



CASE STUDY 26

JUNE 2014

## M/s Peeveear Medical Agencies, Kerala v. All India Organization of Chemists and Druggists and Ors. (Anticompetitive Agreements)

### Forum:

Competition Commission of India<sup>1</sup>

### Legislative Provisions Referred:

#### **Competition Act, 2002<sup>2</sup>**

1. Section 2(h) – ‘Enterprise’
2. Section 3 – ‘Anticompetitive 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 Peeveear Medical Agencies, Kerala (Informant)
2. All India Organization of Chemists and Druggists (AIOCD)
3. Janssen Cilag Pharmaceuticals (Janssen)
4. All Kerala Chemists & Druggists Association
5. All Kerala Chemists & Druggists Association (Affiliated to AIOCD)
6. Organization of Pharmaceutical Producers of India (OPPI)
7. Indian Drug Manufacturers Association (IDMA)

### Facts of the Case:

The Informant was a partnership proprietor firm dealing in stocking, selling and distribution of wholesale drugs, in Kerala. As per the information, AIOCD, an all India body of drug stockists registered under the Societies Registration Act, has full control over the stockists of drugs and medicines in India. The informant alleged that AIOCD has been abusing its dominant position by being regularly involved in anticompetitive agreements, controlling the trading policies and profit margins of different manufacturing

companies and stockists and regulating stockists/distributor agreements of every manufacturing company. Further, threats of boycott were issued and new business entrants were hindered by stringent enforcement of technical compliances such as attaining a No Objection Certificate (NOC), Product Information Service (PIS) approvals etc. As per the informant, these practices resulted in limiting and controlling the supply and markets and directly influencing the sale and purchase price of the drugs and pharmaceutical products in India, thus violating provisions of the Competition Act.

The Commission considered the information and supporting references and agreed to the existence of a prima facie case to direct the Director General (DG) under Section 26 (1) of the Act to cause an investigation. In the meantime the CCI provided interim relief to the Informant by staying the AIOCD boycott order and restricting Janssen for terminating dealership.

### Main Issues:

1. **Whether the actions of AIOCD and its affiliates – through enforcing grant of NOC, fixation of trade margins, PIS charges or boycott of pharma products - are in violation of Section 3 of the Act?**

**DG - MoU/NOC:** The requirement of NOC for appointing stockists is neither provided in the licensing requirement nor required under any other law. Any restraint on freedom of trade on account of NOC, legitimized through the MOUs, which had the effect of limiting or controlling the market or supply, falls within the mischief of Section 3 of the Act.

**PIS:** The practice of obtaining PIS upon payment of the prescribed charges in the name of advertisement in the Associations bulletin is also a *sine qua non* without which new products are not allowed to be launched.

\*M/s Peeveear Medical Agencies, Kerala v. All India Organization of Chemists and Druggists and Ors., available at <http://cci.gov.in/May2011/OrderOfCommission/27/412011.pdf> last accessed on 16/04/2014.

<sup>1</sup> Hereinafter referred to as ‘CCI’.

<sup>2</sup> Hereinafter referred to as ‘the Act’.

Though the payment of PIS charges ensures not only deemed compliance of the law but also enables them to advertise and circulate product information to all the retailers at a very nominal cost. Thus, the system of PIS ipso facto does not appear to be intended to cause restraint of trade or being injurious to consumer interests. However, the launch of product in market being made contingent on PIS approval by the concerned association of chemists and druggists can result in restraint of trade and lead to denial of market access/controlling of supply/market for any product. Any attempt on part of the members of AIOCD and / or affiliates to delay or withhold PIS approval on any ground, limits or controls supply or market thereof and be treated as a boycott, attracting provisions of Section 3 of the Act.

**Fixed Trade Margin:** While the practice of having fixed trade Margin is also an industry practice and forms a part of the MOUs and the National Pharmaceutical Pricing Authority (NPPA) makes an allowance for margin on price for the retailer and wholesaler, the fact that trade margins have been decided for the wholesalers & retailers operating by way of an agreement between the trade & the industry means that the prices of drugs are directly or indirectly getting fixed and are not being determined by the independent market forces. The manufacturer while deciding the MRP of the drugs cannot fix the prices without providing for the agreed minimum trade margins for the wholesalers & the retailers of the entire industry.

**Boycott:** AIOCD indulge in practices of boycott of pharma companies on various issues contained in the MOUs. With factionalism within the association, different groups try to enforce their decisions on the pharma companies. They also prevail upon the pharma companies to stop supplies to those stockist and retailers who are allegedly engaged in anti-associational activities. Such a concerted action had the effect of limiting or controlling supplies/distribution/availability etc. of drugs which causes appreciable adverse effect on competition and results in denial of market access for the pharma companies and non-availability of drugs to the consumers. Accordingly, the practice of boycott falls within the mischief of Section 3 of the Act.

**Janssen** – It argued that pharmaceutical companies are constrained to accommodate the demands of the AICOD facing the threat of boycott every time.

**IDMA** - does not practice anticompetitive activities. One cannot conjecture that despite IDMA terminating the MOUs it would not continue to desist

the anticompetitive practice in future. IDMA had issued a circular to all their members informing them of the termination of the MOUs and also advised that any action between each individual member and AIOCD or any of its affiliates which violate the provisions of the Competition Act would be illegal and may lead to consequences.

**OPPI** - MoUs were terminated when the Competition Act was enforced in 2009 legal per advice received by OPPI. OPPI was not party to any MOUs or agreements with AIOCD after Act was enforced. Its members do not follow the practise of appointing only NOC obtained stockists nor does OPPI themselves require its members to ensure the NOC for its stockists. PIS is a legitimate system allowing companies to pay a nominal fee while launching a new product in the market and is an efficient manner to comply with the requirements of the Drugs and Price Control Order (1995); however it was grossly misused by the AIOCD. Pharmaceutical companies are compelled to avail PIS approval mechanism because they face the risk of boycotts and delays from AIOCD. Business was hampered due to the boycott of OPPI members' drugs by AIOCD for not complying with illegalities. Fixed trade margins are neither an agreement among pharma producers nor an OPPI mandate, instead a compulsion by the AIOCD. Even after termination of MOUs, stockists compel pharmaceutical producers to maintain uniform trade margins in the market. The DG has comprehensively failed to show that there is an agreement to limit supply or fix prices amongst pharmaceutical producers acting through OPPI. While the margins for the wholesalers are determined by the DPCO producers were free to offer any rate of trade margin for distribution of non-scheduled drugs. OPPI had incorporated the practice of fixed margins in order to allow for a reasonable trade of margin for non-scheduled drugs, which was unregulated, unlike scheduled drugs.

**AIOCD** - The MoU was based on the Mashelkar Committee recommendations asking chemist bodies to act as a watch-dog for the industry. The sale of pharmaceuticals was in accordance with the DPCO and the practice of obtaining NOC was evolved to curb the proliferation of large number of stockists and wholesalers at the cost of the smaller retailers. AIOCD is covered under the definition of 'enterprise' only by virtue of the service of introducing the new products launched through its bulletins and charging the PIS. Naturally, the 'relevant market' for such service can neither be the 'market for pharmaceuticals in India' nor that of 'a drug sold by stockists and retailers to consumers' and in the

absence of an appropriate market definition, a violation of section 3 was not possible.

**CCI-** The Commission observed that AIOCD created a restraint on trade through NOC and MOUs restricting market supply, mandatory PIS approval resulted in delay in reaching drugs to consumers, giving fixed trade margins had the effect of determining the purchase or sale prices of drugs and the boycott by AIOCD and affiliates had the effect of limiting or controlling the supply and market of the pharmaceutical products. These practices were found to violate Section 3(3) (a) and 3(3) (b) of the Act.

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

**DG:** The conduct of AIOCD, OPPI and IDMA regarding the requirement of NOC and the failure to issue public statement viz. MoU termination and their continued adherence by their tacit and implied conduct, had to be presumed a per se contravention of the provisions of Section 3(3) (b) read with Section 3(1) of the Act.

**IDMA & OPPI-** The trade associations submitted that they had been erroneously implicated as respondents given that it was irrational for an association of pharmaceutical producers to limit the supply of its own products as it would be against its own business interest. It was itself a victim of the practices adopted by AIOCD. Assurances were given that all MoUs were terminated and directions issued to all members to refrain from NOC requirements.

**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. It found that pharma companies were themselves victims of arm twisting and boycott tactics by AIOCD and that all existing MoUs stood terminated. The associations do not stand to gain by restricting / limiting the supply of products of their own members.

The OPPI, IDMA and its members appear to be victims of the exploitative tactics of AIOCD and their conduct of entering into MOU with AIOCD should not be treated at par with the conduct of the AIOCD. Therefore, IDMA and OPPI cannot be held liable for violation of the provisions of the Act.

## 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 anticompetitive u/s 3 of the Act.

**CCI-** Relying on its earlier orders<sup>3</sup>, CCI observed that in case of association of enterprises comprising of entities which themselves are enterprises, liability for anticompetitive conduct may arise two fold. While the association of enterprises may be liable for breach of section 3 of the Act embodied in a decision taken by the association, the constituent enterprises of association may also be held liable for contravention of section 3 of the Act arising from an agreement or concerted practice among them. 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.

With regard to the conduct of Janssen, the DG found no violation by it, which was agreeable to the Commission.

### Decision of the CCI:

The CCI identified AIOCD as the apex body exercising *suo-moto* regulatory and executive actions to govern the sale of drugs, without any mandate either under law or from its members. This allowed it to control and restrict the supply of pharmaceutical products in the market and influence the prices of drugs, which is anticompetitive in nature and required stringent action. The CCI directed the AIOCD to cease and desist in following the anticompetitive practices found hereby, specifically discontinuation of PIS and NOC within 60 days of the order. Further, AIOCD was to issue a letter to OPPI and IDMA informing no requirement of NOC and inform all Chemists, Druggists, members and associations that PIS charges

<sup>3</sup> Varca Druggist & Chemist and Ors. v. Chemists & Druggists Association, Goa (CCI order dated 11/06/12), available at <http://cci.gov.in/May2011/OrderOfCommission/4-28%20Main%20Order.pdf> & Peeveear Medical Agencies, Kerala, vs. AIOCD (09/12/2013), available at <http://cci.gov.in/May2011/OrderOfCommission/27/302011GG.pdf>

could be availed voluntarily and that they were free to give discounts to the customers.

Besides passing these orders the CCI imposed a penalty of 10% of the average annual turnover of the financial years 2008-2009, 2009-2010 and 2010-2011.

#### **Separate Orders:**

The majority order did not deliver findings of cartelization and other issues. There were two separate orders passed additionally. One separate order<sup>4</sup> found AIOCD and its affiliate/s guilty of acting as a cartel basis its specific actions and directions to members, for fixing margins in violation of S. 3(3) of the Act. The order also determined office bearers culpability, interpreting S.48 of the Act to argue that since the definition of a 'Company' didn't include individuals working for associations/firms constituting the culpable company, office bearers in this instance could not be made liable. It further imposed 10% penalty on the average turnover of the constituent members of associations (like AIOCD) that didn't have revenues nor maintained balance sheets. In the second order<sup>5</sup> the member agreed with the majority finding on the value of PIS, but did not find the practice to be anticompetitive. Fixing margins and PIS charges were found to have not resulted in price fixation and therefore not violating the Act. But the order found OPPI and IDMA guilty of S. 3(1) as opposed to the majority order.

#### **Analysis of the Main Order:**

Lately, the CCI has increased its focus on anticompetitive issues in the Pharmaceutical and Medicines Sector given its sensitivity in providing life-saving drugs and medicines. The patent regime and protection of product and process patents in India allows for a mix of proprietary and generic drugs with prices regulated for essential medicines. With this order the CCI sought to protect consumer interest beyond the market place by ensuring supply conditions ensure optimum competition outcomes. The levy of the highest possible fine of 10% reflects the CCI's strong message on stringent enforcement of the law in cases of consumer interest in essential sectors. The CCI noted that the consumers at large would have been benefited in monetary terms and

otherwise, in the absence of anticompetitive conduct of AIOCD.

Lately there have also been numerous instances whereby industry associations have been found guilty in the encouragement of anticompetitive practices. This is seen as an indirect subversion of direct culpability of the industry players at large since industry associations ideally do not generate any revenue beyond membership. This structure has been criticised for allowing its members to impose and enforce cartel behaviour on the one hand while escaping actual liability in the event AAEC has been discovered. Therefore, the majority decision in this case has left the issue of direct culpability of the association's office bearers undecided for lack of information. It shall be worthwhile to follow the outcome of this decision to assess whether the protection offered under a Society/Company/Trust or other artificial legal entity to the officer bearers withstands competition law culpability as well as the broader outcome on the interaction between industry bodies and its constituents. Importantly, the range of reforms that have been suggested through the cease and desist orders hereby shall have serious repercussions in the manner medicines are distributed and sold in the marketplace if they prevail.

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<sup>4</sup> Separate Order by S.N. Dhingra, Available at <http://cci.gov.in/May2011/OrderOfCommission/27/302011D.pdf>

<sup>5</sup> Separate Order by Dr Geeta Gouri, Available at <http://cci.gov.in/May2011/OrderOfCommission/27/302011GG.pdf>