



THE CASE OF (UN)HEALTHY AGREEMENTS

Institutionalisation of unethical and illegal drug promotional practices has been put under strict guard, yet, collusion of different kinds exist. The issue note highlights the current and pervasive practices of referrals in the healthcare sector and the need for the Competition Commission of India to intervene and investigate such practices.

Doctor: *Well, I recommend few tests before we proceed for further diagnose. (Handing over a list of tests to be done)*

Patient: *Okay Doctor, (Going through the list) I see, however, there are certain tests that I have already taken and the reports were submitted to you.*

Doctor: *Of course you have, but we trust reports that are authenticated by Dr. Red's Pathlabs, you do understand we cannot afford to take the risks!*

Patient: *Yes of course. (Stands up and leaves)*

Doctor: *Don't forget, Dr. Red's Pathlabs, I will give them a call to give you some discount too.*

Patient: *(Relieved) Oh! Thank you very much.*

Doctors or clinics may change, but what is persistent and consistent, is the inclination towards a pathology lab, commonly known as 'referrals'; however this inclination may differ with the scale/locality of the hospitals and clinics.

Last year when King Edward Memorial Hospital, Mumbai, *banned* medical representatives and private laboratory personnel from entering the wards and outpatient department, a series of reports and research study were published and re-published, outlining the drug promotional practices in various parts of the country. One of the studies provided a picture of what might be described as an unholy alliance: manufacturers, chemists and doctors conspire to make profits at the expense of consumers and the public's

health, even as they negotiate with each other on their respective shares of these profits. Misleading information, incentives and unethical trade practices were identified as methods to increase the prescription and sale of drugs.¹

Unethical agreements or anti-competitive agreements, as competition law of India defines them, is the source of consumer (patients) woes. Though institutionalisation of unethical and illegal drug promotional practices has been put under strict guard, yet, collusion of different kinds exist.

There have been cases where a hospital (doctors/private clinics included), insist patients to use the facility of certain blood bank, pathology labs, stem cell banks, etc. excluding others (referrals). Often, on such referrals the patient is asked for the name of the recommending doctor. And quite often we don't realise that such names are taken to settle the books of these recommending doctors at the end of each month by their respective share of incentives. Interestingly, a report published by CUTS-CCCIER on collusive behaviour in healthcare sector,² highlighted a pattern wherein the high-

¹ Nobhojit Roy, Neha Madhiwalla and Sanjay A. Pai; *Drug promotional practices in Mumbai: A Qualitative Study*, Indian Journal of Medical Ethics, Vol IV No. 2, April- June 2007.

² Rijit Sengupta, *Unholy Alliances in Healthcare Services Collusive Behaviour in Healthcare and Impact on Consumers: Evidence from Assam and Chhattisgarh*, CUTS- CCCIER, 2011.

income individuals were seen to be subjected to more referrals than the others. On more than half of these occasions a particular diagnostic laboratory was suggested by doctors. The fact that only a third of these diagnostic tests ever revealed a serious illness bears testimony to the fact that on most of the occasions, these tests might not have been necessary.³

Such practices are condemned by the Competition Act, 2002 by way of Section 3 of the Act, i.e. Anti-competitive agreements, as not only they are anti-competitive but also anti-consumer's interest. To understand it in a better way, Anti-competitive agreements under Section 3 of the Competition Act, 2002, with reference to the instant case, means an agreement that has been reached between the doctors on one hand and private pathology labs on the other, wherein, the former promises to recommend its patient to use facility of the latter. For rendering such recommendation, the doctor gets incentives from the labs. The law does not restrict recommendation of any drug or labs by doctors, as doing so will make their functioning ineffective. However, it is unethical, if these recommendations are not the product of that doctor's personal expert opinion but the incentives masked thereunder.

Many also claim that such arrangements are necessary so as to uphold standard of detection of a disease, a criterion on which the doctor's diagnose majorly relies. Restricting it would make the whole process of clinical diagnose infructuous. These agreements are usually oral and the consideration is in kind, which often makes difficult to ascertain their existence.

As Shakespeare has written, *conspiracy thou are hatched in secrecy and is executed in darkness*; therefore, regulating and restricting such cartels is not an easy task. What is needed is a regime, where rather than emphasising on restriction, regulation is emphasised upon. That is to say, for example, it should be made a legal obligation for

³ *ibid.*

every hospital/clinics, to provide for a list of pathology labs, according to the location and clinical standards, which should be reasonable. To instil another check, such list should be provided for selected detections (diseases/tests) and not general tests, such as blood tests, lipid profiles, etc. Now, having said that, there have been cases, where the hospitals have in house labs or collection centres and patients are required to use facilities of such in house labs/collection centre. In such specific cases, the need is to regulate the prices of the facilities rendered, in accordance with the fair market prices.

Although there are 11 laws governing the sale of drugs and safe medication and another six laws protecting the consumer interests, but then again there is none which categorically or specifically restrict or regulate healthcare anti-competitive practice. During a recent interview, Mr. Ashok Chawla, Chairman, Competition Commission of India (CCI), prospected the idea of having the commission look into the healthcare sector and in particular such unorganised cartels between the doctors and pathology labs/chemists. Referring to a particular case, he said, *"There was one case of a hospital insisting that patients use the facility of a certain stem cell bank, excluding others. We are at an advanced stage on the issue and will be able to take a decision in the next two months."*⁴

In light of extremely high frequency of referral (to diagnostic clinics) combined with prevalence of 'cuts' for referring doctors, with no policy in place to regulate the same, intervention of CCI would be a welcome step.

⁴ In an interview with Lola Nayar, Outlook India, dated: August 19th, 2013. Excerpts available on the following source-
<http://www.outlookindia.com/article.aspx?287304>, last accessed on 05 September 2013.

The Issue Note is prepared by Molshree Bhatnagar, Research Assistant, CIRC.
The views expressed herein are those of the authors and do not necessarily reflect
the views or position of CUTS Institute for Regulation and Competition (CIRC).

© CIRC, 2013. CUTS Institute for Regulation and Competition, R 75, 1st Floor, Greater Kailash I, New Delhi 110048, INDIA.
T: +91 11 26463021/22/23, F: +91 11 40535921, E: circ@circ.in, W: www.circ.in
Materials published by the CIRC may be reproduced free of charge in any format or medium provided it is reproduced faithfully, not used in a misleading context and properly attributed to the CIRC.