

**COMPETITION COMMISSION OF INDIA**

**Case No. 20/2011**

Date: 19.02.2013

Informant : Santuka Associates Pvt.Ltd., Cuttack

Opposite Party : 1. All India Organization of Chemists & Druggists (OP1)

2. Organization of Pharmaceutical Producer of India

3. Indian Drug Manufacturers' Association

4. USV Ltd., Mumbai.

Per Justice S.N. Dhingra, Member

ORDER

I had the benefit of going through the order passed by my learned colleagues. However, as in case No.C-127/2009/MRTPC (Varca Drugs & Chemists & Ors. against Chemists & Druggist Association Goa (CDAG)) decided on 11.06.2012, I had different opinion on certain issues and position of law; hence this order.

The facts of the case have been brought out elaborately in the majority order and thus are not being repeated unless required in the context. The Opposite Party in an association of Chemists & Druggists. The association is a registered and recognized society under the Society Registration Act. The membership of OP1 is now open only to state Chemists & Druggists Associations which can either become an ordinary or an associate member. The stated object of OP1 is to promote and protect the interest of drug trade industry and allied lines in India. The investigation done by DG and a perusal of Memorandum of Association brings out following practices of OP1 :-

- Appointment/termination of stockists by pharmaceutical industry can be done only with the permission of the association or its affiliate associations or member association. No one can be appointed as stockist without an NOC either from OP1 or from its member associations. An NOC is equivalent to a clearance certificate to be issued by OP1. In case anybody ventures to do the business in

drugs without being member, directions are issued to all the members to boycott him. Directions are also issued to manufacturers and wholesale suppliers that in case they do business with such a non member or with the person not having NOC, they would be boycotted. The boycotts have been actually done and substantial evidence has been placed on record by the informant as well as collected by DG. DG has concluded that obtaining of NOC was a pre condition for any one to open a shop either as a chemist or for being appointed as a stockist, wholeseller or distributor of pharmaceutical companies. The DG also found that Product Information Service Approval (PIS Approval) was also a must and PIS charges in respect of one drug was Rs.2000 in case of normal companies and 50% discount was given to SSI Units in PIS charges. It is also an undisputed fact that OP1 had also fixed the margin and no trader could give any discount to the customers. The consumers had no choice and the retailers were not permitted to sell the drugs below MRP giving discount to the consumer. Similarly, margins of whole sellers were also fixed by OP1 association and no pharmaceutical company could give discount above the margins to the whole sellers.

The majority order had framed following four issues :-

“Issue No. 1 – Whether the actions and practices of AIOCD regarding grant of NOC for appointment of stockists, fixation of trade margins, collection of PIS charges and boycott of products of pharmaceutical companies are a violation of Section 3 of the Act.

Issue No. 2 – Whether OPP2 and IDMA are also liable for violation of Section 3(3) of the Act along with AIOCD as the practices pertaining to NOC/LOC, PIS and fixed trade margin followed by their members are arising out of the various agreements between AIOCD, OPP1 and IDMA?

Issue No. 3 –Whether the members/office bearers of the Executive Committee of AIOCD, OPP1 and IDMA are also liable for violation of Section 3 of the Act?

Issue No. 4 – Whether the conduct of USV falls foul of the provisions of the Act, as alleged by the informant.

I am in agreement with the decision of the majority in respect of issue No. 1, issue No. 2 and issue No. 4. However, I am not in agreement about the conclusions arrived at in respect of issue No. 3.

Shri R.Prasad, Member in his supplementary order has stated that there was also violation of section 4 of the Competition Act on the ground that OP1 was a person defined under section 2(l) and was carrying an activity as provided in section 2(h) of the Competition act. Therefore, actions of OP1 are to be seen from the angle whether the activity of OP1 was covered under the Competition Act or not. Shri R. Prasad has concluded that OP1 enjoyed a dominant position in the relevant product market of marketing of medicines and due to its collective strength, it was able to operate independent of competitive forces primarily because no competitive force was prevailing in the relevant geographic area and due to collective strength of association, it was able to operate independent of competitive forces.

While dealing with similar issues and similar facts and arguments of parties in case No.C-127/2009/MRTPC (Varca Drugs & Chemists & Ors. against Chemists & Druggist Association Goad (CDAG), I had opined as under :-

“12.The main argument of the OP is that the Association was working for the welfare of its members and for betterment of the trade. It was regulating the trade in such a manner that it was for the benefit of the members & consumers. It is stated that Union Health Ministry had constituted Mashelkar Committee which recommended that Chemists & Pharmacists through their association should act as a watch dogs to prevent entry of spurious drugs/medicines purchased from unauthorized resources and had specifically reiterated that All India organization of Chemists & Druggists should play an active role to educate their members and to cooperate with regulatory authorities to eliminate sale of spurious and sub standard drugs by their members. It is stated that the Association CDAG was issuing NOC after verifying the antecedents of the Stockists, wholesalers and retailers to ensure that nobody deals with spurious drugs. Therefore, whatever was being done was being done for the benefit of the consumers.

13.The argument of the opposite party must fail. Formation of an association is a fundamental right of people of India, but no association can be formed for illegal

purposes or to perpetuate illegality. A perusal of minutes of AGM of oP would show that the whole effort of the OP has been to protect the sizeable profit margin of its members, whether wholesalers or retailers. OP had no business to regulate the profit margins or issue letter of consents or NOCs to persons for doing business in wholesale or retail supply line of drugs/medicines. Only few professions have been given responsibility of keeping a watch on the professionals by legislature by enacting necessary statutes. The elected bodies of Advocates, CAs, CSs, ICWAs & Doctors have been given statutory powers to regulate the profession. No such power has been given by legislature to chemists & Druggists Associations either at state level or national level to regulate business, fix margins & ensure profits or to regulate the entry and exit of the person in this business or to fix norms of minimum turn over etc. The entry into this business is regulated by a host of central rules and regulations and a complete administrative structure is there at state and central level under Drugs & Cosmetic Act & Rules. It is the state which grants or revokes licence to do trade in this field. No association can super impose its own dictate over retailers or wholesalers about whether they can open shop in an area or not. The business person itself has to decide whether he wants to enter the field and compete with others or not. CDAG or any other association of existing retailers or whole sellers cannot decide nor has business to decide whether a new entrant in the field should be there or not. There can be no worse anti competitive act than denial of market access to a person.

14. Section 3 of the Competition Act (the Act) provides that where an agreement is entered into between enterprises or association of enterprises etc. etc. or a practice is carried on or a decision is taken by any association or enterprise or association of persons including cartels engaged in identical or similar trade of goods or provision of service, which directly or indirectly causes or likely to cause an appreciable adverse effect on the competition within India, such an agreement shall be void. Section 3(3) provides that if decision or practice determines purchase or sale price, it shall be presumed to have an appreciable adverse effect on competition. Similarly, if the actions or decisions or practices limit or control production/supply, market of provision of services, it shall be presumed to have appreciable adverse effect on competition. Section 3 prohibits an agreement in respect of supply, production, distribution, storage, acquisition or control of goods which causes or is likely to cause an appreciable adverse effect on competition within India.

15. Cartel is defined under section 2(c). Cartel includes an association of producers, sellers, distributors, traders or service providers who by agreement among themselves limit, control or attempt to control production, distribution, sale or price of, or trade in goods or provision of services.

16. In order to form a cartel, it is not necessary that a formal association should be got registered. A cartel can be formed by an informal association of enterprises as well as by a formal registered Association of enterprises. The coordination between the enterprises can be achieved through medium of either

of the associations. Formation of a trade association becomes handy where cartel consists of a large number of firms. In such cases where trade associations are formed for the purpose of cartelization, the compliance of the rules made by the cartel needs to be monitored and is monitored through the Executive Committee or the members of the Association. Where only a few firms unite to form a cartel, it is relatively easy for each firm to monitor one another. However, where large numbers are there, this monitoring and penalizing is done through reporting by the members. The members keep on giving information to the Executive Committee about the violation as it comes to their knowledge. Then the executive committee takes action.

17. The legislature was aware that associations can take the shape of cartels and that is why in section 2(c), the association of producers, sellers, etc. has been included in the definition of cartels. Similarly, the legislature in section 3 also envisaged a situation where enterprises may form an association and take such decisions or adopt such practices which were akin to a cartel. The constitution of an association and adopting of its Memorandum of Articles of Association, its rules, bye-laws, guidelines itself is a decision of the enterprise. Every individual member who subscribes to the Memorandum of Association and becomes member of the Association either at the time of inception or later on, is a party to the decision as recorded in the form of by-laws, guidelines, rules & regulations of the association. The decisions of the Executive Committee of the Association elected by the general body of the association are not only the decisions on behalf of Association but amount to the decisions of the members of the Association. It is quite possible that some members may not agree with the decision of Executive Committee. Those members who do not agree with such decisions which affect the trade or service are supposed to convey their disagreement with the decisions to the Association. If no member conveys disagreement to the decision of the Executive body, it is presumed that he agrees with the decision.

18. An association may have two faces, one that of the looking after the welfare of the Association members and other face that of killing the competition among the members and to ensure cooperation in earning assured profits as well as taking such decisions which are anti competitive. The Commission has to adopt a functional approach. Those actions of the Association which are only in the nature of welfare of the members of the association like ensuring that the members get credit from wholesalers, they are not harassed by the authorities, organizing welfare schemes, cultural programmes etc. are the measures of an association which are not to be objected to. However, those functions and decisions of the association which violate Competition law are to be considered in a different perspective and cannot be considered as legitimate functions of the association. An association of enterprises can be held responsible as a body for anti competitive decisions and the members of the Association individually can also be held responsible for those decisions and practices which are anti competitive and show formation of a cartel.

19. The various decisions and guidelines some of which have been enumerated in paragraph 4 above, would show that the OP in this case has practically taken the shape of a cartel. The guidelines issued by CDAG that no company can appoint stockist without obtaining LOC or no stockist would be allowed to be appointed unless the previous stockist had reached a certain minimum turnover, or unless he is made stockist for all the divisions, are in the nature of limiting the provisions of service.

20. Appointment of stockist, wholesalers is for the purpose of supply of drugs. These drugs are supplied by stockists to wholesalers and by wholesalers to the retailers. This chain of supply of drugs exists so that the supplies go to the ultimate consumers uninterrupted. In this market of supply of drugs CDAG by its guidelines, actions and penal provisions had put limits to the provision of the services. The decision regarding number of stockists to be appointed in a particular territory is taken by pharma companies based on demand for drugs. Any restriction on such matters collectively imposed or mandated by an association of competitors not only infringes on the freedom of trade as guaranteed by Constitution of India but also erects barrier to competition. It may again be reiterated here that there exists a government regulatory mechanism which ensures the fulfillment of regulatory requirements for issuing licenses to all sales establishments pertaining to drugs including wholesalers and retailers. The conduct of the OP in terms of imposition of restriction on appointment of stockists is anti competitive. The restrictive guidelines and norms implemented by the association, seen in conjunction with the action taken for non-compliance, establish that the conduct of the CDAG amounts to limiting the number of players and controlling the supply of drugs in the state of Goa and therefore, contravenes Section 3(3)(b) of the Competition Act, 2002.

21. The guidelines issued by CDAG and for which penalties are imposed by CDAG limit the provision of service of supply of drugs to the retailers as well as to the consumers. CDAG has even ensured that wholesalers and retailers also cannot function in the territory of Goa without obtaining NOC from the Association and without becoming member of the association. A collective coercive action is taken by CDAG through its members, if any one dares to defy the guidelines of CDAG.”

On fixation of margins which is the practice prevalent through out India amongst all associations, I had given following views :-

“26. The directions given by CDAG to retail chemists that they should not enter into ‘unhealthy competition’ by giving discounts to the consumer shows that CDAG had in fact fixed the prices of all drugs for the consumer as MRP and no discount can be given to the consumers. Similarly directions and guidelines given by CDAG to its wholesalers and stockists about fixing the discounts in case of non-scheduled drug also results into fixing the prices. The wholesalers cannot give additional discounts to the retailers for showing better performance nor a wholesaler can try to increase its sale by offering more discounts. Thus there is

no price competition in the sale of drugs between the wholesalers because every wholesaler has to sell a drug at the same price despite the fact that he has wide margins out of which he can give further discounts to the customers ultimately which will go to the consumers.

27. The drugs these days are quite costly. Some of the drugs cost in lakhs. Many of these are essential drugs used in serious ailments. If a drug costs Rs.1,00,000 for a pack of one month, the discount of 20% would amount to Rs.20,000. Even if the wholesaler or the retailer can afford to give additional discount to the consumer, they do not give discount to the consumer because all of them have joined hands and formed a cartel that no discount would be given to the consumer.

28. This cartelization had taken place because all the members have subscribed to the decisions of the Association that they would abide by the guidelines issued by the Association in respect of retail and wholesale discounts. The association had fixed cash discounts and had also given directions of non transferring of benefits to the consumers. The decision of the association is the decision of the members of the Association. It is apparent that all the members of the Association together acted as a cartel by subscribing to the Memorandum of association and guidelines and by following it. A perusal of the minutes of the General Body meeting would show that violations of the guidelines were brought to the notice of the Executive Committee and the Executive Committee decided to take action against the violators.”

It is to be noted that all regional associations are following the footsteps of AIOCD and the MOA of AIOCD and regional associations contain similar provisions. Thus above position is applicable to OP1 with full force. It is also apparent that for being a person /enterprise as covered under Competition Act, it was not necessary that one has to have profit motive. An Association can be engaged in an economic activity without a profit motive,. This would not mean that the activity of the Association would not be an economic activity. When an organization of different enterprises, who are undeniably engaged in economic activity, control the reins of its members and decide how the members will conduct themselves in the business, I consider such organization itself stands indulged in economic activity. Moreover, all those persons who become members of such Association by signing the MOA, in fact enter into an agreement with each other in terms of the MOA and that is the reason that they abide by all the guidelines, circulars, issued by the association and go to the extent of boycotting some one for which the directions are issued by the association. These associations act for the benefit of their members and charge membership fee from them. They may be

registered under the Societies Act or as a company under section 25; they are to be considered as undertakings involved in economic activity. Protecting economic interest of their members is itself an economic activity. In this case protecting margins of the members and ensuring that the members do not sell medicines to the customers at a discount is an economic activity. Thus the association is like a trade association and all the traders or the bodies of traders come together on a platform for mutual benefit.

It is settled law that the Commission has to apply the functional approach while considering the issue of economic activities and the nature of activity of an association. When an association of Chemists and druggists does not allow entry of an outsider into trade/business and puts restrictions and obstacles by way of issuing boycott calls, it effectively kills competition in the trade in order to promote the economic interest of its members at the cost of free trade. It is one of the mandate of the Competition Commission under section 18 of the Competition Act to eliminate practices having adverse effect on competition and to promote and sustain the competition so as to protect the interest of consumers and ensure freedom of trade. When an association by its browbeating tactics and by issuing boycott calls prevents the entry of other persons interested in taking up the trade, without first obtaining its membership, the association actually acts contrary to the freedom granted by the to every citizen of India to adopt any trade or profession.

There is no dispute about the fact that OP1 is an All India Association of Chemists & druggists and there is no competitor to this association. It is active in the relevant market of distribution and supply of drugs and has acquired a position of dominance due to its threat of boycott and taking other effective but illegal penal actions against the manufacturers, members and non members. It is in a position of directly as well as indirectly imposing unfair and discriminatory conditions vis-à-vis non members in the sale of goods and services in the relevant market as discussed above. It also limits and restricts the market of distribution of medicines on all India basis at its will by giving boycott call in any area within India. Consequently, its actions result in denial of market access to the customers in the area where there are no stockists, since no stockist can be appointed without NOC and without first obtaining its membership. It is, therefore,

clear that it was also a case of abuse of dominant position by OP1 in the market of stocking and distribution of drugs.

The majority order has held that the office bearers of the Executive Committee of OP1 were also liable for violation of section 3 of the Act. However, in my opinion the legal position is otherwise.

Penalty against the persons violating section 3 or 4 are provided under section 27. Section 27 reads as under :-

**27.** Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

42[Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.]

A perusal of section 27 would show that Commission can issue cease and desist order under section 27(a) against any enterprise or association of enterprises or a person or association of persons involved in such agreement or abuse of dominant position. Thus it is apparent that the Commission has to give a finding about the enterprise, association of enterprises, person or association of persons to have been involved in an anti competitive agreement or abuse of dominance. While considering the violation under section 3 or 4, the Commission in this case and similar other cases had considered the actions of the association and not actions of individual

office bearers. Thus under section 27(a), cease and desist order can be issued only against those persons who were found in violation of section 3 or 4 of the Act. If the association has been found in violation of section 3 or 4, the association can be issued cease and desist order. Although word person is used in section 27 but the person here would draw meaning from section 2(l) and it is that person who has been found in violation of section 3 and 4. Unless the Commission has considered the actions of such person, the cease and desist order and similarly penalty order under section 27 (b) cannot be imposed. I, therefore, consider that unless the Commission had considered the acts of the office bearers in their individual capacity to determine the violation of section 3 and 4 of the Act, section 27 cannot be used to impose penalty on the office bearers. However, the legislature seems to be aware of this and therefore, enacted section 48 which reads as under :-

**“Contravention by companies**

**48.(1)** Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued there under is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(a) "company" means a body corporate and includes a firm or other association of individuals; and

(b)"director", in relation to a firm, means a partner in the firm.

A reading of section 48 would show that section 48 fixes liability of each one of those persons who at the time of contravention being committed by a company was responsible for the conduct of the business of the company. The company has been defined in section 48 itself and this definition does not include association of enterprises. The legislature seems to have deliberately excluded the association of enterprises and only included association of individuals in the explanation. This exclusion of association of enterprises would show that the legislature did not want the office bearers of association of association to be covered under the provision of section 48. In my opinion, therefore, the office bearers of an association of enterprises cannot be penalized for the act of the association either under section 27 or under section 48 and it is only the association of enterprises i.e. OP1 which can be penalized under section 27.

I agree with the penalties imposed on the association by the majority order.

Secretary is directed to inform all concerned accordingly.

Sd/-  
[Justice S.N. Dhingra (Retd.)]  
Member.