



CASE STUDY 20

JANUARY 2014

M/s Santuka Associates Pvt. Ltd. v. AIOCD & Ors* (Anticompetitive Agreements)

Forum:Competition Commission of India¹**Legislative Provisions Referred:****Competition Act, 2002²-**

1. Section 2(h) – ‘Enterprise’
2. Section 3 – ‘Anti-competitive Agreements’
3. Section 4 – ‘Abuse of dominant position’
4. Section 27 – ‘Orders by Commission after inquiry into agreements’

Parties to the Case:

1. M/s Santuka Pvt. Ltd (Informant)
2. All India Organisation of Chemists and Druggists (AIOCD)
3. Organisation of Pharmaceutical Producer of India (OPPI)
4. Indian Drug Manufacturer’s Association (IDMA)
5. USV Ltd. (USV)

Facts of the Case:

The Informant was a clearing and forwarding agent (C&FA) in medicines of various pharmaceutical companies at Cuttack. As per the information, AIOCD, an all India body registered under the Societies Registration Act, has full control over the stockists of drugs and medicines in India.

The informant alleged that AIOCD imposed unfair and discriminatory conditions against any stockist, distributors and C &FAs who did not give in to its mandates and dictates, thereby abusing its dominant position. It was also alleged that threats of boycott were issued and also new entrants were hindered entry by closing competition doors in the market by imposing stringent requirements of No Objection Certificate (NOC), Product Information Service (PIS) approvals etc. As per the informant, these practices

restricted market access by limiting and restricting supply of pharmaceutical drugs in the market and thus violated the provisions of the Competition Act.

Main Issues:

1. **Whether AIOCD indulged in anti-competitive practices by imposing requirements of NOC, PIS approvals and boycott of products?**

Informant- The informant claimed that AIOCD influenced the purchase and sale price of drugs and pharmaceutical products, controlled the trade margins and profit margins and collected PIS of Rs. 2000/- per product from a new stockist of pharmaceutical companies.

DG- The DG concluded that the horizontal agreements between AIOCD with other pharmaceutical companies, fell within the ambit of Section 3 of the Act as it applied to the practice carried on or decision taken by any association of enterprises or association of persons which indulged in activities of price fixing, restricting market supply etc. It was found that the requirement of NOC limited market supply, boycott of products by delaying or withholding PIS approval which was a sine qua non of the agreements, MOU between AIOCD, OPPI and IDMA resulted in determination of price of drugs/trade margins in the market on a non-competitive basis, in violation of section 3 of the Act.

AIOCD- It claimed that there was no evidence to prove an existing agreement between members of AIOCD. Secondly, their relevant market was not the pharmaceuticals in India or drugs sold to stockists/distributors, but only the service rendered by it. Also, the fixation and prices of drugs was as per the National Pharmaceutical Pricing Authority regulations. NOC requirements and MOUs were as per the recommendations made by the Mashelkar Committee.

*M/s Santuka Associates Pvt. Ltd. v AIOCD and Ors., available at <http://cci.gov.in/May2011/OrderOfCommission/202011.pdf>, last accessed on 16/12/2013.

¹ Hereinafter referred to as ‘CCI’.

² Hereinafter referred to as ‘the Act’.

CCI- The Commission observed that AIOCD created a restraint on trade through NOC and MOUs which restricted market supply, delay/withhold of PIS approval as found by the DG violated section 3, the industry practice led to determination of trade margins and the boycott of pharma companies on the basis of MOUs caused an appreciable adverse effect on competition for the pharma companies and controlled availability to the consumers.

2. Whether liability u/s 3 also accrues to OPPI and IDMA along with AIOCD?

DG- The DG concluded that the tripartite agreements between OPPI, IDMA and AIOCD were still in existence as no evidence was presented to prove otherwise.

IDMA & OPPI- IDMA submitted that it had already terminated the MOUs with AIOCD and had issued a circular to all its members informing them of the same. OPPI emphasized that it would not restrict supply of its own products. Secondly, all MOUs stood terminated as claimed by it. The PIS system was only an easy way of complying with the requirements of the Drug Pricing Control order. It claimed that the informant was not even a member of OPPI and the reliance placed by the DG was purely circumstantial. It also negated the claim of NOC requirements from AIOCD.

CCI- The CCI observed that AIOCD, OPPI and IDMA were not engaged in identical or similar trades or provision of services and therefore could not be said to be association of enterprises, as categorised by the DG. OPPI and IDMA were drug manufacturers whereas AIOCD was an All India association of chemists and druggists. They were only victims of the anticompetitive practices of AIOCD as no association would deter its own interests by restricting supply of its own products.

3. Whether the member of the Executive Committees of AIOCD, OPPI and IDMA were also liable u/s 3 of the Act?

DG- The DG concluded that the agreements between members of the AIOCD, OPPI and IDMA and the decisions taken therein were anti-competitive u/s 3 of the Act.

CCI- Relying on its earlier order³, CCI observed 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.

In present case, it was observed that since AIOCD, OPPI and IDMA had not submitted the names and addresses of its office bearers and its annual turnover as requested by the Commission, the issue would be dealt separately when the information would be furnished by AIOCD.

4. Whether conduct of USV Ltd. fall u/s 3 of the Act?

Informant- The informant claimed that USV accepted NOC from AIOCD before appointing stockists/ distributors, paid PIS charges to it and also paid some sum of money to the President of AIOCD to settle issues with it. The sales chart of USV from January 2011- August 2011 showed a clear boycott of its goods. It paid Rs. 25 lakhs to Maharashtra State Chemist and Druggist only because USV failed to take any action against the Informant. According to the Informant, all of the above supported the averments made by it that USV Ltd. was also liable u/s 3 of the Act.

DG- The DG did not find any evidence against USV based on the facts and circumstances of the case.

USV- It said that since the DG did not find any evidence against it, USV should not be indicted for any wrongdoing.

CCI- The CCI did not pass any specific order and restrained AIOCD to issue threat to USV for terminating its C & F agency with the Informant. USV was not penalised.

Decision of the CCI:

The CCI observed that AIOCD was the apex body and due to its position it was able to control and restrict the supply of pharmaceutical products in the market. It was also able to influence the level of prices of drugs and pharmaceutical products through its mandates and directions which were anticompetitive in nature and thus, stringent action was required in the case.

CCI directed AIOCD to issue letter to OPPI and IDMA informing that there was no requirement of obtaining an NOC for appointment of stockists and the pharmaceutical companies. CCI further directed

³ Varca Druggist & Chemist and Ors. v. Chemists & Druggists Association, Goa (CCI order dated 11/06/12), available at

cci.gov.in/May2011/OrderOfCommission/4-28%20Main%20Order.pdf

AIOCD to inform all Chemists & Druggists and all its members and associations that PIS charges were not mandatory and PIS services could be availed by manufacturers/pharmaceuticals firms on voluntary basis and that they were free to give discounts to the customers.

Considering the facts and circumstances, the CCI imposed a penalty of 10% of the annual turnover of the financial years 2008-2009, 2009-2010 and 2010-2011. A cease and desist order was passed against AIOCD from indulging in the above discussed anticompetitive practices.

Separate Orders:

The majority order did not find any contravention of the Act by OPPI, IDMA and USV Ltd. There were three separate orders passed. One separate order found contravention by IDMA and OPPI also for signing tripartite agreement with AIOCD which contained some clauses which were restrictive in nature⁴. In other order AIOCD was found guilty of abusing its dominant position⁵. One of the separate orders noticed that the office bearers of an association of enterprises cannot be penalised for the act of the association either under section 27 or under section 48 and it is only the association of enterprises i.e. AIOCD which can be penalised under section 27.⁶

Analysis of the Main Order:

Recently, the CCI has given a lot of attention to the pharmaceutical sector, particularly to the pricing and selling practices and the patent regimes. In this case, CCI imposed the maximum penalty under section 27 viz.: @ 10% average of the receipts of the three years. CCI, while giving reasons for levying high penalty also noted that the consumers at large would have been benefited in monetary terms and otherwise in the absence of anticompetitive conduct of AIOCD.

The penalties imposed by the CCI are amongst the highest which have been imposed anywhere in the world. This is so because this sector affects consumers at large and directly affects prices of drugs and pharmaceutical products. In such a situation, it is quintessential to bring to light the

anticompetitive practices of associations of druggists and chemists such as the AIOCD, which have control over more than 90% of the wholesalers and retailers in the pharmaceutical industry.

In many cases the CCI has directed the parties to modify or delete the anticompetitive clauses from the agreements, MOUs etc. and cease and desist from indulging in anticompetitive activities but, still it has not imposed tangible liability on individual offenders for any violation. The majority order in this case decided to deal with the issues of passing orders under Section 27 of the Act against the individual office bearers of AIOCD separately when CCI receives requisite information from AIOCD. This will unravel new developments in case of individual liability especially keeping in view CCI's observation that anti-competitive decision or practice of the association can be attributed to the members who were responsible for running the affairs of the association.

Given the sweeping remedial measures sought by the CCI against entrenched practices in the pharmaceutical industry, it will be interesting to see whether and up to what extent the AIOCD complies with the CCI's orders. This order will have great impact on the distribution system for pharmaceutical products in India. If upheld at appellate stages this order will also be a big challenge for CCI's ability to monitor and enforce compliance with its orders.

Prepared By: Saket Sharma & Rishika Mishra, CIRC

⁴ Separate Order by Dr Geeta Gouri, Available at cci.gov.in/May2011/OrderOfCommission/202011GG.pdf

⁵ Separate Order by R. Prasad, Available at cci.gov.in/May2011/OrderOfCommission/202011R.pdf

⁶ Separate Order by S.N. Dhingra, Available at cci.gov.in/May2011/OrderOfCommission/202011D.pdf