



COMPETITION COMMISSION OF INDIA

Case No. 90of 2014

In Re:

**Shri Ramamurthy Rajagopal,
138, Dr. Radhakrishna Salai,
Opp. Police Quarters
Mylapore, Chennai**

Informant

And

**Doctor's Associates Inc,
Miami, Springs, Florida, USA**

Opposite Party 1

**Subway International,
B.V. Amsterdam, Netherlands**

Opposite Party 2

**Subway Systems India Private Limited
Level 2, Elegance, Mathura Road,
Jasola, New Delhi**

Opposite Party 3

CORAM

**Mr. S. L Bunker
Member**

**Mr. Sudhir Mital
Member**

**Mr. M. S. Sahoo
Member**



Present for the Informant: Shri K. K. Sharma, Advocate
Shri Danish Khan, Advocate; and
Shri Inderpreet Singh, Advocate

Order under section 26(2) of the Competition Act, 2002

1. The present information has been filed by Shri Ramamurthy Rajagopal (hereinafter referred to as the “**Informant**”) under section 19(1) (a) of the Competition Act, 2002 (“**the Act**”) against Doctor’s Associates Inc (“**OP 1**”), Subway International (“**OP 2**”) and Subway Systems India Private Limited (“**OP 3**”) alleging, *inter alia*, contravention of the provisions of sections 3 and 4 of the Act.
2. As per the Information, the Informant entered into a partnership deed dated 01.08.2012 with Mr. Babu Munusamy and established a partnership firm by the name of M/s Vidba Associates.
3. It is submitted that the OP 1 owns the proprietary system for establishing and operating restaurants featuring sandwiches and salads under the brand name "SUBWAY". OP 1 also owns the rights and goodwill associated with the brand "SUBWAY" relating to the marks, copyrights, trade-dress, recipes, formulas, food preparation procedures, business methods, forms, policies, trade secrets, knowledge and techniques. The OP 2 has a non-exclusive sublicense to use brand "SUBWAY" to establish and sub-licence the establishment of restaurants in countries outside the United States of America, Canada, Australia, South Africa, Colombia and Brazil. The OP 3, by virtue of a sub-license issued by OP 2, is engaged in the business of franchising of "SUBWAY" stores, which prepare and sell submarine sandwiches and salads from a retail outlet under the Brand "SUBWAY" in India. The Informant and OP-3 entered into a franchise agreement dated 24th May 2012 for operating "Subway"



restaurant at 133, Dr. Radhakrishna Salai, Opp. Police Quarters, Mylapore, Chennai-600004.

4. The Informant has alleged that he pays the rent to the Landlords directly, even though OP 3 has executed a lease agreement with the Landlords. It is averred that even though the rent and service tax are paid by the Informant to the Landlords, the Central Value Added Tax (CENVAT) credit is claimed by OP 3. The Informant has further alleged that OP3 has abused its dominant position by imposing unfair condition in so far as the CENVAT credit is concerned.
5. The Informant has alleged the following clauses of the Franchise Agreement to have contravened the provisions of section 4 (2)(a)(i) of the Act:
 - i. Recital M of the 'Franchise Agreement' provides that any dispute or claims arising out of or relating to the agreement, except for certain sub-paragraph 10.f, will be adjudicated in New York, USA and the law of Netherlands will be applicable.
 - ii. Clause 5(b)(ii) requires the Informant to purchase all food, equipment, beverages, and other products or services which are used in the restaurant exclusively from an approved distribution centre for maintaining identical standards across all the stores. The same includes purchase of only approved carbonated beverages like Coca-Cola and Lemon Tea from the authorized distributor Jyothi International. It is further submitted that the same beverages are available in the open market at a much lesser price than that is being delivered by an approved distributor and also the goods supplied by the said distributor incurs transportation and warehousing charges as it is located far from the store. Given the situation, the franchisee have no choice but to sell the beverages to the consumer at a higher price. In view of the above, the Informant has submitted that such



imposition of unfair condition amounts to violation of the provisions of section 4(2)(a)(i) of the Act.

- iii. Clause 8(g) provides that the Informant will not be able to directly/ indirectly engage in, or assist in, any sandwich business within three miles or five kilometers of any location where a *subway* restaurant operates for three years after the termination or transfer of the Franchise Agreement even if the same is permitted by the local law. The Informant submits that such non-compete clause is anti-competitive in nature.
- iv. Clause 9 (d) provides that OP 3 may transfer and assign the said Agreement without the consent of the Informant. However, the Informant was restricted to transfer the restaurant and the Franchise Agreement to another person without prior express consent of OP 3 in terms of clause 9(a) of the Agreement. It is alleged that the same reflects the unfair terms and conditions in the Agreement since it puts the two parties to the Agreement on an unequal footing.
- v. Clause 10 of the Agreement provides for arbitration as a dispute resolution mechanism. It is submitted that though the arbitration proceeding shall be conducted in New York, United States of America in accordance with Netherlands law, the Informant is restricted to seek any damages or claim against the OP1. Therefore, the Informant has alleged that such clauses are in violation of the provisions of section 4(2)(a)(i) of the Act.

6. The Informant has also alleged the following clauses of the Franchise Agreement to have contravened section 4 (2) (a) (ii) of the Act:



- i. Clause 2 (Royalty Payments) provides that a royalty payment of 8% of the sales on weekly basis throughout the term of the Franchise Agreement is to be paid by the Informant to the OPs. The Informant alleges that the gross sales being taken as a measure of calculating royalty instead of profits is highly unfair being charged by the OPs.
 - ii. Clause 5 (i) provides for mandatory payment of 4.5% of the gross sales of the restaurant on a weekly basis as a contribution towards an advertising fund. It is alleged that the same is an imposition of unfair price in violation of the provisions of section 4(2)(a)(ii) of the Act.
7. It is averred that Clause 5(b)(ii) shows presence of an exclusive supply agreement as the Informant is required to purchase all required beverages exclusively from an approved distribution centre or another approved source. It is alleged that the same is in violation of the provisions of section 3(4)(b) of the Act.
8. It is submitted that Clause 5(d) prohibits the Informant to own or assist any person directly or indirectly to any business which is similar to the subway business mentioned in the Agreement. The penalty for such violation is Rs.5,00,000/- for each business operation and 8% of its gross sales. The Informant has alleged the same is in violation of the provisions of section 3(4)(d) of the Act since it restrains the Informant vertically 'under refusal to deal'. It is further alleged that the clause 8 (g) of the Agreement is in contravention of the provisions of section 3(4)(d) of the Act since the same does not allow the Informant to open any competing sandwich business for three years from the date of expiry/termination of the Agreement.
9. The Informant has submitted that the market share of OP 3 in the relevant market, as defined by the Informant herein below, exceeds 30% and it is



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well established that 55% (approx.) of the existing franchisees of Quick Service Restaurants (QSRs) are those of OP 3.

10. Based on the above allegations and the information, the Informant has prayed, *inter alia*, for initiation of an investigation against the OPs under section 26(1) of the Act.
11. The Commission has perused the material available on record including the information, facts and data placed on record by the Informant. The Commission has also heard the counsel on behalf of the Informant.
12. Facts of the case reveal that the grievance of the Informant primarily pertains to the alleged anti-competitive terms and conditions of the 'Franchisee Agreement' executed between the Informant and OP 3 in contravention of the provisions of the Act.
13. The Informant has made allegations under section 3 of the Act. The Commission observes that these allegations do not have any AAEC in the market since the size of the concerned market is huge as compared with the market size of 'Subway' food chain business. Therefore, the impact of such restriction, if any, is negligible. Thus, the Commission is of the considered view that the conduct of OP 3 does not contravene any provision of section 3 of the Act.
14. Since the conduct of the OP 3 needs to be analysed under section 4 of the Act, the Commission deems it appropriate to first delineate the relevant market. Though the Informant has defined the relevant market as "market for multinational QSR in Mylapore and surrounding areas within radius of not exceeding five kilometres", the Commission is of the view that this delineation is improper.



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15. The Commission observes that the Informant is a franchisee of “Subway” and has entered into a franchisee agreement with OP 3 and OP 3 is the franchisor. The Commission further observes that “Subway” is an international restaurant chain and is engaged in the business of fast food/quick service restaurants and operates its business through its franchisees. In view of the abovementioned facts, the relevant market in the instant case appears to be “*market of services of franchisee for a fast food restaurant chain/ quick service restaurant chain*”. With regard to the relevant geographic market, it would be ‘*Chennai*’ since the provision of franchisee services for running a fast food chain and the demand for the same seems to be homogeneous in Chennai, distinct from other cities.

16. With regard to the dominance of OP 3 in the relevant market, the Commission notes that the market of fast food is huge, spread all over India and readily available/located in close proximity to each other or near any eateries joints, markets, malls, etc. It is noted from the official website of Subway that it has 476 outlets in India and 46 outlets in Chennai. In the same geographic area, Pizza Hut has 13 delivery stores and 7 Dine-in stores, KFC has 15 stores, Mc. Donald’s has 10 stores, Cafe Coffee Day has 77 stores and Domino’s pizza has 47 stores. Thus, it is observed that with the presence of so many competitors in the relevant market and consumers having several options to choose from, OP 3 neither has a position of strength, which gives it the power to act/operate independently of its competitors, nor has the ability to affect its competitors and consumers in the market. Even if we examine from the franchisee’s angle as a seller, it is evident that a franchisee has many options to opt for as a service provider in the market. Therefore, the Commission is of the firm view that OP 3 does not enjoy a dominant position in the relevant market. In the absence of dominance of OP 3 in



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the relevant market, the alleged abuse of dominance need not be assessed under section 4 of the Act.

17. In the light of the above analysis, the Commission finds that no *prima facie* case of contravention of the provisions of sections 3 and 4 of the Act is made out against the OP 3 in the instant matter. Accordingly, the matter is closed under the provisions of section 26(2) of the Act.

18. The Secretary is directed to inform all concerned accordingly.

Sd/-

(S. L Bunker)

Member

Sd/-

(Sudhir Mital)

Member

Sd/-

(M. S. Sahoo)

Member

New Delhi

Date: 13/05/2015