

**COMPETITION COMMISSION OF INDIA**

Date 19.02.2013

**Case No: 20/2011**

Informant: Santuka Associates Pvt. Ltd., Cuttack

Opposite Party: All India Organization of Chemists and Druggists Association, Mumbai and USV Ltd., Mumbai.

**Order: Member (Dr.GeetaGouri)**

1. An information filed by under Section 19(1)(a) of the Competition Act, 2002, against All India Organization of Chemists and Druggists Association (AIOCD), Mumbai and USV Ltd., Mumbai. The allegations pertain to certain restrictive trade practices adopted by All India Organization of Chemists and Druggists Association (hereinafter referred to as AIOCD) and USV Ltd., Mumbai.
2. According to the informant, AIOCD is abusing its dominant position by way of limiting and restricting the supply of pharmaceutical drugs in India in violation of Section 4 of the Competition Act, 2002. The Informant further alleged that AIOCD as an association, doing various acts in the matter of controlling the trading policies of different manufacturing companies, controlling the profit margins, regulating the stockist-ship of manufacturing company, recommending to all its members and stockists all over the country the profit margins of a company. AIOCD has entered into various MOU with the associations of pharmaceutical manufacturers such as IMDA and OPPI in terms of which a drug manufacturing company can appoint stockists only in consultation with the concerned state/district chemists and druggists association and as per the guidelines laid down by the state association. When there is only one stockist of the company in the market the second stockist can be appointed only if it is done with the consultation of state/district association and also the second stockist should be a bonafide member of the association affiliated with AIOCD.
3. AIOCD not only formulates guidelines for the appointment of wholesalers/agents/distributors by pharma companies but also has fixed price margins. The allegation of the informant centred on the selection process and

appointment of stockists by AIOCD (national level association of wholesalers and retailers) and its abuse, resulting from existing guidelines and MoUs between AIOCD-IDMA-OPPI. The present case is along similar lines as MRTP Case No. C-127/2009/DGIR4/28 (Varca Druggist & Chemist and others vs CDAG) and Case Ref: Case No: C-87/2009/DGIR (Vedant Bio-Sciences, Baroda vs Chemists and Druggists Association, Baroda (CDAB)). As regards the earlier cases the majority order and the minority orders agreed on the anti-competitive practices indulged by state/district level associations as the main allegations levied by the Informant on these associations. However, in the present case, the Informant levied the allegations on the national level association of chemists and druggists known as AIOCD as the President of the AIOCD does not recognise the validity of the district level association namely Cuttack District Chemists & Druggist Association due to some dispute over elections of the latter and has formed "AIOCD Utkal Committee" appointing himself as the Chairman and his supporters as Convenor and Committee Members.

4. The allegations in the present case are more or less identical to the previous cases but with a few minor differences.

5. The DG investigated the following allegations levied by the Informant:

Issue No. 1 Whether the action and practices of AIOCD regarding grant of NOC for appointment of stockists and dealers, fixation of trade margins and collection of PIS charges and/or boycott of products of pharma companies are anticompetitive in nature within the provision of Section 3 of the Competition Act?

Issue No. 2 Whether OPPI 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, fixed trade margins followed by their members are arising out of the various agreements between AIOCD, OPPI and IDMA?

Issue No. 3 Whether the members/office bearers of the Executive Committees of AIOCD, OPPI and IDMA are 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?

6. Methodology of Analysis

*DG and Majority Order:*

- 6.1 Relating to Issue no. 4, I am completely in agreement with the majority order as Commission did not find anything against USV. However, relating to Issue No. 1, 2 and 3, I prefer to look at each of the following allegations/practices in the present case separately, as done in the previous case(s), for anti-competitive conduct as these require separate examination from the lens of competition assessment:

Issue No. 1:

Whether the action and practices of AIOCD regarding grant of NOC for appointment of stockists and dealers, fixation of trade margins and collection of PIS charges and/or boycott of products of pharma companies are anticompetitive in nature within the provision of Section 3 of the Competition Act?

Since, Issue no. 1 itself involves five sub-issues; I would analyse all these one by one as follows:

- (i) Conduct of AIOCD and its affiliates in the matter of granting of no-objection certificate (NOC) before the appointment of stockists/distributors leads to reduction of supply in the market, in contravention of section 3(3)(b) of the Act.
- (ii) Fixing of trade margins for stockists/distributor amounts to fixing of prices violating section 3(3)(a) of the Act.
- (iii-a) Fixing of PIS charges leading to the fixing of prices of drugs in violation of Section 3(3)(a) of the Act.
- (iii-b) Requirement of approval for launching a product in the markets in form of PIS approval results in entry barrier and hence restrict supply of drugs in the market drugs in violation of Section 3(3)(b) of the Act.
- (iv) Indulgence of AIOCD and its affiliates in practices of boycotting pharma companies on various issues contained in MoU is violation of Section 3(3)(b) read with Section 3(1) of the Act.
  - (i) In the issue of requirement of no-objection certificate (NOC)/LOC from AIOCD or its affiliates before the appointment of stockists/distributors, I am in agreement with the majority order as it leads to limiting supply of drugs in the market and hence in contravention of section 3(3)(b) of the Act.
  - (ii) Fixing of trade margins for stockists/wholesalers and retailers according to the majority order was violative of Sec 3(3)(a) of the Act.

For this allegation, I again invite attention to my order passed in the case of MRTP Case No. C-127/2009/DGIR4/28 (Varca Druggist & Chemist and others vs CDAG) and Case Ref: Case No: C-87/2009/DGIR (Vedant Bio-Sciences, Baroda vs Chemists and Druggists Association, Baroda (CDAB)) and conclude that margin fixation cannot be presumed to be anti-competitive activity, in this particular sector.

- (iii-a) The majority order held that fixing of PIS charges leading to the fixing of prices of drugs in violation of Section 3(3)(a) of the Act.

In my previous 2 orders in the case of MRTP Case No. C-127/2009/DGIR4/28 (Varca Druggist & Chemist and others vs CDAG) and Ref: Case No: C-87/2009/DGIR (Vedant Bio-Sciences, Baroda vs Chemists and Druggists Association, Baroda (CDAB)), I had taken a view that PIS as the name suggests is the Public Information System and plays a very important role in lending transparency to wholesalers, retailers and patients on the constituents of different drugs. Therefore this system cannot be faulted for price fixation and hence cannot be termed as anti-competitive as per provisions of the Act.

- (iii-b) In the present case like Case Ref: Case No: C-87/2009/DGIR (Vedant Bio-Sciences, Baroda vs Chemists and Druggists Association, Baroda (CDAB)) however, it is noted that AIOCD used PIS as an instrument to restrict launching of new products by non-issue of PIS. The use of PIS as an NOC for new launches is violation of Sec 3(3)(b) of the Act.

The DG in his report observed that launch of product in the market being made contingent on PIS approval by the concerned association of Chemists and Druggists can result in restraint of trade and lead to denial of market access for any product which can also deprive consumers of the benefits of such drugs. DG in his report indicated that there are many instances where the association refuses to grant PIS approval on a variety of factors. Thus DG concluded that any attempt on part of members of AIOCD or its affiliates to delay or withhold

the PIS approval on any ground which limits or controls supply or market thereof has to be treated as boycott and hence the violation of Section 3(3)(b) of the Act.

From the above paras, while I have noted that charging for PIS cannot lead to price fixing, however, by delay or withholding the approval for launching a new product in the markets results in entry barrier and hence restrict supply of drugs in the markets and hence is in contravention of Section 3(3)(b) of the Act.

- (iv) Indulgence of AIOCD and its affiliates in practices of boycotting pharma companies on various issues contained in MoU is violation of Section 3(3)(b) read with Section 3(1) of the Act.

DG in his report has observed that the act of boycott, either to enforce covenants of the MOU's or otherwise, has the effect of limiting or controlling the supplies of drugs in the markets and results in non-availability of the same to the consumers which causes AAEC on competition. The Commission in its majority order is in the agreement with the findings of DG and so I am and therefore this act of AIOCD or its affiliates for boycotting pharma companies on various issues is in contravention of Section 3(3)(b) of the Act.

Issue No. 2:

Whether OPPI 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, fixed trade margins followed by their members are arising out of the various agreements between AIOCD, OPPI and IDMA?

The DG in his report observed that the tripartite agreement amongst AIOCD, IDMA and OPPI and to practice the decisions contained in MoU pertaining to NOC/LOC, PIS, Fixed trade margins also amounts to an anti-competitive agreement within the meaning of section 3(3)(a) and 3(3)(b) read with section 3(1) of the Act.

The DG in his report mentioned that the stand of IDMA and OPPI that the various MOUs signed between AIOCD-IDMA-OPPI have been terminated or stand expired does not have any substance and appear merely to be an attempt on their part to

wriggle out of their culpability in violation of the various provisions of the Act as the agreement is very much in practice.

For this issue, I differ with the viewpoint taken in the majority order and agree partially with the findings of DG. In my view, as explained in Issue 1(ii) and Issue 1(iii-a) above, PIS charges and fixing of trade margins cannot be termed as anti-competitive and hence the tripartite agreement amongst AIOCD, IDMA and OPPI cannot be termed as anti-competitive. However, this agreement is violation of Section 3(1) of the Act for making NOC/LOC and PIS approval as mandatory. Since, AIOCD is an association of chemists and druggists while IDMA and OPPI are the associations of drug manufacturers and they are not engaged in the similar or identical trade, Section 3(3) cannot be applied. But the agreement entered into amongst these associations has an AAEC and hence in contravention of Section 3(1) of the Act.

#### Issue No. 3:

Whether the members/office bearers of the Executive Committees of AIOCD, OPPI and IDMA are liable for violation of Section 3 of the Act?

The majority order has maintained that “*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 for practice of the association*”. The majority order held responsible only office bearers of AIOCD for such practice and excluded the members of IDMA and OPPI for the violation of Sec 3 in view of their findings given in Issue No. 2 in their order.

For this issue also, I am not in full agreement with the majority decision and feel that keeping in view my analysis above in Issue No. 2, the office bearers of IDMA and OPPI are also equally responsible for violation of Section 3(3)(b) of the Act for entering in an agreement (MOU) with the AIOCD which contains clauses for making NOC/LOC and PIS approval as mandatory from AIOCD. The office bearers of IDMA and OPPI shall be treated as par with their counterparts in AIOCD as they were party to sign such agreement which Commission held as anti-competitive and violation of Section 3 of the Act.

## 7. **Conclusion**

7.1 Based on the above analysis, I conclude as following:

- (i) Regarding Issue No. 1(i) above, I am of the opinion that no-objection certificate (NOC) from AIOCD before the appointment of stockists/distributors and agree with the majority order that the requirement of NOC leads to reduction of supply in the market and in contravention of section 3(3)(b) of the Act.
- (ii) Similarly for Issue No. 1(iii-b) and 1(iv) above, I am also of the opinion that requirement of approval for launching a product in the markets in form of PIS approval and boycotting the pharma companies for various unjustified reasons by AIOCD and its affiliates results in entry barrier and hence restricts supply of drugs in the markets and is in violation of Section 3(3)(b) of the Act.
- (iii) However, remaining two allegations i.e. fixing of margins and fixing of PIS charges for dissemination of information regarding new drugs by the AIOCD or its affiliates does not result in price fixing and hence cannot be termed as violation of Section 3(3)(a) of the Competition Act, 2002.
- (iv) Regarding Issue No. 2, I am of the view that by signing an agreement with AIOCD, which has some clauses which causes or may cause supply restraints of drugs in the markets, IDMA and OPPI are also violated Section 3(1) of the Act.
- (v) Regarding Issue No. 3, I hold the office bearers of IDMA and OPPI responsible for violation of Section 3(1) of the Act for signing tripartite agreement with AIOCD which contains clauses which are anti-competitive in nature.
- (vi) With regard to Issue No. 4, I am in full agreement with the majority order and found no contravention of any of the provisions of the Act by USV.

## 8. **Order**

8.1 This order finds contravention by AIOCD on the following counts:

- a. In the appointment of stockists by way of issue of 'NOC' and regulating the number of stockists in contravention of Section 3(3)(b) of the Competition Act, 2002.
- b. The restrictive conditions related to delay or withholding the approval for launching a new product in the markets in the form of PIS approval results in entry barrier and hence restrict supply of drugs in the markets and hence is in contravention of Section 3(3)(b) of the Act.

- c. Boycotting of pharma companies for various unjustified reasons has the effect of limiting or controlling the supplies of drugs in the markets and results in non-availability of the same to the consumers which causes AAEC on competition and is in contravention of Section 3(3)(b) of the Act.
- 8.2 I also find contravention by IDMA and OPPI for signing tripartite agreement with AIOCD which contains some clauses which are restrictive in nature and result/may result in limiting of supply of drugs in markets.
- 8.3 The amount of penalty on AIOCD may be in line with the majority order. Besides, I also impose penalty on IDMA and OPPI @ 10% of the average of the total turnover of the receipts for the preceding 3 years i.e. 2008-09, 2009-10 and 2010-11
- 8.4 AIOCD, IDMA, OPPI and their members to cease and desist from the following activities within 60 days from the date of receiving this order and to furnish an undertaking to this effect:
- a. Mandatory requirement of grant of NOC for appointment of stockists;
  - b. Withholding/delay in giving PIS approval for launching a new product in the markets; and
  - c. Boycotting of pharma companies for various unjustified reasons.
9. The Secretary is directed to inform the parties accordingly.

Sd/-  
**(GEETA GOURI)**  
**Member**