

In Re: Bengal Chemist and Druggist Association

Sou moto Case. No. 02 of 2012 and Ref. Case No. 01/2013

Nature of Infringement: Anti-competitive Agreement

Legal Provisions: Section 3, Section 19, Section 27, Section 48

Order: Order passed under Section 27 of the Competition Act, 2002

Key Words: Association of Enterprise, MRP, No-Discount, Executive member's liability

FACTS:

Bengal Chemist and Druggist Association (BCDA) was alleged to have engaged in anti-competitive practice of directly or indirectly determining the sale price of drugs and controlling the supply of drugs in concerted manner in violation of Section 3(3) (a) and 3(3)(b) of the Competition Act, 2002 (the Act). BCDA is affiliated to All India Organisation of Chemist and Druggist (AIOCD) and registered as a non-profit company under section 25 of the Companies Act, 1956. As per the memorandum of association, the liability of each member is limited and income and property of the BCDA shall be applied solely towards the promotion of the objects and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise to any member of BCDA. It has almost 34000 members who are engaged in wholesale and retail and sale of drugs on the state of West Bengal. BCDA has the three structured as three tier organisation viz. Zones Committees (214), Districts Committees (24) and the State. Both District and Zone Committees is constituted for the period of two years. BCDA has given directives to all its members to not to sell the medicine on a discounted price below MRP. All retailers were compelled to display "No Discount" pamphlets in their shop. In order to ensure strict compliance of its directives, BCDA has been carrying out vigilance operations to identify the retailers defying the directions issued by it, and has even forced the defiant members to shut their shops as a punishment measure. This practice of BCDA is alleged to have resulted into directly or indirectly determining, the sale prices of drugs by prohibiting its retailers members from giving discounts on MRP. This has curtailed the freedom of trade for the retailers and that discount is not being passed on the end consumer.

Issues:

(i) Whether BCDA and its District and Zonal Committees were engaged in anti-competitive practices in violation of the provisions of section 3 of the Act?

(ii) If finding on the issue No. (i) is in the affirmative, whether the members/office bearers of the Executive Committee of BCDA and its District and Zonal Committees are also liable for the violation of section 3 of the Act?

Issue (i): As per the Articles of Association of BCDA, any person, firm or company carrying on the business of chemists and druggists and of Dealers of Drugs, Medicines and of 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 this State (i.e. 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 member of BCDA. Since every member of BCDA is actually a person engaged in an economic activity, the obvious inference is that he/she falls squarely under the definition of “enterprise”. Thus, BCDA which comprises of enterprises is an association of enterprises.

Section 3(3) of the Act not only covers agreements entered into between enterprises or associations of enterprises but also the practice carried on or decision taken by any association of enterprises engaged in identical or similar trade of goods or provision of services. Thus, all actions and practices of BCDA including those relating to issues such as alleged fixation of trade margins, issuing circulars directing its retailer members not to give discount on the MRP in the sale of medicines to consumers, conducting raids in order to ensure strict compliance of its directives, carrying out vigilance operations to identify the retailers defying the direction issued by it, forcing the defiant members to shut their shops as a punishment measure etc. would fall squarely as “practice carried on” or “decision taken by” an “association of enterprises” under Section 3(3) of the Act.

Commission analysed the minutes of the various Executive Committee meetings took place during 2011-2013. Most of the meetings organised during this period have issues like, how to tackle undercutting, maintaining uniform prices, action against chain stores, and action against the members defying the decision of the Association. Based on the decision taken by the association in its executive meetings an organisational movement was launched to fulfil the Agenda of uniform pricing and action against chain store (who are not member of Association).

BCDA in its defence has raised several contention like ignorance of law, no action was taken against any defying members, no vigilance activity was carried out to monitor the implementation of the association order, however all such contention were failed as the minutes suggested that association was fully aware of their organisation movement and objectives they have to achieve through this movement. Coercive method was used to force retailers and wholesaler to comply with the decision of the association. Further retailers were forced to have “No Discount” pamphlets at their shops. BCDA has supported picketing, collection of fines, stoppage of supplies and other measure taken against the non-co-operating parties by the various District/Zonal/Committee. None of the BCDA Executive Committee meeting has condemned or even disapproved the said action.

The Commission notes that fixed trade margins for the wholesalers/retailers respectively are only possible if they sell drugs on their MRP. However, faced with increased competition in the market, accentuated by the opening of retail chains in the last few years, the BCDA decided to enforce sale of drugs at MRP so as to protect the interests of its members. Accordingly, it has launched an organizational movement w.e.f 01.04.2012, to ensure that no retailer or wholesaler grants any discount and that drugs are sold only at their MRP. It has

enforced its decision/diktat through its District/Zonal and Vigilance Committees, and has acted in a concerted manner to ensure that drugs are sold only at their MRP. The BCDA has decided that drugs be sold only at their MRP and that no discounts be offered implies that the maximum retail price has been decided to be the ruling price, thus precluding the possibility of drugs being sold at prices lower than the MRP. The BCDA has indulged in the concerted anti-competitive practice of sale of drugs only on MRP. The collusive action has been taken to ensure that the trade margins do not get determined on a competitive basis and are uniform for all the wholesalers and retailers respectively.

The Maximum Retail Price only sets the upper most price boundary beyond which a product cannot be sold. It does not preclude sale of drugs below the MRP. As can be observed from the replies and oral submissions of the parties on record, there are large number of retailers who are willing to offer discounts on MRP to the customers. However, the concerted and collusive activities of BCDA members have prevented price competition between one retailer and the other. The same has resulted in fixation of the selling prices as the drug prices are not allowed to be determined by the independent market forces. Such conduct of the BCDA contravenes the provisions of Section 3(3)(a) read with Section 3(1) of the Act. When sale of drugs is determined to take place only at MRP, on account of agreement entered into amongst the members of the BCDA, then such a trade practice causes or is likely to cause an appreciable adverse effect on competition, especially when almost all the retailers and wholesalers are members of the BCDA.

Issue (ii): The Anti-competitive decision were taken / ratified by the office bearers and executive committee members of BCDA in the Executive Committee meetings of the Association held from time to time. Office bearers in their common reply to the DG report have taken the plea regarding non-application of the provisions of Section 48 of the Act on them as their liability is limited as per the Memorandum of Association of BCDA, being non-profit company registered under Section 25 of the Companies Act, 1956. However commission held that provisions of Section 27 of the Act are sufficient to make office bearers liable for contravention without aid and assistance of the provision of section 48 of the Act. Further there is no distinction made for the company and company under section 25 of the Companies Act, 1956 under section 48 of the Act. Thus office bearers and executive members of the BCDA are guilty of contravention and are liable to be punished.

Having given due consideration on the issue of quantum of penalty as well as the totality of facts and circumstances, the Commission decides to impose a penalty on the BCDA & its those office bearers who are directly responsible for running its affairs and play lead role in decision making @10% and on the executive committee members @7%, of their respective turnover/income/receipts based on the financial statements filed by them.