td>XX</td>
</tr>
</tbody>
</table>

9.67 The above chart shows that discount and price benefit given to the JV as compared to converters is much more and consequently the cost of procurement of tubes for converters other than the JV would also be on a higher side. While the JV has been given discount and price benefit of xx%, some of other converters have also been given discounts of only xx%. Functional discount has not been given to many converters presumably since the converters did not sign TMLA and did not agree to promote the tubes of OP only.

9.68 In such a case when the cost of procurement of tubes (which comprise of a major portion of cost of manufacture of ampoules) is much lower for JV and prices of end products i.e. price ampoules to the pharma companies remain identical and same (as per admissions of the OP, the prices of ampoules of JV are even higher) the profit margin of downstream converters is bound to be affected. In order to assess the effect and the significance of the discount policy vis-à-vis the profitability or margins of the buyers and therefore any potential injury to competition due to the discount policy, the trend in profit
before depreciation and tax has also been looked into. The figures reveal the following;

**STATEMENT SHOWING FINANCIAL RESULTS OF VARIOUS CONVERTERS**

<table>
<thead>
<tr>
<th>S.N.</th>
<th>Name of the Convertor</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Schott Kaisha</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
</tr>
<tr>
<td>2.</td>
<td>Tube Glass</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
</tr>
<tr>
<td>3.</td>
<td>Klasspack</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
</tr>
<tr>
<td>4.</td>
<td>Lisa Ampoules</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
</tr>
<tr>
<td>5.</td>
<td>Adit Containers</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
</tr>
<tr>
<td>6.</td>
<td>ISGI</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
</tr>
<tr>
<td>7.</td>
<td>Khemka Glass</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
</tr>
<tr>
<td>8.</td>
<td>Kishore Industries</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
</tr>
<tr>
<td>9.</td>
<td>Mak Ampoules</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
</tr>
<tr>
<td>10.</td>
<td>Bombay Glass Blowing</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
</tr>
<tr>
<td>11.</td>
<td>Ambika Parentals</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
</tr>
<tr>
<td>12.</td>
<td>Avon Ampoules</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
</tr>
<tr>
<td>13.</td>
<td>Onaway Glass</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
<td>xxx%</td>
</tr>
</tbody>
</table>

9.69 The Commission observes that it is evident from the above chart that while the profit margin of Kaisha has registered a considerable increase, from xxx% in 2007 to xxx% in 2009-10, margins in case of majority of the other converters have declined.
9.70 The difference in profitability appears to be emanating due to the
difference in discounts giving rise to adverse cost structure to other converters
as compared to the JV. This in turn is causing harm to the competitive ability of
the other converters and consequently harm to competition in the
downstream relevant. Due to the abusive acts and practices of the OP,
margins of other converters are getting squeezed.

9.71 The Commission in this context has also taken into account and
considered the arguments of the OP that the sales of converters have
increased over the years and hence there is no adverse impact on them. In this
regard, the Commission observes that the sales of the converters have
generally increased in the last three years. However, more sales of
downstream products out of tubes supplied by the OP by the converters imply
more sales of the tubes (upstream products) for the OP and increase in its
sales volumes. At the same time, since the profit margins are getting squeezed
for the converters in spite of increase in sales, their ability to compete with the
JV whose profitability is increasing over the years would be considerably
constrained.

9.72 The Commission notes from the details of total sales and profits before
the depreciation and tax in respect of converters that even though the sales in
some cases were on rise during 2007-08, 2008-09 and 2009-10, the profit
before depreciation and tax had declined.

9.73 In order to assess the impact of discounts given to the JV on other
converters, the Commission has also considered total discount in absolute
figures given to it on basic price during 2007-08, 2008-09 and 2009-10. The
Commission notes that total discount during this period given to the JV during the period was as under:

<table>
<thead>
<tr>
<th>Discount / Rebate</th>
<th>Schott Glass (I) Pvt. Ltd.</th>
<th>Schott, Germany</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2007-08</td>
<td>2008-09</td>
</tr>
<tr>
<td>Target</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>Functional Bonus</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>Bonus</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>Others</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>Total</td>
<td>XXX</td>
<td>XXX</td>
</tr>
</tbody>
</table>

9.74 Thus, during the year 2008-09, the JV was given a discount of Rs. XXX and during 2009-10 the discount given was Rs. XXX Crore. In comparison, the combined profit before depreciation and tax during the year 2008-09 of major 12 converters other than the JV was around Rs XXX Crore, more than discount given to the JV. In such a situation, when the combined profit of all major converters in the market is less than the discount given to the JV, Commission observes that the converters would not be in a position to sustain in the market in the long run since their margins are under severe stress.

9.75 The Commission also observes that the profit before depreciation and tax of the JV during 2008-09 was about Rs. XXX Crore and during 2009-10 it was Rs. **XXX crore**, while discount given by the OP and related entities was to the tune of Rs. XXX Crore and Rs. **XXX Crore** respectively, about half of the total profit.
Thus, the arguments of the OP that the profitability of the JV is more since it is efficient in comparison to other converters does not hold good.

9.76 The Commission further observes that in order to strengthen its position in both upstream and downstream market, the OP has taken steps to reduce competition both in upstream as well as downstream market. In the downstream market, Kaisha Manufacturers before formation of JV was the market leader and therefore, the OP formed a JV with it to strengthen its position in that market. If the margins of the converters are squeezed to a level that they find it difficult to survive, then they may also opt to become a part of the overall business structure of the OP. The OP had tried to form JV with other converters also under its overall business strategy. In this regard, the Commission finds the statement of Managing Director of Klasspack Pvt. Ltd. before the DG relevant:

“Q.18 Has Schott ever offered to you to form a joint venture with them or do you have information of any such offer to any other converters? Why do you think they chose Kaisha over the others?

Ans. Around 2003-04 Schott Germany had expressed their interest in a JV with Klasspack alongwith other converters namely, Kaisha Tube Glass and Aegis. We believe that these companies were shortlisted in terms of their business share with Schott Glass Tubing Division as well as other factors such as capacity, infrastructure and market share. As per our understanding we believe that Kaisha was the largest company in the sector with consumption infrastructure exceeding 3200 tons of tubes per annum (the threshold to justify investment for a furnace or tank for production of glass tubes)
along with the required financial muscle power that could have posed competition to Schott in tubing segment. Probably, by putting up a JV with Kaisha, Schott has taken care of its potential competitor.”

9.77 The Commission notes that the Competition Act, 2002 prohibits both discriminatory pricing as well as conditions imposed by a dominant enterprise for sale of its products. The Robinson Patman Act (1936) in the US also makes it unlawful for a seller “to discriminate in prices between different purchasers” of the same products “where the effect of such discrimination may be to substantially lessen competition.”. Further, according to Article 82 (c) of the EC Treaty, if a dominant firm applies “dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at competitive disadvantage”, it is considered an abuse of dominant position. Thus, in other jurisdictions as well discrimination has been considered bad that entails establishment of (i) dissimilar treatment to equivalent transactions and (ii) fulfillment of the conditions that competition is harmed or is likely to be harmed.

9.78 The Commission in the backdrop of the foregoing has carefully considered the arguments of the OP that Schott Kaisha and other converters are not similarly placed and since Schott Kaisha-JV is its major customer, it is giving more discounts to it as an incentive. After giving due consideration to the contention of the OP, the Commission observes that giving favourable discount to a customer who is providing more business may not be anti-competitive provided there is no harm caused to competition in the market. In the instant case, however, the OP is charging different prices to different
customers for the same and equivalent product in terms of quality and other characteristics. The price of tubes for the JV has been fixed under Long Term Tubing Supply Agreement by the OP. Due to this arrangement, the JV will always be getting price benefits over other converters even if it does not get any target or functional discount. While price for tubes has increased as has been reported by DG for other converters, since signing of Long Term Tubing Supply Agreement it has remained the same for the JV. Therefore, dissimilar conditions of sales have been imposed by the OP for equivalent transactions between JV and other converters. In addition to price benefit, the OP is not only giving enhanced quantum of discount to the group JV in comparison with the other converters, but is also applying dissimilar conditions for giving such discounts. All these factors are giving competitive edge to the JV over other competitors in the downstream market which is reflected in their declining profit margins. The margins of other converters in downstream market vis-à-vis the JV have also gone down considerably over the years.

9.79 All relevant evidences and information gathered by the DG with respect to the implementation mechanism and details of actual disbursement of target discount have also been examined by the Commission. The converters in their statements have claimed that the OP had been behaving in favour of a set of buyers and discriminating against the others through various means, target discount being one of them. Whereas, the OP, in their submissions, averred that no differentiation was made amongst similarly placed customers.

9.80 The Commission on analysis of available materials on record has found that there were instances when the disbursals of the discount were not as per
the declared discount schedule. Similarly placed buyers in terms of volume purchased in a given year were found to have been granted different rates of target discount. The Supply Agreements also bind the converters to purchase tubes only from the OP. The conditions in the functional discount policy followed till 2010, particularly debarring the use of Chinese tubes raises serious competition concerns. The revised functional discount policy read with TMLA, Marketing Support agreement also has potential to cause competition concerns in both upstream and downstream relevant market as has been brought out in previous paras.

9.81 The relevant products in the instant case being differentiated in terms of price and quality or technical parameters, restriction by the dominant supplier on use of any other quality variant of tubes or a class of tubes such as Chinese impose restriction on consumer choice. Therefore, the Commission observes that policy of discount pursued by the OP has impaired the competitive ability of converters leading to a weaker competitive market structure in the downstream containers industry. The Commission also notes that it is not that the discount structure read with other polices of OP is designed to meet competition since the OP is a dominant player in the upstream market and its related concern i.e. JV, Schott Kaisha is also a leader in downstream market. Rather it appears to be with a purpose to maintain dominance of the OP and its JV in both the upstream and downstream markets. It could be due to this strategy that the informant has gone out of the upstream market and the market share of Nipro-Triveni which was xx% in upstream market is reduced to xx-xx% as per replies submitted before DG. Further, the margins of converters have also gone down considerably and if the impugned
discriminatory discounts continue, the competitive structure in downstream market would also be impaired.

9.82 The Commission observes that in other jurisdictions such a discount policy of a dominant enterprise which has exclusionary and exploitative effect has been severely condemned. The Court of First Instance of EU in case of Manufacture française des pneumatiques Michelin v Commission, (Michelin II), [T-203/01] has observed that quantity rebates not based on cost efficiencies are not economically justified and is discriminatory arising out of abuse of dominant of an enterprise within the meaning of Article 82(c).

9.83 The Commission observes that target discounts as such should normally be embedded in efficiency and economies of scale of an enterprise which is commanding a position of dominance. It may be a case that increase in the quantity supplied may result in lower overall costs for a dominant supplier which it will pass on to its customers in the form of a more favourable discount. However, while giving enhanced discount under favourable conditions to JV, cost does not appear to be a key consideration for the OP. Since the price has already been fixed and determined for supply of tubes to the JV under Long Term Tubing Supply Agreement in comparison to other converters, cost incurred by the OP for supply of tubes to JV appears to have no bearings upon the price. Consequently, it cannot be said that the discount to the JV is linked with the cost efficiency with regard to the production of the tubes. Moreover, if a discount scheme which spells out such criteria that effectively bind the customers to obtain supplies from a dominant player during a year for availing a higher discount and which is more favourable to the JV of that dominant player as in this case, is not benign for competition.
9.84 The Commission in this regard notes that in Portuguese Airports [Case C-163/99] the European Commission had adopted a decision establishing that the undertaking was in breach of Article 86 read in conjunction with Article 82 in respect of a system of discounts on landing charges at the airports of Lisbon, Oporto, Faro and the Azores. Discounts were offered to airlines according to the number of flights that landed at Portuguese airports. The European Court of Justice (ECJ) in this case ruled that the rules for calculating the discounts must not result in the application of dissimilar conditions to equivalent transactions contrary to Article 82(2) (c).

9.85 Further, target discounts coupled with fidelity rebates i.e. discounts offered as a counterpart of a commitment from the purchaser to place all or most of its orders to the seller granting the rebate like functional discounts as in the instant case, be they large or small, shall become a potent horizontal exclusionary device aimed at foreclosing competition.

9.86 The decisions of European Commission and judgments of ECJ involving fidelity rebates have condemned them as abusive conduct of dominant enterprise within the meaning of Article 82(c). In Hoffmann-La Roche [85/76, ECR[1979]-461] the dominant company had granted rebates to a number of purchasers, as a counterpart to the commitment from the purchasers to acquire all or most of their vitamins or certain vitamins from Hoffmann-La Roche. The Commission held that these contracts, on the one hand, had a horizontal effect by distorting competition between vitamins producers and, on the other hand, had a discriminatory effect in that they applied dissimilar conditions to equivalent transactions.
9.87 Bearing in mind the construct of the upstream and downstream relevant market(s) and the nature of competition among the converters, having done a comprehensive analysis of the qualitative and quantitative evidences, the Commission arrives at a conclusion that the discount policy of the OP is both unfair and discriminatory and is violative of provisions of section 4(2)(a) (i) and 4 (2)(a)(ii) of the Act, which prohibits any dominant enterprise from imposing directly or indirectly unfair or discriminatory conditions and prices in sale of goods.

Sub-Issue 3 : Whether the aforesaid policies of OP are exclusionary and limit and restrict the market in violation of provisions of section 4(2) (b) (i) and are also causing denial of market access in terms of section 4(2)(c) of the Act?

9.88 The Commission on the basis of aforesaid analysis notes that the discount policies of the OP coupled with the Trade Mark Licence Agreement, Supply Agreement and Marketing Support Agreement attempt to bind the converters to procure glass tubes only from it. The statements of converters recorded before the DG show that they are wary of signing TMLA since it puts restrictions on them to purchase tubes from any other source, even if TMLA does not have an express provision of exclusivity of dealing with the OP.

9.89 The Commission observes that the aforesaid acts of the OP to ensure that the converters do not switch over to the other suppliers in upstream market including imports, limits the overall market of tube glass and is violative of provisions of section 4(2)(b)(i) of the Act, which prohibits a dominant enterprise from engaging in any practice which limits or restricts the market.
9.90 The Commission also observes that the discount policies of the OP have exclusionary effect as discussed in preceding paras. The converters in their statements before DG have brought out that the OP restrains them from using any other glass tube and threatens to stop supplies if they do so. In order to buttress their contention on this point, details have been submitted by Kishore Industries to show that supplies to it were stopped since it had agreed to take up job work for Strides Arcolabs Limited, a pharma company who was importing tubes from sources other the OP. The Commission also observes that the functional discount policy read with TMLA bind the converters to promote tubes of the OP only for availing functional discount. This has an exclusionary effect on the competitors of the OP in upstream relevant market since if the conditions imposed by the OP are followed by all the converters, it would be difficult for the competitors of the OP to get customers for their products.

9.91 However, at the same time, the Commission does not find that the aforesaid acts and practices of OP deny access to some essential facilities due to which the other upstream manufactures are not in a position to make entry in the market, as not only imports are taking place in some measure but Nipro-Triveni has also made entry in the market, albeit with relatively smaller market share. Therefore, although there is a case against the OP of indulging in acts and practices which limit the market and also that discounts of the OP have exclusionary effects, it cannot be said that the actions of the OP have led to denial of access to the upstream market to other players as has been alleged by the informant and established by the DG.
Sub- Issue 4: Whether the OP has leveraged its position of dominance in relevant upstream market of neutral USP-1 glass tubes to enter into or protect the relevant downstream market of containers, i.e., ampoules, vials, dental cartridges and syringes made out of ‘Neutral USP-1 Borosilicate Glass Tubes? 

9.92 As has been brought out in para 9.69 above, Profit before depreciation & tax of JV, Schott Kaisha has increased considerably since 2008 when it was formed. The OP has argued that profitability of Schott Kaisha must be seen with reference to its efficiency and also to the past performance of Kaisha Manufacturing Private Limited. However, in this regard, the Commission notes that prior to formation of JV, the profit before depreciation and tax of Kaisha Manufacturing Private Limited were very low (xxx in 2007-08), as compared to the period when JV was formed and became fully operational (it was xxx % in 2008-09 and xxx % in 2009-10). In fact the Profit before depreciation and tax of Kaisha before JV was never as impressive as after the formation of JV in 2008. Thus, the rising profits of Schott Kaisha, JV cannot be solely attributed to the efficiency and past performance of Kaisha Manufacturing Private Limited.

9.93 The Commission notes that as discussed in foregoing paras, the JV is getting favourable treatment on account of discounts from the OP. In addition, the price of tubes for JV is also different and lower as compared to other converters. As discussed in earlier paras of this order, as per Long Term Tubing Supply Agreement entered into by Schott AG with the JV, the price for supply of tubes to Schott Kaisha had to remain at static for xxx years (i.e. up
to xxx). In its reply before DG, Schott Kaisha has also submitted that since xxx there has been no price increase in supply of tubes.

9.94 After xxx, the percentage price increase which Schott applies regularly for other customers in the Indian market was to be applied to Schott-Kaisha as well. However, the basis for the increase in price was to be kept as on xxx, instead of xxx as in case of other converters. During the period after the formation of JV, DG has reported that there has been about xxx % rise in price of the tubes of the OP for the other converters. Thus, the OP, having position of dominance in upstream market, with its Long Term Tubing Supply Agreement with Schott Kaisha, its vertically integrated firm, has ensured that competitors of the JV do not have a level playing field.

9.95 The Commission notes that Schott Kaisha, being the JV of Schott, has been given preferential treatment over the other converters in ensuring uninterrupted supplies of the required sizes of the glass tubes to it. This has been a cause of major complaint against the OP by the converters before DG.

9.96 The Commission finds it relevant to take note of clause (5) under the heading no.3, ‘Deliveries, Payment Terms and Prices’ of the Long Term Tubing Supply Agreement, which stipulates that ‘In supplying products to customers in India Schott will give priority to Kaisha’. Thus, the OP is under obligation to make supplies to its JV, which is not available to other converters.

9.97 In his statement before the DG, Mohan Joshi, President of SCHOTT Glass India (the OP) has stated that there were difficult times in 2008 & September
2010 when it was not able to make timely supplies to its customers. However, even during such times pharma companies sourcing their supplies from Schott Kaisha were assured of timely deliveries. The statement is indicative of the fact that in making supplies, the JV is given preference over the other converters.

9.98 The Commission also finds statements of the converters before DG relevant in which it is confirmed that they face interruptions in supplies while JV is assured of regular and uninterrupted supplies.

Reply of Anil Kumar Gupta of Adit Containers

‘5. Have you ever been a victim of Schott’s so called abusive conduct? What do you really mean by abusive conduct?

Ans. Yes, we have suffered because of curtailment of supplies despite being a big purchaser of SGI and a very prompt pay master. We were suppliers of vials to Shanta Bio Tech and Kaisha wanted to enter in Shanta to make supplies. To get us in line, our tubing was suspended by SGI so that we supply at the same prices as Kaisha (a higher price) and also to demonstrate to Shanta that it is better to buy from Kaisha if they want to have continuous supply of Schott tube made product. ....... Also our converting business for Strides Arcolab Ltd. had to be cancelled on account of threats from Schott which did not allow us to undertake job work of conversion for tubes imported by Strides from NEG Japan as this would have meant lower cost of procurement for strides which was otherwise buying from Kaisha at significantly higher prices. We were forced to withdraw in the matter on account of fear of stoppage of supplies of tubes from SGI which would have adversely affected our business....’.
Reply of Kishore Industries

‘M/s. SCHOTT Glass India Pvt. Ltd. has insisted us to sell our product at a particular price to M/s. Biocon Ltd. (Bangalore) and M/s. Strides Arcolab Ltd. (Bangalore) since their joint venture company was also supplying to these Pharmaceutical companies. As all this was verbal communication no correspondence can be produced.

‘...SCHOTT Group has always been trying to eliminate competition of tubing by various means since their inception in our country. Thereafter, they are also trying to eliminate competition of ampoules and vials by favouring their Joint Venture Converter Company. Also on many occasions they have stopped our supplies on various pretexts such as:

(a) Accepting Job work of Strides Arcolabs Ltd.
(b) Offering samples of Vials manufactured by other tubing.
(c) Prices offered to Pharmaceutical Companies.
(d) Using any other tubing.
(e) Not giving the list of our customers.
(f) Not disclosing the prices of our customers.
(g) Not signing their Licence Agreement in which penalty of Rs.7.0 million was imposed on us. ----”

9.99 Certain e-mails exchanged between the OP and Kishore Industries on the issue of interruption in supplies have also been placed on record. In this connection, the replies of Dr. Anil Aggarwal of Mak Ampoules and Sandeep Khemka of ISGI also indicate that the OP and its other group concerns are promoting JV at the expense of other converters.
9.100 The OP has also ensured that the prices of containers in downstream market are maintained. On record, there is an evidence in form of a meeting convened by the OP on 01.08.2008 at Hotel Sea Princess (Juhu) in which issues regarding coordination of prices by the OP which a converter could offer were discussed. A copy of the letter inviting the converters for the said meeting, which has been sent by then GM of the OP, Shri Rakesh Srivastava, has been enclosed by converters. The letter reads as under:

‘Dear Sir,

All leading manufacturers of ampoule and vials are in a very critical situation. They have been experiencing huge increase in the prices of production inputs like tubing, gas, oxygen, electric, etc. To discover approach to serve Pharmaceutical companies better, you are invited to participate in meeting at Hotel Sea Princess (Juhu) at 6.00 PM on 1st of August 2008. The meeting will be followed by cocktail dinner. Please make yourself available to participant in the meeting.

Best Regards,

Rakesh Srivastava’

9.101 The deliberations in the meeting as stated by various converters before DG show that the OP was trying to coordinate the prices which a converter could offer to the Pharma companies.
Statement of Shri Anil Kumar Gupta, Managing Director of Adit Containers Pvt.Ltd

‘14. Please refer to Annexure-16 & 17 of your reply wherein, the converters were called by Shri Rakesh Srivastava, DGM Sales and Marketing of Schott Glass India Pvt.Ltd., on 1-8-2008 for discovering approach to serve Pharmaceutical companies better. What happened in this meeting?

Ans. In this meeting the converters were asked to disclose the names of the customers of their products alongwith the prices at which the supplies were being made to the Pharma companies. They were told that no one else will enter the Pharma companies where each of us was making supplies respectively. However, all of us were directed to make supplies only at prices dictated by SGI / Kaisha which was higher than the prices prevailing then. The joint venture of Schott Kaisha was just about to be operationalized then. Therefore, we were restricted from expanding our customer base. It can be seen from Annexure-17 of our reply that the Kaisha reserved for itself virtually the whole of the Pharmaceutical market and also allowed some of its favoured converters like Tube Glass, Klasspack to have a greater share than warranted by their operations. We had to agree under duress as this was a time of short supply of glass tubes, Kapoor’s tubing business had been shut, and we had no option but to agree to the terms of SGI to survive in the business.’
(ii) Statement of Dr. Anil Aggarwal, Managing Director, M/s Mak Ampoules Pvt. Ltd.

‘10. There was a meeting of converters organized by Shri Rakesh Srivastava of SGI at Hotel Sea Princess (Juhu) on 1.8.2008 on the issue of pricing of the product. Could you tell briefly as to what was discussed in the said meeting?
Ans. Firstly, Mr. Rakesh Srivastava of SGI stated that he wanted to prepare a data of all Pharmaceutical companies using ampoules/vials with respective name of converters supplying in that company. He then suggested that no converter should approach another converter’s customers and should stick to their respective customers as per the data sheet prepared in that meeting. He also stated that in case another converter’s customer is approached by us, then we have to first take the rate from the existing converter and not quote below the same.

12. Has the above direction of SGI been complied by you in particular and the other converters in general?
Ans. I had to comply with the above stated diktat as along with the same, they had issued threat to discontinue my supply in case I did not abide by the same. It is my belief that under the threat of stoppage of supplies all the converters have complied with the directions of the SGI as stated above.’

(iii) Statement of Shri Krishan Mehra, Partner, M/s Kishore Industries

‘11. Please refer to Annexure-XVI of your reply wherein, the converters were called by Shri Rakesh Srivastava, DGM Sales and Marketing of Schott Glass India Pvt. Ltd., on 1-8-2008 for discovering approach to serve Pharmaceutical companies better. What happened in this meeting?
Ans. In this meeting Schott India asked all the converters (approximately 20) to give the names of their customers (Pharma companies) to which they are supplying ampoules and vials along with the rates at which the said supplies are being made. In this meeting Mr. Kairus S. Dadachanji, the current MD of Schott Kaisha, was also present and this was prior to the JV of Schott India and Schott Kaisha. All the information collected in this meeting has been passed on to Schott Kaisha and the same is used against the converters who were forced into parting with commercially sensitive information under fear of Schott India. We have experienced that the purchase officers of the Pharma companies have been made to understand by Schott India that converters other than Schott Kaisha are using substandard raw materials and that their supplies from Schott India shall not be consistent. As a result many of the Pharma companies have switched over to Schott Kaisha for their procurement in preference to the other converters.

9.102 Although the aforesaid statements of the converters pertain to the year 2008 before formation of JV, at the same time, these statements show that there was an attempt by the OP to get information of customers just before the formation of JV, which could be with a view to helping the JV in building up its business as has been alleged by the converters. The informant has also submitted transcripts of recorded conversation of meetings in 2010 with the representatives of OP, Schott group and converters in which prices of downstream market were discussed.

9.103 The Commission on the basis of aforesaid observes that it is evident that conduct of OP, who is in a dominant position in the upstream relevant
market of tubes, has contributed to the lessening of level of competition in the
downstream market in the favor of Joint Venture, the Schott Kaisha. The
Commission accordingly holds that the said act on the part of OP together with
other group concerns attract the provision of Section 4(2)(e) of the Act, which
stipulates that no enterprise will use its dominant position in one market to
enter into or protect other relevant market.

Sub-Issue 5: Whether the OP has engaged in the practice of making the sale
of amber tubes contingent upon converters buying clear tubes from it in
contravention of provisions of section 4(2)(d) and any other provisions of
section 4 of the Act?

9.104 As per allegations of the informant and findings of DG, the OP leverages
its monopoly in the amber segment of glass tubes to ensure full line
enforcement of its products on the converters. The Commission notes in this
regard that some of the converters like Kishore Industries, Adit Containers and
Mak Ampoules have stated in their replies that they are forced to meet their
entire requirements from the OP only, failing which they would be barred
from getting supplies from the OP.

9.105 The OP has denied this allegation in its defence dated 10.09.2010 stating
that only 3 out of the converters examined by the DG have raised this
allegation and further no documentary evidence has been produced to bring
out that it makes the sale of amber borosilicate glass tubes contingent upon
the converters purchasing clear borosilicate glass tubes.

9.106 The OP has further submitted that DG has also reported that its glass
tubes are far more superior in quality to those of other manufacturers and its
tubes are seen to be more reliable in making supplies to the converters. Given these facts which clearly indicate a preference by the converters to its tubes, it is inconceivable why it would make supply of its amber tubes contingent upon purchasing it clear glass tube.

9.107 The Commission has gone through various contentions of the parties and documents made available on record and notes that one of the converters, Shri Krishan Mehra of Kishore Industries in his statement before DG, as has also been relied upon by DG while drawing conclusions, has stated as under:

‘...............They would also insist on purchasing NGC tubes from them even when we required only NGA tubes from them......’

9.108 The informant in its summary of oral submissions dated 10.10.2011 has also produced a letter by the OP to one Adarsh Industries in which it has been mentioned;

"We have announced some quantity based discount scheme for neutral glass tubes, but you can’t avail quantity base discount. As per our policy decision that scheme is applicable only on mix purchases of clear and amber tubings only."

9.109 The letter is dated 18.08.1999, however, it still has evidentiary value which is evident from replies dated 04.11.2011 of the OP to the questionnaire of the Commission on the issue of justifications for bundling discounts on the amber and clear tubes. In the said replies, the OP has inter-alia submitted;
"... both NGC and NGA tubes are manufactured on the same (older) production tanks. Therefore, the output of both NGC and NGA is based on the same production tanks. The functioning of the production tanks on a continued and stable basis requires a stable demand for both NGC and NGA glass tubes. Ensuring a stable demand for both these varieties of glass tubes has always been a challenge for it. It is for this reason, that the NGC and NGA have been marketed jointly and with common incentives for its customers."

9.110 On the basis of aforesaid, the Commission observes that it is an undeniable fact that both the products are tied and marketed together and bundled discount is given to the customers on them. The Commission also notes that given that the OP has market share of around 90% in NGA and Fiolax Amber, enjoying virtual monopoly over these segments, it has the power to leverage sale of the amber tubes contingent upon sale of clear tubes. While the dark Amber tube is imported, light shade variety preferred by pharma companies is produced only by the OP since this shade cannot be imported as they do not match the requirements of pharma companies. Further many converters have replied like Indian Scientific Glass Industries (ISGI) that it is not commercially viable to import the entire requirement of Amber Tubes due to major difference in price. The statements of the converters that the OP leverages such power in the amber segment to enforce sale of clear tubes finds further force when seen along with the TMLA and overall discount policy of the OP, which makes it clear that the OP through its policy of bundled discount forces the converters to procure both the products from it.
9.111 The Commission further notes that the OP in its replies dated 04.11.2011 in the context of rational of its discounts policy to meet out competition, has stated that Nipro-Triveni, another player in the market is having sufficient know-how and resources to manufacture NGA tubes and now also has commenced manufacturing Amber tubes.

9.112 The Commission on the basis of foregoing observes that the policy of the OP to market both the products jointly with common incentives appears to be designed with a view to protecting its dominance in the upstream market. It is the pressure from the potential manufacturers which forces it to bundle its products for discounts as a measure of quantity forcing which in a way reduces the demand for products of rival competitors by giving incentives to the converters to get their entire requirements from the OP only. As a dominant player, the OP will seek to maximize its revenues by selling two products together by providing bundled discounts on them- one, on which it exercises near monopoly and the other product in which there are competitors in the market, since that would lead to more and additional units of both the products being sold in the market.

9.113 The Commission holds that conduct of the OP violative of provisions of section 4(2)(d) of the Act which states as under:

4(2) There shall be an abuse of dominant position under sub-section of an enterprise or a group if enterprise or group
d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of such contracts.

9.114 The Commission observes that the conduct of the OP is abusive because the converters are obligated to purchase Amber Tubes along with Clear Tubes in order to avail discounts in violation of provisions of section 4(2)(d) of the Act. Further, through this act, the OP is also imposing unfair conditions of sales of tubes which make converters to procure both kinds of tubes from the OP to avail common discount, which is violative of provisions of section 4(2)(a) of the Act. While delineating relevant market(s) in the case, the Commission has considered upstream neutral clear glass market as distinct from upstream neutral amber glass market. In amber tube glass market, the OP enjoys a position of near monopoly while in clear tube glass market, there is some degree of competition due to the presence of since Nipro-Triveni in market and due to imports in some measure. Thus, through the act of bundling discounts on both the products, the OP in fact is protecting the market of neutral clear glass tubes by using its position of near monopoly in neutral amber glass tubes market, which is violative of the provisions of section 4(2)(e) of the Act which prohibits an enterprise from using its position of dominance in one relevant market to protect other relevant market.

9.115 The Commission holds that the impugned act of the OP is anti-competitive with a view to exclude rivals by selling both NGA (a near monopoly product) and NGC together and offering combined discount on them to converters. If the converters seek purchase of the two products
together from the competitors of the OP, they might be able to match the discounted price of OP in the market of NGC only and may not be able to compensate the converters for the loss of discount on NGA, since it is the OP which has a near monopoly on it. As a result, the competitors, even if efficient in other respects but who makes only NGC may not be able to compete on equal footing with the OP in the market. Bundling a near monopoly product with one that has potential of facing or has some degree of competitive forces working on it may result in the overall competition in the market being distorted.

**Sub- Issue 6 : Whether the OP has refused to deal with informant as has been alleged, denying market access to it and if yes, has the OP contravened the provisions of section 4 (2) (c) of the Act?**

9.116 The Commission notes from the information available on record that earlier the informant was engaged in the business of making borosilicate glass tubes as well as glass ampoules made out of those tubes. The informant has alleged that it was forced to go out of the business of manufacturing borosilicate glass tubes in 2008 due to anti-competitive practices of the OP and now it is engaged solely in the business of manufacturing glass ampoules and other containers. It has also been alleged by the informant that the OP had stopped supplies to the informant as early as 2001 which was not resumed even after the informant exited the tube manufacturing business in 2008.

9.117 The OP in its defence has submitted that given the previous attempts of the informant to intentionally infringe Schott’s trademarks and to fraudulently
market borosilicate glass tubes manufactured by it as borosilicate glass tubes manufactured by the OP, it is reluctant to supply its borosilicate glass tubes to the informant. The OP has also contended that a party cannot be forced to supply its products to a person who has by previous actions shown disregard for the intellectual property rights of such party and has in fact attempted to defraud through misrepresentation, other players in the vertical supply chain. It has also been argued that there are other manufacturers in the market apart from Schott Glass India and its refusal to supply Borosilicate Glass Tubes to informant does not affect its ability to manufacture ampoules.

9.118 The OP in support of its arguments also produced a copy of an order for printing fake labels of ‘NGC Schott’ and ‘Made in India by Schott Glass India Pvt. Ltd,’ under the signature of Director, Kapoor Glass (the informant), in view of which OP purportedly blacklisted the informant and decided not to enter into any supply arrangements with it.

9.119 The informant has contested the stand taken by the OP and has stated that Schott India refused to deal with it vide its letter dated 05.04.2001, whereas the incident of alleged attempt of infringement of Schott’s trademark is of 29.7.2002. Thus, it has averred that there is no correlation between Schott’s refusal to deal with the informant and the alleged incident.

9.120 The informant has further explained its conduct in the matter relating to use of labels of OP by stating that it used to procure glass tubes from Bharat Glass/Schott India to make ampoules for such customers who wanted ampoules made out of Bharat Glass/OP’s tubes as they had stabilized their
formulations with such tubes. However, when OP refused to supply tubes to the informant, it was forced to procure its tubes from other ampoule makers, who had excess stock of such tubes, in order to retain its customers in the market for ampoules. Those ampoule makers however decided to supply Schott tubes to it on ‘no names’ basis and after removing the labels in order to avoid getting noticed by Schott. The informant has also stated that Schott’s last supply of glass tubes to it was on 12.10.2000 for an amount of Rs. 5,47,140.

9.121 The informant has also stated that in order to make supplies to Ranbaxy Laboratories Ltd. in the year 2002, which wanted ampoules made from Schott India tubes, it had procured Schott India tubes from Adit Containers Pvt. Ltd., who supplied the tubes vide invoice no. 000038 dated 04.07.2002 after removing the labels of OP. The informant has also submitted a copy of the excise invoice and extract of excise record for supplies made by Adit Containers to the informant and also a letter dated 29.09.2010 from Adit Containers confirming the said position.

9.122 According to informant, as per the industry practice, Ranbaxy wanted to inspect its manufacturing plant before accepting ampoules from it. While it had been able to procure tubes of OP from Adit Containers, the said tubes did not carry labels of OP. It has also stated that any attempt by it to convince Ranbaxy that the tubes which did not bear Schott India labels were indeed Schott India tubes was likely to be treated as ‘passing off’ of another quality of tubes which would have resulted in cancellation of the orders and future long term business from one of its most important customer.
9.123 It has submitted that in order to pre-empt the situation wherein genuine tubes manufactured by the OP could be construed by the customers as different quality tubes, it was forced to take the extreme step of getting the labels printed but for the limited purpose of affixing them to such tubes which were authentic ‘Schott-India’ tubes.

9.124 On the basis of the facts of the case as above, the Commission observes that the initial act of refusal to supply by the OP to the informant had taken place well before 20.05.2009, the date of notification of the provisions of section 4 of the Act. Normally the alleged competitive act that had taken place before the notification of enforcement provisions would not be liable for inquiry within the ambit of section 4 of the Act unless the impugned act continues to take place even after that. In the instant matter although the act of refusal goes back to the pre-notification period, since the same continues as on date as has been alleged by the Act, the Commission deems it necessary to deal with this issue.

9.125 In this regard, on a careful consideration of the facts of the case, The Commission observes that there are contesting claims by both the parties as regards alleged fraudulent usage of Schott Labels and products by the informant as discussed in foregoing paras. However, from records it is evident and also accepted by the informant that it has indulged in affixing labels of the OP without its authorization, although it has also submitted that such usage was only in respect of the products of the OP and not its own products.

9.126 Based upon aforesaid, the Commission observes that the OP was therefore within its rights to stop supplies to the informant in order to protect
its trademarks. The Commission further observes that a manufacturer or a supplier is not obliged and cannot be forced to supply its products to an entity which has used its name and labels without its prior permission in past.

9.127 In light of foregoing, the Commission does not find merit in the allegations that the conduct of the OP in refusing to deal with the informant was or is to purposely deny access to its products in order to impose restrain on the ability of the informant to compete in the market. Consequently, the OP cannot be held guilty of contravening provisions of section 4(2) (c) or any other provisions of the Act.

Sub- issue 7 : Whether the OP has indulged in the practice of predatory hiring of employees of the informant and if yes, can the practice be called inconsistent with the requirements under section 4(2)(e) of the Act? Further, can this act be said to be violative of provisions of section 4 (2)(b)(i) since it is limiting and restricting the ability of the informant to produce goods as alleged by the informant?

9.128 The informant has alleged that the OP tried to destabilize it by pursuing a policy of predatory hiring of its key personnel who were operating the high speed imported lines of the informant and also by hiring of its managerial staff. It has furnished a list of about 50 employees who were hired by the Joint Venture Company, namely, Schott Kaisha Pvt. Ltd. The informant has also brought out that its unit located approximately 200 Km. away from Schott Kaisha was targeted for hiring of the employees and there was no such hiring from the factories of the other converters located within 15-20 Km.
9.129 The informant has further alleged that this act of predatory hiring of employees of the informant by the OP is also violative of provisions of section 4(2)(b)(i) since this act has limited and restricted its ability to produce goods. Further, this act of the OP is also violative of provisions of section 4(2)(e) of the Act since it seeks to protect the downstream ampoules market in which it is operating through JV by using its dominance in upstream tube market in violation of provisions of section 4(2)(e) of the Act.

9.130 As regards the allegation of predatory hiring, the OP has denied the same and has also submitted that the Indian Competition Act does not recognize the concept of predatory hiring. It has submitted a list of 30 employees who moved out of the informant from the period March 2003 till February 2010 and joined Kaisha on their own accord, due to better terms and conditions of employment being offered. It has further stated that inability of the informant to retain its employees cannot be blamed on another employer that offers better terms and conditions of employment.

9.131 The Commission notes that DG has found the allegation of predatory hiring as unsubstantiated. The Commission, in this regard, observes that there is no doubt that there are evidences on record which show that the employees of the informant including some key personnel have indeed joined Schott Kaisha, a fact which has not even been disputed by the OP. However, the Commission feels that such a movement is normally observed across industries. Labour as one of the factors of production is free to move from one enterprise to another to earn better remuneration and gains and such a movement cannot per se be called anti-competitive. Further, the provisions of
the Indian Competition also do not expressly consider and provide for such movement as an abusive practice on part of a dominant enterprise.

9.132 In view of the above, the Commission concludes that the movement of employees from the informant to OP and Schott Kaisha cannot be attributed to an abusive conduct on the part of the OP in contravention of any of the provisions of section 4 of the Act. The issue as such does not raise any competition concern in the relevant market.

10. Order under Section 27 of the Act

10.1 The Commission has found OP in contravention of various provisions of section 4 of the Act. Its acts and conduct have adversely affected competition on the relevant market(s) delineated in the instant case. Due to unfair and dissimilar discounts of the OP, the converters in the downstream market have been impacted adversely and their margins have also declined.

10.2 As a dominant player in market, there was special onus on the OP to ensure fair competition in the market. Due to the abusive acts and conduct of the OP, the small converters are not able to compete on equal footing with Schott Kaisha, Joint Venture of the Schott group.

10.3 In view of aforesaid, the Commission decides to impose penalty on the OP for its act of distorting competition in the market. Taking into account anti-competitive effects arising out of its conduct in the relevant market(s) in India,
the Commission feels that ends of justice would be met if penalty at a rate of 4% on the average of three years turnover of the OP is imposed as under:

<table>
<thead>
<tr>
<th>Turnovers of SGI</th>
<th>2007-08</th>
<th>Rs. 115.86 crore</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2008-09</td>
<td>Rs. 153.22 crore</td>
</tr>
<tr>
<td></td>
<td>2009-10</td>
<td>Rs. 155.29 crore</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>Rs. 424.37 crore</strong></td>
</tr>
</tbody>
</table>

**Average of Three years Turnover** Rs. 141.46 crore

Penalty at rate of 4% on Average of three years Turnover Rs. 5.66 crore

10.4 In addition, the Commission also deems it fit to issue following cease and desist order;

a) The OP should desist from applying dissimilar conditions while giving discounts to Schott Kaisha vis-a-vis other converters.

b) The terms of transactions for supply of tubes to Schott Kaisha, the JV should be similar and non-discriminatory vis-a-vis the other converters.

c) The discount on both Amber and Clear Tubes should not be contingent upon sale of each other.
10.5 The Commission also directs that penalty amount as determined above should be deposited within 60 days of receipt of this order. Further, compliance to the directions in para 10.4 above must be reported within three months of receipt of this order.

11. The Commission decides accordingly.

12. The Secretary is directed to send a copy of the order to the parties in terms of the relevant provisions of the Act and the Regulations made thereunder.

Sd/-
Member (AG)

Sd/-
Member (T)

Sd/-
Member (G)

Certified True Copy

SANJEEV KUMAR
Asstt. Director (C.S.)
Competition Commission of India
Government of India
New Delhi

02/07/2012