Competition Commission of India

MRTP Case No. C-87/2009/DGIR

Dated 5.9.12

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

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

As Per R. Prasad (dissenting)

I have gone through the orders passed by the majority of the members of the Commission. I have a different view and therefore, I am passing a separate order. The facts are stated in the order of the majority and there is no need to repeat them.

2. The first issue is the applicability of Section 3 of the Competition Act. The scheme of the entire Competition Act, 2002 is against monopoly or dominance. This is done either by entering into anticompetitive agreements which is Section 3 of the Act. Persons who do not have sufficient dominance or market/economic power enter into anticompetitive agreements so as to collectively acquire monopoly power. Anticompetitive aspects of such agreements are defined in Section 3 and the factors to determine such anticompetitive activities are described in Section 19(3) of the Act. Dominance or monopoly power can also be acquired by acquisition or merger and amalgamations. These are the subject matter for consideration in Sections 5 and 6 of the Act. The factors to be seen for identifying the concentration of economic power are mentioned in Section 20(4) of the Act. Under Sections 3, 5 and 6 of the Act, Commission is required to establish appreciable adverse effect on competition. But when dealing with dominance in Section 4, the

Commission is not required to establish appreciable adverse effect on competition. Once dominance is established in a relevant market, then under Section 4 only the abuse needs to be examined.

3. Now, coming to the issue at hand i.e. the application of Section 3 of the Act, we have to examine the provisions. According to the provisions, persons or enterprises cannot enter into an agreement in respect of supply, storage, distribution of goods and provisions of services which creates an appreciable adverse on competition. If an appreciable effect on competition is caused then the agreement is void. But would an agreement entered into by enterprises to form an association would be an agreement in respect of restriction on supply, storage, distribution of goods and provisions of services. The agreement envisaged in Section 3 is not an agreement to form an association but an agreement which creates an appreciable adverse on competition. I therefore do not agree that the association was formed with the idea of gaining economic power and creating an adverse effect on competition. The agreement referred to in Section 3 is not the agreement to form an association. It is an agreement which leads to an anticompetitive behaviour in the markets. If the memorandum of CDAB is seen, it would show that the agreement to form the association was not to create AAEC in the market. Forming an association for the welfare of the members is a constitutional right guaranteed under Article 19 of the Constitution of India. If the argument that the association was formed with the idea of gaining economic power then all the trade associations formed would have to be treated as void under Section 3(2) of the Act. By forming a trade association, one gets economic strength and may be a position of strength and dominance. But the agreements referred to in Section 3(1) are different agreements between enterprises which are entered into with the motive of causing appreciable adverse effect on competition in India. If a view is taken that the formation of a trade association is an agreement hit by the provisions

of Section 3 then it has to be established that such an association is causing an appreciable adverse effect on competition in India.

4. If one looks at the definition of person in Section 2(l) of the Act, then a society registered under the Societies Act is a person. Therefore from this definition it is clear that the intention of the legislature was to recognize the formation of such societies or associations as a person and such agreements to form such societies were not the subject matter of the rigours of Section 3 of the Act. Once the law treats an entity as a person, the Commission is not entitled to treat such a person's formation for an inquiry under Section 3 of the Act.

5. Section 2(h) of the Act defines an enterprise as a person or a government department. In India, we are not governed by the European or American competition laws where a person is not defined. In such a case, the formation of such an association itself may be questioned as an anticompetitive agreement. But in India the issue is different. In the case of Hindustan Lever Ltd. AIR 1971 SC 1285, the Supreme Court has looked down upon the intention of authorities to look at the laws foreign jurisdiction when there is no requirement as our laws are clear.

6. Further, as the association in this case is a person, it cannot enter into an agreement with one self or take a decision unilaterally or unilaterally have practices so as to be hit by the provisions of Section 3 of the Act. For Section 3, there has got to be more than one person. As in this case there is only one person, as sanctioned by law under Section 2(l) of the Act, Section 3 has no application.

7. The question for examination is that when such a person is exhibiting anticompetitive behaviour, what would be the procedure to deal with such behaviour under the provisions of the Competition Act, 2002. In this particular case there is no doubt that the society CDAB's formation

increased the economic strength of the small retailers, stockists and the wholesellers dealing with the sale of drugs within the territorial jurisdiction of Baroda. This society/association had no statutory backing for running its affairs but it started regulating the trade in the state of Baroda. This was possible for the association to do so because it could boycott a person and ensure that market access was denied to person who did fall in line with the directives of the association. In fact it could drive a person out of business by its activities. The society could also ensure that a company marketing drugs in Baroda could be driven out of Baroda markets if the drug marketing / manufacturing company did not follow the directives of the society. This could be done by a diktat issued by the society that its members would not deal in the drugs manufactured/marketed by the companies who did not follow the directives of the society. All the members would then stop buying and selling the drugs of the delinquent drug company and in a short time, the drug company would have to exit the market of Baroda. A company trying to market its goods in Baroda would not be able to market the goods in Baroda as it would not be able to set up a marketing chain in Baroda without the blessings of the CDAB.

8. Before taking the discussion further it is necessary to examine the functioning of CDAB. CDAB functions in Baroda but then there is an All India chain of wholesellers and retail of All India level known as All India Organisation of Chemists and Druggists (AIOCD). CDAB is affiliated to AIOCD like other state level association. In a state there are associations of wholesellers and retailers at district levels which are affiliated to the state level associations. AIOCD had entered into a MOU with the Organisation of Pharmaceutical Products of India (OPPI) and Indian Drug Manufacturers Association (IDMA) in 1982. According to the norms laid down in the MOU margins were fixed at the level of wholesellers and retailers. Guidelines in the MOU have also been laid down for the appointment of new and additional stockists. Further no drug

manufacturing company could conduct business with wholesellers and retailers unless it followed the guidelines and norms of AIOCD. Many of the guidelines appear to be restrictive and anticompetitive in nature. These guidelines are applicable to the manufacturers, stockists and distributors.

9. Pharmaceutical products are marketed in a regulated under the Drug Price Control Order (D.P.C.O.) issued by the Central government. Under the Price Control Order, whenever a drug is introduced in the market, it is for the drug company to give information to the consumers about the drug. As this involves costs, the drug companies pay the association certain sums of money to the association and it is the job of the association to give information about the product to the consumers. The payment is known to be paid for Product Information Service (PIS).

10. The D.G. has reported in his report that each state association has to follow the guidelines laid down by AIOCD. According to him these guidelines have the effect of controlling and limiting supplies of medicines in the market. One of the respective factors mentioned by the DG is PIS. The second anticompetitive measure referred to by the D.G. is the requirement to obtain a no objection from the state level association from the State/District level association. Further a new stockist or a distributor has to become a member of the association before he can become a distributor/stockist. The State/District level association can levy fines on a stockist/distributor if he does not follow the guidelines laid down by the AIOCD/State/District association. Normally in an area according to the AIOCD guidelines not more than two stockists can be appointed. If the third stockiest is appointed, it can only be done after an approval of the State association is obtained. Further as AIOCD has entered into an agreement with OPPI and IDMA, if a stockist does not obtain a NOC, the manufacturers would not supply medicines to the said stockist. Whenever, a new drug is introduced in the market a SSI unit, it has to be

certified by the OPPI/IDMA. According to the agreement between AIOCD and OPPI/IDMA whenever a new drug is introduced in the market, PIS charges are to be paid. If the PIS Bulletin is not published then no PIS charges are payable by the drug companies. If the balance sheet of a SSI unit is certified by OPPI/IDMA, the SSI unit get 50% discount on PIS charges. Another abuse noted by the D.G. was the fact that no wholeseller could sell goods to the consumers without incurring a penalty from the association. Further, no drug company market drugs directly in the market to consumers/doctors. No drug company could appoint any stockist/distributor without NOC from the association.

11. The D.G. has held in his report that –

(i) fixing of trade margins for stockists/distributor amounts to fixing of prices under Section 3(3)(a) of the Act.

(ii) fixing of PIS charges leads to the fixing of prices of drugs in violation of Section 3(3)(a) of the Act.

(iii) As N.O.C. before the appointment of stockists/distributor leads to reduction of supply in the market, it is a contravention of Section 3(3)(b) of the Act.

12. The first issue to be decided is that fixing of trade margins for stockists and distributors amounts to fixing of prices in accordance with Section 3(3)(a) of the Act. The facts of the case are that medicines are subject to Essential Commodities Act, 1955. Under the said Act, a Drug Price Control Order (DPCO) has been issued. Around 350 medicines are covered under this order. In this order, the drugs listed are known as scheduled drugs. The other drugs not covered by the DPCO order are known as non scheduled drug. According to the DPCO, the margin is fixed for the wholesellers at 16% and for the retailers it is fixed at 8%. This is mandatory and all the manufacturers, the wholesellers and the retailers have to follow this order. As far as non scheduled drugs are concerned. AIOCD in its agreement with the IDMA and the OPPI has decided that the

margins for the wholesellers would be 20% and for the retailers would be 10%.

13. The question to be decided whether the fixation of the margins for the wholesellers and the retailers by the AIOCD, the IDMA and the OPPI amounts to a fixation of price. In every trade while marketing products, discounts and rebates are allowed to wholesellers and retailers. This margin is the source of revenue to the wholesellers and the retailers. Without these systems of discounts and rebates called the margin money, the retail chain cannot survive. This system cannot be regarded as fixing of prices. In the case of Hindustan Lever Ltd. AIR 1971 SC 1285, the Supreme Court has stated that in case of competition, rule of reason has got to be adopted. In the opinion 'per se' rule in respect of a provision is not applicable under Indian laws. 'Per se rule' may be applicable under the American legal system but it is not applicable in the Indian legal system. In this particular case, the margins fixed at 20% and 10% for wholesellers and retailers are not unreasonable and are line with the similar practices followed in other trades in the market. There is no doubt that the margins fixed are in line with the margins fixed by the DPCO order though in the case of non-scheduled drugs the margins were fixed in accordance with agreements entered into by AIOCD, the IDMA and the OPPI. But in any case there is no doubt that margins fixed for the wholesellers and the retailers result in fixing the prices of drugs indirectly. But this fixation of prices is done by the manufacturers and not the association CDAB. Therefore CDAB cannot be held responsible for fixing the prices. Further applying the rule of reason fixing the prices by taking into account the margins, does not amount to fixation of prices under the Competition Act.

14. The issue which is important is the directive issued by CDAB that the wholesaler would not give discount of more than 2% to the retailer and that the retailers would not give any discount to the consumer. If the

wholeseller and the retailer gave any discount to the retailer and the consumer respectively they were liable to be fined by the association. This is a restriction on freedom to do business. The behaviour of the association is anti-consumer. If a retailer wanted to give discount to a consumer out of its margin of 8% for scheduled drug or out of 10% out of non scheduled drug, the association had no right to stop this. Competition arises when two entities compete with each other on the basis of prices to get more competitors. If each competitor is made to sell at the same price then there would be no competition in the market. Thus, by making the retailer not to pass on the discount to the consumer it limits the market for a retailer. Further by not allowing a wholeseller or a retailer to give discount to a buyer, as it is a restriction on the freedom of trades, it also amounts to putting unfair conditions in the purchase or sale of goods. Thus, these activities of the association are anticompetitive in accordance with the provisions of the Act.

15. The second issue is the issue of PIS. Whenever a new drug is introduced in the market, DPCO directives require the drug companies to give information about the new drug to the wholesellers, retailers and the consumers. The drug companies because they do not access to all the retailers, wholesellers and the consumers they pass on this duty to the AIOCD. For this purpose the drug companies pay a sum of Rs.2000/- before introducing a new drug. As far as the State agencies are concerned, they are entitled to receive a sum of Rs. 500/- whenever a drug company introduces a new drug. According to MOU between AIOCD and the IDMA and the OPPI if the information bulletin is not published then the drug companies are to give any PIS fund either to the AIOCD or the State agencies. CDAB found that some wholesalers were making new drugs available to the retailers without paying PIS charges to CDAB. CDAB proposed to fine the wholeseller a sum of Rs.1000/- instead of Rs.500/- payable as PIS. According to the D.G., the insistence on P.I.S. payments restricts the supply and availability of drugs. It is not clear as

to how a small sum of Rs.500/- taken from a wholeseller at the time of introduction of a new drug is anticompetitive. It is also not clear as to how the charge of P.I.S. leads to a restriction and supply of medicines in the market. It is on the basis of D.P.C.O. directive that at the time of introduction of new drug information has to be given to the retailer and the consumer. The information to be furnished involves cost and if this cost, which is nominal, has to be paid by a wholeseller, it does not lead to restriction of supply. Therefore the levy of PIS does restrict the market and is held not to be anticompetitive.

16. The next issue to be considered is the issue of the denial of market access. An issue which was raised in the information and which has also come out DG's report is that in Baroda no person who is not a member of the CDAB can do business as a retailer or wholeseller. If the enterprise wants to become a wholeseller or a stockist, it has to first become a member of CDAB and then apply for a no objection certificate. Without the 'no objection certificate', no drug manufacturer can make an enterprise either a wholeseller or a stockist. This is on the basis of the MOU between AIOCD and the IDMA and the OPPI. If a manufacturer makes someone a wholeseller or a stockist of its drugs without the NOC from CDAB the retailers would boycott the said wholeseller or the stockist. This happens because the retailers being members of the CDAB would follow the directives of CDAB. But the boycott would drive the newly appointed stockist out of business. Further when a retailer buys medicines from a stockist/wholeseller who is a member of CDAB, according to the CDAB guidelines, he is given a credit of 20 days and after that the retailer has to pay interest at 18%. If a retailer is a habitual defaulter, CDAB directs the other stockists not to supply medicines to driven out of business. But if the stockist/wholeseller is not a CDAB member, CDAB follows a different policy. A retailer in such a case asks the retailers to take a credit of three of four months. This behaviour of CDAB is having a discriminatory behaviour.

17. Taking the issue of denial of market access further the whole process starts with the MOU between AIOCD and the IDMA and the OPPI. According to this MOU in a state or an area, not more than two stockists could be appointed by a drug company. But in Baroda, a drug company could appoint five stockists depending on the turnover of the concerned medicines. Thus, the CDAB has limited the market to just five stockists. It is also a restriction on the freedom to carry on business. Further by limiting the number of stockist, competition has been reduced and the availability of medicines would accordingly reduce.

18. It has been argued on behalf of CDAB that the NOC was required in order to eliminate sellers of spurious drugs in the market. No material has been submitted to show that there was a sale of spurious target and the system of NOC helped in eliminating such sellers of spurious drugs from the market. In fact the main aim was to restrict the number of wholesalers and stockists so as to ensure that there was lesser number of players in the market so that each stockist would have a larger share of the pie. Therefore the arguments of CDAB are without any basis and cannot be accepted. The fact is that by the action of CDAB the market is limited and there was a denial of market access to many persons. The denial of market access to persons to sell medicines in the State of Baroda is an infringement of the freedom of trade and lesser consumer satisfaction because the availability of the drugs decreases.

19. An argument can be raised that as the CDAB does not carry out any business, it cannot be treated as an enterprise under Section 2(h) of the Competition Act. According to the definition the keyword is carrying out any activity. As the activity of CDAB has an effect on carrying on the business of medicines in the State of Baroda, it is certainly hit by the definition of enterprise as it is also a person defined under section 2(l) of the Act. Carrying on business is not necessary for a person to fall under

the definition of enterprise under the Competition Act. This view has been confirmed by the Delhi High Court in the case of Hemant Sharma vs. Chess Federation, Writ Petition (Civil) No. 5770 of 2011.

20. The next issue to be decided in this case is as to whether CDAB enjoys a dominant position in the relevant market. The market has to be defined with reference to the relevant product market or the relevant geographic market or with reference to both the markets. In this particular case the relevant geographic market would be the State of Baroda. As far as the relevant product market is concerned it means the marketing medicines in Baroda. The position of dominance arises due to the formation of a product association for the State of Baroda as well as the MoUs entered into by AIOCD with OPPI and IDMA. Due to this collective strength of association CDAB is able to operate independently of competitive forces primarily because no competitive force is prevailing in the State of Baroda. The object of the association is to regulate the trade of the sale of medicines in the State of Baroda. Thus the association be able to affect its consumers in the relevant market in its favour. The fact is mentioned in Section 19(4) have also be considered while deciding the issue of dominance. As far as a market share of the association, the size and resources of the association, size and importance of the competitors, economic power of the enterprise, vertical integration of the enterprise, countervailing buying power, market structure and the size of the market is concerned, are the factors which cannot be seen or examined in this case of the association. But the consumers are depending on the decisions of the association and the dominant position has been acquired due to the collective bargaining power which the association is acquired for forming the association. Therefore under clause (g) of Section 19(4) the dominance has been acquired under the item 'otherwise'. No relative advantage acquired in terms of economic development by informing the association or by regulating the trade of medicines in the State of Baroda. But as medicines are important for human life, social obligations and

social costs are necessary. Therefore clause (f), (g), (h), (k) and (l) of Section 19(4) are applicable to the facts of this case.

21. In view of these facts the dominance of CDAB is established in the market of medicines in the State of Baroda. The abuse of dominance is already established as discussed in Paras 16 and 17 of this order. The behaviour of CDAB is discriminatory as far as the conditions of purchase and sale of goods which is medicines in this case. Therefore the provisions of Section 4(2)(a)(i) are attracted. The action of CDAB also limits and restricts the market of medicines in Baroda as there is restriction to the entry of stockists and wholesalers in the State of Baroda. Therefore the provisions of Section 4(2)(b)(i) are clearly attracted. The practice followed by CDAB also results in denial of market access as no one can enter the market without no objection certificate from the association. Therefore CDAB has contravened section 4(2)(c) of the Act.

22. As the abuse of dominance is established, I am in agreement with the majority view that penalty has to be levied in this case. I agree with the majority view to the extent of the penalty levied in this case. The other directions issued in the order of majority have to be followed by the CDAB in this case.

23. The secretary is directed to send a copy of this order to the concerned parties.

Sd/-
Member (R)

Certified True Copy

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