



CASE STUDY 25

MAY 2014

In Re: Bengal Chemist and Druggist Association * (Anticompetitive Agreements)

Forum:

Competition Commission of India¹

Legislative Provisions Referred:

Competition Act, 2002²-

1. Section 3(3)(a)- Any agreement entered by any association of enterprises which directly or indirectly determines purchase or sale prices,
2. Section 26(2)- Procedure for inquiry under section 19
3. Section 27 - Orders by Commission after inquiry into agreements or abuse of dominant position.
4. Section 48 - Contravention by companies

Parties to the Case:

1. Bengal Chemist and Druggist Association
2. Ref. case no. 01 of 2013

Facts of the Case:

The CCI received information via email on the alleged anti-competitive practices of Bengal Chemist and Druggist Association (BCDA). The BCDA was alleged of engaging in anticompetitive activities such as price-fixing, limiting supply as well as setting selling price of drugs. The CCI pursued a suo moto enquiry into the matter under section 19(1). The CCI referred the matter to DG for its investigation under section 26 of the Act. However subsequent information was filed by the Director, Directorate of Drugs Control, West Bengal (ref. case no. 01 of 2013). The Director after pursuing the matter himself filed a complaint to the CCI. The CCI referred the case to the DG for investigations. Further directions were issued to club the two matters after observing that their substance is essentially the same. The DG, having already concluded its report in the suo moto case brought to the notice of the CCI that the investigation on the first matter being complete, for case

no. 01 of 2013, being the same subject matter, treated and adopted the previous investigation report of the suo moto case and placed it before the Commission for consideration.

Main Issues:

Issue 1. Whether the impugned body being a “trade association” is covered by the law and whether it has infringed the law?

DG: The DG during its investigation found that the BCDA and its District and Zonal Committees were engaged in anti-competitive practices of directly or indirectly determining the sale prices of drugs and controlling or limiting the supply of drugs through concerted and restrictive practices including imposing 'No Discount' notices to be displayed at the said shops, in contravention of the provisions of Section 3(3)(a) and (b) read with Section 3(1) of the Act.

OP: It was submitted by BCDA that it was a non-profit company registered under Section 25 of the Companies Act, 1956 therefore cannot be treated as an enterprise.

CCI: As per the Articles of Association of BCDA, any person, firm or company carrying on the business of Chemists and Druggists, Dealers of Drugs, Medicines and Allied Products and of Manufacturer of Medicines, Drugs, Pharmaceuticals etc. and possessing a drug license under the Drug and Cosmetics (Amendment) Act and of the accredited Agents and Representatives of such licenses of other States having their office in West Bengal can become an ordinary Member of the Association subject to the provisions and restrictions contained in those Articles. Thus, it is not the case that any person can become a member of BCDA but only those persons falling within the aforesaid category can become a member of BCDA. Hence every member of BCDA is actually a person engaged in an economic activity which essentially is covered under “enterprise” definition of section 2(h). Any act or practice carried on

* In Re: Bengal Chemist and Druggist Association and Ref. case no. 01 of 2013, Date of order by CCI: 11/03/2014; available at <http://www.cci.gov.in/May2011/OrderOfCommission/27/022012.pdf>, as accessed on 15/04/2014.

¹ Hereinafter referred to as 'CCI'.

² Hereinafter referred to as 'the Act'.

or decision taken by an association of enterprise is therefore covered under section 3(3) of the Act. Held, the concerted and collusive activities of BCDA members have prevented price competition between one retailer and the other. This has resulted in fixation of the selling prices as the drug prices were not allowed to be determined by the independent market forces. Such activities of the BCDA are palpable anti-competitive conduct which contravenes the provisions of Section 3(3)(a) read with Section 3(1) of the Act.

Issue 2. Whether the impugned body can plea for relief from imposition of penalty under section 27 after having “cease and desist” its impugned practice?

OP: The BCDA submitted that it has voluntarily complied with the requirement of section 27(a) of the Act, therefore no penalty should be imposed by the Commission under section 27(b) of the Act. If at all circumstances warrant imposition of penalty, mitigating factors like voluntary compliance and undertaking by BCDA, acting under bona fide belief, ignorance of law etc. be considered by the Commission. It sought for relief under the above provision while relying upon the judgment of the Supreme Court in the All India Organization of Chemists and Druggists and Others v. Director General, Investigation & Registration³, and order of the Competition Appellate Tribunal in the matter of Director General v. Voltas Limited and another⁴, to support its argument that if the currency of agreement/acts/practices which is the subject-matter of the notice of enquiry has expired, the notice of enquiry becomes infructuous.

CCI: Held, ignorance of law is no excuse under the law. Any anticompetitive act or conduct is required to be penalised to cause deterrence in future among the erring entities engaged in such actions.

Issue 3. Whether the provisions of section 48 can be invoked upon the office bearers of the trade association?

DG: DG as directed by the CCI pursued the case under provisions of section 48 and also served notices to the office bearers of BCDA under this provision.

OP: BCDA submitted that section 48 of the Act may not be applicable to its office bearers and executive members as their liability is limited as per the Memorandum of Association of BCDA being a non-profit company registered under section 25 of the Companies

Act, 1956. It was submitted that mere presence in a particular executive meeting of BCDA may not be treated as violation of section 48 of the Act. As per the Memorandum of Association, the liability of each member is limited and the income and the property of BCDA is to be utilised solely towards the promotion of its objectives, and no portion was to go to its members, directly or indirectly, in the way of dividend, bonus or otherwise.

CCI: The Commission reiterating its earlier decision in case no. 60/2012 (M/s Arora Medical Hall, Ferozpur & Ors.)⁵, observed that the provisions of the section 27 of the Act are sufficient to make the office bearers liable for the contravention without the aid and assistance of the provisions of section 48 of the Act. As regarding the provisions of section 48, the same is made applicable in this case as BCDA was a body corporate registered under section 25 of the Companies Act, 1956. Therefore the office bearers and its executive members are found guilty of the contravention of law and are liable to be punished.

Decision of the CCI:

The CCI in this case not only penalised the association (BCDA) for its anti-competitive conduct but also additionally held 78 of its senior office bearers to be personally liable for taking/endorsing such anti-competitive conduct of the BCDA. The CCI while penalising took into account the income certificates of the office bearers and the turnover of the BCDA and imposed Rs 18.38 crore (out of which the amount of fine imposed upon the BCDA was only Rs 13.24 lakh).

Analysis of the Order:

With this order the CCI is sending a clear signal that it has moved a notch higher in dealing with competition compliance by Indian companies/ bodies. The CCI has been successful in the lifting the corporate veil on the fact that the conduct of a company is a decision of a director and/or its corporate officers. It wasn't the case that the CCI has freshly acquired the powers to deal with such cases. The mechanism to bind individuals/ office bearers was prevalent under the provisions of section 48 of the Act. The sub- provisions (1) and (2), very clearly lays down that any person engaged in any anticompetitive practice as well as act in contravention of the act, rule or order made or direction issued is a company and every person acting for the company at that time will also be held

³ 2002 CTJ 4 (Supreme Court)

⁴ 2010 CTJ 4 (COMPAT) (MRTP)

⁵ Order passed by CCI on 05/02/2014 available at <http://www.cci.gov.in/May2011/OrderOfCommission/27/602012.pdf> last accessed on 15/04/2014

personally liable to be proceeded against and punished accordingly. So a director or a senior officer in charge of the affairs of a company need to be cautious of its activities now as the CCI is going to come down on its office bearers too. Onus is on the officers to comply the law as they take the decision on behalf of the company. If the officers either willingly or unknowingly adopt practices that are in contravention of the Act, the law will axe on them. The CCI will not entertain pleadings on “ignorance of the law” as it is a settled principle that ignorance of law is no excuse under the law. The company may also be penalised separately for such anti-competitive conduct.

It is pertinent to mention here that there has been a spat of cases against chemist and druggist associations for engaging in anticompetitive activities.⁶ The ultimate benefit of the CCI’s whip will pass on to the consumers who will get access to medicines at competitive prices. Also medicines are a matter of necessity to save oneself from suffering (pain/death). The unethical practices of the trade association can deprive them of their legitimate right to get medicines prescribed by the doctors at competitive prices.

Any anticompetitive act or conduct is required to be penalised to cause deterrence in future among the erring entities engaged in such actions. However, there is no need to panic as no alarm is set off. The Competition Act is a civil law, unlike the criminal sanctions applicable in Canada and the United States, which imposed jail sentences for cartel activities⁷. The Act provides scope for defence if any such person liable to any punishment is able to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.⁸ Therefore, it is a must that all the companies follow due diligence of the Competition Act to save itself from being penalised as well as to save its image vis-à-vis goodwill.

Prepared By: Lunita Hijam, CIRC

⁶ [All India Organization of Chemists and Druggists (AIOCD) and its affiliates - All Kerala Chemists & Druggists Association (AKCDA), Assam Drug Dealers Association (ADDA) and Barpeta Drugs Dealers Association (BDDA)]

⁷ <http://www.oecd.org/competition/cartels/34306028.pdf>

⁸ Refer proviso to the section 48 of the Act.