In Re: Vedanta Bio Sciences, Vadodara (Informant) and Chemists and Druggists Association of Baroda (Opposite Party)

Case No. C-87/2009/DGIR

Date of Decision: 15-01-2019

Keywords: pharmaceutical, fixation of trade margin, No Objection Certificate

Rule: Section 3(1), Section 3(3)(a), Section 3(3)(b)

The Informant had alleged that OP was imposing unfair conditions in sale of pharmaceutical products of different companies. Further, the OP has formulated guidelines for its members which require any person including a member to obtain permission/NOC (No Objection Certificate) before becoming a stockist of a company, and forced stockists to not sell products of a pharmaceutical company unless NOC is obtained. Another allegation is that the OP was also engaged in fixation of margins for pharmaceutical products.

After receiving the complaint, Director General (Investigation & Registration), Monopolies & Restrictive Trade Practices Commission [hereinafter referred to as 'DG (IR), MRTPC'] undertook a preliminary investigation into the allegations made in the complaint. However, the case was transferred to the Competition Commission of India (hereinafter, the 'Commission') by MRTPC under the provisions of Section 66(6) of the Competition Act, 2002 (the 'Act'). The Commission after forming a prima-facie opinion, directed the office of Director General (hereinafter, the 'DG') to conduct investigation into the matter.

Findings of the DG

The DG was of the view that the evidence gathered during investigation established that the OP was insisting upon seeking its NOC before any pharmaceutical company could appoint a stockists and was also engaged in fixation of trade margins for wholesalers and there have been payments towards advertisements before launching of new products by pharmaceutical companies. Based on the analysis of the evidence gathered during the course of proceedings, it was concluded by the DG that the circulars issued by the OP and practices adopted by it were restrictive and anti-competitive in nature in terms of the provisions of Section 3(3)(a) and Section 3(3)(b) of the Act.

Analysis of the Commission

Two issues formulated by the Commission are as follows:

Issue 1: Whether the OP was mandating NOC prior to the appointment of stockist by pharmaceutical companies in contravention of the provisions of Section 3(1) read with Section 3(3)(b) of the Act?

Issue 2: Whether the OP was fixing the trade margins for wholesalers or retailers in contravention of the provisions of Section 3(1) read with Section 3(3)(a) of the Act?

Issue 1

The Commission held that the practice of mandating NOC prior to the appointment of stockists resulted in limiting and controlling the supply of drugs in the market, contravening Section 3(3)(b) read with Section 3(1) of the Act. By mandating an NOC requirement as a pre-requisite for appointing a stockist by pharmaceutical companies, the chemists and druggists associations discouraged new/existing stockists to enter/expand the market creating an entry barrier.

The Commission noted that the documentary evidence relied upon by the DG in the present case, with regard to aspect of NOC, comprised of 2 circulars, viz. circular dated 02.03.2009 and circular dated 10.11.2009. In paragraph 7 of the circular dated 02.03.2009, the word '*manjuri'* had been used. The Commission concluded that the word '*manjuri'*, which evidently meant 'permission', and its usage in a circular (dated 02.03.2009) meant to be circulated to the chemists and druggists located all over the district of Baroda in the State of Gujarat clearly led to a conclusion that it was meant to convey OP's NOC in respect of the entities mentioned in paragraph 7.

Further, with respect to circular dated 10.11.2009, the Commission found that it revealed that the OP had tried to interfere with the fair functioning of the market by stopping new stockists/chemists from entering in its area with the purported aim to safeguard the interest of its existing members. Such act hinders the entry of new stockists.

Issue 2

The circular dated 02.03.2009 and the other evidence also confirmed the practice of fixation of trade margins for nonscheduled/non-DPCO products by the OP to the tune of 10% for the wholesaler and 20% for the retailers. It should be an independent commercial decision of every entity in the vertical chain to decide the margin it wants to secure or pass on from the upstream entity or the downstream entity, respectively.

Therefore, the Commission found the conduct of OP to be anticompetitive and in contravention of the provisions of Section 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act for mandating the requirement of NOC prior to appointment of stockists and for fixing the trade margins