

5.9.12

COMPETITION COMMISSION OF INDIA

Case Ref: Case No: C-87/2009/DGIR

Informant: Vedant Bio-Sciences, Baroda

Opposite Party: Chemists and Druggists Association, Baroda (CDAB)

Order: Member (Dr. Geeta Gouri)

1. Information filed by Vedant Bio-Sciences, Baroda was received in the Commission from Monopolies and Restrictive Trade Practices Commission (MRTPC) on transfer under Section 66(6) of the Competition Act, 2002, against Chemists and Druggists Association, Baroda. The allegations pertain to certain restrictive trade practices adopted by Chemists and Druggists Association, Baroda, (hereinafter referred to as 'CDAB'). While the original information was filed before MRTPC, the substance of allegation shall be analysed on the basis of the provisions of the Competition Act.
2. According to the informant, CDAB as an association, framed various guidelines, meant to benefit its members in carrying out their business of stocking, wholesaling and retailing of pharmaceutical product. However, as per the allegations, over the years, the CDAB has become a monopolistic body and has started indulging in certain restrictive trade practices, now deemed anti-competitive. The allegation of the informant centred on the selection process and appointment of stockists by AIOCD (national level association of wholesalers and retailers) and CDAB and its abuse, resulting from existing guidelines and MoUs between CDAB and the manufacturers. The present case is along similar lines as MRTP Case No. C-127/2009/DGIR4/28 (Varca Druggist & Chemist and others vs CDAG). As regards the earlier case the majority order and the minority orders agreed on



the anti-competitive practices indulged by CDAG but differed with regard to the specific practices and their impact on competition.

3. The allegations in the present case are more or less identical to the previous case. To refresh the allegations pertain to:

a) Appointment of stockist/wholesaler is permissible only after issue of 'No Objection Certificate' (NOC) from CDAB.

As noted in the CDAG case pertaining to Goa, the 'right of appointment' of stockist translates into:

- i. Restrictions on the number of stockists in a given territory;
- ii. Conditions for permitting appointment of additional stockist.

Limited number of Stockists so appointed control the supply of drugs in Vadodara.

b) Appointed stockists/wholesalers are under instructions from CDAB and;

- i. are not permitted to pass on the various benefits of schemes introduced by the Pharma companies,
- ii. are required to pay for the issue of NOC by CDAB for stockists of a company.

In case of failure to comply CDAB either: i) impose heavy penalty on firms which do not follow the norms prescribed by the associations; and /or call for boycott of the stockist in question.

During the investigation, DG also observed that as per relevant guidelines of AIOCD, restrictions have also been imposed by CDAB on pharma companies as under:

- (i) Pharma companies are not permitted to make direct supplies to doctors, nursing homes, chemists etc. and instead route the same through the authorized stockists only.
- (ii) Pharma companies and wholesalers are restricted from supply of drugs to retailers who are not the members of CDAB.

The DG further observed during investigation that CDAB is restricting the supply of drugs in Vadodara by not giving NOC for appointment of



new/additional stockists and by discriminating between members and non-members:

- (i) Stopped new people/parties from opening retail outlets in order to protect interests of members.
- (ii) By not granting permission to start sub-stokist category.
- (iii) By depriving the non-members of the benefits like expiry/breakage, leakage settlement, delivery, discounts etc.

c) The DG also investigated the following allegations levied by the Informant:

- (i) Fixation of trade margins to wholesalers and retailers;
- (ii) Issue of PIS by the Associations.

4. Methodology of Analysis

DG and Majority Order:

4.1 The approach of DG as noted in MRTP Case No. C-127/2009/DGIR4/28 (Varca Druggist & Chemist and others vs CDAG - Order: Member (Geeta Gouri) pertaining to the allegations both filed and observed was to examine these as an integral part of association functioning. To quote:

"Evidences collected in course of proceedings and statements of persons recorded before this office are indicative of the fact that the associations, not only limit and control supply of drugs in the market through a system of PIS approvals, but also limit and control the number of players by insisting on need of NOC of associations for appointment of stockists in their areas of operations. It has also been found that the associations through their guidelines and norms fix margins for the wholesalers and retailers, which has the effect of determination of sale prices of drugs in the market. These practices and conduct of CDAB are violative of provisions of Section 3(3) (a) and 3(3) (b) of the Competition Act, 2002". (DG supplementary report dated March 4, 2011).

4.2 This approach as observed in the earlier case, while it may have its merits can lead to situations where the positive activities of an association tend to get blurred by the undesirable outcomes. More significantly, it prevents identification of the precise anti-competitive effects which as per DG are in



built into the guidelines and MOU, nor is it possible to capture the dynamics of an industry where associations have been in existence for over four decades and the present guidelines are a result of long term negotiations between the industry players, which might have contributed to the overall stabilization of the industry, thus mutually benefitting all the participants. The majority order has also followed the same approach and concluded that the association(s), not only limit and control supply of drugs in the market through a system of PIS approvals, but also limit and control the number of players by insisting on NOC for appointment of stockists. It was also concluded that associations, through their guidelines and norms, fix margins for wholesaler and retailers, which has the effect of determination of sale price of drugs in the market. The DG and the majority Order found all these activities to be in contravention of Section 3(3)(a) and 3(3)(b) of the Act.

4.3 As in the previous case I prefer to look at each of the following allegations/practices separately for anti-competitive conduct as these require separate examination from the lens of competition assessment:

- (i) Requirement of no-objection certificate (NOC) from CDAB 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) Fixing of PIS charges leading to the fixing of prices of drugs in violation of Section 3(3)(a) of the Act. Specifically the requirement of approval for launching a new product in the markets in form of PIS approval results in entry barrier and hence restrict supply of drugs in the markets drugs in violation of Section 3(3)(b) of the Act.



Observations:

- (i) *Issue of requirement of no-objection certificate (NOC) from CDAB before the appointment of stockists/distributors in Vadodara leads to limiting supply in the market, in contravention of section 3(3)(b) of the Act.*

On this issue, I agree with the main order, however, a detailed in depth inquiry into the role and function of the parent associations (AIOCD, IDMA, OPPI) who have been setting the terms of business between the players at the various levels of the supply chain over the years is required as I recommended in my order for Case No. C-127/2009/DGIR4/28 (Varca Druggist & Chemist and others vs CDAG).

- (ii) *Fixing of trade margins for stockists/wholesalers and retailers.*

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 conclude that margin fixation cannot be presumed to be anti-competitive activity.

- (iii) *Fixing of PIS charges leading to the fixing of prices of drugs in violation of Section 3(3)(a) of the Act.*

In case of MRTP Case No. C-127/2009/DGIR4/28 (Varca Druggist & Chemist and others vs CDAG), 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. There is no basis for changing this view except when CDAB of Gujarat has deliberately withheld PIS approval. The DG in the supplementary report has listed drugs that have not been launched in the state of Gujarat of account of non-issue of PIS approval by CDAB.



DG has observed that the modus operandi followed in respect of PIS is that a drug company has to get drugs approved for their launch in a particular territory by the state level association.

DG further observed that *"If product NOC in form of PIS approval is not given, companies will not be in a position to supply drugs. The depositions of persons before this office establish that certain drugs are not available in Vadodara because PIS approval has not been given"*.

A list of such drugs is given at page no. 12 and also at exhibit-6 of the DG (supplementary) report saying that these drugs could not be launched in Gujarat because Federation of Gujarat State Chemist and Druggist Association/CDAB has not given PIS approval for the same. DG has also observed from the findings of survey conducted by DG that Listrine Mouthwash was also not available because the same had not been approved by the Association.

From the above paragraphs it is concluded that charging for PIS cannot lead to price fixing. However, by not giving approval for launching a new product in the markets results in entry barrier and hence restricts supply of drugs in the markets. Hence to this extent is in contravention of Section 3(3)(b) of the Act.

Conclusion

With regard to no-objection certificate (NOC) from CDAB before the appointment of stockists/distributors I agree with the majority order and of the opinion that the requirement of NOC leads to reduction of supply in the market and in contravention of section 3(3)(b) of the Act. Similarly, I am also of the opinion that 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 markets and is in violation of Section 3(3)(b) of the Act. For remaining



two allegations i.e. fixing of margins and fixing of PIS charges by the CDAB does not result in price fixing and hence cannot be term violation of Section 3(3)(a) of the Competition Act, 2002.

Order

This order finds contravention by CDAB on two 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 giving PIS approval for launching a product which are in contravention of Section 3(3)(b) of the Act.

As mentioned earlier and also in my order in Varca Drugs case, a suo motto investigation be initiated into the nexus between associations both horizontal and vertical for as observed most of the practices have evolved over several decades. In fact, association in the Pharma industry associations have impacted on several activities along the value chain.

The amount of penalty may be in line with the majority order.

CDAB 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. Limiting and controlling the number of stockists by doing away with the restrictive clauses contained in guidelines as the same is in contravention of Section 3(3)(b).
- b. The restrictive conditions related to insistence on routing the bids through authorized stockists, non-allowance of companies and wholesalers to deal with retailers who are not the members of CDAB which are in contravention of Section 3(3)(b).



- c. The restrictive conditions related to giving PIS approval for launching a product which are in contravention of Section 3(3)(b) of the Act.

The Secretary is directed to inform the parties accordingly.

Sd/-
Member (GG)

Certified True



S.P. Gahlaut
06/09/2012
S.P. GAHLAUT
Assistant Director
Competition Commission of India
New Delhi