

COMPETITION COMMISSION OF INDIA

M RTP Case No. C-87/2009/DGIR

Date: 5<sup>th</sup> September, 2012

Informant; Vedant Bio Sciences through Advocate D.P. Pandey & Maneesh Dubey

Opposite Party Chemists & Druggists Association of Baroda through Advocate Nikhil Goel & Sayid Mazoor

ORDER

I had the advantage of going through the orders passed by my learned colleagues. I am in agreement with the conclusions regarding violation of Section 3 & 4 of the Competition act by O.P. However, I have different opinion about the quantum of penalty and action under section 27 of the Act. So this separate order deals with limited aspect.

The Commission had the opportunity to deal with a similar case filed by Varca Drugs & Chemists & Ors. against Chemists & Druggist Association, Goa in case No.C-127/2009/MRTPC and had passed an order of imposing penalty as well as issuing cease and desist order. This is the second case against a chemist' & druggists association of another region. The allegations made by the informant in the present case are similar to those which were made by the other informant in case No.C-127/2009/MRTPC. The findings of DG, and the majority order passed by my learned colleagues, both show that the opposite party association in this case had contravened section 3 and section 4 of the Act. The Opposite Party in this case as in the earlier case had been issuing guidelines/instructions/letters/circulars to the Members in respect of appointment, termination of stockists, issuance of no objection certificates, clearance certificates for appointment of stockists, the minimum turn over having been achieved by earlier stockists as a condition for appointment of new stockists, imposition of



penalties for violating the guidelines of the Association, bar on the members stockists and druggists for dealing with non members, number of stockists which can be appointed by pharmaceutical companies within an area, penalty for dealing with drugs by stockists in respect of which NOC had not been issued by the association, fixing of margins, cash discounts etc. The OP Association had been taking and threatening action against those who were found violating the guidelines/circulars.

The guidelines, circulars, letters, MOUs of the druggists & Chemists Association are in the nature of contravention of provisions of the Competition Act as found by the order of the Commission. I am in agreement with the finding given about the violation of Section 3 and 4 of the Competition Act. In my order dated 11<sup>th</sup> June, 2012 in respect of case No.C-127/2009/MRTPC (Varca Drugs & Chemists & Ors. Against Chemists & druggist Associatio, Goa (CDAG), I had observed that though formation of an association is a fundamental right of the people in India but no association can be formed for illegal purpose or to perpetuate illegality. I had also observed that the Association of Chemists and Druggists had no right to regulate the profit margins or issue NOCs or LOCs to the persons for doing business in wholesale or retail supply of drugs and medicines nor can impose penalty on members for not following its guidelines. From the facts which had come out in these two cases, it is seen that the Associations issue boycott call and all the members including pharmaceutical companies refuse to deal with such druggists and stockists against whom boycott calls are issued and ultimately such chemists/druggists/stockists are made to fall in line. The Commission has found these as anti competitive practice and also as abuse of dominance by the Association. Often Associations grant or revoke licences of stockists/druggists using their dominant position and arm twisting tactics.

I had observed in my order dated 11<sup>th</sup> June, 2012 (Case No.C-127/2009/MRTPC) that formation of a trade association for such purposes as were perpetuated by the Association in that case amounted to formation of a cartel by the members of the Association and all the traits of cartelization were present in such Association. The Associations may profess to be a welfare association but it may have two faces; one that of looking after the welfare of the members and the other of killing



competition amongst the members to ensure earning assured profits. I had given detailed reasons in my order how such Associations act as cartels and are liable to be penalized under section 3(3)(b) of the Competition Act as well.

The guidelines, circulars issued by the Opposite Party in this case not only limited the provision of services of supply of drugs to the retailers and consumers but also resulted into ensuring that the consumer was not transferred any discount and he was sold drug only at MRP.

Section 18 of the Competition Act casts a positive duty on the Commission to eliminate practices having adverse effect on competition: to promote and sustain competition, to protect the interests of consumers and to ensure freedom of trade carried on in the markets in India. The preamble of the Act also states that the purpose of establishment of the Competition Commission was to prevent practices having adverse effect on competition, to promote and sustain competition in the markets and to protect the interests of consumers to ensure freedom of trade.

Health sector is a crucial sector of India. The poverty line in India is Rs.32 per person per day income and it is supposed that a person within this income would be able to make provision for medicine also. About 50% of the population of India belongs to this category which cannot have the luxury of having health care and suffers from mal-nutrition, child mortality, death of the mother at the time of birth and deaths because it cannot afford medicine in case of illness. In view of this economic scenario of about half of the population in India, I consider that anti competitive practices and practices of stockists & retailers not to pass over benefits of discounts to the consumer & killing competition through aegis of Association must be looked upon very seriously and such Associations must be administered bitter pill of heavy penalty to ensure that the medicines are available to the common man at reasonable price and to ensure that a healthy competition is there among them.

I, therefore, consider that the Commission should issue a cease and desist order to all the Chemists & Druggists Associations active in India that they should cease and desist from adopting following practices –



- i) Making of membership of the association as a pre-condition for doing business as a chemist/druggist/stockist in any area;
- ii) Issuance of NOC/LOC for appointment of Chemists/Druggists/Stockists/Super stockists;
- iii) Issuance of boycott calls or letters to the Drug Manufacturers for not supplying medicines to any enterprise for want of membership;
- iv) Fixing of trade margins for wholesalers, stockists and retailers;
- v) Issuance of directions as to how much cash discounts should be given by stockists/super stockists/wholesellers.
- vi) Fixing of number of stockists that can be appointed by a pharmaceutical company in an area;
- vii) Compulsion on payment of PIS charges by the pharmaceutical companies as a pre-condition for marketing the drugs;
- viii) Putting a bar on manufacturers/pharmaceutical companies on supply of medicines to doctors, nursing homes, hospitals or chemists, directly and putting a condition of routing of supplies through chemists;
- ix) Putting a bar on companies/stockists from bidding for government tenders directly;
- x) Giving directions that retailers shall not pass any benefits given to them by pharmaceutical companies to the consumers;
- xi) Putting a bar on wholesalers not to operate beneficiary schemes to get larger orders from retailers;
- xii) Putting a bar on retailers or stockists not to enter into a competition inter-se;
- xiii) Issuing circulars to the members signaling boycott of stockists & companies, firms; and
- xiv) Putting pressure on stockists/manufacturers for towing the line of the Association or face penalties.

The Commission is obliged to make it clear that in case an Association is found indulging into any of the anti competitive activities and not complying with cease and desist order, a serious view shall be taken by the Commission.



I also consider that the basis of imposing penalty on the Association cannot be the collection of membership fee or the turnover of the Association alone. The Association may be having nominal or negligible turnover by way of collection of membership fee but it may be involved in a serious or grave contravention of the provisions of the Competition Act. The Association is a body of enterprises and the imposition of penalty should commensurate with the strength of its members and their total turnover. The Associations acts on behalf of their members, eliminate competition among the members to ensure maximum profits to them. Imposing penalty on the basis of turnover of the Association would actually mean encouraging the enterprises to form Associations and committing anti competitive acts in the garb of Associations to avoid heavy penalties on the basis of their individual turnover. I consider this cannot be the intent of the legislature. The legislature has provided for severe penalties in cases of cartelization and such actions of the Associations which are meant for purpose of increasing profits of their members by adopting anti competitive practice of fixing prices amount to cartelization. I, therefore, consider that while imposing penalty under section 27, the total turnover of all the enterprises which are part of the Association should be taken into consideration.

Since the data in respect of the total turnover of the OP Association is generally not available and all the members of the Association do not send their financial data, the Commission can make a rough estimate of the turnover of the Association and can impose appropriate penalty. Section 27 of the Competition Act, which relates to imposition of penalties, provides that the Commission may impose such penalty as it may deem fit. However, such penalty cannot be more than 10% of the average of the turnover for the last three preceding financial years. The penalty provided is more severe in cases of cartels. In case of cartels, the penalty can be three times of the profits for each year of continuance of such agreement or 10% of the turnover for each year of continuance of such cartel, whichever is higher.

In the present case, the opposite parties had been involved into anti competitive practices for quite long time and these practices continued even after the information was given. The Association has not taken a stand before the Commission that it would



discontinue the practice. The only stand taken by the association has been of a denial of the facts. Under these circumstances, I consider the penalty imposed on the association must commensurate with the seriousness of the violation. I consider that a penalty of Rs.10 crores should be imposed on the Association for violations. The association should pay this penalty out of its own fund which it has collected over the years from the members and in case of shortfall, it should collect the same from the members.

SJ/-  
Member (D)

Certified True



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06/09/2012  
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