CHAPTER 4.

ANALYSIS OF THE CASES DECIDED BY COMPETITION COMMISSION OF INDIA RELATING TO HEALTHCARE INDUSTRY

4.1 INTRODUCTION

The Indian health care industry has been a subject of scrutiny of the Competition Commission of India ever since its establishment. Various aspects of the healthcare industry have been under inquiry before CCI relating not only to anti-competitive agreements but also other aspects of competition law like abuse of dominance and combinations. In the present chapter, the researcher has attempted to bring together in a concise manner the cases filled before the CCI either based on information provided by an informant or *suo motu* relating specifically to anti-competitive practices and agreements which are covered under Sec 3 of the Competition Act, 2002. Some cases discussed below were transferred from Monopolies and Restrictive Practices Commission to Competition Commission of India after the MRTP Act was repealed.

In this chapter the researcher has analysed sixteen cases pertaining to the Indian healthcare industry. These cases for the sake of brevity have been categorised in three parts based on the similarity of facts and issues determined in each of them. The purpose of this analysis is threefold, one that there is a consolidation of the cases dealt by CCI relating to the concerned industry, second, to understand the vantage point from which CCI and COMPAT have been interpreting the Indian competition law in case of healthcare industry and third, the impact or effects of CCI/ COMAT’s orders in changing the conduct/behaviours within the healthcare and more specifically healthcare delivery services. This, the researcher believes will assist in understanding the evolving competition law jurisprudence in India along with plugging the gaps in the existing legislative framework or its implementation.

Cases have been analysed into the following three categories:

1. Issues pertaining to ‘No Objection Certificate, Product Information and trade margins alleging violation of Sec 3 at the hands of various Chemists and Druggists Associations in India

2. Hospital exclusivity contract and violation of Sec 3

3. Health Insurance companies allegedly involved in bid rigging and cartelization in violation of Sec 3 of the Competition Act.

4.2. ISSUES PERTAINING TO ‘NO OBJECTION CERTIFICATE, PRODUCT INFORMATION AND TRADE MARGINS ALLEGING VIOLATION OF SEC 3 BY VARIOUS CHEMISTS AND DRUGGISTS ASSOCIATIONS IN INDIA

4.2.1 VARCA DRUGGIST & CHEMIST CASE\(^3\)

Facts/Background

The case was initiated on the basis of a complaint filed by Varca Druggist & Chemist before the Monopolies & Restrictive Trade Practices Commission\(^4\) alleging that the defendant Association along with its members constituted by Chemists, druggists, distributors, stockists and retailers were indulging in restrictive trade practices. The informant alleged that the defendant Chemist & Druggist Association, Goa had issued various guidelines which its members were bound to abide by. These guidelines include anti-competitive practices relating to appointment of stockists/wholesaler by a pharmaceutical company only from those who were already a member of CDAG, making stockists who were not a member ineligible for being appointed. Further, CDAG mandated ‘No objection certificate’ (NOC) issued by it for such appointments. CDAG had also put in place restrictive conditions for the appointment of third, fourth or fifth stockists along with a maximum limit of five stockists to be appointed by any company. In case a company appoints a new individual or firm who possesses all the qualifications without obtaining this NOC, CDAG threatens it with punitive actions along with boycott.


\(^4\) MRTP Act, supra note 2 at 140
After CDAG had submitted its objection, the MRTP Act, 1969 was repealed and the case was transferred to the Competition Commission of India under Sec 66(6) of the Competition Act, 2002. Forming a *prima facie* case the Commission referred the matter to the Director General (DG) for further investigation. The DG found CDAG practices anti-competitive. CDAG filed its reply to the DG Report. Subsequently, CCI ordered a Supplementary Report to be submitted by the DG.

**Issues**

Based on the reports by the DG and the evidence on record, CCI determined following issues:

(i) Whether the information could be examined under the provisions of the Competition Act, 2002?

Regarding issue number one, CDAG contended that most of the issues in the case were relating to Unfair Trade Practices which after the MRTP Act, 1969 was repealed were dealt by the National Consumer Commission under the Consumer Protection Act, 1986. Hence, the Commission according to CDAG was not empowered to direct the Director General to investigate the matter under Sec 26(1) of the Competition Act, 2002. Therefore, the investigation Report of DG according to the defendant was of no effect in the case as the Commission had exceeded its jurisdiction. CDAG further contended that any act committed during the currency of MRTP Act, 1969 could not be called in question under the Competition Act, 2002 and that the provisions of MRTP Act, 1969 would only be applicable to proceedings which were instituted under the Act before the commencement of the Competition Act, 2002. Since the complaint was received by the Commission in July, 2009 and the Competition Act came into force on October, 14th, 2009, the complaint should be treated and disposed off as per the provisions of MRTP Act, 1969.

This preliminary objection was rejected by the Commission stating that the position in this regard had already been cleared by the Delhi High Court in the case of *Interglobe Aviation ltd v Competition Commission of India*⁵. The Commission further stated that even where the alleged anti-competitive conduct was started before Sec 3 and 4 came into force, the Commission had the jurisdiction to look into such conduct if it continued even

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⁵ W.P.(C ) 6805/2010
after the enforcement of the relevant provisions of the Act. This was the position laid down by the Hon’ble High Court of Bombay in the case of *kingfisher Airlines ltd v Competition Commission of India & Ors.* Since, the continuance of enforcement of the guidelines of CDAG and agreement amongst the members of CDAG which have been shown to have anti-competitive effect, the case would be covered by the Competition Commission of India.

The Commission after settling the issue of jurisdiction went on to consider the issue of trade margins. As per the Drug Price Control Order (DPCO), 1995, the trade margins for scheduled drugs is fixed at 16% for a retailer and in case of non-scheduled/ non price controlled drugs, the trade margins has to be determined for the wholesalers and the retailers operating in the pharmaceutical market through an agreement between the trade associations and the pharma industry. The fact that MOU between AIOCD, OPPI and IDMA highlighted in the DG Report led to determination of trade margins even on the sale of non scheduled drugs, the Commission came to a conclusion that trade margins were fixed not on the basis of DPCO.

(ii) If affirmative, then whether the conduct and practices of CDAG were anti-competitive and in violation of Sec 3 of the Act?  

The Commission while deliberating the issue considered whether CDAG was an ‘enterprise’ under the Act. Since the constituent members of CDAG were stockists and retailers of pharma companies who were engaged in the supply of pharma products to the consumers, it would be considered to be an ‘enterprise’ and agreements or practices carried out by an association of enterprises engaged in identical or similar trade of goods or provision of services can be violative of Sec 3 of the Act.

The Commission in agreement to the supplementary Report of DG found various clauses such as those relating to appointment/termination of stockists by pharma companies in the MOU and guidelines framed by CDGA along with practices carried on by it to be restricting and controlling the supply of drugs. The clauses highlighted the fact that only members of association were allowed to do business of pharmaceutical drugs as wholesalers and retailers. Further, as per the CDAG guidelines without obtaining NOC

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6 LAWS(BOM)-2010-3-261  
7 Varca case, supra note 3 at 141
from CDAG ‘neither any new product could be introduced by any pharmaceutical company nor any new stockists could be appointed.’ The Commission found evidence in the MOU that if the members did not follow this procedure, then they would be either boycotted or penalized. Hence, the Commission was of view that the association had been limiting and controlling the supply of drugs by way of charging Product Information Service (PIS) without which drugs would not be introduced within Goa is violates Sec 3 of the Competition Act, 2002.

The Commission after carefully examining DG’s both initially and supplementary Reports, along CDAG MOU, minutes of the meetings, annual reports and interviews, came to a conclusion that CDAG through

Guidelines and actual conduct is able to limit supply of drugs and number of players in market, since without NOC of the Association; no person can be appointed as wholesaler or stockists at Goa. Further, if NOC in form of PIS approval is not given for pharma products the companies will not be in a position to supply drugs. The guidelines and practices of issuing NOC for appointment of a new or additional stockists in a particular territory eventually restricts the number of players in the market and in turn also limits or controls supply of drugs.

The Commission was of the view that for the purpose of Sec 3, the delineation of relevant market was not required. It also explained that once the elements constituting the violation of Sec 3 (3) of the Act have been established, the presumption regarding AAEC is triggered and the burden of proof shifts on the infringing entity to rebut that presumption referring to the factors enumerated in Sec 19(3) of the Act. The Commission analysed all the factors under Sec 19(3) and found all pro-competitive factors to be absent at the same time anti-competitive factors to be present in the case. Hence, the Commission found CDAG to have indirectly fixed sale prices and supply of pharmaceutical drugs in violation of Sec 3 of the Act.

(iii) Whether the members of the Executive Committee of CDAG were also liable for violation of Sec 3 of the Act?

\[8 \text{ Id.}\]
Regarding the third issue of whether the members of the executive committee of CDAG were responsible for anti-competitive conduct, the Commission was of the view that:

...in case of association of enterprises, called trade associations in common parlance, comprising of members which are themselves enterprises, liability for anti-competitive conduct may arise two fold. An association of enterprises may be liable for breach of section 3 of the Act embodied in a decision taken by that association, while additionally the constituent enterprise of association may be held liable for contravention of Sec 3 of the Act arising from an agreement or concerted practice between them.\(^9\)

The Commission attributed the anti-competitive decisions or practices of the association to members who were responsible for running the affairs of the association and actively participated in such anti-competitive decision or practice of the association. Under Sec 48 of the Act, individual liability of the person, in addition to the liability of the company has been made for persons who were in charge of and were responsible for the conduct of the business of the company at the time of such contravention. Associations and firms are included under this section. Hence, the Commission applied this section and was of the view that the Executive Committee of CDAG who were responsible for anti-competitive conduct of CDAG are also liable for the violation of Sec 3(3) (a) and Sec3 (3) (b) of the Competition Act, 2002.

**Decision**

The Commission passed an order under Sec 27 of the Act imposing penalty at ten percent of the average of the receipts from financial years 2008-09 and 2009-10 along with cease and desist from indulging in anti-competitive practices found in violation of Sec 3. The Commission also directed CDAG to file an undertaking that Guidelines and MOU with respect to non-appointment of a stockists or wholesalers from amongst the non-members of CDAG, requirement of NOC from CDAG as well as clauses mandating PIS approval from CDAG for introduction of drug to hospitals through authorised stockist will be done away with within 60 days of the order. The Commission also required the removal of clauses in MOU and Guidelines laying down the margins for wholesalers and retailers in non-scheduled

\(^9\) *Id.*
drugs as well as a cap on the amount of discount a wholesaler can give to the retailers within 60 days of the receipt of the Order.

4.2.2 VEDANT BIO SCIENCE CASE\textsuperscript{10}

**Facts/background**

The case was initiated on a complaint by Vedant Bio-Science, a Baroda based distributor of certain pharmaceutical companies as well seller of pharmaceutical formulations. The complainant made following allegations against Chemists & Druggists Association of Baroda (CDAB):

(i) CDAB, an unregistered body and was imposing unfair conditions in sale of pharmaceutical products of different companies.

(ii) CDAB had formulated guidelines for its members who required any person including a member to obtain permission / NOC before which he could become a stockist of a particular company.

(iii) CDAB forced the additional/new Stockist not to sell the products of a pharmaceutical company unless NOC was obtained from the existing Stockist of that pharmaceutical company operating in that area.

(iv) CDAB insisted on procuring NOC before a pharmaceutical company launched new products or appointed new Stockist. In case such NOC was not obtained, then the company was not allowed to launch new product or appoint new Stockist.\textsuperscript{11}

(v) A circular dated 02.03.2009 was issued by CDAB, wherein permission had been granted to become Stockists or take work for some pharmaceutical companies, which indicates that NOC was a must to do business.\textsuperscript{12}

(vi) CDAB is also engaged in fixing margins for pharmaceutical companies.

(vii) NOC had to be procured for several aspects like launch of new company products, appointment of new Stockist or addition of Stockist.\textsuperscript{13}

(viii) CDAB charged Rs. 2000/- per product from all companies which wanted to launch new product in the market. These charges were collected towards the advertisements in their magazine called 'Chemists News'. Price structure of each

\textsuperscript{10} Vedant Bio Science v. Chemists and Druggists Association of Baroda, MRTP Case No C-87/2009/DGIR
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
product been controlled through this advertisement and without detailed price structure; the products are not allowed to be launched.\textsuperscript{14}

The case came initially under the Monopolies and Restrictive Trade Practices Act, 1969, however, since its repeal, the case was transferred to CCI. The Commission was of the opinion that there is a prima facie case and ordered the Director General (DG) to conduct investigations.

As per the DG Report which was submitted to the CCI, evidence gathered clearly highlighted that the concerned association was not only insisting upon seeking its NOC ‘before any pharmaceutical company could appoint a wholesaler but it was also fixing trade margins for the wholesalers and there have been payments towards advertisements, donations.’ Therefore, based upon the evidence gathered, DG concluded that the circulars issued by CDAB and practices adopted by it were restrictive and anti-competitive.\textsuperscript{15}

The DG report was considered by the Commission which was of the view that further investigation into certain aspects was necessary in order to arrive at a proper conclusion. Accordingly, the Commission directed the DG to submit a supplementary report after analysing evidence on the following aspects\textsuperscript{16}:
(i). Evidence regarding the agreement, practice and decision amongst members of the alleged cartel to limit /control prices.
(ii). Evidence and data, on the basis of facts, figures and market survey, to show that the alleged cartel has actually determined the sale prices of drugs.
(iii). Further evidence, including data, in support of the finding that CDAB has limited or controlled supply of drugs.
(iv). Evidence relating to actual supply and movement of drugs in the market, the Actual margins charged at various stages of the supply/ distribution chain, the discounts, if any, given with reference to the margins laid down in the guidelines.
(V). the nexus between All India Organisation of Chemists & Druggists (AIOCD) and CDAB and specific evidence about the members of CDAB, who have participated actively in the operation of the alleged cartel.

\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
(vi). Full financial information necessary to determine appropriate penalties for AIOCD, CDAB and the Active individual members of CDAB, in case the Commission finally finds that there has been an infringement of any provision of the Act by the Associations and their members.

Issues

On the basis of issues raised by the informant, the evidence gathered by the DG and replies/submissions filled by both the parties, the Commission found the following as the relevant issues:

1. Whether the conduct and practices of CDAB are anti-competitive and in violation of Sec 3 of the Act?

For the purpose of determination of the above issue the Commission determined whether the conduct and practices of CDAB were anti-competitive and violating Sec 3 of the Competition Act which relates to anti-competitive agreements. The Commission considered S. 3(1) of the Act which prohibits and Sec 3(2) which makes void all agreements by association of enterprises or persons in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of services which cause or likely to cause appreciable adverse effect on competition within India. Hence if any agreement restricts or is likely to restrict the competition then it will be considered anti-competitive under the Indian competition law.

Further, CCI was of the view that Sec 3(3) of the Act applies not only to an agreement entered into between enterprises or associations of enterprises or persons or association of persons or between any person and enterprises but also with equal force to the practice carried on or decision taken by any association of enterprises or association of persons including cartels, engaged in identical or similar trade of goods and provision of services which has the purpose of directly or indirectly fixing prices, limiting output or sales, or sharing markets or customers. Once existence of prohibited agreement, practice or decision enumerated under s. 3(3) is established there is no further need to show an effect on competition because then a rebuttable presumption is raised that such conduct has an appreciable adverse effect on competition and is therefore anticompetitive. In such a situation
burden of proof shifts on the opposite parties to show that impugned conduct does not cause appreciable adverse effect on competition.\textsuperscript{17}

The Commission applied the section after assessing whether CDAB which being an association of wholesalers and retailers of Baroda district affiliated to the AIOCD was an ‘enterprise’ under Sec 2(h) of the Act? The Commission found the answer affirmative. The Commission was further of the view that CDAB was taking decisions relating to distribution and supply of pharmaceuticals products on behalf of the members who are engaged in similar or identical trade of goods, the practices carried on , or decisions taken by CDAB as association of enterprises was also covered within the scope of Sec 3.

Further, the Commission also pointed out that:

As one of the main elements of the determination process of anti-competitiveness, the Commission considered whether there is a nexus between CDAB and AIOCD and that CDAB follows guidelines /norms prescribed by AIOCD. The Commission agreed with the view of DG in this regard based on the statements of wholesalers and office bearers of CDAB along with the information available at the website of AIOCD, terms of agreements and MOUs between AIOCD with Organization of Pharmaceuticals Producers of India (OPPI) as well as Indian Drugs Manufacturers Association (IDMA) relating to appointment and discontinuation of stockists provided ample evidence on record to establish this fact

2. Practice of NOC

The Commission based on the evidence on record was of the view that practice of insisting upon obtaining ‘No Objection Certificate’ (NOC) by the Association for both introductions of new products as well as new stockists by any pharmaceutical company was anti-competitive. In the Report of the DG there were instances along with letters where the pharma companies had stopped the supply of drugs to wholesalers as no NOC was obtained along with a penalty being levied. The Commission also noted through various statements of medical agencies that CDAB through its practices and conduct limited and controlled the supply of pharmaceutical drugs in the market.

\textsuperscript{17} Id.
The Commission also noted from the DG report that unless a firm was a member of CDAB, it could not have any normal commercial relationship with the other members of Association, creating barriers in terms of doing business. Therefore, unless a concern became a member of CDAB, it could not transact business with other members of the Association.

The Commission drew the following conclusions in agreement with the Report submitted by DG:

(i) The guidelines and practice of issuing NOC for appointment of a new or an additional stockist in a particular territory eventually restricted the number of players in the market and in turn also limited or controlled the supply of drugs.

(ii) CDAB, through its guidelines and actual conduct was limiting supply of drugs as without obtaining NOC from the Association no Stockist is allowed to sell any new drug in the market.

(iii) The boycott of those firms which did not follow the dictates of Association and imposition of penalties on them, establish that the practices and conduct of CDAB were restrictive and anticompetitive.

The Commission was of the opinion that if the practice of NOC was done away with, it would lead to better supply of drugs. Considering the above points, the Commission concluded that the alleged practices of CDAB were anti-competitive and violative of Sec 3(3)(b) read with Sec 3(1) of the Act.

3. PIS approval

Regarding the issue of charging fees from the drug manufacturing companies for new medicines / formulation in the name of PIS on the pretext of publishing the information regarding the medicine / formulation in the Chemist News Bulletin, the Commission found that the evidence disclosed that PIS approval was given by the State Federations / State Unit of AIOCD, and therefore, the liability for the same could not be fixed upon CDAB which was a district level association.

4. Issue of trade margins

The Commission also deliberated upon the final issue relating to determination of trade margins by CDAB i.e. fixing of margins which eventually has an effect on the sale price of drugs which are non-controlled as per the DPCO, 1995. Since, in the case of such non-
scheduled drugs, trade margins would be decided by the industry itself, yet, in the present case, the trade associations such as AIOCD and CDAB as per their MOUs fix the trade margins. The Commission in this regard was of the view that the CDAB was fixing the margins for the wholesalers and retailers by enforcing the norms laid down by the AIOCD and which has the effect of determination of sale prices of drugs in the market in violation of the provisions of S. 3(3) (a) read with S. 3(1) of the Act.

**Decision**

The Commission imposed under Sec 27 of the Competition Act, a penalty at ten percent of the average of the receipts of financial years 2006-07, 2007-08 and 2008-09 on CDAB. The Commission also ordered CDAB to cease and desist from indulging in the practices which were found to be anti-competitive i.e. fixing of trade margins of pharma products, non appointment of a stockist or wholesaler from amongst the non-members of CDAB, requirement of ‘No Objection Certificate’ from the CDAB for appointment of stockist or wholesaler and limit on number of stockist of pharmaceutical companies was to be done away within 90 days from the date of receipt of the order.  

**4.2.3 SANTUKA ASSOCIATES CASE**

**Facts/ Background**

Informant, Santuka Associates Pvt Ltd alleged abuse of dominant position by the All India Organization of Chemists & Druggists (AIOCD) by way of limiting and restricting supply of pharmaceutical drugs in India. It was alleged that AIOCD performs various acts for controlling the trading policies of different manufacturing company. The informant being the sole distributor of medicines of U.S Vitamins Ltd (USV), informed several times that representatives of AIOCD were constantly threatening USV to terminate their contract with the informant and that the sales of USV’s products had already been stopped in Mumbai city with AIOCD further threatening to stop the sale in the entire State of Maharashtra if USV doesn’t terminate its contact with the informant.

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19 Id.
20 Santuka Associates Pvt Ltd v All India Organization of Chemists and Druggists, 2013 COMPLR 223 (CCI)
21 Id.
The informant made the following allegations:

1. AIOCD was abusing its dominant position by imposing unfair and discriminatory conditions which had the effect of limiting/denying market access to genuine stockists, distributors and C & FAs unless they submit to its dictates and mandates.

2. AIOCD imposed conditions which had the effect of creating barriers to new entrants and also foreclosing competition by hindering entry into the market.\(^{22}\)

3. The constant threats given by AIOCD to the pharmaceutical companies could, in no way, be said to increase the efficiency in supply, distribution or storage of pharmaceutical products in India or to be in the benefit of the various stockists or distributors or C & FAs.

4. AIOCD has been giving oral threats to various drug manufacturers to comply with their illegal demands and objectives and in the process indulged in practices resulting into denial of market access.\(^ {23}\)

5. The conditions imposed by AIOCD that no agreement by a drug manufacturing company with a stockist or a distributor or a C & FA would be entered into unless they had a ‘No Objection Certificate’ from an affiliated organization of AIOCD, was clearly an abuse of dominant position by AIOCD.\(^ {24}\)

6. The various MOU’s and agreements by AIOCD and its affiliated organizations either with the association of drug manufacturers or with individual drug manufacturers restricting the appointment of stockists by prescribing unfair conditions was illegal and contrary to the provisions of the Act.\(^ {25}\)

The Commission after making an opinion that a *prima facie* case exists, directed the Director General (DG) to investigate. The Commission also granted interim relief in favour of the Informant till the final orders in the case. The DG upon the completion of the investigation concluded that there was in existence horizontal agreement amongst the members of AIOCD. The practices such as issue of NOC for appointment of stockists, fixation of trade margins and collection of PIS charges, boycott of products of pharmaceutical companies were violative of competition provisions laid down under Sec 3(3)(a), 3(3)(b) read along with Sec 3(1) of the Competition Act.

\(^{22}\) *Id.*

\(^{23}\) *Id.*

\(^{24}\) *Id.*

\(^{25}\) *Id.*
The investigation conducted by DG also concluded that ‘the decisions amongst the members of Organisation of Pharmaceutical Producers of India (OPPI) & Indian Drug Manufacturers’ Association (IDMA) to enter into agreements and to give effect to the decisions contained in the MOUs pertaining to NOC/LOC, PIS charges, fixed trade margins also amount to an anti-competitive agreement within the meaning of S. 3(3)(a) and 3(3)(b) read with S. 3(1) of the Act.\textsuperscript{26}

\textbf{Issues}

1. Whether practice such as grant of NOC, fixation of trade margins, collection of PIS charges and boycott of products of pharmaceutical companies are a violation of Sec 3 of the Competition Act, 2002.

The Commission for the purpose of applicability of Sec 3, at first considered whether AIOCD which consists of the State Chemists & Druggists Associations was covered under Sec 3 (3) as an ‘enterprise’. AIOCD was a national level registered association of chemists and druggists affiliated to every state association. The members of AIOCD were stockists and retailers of pharmaceutical companies who conducted the business of supplying of pharma products to the consumers. They along with AIOCD according to CCI fall within the definition of ‘enterprise’ under the Act. Since the Report of DG found conduct of AIOCD, OPPI and IDMA anti-competitive the Commission examined the specific issues in detail.

NOC – As per the DG report a letter was issued by AIOCD to all pharma companies to submit application of NOC to concerned district association, which in turn would forward their recommendations to Utkal Chemists & Druggist Association (UCDA) which would issue NOC in favour of the party as recommended by the concerned District Association within seven days of receipt. The DG Report also contained certain pharmaceutical companies which had on record mentioned the requirement of NOC/LOC as per AIOCD practice to be submitted by prospective distributors from the concerned State Chemists & Druggists Associations. The Commission found this requirement arising from MOU’s between AIOCD, OPPI and IDMA to be in \textit{per se} contravention of the provisions under Sec 3 of the Act by limiting or controlling the market or supply.

\textsuperscript{26} Id.
On the issue of Product Information Service (advertisement in the Association’s bulletin), for the new products to be launched in the distribution channel, PIS approval from AIOCD or its affiliated State Association was mandated on payment of a fees. There was evidence that AIOCD had delayed or withheld PIS approval which violated Sec 3 as such practice limits or controls supply in the market.\textsuperscript{27}

The DG, in this regard, has observed that the payment of PIS charges by the pharma companies in the name of advertisement charges to the State Chemists & Druggists Associations at the time of the product launch or any change in product brand / dosage form / strength thereof in the respective PIS bulletin ensures not only deemed compliance of the law but also enables it to advertise and circulate product information to all the retailers at a very nominal cost. However, the launch of product in the market being made contingent on PIS approval by the concerned association of Chemists & Druggists sometimes results in restraint of trade and leads to denial of market access / controlling of supply / market for any product of a company which can also deprive consumers of the benefits of such drugs.\textsuperscript{28}

The Commission was also in agreement with the DG Report that boycott of the products of pharma companies due to lack of PIS approval was violative of Sec 3(3) (b) read with Sec 3 (1) of the Act.

On the issue of fixed trade margins, which was being charged based on the MOU between AIOCD, OPPI and IDMA from the pharma companies had been directly or indirectly determining the purchase or sale price of drugs in the market. The evidence submitted by various pharma companies citing the industry practice for fixing margins, which were neither being determined on a competitive basis nor allowed to fall below the agreed percentages. As per CCI’s observation, the DPCO fixed the margin of only scheduled drugs up to 16 % and no statutory obligations exists to pay specified margins for non-scheduled drugs contrary to the statements of the pharma companies.

Regarding the issue of boycott by AIOCD and or its affiliated State/District Trade Associations, the Commission after perusal of the evidence collected by DG such as

\textsuperscript{27} Competition Act, 2002, \textit{supra} note 1 at 140
\textsuperscript{28} Santuka Associates, \textit{supra} note 20 at 151
statements and letter to pharma companies for non-supply of stocks, agreed with the opinion of DG that

AIOCD and its affiliates indulge in practices of boycotting pharma companies on various issues contained in the MOU’s. In case of internal disagreements / factionalism with the association, different groups try to enforce their decisions on the pharmaceutical companies in the matter of appointment of stockist being made contingent on NOC from a particular faction, payment of PIS charges to a particular group etc. The, act of boycott either to enforce the covenants of the MOU’s or otherwise on account of internal dissentions cannot be deemed to be pro-competitive in any manner as it has the effect limiting or controlling supplies / distribution / availability etc. of drugs which causes appreciable adverse effect on competition and results in denial of the market access for the pharmaceuticals companies and non availability of drugs to the consumers.  

2. Whether OPPI and IDMA along with AIOCD were also liable for the violation of anti-competitive provision under Sec 3(3) of the Act? 

On this issue the justification offered by IDMA and OPPI was that they have not renewed their MOU with AIOCD and that the previous MOU’s stand expired. They further stated that neither OPPI nor IDMA ‘has intimated that they have issued any public statement or has even intimated their members that the MOU’s between AIOCD, OPPI and IDMA had been terminated. The Commission was of the view that OPPI and IDMA were associations of manufacturers of drugs whereas AIOCD was an association of chemists and druggists. Sec 3(3) could not be applied on them as they were not associations of enterprise who are engaged in horizontal or similar trade of goods or provision of services. Since they were entities functioning at different stages of production chain, their violation must be scrutinised under Sec 3(4) of the Act. On this issue, CCI concluded:

The Commission notes that AIOCD, IDMA and OPPI are associations of enterprises and their constituent enterprises are engaged in activities mentioned in S. 2(h) of the

29 Id.
30 Competition Act, supra note 1 at 140
Act. But, AIOCD, IDMA and OPPI themselves are not engaged in any activity mentioned in S. 2(h) of the Act and therefore, cannot be held to be "enterprises" u/s. 2(h) of the Act. Therefore, they cannot be said to be part of a vertical chain as envisaged under S. 3(4) of the Act and, consequently agreement in form of MoU does not fall under the ambit of S. 3(4) of the Act.\(^{31}\)

Hence, the Commission was of the view that associations such as IDMA and OPPI would not enter into such MOU’s with AIOCD since it will be against their very interest by limiting or restricting supply of products. They did not stand to gain by offering fixed trade margins and hence they were not liable for violation of the Competition Act.

3 Whether members of the Executive Committees of AIOCD, OPPI and IDMA were also liable for the violation of Sec 3?

Regarding whether the office bearers or the executive committees of AIOCD, OPPI and IDMA were liable for violation of Sec 3, the Commission applied the reasoning given in the Varca Druggist case that the liability for anti-competitive conduct may be two-fold i.e. The association as well as its members who were responsible for running the affairs which gave effect to the anti-competitive decisions, could both be held liable. Since there was no liability of IDMA and OPPI established in the first place, only the Executive Committee of AIOCD was held responsible.

4. The final issue before the Commission was the specific allegations against USV by the informant. Whether the conduct of USV falls foul of the provisions of the Act, as alleged by the Informant?\(^ {32}\) The Commission found nothing against USV.

**Decision**

The Commission found AIOCD guilty of violating Sec 3(3) (a) and Sec 3(3) (b) of the Act, and passed orders under Sec 27 of the Act. It imposed penalty upon AIOCD at ten percent of the average of the receipts for financial years 2008-09, 2009-10 and 2010-11 along with direction to cease and desist from indulging in practices found anti-competitive. They were

\(^{31}\) Santuka Associates, *supra* note 20 at 151

\(^{32}\) *Id.*
further directed to make an undertaking that the practices such as NOC for the appointment of stockists, fixing trade margins and collection of PIS charges should be discontinued within 60 days from the receipt of the order.

4.2.4 MS PEEVEEAR MEDICAL CASE

Facts
The informant firm was a stockists, dealer, distributors of wholesale drugs in the State of Kerala, alleged that AIOCD, which is an all India body registered under the Societies Registration Act has been abusing its dominant position by anti-competitive agreements, controlling trading policies and profit margins of different drug manufacturing companies, controlling profit margins, regulating the stockists/distributor agreement of each and every manufacturing company and recommending profit margins to all its members in the name of Product Information Service (PIS) for launch of new medicines. In case of non-compliance, it threatens to boycott the stockists. The informant also alleged that due to the lack of no objection certificate, a practice followed by AIOCD, pharma company Janssen Cilag Pharmaceutical denied supply of medicines to the informant. The informant thus alleged AIOCD used unfair and discriminatory conditions leading to the effect of limiting/denying market access to genuine distributors unless they follow the practices and conditions of AIOCD.

The Commission considered the information and supporting references and agreed to the existence of a prima facie case to direct the Director General (DG) under Section 26 (1) of the Act to cause an investigation. In the meantime the CCI also provided interim relief to the Informant by placing a stay order on the AIOCD boycott order and restricting Janssen for terminating dealership.

Issues
After examination of the DG Report, submissions by the parties along with other materials on record the Commission determined the following issues in the case:

33 Id.
34 Ms Peeveear Medical Agencies v AIOCD & Ors, In re: Case no 30/2011
35 Competition Act, supra note 1 at 140
1. Whether the actions and practices of AIOCD and its affiliated state association of Kerala (AKCDA) on the issue of grant of NOC for appointment of stockists, fixation of trade margins and collection of PIS charges and / or boycott of products of pharmaceutical companies were in violation of Section 3 of the Act?\(^{36}\)

The DG in its investigation found the requirement of NOC, PIS and or boycott to give effect to limit or control supply/market which was in contravention of Sec 3 of the Act. The opposite party Janseen argued that it was mandated by AICOD to demand NOC or else face the threat of boycott every time.

OPPI argued that - MOUs were terminated when the Competition Act was enforced in 2009 legal per advice received by OPPI. OPPI was not party to any MOUs or agreements with AIOCD after Act was enforced. Its members did not follow the practise of appointing only NOC obtained stockists nor did OPPI themselves required its members to ensure the NOC for its stockists. It further submitted further that PIS though a legitimate system allowing companies to pay a nominal fee while launching a new product in the market and is an efficient manner to comply with the requirements of the Drugs and Price Control Order (1995); however it was grossly misused by the AIOCD. The risk of boycotts and delays force the pharmaceutical companies to adhere to this practice. Even after termination of MOUs, stockists compel pharmaceutical producers to maintain uniform trade margins in the market. The DG, according to CCI had comprehensively failed to show that there was an agreement to limit supply or fix prices amongst pharmaceutical producers acting through OPPI. While the margins for the wholesalers are determined by the DPCO producers were free to offer any rate of trade margin for distribution of non-scheduled drugs. OPPI had incorporated the practice of fixed margins in order to allow for a reasonable trade of margin for non-scheduled drugs, which was unregulated, unlike scheduled drugs.\(^{37}\)

AIOCD argued that their practice of MOU was as per the Mashelkar Committee recommendations and DPCO and hence, not violative of Sec 3. Regarding the issue,
CCI was of the opinion that AIOCD created a restraint on trade through the practice of No Objection Certificate (NOC), Product Information Service (PIS) and boycott were in violation of Sec 3(3) (a) and Sec 3(3) (b).

2. Whether OPPI and IDMA were also liable for violation of Section 3(3) of the Act along with AIOCD as the practices pertaining to NOC/ LOC, PIS, fixed trade margin etc. followed by their members were arising out of the various agreements between AIOCD, OPPI and IDMA?^{38}

DG in its Report was of the opinion that the failure to issue public statement regarding termination of MOU by OPPI and IDMA ‘and their continued adherence by their tacit and implied conduct’ was a *per se* contravention of Sec 3(3) (b)^{39} and Sec 3(1) of the Act.^{40} However, IDMA as OPPI submitted that it was against their interest being associations of pharmaceutical producers to enter into the MOUs and that they had been terminated with directions issued to all their members to refrain from the practice of NOC requirement. They therefore, submitted that they were wrongly implicated. CCI observed that AIOCD, OPPI and IDMA were not engaged in similar trades and hence the provisions of Sec 3(3) were not applicable to OPPI and IDMA. Further, it found the pharma companies to be victims of arm twisting and boycott by tactics by AIOCD.

The OPPI, IDMA and its members appear to be victims of the exploitative tactics of AIOCD and their conduct of entering into MOU with AIOCD should not be treated at par with the conduct of the AIOCD. Therefore, IDMA and OPPI cannot be held liable for violation of the provisions of the Act.^{41}

3. Whether the members / office bearers of the Executive Committees of AIOCD, AKCDA, OPPI and IDMA were also liable for violation of Section 3 of the Act?^{42}

Regarding the third issue, CCI relied on its pervious decision in the *Varca Druggist* case where it had explained the liability for anti-competitive conduct to be two fold in

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^{38} Id.
^{39} Competition Act, supra note 1 at 140
^{40} Id.
^{41} Ms Peeveear Medical Agencies, supra note 34 at 157
^{42} Competition Act, supra note 1 at 140
case of enterprises comprising of entities and the office bearers who were responsible for the affairs of the company which were anti-competitive could be made responsible for the contravention of the provisions of the Act.

**Decision**

Order by the majority- The CCI identified AIOCD as the apex body exercising suo-motu regulatory and executive actions to govern the sale of drugs, without any mandate either under law or from its members. This allowed it to control and restrict the supply of pharmaceutical products in the market and influence the prices of drugs, which was anticompetitive in nature and required stringent action. The CCI, therefore, directed the AIOCD to cease and desist in following the anticompetitive practices i.e, specifically discontinuation of PIS and NOC within 60 days of the order.

Further, AIOCD was to issue a letter to OPPI and IDMA informing no requirement of NOC and to inform all Chemists, Druggists, members and associations that PIS charges could be availed voluntarily and that they were free to give discounts to the customers. Besides passing these orders the CCI imposed a penalty of 10% of the average annual turnover of the financial years 2008-2009, 2009-2010 and 2010-2011.

**Separate Orders**

Other than the decision by the majority, two separate orders were passed by Justice (Retd) S.N.Dhingra, one of the presiding members of the case. First order found AIOCD and its affiliate/s guilty of acting as a cartel basis its specific actions and directions to members, for fixing margins in violation of S. 3(3) of the Act. This order also determined office bearers culpability, interpreting S.48 of the Act to argue that since the definition of a ‘Company’ did not include individuals working for associations/firms constituting the culpable company, office bearers in this instance could not be made liable. It also imposed 10% penalty on the average turnover of the constituent members of associations (like AIOCD) that didn’t have

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44 Competition Act, *supra* note 1 at 140
revenues or maintained balance sheets. In the second order the member agreed with the majority finding on the value of PIS, but did not find the practice to be anticompetitive. Fixing margins and PIS charges were found to have not resulted in price fixation and therefore not violating the Act. But the order found OPPI and IDMA guilty of Sec 3(1) as opposed to the majority order.

4.2.5 In Re: M/S Sandhya Drug Agency Case

Facts
The informant, a wholesaler and supplier of various pharmaceutical companies filed the information through its partner against Assam Drug Dealers Association (ADDA), Barpeta Drug Dealers Association (BDDA), All India Organisation of Chemist and Druggists (AIOCD) and Alkem Laboratories, a drug manufacturing company. The informant alleged abuse of dominance by them.

According to the informant, ADDA and BDDA in collusion with AIOCD via letter directed Alkem to stop the supply of products to the informant. As per the Informant, BDDA a trade body which manages the distribution and supply of drugs in district Barpeta, Assam and enjoyed a dominant position in the distribution and supply of drugs in the aforesaid district. Further, BDDA was affiliated to ADDA which in turn was affiliated to AIOCD, thus, AIOCD enjoyed a dominant position in the distribution and supply of drugs in India. The Informant also alleged that ADDA was a trade body which manages the distribution and supply of drugs in the state of Assam and enjoys a dominant position in the distribution and supply of drugs in the state of Assam. The Informant had further alleged that Alkem was acting in terms of the directions passed by AIOCD, ADDA and BDDA and had violated the provisions of Section 4 of the Competition Act, 2002. The Commission after being of the view that there was a prima facie case directed DG to investigate into the matter and submit a report.

46 In Re: M/s Sandhya Drug Agency v. Assam Drug Association & Ors ,Case no 41 of 2011
47 Id.
Issues

1. Whether the actions and practices of AIOCD, and its affiliated State Association of Assam, i.e. ADDA and District Association of Barpeta i.e. BDDA on the issue of grant of NOC for appointment of stockists, fixation of trade margins and collection of PIS charges and / or boycott of products of pharmaceutical companies were in violation of Section 3 of the Act?\textsuperscript{48}

DG in its report concluded that the act and conduct of ADDA and BDDA were in concert with AIOCD which amounted to horizontal anti-competitive agreement. The Commission was of the opinion that for the applicability of Sec 3, it is crucial to see whether the three associations are covered under the category of entities enumerated under Sec 3(3)\textsuperscript{49}. It found that AIOCD, ADDA and BDDA fall within the definition of ‘enterprise’. Further, the Commission looked into the evidence submitted in the DG report including various letters issued by the associations on the manner of appointment of stockists. It also noted various letters collected by DG which were issued by BDDA contained terms of the business guidelines and rules for retail Chemists and Stockiest/Wholesalers the requirement of NOC/LOC for appointment of new stockiest. The Commission rejected AIOCD’s view that the practice of NOC had evolved to prevent entry of spurious quality drugs purchased from unauthorised sources. Thus, the Commission agreed with the conclusion of DG that the conduct of AIOCD and its affiliates i.e. ADDA and BDDA in the matter of grant of NOC attracted the provisions of Section 3(3) (b) read with Section 3(1) of the Act.\textsuperscript{50}

On the issue of PIS, DG had observed that ADDA grants PIS approval in the name of Product Advertisement Service. The pharma companies had to obtain PIS approval from the respective State Chemists and Druggists Associations affiliated to the AIOCD before they could introduce new products in the market. PIS approval entailed payment of prescribed charges for the purpose of publication of the product information in the PIS bulletin which was published State wise. The pharmaceutical companies and manufacturers associations on record had also stated before the DG that payment of PIS charges were mandatory for introducing new drugs in the market.

\textsuperscript{48} M/s Sandhya Drug Agency, supra note 46 at 161
\textsuperscript{49} Competition Act, supra note 1 at 140
\textsuperscript{50} Id.
In absence of this payment, no new products were allowed to be introduced in distribution channel. The DG, concluded that any attempt on the part of the members of AIOCD and or its affiliates to delay or withhold any PIS approval on any ground which limited or controlled supply or market thereof had to be treated as a kind of boycott, thus attracting the provisions of Section 3(3) (b), read with Section 3(1) of the Act.

After considering DG’s report on this aspect, the Commission looked into the previous matter of Varca Druggist & Chemist v. Chemist & Druggist Association of Goa, and also Santuka Associates v AIOCD & Ors, where the Commission was of the view that similar contention raised by AIOCD were flawed and contrary to scheme and provisions of the Act as for finding contravention under Section 3, the delineation of relevant market was not required. Hence, the justifications forwarded by ADDA in this regard were considered not tenable.

On the issue of fixed trade margins the DG, had observed that the pharmaceutical companies paid trade margins to the members of the wholesalers and retailers in terms of the MOUs between AIOCD, OPPI and IDMA. The Commission also noted that as a result of the above said industry practice the trade margins were not being determined on a competitive basis nor were allowed to fall below the agreed percentages. The Commission, in this regard further noted that while the margin of 16% for retailer is fixed for scheduled (controlled) drugs in terms of Para 19 of the DPCO, for non-scheduled drugs there was no statutory obligations to pay any specified margins either to the retailers or to the wholesalers in the DPCO.

ADDA, submitted on its behalf that the price of the drugs (scheduled and non-scheduled) was fixed under DPCO 1995 and the trade margin was fixed by the government authorities and formed a part of the MOU between AIOCD, OPPI and IDMA. ADDA had therefore, no say in the matter of fixation of trade margins. AIOCD on the issue of fixed trade margins contended that NPPA regulated the

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51 M/s Sandhya Drug Agency, supra note 46 at 161
52 Varca case, supra note 3 at 141
53 Santuka Associates, supra note 20 at 151
54 M/s Sandhya Drug Agency, supra 46 at 161
55 Id.
fixation and revision of prices of bulk drugs and formulations and also monitored the 
prices of both controlled and decontrolled drugs in the country through the provisions 
of the DPCO. As per AIOCD, till then no complaint had been made before the NPPA 
for any violation of the DPCO. The Commission observed that the arguments of both 
ADDA and AIOCD\textsuperscript{56} were incorrect since the margin for scheduled drugs had only 
been fixed as per the DPCO and for non-scheduled drugs there was no statutory 
obligation to pay any specified margins.

The Commission was, therefore of the view that there was no reason to disagree with 
the DG’s observation that the agreement to give fixed trade margins to the 
wholesalers and the retailers had the effect of directly or indirectly determining the 
purchase or sale prices of the drugs in the market and the said conduct of AIOCD, its 
constituents and affiliates fell within the mischief contained in Section 3(3) (a) of the 
Act.\textsuperscript{57} It stated, ‘there could be no denying to the fact that had there been no fixed 
trade margins, competition amongst the retailers would have forced them to reduce 
their trade margins resulting into sale of drugs at prices even below the MRP to the 
retailers or to the wholesalers.’\textsuperscript{58}

2. Whether OPPI and IDMA were also liable for violation of Section 3(3) of the Act 
along with AIOCD as the practices pertaining to NOC/ LOC, PIS, fixed trade margin 
etc. followed by their members were arising out of the various agreements between 
AIOCD, OPPI and IDMA?

Regarding the second issue DG concluded that as the conduct of AIOCD and its 
affiliates, i.e., ADDA and BDDA was emanating from the various MOUs signed 
between the AIOCD-OPPI IDMA, the decision amongst the members of OPPI & 
IDMA to enter into tripartite agreements between the AIOCD, OPPI & IDMA and to 
execute the decision contained in the MOUs pertaining to NOC/ LOC, PIS, fixed 
trade margin also amounted to an anti-competitive agreement within the meaning of 
section 3(3)(a) and 3(3)(b) read with section 3(1) of the Act.

\textsuperscript{56} Id.
\textsuperscript{57} Competition Act, \textit{supra} note 1 at 140
\textsuperscript{58} M/s Sandhya Drug Agency , \textit{supra} 46 at 161
The Commission keeping aside the issue of anti-competitive practices by OPPI and IDMA considered whether Sec 3(3) was applicable to them in the first place in the present scenario. Since OPPI and IDMA were associations of manufacturers of pharmaceutical products whereas, on the other hand, AIOCD was an association of chemists & druggists. Further, Section 3 (3) of the Act captures anticompetitive agreements amongst the entities engaged in identical or similar trade of goods or provision of services. It was apparent that AIOCD, OPPI and IDMA were ‘not entities engaged in identical or similar trades of goods or provisions of services.’ Therefore, the Commission was of the view that the MOUs between AIOCD, OPPI and IDMA could not be examined for violation under Sec 3(3) (a) and Sec 3(3) (b) of the Act.\(^59\)

In view of the above discussion the argument advanced by these associations that they were compelled to maintain fixed trade margins by AIOCD under the threat of boycott appeared to the Commission to have some force. Therefore, the Commission was of the view that the OPPI, IDMA and its members appeared to be victims of the exploitative tactics of AIOCD and their conduct of entering into MOU with AIOCD could not be treated at par with the conduct of the AIOCD. Therefore, IDMA and OPPI could not be held liable for violation of the provisions of the Act.

3. Whether the members / office bearers of the Executive Committees of AIOCD, ADDA, BDDA, OPPI and IDMA were also liable for violation of Section 3 of the Act?

The Commission reiterating its interpretation of Sec 3 in the case of Varca Druggist case and Santuka case, held that in case of association of enterprises comprising of entities which themselves were enterprises, liability for anti-competitive conduct may arise two fold i.e. of the association of enterprise and the constituent enterprise of association may also be held liable. Therefore, members who were responsible for running the affairs of the association in giving effect to the anti-competitive decision. Office bearers of OPPI and IDMA were not held liable. The Commission passed a separate decision in this regard.

\(^{59}\) Id.
Decision

The Commission gave the following orders: 60

a. Cease and desist orders for engaging in anti-competitive practices.

b. The AIOCD, ADDA and BDDA were directed to file an undertaking that the practices carried on by their members on the issue of grant of NOC for appointment of stockists, fixation of trade margins, collection of PIS charges and boycott of products of pharmaceutical companies have been discontinued within 60 days from the date of receipt of this order.

c. AIOCD was to issue a letter to the OPPI, IDMA and to Alkem that there is no requirement of obtaining an NOC for appointment of stockists and the pharmaceutical companies, stockists; wholesalers are at liberty to give discounts to the customers.

d. Imposed penalty at the rate of ten percent of the average of the receipts for financial years 2008-09, 2009-10 & 2010-11 on AIOCD, BDDA and ADDA

4.2.6 IN RE: M/S ROYAL AGENCY CASE 61

Facts/ background:

The informant was a distributor of medicines in the State of Goa. It was appointed by M/s Franco (opposite party) as one of the distributor of its drugs in Goa. Chemists & Druggists Association (CDAG) was a State level association in Goa. M/s Franco stopped the supply of the products to the informant under the alleged influence of the Chemists & Druggists Association Goa. It was further alleged that this was done because the informant refused to become a member of the Association and did not obtain ‘No Objection Certificate’ (NOC) from the Association for carrying on the business in Goa. The Commission formed a prima facie opinion and directed Director General (DG) to cause an investigation into the matter. DG found CDAG guilty of anti-competitive practices.

Issues

On the basis of the Report submitted by the DG, the Commission set the following issues:

Issue 1: Whether the allegations levelled by the Informant regarding stoppage of supplies by M/s Franco were substantiated by the evidence available on record?

60 Id.
61 In Re: M/S Royal Agency v. Chemists & Druggists Association, Goa and M/s Franco –Indian Pharmaceuticals Pvt Ltd , Case no 63 of 2013
In the DG Report, invoices were provided of the supply of medicines to the informant against two purchase orders dated 12.07.2013 and 18.07.2013. Thereafter, no supply was made by M/s Franco to the Informant but supplies were resumed only in December 2013. Thereafter, regular supplies had been made by M/s Franco to the Informant. The Commission was of the view:

After analysis of the statements made by the above mentioned witnesses examined by the DG and the surrounding circumstances, the Commission is of the considered opinion that there was a short break in the regular supplies to the Informant by OP-2. However, this fact alone is not conclusive to fix the liability of OPs under the provisions of the Act.

Issue 2: Whether such stoppage of supplies by M/s Franco to the Informant was on account of directions/diktats issued by Chemist & Druggist Association in contravention of Section 3(3) read with section 3(1) of the Act?

The stoppage of supplies by M/s Franco to the Informant took place for a period of few months i.e. from July 2013 to December 2013. This stoppage, as alleged by the Informant, was on account of directions/diktats issued by CDAG to M/s Franco not to deal with the Informant as it was not a member of the Association. Further, it had also been brought on record since M/s Franco resumed supplies to the Informant during the period of investigation itself; the Informant had requested the Commission to close the proceedings. To the Commission it appeared that the matter pertained primarily to single instance of stoppage of supplies.

The Commission therefore found no competition issue in the instant case. The Commission was of the view that the evidence on record was insufficient to hold CDAG liable for the discontinuation of supplies to the Informant under the provisions of the Act.

Issue 3: Whether the conduct of the M/s Franco is in violation of section 3 of the Act?

Commission found no evidence placed on record which showed that there was an agreement or understanding of some sort between M/s Franco and its distributor.

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62 Competition Act, supra note 1 at 140
Decision

The majority members of the Commission based on the evidence and material available on record, found no contravention of the provisions of section 3 of the Act by the opposite parties. Accordingly, the Commission decides to close the matter.63

Mr Augustine Peter, member of the Commission gave a dissent note where he agreed with the conclusion of the DG Report. He further stated that

..to the case that despite previous orders of the Commission declaring certain practices as anti-competitive, there is some kind of pressure exerted by CDAG, the OP1 Association on the OP2 that gets manifested in the latter’s disposition as reflected in its submission cited above and its behaviour viz. decision to stop supplies of drugs and medicines without assigning any reason and allegedly on the sole reason of non-procurement of NOC/not being member of OP1 Association. Statement of OP2 to the effect that it is willing to supply drugs to the informant but is not willing to fuel any misunderstanding with the CDAG, the OP1 Association, portrays the extent of threat prevailing in the mind of OP2 with respect to the behaviour of OP1.

He stated further:

Based on the above discussion, I have no doubt that the requirement of the Act of in terms of indirect evidence against OP1 as regards continued practice of NOC requirement and PIS is well satisfied in this case. There is indirect evidence confirming that the OP1 Association played a role in limiting and controlling the provision of services/supply of drugs and medicines in Goa by insisting on NOC, thereby contravening the provisions of Section 3(3) (b) read with section 3(1) of the Act. Not only is the NOC practice going on but PIS also continues. The evidence available passes the test of ‘strong probability’ (recognised by COMPAT).64

In his dissenting order, the member, therefore, found the Chemist & Druggist Association, Goa to be limiting and controlling the provision of services/supply of drugs in Goa

63 M/S Royal Agency, supra 61 at 166
64 Id.
contravening Sec 3(3) (b) read with Sec 3(1) of the Act. He also found M/s Franco to be indulging in anti-competitive practices violating Sec 3(4) (d) read with Sec 3(1) and Sec 19(3) of the Act. A penalty at ten percent of their average income for the previous three financial years was also imposed.

4.2.7 **IN RE: COLLECTIVE BOYCOTT/REFUSAL TO DEAL BY THE CHEMISTS & DRUGGISTS ASSOCIATION CASE**

**Facts**

The present case comes in the aftermath of another case decided by the CCI *M/s Varca Druggist & Chemists*. In it CCI had found Chemists & Druggists Association, Goa in contravention of Sec 3 of the Competition Act and had passed an order under Sec 27 of the same. The informant in the present case was also one of the informant in the Varca case informed the Commission that CDAG had not complied to the order of the Commission and that under the guidance of CDAG all stockists of M/s Wockhardt have formed a cartel and boycotted receiving its goods so as to compel it to stop its dealing with the informant. On this information, the Commission took *suo- motu* cognizance of the allegation and asked the DG to cause an investigation into the matter.

Based on the evidence in the form of minutes of the Executive Committee (EC) meetings of CDAG, emails exchanged between the Opposite Parties and the Informant, details of supplies made by M/s Glen mark Company and M/s Wockhardt Ltd to the Informant, the Memorandum of Understanding (MOU) signed between Glen mark and the Informant, the agreement executed between Wockhardt and the Informant *etc.*, collected during the course of investigation, DG was of the view that CDAG provided ‘a platform for anti-competitive conduct and it controls the supply chain through which drugs and medicines are made available in the market.’ It also found CDAG coerced Wockhardt to stop supplies to the informant thereby limiting and controlling supplies in the market of drugs and medicines in contravention of Sec 3(3) (b) read with Sec 3(1) of the Competition Act.

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65 *In Re: Collective boycott/refusal to deal by the Chemists & Druggists Association, Goa (CDAG), M/s Glen mark Company and, M/s Wockhardt Ltd*, *Suo- Moto Case* no 05 of 2013

66 Varca case, *supra* note 3 at 141

67 Competition Act, *supra* note 1 at 140

68 Collective Boycott case, *supra* note 65 at 169

69 Id.
DG further concluded that based on the minutes of different EC meetings of CDAG, it had no intention of comply with the order of CCI in the previous case.

Deliberations in the EC meetings of CDAG were indicative of the continuing control exercised by CDAG on the supply chain of drugs and medicines through the practice of requirement of LOC (Letter of Cooperation)/NOC (No objection Certificate) for appointment of stockists by pharmaceutical companies. Such conduct of CDAG was found to be in contravention of the provisions of Section 3(3) (b) read with section 3(1) of the Act.  

**Issues**

On the basis of various materials available on record, the Commission decided the following issues in the present case:

1. Whether the practices of CDAG amount to continued contravention of Section 3(3) read with section 3(1) of the Act in violation/non-compliance of the order of the Commission dated 11.06.2012?

The Commission agreed with DG report that evidences highlight CDAG disregard to the earlier order by the Commission and continue anti-competitive conduct by forcing pharmaceutical companies to discontinue supply through non-authorised stockist such as the informant. Further, the meeting dated 31.08.2012 showed that CDAG was imposing its decision on members on the issue of LOC/NOC. Minutes of the meeting dated 11.01.2013 show that CDAG was trying to find ways of evading the Commission’s order and was threatening to take action against any of its members who would dare to go against its diktat. The EC meeting dated 16.05.2013 further showed that CDAG was indulging in collective boycott and was seeking to enforce its decision regarding ‘bandh’.

The Commission further observed that CDAG coerced Glen mark as clearly visible from the e-mails exchanged between CDAG, the Opposite Party No. 2 and the Informant. Pursuant to the coercion of CDAG only, the Opposite Party No. 2 suspended supplies through the Informant. It further directed the Opposite Party No. 2 and other members to route all supplies through appointed stockists only. It may be noted that none of the above stated

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70 Id.  
71 Id.
emails was disputed by CDAG or the Opposite Party No. 2. Therefore, Commission had no doubt that the CDAG was controlling the supply chain through which drugs were made available to the consumers in the market; in complete disregard of Commission’s order dated 11.06.2012. The Commission thus recognised the failure of CDAG to comply with its order and continuance of anti-competitive practice in contravention of Sec 3(3) (b) read with Sec 3(1). On the issue of individual culpability and penalty of the office bearers, the Commission refrained from dealing with it.

2. Whether the conduct of the Opposite Party No. 2 and Wockhardt was in violation of section 3 of the Act?

DG was of the view in its report that since Glen mark and Wockhardt were drugs manufacturing companies, the agreement between CDAG and the manufacturing companies did not fall within the ambit of Sec 3(3) and Sec 3(4) of the Competition Act. The Commission agreed with this conclusion and that there was no agreement between the two drug manufacturers in regards to suspension of supplies to their appointed institutional stockist. The Commission deliberated upon whether the act of the Opposite Party Nos. 2 & 3 of suspension of supplies through the Informant and thereafter routing of supplies through their other appointed stockists could be construed as an agreement between the Opposite Party Nos. 2 & 3 and their respective appointed trade stockists which falls within the purview of section 3(4) of the Act, as existence of an agreement was a *sine qua non* for establishing contravention under section 3 of the Act.

However, as per the DG report that though the Opposite Party No. 3 had appointed the Informant as its institutional stockist for the company's Super Specialty Division (SSD) in July, 2011, supplies were made to him only twice in the months of July, 2011 and April, 2012. Further, the DG concluded that the conduct of the Opposite Party No. 3 in suspending supplies to the Informant can be construed to be an agreement between the Opposite Party No. 3 and their respective trade stockists in contravention of the provisions of section 3(4) (d) of the Act. The Commission was of the opinion that mere non-dealing with the Informant for a short span of time under the coercion of CDAG could not be construed as an agreement

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72 Id.
73 Competition Act, supra note 1 at 140
74 Collective Boycott case, supra note 65 at 169
between Opposite Party No. 3 and their appointed stockists as per section 3(4) of the Act. Accordingly, the Commission was of the view that the Opposite Party No. 3 was not liable under the under section 3(4) (d) of the Act.

Decision

The Commission directed CDAG to cease and desist from indulging in the practices which were found to be anti-competitive under Sec 3 of the Act. As regard the penalty under Sec 27 of the Act, CCI found it apparent that CDAG had completely disregarded the order of the Commission dated 11.06.2012. By continuing anti-competitive conduct in spite of specific directions against it, CDAG had shown utmost disrespect to the Commission’s mandate. Further, absolutely no mitigating factor was shown by the parties and none was borne out from the records. Therefore, the Commission imposed a penalty of ten percent on CDAG of its receipts based on the financial statements filed by them which was to be deposited within sixty days of the receipt of the order.

4.2.8 IN RE: M/S ROHIT MEDICAL STORE CASE

Facts

Informant alleged that the Opposite Parties were engaged in anti-competitive practices of imposing the condition of obtaining ‘No Objection Certificate’ (NOC) prior to the appointment of stockists in the state of Himachal Pradesh. Earlier the Monopolies and Restrictive Trade Practices Commission (MRTP Commission) passed an order in Cases No. 93/2008 and 102/2008 and held that seeking NOC prior to the appointment of stockist was anti-competitive and directed Himachal Pradesh State Chemists & Druggists Association to inform the same to all its members. However, Himachal Pradesh State Chemists & Druggists Association changed its name to Himachal Pradesh Society of Chemists and Druggists Alliance (HPSCDA) in order to avoid the compliance of the said directions of MRTP Commission. Informant, in the present case, alleged that President of HPSCGA was continuing the proscribed conduct in complete disregard of the directions issued earlier by

75 Competition Act, supra note 1 at 140
76 Id.
77 In Re: M/s Rohit Medical Store v. Macleods Pharmaceutical Ltd and Ors, Case no 78 of 2012
78 Id.
compelling the pharmaceutical companies to obtain NOC from the HPSCA prior to the appointment as stockist in the state of Himachal Pradesh⁷⁹.

The informant further alleged that Macleods Pharmaceuticals offered to appoint it as one of its stockists. The informant finished all the formalities except the NOC from HDSCDA which was a required document by the pharma company. Informant deposited rupees four lakhs with the pharma company placing an order for the products; however they were not delivered even after placing another order. It is alleged to have been revealed by the Clearing and Forwarding Agent (CFA) of the Pharma Company Macleods that in the absence of NOC from HPSCGA, the ordered products were undelivered. In order to establish this allegation, Informant had placed on record an audio CD purported to contain recorded telephonic conversation⁸⁰ between Macleods and the president of HPCDA in this regard.

The informant also alleged similar denial of stockist ship by M/s FDC Ltd for non submission of NOC from HPCDA. Further the Informant in case of M/s Cipla Ltd alleged that it had made the informant stockists of only one division inspite of repeated requests. This was according to him was also done due to the want of NOC from HPCDA.

The Commission formed a *prima facie* opinion that HPCDA was in violation of Sec 3(3) (b) read with Sec 3(1) of the Competition Act, hence ordered an investigation by the Director General (DG) which concluded that HPCDA was limiting or controlling the supply of drugs and medicines in Himachal Pradesh by dictating requirement of NOC for appointment of stockist in contravention of section 3(3) (b) read with section 3(1) of the Act.⁸¹ It also concluded that Macleod pharma also contravened Sec 3(4) (d) read with Sec 3(1) by refusing to deal with the Informant DG in its report did not found any contravention by the other pharma companies.

**Issues**

1. Whether the allegations against HPCDA, as regarding imposing condition of obtaining NOC from it prior to the appointment of stockists by the pharmaceutical companies and payment of PIS charges before the launch of their new product, were substantiated by the evidences available on record and if so, whether it amounts to

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⁷⁹ *Id.*
⁸⁰ *Id.*
⁸¹ *Competition Act,* *supra* note 1 at 140
contravention of section 3(3) (b) read with section 3(1) of the Act? Whether the
president, HPCDA is responsible under section 48 of the Act for the conduct of the
Association?82

On the basis of the evidence collected by DG including emails exchanged between the
pharma companies and the president of HPCDA seeking NOC from the Association
for the appointment of stockists along with telephonic conversation’s transcript
indicating the prevalent practice of NOC, the Commission was of the view that
HPCDA had been indulging in anti-competitive practice of requirement of NOC.
Regarding PIS charge before every launch of new product, the Commission also
found it anti-competitive. The Commission referred to Varca Case83 and In re:
collective boycott84 case where it had been held unequivocally that mandating the
procurement of NOC for the appointment of chemists/ stockists or imposing PIS
charges are anti-competitive practices. The Commission thus was of the opinion that
HPCDA acted in contravention of 3(3) (b) read with Section 3(1) of the Act by
limiting and controlling the supplies or provision of services by imposing a condition
of PIS charge.

Further the Commission also took note of the evidence collected by DG against the
president of HPCDA in form of emails exchanged by him with the pharmaceutical
companies seeking NOC, ‘which in a way amounts to obtaining prior approval for the
appointment of stockists. Thus, the Commission was of the opinion that the president
had played an active role in ensuring that such anti-competitive mandates are
followed. Hence, he was held liable under Sec 48 of the Act for the contravention of
the provisions.85

2. Whether the conduct of the three pharmaceutical companies, regarding denial of
stockistship and supplies to the Informant for the want of NOC from HPCDA, was

82 M/s Rohit Medical Store, supra note 77 at 172
83 Varca case, supra note 3 at 141
84 Collective Boycott case, supra note 65 at 169
85 Id.
As per the evidence collected by DG, the email collected from the pharma company Macleods was from an employee Mr Rana. The, pharma company submitted that since the email was from a personal email id address of its employee, it cannot be made liable. The Commission found no merit in this contention. It is further noted that the transcript of the conversation between Macleods and the president of HPCDA, submitted by the Informant, clearly indicates that Macleod’s was enquiring as to whether NOC was required or not. The pharma company even stated that the supplies would be stopped if the President, HPCDA suggested so. Thus it was easily construed as evidence of communication/understanding between Macleod and HPCDA since its president was acting in the capacity of HPCDA.

With regard the understanding between the Pharmaceutical company Macleod and HPCDA, the Commission took the similar view as in the Hiranandani case ‘even if it is not falling under section 3(3) or 3(4) of the Act, is amenable to the jurisdiction of the Commission under section 3(1) if the same has an appreciable adverse effect on competition (AAEC).’

With this in the background the Commission was of the opinion that the telephonic conversation between the pharma company and the president on behalf of HPCDA and the conduct of the pharma company in not supply drugs to the informant could be construed to be an agreement between the Association and the Pharma Company. Therefore, the Commission considered HPCDA’s instructions to the pharma company and its agreement to such instructions as an agreement under Sec 3(1) of the Act subject to establishment of AAEC of such an agreement. It opined:

With regard to the AAEC, the Commission is of the view that pharmaceuticals companies like OP 1 may be having miniscule market shares individually; the Commission, however, is concerned about their ability to collectively affect

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86 Id.
87 In Re: Mr Ramakant Kini v. Dr L.H. Hiranandani Hospital, Case no 39 of 2012
the competition in the market. The Commission is concerned about the effect their action will have when seen in aggregation to the actions of their co-
players in the market. The Commission has seen in number of previous cases involving chemists and druggists associations where the diktats of the Association are followed by the members without any hesitation. Even though OP 1 acted on the directions and threats of OP 5, the same cannot absolve it of its liability under the Act. OP 1 could have approached the Commission instead of complying with the directions of OP 5 which is in contravention of the provisions of the Act. Such refusal to deal with unauthorized stockists by multiple members of the Association (pharmaceutical companies like OP 1) may adversely and appreciably affect the competition in the market.

The Commission concluded that the material available regarding the agreement between Macleod and HPCDA was not sufficient to assess the AAEC It also found no contravention by pharmaceutical companies.

Decision
Commission directed HPCDA to cease and desist from indulging in anti-competitive practices which were in contravention of Sec 3 of the Act. To cause deterrence in future among entities which engage in anti-competitive activities of such nature since the Commission noted such activities in various state and regional chemists and druggists associations, it imposed a penalty at the rate of ten percent based on the financial statements of HPCDA.

With regard to the liability of the President of HPCDA, the Commission awarded a penalty under Sec 48 regarding his active involvement in execution of the anti-competitive practices carried on by the HPCDA. The Commission imposed penalty at the rate of eight percent of its income on the President of HPCDA. The penalty is to be deposited within 60 days from the date of its receipt.88

88 M/s Rohit Medical Store, supra note 77 at 172
Appeal

An appeal was filed against this order in the COMPAT. The Tribunal went through the objections and submissions before the Commission and found that the specific plea of violation of the principles of natural justice by the appellant was not addressed. This plea was filed in the context that DG relied upon the statement made by the respondent and the unverified documents produced by him ‘without giving an opportunity to cross examine him’. He also laid emphasis on the ‘conduct of the respondent no 1, who had filed similar information on an earlier occasion and then applied for withdrawal thereof.’ He also pleaded that the DG had relied upon his personal knowledge for recording a finding against them and this was contrary to the basic principles that ‘no one should be a judge in his own cause.’ Further, on merit, the appellant also made detailed submissions to show that the findings recorded by the DG on the issue of violation of Sec 3(1) read with Sec 3(3)(b) of the 2002 Act was perverse since he relied upon the unsubstantiated statement made by Respondent no 1 and fabricated documents produced by him.

The Tribunal considered the plea of violation of natural justice and decided that rather than examining the case on merits of the allegations, asked the DG to conduct fresh investigation into the matter. Further, the Commission was asked to pass fresh order after giving opportunity to the parties to file objections/ submissions in respect of the findings which may be recorded by DG.

Hence, the appeal was allowed and the impugned order was set aside with the matter being remitted to DG for a fresh investigation. The matter was pending till the writing of this research.

4.2.9 Maruti & Company Case. 89

Facts

The appellant, filled the information with CCI that the respondent, Karnataka Chemists & Druggists Association( KCDA) denied supply of drugs to the informant for want of a ‘No

89 Maruti & Company v Karnataka Chemists & Druggists Association, Mr K.E. Prakash, President KCDA, the Regional Sales Manager/ State In charge, Lupin Diabetes Care Unit of Lupin Ltd and Lupin Ltd, Case no 71 of 2013
Objection Certificate’ issued by it. According to the informant, the company was appointed as a stockist for the Diabetes Care Division of Lupin; however, the drugs were not supplied against the order placed in August, 2013. The Regional Sales Manager of Diabetic Care Division directed the informant to obtain an NOC from KCDA which is a precondition for the commencement of the supply of drugs.

When the Informant sought clarification from KCDA for non-supply of drugs over the phone on 16th July, 2013 and on 18th July, 2013, the President of KCDA allegedly directed the Informant to obtain an NOC from KCDA before commencing the business. It was thus alleged that KCDA and the president of KCDA, in collusion with the regional sales manager of Lupin Diabetic Care Division and Lupin, were insisting that the Informant obtain an NOC from KCDA as a precondition for the supply of drugs to be made to it. The Informant further claimed that it had placed an order dated 24th August, 2013 with Lupin for supply of life saving drugs, through speed post, against which no supplies were made.

The Commission directed DG to cause an investigation as it was of the opinion there was a prima facie case. Based on the evidence collected by the DG via letters, minutes of the Working Committee and Managing Committee meetings and cross examination of the witness, the DG report concluded that Informant’s allegations against Lupin Ltd for non supply of goods on account of want of NOC was established. DG also stated concluded that by making NOC mandatory prior to the supply of drugs to their newly appointed stockists, KCDA has contravened the provisions of Sec 3(3) (b) read with Sec 3(1) of the Act.90

**Issues**

On the basis of information submitted, DG report, Report of cross-examination as well as objections submitted, the Commission determined the following issues in the present case:

Issue 1: Whether KCDA was mandating NOC prior to the appointment of stockist by pharmaceutical companies? Whether the allegations levelled by the Informant regarding refusal to supply by OP4, on account of the practice carried on by OP1, has been substantiated by the evidence available on record?

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90 Competition Act, *supra* note 1 at 140
After being appointed as the stockist of Lupin Company, the informant placed the order for the supply of drugs in August 2013 by speed post, the delivery receipt of the same from the Department of Post confirms that it was delivered in August 2013 with delivery slip signed by officials of Lupin Company. However, the Regional Distribution Manager of Lupin denied receiving the order then. Since they were not able to controvert the receipt of the speed post nor establish that the speed post was merely a ‘greeting card or blank paper’ as argued during oral submission, the Commission was of the view that the pharma company Lupin had received the order placed in August 2013 but did not supply drugs to the informant.

Regarding the requirement of NOC being the reason of non supply, the DG in its report submitted

..the webpage of OP1 displayed a Form titled 'Stockist Appointment Form' until 13th November 2013. The letter dated 05th June 2013 from OP4 (through OP3) to OP1 also contained the same Form titled 'Stockist Appointment Form', as appearing on OP1’s website. This Stockist Appointment Form was subsequently removed from the OP1’s website during the course of investigation. The tenor of the Stockist Appointment Form clearly shows that it was used by pharmaceutical companies (in this case OP4) to inform OP1 of OP4’s existing and newly appointed stockists, with the request that this information be passed onto OP1’s members so that they could start dealing with the new appointee.  

Although OP2 has contended that this Stockist Appointment Form was not a mandatory requirement to be submitted to OP1, the fact that the letter dated 05th June 2013 was forwarded by OP4 to OP1 under the subject heading, "NOC Request letter to KCDA" is, in and of itself, evidence that an NOC was being sought by OP4 from OP1. Further, the phrases used in the said Form, "so that they could start dealing with the new appointee" conclusively proves that such intimation is a pre requisite and, thus, mandatory for a proposed stockist to be able to deal with the members of OP1.

91 Maruti & Company Case, supra note 89 at 177
Minutes of few meetings of the working Committee of KCDA submitted to DG also were self speaking regarding the fact that there were regular discussions on the issues of erring pharma companies which had failed to obtain an NOC from KCDA for the appointment of new stockists. The Commission was hence of the view that KCDA has been indulging in the practice of mandating NOC with no contest by KCDA on this behalf. The Commission concluded that KCDA had contravened the provisions of Sec 3(1) and Sec 3(3) (b) of the Act.

Issue 2: Whether there was any anti-competitive understanding or arrangement between KCDA and Lupin, in contravention of the provisions of Section 3 of the Act?

One of the objections raised by Lupin was that KCDA and Lupin did not operate at the same level of the production chain and, as such, their conduct cannot fall under the provisions of Section 3(3) of the Act. It was also noted by the Commission that KCDA was not engaged in the supply and distribution of drugs and medicines in the market in which Lupin was a manufacturer of drugs and medicines. Both were neither horizontally placed nor vertically related in the production chain. However, even if an agreement does not fall under Sections 3(3) or 3(4) of the Act, it can still be examined under the parent prohibition set out under Section 3(1) of the Act. With that background, the conduct of Lupin was analysed by the Commission to see whether there has been an arrangement/understanding between the two within the meaning of the prohibition set out under Section 3(1) of the Act.

The Commission in the instant case was of the opinion that the pharma company Lupin might have acted under the influence of KCDA in insisting for NOC prior to commencing supplies to the newly appointed stockist. However, the same cannot absolve it from liability under the Act for its anticompetitive arrangement/understanding/coordination with KCDA.

The existence of any such pressure/influence by OP1 ought to have been reported by OP4 to the Commission. This matter assumes further significance in light of the Commission's various orders denouncing the practice of mandating NOC as anticompetitive. Instead of informing the Commission about the anticompetitive practices of OP1, OP4 chose instead to join hands with OP1 in implementing the NOC requirement. Thus, OP4, by virtue of this arrangement/understanding with OP1, also becomes liable for the consequences of the anticompetitive effects that the NOC
requirement has on the market. Such an agreement ultimately has an adverse impact on competition in the overall market for supply of medicines and drugs.

In view of this, the Commission held that the pharma company Lupin and KCDA had entered into an anticompetitive arrangement/understanding/coordination in violation of the prohibition contained in Section 3(1) of the Act.

Issue 3: If the answer to Issue 1 and 2 were in affirmative, whether the individual office bearers/officials of KCDA and/or Lupin were liable under Section 48 of the Act for their respective anticompetitive conduct?

The Commission considered the application of Sec 48 in the present case, where there was on record ample evidence that the President of KCDA had been actively involved in the anticompetitive conduct of Association as the letters establishing KCDA’s liability for contravention of Section 3 of the Act were signed by its president. The genuineness of these letters had not been challenged. In view of the foregoing, the Commission held that the impugned conduct of KCDA took place with the consent and connivance of the President of KCDA. Hence since, the President, Vice-president and the Secretary of KCDA failed to produce any evidence to demonstrate that the contravention was committed without their knowledge, they have been held in contravention of Sec 3 of the Act under Sec 48(1) and Sec 48 (2).

With regard to the liability of the officials of Lupin under Section 48 of the Act, the DG found the Regional Sales Manager of Lupin and Regional Distribution Manager to be liable for the anticompetitive conduct of the pharmaceutical company as these officials were directly dealing with the Informant and were aware of the requirement of NOC. The emails sent by Lupin to the Informant, under the subject heading, ‘NOC Request letter to KCDA’ along with the attachment ‘NOC Request pdf’, were copied to the Regional Distribution Manager. The said email contained an attachment titled, 'NOC Request pdf ', which was the letter signed by Regional Sales Manager.

92 Id.
All these establish the involvement of both in insisting for NOC of KCDA and in refusing supplies to the Informant. This amply proves that the contravention was committed with their consent. Thus, they were liable under the provisions of Section 48(2) of the Act for their active involvement in the contravention of the provisions of the Act by Lupin.

**Decision**

The Commission found KCDA and pharma company Lupin along with its office bearers responsible under Sec 48 of the Act and ordered cease and desist from practices such as NOC. The Commission went on to create deterrence to prevent future contravention of the Act by imposing a penalty at the rate of ten percent of its income of two years on KCDA. Regarding the office bearers, of KCDA, penalty at the rate of ten percent on their income was imposed. Further, penalty at the rate of one percent of its turnover based on the financial statements filled was imposed on pharma company Lupin for the contravention of the Competition Act. A similar penalty of one percentage on their income was imposed on the two office bearers of Lupin who were found responsible under Sec 48 of the Act.

**4.2.10 In Re: M/s Arora Medical Hall case**

**Facts**

The informant was a partnership firm engaged in the business of wholesale trade of medicines in Ferozepur, Punjab. It bought the case against the Chemists & Druggists Association, Ferozepur along with its office bearers alleging *inter alia* violation of Sec 3 and 4 of the Competition Act, 2002.

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

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93 Competition Act, *supra* note 1 at 140
94 In Re: M/s Arora Medical Hall v. Chemists & Druggists Association, Ferozepur and Ors Case no 60 of 2012
95 Competition Act, *supra* note 1 at 140
As per the information provided, CDAF passed a resolution in a meeting to boycott the informant. The resolution included:

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

(b) CDAF has resolved to boycott the informant.

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

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

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

It was alleged that the above said acts of the opposite parties were in violation of the provisions of sections 3 and 4 of the Act as the activities of the opposite parties were not only creating barriers to new entrants in the market but also driving existing competitors out of the market. The Commission directed DG to cause an investigation and submit the report on the matter. 96

**Issues**

1. Whether the decision/resolution taken by CDAF in its meeting amounted to limiting and controlling supply in the market of drugs and medicines and was in contravention of Sec 3.

After going through all the documents on record and the replies filed, the Commission was of the view that the decision of CDAF in its meeting and the circular subsequently amounted to limiting and controlling of the supply of drugs.

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

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96 M/s Arora Medical Hall, supra note 94 at 182
defying its directives and continuing dealings with the informant. On behalf of CDAF it was submitted that all the retailers, who were its members, objected to the abusive conduct of the informant in not refunding the inflated/ tampered bills raised by the informant, without deducting the amount for expired medicines returned by the retailers. In this connection, it was pointed out that in order to resolve the issue, CDAF in its General Body meeting held on 23.05.2012 provided two or three days time to the informant to settle the accounts of the retailers. However, the informant refused to discuss the matter with CDAF or clear his position. It was therefore submitted that the impugned action of CDAF to boycott the informant was taken only upon deliberation of the retailers, who were suffering due to the abusive and fraudulent conduct of the informant.

Another aspect considered by CCI was the fact that non-membership of the informant became an important consideration for CDAF to take the impugned decision. This as per CCI’s observation would drive competitors out of the market.

2. Requirement of NOC by CDAF Decision
The informant alleged that CDAF had made NOC issued by it mandatory for the appointment of chemist/druggist as a distributor of medicines of a company in Ferozepur city. He further stated that due to the objection raised by him in this regards, he was expelled from the primary membership of CDAF.

The Commission was of the view that CDAF circular issued on 15.04.2006 wherein the decision taken by the Executive Committee of CDAF in its meeting held on 13.04.2006 was recorded, the same is quoted below:

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

The opposite party association could not rebut the said presumption. It was not shown by the opposite party association how the impugned conduct resulted into accrual of
benefits to consumers or made improvements in production or distribution of goods in question. Further, the opposite party could not explain as to how the said conduct did not foreclose competition Therefore, based on the evidence collected the Commission conclude that CDAF had been following a practice of requirement of NOC prior to appointment of a new/ additional stockist in Ferozepur, which had the effect of limiting and controlling the supply of drugs and medicines in Ferozepur. This conduct of CDAF was found to be anti-competitive and in contravention of Sec 3(3) (b) read with Sec 3(1) of the Act.97

3. Whether the individual officer bearers of CDAF be made responsible for the anti-competitive conduct.

The Commission agreed with the report of DG, that the president, vice-president and the secretary of CDAF were responsible as the decision and perpetuation of the practices by the association which have been found anti-competitive, they were also part of the decisions and practices. The Commission was of the view that the provisions of Sec 27 of the Act were sufficient to hold the office bearers guilty in the present case without the application of Sec 48.

As per the provisions of section 27(b) of the Act, where after inquiry, the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.99 The Commission applied this section and imposed penalty.

Decision

1. The Commission directed the opposite parties to cease and desist from indulging in such anti-competitive practices which had been found to be anti-competitive in terms of the provisions of section 3 of the Act in the preceding paras of this order.

97 Competition Act, supra note 1 at 140
98 Id.
99 M/s Arora Medical Hall, supra note 94 at 182
2. As a deterrent in future to both associations and officer bearers, under Sec 27 of the Act, the Commission imposed a penalty at the rate of ten percent on all the opposite parties based as per the financial statement of income filed by the CDAF and its office bearers.

Case Analysis
The case comes in line with the earlier cases relating to issuance of NOC. The menace of requirement of NOC continues inspite of several pronouncements by CCI against such anti-competitive practices. In this case both the DG and CCI failed to consider factors under Sec 19(3) to determine AAEC. It is of importance to mention that though the Commission while looking into the Report submitted by the DG found the analysis missing, it however, did not carry out the analysis itself. The significance of the factors in assessing the AAEC on the overall alleged anti-competitive practice/ agreements can not be undermined. The fact that there are number of cases where CCI fails to do so raises questions regarding its decisions on such matters.

Another pertinent aspect is that the efficacy and the subsequent implementation of such orders by CCI is still a question as the cases before it suggest that the practices which limit and control the supply have not stopped within the pharmaceutical industry. Hence, the Commission has to drive home a lesson by either imposing substantial penalty on not only the CDAF but also its office bearers or else relook its mechanism of imposing penalties

4.2.11 In re: The Belgaum District Chemists and Druggists Association case.\(^{100}\)

Facts
The case was transferred from Monopolies and Restrictive Trade Practices Commission to CCI under Sec 66(6) of the Competition Act, 2002.\(^{101}\) In this case, the informant, the Belgaum District Chemist and Druggists Association filed a complaint alleging that Abbot India Ltd and Geno Pharmaceutical stopped supply of essential medicines to some of its members due to lack of ‘No Objection Certificate’ from All India Organisation of Chemists and Druggists or from Karnataka Chemists and Druggists association. This, according to the

\(^{100}\) In re: The Belgaum District Chemists and Druggists Association v. Abbot India Ltd., Karnataka Chemists and Druggists Association, Geno Pharmaceuticals and All India Organisations of Chemists and Druggists, Case no C-175/09/ DGIR/ 27/28- MRTP

\(^{101}\) Competition Act, supra note 1 at 140
informant had led to restriction in supply of essential medicines and was anti-competitive. CCI directed DG to cause an investigation and submit a report upon the matter.

The DG found that KCDA and AIOCD had indulged in actions and practices that were anti-competitive in nature. The DG concluded that Opposite Parties through their guidelines, rules and regulations coupled with their anti-competitive conduct contributed to appreciable adverse effect in the market for pharmaceutical products, in contravention of the provisions of Section 3(3)(a) and Section 3(3)(b) of the Act. It also found MOUs of KCDA with OPPI IDMA. There was a supplementary investigation also directed by the CCI to gather more information including financial information necessary to determine appropriate penalties. KCDA failed to submit the financial information required and, CCI hence, under Sec 43 of the Act initiated proceedings against the executive members of KCDA. This proceeding was impugned in a Writ Petition in the Karnataka High Court. It disposed the WP filed by KCDA with directions to file the preliminary objections before the Commission.

**Issues**

1. Whether the conduct of AIOCD pursuant to its agreements/ MOUs entered into with OPPI and IDMA was in contravention of Section 3(1) read with 3(3) of the Act?

In the evidence on record, there were circulars and tripartite MOUs with OPPS and IDMA suggesting requirement of NOC by the State association for appointment of stockists / additional stockists by the pharma companies, mandatory PIS from State association on payment of charges for launch of new drugs and fixing of trade margins for wholesalers and retailers.

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

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102 Id.
103 Id.
104 Id.
amount to contravention of the provision of Section 3(3)(a) and Section 3(3)(b) of the Act respectively.\textsuperscript{105}

The Commission was of the opinion that there was contravention of Sec 3(3)(b). Taking similar stand on the issue as in earlier cases relating to NOC, PIS and fixing of trade margins since the opponents sought to justify the three on similar grounds as in previous cases. The Order in Peeveear Case\textsuperscript{106} and Sandhya Drugs\textsuperscript{107} case (based on same practice of NOC, PIS and trade margins) were still pending, the AIOCD argued that the same would have implications on the present case. CCI opined:

..that the Hon’ble Tribunal, while disposing of the said appeals, vide its recent judgment dated 9th December 2016, has inter alia clarified that ‘if the Commission receives any fresh information or suo-moto comes to know that the respondents or any other similarly situated persons have/has resorted to anti-competitive practices like mandatory NOC, then this order shall not prevent it from ordering an investigation under Section 26(1) of the Act and take appropriate decision in accordance with law.’\textsuperscript{108}

Hence, CCI rejected the above argument of AIOCD.

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

CCI referred to various correspondences made by KCDA, copy of the webpage of KCDA relating to stockistship appointment where it was evident that as per the MoU between AIOCD, IDMA and OPPI, KCDA had adopted a policy for appointment of stockists whereby new pharma companies were allowed to appoint only two stockists in one revenue districts. They further mentioned NOC from KCDA a must for adding, deleting or changing of

\textsuperscript{105} The Belgaum District Chemists and Druggists Association case, \textit{supra} note 100 at 186
\textsuperscript{106} Ms Peeveear Medical Agencies, \textit{supra} note 34 at 157
\textsuperscript{107} M/s Sandhya Drug Agency, \textit{supra} note 46 at 161
\textsuperscript{108} The Belgaum District Chemists and Druggists Association case, \textit{supra} note 100 at 186
stockists. CCI quoted number of earlier cases where NOC as a pre-requisite for appointment of stockists had been termed anti-competitive.

Regarding PIS for the launching of new drugs, CCI disagreed with the DG report. CCI was of the opinion that though the material on record showed that PIS services were provided by KCDA, nothing had been brought out by the investigation / record to show payment of PIS charges is a mandatory pre-requisite to launch new drugs. CCI did not find any contravention of Sec 3(3) by KCDA in this regards.

Decision
CCI directed KCDA to cease and desist from indulging in the mandatory practice of NOC. However, the Commission refrained from imposing monetary penalty as a penalty had been already imposed upon KCDA in the case of M/S Maruti & Company where the period of contravention was after the present case. However, CCI did warn that any future contravention on the issue of NOC by KCDA would be taken seriously and acted upon accordingly.

4.2.12 In re: Mr. P.K. Krishnan case.¹⁰⁹

Facts
The Informant in the present case was the sole proprietor of a business dealing in the distribution of medicines of fifteen pharma companies in Palakkad district of Kerala. He alleged that the Sales Manager of Alkem rejected his application for appointment as a stockist since he failed to obtain a ‘No Objection Certificate’ from All Kerala Chemists and Druggists Association. According to him he was formally offered stockistship in 2013 in a letter, however, subsequently Alkem Laboratories refused to supply the order without assigning reason. Upon representation, he was verbally told that due to the failure to obtain NOC from All Kerala Chemists and Druggists Association the supply order had returned.

CCI ordered an investigation directing the DG to submit a report. On the basis of the submissions made by the parties and third parties, the DG concluded that AKCDA and its office bearers had been insisting on NOC before appointment of new stockists of

¹⁰⁹ In re: Mr. P.K. Krishnan v. Mr Paul Madavana, Divisional Sales Manager M/s Alkem Laboratories Ltd, M/s Alkem Laboratories Ltd and All Kerala Chemists and Druggists Association, Case No. 28 of 2014
pharmaceutical companies which led to limiting and controlling of the supply of drugs and medicines in Kerala apart from creating entry barriers contravening the provisions of section 3(3)(b) read with section 3(1) of the Act. In their replies to the DG defendants alleged that the Informant had suppressed the facts and that he has been made a stockist subsequently.

Issues

1. Whether the suppression of facts by the Informant made the proceedings infructuous, as alleged by the Opposite Parties? Whether the Informant was liable to be penalized under section 45(1)(b) of the Act?

CCI considered the chronology of the events and was of the view that the prima facie order by it was important in understanding this issue. It opined:

The liability of the Informant for suppressing the facts in the present case is a separate issue and will be dealt later in this order. However, even if the same is established, it will not render the present proceeding infructuous for two reasons. First, there was alleged refusal to deal with the Informant for want of NOC. Mere appointment of the Informant as a stockist on 19.03.2014 and resumption of supplies to it will not undo the alleged anti-competitive practices/conduct that prevailed from November, 2013 to March, 2014. Second, even otherwise the proceedings under the Act are not restricted to a particular Informant/person. The Informant in the proceedings under the Act is only one medium through which the Commission becomes aware of the anti-competitive conduct/practices prevailing in the markets.

Hence in regards the allegation of suppression of facts, CCI found it misplaced. Regarding application under Sec 45(1)(b) of the Act, filed by Alkem Lab, CCI was of the view that though informant was a stockist of the pharma company on the date when the information was registered due to rectification required, however, the original information was before his appointment. In view of this, CCI did not find it appropriate to penalise the informant.

110 Competition Act, supra note 1 at 140
111 Mr. P.K. Krishnan case, supra note 109 at 189
2. Whether the conduct/practices of OP 2 and/or OP 3 amounted to contravention of any of the provisions of section 3 of the Act?

On the basis of emails and submissions by third parties it was apparent that ‘implicitly, the pharma companies had accepted the fact that trade associations were verbally compelling them to obtain NOC and they would resort to practices like boycott, limiting the supplies and/or market etc., in the event pharmaceutical companies refuse to follow their diktats.’

Further, the email exchange between pharma companies and All Kerala Chemists and Druggist Association also illustrated the prevalence of anti-competitive practice of requiring NOC inspite number of previous orders of CCI in various cases. More particularly, in the case of *M/s Peeveear Medical Agencies, Kerala v. AIOCD and others*\(^\text{112}\) CCI found the practice of NOC prevalent in the State of Kerala leading to limiting or controlling supply of drugs in the market. It held both AIOCD and its State affiliate AKCDA to be in contravention of Sec 3(3)(a) and Sec 3(3)(b) read with Sec 3(1). Apart from imposing monetary penalty on AKCDA, the Commission further had directed AKCDA, the opposite party in the present case and AIOCD to file an undertaking that the practices carried on by their members such as the issue of grant of NOC for appointment of stockists, fixation of trade margins, collection of PIS charges and boycott of products of pharmaceutical companies have been discontinued. Accordingly, AKCDA filed an undertaking dated 21.02.2014 declaring that it had not conducted its activities nor would it indulge in future in any kind of anti-competitive conduct in contravention of the Commission’s order dated 09.12.2013.

The present case where NOC was still being issued by AKCDA was wilful non-compliance of the earlier order of CCI. It held the President and General Secretary of AKCDA to be in violation of Sec 48 of the Act. It did not agree with the conclusion of DG to penalise the treasurer of the association as he was only the custodian of funds and responsible for keeping financial statements on behalf of the association.

Regarding Alkem Lab, CCI referred to the *Hiranandani case*\(^\text{113}\) where it was decided that even if an agreement does not fall within Sec 3(3) or Sec 3(4) of the Act, it can be bought

\(^{112}\) Ms Peeveear Medical Agencies, supra note 34 at 157

\(^{113}\) Case no 39 of 2012
under the jurisdiction of CCI under the provision of Sec 3(1) if it has AAEC. Hence, the instruction of AKCDA to Alkem Lab and its agreement to such instructions was construed as an agreement under Sec 3(1) of the Act. It held the DGM- ACE Sales (South and West Bangalore) and Branch Manager & Authorised Signatory of Alkem Lab also responsible for contravention of the Competition Act.

**Decision**
CCI ordered Alkem Lab, AKCDA and their officials to cease and desist from indulging in any of the practices found anti-competitive in the case. It also imposed penalty at the rate of ten percent of their income on AKCDA and its officials.

Additionally, the Commission directs AKCDA to organize, in letter and in spirit, at least five competition awareness and compliance programmes over the next six months in State of Kerala for its members. Regarding Alkem Labs and its officials, CCI imposed a penalty at three percent of their income.

4.2.13. **In Re: Bengal Chemist and Druggist Association case**

**Facts**
CCI initiated the investigation *su o motu* based on an email it received alleging anti-competitive practices by Bengal Chemists and Druggists Association (BCDA). It was stated that BCDA is an association of wholesalers and retail sellers of drugs affiliated to All India Organization of Chemist and Druggist.

It was alleged by the Informant that the BCDA’s executive committee directed (information available on its website) its retailer member not to give discount on the MRP in the sale of medicines to consumers. Further, the Informant alleged that in order to ensure strict compliance of its directives, BCDA had been carrying out vigilance operations to identify the retailers defying the directions issued by it, and had even forced the defiant members to shut their shops as a punishment measure. Therefore, the informant alleged that the conduct of BCDA had curtailed the freedom of trade for the retailers and that discount was not being passed on to the end consumers which resulted in direct or indirect determining the sale prices of drugs by prohibiting its retailer members from giving discounts on MRP as well as

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114 *Su o motu* case no 02 of 2012
controlled and limited the production/supply of medicines and the market of provision of services by forcing them to close their business and adversely affected the interest of retailers and consumers.

Along with the aforementioned information, a reference was also filed by the Director, Directorate of Drugs Control, and West Bengal under:

Section 19 (1) (b) of the Act against BCDA alleging *inter alia* that it had issued anti-competitive circulars (based on emails by member of All India Drugs Action Network which had inspected shops and interviewed customers and no discount was given) directing the retailers not to give any discount to the consumers, which was in contravention of the provisions of section 3 of the Act. The Director hence submitted that BCDA had contravened Sec 3(1), Sec 4(1) and Sec 4(2) of the Act.

Commission directed DG to club the investigation of both the cases and submit a consolidated report. The DG concluded in its report that BCDA, its District and Zonal Committees were engaged in anti-competitive practices of directly or indirectly determining the sale prices of drugs and controlling or limiting the supply of drugs through concerted and restrictive practices, in violation of Sec 3(3) (a) and (b) of the Competition Act.

**Issues**

The Commission determined the following issues after the submission of the DG report and the replies/objection in the present case:

i) Whether BCDA and its District and Zonal Committees were engaged in anti-competitive practices in violation of the provisions of section 3 of the Act?

After establishing BCDA as an ‘association of enterprises’ which comes under Sec 3(3), CCI carefully perused the evidences. In the minutes of the Executive Committee of BCDA, it had been stated that actions were to be taken against stores which were undercutting the drug

115 Competition Act, *supra* note 1 at 140
116 *Id.*
prices and enforcing strict adherence to BCDA guidelines along with restricting of supplies to non-cooperating members.

It is thus evident from the various minutes as discussed herein above that BCDA and its affiliated District and Zonal Committees have taken concerted action against the retailers, largely the chain stores, who have indulged in sale of medicine below MRP by offering discounts to the customers. They had launched organizational movement with effect from 1st April, 2012 against these entities and have tried to enforce their decision regarding sale of drugs on MRP by activating Vigilance and Zonal Committees in the various Districts and Zones of Kolkata. Thus, the contention raised by BCDA that it has not taken any measures against those members who offered medicines at discounts does not appear to hold any trace of truth in it and is bound to be rejected.117

The Commission also examined the submissions made to the DG by the various retailers which were mentioned in the various minutes of BCDA. They also testified regarding the concerted action of the BCDA and its affiliated District and Zonal Committees in enforcing their decision regarding sale of drugs on MRP, which the CCI found coercive and anti-competitive. The Report of Assistant Director, Hooghly District Drug Control office was in tandem with the findings.

The Commission noted that fixed trade margins for the wholesalers/ retailers respectively were possible only drugs were sold on their MRP. Faced with increased competition in the market, accentuated by the opening of retail chains, the BCDA decided to enforce sale of drugs at MRP so as to protect the interests of its members. Accordingly, it had launched an organizational movement w.e.f 01.04.2012, to ensure that no retailer or wholesaler granted any discount and that drugs were sold only at their MRP. It had enforced its decision/diktat through its District/Zonal and Vigilance Committees, and acted in a concerted.

The Commission further observed that the activities of trade association to direct its members to sell drugs only at their MRP was an anti-competitive conduct which cannot be justified on the ground that most of the members of the BCDA, would be ruined if competitive forces

117 Bengal Chemist and Druggist Association case , supra note 114 at 192
were allowed to operate in the market. Hence, CCI held BCDA and it District as well as Zonal Committees liable for engaging in conduct which was in violation of Competition Act.\textsuperscript{118}

2. The role of individual office bearers in the anti-competitive conduct

CCI with the assistance of the supplementary investigation report submitted by DG considered the involvement of the office bearers of BCDA in such anti-competitive conduct. DG found them complicit of the acts, however, the office bearers in their common reply had taken the plea regarding non application of the provisions of Section 48 of the Act upon them as well as the office bearers and executive members of BCDA as their liability was limited due to the Memorandum of Association of BCDA, being a non-profit company registered under Section 25 of the Companies Act, 1956.\textsuperscript{119}

Commission referred to the case of \textit{Arora Medical Hall}\textsuperscript{120} where it was clarified that the provisions of Sec 27 of the Act were sufficient to make office bearers liable for contravention without the aid and assistance of the provisions of Sec 48 of the Act. Further the Commission also noted from the records that BCDA was a company registered under Section 25 of the Companies Act, 1956 and provisions of Section 48 of the Act were undoubtedly applicable to the BCDA. Therefore, the Commission found office bearers and executive members to be guilty.

\textbf{Decision}

CCI ordered cease and desist from continuing the anti-competitive activities. It also imposed a penalty on BCDA and its office bearers who were directly responsible for running its affairs and making the decisions at the rate of ten percent and on the executive committee members at the rate of seven percent of their respective turn over based on the financial statements filed by them.

\textsuperscript{118} Competition Act, \textit{supra} note 1 at 140


\textsuperscript{120} M/s Arora Medical Hall, \textit{supra} note 94 at 182
Analysis

This was the first case brought before the CCI which highlighted the practice of selling drugs at MPR with refusal to give discounts based on the decision of various chemists and drug associations. Though, CCI imposed a penalty upon them, the actual end of such practices from the Indian drug market is to be further inspected and analysed.

After considering the thirteen cases whose background, issues and decisions have been discussed individually, following is there case analysis represented in form of a chart. This chart highlights the key point considered by the researcher for the purpose of this research, for example who filing of the case (complaint or *suo moto*), issues involved, whether the DG investigation was sufficient or directed to make a supplementary/ fresh investigation, whether while considering the issues at hand, CCI assessed the case based on the factor enumerated under Sec 19(3) of the Competition Act.\(^\text{121}\)

Regarding the cases it is to be noted that there was a surge of cases relating to anti-competitive practices in the medicines distribution channel from the year 2009 onwards till 2013. Number of cases were filed mostly by the wholesaler / distributors of medicines who complaint of anti-competitive practices such as ‘NOC, PIS , boycott, fixing of trade margins, no discounts’ by State chemist and drugs associations in conjunction with the All Indian Organisation of Chemists and Druggists. Very few cases were reported where it was alleged that the drug manufacture associations such as OPPI and IDMA were also involved in anti-competitive practices along with the chemist and druggists associations.\(^\text{122}\) In majority of these cases though it was clear that the drug manufacture associations were participating in the anti-competitive practices, CCI found them doing so under the threat of boycott by AIOCD. CCI further went ahead with not apply Sec 3(3) on the relationship between drug manufactures and chemists associations as they were not associations of enterprise which were engaged in horizontal or similar trade. Due to them functioning at different levels of production and distribution chain, their violation was not scrutinised under Sec 3(3). This clearly indicates that uncovered anti-competitive practices may be in existence between the drug manufacture associations in collusion with chemists and druggist association, CCI needs to investigate them for fostering competition within the sector. A tabular representation of the

\(^{121}\) Competition Act, *supra* note 1 at 140

\(^{122}\) Ms Peeveear Medical Agencies , *supra* note 34 at 157, Minority judgement given by Dr Geeta Gouri found OPPI and IDMA guilt of anti-competitive practices., See also Santuka Associates Pvt Ltd v AIOCD, *supra* note 20 at 151
analysis of the thirteen cases has been attempted by the researcher and is part of appendices to this research

Further, inspite of recurrent contravention of CCI orders for discontinuing certain anti-competitive practices, state and all India chemists associations continued the practices. This being evident, CCI hardly awarded individual penalties to officer bearers who were part of the executive committee of the associations so as to create deterrence.\textsuperscript{123} CCI also did not exercise its powers under Sec 42 of the Competition Act, by causing an inquiry into the compliance of its order or direction. In cases where an appeal was filed with the COMPAT, the appellant tribunal also did not exercise its powers under Sec 53Q\textsuperscript{124} and 53 U\textsuperscript{125}. This is apparent by the fact that in each of these cases CCI ordered cease and desist, yet the practices continued. CCI gave a unique order by asking the All Kerala Chemists and Druggists Association to conduct at least five competition awareness and compliance programmes in the State of Kerala, however, whether they were implemented remains a question.

Coming to the manner in which CCI analysed the cases, majority of them did not have the factors mentioned under Sec 19(3) considered. These factors are vital and the only guideline given under the Indian competition law relating to assessing the AAEC by the horizontal and vertical agreements. This made the assessment of the cases by CCI skewed. Also, most of the cases were filed based on a complaint or informant. Only one case was initiated \textit{suo motu} by CCI\textsuperscript{126}. This indicates towards to the fact that inspite of recurrent cases on anti-competitive practices by the chemist and drug associations with non-compliance of its orders, CCI did not take sufficient cognizance required of these practice \textit{suo motu} within the industry so that such practices may be curbed. The clear example of this is the fact that both drug manufacturers associations namely OPPI and IDMA were found part of the anti-competitive practices, further investigation in this regard was necessary by CCI. It requires examining various relationships and interactions between competition law and specific industrial bodies / associations.

\textsuperscript{123} M/s Rohit Medical Store, \textit{supra} note 77 at 172, M/s Arora Medical Hall, \textit{supra} note 94 at 182, Mr. P.K. Krishnan case, \textit{supra} note 109 at 189
\textsuperscript{124} Contravention of orders of COMPAT
\textsuperscript{125} Power to punish for contempt
\textsuperscript{126} Bengal Chemist and Druggist Association case, \textit{supra} note 114 at 192
4.3 HOSPITAL EXCLUSIVITY CONTRACT AND VIOLATION OF SEC 3

4.3.1. *IN RE: MR RAMAKANT KINI V. DR L.H. HIRANANDANI HOSPITAL*127

**Background**

One Mrs Jain entered into an agreement with M/s Life Cell India Pvt to avail its services for banking of stem cells of her soon to be born child. The stem cells blood are collected from the umbilical cord within ten minutes of the birth of a child and subsequently preserved in a bank stored at sub-zero temperature. Mrs Jain was registered at the Hiranandani hospital for maternity related services as well as delivery of her child. Mrs. Jain requested Hiranandani hospital to allow Life Cell to collect the stem cells blood soon after her delivery. After a Hiranandani doctor told her that Life Cell could not provide its services due to the exclusive contract, Mrs. Jain chose to give birth in another hospital. At the time of admission, Mrs. Jain was not informed by Hiranandani Hospital that it had an arrangement with Cryobank and that it did not allow other stem cell banks to enter the hospital. Because of this refusal by the hospital to permit Life Cell to collect stem cells, Mrs. Jain had to shift from Hiranandani hospital and get her delivery done at another hospital. On the basis of this Mr. Ramakant Kini filed a complaint with the Commission as an Informant, alleging that the hospital had engaged in anti-competitive and abusive behaviour.

Pursuant to finding the existence of a *prima facie* case, an investigation was initiated. It is interesting to note that even at this preliminary stage of the case, there was a difference of opinion amongst the members, where one member gave a dissenting order for no case being made for starting the investigation.128 Based on the majority opinion, a Report of the Director-General (‘DG’) was later submitted after investigation conducted by it on the matter.

**Competition law issues analysed by the Commission**

1. Anti-competitiveness of the exclusive agreement

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127 Hiranandani case, *supra* note 87 at 175
Section 3(1) of the Act\textsuperscript{129} prohibits agreements which cause, or are likely to cause, an appreciable adverse effect on competition (‘AAEC’) in the market, whereas Section 3(3)\textsuperscript{130} pertains to horizontal agreements and Section 3(4)\textsuperscript{131} to vertical agreements. The Commission considered whether the exclusive agreement was in question here was anti-competitive. As per the evidence on record, the clauses of the agreement specifically mentioned of ‘tie up’ and ‘exclusive services’ of the Gynaecologists of the Hiranandani hospital and Cryobank for stem cell bank services. The hospital submitted on its behalf that Sec 3(4) applies to agreements between undertakings at different stages of production chain in different markets. In the present case maternity services by the hospital and stem cell banking services by Cryobank were two different markets. Hence, as they were in different production chains, Sec 3(4) couldn’t be applied. This argument was not accepted by the Commission. It was of the opinion that not all agreements were covered under Sec 3(3) and Sec 3(4).

The Commission can consider the impact of any agreement which falls within the four walls of section 3(1) and assess if the agreement has an appreciable adverse effect on competition. The Commission has therefore to consider whether the impugned agreement causes or is likely to cause appreciable adverse effect on competition within India or not and for considering this, the Commission has to keep in mind the purpose for which the Act was enacted, i.e. inter alia freedom of trade and consumers’ interest must be protected.\textsuperscript{132}

CCI after looking into the amount of commission paid by the Cryobank to the Hiranandani hospital (fees of INR 20,000 per patient) as compared with other stem cell banks fees, was of the opinion that it was the sole and important criteria of selecting Cryobank as the stem cell banking company by the hospital as it paid the highest amount per enrolment to the hospital with disregard to the effect of such an agreement on competition in the market and consumer welfare. CCI further assessed the anti-competitive effects of the contract based on the factors under Sec 19(3) that it is required to take into account. CCI was of the opinion that stem cell banking services as an industry in India was at a nascent stage, exclusive contracts between a hospital and stem cell banks had a tendency of distorting market mechanism altogether. The effects would worse in this market due to the total dependence of the expecting mothers on the maternity service providers to get access to the stem cell from newly born children born

\textsuperscript{129} The Competition Act, supra note 1 at 140
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Hiranandani case, supra note 87 at 175
in the hospitals. Further, the consumers may suffer due to inefficiency of the banker which is tied up with a specific hospital. This would result in total failure of service for stem cell banking. Also due to limited consumer choice, consumer preference may be moulded in a particular manner which would distort market mechanism.

Further CCI deliberated that Mrs Jain had to change her hospital at the last minute since she was not informed earlier of this exclusive agreement between Cryobank and the hospital. Commission opined that since it was not a requirement under Sec 3 to establish a relevant market, but to see if the agreement had anti-competitive effect in any market, the agreement between Hiranandani hospital and Cryobank was anti-competitive and in contravention of Sec 3(1).

2. Abuse of dominance

Under Sec 4 of the Competition Act, five types of conducts by a dominant enterprise in the market have been termed abuse of dominance. For this the Commission has a three-step process in analysing the abusive behaviour. These are determination of the relevant market, the assessment of dominance, and the assessment of abuse. CCI considered the relevant market to be ‘provision of maternity services by super speciality hospitals’ in tandem with the DG report, however due to lack of sufficient evidence and a market share threshold, the Commission did not find Hiranandani hospital to be dominant in the relevant market.

**Decision**

The Commission for the first time applied a wide interpretation to Sec 3(1) of the Act by giving a standalone application to it. The Commission was of the view that Sec 3(3) gives a list of categories of agreements to be presumed having AAEC. Sec 3(4) also gives an illustrative list of agreements at different stages or levels of production chain which may be anti-competitive, however, both the sub-sections are ‘expansion of Sec 3(1) but not exhaustive of the scope of Sec 3(1).’

The Commission on reading of Sec 19(1) and Sec 33 about violation under Sec 3(1) and not Sec 3(3) and 3 (4) came to a conclusion that the scope of Sec 3(1) of the Act is wider and independent of the application of Sec (3) and Sec 3(4). It also considered that for the purpose

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133 Applicable adverse effect on competition
of Sec 3, the Commission is not suppose to enter into a discussion of market dominance, which exercise is necessary to be done in case of Sec 4.

The Commission found Hiranandani hospital along with Cryobank to have entered into an anti-competitive agreement which had an appreciable adverse effect on the competition in the stem cell banking sector of India. CCI declared the said agreement null and void. It further directed the hospital to not enter into similar agreements with stem cell banks. CCI imposed a severe penalty at four percent of the average turnover of the last three years on the Hiranandani hospital which was to be deposited within sixty days of receipt of the order.

The Commission also expressed its opinion that hospitals must restrain from entering into similar arrangements with stem cell banks since they have an adverse effect on not only competition but also the ‘spirit of health services and affect free trade besides being anti-consumers.' Hence, CCI reasoned that such an exclusive contract would foreclose an important route to market for stem cell banking, i.e. the Hiranandani hospital. CCI was of this opinion inspite of the said contract being of a short duration of 1 year which was terminable on notice.

As part of minority opinion, CCI member Dr Geeta Gouri gave a separate order. In it she elaborated upon the unique economic conditions as well as agreements that exist in the health care industry. In her opinion although each entity in a health care industry is related to the other, the integration is not complete in as much as there is a lack of independence while making decision for utilization of a particular service. For example patients purchase medicines which are prescribed by doctors.

From the perspective of the alleged abuse of dominance, the Member after taking all information into consideration decided relevant market for the present case to be ‘maternity service in the city of Mumbai’. Then she attempted to estimate the market share of hospital in the revised relevant market. As per the submissions made, 3602 maternity patients had enrolled for maternity services at Hiranandani hospital during 2009-12. For assessing the total market size, reliance was also placed by the member on an internet article, according to which there were at least 1, 61,500 live births in Mumbai in the year 2009. From these two figures, the market share of the hospital in the relevant market was calculated to be less than

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134 Hiranandani case, supra note 87 at 175
one percent. Hence according to the minority decision, the hospital was not in a dominant position within the relevant market.

In the analysis of Sec 3 violation, based on the documents and submissions, the Member laid down the following issues for consideration:

(i) Was there a vertical relationship between the Hiranandani hospital and Cryobanks?

The Member pointed out that a patient demands maternity services, collection and banking of the umbilical cord stem cells, as two outputs for a final consumption. When the baby is delivered, a sample of umbilical cord stem cells is collected within 10 minutes from the placenta. Both the outputs are produced sequentially, at the same production stage and in a short time gap. This shows that the hospital is in a vertical relationship not only with obstetricians and other specialists for the provision of maternity services, but also with umbilical stem cell bank for collection of umbilical cord stem cells.

(ii) Could the agreement between OP and Cryobanks be termed as a tie-in agreement?

Considering the Explanation (a) to Section 3(4) of the Act which defines tie-in ‘as including any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods’, the Member deliberated whether the agreement in question in the present case was a tie-in-arrangement. The hospital provided maternity services to all those who seek its service. It was also submitted that the hospital refused all stem cell banks other than Cryobanks in its premises for stem cell banking services. The DG had submitted that during 2009-12, a total of 3602 patients enrolled at hospital for maternity services, out of which only 252 availed stem cell banking services from its premises. According to the member, it was evident those 3350 patients availed only maternity services during the period under reference and that these patients were not compelled to avail stem cell banking services from the hospital premises. In view of this, Dr Gouri was of the opinion that it could not be concluded that the agreement between the hospital and Cryobank was a tie-in agreement since more than 93% of the patient had the choice of availing only maternity services.

(iii) Whether the agreement between OP and Cryobanks was an exclusive supply agreement?

Dr Gouri opined that in the present case, conditions for exclusive supply agreement did not appear to hold true for the reason that hospital did not stop Cryobank from enrolling patients
from other hospitals. This was supported by the fact that Cryobank had exclusive tie-up with various hospitals across the country. In view of the aforesaid, the member concluded that there was no foreclosure and accordingly no violation of Section 3(4) of the Act.

(iv) Could the conduct of Hiranandani hospital be said to be in the nature of refusal to deal for other stem cell banks?

The Member observed that (i) Impugned agreement of OP with Cryobanks was initially for one year only; (ii) the hospital was able to influence less than 1% maternity patients in the area of Mumbai; (iii) The effect of so called tie-in is cast on less than 7% of its customers; and (iv) As submitted by OP, the practice of having an arrangement exists in other hospitals also. Hence, the hospital was within its rights to choose its business partners in accordance with its commercial interests.

(v) Was there AAEC arising out of the agreement between Hiranandani hospital and Cryobanks?

Dr Gouri analysed Sec 3 read with Sec 19. She referred to a previous decision of CCI in Sonam Sharma case\(^\text{135}\) and came to a finding that Hiranandani hospital and Cryobank were not in violation of Sec 4 or Sec 3(4), hence there was no AAEC arising out of the alleged anti-competitive agreement between the hospital and Cryobank.

**Analysis of CCI’s majority and minority decision**

This is the first case dealt by CCI relating to private healthcare sector involving an agreement entered by the private hospital. It is also the first case on hospital exclusivity contract in India under the purview of Competition Act, 2002. CCI went ahead with a very different interpretation of Sec 3 by making Sec 3(1) a wider and all encompassing sub-section. Since the present agreement did not fall squarely within Sec 3(4), the Commission applied it under the larger Sec 3(1) which according to the broader interpretation not only included the agreements stated under Sec 3(3) and Sec 3(4) but others.

In addition, another consequence of the expansive interpretation is the lack of clarity in relation to the burden of proof where agreements are not addressed by either Section 3(3) or

3(4). In the case of horizontal agreements, there exists a presumption of AAEC, whereas in
the case of vertical agreements, AAEC must be demonstrated. In the instant case, the
Commission opined that the agreement fell under neither category, but did not specify the
implications of the categorization under Section 3(1) from the perspective of burden of proof.

Another aspect relating to CCI’s interpretation is that the range of available justifications is
also impacted by the expansive interpretation of Section 3. In cases where the agreement falls
under Section 3(1), any justifications offered must be related to the positive factors listed
under Section 19(3), whereas in cases where the agreement falls under Section 3(4),
justifications need not be restricted to the positive factors listed under Section 19(3). This, in
effect, means that the rule of reason analysis in the case of an agreement falling within the
ambit of Section 3(1) allows for fewer justifications than its counterpart under Section 3(4).

On the issue of hospital exclusivity contract, The Commission notes that enterprises are
generally free to choose their business models, but that the hospital could not do so, as the
arrangement limited the growth of the market for stem cell banking services. It is pertinent to
note that this observation was recorded despite finding that the hospital was not dominant in
the relevant market.136 This limitation on the freedom of contract is being imposed on the
hospital despite the lack of finding dominance

Hence, CCI has in the larger picture created a new category of anti-competitive agreements
which are neither horizontal nor vertical increasing the scope of scrutiny of agreements under
the Competition Act.

Further, another point to note is that while considering the ‘comparable price structures of
hospitals in the relevant market’ , the Commission was of the opinion that market share alone
is not indicative of dominance leading to not making Hiranandani hospital dominant within
the relevant market. However, while analysing the agreements under Sec 3, the Commission
noted that it would be ‘expensive and inconvenient for the patients to switch hospitals after
having developed a trust in the treatment of the hospital’. This shows that the Commission
does not apply switching cost analysis under Sec 4 but takes a note of it under the analysis of
Sec 3. This creates inconsistencies in understanding the approach of the Commission.

136 Para 29 of the order
The dissenting judgement of Dr Geeta Gouri is also very detailed and methodical in its approach to ascertain whether there was an anti-competitive agreement between the hospital and the stem cell bank. The minority judgement lends valuable insight and interpretation for the COMPAT in the subsequent appeal.

**Appeal to COMPAT**

An appeal was made by the hospital against the order passed by CCI. COMPAT in the first place found various errors in DG’s report submitted to CCI. It pointed out that DG did not conduct an independent investigation of maternity service prices in exercise of his investigative duties and without any basis jumped to an incorrect conclusion that low end hospitals/nursing homes do not compete with Hiranandani hospital. In regards to DG’s assessment that the hospital did not provide any evidence of the technical evaluation process for appointing a stem cell bank, COMPAT was of the opinion that DG ignored Hiranandani hospital’s internal records of the technical evaluation which had been submitted as evidence on record demonstrating the process of selection. Further, The DG has incorrectly observed that hospital did not have an exclusive tie-up arrangement with another stem cell banking service provider in earlier years. However, Hiranandani hospital had submitted executed version of two agreements with Life Cell, for the years 2009-2010 and 2010-2011. The Life Cell Agreements were for a period of one year each, by which hospital was bound to offer exclusively Life Cell stem cell banking services for its patients for a period of one year.

According to COMPAT, the DG’s analysis of hospital’s catchment area was based on an incorrect data set of patients who availed of maternity and stem cell collection and banking services and not of those patients who obtained maternity services alone at hospital (being the Actual consumers of the relevant product market). Finally, COMPAT also commented on DG’s not obtaining submission or even recorded the informant’s or Mrs Jain’s testimony to test the veracity of their claims and its incorrect product market definition.

COMPAT on the issue whether the conduct of Hiranandani hospital be termed refusal to deal was of the opinion that allegation pertaining to it would only operate if (a) parties have an agreement between them and (b) parties to the agreement were restricted or likely to be restricted from selling or purchasing goods. In the present case on account of agreement

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137 COMPAT Appeal no 19 of 2014
between Hiranandani hospital and Cryobank, it was alleged that other stem cell banks had been refused by Hiranandani. Considering this, every exclusive deal could potentially be categorised as refusal to deal.

*Antitrust does not impinge on most companies' choices to deal, or not to deal, with other companies. However, antitrust laws frown upon such refusals that have a foreclosure effect on substantial amount of a market i.e. whether the contravening entity has a substantial market power so as to adversely affect competition in its favour*.138

*In the present case, following are to be noted: (i) Impugned agreement of OP with Cryobanks was initially for one year only; (ii) the OP is able to influence less than 1% maternity patients in the area of Mumbai, if at all it does so; (iii) The effect of so called tie is cast on less than 7% of its customers; and (iv) As submitted by OP, the practice of having an arrangement exists in other hospitals also. As regards contention of the Informant that other stem cell banks are restricted from doing business with the patients of OP, it would be appropriate to say that OP is within its right to choose its business partners in accordance with its commercial interests.*139

COMPAT applied rule of reason approach with giving due regards to the factors enumerated under Sec 19(3) to determine an appreciable adverse effect on competition which was not done by CCI for deciding relevant market. The Tribunal found no violation of Sec 3(4) after the examination.

Subsequently in the appeal COMPAT dealt with two issues:

1. Whether the findings recorded by the majority members of CCI that the appellant was guilty of acting in violation of Section 3(1) of the Act was legally sustainable?

COMPAT on reading of Sec 3 observed that both DG and CCI completely overlooked that the agreement entered between the appellant the Cryobank did not, in any manner, restrict the choice of the service provider in the relevant market (stem cell banking).

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138 Id.
139 Id.
By virtue of the agreement, the appellant could provide stem cell banking services to the patients who wanted to avail such services only through Cryobanks but the latter was free to enrol any patient(s) for such services to be availed in any other hospitals, maternity homes etc. That apart, there were 13 other players in the market of stem cell banking and the patients were free to avail services of any of these service providers according to their convenience and financial capacity.  

Both DG and CCI confused the basic issue by presuming that the stem cell banking service was an integral part of the maternity services provided by the appellant hospital which led to the erroneous decision of violation under Sec 3(1). Even the informant failed to establish a case on how Hiranandani hospital and Cryobank have infringed Sec 3(1).

2. Whether the penalty of Rs. 3, 81, 58,303/- imposed by the Commission taking into consideration total turnover of the appellant for last three financial years was legally justified?

CCI imposed the penalty on the average turnover on violation of Sec 3(1). The question considered by COMPAT was of the ‘relevant turnover’. The Hiranandani hospital provided multiple healthcare services of which maternity service was one of them and stem cell banking provided by a third party (Cryobank) a smaller part of the maternity services for those who desired to avail it. Therefore, even if there was a violation of Sec 3(1), penalty must be based upon income derived from only maternity and no other services of the hospital.

Decision
COMPAT allowed the appeal by Hiranandani hospital and the earlier decision of CCI was set aside

Case analysis
After a perusal of the decisions by both CCI as well as COMPAT following points need to be highlighted:

140 Id.
1. Exclusive dealings are very much part of everyday business not necessarily anti-competitive in nature. Hence an effect based analysis of exclusive arrangement is required.

2. CCI should examine the various factors enumerated under Sec 19(3), (5) and (6) independently in relation to every case without completely relying on DG’s conclusion in its Report.

3. The turnover for the penalty imposed must be based on a ‘relevant turnover’.

4. Examinations in chief are important. In the *Hiranandani* case, neither the DG nor the CCI deposed the actual complainant. And there was necessarily no cross-examination. This failure was described as ‘fatal to the allegations … that the appellant had indulged in anti-competitive activities.’ The DG’s failure to conduct a complete assessment was sufficient to overturn the decision.\(^{141}\)

The above ruling by COMPAT has laid down some ground rules that CCI must keep in mind while assessing future cases. Another important aspect which is of much significance is that COMPAT has considered exclusive dealings in business (hospital exclusivity contracts in this case) not anti-competitive in nature.

### 4.4. HEALTH INSURANCE COMPANIES ALLEGEDLY INVOLVED IN BID RIGGING AND CARTELIZATION IN VIOLATION OF SEC 3 OF THE COMPETITION ACT.

#### 4.4.1. *IN RE: CARTELIZATION BY PUBLIC SECTOR INSURANCE COMPANIES CASE*\(^{142}\)

CCI received an anonymous information alleging infringement of Sec 3 of the Competition Act by the four respondent public sector insurance companies. It was allege that these insurance companies rigged the tender floated by the Government of Kerala on 18.11.2009 for selecting insurance service provider for implementation of the ‘Rashtriya Swasthya Bima Yojna’ (‘RSBY’) for the year 2010-11. It was also alleged that they had formed a cartel and


quoted higher premium rates in response to the aforementioned tender. A copy of the minutes of the ICCC meeting dated 07.12.2009 attended by the company officials of the above-named public sector insurance companies was enclosed with the anonymous information. These minutes reveal that the ‘winner’ of said tender was pre-decided by the public sector insurance companies.

On the direction of CCI, the DG conducted an investigation into the matter and fund cartelization by the companies during the period of 2010-2011 and 2012-2013. CCI decided following issues for consideration:

1. Whether the public sector insurance companies i.e., OPs constituted a single economic entity?

The Insurance Companies submitted that each of them was wholly owned by the Government of India and controlled and managed through the Department of Financial Services in the Ministry of Finance. Hence, they constituted a single economic entity and that therefore, an allegation of cartelisation was unsustainable against them.

The CCI however was of a different opinion and held that the Insurance Companies did not constitute a single economic entity because the regulatory intent of the Government of India with regard to the Insurance Companies was for them to act independently and to compete with the private operators in the insurance sector to offer better services to consumers. Further, each of the Insurance Companies had placed separate bids in response to the tender and all decisions with regard to the bids were taken internally at company level without any *ex ante* approval of or *ex post* notification to the Ministry of Finance.143

2. If finding on the issue No. (i) was negative whether the conduct of the insurance companies resulted in contravention of any of the provisions of the Act?

The authenticity of the minutes of the meeting was confirmed by the companies. CCI was in agreement with the DG Report that the proposed arrangement as per the minutes of the said meeting did lead to the insurance companies bidding and as per the agreement in it, United India Insurance Corporation quoted the lowest price among the insurance companies.

The collusion was further established when CCI agreed with the findings of the DG that –

the conducts of OPs in relation to the subsequent tenders issued by the Government of Kerala and found that the OPs had colluded to steadily raise the insurance premiums by quoting higher premiums. Further, the DG noted that a clear bidding pattern emerged from OPs’ actions. In relation to the tenders issued by the Government of Kerala for the years 2011-12 and 2012-13, the DG found that: (a) OP-4 secured the L1 position and became the supplier under the RSBY and CHIS schemes; (b) OP-4 entered into business sharing arrangements with OP-1 and OP-2; (c) towards the completion of a year, OP-4 requested for an upward price revision and when such requests were denied, OP-4 invoked the exit clause of the contracts, thereby, compelling re-tendering by the Government of Kerala.\footnote{144}

Further, the insurance companies failed to provide a conclusion justification for the significant rise on the insurance premium rates as well. With the assistance of internal office notes obtained by DG, there was clear indication that insurance companies cartelised to fix a high insurance premium rate.

Decision

The CCI under Sec 27 has ordered that the Insurance Companies cease and desist from such anti-competitive practices. Based on its findings, the CCI also imposed a total penalty of INR 671.05 crores on these insurance companies.\footnote{145}

Case analysis

This order is significant in respect of the standard of evidence that the CCI based its conclusions on. In several previous instances, the CCI had found conduct to be anti-competitive based on purely circumstantial evidence, this order can be considered to sets a good precedent for a higher standard of proof. This case involved the concept of ‘information exchange’ and was the first case relating to it in the Indian health care industry from the perspective of competition law. There is also something to be said for the fact that the CCI acted, of its own accord, taking cognizance of an anonymous complaint.

\footnotetext{144}{Id.} \footnotetext{145}{Id.}
The Order also reflects the CCI's commitment to its purpose, irrespective of whether the anti-competitive conduct is by a private sector companies or companies in the public sector, where the Government holds a stake. ‘It is perhaps a wakeup call to public sector undertakings and their imminent need for appropriate compliance programmes.’

**Appeal in the Competition Appellate Tribunal**

An appeal was filed against the order by CCI. COMPAT laid down following issues to be determined in the appeal:

1. Whether the Appellants were a ‘single economic entity’ and hence there could not be any agreement in terms of Section 3 of the Act, amongst the companies which were part of the same enterprise, causing appreciable adverse effect on competition;

2. Whether the meeting of 7.12.2009 and the conduct of the Appellants in regard to various tenders, evidenced bid rigging in terms of Section 3 of the Act or a co-insurance arrangement;

3. Whether the Appellants had any escape from the presumption of bid rigging having appreciable adverse effect on competition;

4. Whether Investigation by the DG and the impugned Order of the Commission went beyond the period covered by the Order under Section 26(1) of the Act passed by the Commission;

5. Whether the principles of natural justice were violated, vitiating the impugned Order, by non-signing of the order by the Chairman who was present during the deliberation in the Commission;

6. Whether finding of the Commission of virtual fraud was valid;

7. Whether the penalty could be levied and if so whether the quantum was to be calculated with reference to the total turnover or with reference to the turnover of the transactions relating to bid rigging.

The Tribunal also rejected the proposition of Appellants that they were a ‘single economic entity’ as they were driven by a common objective of carrying out obligations of State and

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146 COMPAT Appeal no 94/2015
147 Competition Act, supra note 1 at 140
148 *Id.*
were ‘State’ in implementing the health insurance schemes and other social obligations under Directives Principles of the Constitution. The Tribunal was of the opinion that there was no constitutional obligation on the Appellants are there under DPSP to provide health insurance to all.

While acting as ‘State’, the only obligation of the Appellants in regard to insurance contracts was to be fair and reasonable and to be governed by the larger public policy but that did not mean that they were to necessarily provide health insurance by bidding for the government of Kerala tenders or were in terms of General Insurance Business Nationalisation Act, 1972\(^{149}\) (GIBNA) read with Article 39 (c) of the Constitution\(^{150}\) mandated to participate in the health insurance schemes. It is also important to note that Article 39 (c) of the Constitution provides that the State shall direct its policy towards securing that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The admitted facts reveal that, senior officials of the Appellants held a meeting on 7.12.2009 wherein it was agreed that United India Insurance Company (UIICL) would be ‘L1’ with respect to the tender floated by the Government of Kerala for the year 2010-11. UIICL did in fact emerge as the lowest qualifying bidder in terms of the aforesaid agreement for subsequent tenders too, where all the four Appellants bid. The contention of the Appellants was that, UIICL had incurred huge losses from the first year of the scheme and having already suffered losses in the previous years, the sister companies discussed about the capacity building, risk improvement measures and sharing of burden of losses while serving a social sector scheme.

Tribunal was in agreement with the Commission that the Appellant did enter into an agreement which was in contravention of Sec 3 of the Act\(^ {151}\) resulting in bid rigging. The bid rigging arrangement executed by the Appellants was in the nature of cover bidding whereby three of them agreed to submit bids which were higher than the bid of UIICL. The Appellants, through their separate bids created an impression of genuine competition. This misleading facade resulted in UIICL not ending up as a lone qualifying bidder.


\(^{151}\) Competition Act, supra note 1 at 140
On the issue whether the Appellant could escape the presumption of appreciable adverse effect on competition on account of bid rigging, the Appellants argued that agreement, if any between the Appellants could not have had any appreciable adverse effect on competition in the market, which is the sine qua non for the contravention under Section 3(3) of the Act for various reasons including that it was an agreement between sister concerns controlled by the common shareholder, that not all the Appellants qualified for the financial evaluation of the bids each year and that factors under Sec 19(3) showed there was no AAEC on the contrary there would be `substantial benefit to the consumers and there was also increase in efficiency as a result of the agreement of co-insurance entered into between the parties.‘.

On the issue of validity of the penalty imposed by CCI, the Appellants submitted that the agreement was necessary to serve the needs of the society better and it was not a case of continuous disregard of law and no mala fide could be attributed to the Appellants. However, the Tribunal was of the opinion that law was breached and the legal conclusive presumption would be that there was an appreciable adverse effect on competition.

Penalty was to be calculated with reference to the gross premium received by UIICL as insurance provider under RSBY/CHIS scheme and penalty for each of the Appellants would be a proportion of their share in such premium. On the question of quantum of penalty imposed, the Tribunal considered the mitigating and aggravating circumstances. Considering the burden of penalty would ultimately be borne by the public since the insurance companies were publicly owned, the Tribunal therefore reduced the penalty from two to one percent of the relevant turnover.

**Case analysis**

Due to the availability of accurate internal records of the meeting of the four insurance companies, the establishment of contravention of Competition Act was done expeditiously in this matter by both CCI and COMPAT. The only point of difference between the two orders was that relating to the quantum of penalty imposed, which was reduced by COMPAT after considering the interest of the public. The case serves as a reminder that health insurance sector is not completely immune to anti-competitive practices and even public sector enterprises which aim to serve the public engage in restrictive behaviours and practices.
4.4.2. *IN RE: ASSOCIATION OF THIRD PARTY ADMINISTRATORS AND GENERAL INSURERS’ (PUBLIC SECTOR) ASSOCIATION OF INDIA CASE.*

**Facts**

In the present case the Association of Third Party Administrators, filed the information before CCI alleging that the General Insurers’ (Public Sector) Association along with the remaining opposite parties which were the public sector general insurance companies were in contravention of Sec 3 and 4 of the Competition Act. The Informant has stated that PSGICs collectively hold/control about 60% of the health insurance business. It has been alleged that PSGICs constitute a ‘group’ within the meaning of Explanation (b) to section 5 (b) of the Act and acted in concert being part of a cartel.

The informant alleged that despite being an *ad hoc* body, GIPSA expressed interest in setting up the Health Insurance TPA of India Ltd (HITPA), a captive TPA, through a joint venture, thus demonstrating that GIPSA was being used to further anti-competitive agreements among the insurers. The informant supplied a circular issued by the Department of Financial Services directing the chief managing directors of the four insurers not to conduct standalone group health insurance business with each other without obtaining express consent from all concerned directors so as to ensure that there was no competition among them. The informant also supplied communications showing compliance with the circular. CCI, therefore, directed DG to investigate in to the matter for contravention of Sec 3 of the Act.

In the comprehensive report submitted by DG it was observed that HITPA had been set up as a joint venture company by four public sector general insurers i.e. the PSGICs and General Insurance Corporation of India (GIC) for which consent was granted by IRDA to public sector general insurance companies to hold stake in the jointly formed captive TPA. It was found that though the captive TPA obtained the certificate from IRDA for working as TPA in the Health Insurance sector in June 2014, it was not operational as on the date of submission of the DG reports.

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152 *In Re: Association of Third Party Administrators and General Insurers’ (Public Sector) Association of India, New India Assurance Co Ltd, National Insurance Co. Ltd., United India Insurance Co. Ltd and Department of Financial Services Ministry of Finance, GOI, Competition Commission of India Case no 107 of 2013.*

153 *Competition Act, supra note 1 at 140*

154 *Id.*
As per the IRDA amendments of 2013, the role of TPAs in claim settlement and agreement with hospitals changed and the primary responsibility of it henceforth now lies with the insurance companies. Along with it, the authority to empanel and contract with hospitals to provide cashless treatment to insured patients has since then been with the insurer. In the opinion of the DG, since TPAs are tripartite signatory in the contact between insurer and hospital for cashless treatment, HITPA could not lead to anti-competitive effects in the healthcare market. Thus, the decision of PSGICs to have a new TPA which would have no exclusive rights of their business was found to be a commercial decision aimed at improving the level of services. The investigation further concluded that the formation of new TPA jointly would not foreclose the market or lead to any appreciable adverse effect on competition.\textsuperscript{155}

Regarding the allegation relating to violation of Sec 3(4) of the Act and pre-arranged agreement amongst the PSGICs in respect of sharing of the group health insurance business amongst them, the DG found no evidence. Hence, the DG found there was no attempt to determine the prices, limit or to restrict the supply of services in the market of health insurance or TPA leading to no violation of the Competition Act.

**Issues**

CCI though did not expressly spell out the issues, however during the proceedings determined two main issues:

1. Whether the formation of HITPA in the form of a JV by the PSGICs using the General Insurers’ Association as a platform was an horizontal anti-competitive arrangement?

In the present case, the informant placed reliance on an earlier order of CCI which related to this JV TPA yet to be formed at that time\textsuperscript{156}. The Commission however, did not find any contravention at that time and disposed the case with the view that such JV would not lead to any competition issues on the contrary enhance efficiency.

The Commission considered the relevant provision of the Act, which creates an exception by the legislation for horizontal anti-competitive agreement. Joint venture agreements which

\textsuperscript{155} Association of Third Party Administrators, supra note 152 at 214

\textsuperscript{156} Case no 49 of 2010
enhance efficiency ‘in production, supply, distribution, storage, acquisition or control of goods or provision of services.’ have not considered anti-competitive under the Indian competition law. Such agreements are therefore not per se anti-competitive and their impact needs to be assessed on the touchstone of the factors laid down under section 19(3) of the Act. After looking into them, CCI was of the opinion that forming the JV was a commercial decision to improve the level of service and that it would affect the market for TPA in an appreciable adverse manner. According to CCI:

*Obviously, the existing TPAs would have to forego some business to the newly formed HITPA which is common phenomenon in any market facing new entrants. This, however, does not seem to cause absolute foreclosure for the existing TPAs. It has been clearly stated by the PSGICs that the existing TPAs would continue to remain on their panel and the newly formed HITPA would be one amongst other TPAs.*

*Further, the choice of consumers largely based on the efficiency in services would be the sole criteria that would guide the PSGICs in their choice of TPAs. It was confirmed that no preferential treatment or reservation would be accorded to HITPA vis-à-vis other existing TPAs. Furthermore, it was also submitted by the PSGICs that if the services of HITPA are not found to be satisfactory by the customers, they will have a choice to switch or to avail the services of other TPAs.*

Eventually, CCI could not find any evidence of a vertical agreement between PSGICs and HITPA which was in violation of Sec 3(4)

2. Whether there was as alleged sharing of data among PSGIC as per the instruction of the General Insurers’ Association

The Informant had alleged that Department of Financial Services issued a circular dated 24.05.2012 addressed to the respective CMDs of PSGICs. The said circular had instructions regarding underwriting of group/ tailor-made group health insurance policies with net premium of above Rs. 1 crore and on sharing of data concerning premium, claims etc. with respect to major accounts. Instructions were also issued to the effect that no PSGIC shall obtain business of stand-alone group health insurance from any of the public sector

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157 Competition Act, *supra* note 1 at 140
158 Association of Third Party Administrators, *supra* note 152 at 214
companies without the prior written and explicit ‘No Objection Certificate’ (NOC) from the concerned CMD of the other company.

On this the Commission was of the opinion that the issuance of such directions did not necessarily or conclusively indicate collusive arrangement between the recipients of such instructions. It needed to be seen whether the recipients, who were horizontally/similarly placed, in fact had followed such instructions and thus hampered the competition in the market in order to bring such recipients within the purview of section 3(1) read with section 3(3) of the Act\textsuperscript{159}. Further, in regards to the alleged liability of the Department of Financial Services for issuing the purported circular, CCI noted that the department functioned only as an extension of the government and acts on behalf of the president in order to monitor the overall performance and functioning of public insurers. Hence, it did not qualify as an 'enterprise' within the definition set out in Section 2(s) of the act. However, the CCI opined that the department should have refrain from issuing any directions or guidelines to public insurers in the interest of protecting competition.

Decision

The Commission was of the opinion that no contravention of the provisions of the Act has occurred and thereby it closed the case.

Case analysis

CCI scrutinised the facts well in this case especially after a word of caution by the COMPAT in earlier cases such as \textit{Hiranandani}\textsuperscript{160} case. Though the scope of anti-competitive conduct is very much present in the TPA segment of health insurance, in this particular case no contravention was found. The competition authorities in India in such a scenario must keep a close watch on this important and growing aspect of the health care industry of India.

\textbf{4.5 CONCLUSION}

Out of the sixteen cases relating to the healthcare market which have been bought before CCI till date, most of them pertain to NOC, PIS and fixed trade margins. Inspite of the surge in cases on these issues from 2009 onwards, practices which were repeatedly declared anti-competitive by the CCI continued to be reported till the year 2013 by number of wholesale

\textsuperscript{159} \textit{Competition Act, supra} note 1 at 140
\textsuperscript{160} \textit{Hiranandani case, supra} note 87 at 175
druggists/stockists and sometimes by their associations. This was the case inspite of heavy penalty being imposed upon them.

The Competition Act, 2002\textsuperscript{161}, lays down monetary penalties and other forms of sanctions. These include cease and desist, heavy monetary penalties, liability of office bearers of the company, agreement being void and unenforceable and imprisonment. To achieve elimination of the said anti-competitive practices as decided by CCI, the Act also mentions under Sec 42 the action to be taken for the contravention of the order.\textsuperscript{162} The risk of non-compliance includes imposition of penalties, awarding compensation to parties suffered damages from non-compliance of CCI’s order, and damage to reputation. The overall purpose of this is to achieve a stricter compliance of the Competition Act and the Orders of CCI so as to curb anti-competitive practices from the market.

What is also interesting to note in the overall analysis of the cases is that despite CCI’s imposition of penalties on associations as well as individual office bearers these practice continued. The purpose of monetary penalty was to create deterrence but CCI has been unable to eradicate these practices within the drug supply agencies. This brings us to question that whether the present framework of curbing anti-competitive practices under the Competition Act especially in the case of healthcare delivery industry is sufficient? Whether there is a need to relook the present approach towards penalty and re-adjust it?

Another aspect of the enforcement by CCI is that other than cease and desist order and fines both CCI and COMPAT have hardly imposed any other forms of sanctions as mentioned above. Here Sec 42 of the Competition Act\textsuperscript{163} is worth mentioning, it gives power to the

\begin{verbatim}
\textsuperscript{161} Competition Act, supra note 1 at 140
\textsuperscript{162} Sec 42 -Contravention of orders of Commission
(1) The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act.
(2) If any person, without reasonable clause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.
(3) If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under sub-section (2), he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit: Provided that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it.]
\textsuperscript{163} Sec 42 Contravention of orders of Commission-
(1) The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act.
\end{verbatim}
Commission to cause an inquiry into the compliance of its orders or directions, impose penalty on non-compliance as well as imprisonment which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both. These powers may be exercised as a Chief Metropolitan Magistrate, Delhi. Till date CCI has invoked these provisions in five cases where penalties were imposed, out of which three are still pending.

On filing of a Right to Information application before CCI, the researcher was made aware that out of the cases discussed above CCI has invoked Sec 42 only in three cases. Further, the Act also gives powers to COMPAT to punish for contempt similar to that of the High Court under the Contempt of Court Act, 1971, but there seems to be no cases filed under this provision regarding non-compliance of the order of COMPAT.

The health care delivery services which forms a large and a very crucial part of this industry has not been of much focus of CCI. The only case relating to hospital bought before the CCI and COMPAT has been the Hiranandani case. It deals with the issue of hospital exclusive contracts. The stand of COMPAT in regards to such contracts is in line with various other competition authorities. However, the possibility of other anti-competitive practices plaguing the healthcare delivery services continues to exits.

Another aspect which is interesting to note is the ratio of cases which were bought before the Commission through an informant versus cases which were filed suo motu. Only three

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(2) If any person, without reasonable clause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.

(3) If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under sub-section (2), he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit: Provided that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it.

The three cases that have been mentioned under the RTI application are CCI v ALL Kerala Chemist & Druggist Association, CCI v Barpetta Drug Dealers Association and CCI v Chemist & Druggist Association, Goa.

Power to Punish for contempt under Sec 53U:-
The Appellate Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and, for this purpose, the provisions of the Contempt of Courts Act, 1971 (70 of 1971) shall have effect subject to modifications that,-

(a) the reference therein to a High Court shall be construed as including a reference to the Appellate Tribunal;
(b) the references to the Advocate-General in section 15 of the said Act shall be construed as a reference to such Law Officer as the Central Government may, by notification, specify in this behalf. ]

Appeal, supra note 137 at 205
cases\textsuperscript{167} out of sixteen were filed by CCI exercising its power to initiate the case on its own. This raises a serious question regarding the pro-activeness of CCI in the identifying and curbing anti-competitive practices within the healthcare industry of India.

Healthcare sector has been part of various inquires conducted by competition authorities worldwide such as ‘Pharmaceutical Sector Inquiry Report’ by European Commission\textsuperscript{168} and a series of public hearing in 2003 conducted by Federal Trade Commission on a range of issues in healthcare\textsuperscript{169}. Such steps assist in understanding the condition, behaviours and practices within the market whether the larger healthcare industry or a more focused aspect of it like the area of the present research, healthcare delivery services. The Indian health industry is not immune to anti-competitiveness; CCI has not yet taken any significant step in this aspect so as to understand the dynamics within the market and efficiently combating anti-competitive practices within it.

\textsuperscript{167} Bengal Chemist and Druggist Association case , supra note 114 at 192 , Collective Boycott case, supra note 65 at 169 and Cartelisation by Public sector insurance company case, supra note 142 at 208.