



## COMPETITION COMMISSION OF INDIA

**Case No: 30/2011**

**In Re:**

**M/s. Peeveear Medical Agencies Informant**

- (1) All India Organization of Chemists and Druggists Association, Mumbai; and **Opposite Parties**
- (2) Janseen Chilag Pharmaceutical  
(a division of M/S. Johnson and Johnson Ltd.).

**Per**

**Order**

**Member (Dr. Geeta Gouri)**

This is the fourth of the information filed by distributors of pharmaceutical products, under Section 19(1)(a) of the Competition Act, 2002, against the All India Organization of Chemists and Druggists Association (hereinafter referred to as AIOCD) and its allies the State Associations downstream and associations upstream. As referred to in my earlier Order the disconcerting aspect in the pharmaceutical sector is the long line of Associations along the entire value chain from drug producers to wholesalers to retailers. In the investigations in all these cases what comes out clearly are the actions of these associations need to be assessed singly and jointly in terms of consumer harm. The prevalence of multiple Associations at each level of the production chain have as stated in our Order on Verca( Order No: MRTP Case No. C-127/2009/DGIR4/28) have distorted the drugs market by nullifying the countervailing power that each rung of the value chain independently asserts on the backward and forward linkages more often to the detriment of consumers, with a few exceptions.

1. According to the informant, the AIOCD, under the guise/pretext of protecting the interests of its' members, has been abusing its dominant position by way of



agreements which have the result of limiting and controlling the supply and marketing of drugs and directly influencing the purchase and sale price of the drugs and pharmaceutical products in India. AIOCD has been controlling the trading policies of different manufacturing companies, controlling the profit margins, regulating the stockists/ distributor agreements of each and every manufacturing company, recommending to all its members and stockists all over the country the profit margins of a company; collecting Rs.2000/- per product from every manufacturer in each state for permitting the launch of their new products. AIOCD the informant alleges has been issuing dictates to stockists all over India not to deal with the stocks of different medicine manufacturers as directed by it. Further AIOCD has entered into various MOUs with the associations of pharmaceutical manufacturers such as IDMA 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.

2. 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 case No. 20 of 2011 (M/S Santuka Associates Pvt. Ltd, Cuttack, Orissa vs AIOCD and USV Ltd.) on which Commission had passed its final orders (both majority and minority) on 19.02.2013. As regards the earlier case (No. 20 of 2011), the majority order and the minority orders agreed on the anti-competitive practices like imposing of mandatory requirement of obtaining no-objection certificate (NOC) by the drug manufacturers from AIOCD before the appointment of stockists/distributors. On the issue of mandatory requirement of obtaining approval for launching a product in the markets in form of PIS approval I agree with the majority Order that PIS required to be issued by the AIOCD while an appropriate arrangement, has and is used by the Chemists and Druggists Association as a weapon to raise demands for higher rates than agreed for issue of



PIS prior to release of the concerned drug in the market. The resultant bargaining process between AIOCD and OPPI/IDMA results in restricting the supply or entry of new drugs into the market resulting in consumer harm. But I differ from the majority Order that PIS issued by AIOCD is anti-competitive as maintained in the earlier Orders and will be explained later in the Order. The majority order has alleged violation of Sec 3(3)(b). However, regarding allegations like fixing of margins and fixing of PIS charges for dissemination of information regarding new drugs by the AIOCD or its affiliates, I did not agree with the majority decision and was of the opinion that the same does not result in price fixing and hence cannot be termed as violation of Section 3(3)(a) of the Competition Act, 2002. I also did not agree with the majority decision in the above mentioned case on the issue of violation of Sec 3(1) of the Act by IDMA and OPPI and found them guilty for the same. While the earlier Orders were centered on Sec 3(3)(a) the close association and linkage of Association in the vertical value chain of producers and dealers, on reflection may require examination of violation of Sec 3(4).

3. Sec 3(4) reads as

Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, shall be an Agreement in contravention of sub-section (1) of Section (3) if such Agreement causes or likely to cause an appreciable adverse effect on competition in India

Can an Association be equated with an enterprise? This basic question needs to be examined in the light of the long relationship between manufacturers and as members of either IDMA or OPPI and of distributors of AIOCD and its regional branches that result in several commercial decisions on market allocation, fixing of trade margins, or issue of NoC the Associations in this specific case be treated as equivalent to an enterprise. My colleague, Justice Dhingra in his order has voiced similar views while discussing contravention under Sec.48(2). The revisit has also been prompted by the fact that in the alleged violations what emerges is a demarcation of territory by the Associations with process of give and take. In this Order we have examined both Sec 3(3) and Section 3(4).



4. The Commission in its meeting held on 23.6.2011, considered the information and referred the case to DG for investigation under section 26(1) as it found existence of prima-facie case.

5. Although, the Informant had not made AKCDA, IDMA and OPPI as opposite parties in the present case, but keeping in view of the Commission's Order under section 26(1) dated 23.6.2011, the DG had also investigated the role of AKCDA being the state level association affiliated with AIOCD and the role of OPPI and IDMA being the associations of drug manufacturers in limiting the supply of drugs in the market and fixation of prices of drugs.

6. The allegations in the present case are more or less same as in case No. 20 of 2011 (M/S Santuka Associates Pvt. Ltd, Cuttack, Orissa Vs. AIOCD and USV Ltd.).

On the basis of DG report, on the basis of submissions made by various parties and on the basis of other material available on record, the majority decision in the present case relied upon following issues for determination of violation of the provisions of the Act by the opposite parties:

#### Issue No. 1

Whether the action and practices of AIOCD and its affiliated state association of Kerala, i.e. AKCDA on the issue of grant of NOC for appointment of stockists, fixation of trade margins and collection of PIS charges and/or boycott of products of pharmaceutical companies are in violation of Section 3 of the Competition Act?

#### Issue No. 2

Whether OPPI and IDMA are also liable for violation of Section 3(4) of the Act along with AIOCD as the practices pertaining to NOC/LOC, PIS, fixed trade margins etc. 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, AKCDA, OPPI and IDMA are liable for violation of Section 3 of the Act?

Issue No. 4

Whether the conduct of Janssen also falls foul of the provisions of the Act?

### 6.1 Methodology of Analysis

#### *Findings of DG and Majority Order:*

Relating to Issue no. 4, I am completely in agreement with the majority order as Commission did not find anything against Janssen Chilag Pharmaceutical. 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 was done in case no 20 of 2011 (M/S Santuka Associates Pvt. Ltd, Cuttack, Orissa vs AIOCD and USV Ltd.), 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 and AKCDA regarding:

- (a) grant of mandatory NOC for appointment of stockists and dealers;
- (b) fixation of trade margins,
- (c) 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 was done in case no. 20 of 2011 as follows:

- (i) Conduct of AIOCD and its affiliated state association AKCDA in the matter of granting of no-objection certificate (NOC) before the appointment of stockists/distributors leads to reduction of supply in the market.



- (ii) Fixing of trade margins for stockists/distributor amounts to fixing of prices
- (iii-a) Fixing of PIS charges leading to the fixing of prices of drugs
- (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
- (iv) Indulgence of AIOCD and AKCDA in practices of boycotting pharma companies on various issues contained in MoU

(i) On 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.

7. For this allegation, I again invite attention to my earlier orders 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 case no 20 of 2011 (M/S Santuka Associates Pvt. Ltd, Cuttack, Orissa) and conclude that margin fixation cannot be presumed to be anti-competitive activity, in this particular sector as these are in line with the NPPA prescribed margins. Under the circumstances, the margin fixation seems to work in the direction of achieving price control over non-scheduled drugs on the same lines as the scheduled drugs and hence fixing trade margins (which are in the form of price ceilings) is a good practice to avoid expropriation and a cascading effect at all levels of supply chain. Moreover, I concluded in my above said Order that while margin fixation in case of product such as drugs and pharmaceuticals, has the merit of introducing transparency and stability in the industry operations, the adverse impact on prices and end consumer remains inconclusive. On that note, it is held that margin fixation has not produced any anti-competitive effect on the



consumer, as for him, the effective price is the MRP, which has to be paid and the investigation has not been able to establish the adverse impact of margins on prices. There is no appreciable adverse effect on competition and no perceived consumer harm. For detail analysis, my Order for case of MRTP Case No. C-127/2009/DGIR4/28 (Varca Druggist & Chemist and others vs CDAG) may be referred in which observations from a working paper titled “*The Regulation of Mark Ups in Pharmaceutical Supply Chain*” published in May 2011 of WHO/HAI were referred.

8. Fixation of trade margins involves producers and distributors. In this context it is important to see if there is any violation of Sec.3(4)(e). Sec 3(4) pertains to vertical restraints and any violation must be assessed in respect of potential inefficiency and harm to consumers versus efficiencies and benefits to consumers. As noted in the previous para fixation of trade margins stabilizes prices in the drug market especially since there are several drug manufacturers including generic and branded drugs. The WHO observations in an industry dominated by a few players I note that grade margins have favoured consumers. Hence no violation of Sec. 3(4)(e).

(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 3 orders viz. (i) MRTP Case No. C-127/2009/DGIR4/28 (Varca Druggist & Chemist and others vs CDAG), (ii) Ref: Case No: C-87/2009/DGIR (Vedant Bio-Sciences, Baroda vs Chemists and Druggists Association, Baroda (CDAB), and (iii) case no. 20 of 2011 (M/S Santuka Associates Pvt. Ltd, Cuttack, Orissa), I had taken a view that PIS, as the name suggests is the Public Information System, plays a very important role in lending transparency to wholesalers, retailers and patients on the constituents of different drugs. The DG in his investigation report also categorically mentioned that:

*“the payment of PIS charges by the pharma companies in the name of advertisement charges to State Chemists & druggists associations at the time of the product launch and or any change in product brand/dosage form/strength thereof in the respective PIS bulletins ensures not only*



*deemed compliance of the law but also enables it to advertise and circulate product information to all the retailers at a very nominal cost. The logistical problems connected with circulating the price lists to every retailer of the country who sell their product may work out to be enormous apart from being very expensive. Thus the system of PIS ispo facto does not appear to be intended to cause restraint of trade or being injurious to consumer interests”.*

9. Keeping in view my analysis in earlier cases as mentioned above and the analysis by the DG on PIS charges in the present case, I strongly feel that the system of PIS for dissemination of information and advertising about the new drugs and charges for the same cannot be faulted for price fixation rather it is a very effective and economical way for dissemination of information on new drugs in the market by the pharma companies as also concluded by the DG in his report and hence cannot be termed as anti-competitive as per provisions of the Competition Act. An important role is played by the PIS in reducing market information asymmetries and hence PIS should be seen as a product to improve market outcomes given that this can be an important role of an association and calling this as anti-competitive will be erroneous.

(iii-b) In the present case also (as in Case no 20 of 2011), the 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.

10. 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 including asking for charges in excess of the prescribed charges in the MOU. The Secretary General of IDMA has also testified to this effect. Thus DG concluded that any attempt on part of members of AIOCD or its affiliates to delay or withhold the PIS approval or boycott of the products on the issue of PIS approval etc by AIOCD and its affiliates is in violation of the provisions of Sec. 3(3)(b) read with Sec. 3(1) of the Act.





11. From the above paras, while I have noted that charging for PIS cannot lead to price fixing, however, by delay or withholding the approval of PIS for launching a new product in the markets or boycotting the pharma product on the issue of PIS or on any ground which limits or controls supply or market thereof results in entry barrier and hence is in contravention of Section 3(3)(b) of the Act. This conduct of AIOCD is an indication that various activities it carries out under the aegis of an association are in the nature of a regulator without any sanction. Presuming the role of the regulator it restricts and fully controls the markets for drugs and does not allow it to function effectively. AIOCD is not an approving authority or regulator and market is not allowed to develop on account of such non- mandated interventions by the associations. Therefore, on this issue, I am in full agreement with DG and majority order of the Commission.

(iv) Indulgence of AIOCD and AKCDA 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.

12. DG in his report has observed that the AIOCD and its affiliates indulge in practice of boycotting pharma companies on various issues contained in the MoUs. The DG found the act of boycott, either to enforce covenants of the MOU's or otherwise, as anti-competitive as any such act result in limiting or controlling the supplies of drugs in the markets and ultimately may end up in non-availability of the drugs to the consumers which causes or may cause an 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, AKCDA and 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?

13. 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.

14. 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.

15. Further, DG observed that neither the OPPI nor the IDMA has intimated that they have issued any public statement or have even intimated their members that the MOUs have been terminated. In fact, the DG observed that it can be seen from the replies of various pharma companies on record affiliated to the OPPI that the understanding of the parties, which was earlier documented by way of MOUs between AIOCD-OPPI-IDMA, is very much being still practiced by them.

16. For this issue, as held by me in my Order on case no. 20 of 2011 (M/S Santuka Associates Pvt. Ltd, Cuttack, Orissavs AIOCD and USV Ltd.), I completely in agreement with the findings and observations of DG and differ with the viewpoint taken in the majority order. 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, AKCDA, OPPI and IDMA are liable for violation of Section 3 of the Act?

17. 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 and AKCDA 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.

18. For this issue also, as held by me in my Order on case no. 20 of 2011 (M/S Santuka Associates Pvt. Ltd, Cuttack, Orissavs AIOCD and USV Ltd.) I am not in full agreement with the majority decision and feel that keeping in view my analysis above in Issue No. 2, besides the office bearers of AIOCD, the office bearers of IDMA and OPPI are also equally responsible for violation of Section 3(3)(b) of the Act for entering in tripartite 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.

19. Since the AIOCD and AKCDA have not furnished the names and addresses of its office bearers, Commission in its majority order decided to deal with the issue of passing orders under Section 27 of the Act separately with respect to the office bearers of these associations. However, keeping in view my above analysis, IDMA and OPPI to furnish the names and addresses of the office bearers of both these associations so that appropriate order could be passed against these associations also.



## Conclusion

20. 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 is anti competitive 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 held the office bearers of IDMA and OPPI along with office bearers of AIOCD 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. I also held AKCDA, which is a state level association for chemists and druggists affiliated to AIOCD, and its office bearers responsible for violating the provisions of the Act as explained in the majority order.



(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 Janssen Chilag Pharmaceutical.

### **Order under Section 27**

This order finds contravention by AIOCD and AKCDA 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 by way of PIS approval which 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 an AAEC on competition and is in contravention of Section 3(3)(b) of the Act.
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 in/may result in limiting of supply of drugs in markets.
3. Regarding imposing penalty on AIOCD and AKCDA, I fully support the majority decision (para 25). However, I also order that penalty to be imposed on AKCDA, IDMA and OPPI at the rate of 10% of the average of the receipts for the financial year 2008-09, 2009-10 and 2010-11 as was done in the case of AIOCD. Proceedings be also initiated against IDMA, OPPI and their office bearers along with the proceedings against AKCDA and its office bearers. The culpability of these associations cannot be ignored in distorting the market for drugs in India, through concerted actions between the various associations.



4. AIOCD, AKCDA, IDMA, OPPI and their members to cease and desist from the following activities and to furnish an undertaking to this effect within 60 days from the date of receiving this order:

- 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.

5. AIOCD shall issue a letter to OPPI, IDMA and Janssen clearly indicating withdrawal of mandatory requirement for obtaining NOC from it for appointment of stockists and wholesalers by the pharma companies and also indicating withdrawal of mandatory requirement for PIS approval for the new drugs as AIOCD or its affiliates are not regulators.

6. It shall also issue a circular to all its members, affiliates associations, all chemists and druggists, clearly indicating that they were free to give discounts to their customers.

7. The Secretary is directed to inform the parties accordingly.

Date: 09.12.2013

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