BEFORE THE COMPETITION COMMISSION OF INDIA, NEW DELHI

In Re: MRTPCase No. C-127/2009/DGIR (4/28)

Informant: Varca Druggist& Chemist & Others

Opposite Party: Chemists & Druggists Association, Goa

Date of decision: 11.06.2012

ORDER

1. BACKGROUND

1.1 This case was initiated on a complaint filed by Varca Druggist & Chemist through its proprietor Mr Hemant Pai Angle and two other proprietors of pharmaceutical drugs and medicines firms (hereinafter referred to as "Informants"), before the Director General (Investigation & Registrations), Monopolies & Restrictive Trade Practices Commission (hereinafter referred to as "DGIR, MRTPC")alleging that the Opposite Party, namely, Chemist & Druggist Association, Goa (hereinafter referred to as "CDAG" or "Association") is indulging into restrictive trade practices.

1.2 The Informants have claimed that they are members of CDAG which has been formed by chemists, druggists, distributors, stockists and retailers of various pharmaceutical companies in Goa.

1.3 The allegations made by the Informants in the complaint / information are summarized as below:

(i) CDAG has formed various guidelines, which its members are bound to abide. The said guidelines were formed by the members of the CDAG for the benefit of its members so that the business of stocking, whole-selling and retailing could be smoothly facilitated among its members. However over a period of time due to the unfair practices of some of the members of its Executive Committee, CDAG has become a monopolistic body and has started practicing certain restrictive trade practices.

(ii) As per the normal practices, whenever a new pharmaceutical company establishes its industry in Goa, or is interested in distributing its products in Goa, it has to appoint stockist and wholesalers for the various regions as per its requirements. These stockist/wholesalers then sell these medicines to the retailers who possess a drug license. However, as per the CDAG guidelines, the CDAG has not only directed but also forced all such companies to appoint their stockist and wholesalers only from those individuals and firms, who are members of the CDAG, thus, making it very clear that no person or firm who is not a member of the

CDAG is eligible for being appointed as the stockist or wholesaler of such a company.

(iii) Furthermore, even when such a company wishes to appoint stockist and retailers from the members of the CDAG, it is insisted and directed that no such stockist or wholesaler could be appointed unless they receive a 'No Objection Certificate' from the CDAG.

(iv) The company desirous to appoint a third wholesaler or stockist has to fulfill the conditions placed by the CDAG that the sale of the previous stockists has to be above Rs. 2 lakh per month. The conditions further go on to restrict the company from appointing the 4th stockist till the sale exceeds Rs. 4 lakh per month. Similarly, only if the average sale crosses Rs. 6 lakh per month then the company can apply to the CDAG for appointment of their 5th stockist.

(v) The guidelines laid down by CDAG do not permit appointing more than five stockists by any pharmaceutical company.

(vi) A committee has been formed by CDAG which has recommended huge increase in the above mentioned slabs without taking retailers into confidence. The retailers and the wholesalers together form this association. The slab of appointment of stockist now starts from Rs. 6 lakh and ends at Rs. 40 lakh for a 5th stockist which totally extinguishes the chances of small wholesalers who could get a offer letter of a particular company to be its stockist as the CDAG bars any new appointment even though the company feels the need.

(vii) The company is restricted to appoint another stockist for one year after it appoints a stockist, even if the company feels the need.

(viii) It has also been the practice of the CDAG that even in cases where the 2 stockists have to be appointed, 'No Objection' by the CDAG is given only for one stockist, and the reason for such an action cannot be questioned by any member of the CDAG or the pharmaceutical company. But earlier, two stockists, who were on their good books, have been appointed.

(ix) As per the market trends in the pharmaceutical business, the pharmaceutical companies introduce schemes for retailers. However, some financially powerful stockist-members of the CDAG who are also on the executive council refuse to pass on the benefits of the schemes to their retailers.

(x) It is also a settled practice in the pharmaceutical business that if a particular batch of drugs or medicines has crossed its expiry date, then such drugs are to be returned by the retailer to the stockist who in turn returns it to the respective company and can claim refund. However such refund is never passed on to the retailers. Some stockists also overcharge the retailers when such products are supplied to the retailer and the retailer has no forum to complain against such a stockist as they are appointed by the company on recommendations of CDAG, and even if the company desires to take action, it cannot do so, because in that case they shall not have any stockist to distribute their products, unless the CDAG gives 'No Objection' to appoint a new stockist.

(xi) Even a new individual or firm which possesses all the qualifications and means for being appointed as stockist, distributor or a wholesaler can't be appointed by any company, although there may be dire need for appointing such a new stockist, unless and until such a firm or a wholesaler obtains a no objection from the CDAG. Further such an individual or firm has to become a member of the CDAG, first.

(xii) When any firm or individual wishes to bid for any government tenders, then the CDAG directs that such tenders are to be routed only through the 'authorized stockist', and such 'authorized stockist' are the members of CDAG, who control the affairs of the CDAG being financially powerful and influencing the executive council.

(xiii) The companies are threatened with punitive actions by the office bearers and therefore, reluctantly the company has to follow the directions of the committee in fear of boycott and the small wholesalers who want to participate in the government tenders are illegally barred from doing so.

(xiv) The members who are wholesalers and who are qualified to quote and bid for the government tenders are threatened of dire consequences if they do not route the supply from the 'authorised stockist'. The companies are also threatened of dire consequences if they do not follow the guidelines of CDAG.

(xv) It is also a common practice of the CDAG to force and compel any new entrant who wishes to carry out business of stockist, distributor or

retailer of any pharmaceutical product to become its member. If such a new entrant refuses to become a member, then the CDAG directs all its members not to purchase stocks from such a stockist and if he is a retailer then not to supply him with stocks of other companies. Similarly if a company wishes to appoint a new or a additional stockist then they cannot do so without the 'consent' of the CDAG, which is against the fundamental rights as enshrined in Article 19 (1) (g) of The Constitution of India.

(xvi) The CDAG also directs that no credit be given to retailer although as per the market practice, a credit of 20 days to one month is normally given to settle all dues. However, if a company appoints a stockist without the consent of the CDAG, then the CDAG directs the existing stockist of such a company to give credit of 3-4 months to retailers so that the retailers do not purchase stocks from the new stockist and also directs its existing stockist who are members of the CDAG not to purchase stocks from such a company so that eventually the company bows down to the demands of the CDAG. So also if the company wishes to supply its stocks directly to a retailer, then in such a case they are directed by the CDAG not to do so and demand that all stocks should be routed through the stockists who are members of CDAG.

(xvii) CDAG's governing body i.e. its Executive Committee, comprises of one President, four Vice Presidents, one Chairman of wholesalers, one Chairman of retailers and seven Members and take arbitrary decisions and force its views on all its members as well as non-members. The

Executive Committee consists of some very financially influential persons who are themselves stockist of various companies and are therefore not allowing companies to appoint new or additional stockist for fear of losing their business so much so that they have even tried to amend the association guidelines so that new companies cannot appoint new stockist. No new stockist has been appointed by any company, without NOC, for the last nine years in Goa as the CDAG does not give its 'No Objection'.

(xviii) Some of the wholesalers are harassed by the Association to relinquish the stockist ship of a particular company, because some of the members of the Executive Committee were interested to grab the company of that particular stockist.

(xix) The retailers are harassed by such stockist by unnecessarily making them stand in queues, demanding immediate payment, non refund on products that have crossed expiry dates, non supply of stock even when such stock is in surplus, non-passing of schemes to such retailers, even when the company has floated various schemes. As some of the stockists enjoy position of monopoly, the retailers are at their wits end.

(xx) At the time of the Annual General Meeting (AGM), most of the members are not intimated, only those members are intimated about the date and time of meeting who are in good books with the executive council members of the CDAG. This is done with the ulterior motive of remaining in power and for the fear of being voted out by majority of

the members. In case members wish to make certain suggestions, which are contrary to the opinion of the members of the executive committee of the CDAG, then the committee unlawfully adjourns the meeting and the next date of meeting is never communicated to such members.

1.4 The Informants prayed for following reliefs :

(i) After conducting inquiry into the working of CDAG and looking into guidelines issued by it, the current executive council be debarred from taking any decisions with respect to any amendment of CDAG guidelines and also that the provisions in the guidelines which restrict the companies to appoint the number of stockists should be scrapped.

(ii) CDAG should be barred from interfering in the free bidding and supply of goods by the wholesaler to the Government.

1.5 After receiving the complaint, the DGIR, MRTPC undertook a preliminary investigation into the allegations made in the complaint and sought the comments from CDAG.

1.6 The CDAG submitted its objections on 05.10.2009 before DGIR, MRTPC denying the allegations made in the complaint and submitted that guidelines issued by CDAG did not amount to monopolistic and restrictive trade practice. It was also submitted by CDAG that the pharmaceutical

companies are at liberty to appoint as many stockists and dealers of their choice as they wish and CDAG is not placing any restriction on appointment of stockists or retailers.

2. At this stage, consequent upon the repeal of Monopolies and Restrictive Trade Practices Act, 1969 (the MRTP Act) the case was transferred to the Competition Commission of India (the Commission) under section 66 (6) of the Competition Act, 2002 (the Act).

3. The Commission, after considering the material on record formed an opinion that a *prima facie* case existed and referred the matter to the Director General (DG) for conducting investigation. In pursuance of the direction of the Commission the DG conducted investigation and submitted the investigation report on16.06.2010.

4. During the course of investigation the DG gathered facts out of primary and secondary sources, collected evidences by sending questionnaire to the concerned parties including information providers, analyzed the evidence/facts gathered in light of the information supplied to the

Commission and recorded the statements of information providers as well as members of CDAG.

Findings of DG Report

5. The observations and the findings in the DG Report can be summarised as under:

5.1. As per the report of DG, from the examination of various clauses of the guidelines of CDAG it is undisputed that unless the CDAG grants NOC, pharmaceutical companies cannot appoint a wholesaler/stockist on its own. Further, it is also stipulated that in order to become a wholesaler or a retailer in Goa, one has to become a member of the association. These conditions, in effect, limit the supply of pharma products in the territory of Goa. The DG in this regard has observed that had it not been for the guidelines, the pharma companies could have appointed more wholesalers and there would have been more retailers leading to more supplies in the market. By restricting the numbers of wholesalers and retailers, the association has restricted the supply of medicines in the market of Goa.

5.2. After examining the conditions prescribed in the guidelines the DG has noted that no wholesaler is allowed to take stockist- ship of any company

without taking permission of the association. Similarly, wholesalers can supply to retailers only if retailers are the members of the association. Thus, there has been understanding among the stockist not to allow other players come in the market and compete against them. Further, as per Memorandum of Understanding, maximum cash discount offered to retailers should be 2% only and wholesalers should not operate any indirect beneficiary schemes to get larger orders from Retailers. As per guidelines, any wholesaler found violating the above rules will be liable to strict action by CDAG on the recommendation of the disciplinary committee appointed for the purpose. The guidelines also state that retailers should not resort to any unhealthy competition by giving discount to their customers and should not operate any beneficiary schemes to attract the customers and retailers found violating the above rules will be liable to strict action taken by CDAG on the recommendation of the Disciplinary Committee appointed for the purpose.

5.3. The DG has observed that the guidelines of the association and understanding among the wholesalers and retailer are anti-competitive since they are acting in concert to fix prices in terms of Section 3(3)(a) of

the Act by not allowing the wholesalers and retailers to give discounts or extend any beneficiary schemes to the customers. Instead of the market forces determining the price of the drugs, ban has been imposed on lowering prices or offering incentives. The DG has quoted the statement of Albert De Sa, President of CDAG confirming that association in its meetings does discuss issues related to price margins etc.

5.4. Further, as per DG, the guidelines are also in violation of Section 3(3) (b) of the Act, since by not allowing any outsider (who is not a member of association) to become stockist or retailer restriction has been placed on the number of players, thereby, limiting the supply of drugs in the market. More players would mean more availability of the drugs in the market and consequently more provisions of goods and services.

5.5. DG has noted that the members of CDAG are meeting during Annual General Meetings and Executive body meetings on regular basis. Apart from the discussion on the topics of common interest of members, certain issues have also been discussed which show that the Chemists and Druggists Association of Goa hold regular meetings with a view to

regulating the conduct and behaviour of members and discipline them. From the excerpts of the meetings, it was also noted that direct supplies from the pharma companies to the hospitals or retailers were severely discouraged. Unity of wholesalers and retailers for a common cause was also discussed in several of these meetings. The minutes also show that without the express approval of the Association, pharma companies cannot engage wholesalers and retailers.

5.6. The DG has come to the conclusion that actions of Association have no positive market outcomes and its conduct and actions, on the contrary, are against public interest. The report goes on to show that three factors listed in Section 19 (3) which could have been advanced as justification for their actions as being pro-competitive and consumer friendly, namely, (I) accrual of benefits to consumers, (II) improvements in production or distribution of goods or provision of services and III) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services, do not offer any kind of defence to them. The DG has also cited the ratio laid down in the cases of Consten Grundif v Commission (1966) ECR 299, GlaxoSmithKline Services Limited V Commission [2006]

ECRII-2969(2006),wherein it has been held that the benefits produced by an agreement must be something of objective value to the Community as a whole, not a private benefit to the parties themselves. Thus, according to the report of DG there is a case against the CDAG to say that their guidelines, rules and regulations coupled with their actions contribute to appreciable adverse effect on competition (AAEC) in the market of pharmaceuticals.

6. Are members of CDAG acting like Cartels?

6.1 The DG has further investigated the aspect as to whether the activities of CDAG/members of CDAG were akin to cartel within the meaning of Section 3(3) of the Act. The DG in this regard observed that it is undeniable that the trade or professional associations in modern times benefit their members and may also be beneficial in increasing the efficiency of the market. Most trade associations take an active role in shaping the way their industries work. They promote product standards and best practices, and define and promote standard terms and conditions of sale. They also issue recommendations to their members on a variety of commercial and non-commercial issues and also promote, represent and protect the interest of

members on legislation, regulations, taxation and policy matters likely to affect them. According to OECD, "although their principal function is to provide services to their members, trade associations also have important "industrial policy" and "political functions". However, the trade or professional associations have to limit their activities in such a manner that they do not run afoul of the competition law. Often discussions of such associations, even if they are meant to pursue legitimate association objectives, bring together direct competitors and provide them with opportunities for exchange of views on the market, which could easily spill over into illegal coordination. Casual discussions of prices, quantities and future business strategies can lead to agreements or informal understandings in clear violation of antitrust rules. Frequently businesses use trade associations as a means of providing "cover" for their cartel activities. It is for this reason that trade associations and their activities are subject to close scrutiny by competition authorities around the world.

6.2 DG has further observed that the trade associations often have been found to serve as a vehicle for practices that prohibit competition in the market as has been seen in cases of some cartels like lysine cartels where activities

were carried out under the garb of associations. The competition agencies across the world have frowned upon trade associations for their direct or indirect involvement in conduct which harm or restrain competition. Office of Fair Trade (UK) has been of the view that functions of trade associations are useful to members - especially, perhaps, to smaller firms – and they may also be beneficial in increasing the efficiency of the market system as a whole. Activities of trade associations which have no appreciable adverse effect on competition may be of no concern. A trade association may, however, provide directly or indirectly the vehicle for anti-competitive, or even collusive activity. When associations act as a conduit for the organization of concerted actions by its members - for example by making recommendations as to the prices at which its members sell their goods or services or by giving a call of collective boycott –both the constituent members and the trade association itself may face condemnation under Article 81 of EC or Section 1 of Sherman Act.

6.3 Many associations including law and attorney firms, worldwide, have issued guidelines for the associations so that their behaviour is compatible with the anti-trust laws. It has been recognized that activities of trade

associations such as general assemblies and meetings can be a forum for concentration between the members. Such concentration does not necessarily have to be related to the subjects that are formally on the agenda of the association. As members of the association will usually also be the competitors, information concerning the meetings of the association might be considered as an indication or proof that the intention to restrict competition or restrictive practices exists amongst certain members.

6.4 The organization cost of a cartel is significantly lowered where a trade association exists. Trade associations, by lowering the cost of meetings and coordinating activities among firms in a market, facilitate the establishment and enforcement of a cartel.

6.5 Here, on this aspect the DG has observed that the wholesalers and retailers used CDAG as platform and issued guidelines/directives which restrict the supply of medicines in the market. It is significant that many powerful wholesalers are retailers as well and such wholesalers could have their own interest in creating such type of guidelines so that others may not get entry in the market of pharmaceuticals in Goa. On the basis of the guidelines

issued by CDAG, following activities of wholesalers and retailers carried out through CDAG, as per the DG may be taken as cartel-like:

i) Guidelines/Directives issued to the members by the association to obtain no-objection certificate to get stockist ship of any pharma company.

ii) Organizing meetings to pursue their agenda.

iii) Talking about pricing margins in the meetings as has been confirmed in the statement of Mr. Albert De Sa.

iv) Taking collective actions in terms of deciding issues of trade, prices, discounts and also awarding punishment to the violators.

v) Denying business unless one becomes member of CDAG and agrees with the terms and conditions of the association.

6.6 The DG in his report emphasized that looking at the nature of activities of the wholesalers and retailers who are the members of CDAG (engaged in similar or identical trade), it can be stated that they reached an agreement amongst themselves and decided to restrict the market of pharmaceutical products by limiting it amongst themselves. As per DG, following factors

which have been identified in general as factors for existence of cartels, facilitated the cartel like behaviour of the wholesalers and retailers:

i) Barriers to entry have been put by CDAG by coming out with the guidelines which state that till one becomes member of CDAG, he or she will not get no-objection to get stockist ship from any pharma company in case of a wholesaler or supply from any wholesaler in case of a retailer. This is clear from the following clauses in guidelines/MoU:

"POLICY TO MAKE SUPPLIES TO NEW RETAIL OUTLETS

Following conditions apply to new Retailers outlets for a period of minimum one year.

a) SUPPLY: No supply to be made to any Retailer by any wholesaler unless such Retailer becomes member of CDAG" (Clause 8 of MoU)."

"Appointment / Termination of new stockiest shall only be done with the permission of the Association."(Clause 1 of Prescription Guidelines)

ii) The pharma companies could have appointed more wholesalers and there could have been more number of retailers but for the existing

guidelines. Not only members but companies also are liable for punishment as per the guidelines of Association, if wholesalers and retailers are appointed without seeking permission from the Association. The companies are also barred from direct supplies to the doctors, nursing homes, chemists. (Clause 7 under the heading General-Prescription Guidelines). CDAG is, thus, controlling the market of medicines.

iii) The cartel like behaviour of wholesalers-retailers was facilitated by the existence of associations and interaction of the wholesalers-retailers in those associations. The members of CDAG are united together and exhibit collective action.

iv) Since the wholesalers and retailers are all concentrated in small state of Goa, Geographical advantage of being present at a small concentrated area also helped the wholesalers-retailers to organize and act together.

v) The guidelines of association contain clauses which try to discipline the violators, an act quite typical of the Cartels. The clauses contain in clear terms the penal clauses in terms of monetary fines in case of violations of guidelines of association. Clause 7 and clause 9 under the heading

procedure of Prescription Guidelines). Thus, policing of activities of members is being done typical of all cartels.

vi) Low expectation of severe punishment *because of the fact that MRTPC (which was in existence earlier) did not have powers of penalizing the firms for anti-competitive behaviour* also facilitated the cartel like behaviour.

6.7 Collusion among independent firms in the same industry to co-ordinate pricing, production or marketing practices in order to limit competition, maximise market power and affect market prices has been referred to as a "cartel". (Canadian Economy online, available at htttp://www.canadianeconomy.gc.ca/english/economy/cartel.html).The most common practice undertaken by cartels is price-fixing. This is the term generically applied to a wide variety of concerted actions taken by competitors, which have a direct effect on price. The simplest form is an agreement on the price or prices to be charged to some or all customers. In addition to simple agreements on what price to charge, the following are also considered price-fixing:

- Agreement on price increase;

- Agreement on a standard formula, according to which prices will be computed;
- Agreement to maintain a fixed ratio between the prices of competing but non-identical products;
- Agreement to eliminate discounts or to establish uniform discounts including agreement on credit terms that will be extended to customers;
- Agreement to remove products offered at low prices from the market so as to limit supply and keep prices high;
- Agreement not to reduce prices without notifying other cartel members including agreement to adhere to the published prices;
- Agreement not to sell unless agreed price terms are met; and agreement to use a uniform price as starting point for negotiations.

6.8 As per the report of DG, it can be seen from the clauses contained in the guidelines of CDAG that discounts are being severely discouraged. Restrictions have been imposed on the members not to pass on beneficiary schemes to the consumers. Further, as has been admitted by Mr. Albert De Sa in his statement, in meetings of association, issues of pricing, price margins are discussed. DG has mentioned that the following clauses in MoU clearly bring out agreements to eliminate discounts or to establish uniform

discounts including agreement on credit terms that will be extended to customers:

"1. Purchase and Payment (Clause 1 of MoU)

a) All Wholesalers should make cash bills of minimum Rs. 100/- However the minimum amount for credit bills is at the discretion of the Wholesalers.

b) It is agreed that maximum cash discount offered to Retailers should be 2% only. The minimum purchase by Retailers for eligibility of cash discount is to be decided by the concerned Wholesaler.

c) No other indirect discount should be given such as selling to Retailers and Doctors without LST / giving free offer either in excess to the trade offer officially operated by the company or giving free other products where no trade offer is operated by the company. Any such things will be considered as indirect discount.

d) Wholesaler should not operate any indirect beneficiary schemes to get larger orders from Retailer.

e) Any wholesaler found violating the above rules will be liable to strict action taken by CDAG on the recommendation of the disciplinary committee appointed for the purpose.

1) For first violation a fine Rs. 2500/- will be imposed beside warning letter will be written to the Wholesaler.

2) For second violation a fine of Rs. 5000/- will be imposed and also executive committee will not issue any NOC to such a wholesaler for a period of 1 year for being appointed as a stockiest any company.

f) Retailers should not resort to any unhealthy competition by giving discount to their customers and should not operate any beneficiary schemes to attract the customers.

g) Any Retailers found violating the above rules will be liable to strict action taken by CDAG on the recommendation of the Disciplinary Committee appointed for the purpose.

1) For first violation a fine Rs. 25000/- will be imposed beside warning letter will be written to the concerned Retailer.

2) For second violation a fine of Rs. 5000/- will be imposed and all Wholesaler will boycott such retailer for a period of 3 months."

6.9 DG has observed that since cartels operate in secrecy, they go up to great lengths to hide their activities. Using trade associations as a cover usually means using an umbrella protection to avoid arousing any suspicion. Based upon guidelines discussed above and the activities of the bodies like CDAG, DG concluded that these association exhibited cartel like behaviour.

6.10 The DG has concluded that the facts brought out during the investigation are indicative that the guidelines of CDAG are restrictive and anti-competitive in nature. The DG has recommended that apart from considering action against the CDAG for their anti-competitive conduct, the Commission may also through Department of Pharmaceuticals, Govt. of India, consider getting directions issued to all such associations including All India Chemists and Druggists Association to desist from such practices.

7. The DG report was considered by the Commission in its meeting held on 29.06.2010 and CDAG was invited to file its comments / objections to the report of DG.

Reply of CDAG to DG report

8. The CDAG filed its reply dated 13.09.2010 before the Commission and also made oral submissions on 12.10.2010.The gist of the objections of CDAG is as under:

8.1 The CDAG has contended that the acts alleged in the complaint filed with the DGIR, MRTPC on 16.06.2009 against CDAG under the MRTP Act, 1969 are for the period prior to 16th June 2009. Consequent upon the repeal of MRTP Act, the said case was transferred to the Commission under Section 66(6) of the Competition Act, 2002. In this regard it is pertinent to note that the notice for investigation dated 20.08.2009 sent by the DGIR, MRTPC was replied on 02.10.2009. Thereafter, on 14.10.2009, the Competition Act, 2002 was enforced vide the Competition (Amendment) Ordinance 2009 (Ordinance 6 of 2009) which also repealed the MRTP Act, 1969. Thereafter, this Commission took up the matter received by transfer from the MRTPC under section 66(6) of the Competition Act, 2002 and carried out an investigation culminating in investigation report dated 15.06.2010. CDAG in this regard emphasized that the entire evidence taken by the DG while

preparing the report relates to the period prior to 16th June 2009, as the 1st Show Cause Notice was issued by the DGIR on 20th August 2009 under the provision of the MRTP Act, 1969 and the present proceedings and preceding investigation were pursuant to the said Notice dated 20th August 2009 only.

8.2 On the above basis the CDAG has argued that the entire investigation and proceedings including the investigation report are completely without jurisdiction and ultra vires of the several provision of law and this Commission as well as the DG of the Commission do not have jurisdiction or any lawful authority in the matter. The CDAG by quoting the various provisions contained in section 66 of the Competition Act, 2002 , section 6 of the General Clause Act, 1897 (10 of 1897) as well assection 2 (o), section2(u) and section 36A of the Monopolies and Restrictive Trade Practice Act, 1969 has contended that a conjoint reading of these provisions makes it clear that after the repeal of MRTP Act,1969 by the Competition Act, 2002 the authorities under the MRTP Act, 1969 viz. the MRTP Commission as well as the DGIR,MRTPC ceased to be in existence and the relevant provisions contained in section 66(3) to 66(8) of the

Competition Act, 2002 provide for continuance of the investigations and proceedings pending under the MRTP Act, 1969before the commencement of the Competition Act, 2002. As perthe averment of CDAG the scheme envisaged for dealing with matters pending under the repealed MRTP, Act is as follows:

i. Section 66(3) of the Competition Act, 2002 provides that all the cases pertaining to Monopolistic Trade Practices and Restrictive Trade Practices pending before the MRTP Commission shall be transferred to the Appellate Tribunal and shall be adjudicated as per the provisions of the MRTP Act, 1969 as if it had not been repealed.

ii. Likewise, section 66(4) of the Competition Act, 2002 provides that all the cases pertaining to the Unfair Trade Practices pending before the MRTP Commission be transferred to the National Commission under the Consumer Protection Act, 1986 and shall be adjudicated as per the provisions of the MRTP Act, 1969 as if it had not been repealed.

iii. Furthermore, section 66(6) of the Competition Act, 2002 provides that all investigations or proceedings, other than

those relating to unfair trade practices, pending before the Director General of Investigation and Registration on or before the commencement of the Competition Act, 2002 Act shall stand transferred to the Competition Commission of India.

iv. Section 66(7) of the Competition Act, 2002 provides that all investigations or proceedings relating to Unfair Trade Practices pending before the Director General of Investigation and Registration on or before the Commencement of the Competition Act, 2002 shall stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 and the National Commission may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

8.3 Therefore, as per CDAG, this Commission can exercise jurisdiction only in investigations or proceedings in matters other than those related to Unfair Trade Practices which were pending before the DG(I&R), MRTPC under the MRTP Act, 1969. On the other hand, investigation or proceedings related to

the Unfair Trade Practices are to be handled only by the National Commission under the Consumer Protection Act, 1986.

8.4 As per the contention advanced by CDAG, section 2(o) of the MRTP Act, 1969 as cited hereinabove defines "Restrictive Trade Practices and the necessary ingredient for "Restrictive Trade Practices" is that there should be an imposition of unjustified cost or restriction on consumers by manipulation as set out in the said section. Further, section 2(u) of the MRTP Act, 1969 defines Trade Practices and finally section 36A of the MRTP Act, 1969 defines Unfair Trade Practices. It has been pointed out that the allegations against CDAG as set out in the complaint of M/s Varca Druggists and Chemists and others (on which the entire saga has commenced) are covered under Section 36A(5) of the MRTP Act, 1969. Thus, as per CDAG the allegations against it are, at the most, in the nature of Unfair Trade Practices and therefore as provided under Section 66(7) of the Competition Act, 2002 only the National Commission under the Consumer Protection Act, 1986 has the power and authority to investigate into the same.

8.5 In light of the above submissions, the CDAG has contended that this Commission has exceeded its jurisdiction and has taken up a matter which it is not entitled nor empowered to entertain. Therefore, as per CDAG, the order of this Commission directing the Director General to investigate the matter under section 26(1) of the Competition Act, 2002 is illegal, unlawful and ultra vires.

8.6 It has been also argued that without prejudice to whatever has been stated hereinabove, under Section 66(1A) and Section 66(10) of the Competition Act, 2002 as well as under Section 6 of the General Clauses Acts 1897, the repeal of the MRTP Act, 1969 does not affect its previous operation or anything duly done or suffered thereunder or any right, privilege, obligation or liability accrued, acquired or incurred under the MRTP Act, 1969.As per the submission made by CDAG it is expressly provided in these provisions that any proceedings or remedy can be instituted, continued or enforced as if the MRTP Act, 1969 had not been repealed.

8.7 It has been submitted that, therefore, any act committed during the currency of the MRTP Act, 1969 cannot be called in question under the

Competition Act, 2002. Furthermore, it is expressly provided that the provisions of the MRTP Act, 1969 will alone be applicable to proceedings which have been instituted under the MRTP Act, 1969 "BEFORE" the commencement of the Competition Act, 2002. Thus, even if it is assumed even for the sake of argument that the present proceedings and investigation are legally maintainable, the provisions of the Competition Act, 2002 cannot be applied under any circumstances and any prosecution or proceedings can be undertaken only in accordance with the provisions of the MRTP Act, 1969 as the entire matter is based on a complaint dated 16.06.2009 viz. before the commencement of the Competition Act, 2002.

8.8 As per the submission made by CDAG, there is no provision in the Competition Act, 2002 whereby the said Act has been granted retrospective effect. Therefore under section 5 (3) of the General Clauses Act, the Competition Act can only be enforced and implemented after 14th October 2009 and not prior to that date. Thus, CDAG contended that the complaint dated 16.06.2009 received from M/s Varca Druggist and Chemist shall have to be treated and disposed off only under the provisions of the MRTP Act, 1969 and not under the Competition Act, 2002 under any circumstances.

The only provisions of the Competition Act, 2002 which may be employed in the present mater are Sections 66 (1A) and 66 (7) of the Competition Act since they provide for continuity of the proceedings / investigations in view of the immediate disbandment of the MRTP Commission and the DGIR, MRTPC. Therefore, any penal provisions or violations, if any, shall be solely and exclusively subject to the provisions of the MRTP Act and not the Competition Act, 2002.

8.9 It has also been submitted by CDAG that the entire evidence recorded and collected by the DG while preparing report dated 15.06.2010 was for the period prior to 16th June 2009 when the Competition Act, 2002 was not enforced and the proper law at the time of the purported commission of the alleged offences was the MRTP Act, 1969. Therefore, CDAG cannot now be subjected to proceedings or penalized under the Competition Act, 2002 on evidence which pertains to period prior to the enforcement of the said Act.

8.10 CDAG has also contended that the DG has submitted report dated 15.06.2010 inter alia finding alleged infringement of the provisions of

Competition Act, 2002 whereas in fact, he ought to have restricted himself only to the provisions of the MRTP Act, 1969 in terms of Section 66(1A), 66(10) of the Competition Act, 2002 and Section 6 of the General Clauses Act, 1897. On the basis of above submissions the CDAG has argued that the investigation report of DG, therefore, is violative of and ultra vires of express provisions of law and is not sustainable.

8.11 Moreover, as per CDAG, since alleged acts were done purportedly in violation of the MRTP Act, 1969, no action can be taken under the Competition Act, 2002 for the very same acts. On this ground also the present proceedings deserve to be dismissed.

8.12 CDAG has also submitted that without prejudice to the above submissions, it can be seen that the DG has failed to take into consideration provisions of Section 19(3) (d) and (e) of the Competition Act, 2002 which mandate that while determining whether an agreement has an appreciable adverse effect on competition (AAEC) due regard to the following factors ought to be given:-

(d) Accrual of benefits to consumers.

(e) Improvements in production or distribution of goods or provision of services.

8.13 CDAG has submitted that the DG failed to consider the fact that on account of the actions of CDAG, ultimately the consumers have been benefitted and that the distribution and sale of drugs has been effectively regulated by CDAG in larger public interests. Therefore, CDAG has committed no infringement of any law much less the Competition Act, 2002.

8.14 CDAG has also submitted that the complainant M/s Varca Druggist and Chemist is a disgruntled and mischievous element and is out to harass and trouble CDAG. Mr. Hemant Angle, the Proprietor of the said Varca Druggist and Chemist was himself the Vice-President of the Executive Committee of CDAG for the period from 2006-2008 and relinquished his office when he lost the elections. Furthermore, Mr. Angle is himself Defendant No. 12 in Special Civil Suit No. 36 of 2008 wherein CDAG is also a Co-Defendant. The documents related to that Civil Case are placed as Exhibit-2in Volume II of the investigation report dated 15.06.2010. Therefore, since the Informant is

sailing in the same boat as CDAG, he is not entitled to make such serious, baseless, false and frivolous allegations against CDAG. It has been further averred that Mr. Angle is misusing the process of this Commission in order to pressurize and browbeat the democratically elected office-bearers of CDAG into abdicating their responsibilities so that Shri Angle can wrest control of it.

8.15 CDAG has submitted that it is a non profit-oriented Association and is interested in the welfare of the trade and the consumers at large and is taking an active role in the trade and is working with the various parties in order to bring about some sense of responsibility and accountability in the trade within the State. CDAG has prayed that it should be encouraged in its benevolent efforts rather than be called into question for its actions which are in the larger interests of the public. Inviting the attention of the Commission to the mandate set out in the Preamble of the Act, the CDAG has also submitted that that the Competition Act, 2002 has been enacted in order to generally protect the interests of the consumers. As per CDAG, it is striving hard to protect the interests of the consumers and therefore none of its actions can be said to be violative or contrary to the provisions of the

Act. On the contrary, the objects of the Act as well as those of CDAG are in consonance with each other.

9. On 02.12.2010, the report of the DG dated 16.06.2010 along with entire material including the submissions made by the CDAG was placed for consideration of the Commission. After going through the entire material, the Commission opined that in order to enable it to come to a conclusion, a further inquiry into certain aspects is required. The Commission, therefore, directed the DG to collect supplementary information / evidence on the following issues:

(i) Determination of price by cartel : Since DG has considered operation of CDAG as a cartel, prohibited under section 3 of the Act, it is necessary to establish the following through reliable evidence on the record;

(a) Material regarding the agreement, practice & decision amongst the members of the alleged cartel to fix prices.

(b) Material to show that the alleged cartel has actually determined the sale prices of drugs as required u/s 3(3)(a) of the Act, with requisite data.

(ii) Limits or controls production etc. : Though DG has concluded violation of Section 3(3)(b) of the Act, it is necessary to get the following evidence for establishing this finding in terms of the specific provisions of Section 3(3) (b):

(a) If CDAG has limited or controlled market for Drugs and Pharmaceuticals – information needed to show that they are actually in a position to do this.

(b) If CDAG, has limited or controlled supply of drugs – there has to be data to establish at least the actual existence of such limitation on supply, if not the extent.

(iii) In addition to the above, the DG was also required to fully investigate and report on the entire structure of the cartel and the active members. As CDAG is a part of All India Organisation of Chemists and

Druggists (AIOCD), which also operated through various state units engaged in activities similar to that of CDAG, DG was required to clearly bring out the nexus between AIOCD and CDAG. DG was also required to give specific evidence about the members of CDAG, who have participated actively in the operation of the stated cartel. In addition, DG had to give full financial information necessary to determine appropriate penalties for AIOCD, CDAG and the active individual members of CDAG, in case the Commission ultimately comes to a finding of a violation of provisions of the Act.

10. In accordance with the directions of the Commission a further investigation was conducted by the DGand a supplementary investigation report dated 18.03.2011 was submitted to the Commission.

Findings of supplementary DG report

11. The observations and findings given in the supplementary DG report are summarized as under :

11.1 Relationship and Nexus between AIOCD and Chemist and Druggist Association, Goa

11.1.1 It has been noted by the DG that AIOCD (All India Organisation of Chemists and Druggists) is an apex body of wholesalers and retailers of pharmaceuticals at All India Level and below AIOCD, there are associations of wholesalers and retailers at the state level in the States. These state associations are affiliated to AIOCD. Further, there are associations at the district level also, which are affiliated to state level associations. DG has further noted that CDAG was registered under the Societies Registration Act, 1860 in the year 1967 and is a state level association of Goa. It is ultimately affiliated to AIOCD. This fact was confirmed in the statement of Hemant Pai Angle, member of Chemist & Druggist Association, Goa recorded on 28.02.2011 and also corroborated by the Informant Mr. Mario Vaz, of Xcel Healthcare, Bardez, Goa, in his statement separately recorded on 28.02.2011.

11.1.2 From the web-site of AIOCD, it has been gathered by DG that AIOCD has been operating at National Level, while there are associations further down at state and district level, which are ultimately affiliated to AIOCD.

11.1.3 The Commission while seeking supplementary report had also called for financial details of CDAG, AIOCD and active members of CDAG. The DG has observed that although in the instant case AIOCD was not named as respondentin the information and the information was filed against CDAG, however, the financial information in respect of AIOCD was obtained for the year ending 31.03.2006 and 31.03.2007.The financials details of executive/main committee members of CDAG who are tasked with the functioning of CDAG were called for but were not submitted during the investigation.

11.1.4 A copy of Annual Report of CDAG showing its comparative financial details for 2008-09 and 2009-10 along with copies of accounts of AIOCD has also been enclosed as Exhibit -2 to the supplementary investigation report by the DG.

11.1.5 In course of investigation, it has been gathered by the DG that AIOCD has entered into MoU with Organisation of Pharmaceutical Producers of India (OPPA) and Indian Drug Manufacturers Association (IDMA) in 1982, prescribing certain guidelines and norms regarding margins at the level of wholesalers and retailers. Among others, guidelines and norms for appointment of new and additional stockists have also been prescribed. No pharma drug company can conduct business with wholesalers and retailers, unless it follows the guidelines and norms of AIOCD, which have been formulated by the members of AIOCD – a body of wholesalers and retailers together.

The guidelines and norms show the collective intent of the members of AIOCD. The guidelines/ norms of MoU are revised from time to time.

11.1.6 The supplementary DG report brought out as to how the guidelines of AIOCD, which are being followed by State/District Level associations like Chemists and Druggists Association of Goa (CDAG), limit and control supplies of drugs and number of wholesalers/stockists in the market and fix margins for wholesalers and retailers which ultimately has the effect of determination of sale price of drugs in the market. AIOCD is in position to control the affairs of State/District Level Associations and these associations cannot deviate from the guidelines/norms of AIOCD. If pharma companies do not follow the norms/guidelines of associations, their normal business operations get hampered. In case members of associations at National, State or District Level, do not follow the guidelines and norms, they are boycotted and even penalized.

11.1.7 The DG has noted that common factor of all these Associations, as is evident from the statements of persons recorded, is that all of these are following norms/guidelines which are restrictive and anti-competitive in nature. This has come out in the statement of Shri Hemant Pai Angle, member of CDAG and statement to similar effect has been given by Mr. Mario Vazalso.

11.1.8 As per DG, if any wholesaler or retailer wants to transact business with the members of CDAG, it has to compulsorily follow the norms and guidelines of association. Further, pharma companies are also obliged to follow the norms of associations, otherwise they would also face problems in selling their products in a particular territory.

11.2 Issue of limit or control of supply

11.2.1. As per DG, CDAG being a state level association and affiliated to AIOCD follows the guidelines/norms prescribed by AIOCD. These guidelines are found to be restrictive and anti-competitive in nature since they ultimately have the effect of controlling and limiting supply of drugs in the market. The restriction is imposed on two counts; one, no pharma company can introduce a pharma drug in a territory, unless it pays certain amount to the association in name of PIS (Product Information Service) purportedly for the purposes of advertisement and second, before appointment of any new stockist or additional stockist, the association grants no-objection in name of NOC/LOC (Letter of Cooperation). If the association does not grant NOC, no new or additional stockist can be appointed. Following

excerpts from compilation of all the Memorandum of Understanding (MoU) and Agreement executed between AIOCD-IDMA -OPPI from 1982 till date (Circulated on 12.05.2009reveal this position:

"1. Stockist Policy:

(i) Appointment of Stockist:

The company will appoint stockist only in consultation with State/District association and as per the guidelines laid down by State Association. Such appointed stockist will work for the area for which they are appointed. Wherever there is only one stockist of the company in the district, the second stockist can be appointed in consultation with state/district association, however the second stockist should be a bonafide member of the association. Company will not appoint any additional stockist for any new division formed or created, it will be given to the any existing stockist of the company.

(ii) Discontinuation of stockist:

a) a regular defaulter in payment

b) dealing in spurious medicines

c) not keeping adequate stock or is not serving the market properly or not submitting regular stock and sales statement

In such circumstances company will approach State/District association with proper documentation and written application. State/District Association will consider the request of the company,

then looking into the facts of the application will try to resolve the issue. If they wish to consider the request of the company then State/District can allow additional or replacement of the stockist to the company as per the set norms of State/District association."

11.2.2. Further, as regards additional stockist also, guidelines have been prescribed to the effect that additional stockist can be appointed only with the concurrence of associations.

"VII. Additional Stockists Appointment (beyond two) :

(a) Additional Stockists may be appointed, subject to State Association's concurrence, provided there is substantial increase in sales, which the existing stockists are unable to cope with. There will be no LOC/LOT fee for such additional stockist's appointments.

(b) The State Association will decide within 30 days from the date of new stockists request to the Association, Internal uniform guidelines will be formulated by AIOCD for State Associations to facilitate expeditious disposal of stockist's applications."

11.2.3. As per DG, without getting NOC from the association, stockists cannot get supplies from pharmaceutical companies in order to sell their products in the market. If the dictates of the association are not followed, then call of boycott is given by the association and the stockists not following the dictates of the association are also

penalized. Along with grant of NOC for appointment of stockists/additional stockists, the association has also adopted the practice of approving introduction of drugs in a particular territory in name of Product Information Service (PIS) and taking money for the same. This practice is also found to be anti-competitive and restrictive. The modus operandi followed in respect of PIS is that a drug company has to get drugs approved for their launch in a particular territory by the associations. The association (CDAG) charge Rs. 500 per drug before it can be launched in a particular territory. Moreover, amount of Rs. 500 is not only charged per drug, but also, per category of that drug. For example if a drug comes under different categories- say, 1 gm, 50 gm, 500 gm pack , for each such category of that drug, the drug manufacturing companies will have to pay Rs.500.Thus, the association (CDAG) not only restricts number of players, but also restricts introduction of new drugs in the market. The relevant portion of MoU of AIOCD on PIS is as under:

"II. Product Information Service (PIS)

(a) If no PIS Bulletin was published or circulated regularly, no PIS charges would be payable.PIS Bulletin information will cover the information as per Form V of DPCO.

(b) PIS charges would be payable only on State-wise basis, except in Maharashtra, where the present District-wise system would continue until March 2004.Thereafter, Maharashtra would also implement PIS system on State-wise basis.

(c) For the purpose of PIS charges, States would be classified under A & B categories as per Schedule 'A' attached hereto.

(d) Subject to above, with effect from 1st October 2003, PIS would be payable as follows:

'A' Category States – Rs.2000/- per entry in PIS Bulletin.

'B' Category States – Rs.500/- per entry in PIS Bulletin.

Note: 'Entry' means product brand/dosage from/strength for which PIS charges will be paid.

(e) No PIS charges are payable for additional pack sizes, additional flavours and/or price revisions. As such, entries will be published free in PIS Bulletins.

(f) All registered SSI units with their own marketing set-up and having annual turnover of up to Rs.25 crores (calculated at Company Prices) as certified by IDMA/OPPI on balance sheet basis, will be eligible for 50% concessional PIS charges."

11.2.4. The DG has quoted the guidelines formulated by CDAG for appointment/termination of stockist which were found to be restrictive in nature. The DG has cited the clauses of Memorandum of Understanding of CDAG to show that in case guidelines/MoU are

not followed, members would be boycotted and penalties would be imposed on the defaulting firms.

11.2.5. The DG after examining the minutes of meeting of CDGA and has come out with the conclusion that the Association is limiting and controlling the supply of drugs. According to DG the minutes of the meeting of association bring out the fact that the CDGA controls the supply of drugs by way of PIS since unless the PIS is paid, drugs cannot be introduced in Goa. Further, the issue of appointment of stockist is also decided by the association.

11.2.6. The DG has noted that according to Memorandum of Understanding (MoU) between Retailers & Wholesalers dated 15/3/2004, no wholesaler is allowed to directly sell the products to the customers and any wholesaler found violating the above rules will be liable to strict action taken by the Association on the recommendation of the Disciplinary Committee appointed for the Purpose. As per the clauses stipulated therein a fine of Rs.2500/- will be imposed for first violation besides warning letter to be issued to the concerned

wholesaler. Further, for second violation a fine of Rs.5000/- is stipulated to be imposed and additionally executive committee will not issue any LOC to such a wholesaler for a period of 1 year for being appointed as stockiest of any company.

11.2.7. The DG has stated that the letters written by CDAG to the Pharmaceutical Companies confirmed that the guidelines issued by CDAG were actually enforced. The DG has referred letter dated 10.01.2009 addressed to M/s Eris Life Sciences Pvt. Ltd., Ahmadabad to show that without NOC of the association, companies cannot appoint stockist. In the said letter the association (CDAG) has intimated the company that as per guidelines it was mandatory for a new company to appoint two stockists. Since the company had not followed the guidelines, the NOC was withdrawn. Similarly the letter dated 8.9.2007 to M/s Emcure Pharmaceutical Ltd., Pune revealed that the NOC from the association (CDAG) is required for appointment of additional stockist.

11.2.8. As per DG report the letter dated 8.9.2008 addressed to M/s Micro Laboratories Limited also revealed the fact that companies can supply only through stockiest appointed by the association (CDAG) as per guidelines. The DG has come to the conclusion that the evidence gathered during investigation establish that the associations- AIOCD, and Chemist and Druggist Association of Goa (CDAG) are engaged in the practice of;

a) Issuing NOC for appointment of a new or an additional stockist in a particular territory which eventually restricts the number of players in the market and in turn also limits or controls supply of drugs;

b) Insisting for PIS approval for introduction of drugs in a particular territory and taking money for that which eventually restricts the supply and availability of drugs;

c) Imposing penalties in case the firms do not follow the norms prescribed by the associations.

11.2.9. DG has stated that if the practice of NOC is done away with, there would be more supply of drugs in the market and consequently more availability of the drug for the common man.

11.2.10. Thus, DG has concluded 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/enterprise can be appointed as wholesaler and stockiest at Goa. Further, if product NOC in form of PIS approval is not given, companies will not be in a position to supply drugs. The guidelines and practice of issuing NOC for appointment of a new or an additional stockist in a particular territory eventually restricts the number of players in the market and in turn also limits or control supply of drugs. The system of PIS approval for introduction of drugs in a particular territory and taking money for that also restricts the supply and availability of drugs. These followed by imposition of penalties on firms which do not follow the dictates of association establish that the practices and conduct of CDAG are restrictive and anti-competitive.

12. Issue of determination of price

12.1 As per the report of DG, besides exercising their control over the number of stockists and products as discussed above, the Association (s) are also

involved in the issue of fixation of margins and ultimately determination of sale price of drugs as far as non-controlled drugs are concerned. The DG has noted that there are broadly two categories of drugs under Drug Price Control Orders (DPCO) for the purpose of price fixation/revision and monitoring. These are scheduled drugs (drugs under price control) and non-scheduled drugs which are out of price control. It has been stated by DG that in the category of non-scheduled drugs the trade associations are determining the margins –which generally is 20% for retailers and 10% for wholesalers. The report has further relied on the statement made by Shri Hemant Pai Angle, member of Chemist & Druggist Association Goa recorded during the course of investigation wherein he has explained the mechanism of determining the trade margins for non scheduled drugs as per the norms fixed in the guidelines of the Association.

12.2 As an evidence that trade margins are decided by the association(s) at the time of giving PIS approval, Mario Vaz, the information provider submitted before the DG copies of approvals of Product Information Service (PIS) given by Chemist & Druggist Association (placed as Exhibit-10 of supplementary report).The DG has stated that the circular of CDAGdated 25.05.2009 also established that trade margins are fixed as per guidelines of Association. The DG has concluded that norms of margin fixed by the association ultimately have the effect of determination of sales price of drug for the end consumer.

12.3 It has been noted by DG that at the time when PIS approval is given by the CDAG for launch of drugs in a particular area, margins for wholesalers and retailers are fixed. The DG has mentioned the instances where margins of some drugs to stockists and retailers were determined and approved under the system of Product Information Service.

12.4 The DG has also noted that apart from fixing margins on drugs, the CDAG also determines the amount of discount to be extended by wholesalers and retailers that has the impact of ultimate determination of price of drugs. In this regard, circulars of CDAG dated 16.08.2005 and 11.06.2009have been cited by DG.

12.5 From the evidence furnished in course of proceedings in form of PIS approvals and statements of persons recorded in course of proceedings, the DG has concluded that the norms and guidelines of the Association which prescribe the margins for wholesalers and retailers, not only has the effect of fixing margins, but also has the effect of determining the sales price of drugs. The margins of drugs for wholesalers and retailers are determined by the association(s) at the time of giving PIS approval for introduction of drugs in a particular territory. The DG has stated that MoU and guidelines of CDAG posted on their website also reveal that margins are determined by the Association. Under the system of PIS approvals, the CDAG takes an amount of Rs.500 per drug per category from drug

manufacturing companies for introduction/marketing of drugs in a particular territory.

13. Whether practices of CDAG are restrictive and anti-competitive

13.1 On the basis of evidence gathered during investigation the DG has come to the conclusion that the practices of CDAG are anti-competitive and restrictive in nature since they not only tend to control and limit the supplies of drugs in the market, but also, fix the margins for the wholesalers and retailers, ultimately determining the sale price of drugs in the market. It has also been observed by the DG that if the practice of NOC is done away with, there could be more supply of drugs in the market and consequently more availability of the drugs for the common man. The DG has also noted that as per guidelines, a disciplinary committee has been constituted to discipline the members. This shows that the association exercises complete control over its members and in case of any violation of guidelines, the members are also punished.

13.2 The DG has concluded that the practices of CDAG are anti competitive to the extent that margins are fixed for wholesalers and retailers, prices are determined, and the supplies are restricted in the market.

14. Role and involvement of members of CDAG

14.1 As regards the question as to who are the members of CDAG responsible for anti-competitive practices, the DG has concluded that it is the

executive/main committee of association which takes decisions on behalf of association. Such members are – Albert De Sa, Mahesh Naik, Akhtar Shah, Santosh Fondekar, Venkatesh Prabhu Desai, BM Prabhu Desai, Datta Ram M. Mopkar, Lyndon D' Silva, Amit Kamt, Sudesh Molio, Rajesh Colvalkar, Livio Vaz, Rajaram Gawas. Further, Mr. Hemant Pai Angle and Mario Vaz in their statements have also named persons, who according to them, are actively involved in the anti-competitive practices.

14.1.1. The DG has also quoted the following statement of Hemant Pai Angle in this regard:

" Q. Who are the members of the Chemist and Druggist Association, Goa who are active participants in the affairs of the Association and all their other alleged anti-competitive practices?

Ans. 11. The main person is Albert De Sa who is President of CDAG and is partner of CS Enterprises. All executive committee members who are wholesalers like – Raj Enterprises (Prop. Rajesh Colvalkar), ICM Enterprises (Prop. Mahesh Naik) and Pharma Plus (of which Santosh Fondekar), Babu Pharma (Prop. Babu Mopkar), G.N. Agencies (Partner- Yatin Naik), D'Silva and D'Silva (Partner- Lyndon D' Silva) are active participants in the association. In addition, Prakash Shankwalkar, Partner of Drogaria Ananta, although not part of the association is also active in the affairs of CDAG."

14.1.2. In the course of investigation, a letter from one, Shri Nadie Jauhri of Nashik was received by the DG in which Shri Jauhri pointed out towards anti-competitive practices of associations stating that they are engaged in giving price approvals and fixing margins of trade. He also requested that his letter along with papers enclosed may be made part of investigation report.

15. Conclusions in the DG report

15.1 On the basis of the evidence collected in course of proceedings and statements of persons recordedthe DG has concludedthat the associations, not only limit and control supply of drugs in the market through a system of PIS approvals, but also limit and control the number of players by insisting on need of NOC of associations for appointment of stockists in their areas of operations. It has also been concluded that the associations through their guidelines and norms fix margins for the wholesalers and retailers, which has the effect of determination of sale prices of drugs in the market. AS per the findings of DG these practices and conduct of CDAG are violative of provisions of Section 3(3) (a) and 3(3) (b) of the Competition Act, 2002.

16. After examining the entire material and supplementary report of DG, the Commission in its meeting held on 26.04.2011 decided that a copy of the DG report be sent to the Informants and the CDAG to invite their comments / objections. The Commission also directed the parties to appear for oral hearing, if they so desire, on 19.05.2011.

17. The Commission further considered the matter in its meetings held on 19.05.2011, 09.06.2011, 30.06.2011 and 21.07.2011.

18. The Informants filed their written submissions dated 19.05.2011 &06.07.2011 11.07.2011 wherein they reiterated the allegations made in the complaint and before DG which primarily relate to the anti-competitive and monopolistic working of the CDAG through the draconian guidelines for appointment of stockists and regarding the requirement of NOC for appointment of stockists. The Informants have also submitted that the contention of CDAG that the supplementary investigation is in fundamental violations of the Competition Act is a ploy to mislead the Commission and to delay the proceedings. The Informants also submitted that the mention of the case pending before Hon'ble High Court of

Karnataka wherein the Commission is also a party is another ploy of CDAG's delaying tactics.

19. The CDAG filed its response to DG's supplementary investigation report vide its replies dated 24.06.2011 and 09.07.2011. In the meeting of the Commission held on 21.07.2011, Shri Yusuf Iqbal Yusuf, Advocate appeared on behalf of the CDAG and made oral submissions.

20. The gist of the above said replies of CDAG to the supplementary investigation report of DG is as under:

A: <u>Preliminary Objections</u>

On behalf of CDAG it has been contended that the proceedings initiated by the Commission on the basis of the DG's supplementary investigation report dated 18.03.2011 are not sustainable in law as fundamental violations of the statutory provisions of the Competition Act, 2002 have been made. It has been submitted that the continuation of these proceedings are required to be reviewed by the Commission, in the light of the following, amongst others, grounds:

i. It has been argued that since violation of the provisions of the Act was recommended in the DG investigation report dated 16.06.2010, the Commission was obliged to conduct an inquiry under section 26 (8) of the Act, after considering the objections to the DG report filed by the parties.

ii. The CDAG has contended that after conclusion of the hearing from both sides, during the said inquiry held on 12.10.2010 under section 26(8) of the Act, the Commission closed the case for orders and no indication of any direction to the DG for any further / supplementary investigation was given to the parties during the said hearing on 12.10.2010.

iii. Based on above it has been argued that the order of the Commission directing the DG to conduct further / supplementary investigation into the same matter, after the matter had been inquired into by the Commission under section 26(8) of the Act and the case closed for orders in the presence of all the parties, was void ab initio in the

absence of any provision to this effect under section 26 of the Act. Consequently, the supplementary investigation conducted by the DG and his supplementary report dated 18.03.2011are non est and without any legal basis.

iv. The CDAG has further contended that without prejudice to the apparent illegality of the order of the Hon'ble Commission directing supplementary investigation and conducting further proceedings based on the supplementary investigation report it is also to be noted that whereas a notice dated 16.03.2011 was issued by the DG to the CDAG calling upon for supplementary information and fixing the date for hearing on 23.03.2011 and subsequently hearing the matter on 07.04.2011 and written submissions were also tendered by the counsel for CDAG on 08.04.2011, the CDAG was surprised to know through the notice of Commission dated 28.04.2011 that the supplementary investigation report was already submitted by the DG to the Commission on 18.03.2011.

v. It has been argued that it is apparently clear and evident that the entire exercise of issuing notice by the DG to the respondent CDAG and calling upon it to present itself for hearing on 23.03.2011, when the supplementary report had already been submitted on 18.03.2011 itself was of no meaning and this aspect should have been taken into account by the Commission.

vi. It has been further contended that on grounds of similar violation of the statutory provisions of the Act in a similar case the Karnataka Chemists and Druggists (TKCD) has filed Writ Petition in the Hon'ble High Court of Karnataka at the Principal Bench at Bangalore vide W.P. No. 19579/2011. Since the same legal issues have also been raised in WP NO. 19579/2011 before the Karnataka High Court and the matter is sub judice the Commission should keep the present proceedings in abeyance till the matter is decided in the Karnataka High Court at Bangalore.

vii. It has been further contended that it is abundantly clear from the sequence of events as recorded hereinabove that the entire exercise

of directing the Supplementary Investigation was done in order to bring the matter within the purview of the Competition Act, 2002 especially since the CDAG had vehemently stated in its written submissions dated 13.09.2010 that the offence, if any, was committed under the Monopolies and Restrictive Trade Practices Act. Therefore by virtue of specific directions as laid down in section 66 (1A) of the Competition Act, 2002 as well as section 6 of the General Clauses Act, the Director General who was conducting the investigation under the Competition Act, 2002 could have at the very most found contravention with the provisions of the MRTP Act which was in existence at the time when the complaint was received. The provisions of the aforesaid sections are very clear, lucid and can hardly be disputed. This Commission can direct an investigation in matters which it receives on transfer from the MRTP Commission subject to the conditions laid down in the sub-sections of section 66 of the Competition Act. It has been submitted that the law is very clear that if any violation is found in such matters, the same can only be that of the MRTP Act and not the Competition Act, 2002. Thus, even if the Director General finds contravention, he can find such

contravention only of the MRTP Act and not the Competition Act, 2002 since the Competition Act was not in existence on the date when the complaint was received. Also, the Competition Act was not in force on the date when the alleged infractions are purported to have been committed. It has been submitted that in the detailed investigation report of 2010, the Director General went beyond the scope of the law and found contravention of the Competition Act, 2002.

viii. It has been submitted that all the reports of the Director General are in the context of the Competition Act, 2002 and he has not found any contravention of the provisions of the MRTP Act (which was in force on the date of the alleged offences as complained). Therefore, the present proceedings deserve to be dropped and quashed.

ix. In addition to the preliminary objections, it has been submitted that the DG has failed to carry out any economic analysis in respect of the relevant market or any anti-competitive agreement in both the Main Report as well as the Supplementary Report. No evidence showing

the existence of any "agreement" between the members of the respondent CDAG has been submitted with both the said Reports to show the violation of section 3(3) of the Act.

x. It has been further contended that the CDAG is an association of Chemists and Druggists and is covered under the definition of an "enterprise" under section 2(h) of the Act only by virtue of the service of introducing the new products launched by the drug manufacturing companies through its bulletins and charging the "product information service (PIS) for the said service. The relevant product market for the CDAG has, therefore, to be related to this "service" rendered by the respondent association and it can certainly not be the "market for pharmaceuticals in the state of Goa" or that of "drugs sold by the stockists and retailers to the consumers", as determined by the DG in Para 7.2.2 of the first report.

xi. The CDAG has, thus, contended that in the absence of an appropriate market definition the conclusion of violation of section 3(3)(a) and

section 3(3)(b) drawn by the DG in the investigation report, cannot be sustained under the eyes of the law.

xii. It has been also contended that the DG has failed to collect any material evidence even in support of his general and vague conclusion except the statement of the complainants which too are full of leading questions and suggestive answers without having been subjected to cross examination by the CDAG and, therefore, they are inadmissible in evidence. The DG has shown utmost disregard to the established legal principles of examination of witnesses on oath in exercise of his power under section 41 (2) of the Act and hence the documentary evidences attached with both the reports are not admissible in evidence.

xiii. The CDAG has also raised the contention that the DG has based his conclusion entirely on the basis of oral allegations made by the complainants without any corroborative independent evidence and the allegations being made by interested witnesses cannot be relied upon. The investigation has been conducted in a most casual

manner and no efforts were made to collect onsite evidence by discreet inspection to verify the veracity of the allegations made in the complaint.

B: Objections on merits

i. The CDAG has also submitted that DG has failed to examine the stockists and dealers in Goa who are not members of the respondent CDAG, and who were specifically mentioned in the reply dated 25.03.2010 filed by the CDAG.

ii. It has been further submitted that the fact that Chemists and Druggists who are not members of the respondent CDAG are operating both as stockists and retailers in Goa goes to show that the requirement of obtaining a no objection certificate from the CDAG does not restrict the entry of new players in the market.

iii. The CDAG has submitted that DG has failed to study and understand the structure of the highly regulated pharmaceutical sector in India.

It is submitted that there is a National Pharmaceutical Pricing Authority (NPPA) which regulates the prices of bulk drugs sold in India and there exists a Drug Policy, 1986 announced in September 1994. The NPPA regulates the fixation and revision of prices of bulk drugs and formulations and also monitors the prices of both controlled and decontrolled drugs in the country through the provisions of the Drugs (Price Control) Order, 1995 (DPCO). It has been pointed out that till date no complaint has been made before the NPPA for any violation of the DPCO by any member of the respondent CDAG. The DG has failed to examine this essential aspect of the case in his Reports.

iv. According to the submissions made by CDAG, the margins allowed to wholesalers and retailers are fixed at 16% for controlled drugs and trade margins of the decontrolled formulations have been mentioned as 20% for retailers and 10% for wholesalers as per the norms of DPCO. It has been pointed out that the same trade margins have been mentioned in the MoU signed between the AIOCD and IDMA and OPPI produced by the complainant and relied upon by the

DG in his reports to conclude the so called "fixation" of trade margins by the CDAG.

v. It has been further contended that the DG has also failed to recognize the history behind the practice of obtaining "no objection certificate" by the pharmaceutical companies from the State Association of Chemists and Druggists. It has been submitted that this practice was evolved on the recommendations of the Mashelkar Committee appointed by the Union Health Ministry of the Government of India. The report of the Mashelkar Committee recommended that the Chemist and pharmacists through their association should act as *"watch dog" to prevent entry of spurious / doubtful quality drugs of those purchase from unauthorized sources* and had specifically reiterated that *all India organization of chemists and druggists (AIOCD) should play an active role to educate their members and to cooperate with regulatory authorities to eliminate sale of spurious and sub standard drug by their members.* The said committee had noted the role of the pharmacy industry, trade and

other professional associations including the AIOCD in preventing the monopolistic activities of large pharmaceuticals companies.

vi. That the MOU was signed between the AIOCD and IDMA and OPPI in the above context and based on the recommendations of the Mashelkar Committee whereby the trade of sale of pharmaceutical products through chemists was organized in accordance with the DPCO and the practice of obtaining "no-objection certificate" from the State level associations of Chemists and Druggists was evolved to curb the proliferation of large number of stockists and wholesalers at the cost of smaller retailers. The DG in his reports has completely overlooked the growth of competition in the pharmacy trade and has failed to recognize the efforts made by the Apex organisation i.e. the AIOCD in organizing a balanced relationship between the large pharmaceuticals companies and the small retailers.

vii. It has also been contended that the DG has also failed to examine any pharmaceutical company to verify the allegations made by the

complainants regarding the alleged role of the respondent in restricting the entry of new stockists.

21. The Commission again considered the matter in its meeting held on 21.10.2011 and decided to direct the CDAG to file its financial statements for the last three years and also to file the names of its office bearers year-wise since June 2009 i.e. the period when complaint was filed by the Informant. In response to the directions of the Commission, a reply dated 04.11.2011 was submitted by the counsel of the Opposite Party which was considered by the Commission in its meeting held on 15.11.2011. In the said reply, the directions given to the party vide letter dated 01.11.2011 by the Commission have been termed as illegal, unlawful and unsustainable. The party has further called upon the Commission to show any provision of law which permits calling of such information.

22. After considering the above said letter of CDAG, the Commission passed an order on 13.12.2011 to the effect that whenever, the Commission finds that an enterprise was in breach of Section 3 or 4 of the Competition Act, the Commission, apart from passing other directions has powers under Sec

27 of Competition Act to impose penalty upto not more than 10% of the average turnover for the last 3 preceding financial years. In case of cartels, the Commission has power to impose penalty upto 3 times of the profit for each year of the continuance of such agreement whichever is higher.

23. In view of the above provision contained in Section 27 of the Competition Act, Commission held that it is imperative that the party involved in a case before the Commission should supply the requisite information about its financial status, including the turnover & profits for last three years. The Commission for the purpose of discharging its functions can even otherwise call upon the concerned parties to file each and every required information. Non filing of the requisite information is looked upon seriously by the legislature and Section 43 of the Competition act provides that if any person (which includes an association or an enterprise) fails to comply with the directions of the omission or with the directions of the DG, seeking information then such persons is liable to be punished with fine, which may extend upto Rs. 1,00,000/- for each day , during such continuance of refusal subject to a maximum of Rs.1,00,00,000/-. Therefore, law being very clear on the aspect, it was held by the Commission that non-submission of

requisite information by CDAG without reasonable cause will hamper further proceedings in the matter. The Commission, therefore, decided to initiate proceedings against CDAG under Section 43 of the Act. The Commission further decided to accord opportunity to the Association of being heard in person or through their authorized representative on 13.12.2011, if it so desired.

24. The Commission thereafter listed the matter for 13.12.2011 to consider the issue of imposition of penalty on CDAG for non-providing of information as required by the Commission. As no one put appearance on behalf of CDAG, the penalty proceedings were taken up *ex-parte*. The Commission noted that CDAG has deliberately and purposefully refused to part with the information and has rather questioned the authority of the Commission to ask for the information. In view of this conduct, the Commission imposed a penalty of Rs. 25,000/- per day on CDAG for non furnishing the requisite information w.e.f. 13.12.2011 for a period of 30 days. In case, the information is not furnished within the 30 days, it was decided that the penalty shall be Rs. 50,000/- per day for the next 30 days and Rs. 1,00,000/- per day thereafter, till the penalty amount culminates to Rs.1,00,00,000/-.

ISSUES

25. The matter was thereafter considered by the Commission in its meeting held on 05.01.2012 and 07.01.2012. The Commission has carefully considered the essential issues raised by the Informants in the instant case, the submissions made by the CDAG before the DG and the evidence gathered by the DG in his first investigation report and the supplementary investigation report as well as the replies filed by the CDAG and the Informants in response to the notice of this Commission. After thorough perusal of the aforesaid documents, the following issues arise for consideration and determination of the Commission in the case:-

(I)Whether the present information can be examined under the provisions of the Competition Act, 2002?

(II)If the answer to the first issue is in affirmative, whether the conduct and practices of CDAG are anti-competitive and in violation of section 3 of the Act?

(III)Whether the members of Executive Committee of CDAG are also liable for violation of section 3 of the Act?

26. Determination of Issue No. 1

26.1 The CDAG has contended that it is clear from a reading of the provisions of the Competition Act, 2002, MRTP Act, 1969 and General Clauses Act, 1897 that after the repeal of MRTP Act,1969 by the Competition Act, 2002 the authorities under the MRTP Act, 1969 viz. the MRTP Commission as well as the DGIR ceased to be in existence and the relevant provisions of the Competition Act, 2002 govern the proceedings and investigation which were pending under the MRTP Act, 1969 before the commencement of the Competition Act, 2002. Since the authorities under the MRTP Act, 1969 ceased to be in existence on the commencement of the Competition Act, 2002, section 66(3) to 66(8) of the Competition Act, 2002 provide for continuance of the investigations and proceedings under the MRTP Act, 1969 before the commencement of the Competition Act, 2002. It has been contended that, however, it has been specifically provided that such pending matters should be dealt with under the provisions of the MRTP Act, 1969 as if it had not been repealed.

26.2 Section 66(6) of the Competition Act, 2002 provides that all investigations or proceedings, other than those relating to unfair trade practices, pending before the Director General of Investigation and Registration on or before the commencement of the Competition Act, 2002 Act shall stand transferred to the Competition Commission of India.

26.3 Therefore, as per CDAG, this Commission can exercise jurisdiction only in investigations or proceedings in matters other than those related to Unfair Trade Practices which were pending before the Director General of Investigation and Registration under the MRTP Act, 1969. On the other hand, investigation or proceedings related the Unfair Trade Practices are to be handled only by the National Commission under the Consumer Protection Act, 1986.

26.4 As per CDAG, the ingredients for "Restrictive Trade Practices" as defined in section 2 (o) of the MRTP Act, 1969 is that there should be an imposition of unjustified cost or restriction on consumers by manipulation as set out in the said section. Section 2(u) of the MRTP Act, 1969 defines Trade Practices and finally section 36A of the MRTP Act, 1969 defines Unfair Trade

Practices. As per CDAG, the allegations against it as in the complaint from M/s Varca Druggists and Chemists and others (on which the entire saga has commenced) are covered under section 36A(5) of the MRTP Act, 1969. Thus, CDAG contends that the allegations against CDAG are at the most in the nature of Unfair Trade Practices and therefore as provided under Section 66(7) of the Competition Act, 2002 only the National Consumer Commission has the power and authority to investigate into the same under the Consumer Protection Act, 1986.

26.5 In light of the above submissions, CDAG has emphasized that this Commission has exceeded its jurisdiction and has taken up a matter which it is not entitled nor empowered to and accordingly the order of this Commission directing the Director General to investigate the matter under Section 26(1) of the Competition Act, 2002 is illegal, unlawful and ultra vires. Thus, it has been argued by CDAG that the Investigation Report pursuant to such order is of no legal force, effect or consequence in any manner whatsoever.

26.6 Further CDAG has contended that under section 66(1A) and section 66(10) of the Competition Act, 2002 as well as under section 6 of the General Clauses Acts 1897; the repeal of the MRTP Act, 1969 does not affect its previous operation nor anything duly done or suffered thereunder nor any right, privilege, obligation or liability accrued, acquired or incurred under the MRTP Act, 1969 and any proceedings or remedy can be instituted, continued or enforced as if the MRTP Act, 1969 had not been repealed.

26.7 Therefore, CDAG contended that any act committed during the currency of the MRTP Act, 1969 cannot be called in question under the Competition Act, 2002. Furthermore, it is expressly provided that the provisions of the MRTP Act, 1969 will only be applicable to proceedings which have been instituted under the MRTP Act, 1969 "BEFORE" the commencement of the Competition Act, 2002. Thus, as per CDAG, the provisions of the Competition Act, 2002 cannot be applied under any circumstances in the present case and any prosecution or proceedings are to be in strict accordance of the MRTP Act, 1969 only as the entire matter is based on a complaint dated 16.06.2009 viz. before the commencement of the Competition Act, 2002.

26.8 Therefore as per CDAG there is no provision in the Competition Act, 2002 whereby the said Act has been granted retrospective effect. Therefore, under section 5 (3) of the General Clauses Act, the Competition Act can only be enforced and implemented after 14th October 2009 and not prior thereto. Thus, the complaint dated 16.06.2009 received from M/s Varca Druggist and Chemist shall have to be treated and disposed off only under the provisions of the MRTP Act, 1969 and not under the Competition Act, 2002 under any circumstances. The only provisions of the Competition Act, 2002 which may be employed in the present mater are sections 66 (1A) and 66 (7) of the Competition Act since they provide for continuity of the proceedings / investigations in view of the immediate disbandment of the MRTP Commission and the DGIR. However, any penal provisions or violations, if any, shall be solely and exclusively subject to the provisions of the MRTP Act and not the Competition Act, 2002.

26.9 In view of the Commission, the preliminary objections taken by the CDAG are contrary to the scheme of the Act and the legal position on this aspect is quite clear. In this regard it is also noted that Hon'ble High Court of Delhi

in W.P. (C) 6805 / 2010, Interglobe Aviation Ltd. Vs Competition Commission of India & Ors. decided on 06.10.2010 has held on similar issue that where the investigation by the DGIR, MRTPC remained incomplete and the matter did not crystallize into a 'case' before the MRTPC, it was not incumbent on the DGIR, MRTPC to transfer the case to the Competition Appellate Tribunal and not to Commission. This view was reiterated by the Hon'ble High Court of Delhi in W.P. (C) 7766 / 2010, Gujrat Guardian Ltd. Vs Competition Commission of India &Ors. decided on 23.11.2010. In this case the petitioner advanced the argument that as the matter was pending before DGIR, MRTPC the case ought to have been transferred to Competition Appellate Tribunal and not to the Commission. It was also contended that the Commission had no power to pass order under section 26(1) in such matter and that the Commission had to proceed under the provisions of the MRTP Act. The Delhi High Court rejected the arguments raised by the petitioner and held that *"This Court finds that since the investigation was incomplete the matter was rightly transferred to the CCI. On further consideration of the material on record the CCI formed a prima facie opinion to proceed under Section 26(1) of the CA. This was not contrary to Section 66(6) of the CA. It is possible in the course of*

investigation that the DG, CCI forms a prima facie opinion to proceed under the provisions of the CA, 2002 itself. There is no illegality per se in such action of the DG, CCI."

26.10 The Commission notes that the present matter was filed before the DGIR, MRTPC on 16.06.2009 and section 3 and 4 of the Competition Act, 2002 dealing with anti-competitive conduct were brought into force on 20.05.2009. Furthermore, on filing of the complaint the DGIR, MRTPC undertook the preliminary investigation which was still pending when the MRTP Act, 1969 was repealed vide ordinance dated 14.10.2009. As the investigation had not culminated into a 'case' the matter was rightly transferred to the Competition Commission by the DGIR, MRTPC invoking the provisions of section 66(6) of the Act as the allegations involved in the complaint were related to restrictive trade practices of CDAG. Even a plain reading of section 66(6) of the Act clearly demonstrates that on receiving the matters where investigation was pending, the Commission may order for conduct of the investigation in the manner as it deems fit. If the Commission were to order investigation in such matters, the only section of the Act which empowers the Commission to do so is section 26 by treating

the complaint as information under the Competition Act. Further, on receiving the matter the order for investigation under section 26(1) can be passed only if in the view of the Commission there existed a prima facie case of violation of the provisions of Competition Act. As the complaint filed before the DGIR, MRTPC was still at the stage of preliminary investigation no right, liability, privilege or obligation can be said to have been accrued to any party and, therefore, the provisions of section 66(1A) or 66(10),referred by CDAG are not applicable in the present situation. Furthermore, the Commission has not been conferred any power to adjudicate any matter invoking the provisions of repealed MRTP, Act. This premise becomes clear when the provisions of section 66(6) are contrasted with the provisions of section 66(3) of the Act. Whereas the Competition Appellate Tribunal has been specifically conferred power to adjudicate cases pertaining to monopolistic and restrictive trade practices pending before MRTP Commission in accordance with the provisions of repealed MRTP Act under section 66(3) of the Act, no such power has been given to the Commission under section 66(6) of the Act. In the backdrop of the provisions of the Act as analysed above, the Commission finds that there is no illegality in entertaining and examining the present case under the

Competition Act, 2002 in which the investigation was pending before the DGIR, MRTPC before the MRTP Act was repealed.

26.11 Further, even in cases where the alleged anti-competitive conduct was started before coming into force of section 3 and 4, the Commission has the jurisdiction to look into such conduct if it continues even after the enforcement of relevant provisions of the Act. This position has been settled by the Hon'ble High Court of Bombay in W.P. No. 1785 / 200, Kingfisher Airlines Ltd. Vs Competition Commission of India & Ors. decided on 31.03.2010. In the said case, it has been held by the Hon'ble Bombay High Court that though the Act is not retrospective, it would cover all agreements covered by the Act though entered into prior to the commencement of the Act but sought to be acted upon now, i.e., if the effect of the agreement continues even after 20.5.2009. In the present case, the practices of CDAG alleged to be anti – competitive have been found by DG to be still continuing and there is nothing on record to contradict the same. Therefore, in view of the continuance of enforcement of the guidelines of CDAG and understanding / agreement amongst the members of CDAG which have been shown to have anti-competitive effect,

the present case is squarely covered by the law propounded by the judgment of the Hon'ble High Court of Bombay in the aforesaid case. The Commission therefore is of the considered view that in the light of legal position as discussed above there is absolutely no illegality in the proceedings in the present case and the arguments and the contentions of the CDAG on this aspect have no force.

26.12 As regards the contention of the CDAG that the Commission has no power to direct the DG to carry out supplementary investigation, the Commission is of the considered view that the plea taken by the CDAG is devoid of any merit and is liable to be rejected. The Act has not placed any fetter on the power of the Commission to conduct further investigation or further inquiry. The Commission vide order dated 02.12.2010, while considering the DG investigation report, had noted that in order to enable it to come to a proper conclusion, a further inquiry into certain aspect is essential and accordingly had directed the DG to conduct further investigations in respect of certain issues specified in the direction with a view to do complete justice in the matter. It is also pointed out that Regulation 20 (6) of The Competition Commission of India (General) Regulations, 2009 specifically

empowers the Commission to direct the DG to conduct further investigation even after the DG has submitted his report.

26.13 The Commission also finds that no procedural irregularity was committed by the DG while conducting supplementary investigation. In this regard, a perusal of the note of the DG forwarding the representation dated 08.04.2011 filed by the advocate of the CDAG reveals that letters were written to the members of the CDAG by the DG for submitting their profit &loss accounts and balance sheets. The advocate of CDAG had filed the aforesaid representation / objection to the supplementary investigation challenging the legality of the proceedings and at the same time choosing to ignore the request of the DG to furnish the requisite information. The DG had stated in the supplementary report that information regarding financial details were called for from the CDAG and the same will be submitted as and when it is submitted. As the DG had already filed the supplementary report there was no occasion for him to give hearing or deal with the objections raised in the representation. In any case the objections taken in the representation were also raised by the CDAG in its reply to the supplementary report of the DG and they have already been

dealt with in the preceding paras of this order and on this count no prejudice has been caused to the CDAG.

26.14 As regards the contention of CDAG that the margins allowed to whole sellers and retailers are fixed at 16% for controlled drugs and at 20% for retailers and 10% for whole sellers for the decontrolled formulations as per Drug Price Control Order (DPCO), it is noted that whereas the trade margins for the scheduled drugs is fixed at 16% for a retailer as per para 19 of the DPCO, 1995, in case of non-scheduled drugs (non price controlled drugs) the trade margins have been determined for the wholesalers and retailers operating in the pharmaceutical market through an agreement between the trade associations and the pharmaceutical industry. Thus, the MOU between AIOCD, OPPI and IDMA, which has been referred in DG report, has in fact led to the determination of the trade margins on sale of the non scheduled drugs. The CDAG has followed the guidelines laid down by AIOCD in this respect. MR. Hemant Pai Angle, member of CDAG has confirmed this in his statement recorded before the DG. On the basis of above facts, the Commission finds that there is no force in the argument of CDAG that the trade margins are being fixed in terms of DPCO.

27. Determination of issue no. 2

27.1. Having decided the issue no. 1 in affirmative, the Commission now proceeds to determine issue no. 2 i.e. whether the acts and practices of CDAG are anti – competitive in nature.

27.2. DG has come to the conclusion that decision in form of guidelines, actions and practices of CDGA are anti-competitive in terms of provisions of section 3(3) (a) and 3(3) (b) of the Competition Act, 2002.The Informants have agreed with the conclusions drawn by the DG and on the other hand the CDAG has denied indulging into any anti-competitive activities.

27.3. Since the DG has found that the CDAG has violated the provisions of section 3(3)(a) and 3(3)(b) of the Competition Act, 2002 the relevant sub-section (3) of section 3 of the Act may be looked into which reads as under :

"Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which –

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development investment or provision of services;

(c) .....

(d) .....

shall be presumed to have an appreciable adverse effect on competition.

27.4. For the purpose of proper appreciation of applicability of relevant provisions relating to anti-competitive agreements, it is useful to consider the various elements of section 3 of the Act in some detail. Section 3(1) of the Act prohibits and section 3(2) 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 completion within India.

27.5. Therefore, if any agreement restricts or is likely to restrict the competition then it will fall foul of section 3 of the Act.

27.6. Further, section 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 for sharing markets or customers. Once existence of prohibited agreement, practice or decision enumerated under section 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 of competition and is therefore anti-competitive. 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.

27.7. The next question arises whether the CDAG, being an association of chemists and druggists in the state of Goa is covered under the category of entities enumerated in section 3(3) of the Act.

27.8. In this respect the definition of 'enterprise' as provided in section 2(h) assumes significance and which runs as follows:-

> *"enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services of any kind ..... but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central*

Government dealing with atomic energy, currency, defence and space.

27.9. It is noted by the Commission that CDAG is an association of wholesalers and retailers of Goa region and is affiliated to AIOCD. From the records it is also gathered that it was registered under the Societies Registration Act, 1860 in the year 1967. Its constituent members comprise of retailers and wholesalers of Goa .A list of members has been enclosed by the DG with the investigation report. The DG has also placed on record MoU of Chemists and Druggist Association, Goa, copies of Rules and Regulations and guidelines to be followed for appointment/ termination of stockist by all pharmaceuticals companies including ayurvedic companies selling through chemists.

27.10. There is no dispute as to the fact that constituent members of CDAG are stockists and retailers of pharmaceutical companies who are engaged in the supply of pharma products to the consumers. Therefore, they fall squarely within the definition of 'enterprise' provided in the Act. Further, sub-section (3) of section 3 of the Act not only covers

agreements entered into between enterprises or associations of enterprises but also the practice carried on or decision taken by any association of enterprises engaged in identical or similar trade of goods or provision of services. There is no denying the fact that CDAG is an **association of enterprises** whose constituent members are engaged in identical or similar trade of goods.

27.11. The MoU, rules , regulations and guidelines are reflective of the collective intent of the constituent members based upon which the CDAG takes decisions and members in turn give effect to the decisions by acting upon them. The CDAG is composed of stockists and retailers with common interests in trade, which join together to further their commercial objectives.

27.12. The Commission, therefore, holds that since CDAG is taking decisions relating to distribution and supply of pharma products on behalf of the members who are engaged in similar or identical trade of goods, the practices carried on, or decisions taken by CDAG as association of enterprises are covered within the scope of section 3(3).

27.13. It is noted by the Commission that the investigation by DG has found many acts and conduct on part of CDAG as anti-competitive. Therefore, it is necessary to examine such infringements by CDAG as alleged in the information and found substantiated by the DG in order to arrive at a conclusion.

Limiting the supply of pharma products

27.14. It is observed by the Commission that in the course of investigation, DG has found that various clauses of MoU and guidelines framed by CDGA as well as the practice carried on by it restrict and control the supply of drugs. In this regard the guidelines of CDGA (placed as Exhibit-4 of supplementary report) are reproduced below:

"GUIDELINES TO BE FOLLOWED FOR APPOINTMENT / TERMINATION OF STOCKITS BY ALL PHARMACEUTICALS COMPANIES INCLUDING AYURVEDIC COMPANIES SELLING THROUGH CHEMISTS

Definition: Stockiest means Trade and Institutional Stockiest. There shall be no differentiation between Trade and Institutional Stockiest as a Stockiest will deal with both wings.

Appointment / Termination of new stockiest shall only be done with the permission of the Association.

Since Goa is a small state it shall be considered as ONE district divided into two North Goa and South Goa. A new company can initially appoint only two stockiest one in North Goa and 2nd in South Goa Preferably. These stockiest may or may not have branches.

All stockiest operating prior to 14th September, 1997 will continue to be the stockiest of their respective companies, irrespective of the number of stockiest in Goa.

All further appointments shall be made as per the following formula:

When the average secondary trade sale crosses 2 lacs, per month, a third

stockiest can be appointed. Average means 6 months trade sales prior to date of application.

When the average secondary trade sale crosses 4 lacs, per month, a fourth stockiest can be appointed.

When the average secondary trade sales are above 6 lacs per month, a fifth stockiest can be appointed.

There can be no more than 5 stockiest except in case of mergers and acquisitions.

Replacement of stockiest is allowed on condition the Association is satisfied the need of replacement taking into consideration the company's interest. The Association must have the consent of the retiring stockiest in writing to allow replacement. Howe ever, such replacement should be effected within six months of the last invoice raised by the supplier on the retiring stockiest. However, if the current sales are not within the above guidelines no replacement shall be given e.g. If there are 3 existing stockiest and if one retires and if the sales are below 2 lacs no replacement will be granted. The company will have to manage with the 2 existing stockiest. No mutual transfer of stockiest ship is permissible, even with the consent of the existing stockiest. Appointment of additional stockiest even with the consent of existing stockiest is not allowed. The decision of the Association is final and binding on all members. Any member purchasing the liabilities and assets of a retiring member

(member who wants to close down his pharma business) will be allowed to take over the existing stockiest ship of the retiring member, with a letter from the retiring member to that effect. No other transfer of stockiest ship is permissible.

Once a company appoints a stockiest, no further appointments can be made for one year.

If any wholesaler takes stockiest ship of a company without the permission of the Association, then the stockiest will be terminated and he will be fined (minimum Rs. 5000/-) and will not be granted permission to take any new stockiest ship for a period of one year.

PROCEDURE

Those companies who are eligible as per above guidelines for additional stock point should give an offer / appointment letter in original to the Association or to the wholesaler whom they wish to appoint. Such offer / appointment letter should be signed by the Manager or a superior officer or issued directly from the company office on the company's letterhead. The company should explain in their letter, the need to change the existing arrangement within the above guidelines.

The wholesaler in turn should inform the CDAG enclosing the above offer/ appointment letter and submit the necessary proof on which eligibility is based.

The steering committee which is constituted for this purpose shall scrutinize such application and issue clearance if the conditions as per stockiest ship guidelines given above are satisfied.

Applications should be disposed off within 30 days from the date of receipt. Within this period the committee should confirm that there are no long pending issue between the company and the existing stockiest.

Routine claim concerning expiry / breakage etc. less than 6 months should not be treated as pending issues.

No stockiest shall place order to the company before receiving clearance certificate within the stipulated period of 30 days.

The final clearance shall be given by the President / Secretary. In case of any disputes in the implementation of the above norms the first appeal authority shall be the steering committee, and the final appeal forum shall be the State Executive Committee.

Any wholesaler violating these guidelines/procedure shall be asked to leave the particular stockiest ship and he will be debarred from taking up any further lines for one year and will have to pay a fine (minimum Rs. 5,000/-).

Any Company which has violated the guidelines will have to pay a fine (Minimum Rs. 10.000/-) and abide by the final decision of the Association.

The Company shall be solely responsible for the excess stocks with the existing stockiest. It is the duty of the company to take back the excess stocks or transfer the stocks to the new stockiest. The excess stock problem should be first settled before the Company dispatches stock to the new stockiest.

A Company can apply for NOC for a new stockiest for each division separately provided that the new stockiest to be appointed is a stockiest of any other division of the Company. A completely new stockiest will be eligible only when the existing stockiest are dealing with all the divisions, and if the application is within the guidelines. If only one division applies for NOC then the new stockiest will have to deal ONLY for that division and CANNOT order or sell goods of the

other divisions. The Company will have to apply fresh for the other divisions in such cases.

If a Company policy is that a stockiest should deal with all its divisions, then the company should apply accordingly, provided all existing stockiest are dealing with all divisions.

A stockiest operating in Goa with multiple branches will be considered as a single stockiest of the company even if the Company raises separate invoice for their different branches.

The NOC given to a Company to appoint a new stockiest is valid for 6 months only. After 6 months the NOC is invalid and the Company/ Stockiest will have to submit a fresh application.

GENERAL

Notwithstanding anything in these norms a company can replace a stockiest when:

Companies are genuinely aggrieved and are losing sales due to the non performance of a stockiest.

A stockiest relinquishes his stockiest ship.

Note: Criteria for non performance will be as follows:

Stockiest is a habitual defaulter of payments to the company.

Does not operate scheme meant for the retailers.

Does not maintain adequate stocks as per inventory norms. (Salesx2 – Closing stock – Stock in transit = Order of next month).

Does not co-operate with the company in providing agreed information. When the company is aggrieved based on the above criteria and wishes to replace a stockiest it will have to submit the necessary evidence to the Association and the Association in turn after discussing the matter with the concerned stockiest will its decision.

The company can only appoint as STOCKIEST a wholesaler who is member of our ASSOCIATION.

If a company has not raised any invoice on a wholesaler / stockiest for continuous 12 months it shall be deemed that the stockiest ship has been terminated and in no way can be restarted without the permission of the Association, provided there is no correspondence between the stockiest and the company on stopping supplies and the Association is informed about this correspondence.

No company can make direct supplies to doctors, nursing homes, chemist. All supplies must be routed through authorized stockiest

ONLY. Companies may quote directly to Government Institutions like G.M.C., D.H.S, M.P.T. but cannot deal with private hospitals, Nursing Homes etc. except through their authorized stockiest.

If a company has stopped operations in Goa for more than 2 years and if it wants to restart operations it will be considered as a new company and will have to apply fresh for P.I.S. and for appointment of stockiest, provided all previous claims of old stockiest / retailers have been settled. Preference to old stockiest should be considered.

Selling of products / brands from one company to another will be considered as a new product.

If a company has closed down its operation then the stockiest are responsible for taking back unsold and expiry stocks from the retailers. The Wholesaler is responsible for expiry of goods sold by him even if company is not giving Credit Note for the same.

It is the duty of the stockiest to inform retailers / Association about the stoppage of operations by the company.

IMPORTANT: No wholesaler should supply goods to any new Retailers, even on CASH, unless the retailers became a member of the Association. The retailer not be given any CREDIT facilities for a

period of 6 months after which the wholesaler may extend Credit facility to the party at his discretion."

"POLICY TO MAKE SUPPLIES TO NEW RETAIL OUTLETS

Following conditions apply to new Retailers outlets for a period of minimum one year.

a) SUPPLY: ***No. supply to be made to any Retailer by any wholesaler unless such Retailer becomes member of CDAG."***

27.15. The examination of the clauses of the guidelines conclusively establishes that no person or entity is allowed to do business of pharmaceutical drugs as wholesaler and retailer unless it becomes member of Association. It is also evident that without obtaining NOC from CDAG neither any new product can be introduced by any pharmaceutical company nor any new stockist can be appointed. These facts were also confirmed by Hemant Pai Angle, Proprietor of Varca Druggist and Chemist in his statement recorded before DG wherein it has been stated by him that in order to become stockist of any pharma company, a stockist/wholesaler has to take NOC from CDAG.

27.16. The fact that the Association not only controls introduction of drugs but also the appointment of stockists has also been confirmed by Mr. Mario Vaz, proprietor of Xcel Healthcare in his statement made before DG.

27.17. The following excerpts from Memorandum of Understanding of CDAG have been reproduced by the DG to show that in case guidelines/MoU are not followed, members would be boycotted and penalties would be imposed on the defaulting firms:

"Purchase& payment"

Any wholesaler found violating the above rules (a to d listed in MoU) will be liable to strict action taken by CDAG on the recommendation of the disciplinary committee appointed for the purpose.

For first violation a fine Rs. 2500/- will be imposed beside warning letter will be written to the Wholesaler.

For second violation a fine of Rs. 5000/- will be imposed and also executive committee will not issue any NOC to such a wholesaler for a period of 1 year for being appointed as a stockiest any company.

Retailers should not resort to any unhealthy competition by giving discount to their customers and should not operate any beneficiary schemes to attract the customers.

Any Retailers found violating the above rules will be liable to strict action taken by CDAG on the recommendation of the Disciplinary Committee appointed for the purpose.

For first violation a fine Rs. 2500/- will be imposed beside warning letter will be written to the concerned Retailer.

For second violation a fine of Rs. 5000/- will be imposed and all Wholesaler will boycott such retailer for a period of 3 months.

Retailers should make payment of credit purchases within 21 days failing which the wholesaler will charge 18% interest from the 30th day.

Wholesalers should report the name of retailers along with details of bills of retailers delaying the payment beyond 60 days which will be forwarded to the Disciplinary Committee

Following action will be taken against the retailers if found guilty.

Issue of warning letter to the defaulting retailer and order him to pay the dues to the respective wholesaler within 8 days along with the interest there on.

In case the defaulting retailer still fails to make the payment to the wholesaler all other wholesaler will be directed to stop supplies to such retailer.

27.18. The fact that the Association is limiting and controlling the supply of drugs is further substantiated from the examination of the following minutes of meeting of CDGA quoted in DG report:

27.18.1. Minutes of the Wholesalers meeting held at Keservel Garden Retreat ,Cortalim on 25.08.2006

"Some wholesalers said that the Company's were selling goods directly to Doctors by passing both the wholesalers and retailers. The names of Companies were Cipla, Glenmark, VHB, Organon, and Thivim Pharmaceuticals. Other wholesalers/retailers who were aware of direct supplies from Company/C&F to Doctors were to report the same to the Association. It was decided that a letter should be sent to such companies."

27.18.2. Minutes of the EC meeting held at the office premises, Panaji, on 14.11.2006

"Regarding Micro Labs it was decided that as they are already having 5 stockists in Goa, a new stockiest cannot be appointed as per our guidelines."

27.18.3. Minutes of the EC meeting held on 20.07.2007

"Mr. Kurtarkar said that he had put before the wholesalers meeting that some wholesalers were making products available and supplying to retailers without paying PIS and he had therefore proposed that for a product made available by a wholesaler without paying PIS charges the wholesaler would have to pay Rs.1000 instead of Rs.500/-".

27.18.4. Annual Report for the year 2007-08

"The total collection on Product Information Service during the last year has been around 12 Lakh which means 2400 new products have been launched during the last year. Retailers

should purchase products only which are registered with the association."

27.18.5. Minutes of Executive Committee Meeting held on 31.07.2008

".....President asked the wholesalers chairman that a wholesalers committee should be formed which would be responsible for deciding on the issue of appointment of stockiest."

27.18.6. Minutes of Executive Committee Meeting held on 19.09.2008

'Complaint from Desai and Co. and Drogaria Menezes and Cia.

"There was a complaint from Desai and Co., about Mahaveer Agency, super stockist of Micro Laboratories and Raju Sales Corporations.

1.....

2.....

3. Micro Laboratories do not take PIS for the new products.

4. Raju Sales Corporation has sold directly as a C&F agent to the retail chemists.

It was decided to write to Mahaveer Agency about the complaints and instruct the firm to adhere to the rules and regulations of the Association."

"Regarding Mediwings Bioscience Pvt. Ltd, Mr. Albert explained the reason for denying the third stockiestship for the company.EC decided to fine the company but Mr. Albert informed that the company and the existing stockiest are settling the issue amicably. It was agreed upon"

27.18.7. Minutes of Executive Committee Meeting held on 29.09.2008

"Mr. Ashish explained the Mahaveer Pharmaceuticals issue. It was decided to write to Micro Laboratories explaining the violation of the CDAG guidelines by their super stockiest with a cc to Mahaveer Pharmaceuticals."

27.18.8. Minutes of the meeting held on 12.02.2009 at office premises

"On the receipt side, Mr. Lyndon said that PIS of total 1860 new products was taken up till 10th of December."

27.18.9. Minutes of the EC meeting held on 20.02.2009 at office premises

'Mr. Rajesh suggested that E.C. should make an offer to the companies. The company can avail a waiver on PIS fees for an year if it sponsors a minimum of Rs. 1 lakh."

27.18.10. Annual Report 2008-09

"During the year we have added 48 new members to the Association and earned Rs.1.2 Lakh by way of New membership fees. The total collection on the Product Information Service has been Rs.12,53,500."

27.19. Thus, perusal of the minutes of the meeting of association clearly brings out the fact that the CDGA controls the supply of drugs by way of PIS since unless the PIS is paid, drugs cannot be introduced in Goa. When the minutes are read in the context of guidelines and MoU of CDAG, it also establishes beyond any dispute that the appointment of stockist is also controlled by the Association.

27.20. Further, according to Memorandum of Understanding (MoU) between Retailers & Wholesalers dated 15/3/2004, no wholesaler is allowed to

directly sell the products to the customers and any wholesaler found violating the above rules will be liable to strict action taken by the Association on the recommendation of the Disciplinary Committee appointed for the purpose. As per the clauses stipulated therein a fine of Rs.2500/- will be imposed for first violation besides warning letter to be issued to the concerned wholesaler. And for second violation a fine of Rs.5000/- is stipulated to be imposed and additionally executive committee will not issue any LOC to such a wholesaler for a period of one year for being appointed as stockiest of any company.

27.21. The Commission is in agreement with the findings of DG that the letters written by CDAG to the Pharmaceutical Companies confirmed that the guidelines issued by CDAG were actually enforced. Further, the letter dated 10.01.2009 addressed to M/s Eris Life Sciences Pvt. Ltd., Ahmadabad goes on to show that without NOC of the Association, companies cannot appoint stockist. In the said letter the CDAG intimated the company that as per guidelines it was mandatory for a new company to appoint two stockists and since the company had not followed the guidelines, the NOC was withdrawn. Similarly the contents of letter dated 8.9.2007 to M/s Emcure

Pharmaceutical Ltd., Pune reveal that the NOC from the CDAG is required for appointment of additional stockist.

27.22. This finding also flows from examination of the letter dated 8.9.2008 addressed to M/s Micro Laboratories Limited which reveals that companies can supply only through stockiest appointed by the CDAG as per guidelines.

27.23. After considering the cumulative effect of the evidence as discussed above the Commission agrees with the conclusion drawn by the DG that the evidence gathered during investigation clearly establishes that Chemist and Druggist Association of Goa (CDAG) is engaged in the practice of;

(i) Issuing NOC for appointment of a new or an additional stockist in a particular territory which eventually restricts the number of players in the market and in turn also limits or control supply of drugs;

(ii) Mandating PIS approval for introduction of drugs in a particular territory and taking money for that which eventually restricts the supply and availability of drugs;

27.24. To enforce the guidelines the CDAG has also put in place the mechanism of imposing penalties in case the stockists or retailers do not follow the norms prescribed by the CDAG.

27.25. The contention of CDAG that it is not restricting either the number of stockists or retailers falls flat in the light of clinching evidence as analysed in the preceding paras.

27.26. The necessary corollary which flows from above findings is that if the practice of NOC is done away with, there would be more supply of drugs in the market and consequently more availability of the drugs to the consumers.

27.27. Thus, Commission concludes 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 stockiest 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 practice of issuing NOC for appointment of a new or an additional stockist in a particular territory eventually restricts the number of players in the market and in turn also limits or controls supply of drugs. The system of compulsory PIS approval for introduction of drugs in a particular territory and taking money for that also restricts the supply and availability of drugs. Had there been no compulsion on the pharmaceutical companies to seek PIS approval before introducing the drugs in any territory and they were allowed to opt for mechanism of PIS for information dissemination voluntarily it may not have possibly given rise to any anticompetitive practice. But in the present matter the aforesaid conduct of CDGA followed by imposition of penalties on firms which do not follow the dictates of association establishes that the practices and conduct of CDAG are limiting and controlling the supply of drugs in the state of Goa in violation of provisions of section 3(3) (b) of the Act.

27.28. The CDAG has also taken the plea that the conclusion of DG are not based on any economic analysis and the relevant market has been incorrectly defined by the DG and, therefore, the conclusion of violation of section

3(3)(b) drawn by the DG in the Supplementary Report, cannot be sustained under the eyes of the law.

27.29. At the very outset, in Commission's view, the arguments raised by the CDAG are flawed and contrary to the scheme and provisions of the Act. For finding contravention under section 3, the delineation of relevant market is not required to be done. Furthermore, as discussed in preceding paras, once the elements constituting the violation of section 3(3) of the Act have been established, the presumption regarding AAEC is triggered and the onus shifts on the infringing entity to rebut that presumption referring to the factors enumerated in section 19(3) of the Act. In the present matter no effort has been made by the CDAG to repel the presumption.

27.30. As pointed out above that though the Commission is not required to launch into an enquiry in cases related to section 3(3) to find out the existence of AAEC, however, the DG has analyzed the action of CDAG vis-a-vis factors mentioned in Section 19(3)in following terms:

(I) **Creation of barriers to new entrants in the market**: As per the guidelines of the association, no new wholesaler can be appointed

unless the pharma companies give no-objection certificate to this effect. The pharma companies can appoint new stockist only as per the guidelines of CDAG which are restrictive in nature. Further, only those retailers are eligible to get supplies from the wholesalers who are the members of the association. With their collective market power, the association of Chemists and druggists has tried to ensure that no new player gets entry in the market without their no-objection. The association has made its members and pharma companies comply with their terms and conditions. During merger of Sarabhai and Nicholas, a group of stockist prevailed over CDAG to ensure that number of stockist remains restricted and thereafter Secretary of CDAG wrote to Nicholas Piramal India Limited not to change in the distribution policy without taking LOC from the association. (It is said that Cipla, a manufacturer of asthma drugs, tried to bypass the supply chain by providing home service for its products. Cipla faced strong resistance from one of the traders lobby- (of some other State), which stopped stocking Cipla's product. Ultimately, Cipla had to withdraw the scheme.)[1]. When a company launches a new product (either branded or generic), to make that product available in the pharmacy, the company has to pay certain amount in form of Product Information System (PIS) to the association. Thus, entry barriers have been created by the association in terms of new players and introduction of new products. Even in case of government tenders, as per the dictate of association, only authorised stockist can make supplies as is evident from the letter addressed to M/s Xcel Healthcare Pharmaceutical distributors, Alto Porvorim, Goa

(Exhibit-4) of the DG report informing them that sale by unauthorized stockist tantamount to violation of Rules and Regulations of CDAG and invites disciplinary action and also asking them to show cause as to why action should not be initiated against them.

(II) **Driving existing competitors out of the market**: The agreements of the like entered by the wholesalers-retailers through CDAG is agreement among competitors at the same level of value chain. Through their actions, the wholesalers-retailers have attempted to ensure that if the wholesalers-retailers do not abide by the decisions of the association, they will be punished and they will not get stockist ship of pharma companies.

(III) **Foreclosure of competition by hindering entry into the market:** The act of wholesalers-retailers certainly attempted to hinder the entry of those wholesalers and retailers who are not the members of the association into the market. Moreover, the pharma companies would also not get entry in the market of pharmaceuticals, unless the association provides a no-objection certificate to them. Thus, the competition has been restricted by their conduct.

(IV) **Accrual of benefits to consumers:** As has been brought out above, the guidelines, rules and regulations of the association are certainly not such which facilitate any benefit to the consumers. On the contrary,

rules and regulations of the association which stipulate that retailers cannot pass on any beneficiary schemes or discount to the consumers certainly is anti-consumer in nature.

(V) **Improvements in production or distribution of goods or provision of services:** The acts, guidelines, rules and regulations of the association also do not bring about any improvement in production or distribution of goods or provision of services since the number of the wholesalers-retailers gets limited and restricted because of the clauses mentioned in the guidelines.

(VI) **Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services:** Further, there is no justification or case made out by the association of its members to prove that their action resulted in promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services. There was no positive outcome achieved either in terms of improvements in production or distribution of goods or provision of services or in terms of promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services as a result of the action of the association or its members.

27.31. Thus, on the basis of analysis of the factors enumerated in Section 19(3) of the Act as brought out by the DG, it can be seen that all pro-competitive factors are absent and at same time all factors indicating anti-competitive effect are present in this case. The analysis done by the DG further strengthens the finding of the Commission that the Chemists and Druggists Association, Goa is engaged in actions and practices which are anti-competitive and violative of provisions of section 3(3)(b)of the Act.

Determining the sale prices of drugs

27.32. In the present case, the DG has also returned the finding that the conduct and practices of CDAG are also indirectly determining the sale prices of non controlled drugs in violation of section 3(3)(a) of the Act. On the other hand the CDAG has denied this charge.

27.33. It has been brought out in DG report that there are broadly two categories of drugs; the scheduled drugs (drugs under price control of DPCO) and non-scheduled drugs which are out of price control. It is in the category of non

scheduled drugs that trade associations decide upon the margins –which generally is 20% for retailers and 10% for wholesalers.

27.34. As regards the issue of determination of margins and sale prices of drugs by the association, in his statement before DG, Shri Hemant Pai Angle, Member of Chemist & Druggist Association Goa, has submitted as under :

"Q. Can you furnish/Do you have evidences regarding the agreement, practices or any decision amongst the members of the Chemist and Druggists Association, Goa to control prices, if any?

Ans. CDAG is affiliated to AIOCD and follows the guidelines of AIOCD. In the guidelines, the margins have been fixed for drugs for both wholesalers and retailers. The margins are fixed at the time of giving PIS approvals. The PIS is collected in the name of advertisements published in the magazines like "Bulletin-cum-PIS". For PIS, Rs.500 per product per strength/formulation is charged. I am giving you copies of approvals given by AIOCD published in "Bulletin-cum-PIS" which would show that Product Information Service is charged by associations.

Q. Can you furnish/Do you have evidences and data to show that the

activities of members of the association have led to determination of the sale price of drugs?

Ans.Trade margins fixed by AIOCD followed by CDAG and PIS charged by them may have impact on prices of drugs. Circular dated 04.06.2010 of CDAG also brings out that the association writes to the companies for effecting variation in prices."

27.35. When asked by the DG how the margins/discounts are decided by the association at various stages of supply/ distribution chain, Mr. Hemant Pai Angle, has stated as under:

"Q. What are the margins charged at various stages of the supply/distribution chain? Please furnish evidences, in your possession, if any?

Ans.The PIS approvals as handed over to you given for different companies would reveal that margins are fixed.

Q. What are the discounts given with reference to the margins laid down in the guidelines?

Ans. Discount policies is given in MoU of CDAG which states that wholesalers can pass only 2% as cash discount to retailers. Further,

CDAG also restricts the retailers from passing on discounts to customers which affects the common man. If retailers give discount to customers/Common man, penalties are imposed. Thus, sale price of drugs are impacted in a way because the retailers, even if they would like to pass on discounts to common man, cannot do so. I am given two pieces of evidences – circular dated 16.08.2005 and 11.06.2009 to support this contention."

27.36. Further, in order to show that trade margins are decided by the Association at the time of giving PIS approval, Mario Vaz, the information provider, submitted copies of approvals of Product Information Service (PIS) given by Chemist & Druggist Association Goa before the DG. The fact that margins are fixed for the wholesaler and retailer at the time of PIS approval, is also borne out from the following statement of Mr. Mario Vaz of Xcel Healthcare Vaz:

"Q. Can you furnish/Do you have evidences and data to show that the activities of the members of the association have led to determination of the sale price of drugs?

Ans. Trade margin fixed by AIOCD followed by CDAG and PIS charged by them may have impact on price of drugs.

Q. What are the margins charged at various stages of the supply/distribution chain? Please furnish evidences, in your possession, if any?

Ans. PIS approvals as handed over to you given for different companies would reveal that margins for wholesalers and retailers are fixed. There cannot be deviation from the margins which are laid down in the guidelines.

Q. What are the discounts given with reference to the margins laid down in the guidelines?

Ans. Discount policy is given in MoU of CDAG which states that wholesalers can pass only 2% as cash discount to retailers. Further, CDAG also restricts the retailers from passing on discounts to customers which affect the common man. If retailers given discount to customers/common man, penalties are imposed. Thus, sale price of drugs are impacted in a way because the retailers, even if they would like to pass on discounts to common man, cannot do so."

27.37. A circular dated 25.05.2009 of CDAG which is available on record also establishes that trade margins are fixed as per the norms set by the guidelines of associations. The trade margins fixed by the association ultimately have the effect of indirect determination of sales price of drug for the end consumer.

27.38. It has also come in evidence that at the time when PIS approval is given by the association for launch of drugs in a particular area, margins for wholesalers and retailers are fixed. The DG has mentioned margins of some drugs to stockists and retailers manufactured by drug companies as determined and approved under the system of Product Information Service.

27.39. Apart from fixing margins on drugs, the Association also determines the amount of discount to be extended by wholesalers and retailers that has the impact of ultimate determination of price of drugs. In this regard, following circular of CDAG dated 16.08.2005 assumes significance;

> *" a – With immediate effect Wholesalers could extend a maximum of 2% Cash Discount for immediate cash payment or payment with current dated cheques to retailers.*
> *<u>Wholesalers</u> are requested not to offer more than 2% C.D. and in case of cheque payment the Cheques should be deposited in the bank immediately.*

Retailers please do not demand more than 2% C.D. and do not give post-dated cheques or do ask wholesalers to present cheques late to the bank."

27.40. In this regard another circular dated 11.06.2009 of the CDAG has also been furnished which also restricts the competition between retailers by denouncing the practice of extending discounts;

"We have been receiving a lot of complaints that many retailers are giving discounts which run even upto 10%.

Please be aware that our Association and its parent body – The AIOCD thrive hard to bargain the companies and maintain our trade margins on medicines. These trade margins are just enough (and some occasions not enough) to sustain ourselves & have a respectable living.

Please also be aware that a big pharmacy retail chain in the Southern India which was brashly advertising and giving discounts to customers, is today in bankruptcy, with losses amounting to crores of rupees.

Giving discounts not only disturbs the other retailers in the neighbourhood who do not give discounts, but it also leads to

unethical practices and is actually hampering your own profits in the long run. You giving discounts is not only destroying the neighbouring retailers, but will also eventually destroy you too.

Please note, strict action will be taken against any retailers found given discounts. We therefore appeal to you to stop giving discounts. Help us to keep the trade healthy & alive!"

27.41. Thus, it is evident that the CDAG is also determining the amount of discount that may be extended by the stockists to the retailers and also the extent of discount which can be given to the consumers by the retailers.

27.42. When the evidence available on record in form of PIS approvals and statements of persons recorded by the DG in course of investigation, is taken into account conjointly it becomes clear that the norms and guidelines of the Association which prescribe the margins for wholesalers and retailers, are not only fixing margins, but also have the effect of indirectly determining the sale price of drugs. The margins of drugs for wholesalers and retailers are determined by the Association at the time of giving PIS approval for introduction of drugs in a particular territory. The DG

has made PIS approvals in some of the cases as part of his report, which clearly show that margins for wholesalers and retailers are determined by the Association. The MoU and guidelines of CDAG posted on their website also corroborate the finding that margins are determined by the Association. Under the system of PIS approvals, the CDAG takes an amount of Rs.500 per drug per category from drug manufacturing companies for introduction/marketing of drugs in a particular territory.

27.43. After careful examination of all the facts and evidence as disclosed by DG report and referred in the foregoing paras the Commission has come to the conclusion that CDAG holds sway over the supply of drugs in the territory of Goa. Furthermore, the cumulative effect of the evidence collected by the DG during investigation and analysed in the light of contentions advanced by the DG leads to inevitable conclusion that the conduct and practices of CDAG emanating from the guidelines and MoU of the Association definitely amount to indirectly fixing the sale prices of pharmaceutical drugs in violation of the provisions of section3 (3) (a) of the Act. The contention raised by the CDAG that their actions cannot be said to be determining the

price of drugs cannot be accepted in view of uncontroverted evidence available on record.

27.44. The Commission finds force in the findings of the DG that in such a situation, when efforts are being made to ensure supply of drugs to the common man at a cheaper rate, the restrictive guidelines of Chemists and Druggists Association work as stumbling block and do not appear to be in line with the government plans to provide medicines to common man at an affordable rate. In view of the aforesaid, the Commission is of the view that CDAG not only limit and control supply of drugs in the market through a system of PIS approvals and limit and control the number of players by insisting on need of its NOC for appointment of stockist but also through its guidelines fixes trade margins for the wholesalers and retailers which, in turn, results into determination of sale prices of drugs in the market. Therefore, the Commission holds that CDAG has violated the provisions of Section 3(3) (a) and 3(3) (b) of the Act.

28. Determination of Issue no. 3

28.1. After having decided that the conduct and practices followed by CDAG are anti-competitive and in violation of provisions of section 3(3) (a) and 3(3) (b) of the Act the Commission proceeds to decide the issue no. 3 i.e. whether the members of the executive body of CDAG are also liable for anti-competitive conduct violative of provisions of section 3(3) (a) and 3(3) (b) of the Act.

28.2. Under the scheme of the Act 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 enterprises of association may be held liable for contravention of section 3 of the Act arising from an agreement or concerted practice between them. Further, the anti-competitive decision or practice of the association can be attributed to the members who were responsible for running the affairs of the association and actively

participated in giving effect to the anti-competitive decision or practice of the association. In case the contravention of any of the provisions of this Act is made by a company, section 48 of the Act specifically provides for the individual liability of the persons, in addition to the liability of the company, who were in charge of and were responsible for the conduct of the business of the company at the time when the contravention was committed. The Explanation to section 48 further provides that for the purposes of this section, company includes a firm or other association of individuals. Therefore, the members of the Executive Committee of CDAG who were responsible for anti-competitive conduct of CDAG are also liable, in addition to CDAG, for contravention of section 3 (3) (a) and 3(3) (b) of the Act.

28.3. The DG has identified the members of the executive committee of CDAG who were responsible for the anti-competitive decisions taken and enforced by the CDAG. Such members are – Albert De Sa, Mahesh Naik, Akhtar Shah, Santosh Fondekar, Venkatesh Prabhu Desai, BM Prabhu Desai, Datta Ram M. Mopkar, Lyndon D' Silva, Amit Kamt, Sudesh Molio, Rajesh Colvalkar, Livio Vaz, Rajaram Gawas. Further, Mr. Hemant Pai Angle and

Mario Vaz in their statements have also named persons, who according to them, are actively involved in the anti-competitive practices. The relevant part of the statement of Mr.Hemant Pai Angle recorded by DG is reproduced below:

"Q.11. Who are the members of the Chemist and Druggist Association, Goa who are active participants in the affairs of the Association and all their other alleged anti-competitive practices?

Ans. 11. The main person is Albert De Sa who is President of CDAG and is partner of CS Enterprises. All executive committee members who are wholesalers like – Raj Enterprises (Prop. Rajesh Colvalkar), ICM Enterprises (Prop. Mahesh Naik) and Pharma Plus (of which Santosh Fondekar), Babu Pharma (Prop. Babu Mopkar), G.N. Agencies (Partner- Yatin Naik), D'Silva and D'Silva (Partner- Lyndon D' Silva) are active participants in the association. In addition, Prakash Shankwalkar, Partner of Drogaria Ananta, although not part of the association is also active in the affairs of CDAG.

28.4. The Commission vide its order dated 13.12.2011directed the CDAG to submit its financial statement for the last 3 years and also to furnish the names of the office bearers, however, CDAG did not file the requisite

information. Therefore, the Commission has decided to deal with the issue of passing orders under section 27 of the Act against the individual members separately when the requisite information is furnished by the CDAG.

Order under section 27 of the Act

29. As the Commission has found that the CDAG has violated the provisions of section 3(3)(a) and 3(3)(b) of the Act the Commission now proceeds to pass suitable orders under section 27 of the Act against the CDAG including penalty.

30. As per the Statutory Audit Report on Audited Accounts for Financial Year 2009-2010 dated November 11,2010 ,annexed with the supplementary investigation report of DG,CDAG (entity against which the allegations have been filed) had the following receipts during 2008-09 and 2009-10:

Financial Years	Receipts (in Rs.)
2008-09	21,38,955.00
2009-10	18,72,007.00

31. Thus, Commission after considering the facts and circumstances of the instant case is of the opinion that it is appropriate to impose penalty @ 10% of the average of the receipts for financial year 2008-09 and 2009-10 (in respect of which the figures are available with the Commission) on CDAG. Therefore, in exercise of powers under Section 27 (b) of the Act, the Commission imposes penalty on CDAG computed as follows:

32.

Gross Revenue Receipts during the year 2008-09	**:**	**Rs. 21, 38, 955.00**
Gross Revenue Receipts during the year 2009-10	**:**	**Rs. 18, 72,007.00**
Average of the Revenue Receipts	**:**	**Rs. 20, 05,481.00**
10% of the Average of the Revenue Receipts	**:**	**Rs. 2, 00,548.00**
Penalty (Rounded off to the nearest number)	**:**	**Rs. 2, 00,000.00**

33. Accordingly, the Commission passes the following orders, under Section 27 of the Act against the aforesaid contravening entities:

(I) The CDAG and its members are directed to cease and desist from indulging in and following practices which have been found

anticompetitive in violation of section 3 of the Act in the preceding paras of this order.

(II) The CDAG is further directed to file an undertaking that Guidelines and MoU with respect to non appointment of a stockist or wholesaler from amongst the non-members of CDAG, requirement of No Objection Certificate from the CDAG for appointment of stockist or wholesaler and limit on number of stockist of pharmaceutical companies as well as the clauses mandating compulsory PIS approval from CDAG for introduction of drugs in the territory of Goa and requiring routing of bids for supply of drugs to the Government and Hospitals through authorised stockists only have been done away within 60 days from the date of receipt of the order.

(III) The CDAG is also directed to remove the clauses in the Circulars, MoU and Guidelines which lay down the margins for wholesalers and retailers in the category of non- scheduled drugs, prescribing a cap on the amount of discount a wholesaler can give to the retailers and prohibiting the retailers from giving any discounts to

the consumers and file an undertaking to this effect within 60 days from the date of receipt of this order.

(IV) A penalty of Rs. 2,00,000/- is also imposed on CDAG. The penalty shall be paid by CDAG within sixty days from the date of receipt of the copy of this Order.

34. Secretary is directed to send a copy of this order to the concerned parties for compliance immediately.

Sd/-	Sd/-	Sd/-
H.C. Gupta	**Anurag Goel**	**M. L. Tayal**
(Member)	(Member)	(Member)

Sd/-

Ashok Chawla

(Chairperson)

Certified True Copy

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

13/06/2012