

# Kluwer Competition Law Blog

## Indian competition authority finds that pharmaceutical companies and their trade association infringe competition law

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### Background

On 3<sup>rd</sup> June 2019, CCI delivered yet another order, wherein it held the Madhya Pradesh Chemists & Druggists Association along with other district-level Associations and Pharma Companies to be in contravention of the Competition Act.[1] According to the commission, the practice of demanding ‘No Objection Certificates’ (NOCs) or ‘Letters of Consent’ (LOCs) by the Associations from the Pharma Companies for the appointment of Stockist was a clear violation of Section 3(3)(b) read with Section 3(1) of the Act.[2] This is not the first time that the Competition Watchdog of the country has penalised Chemists & Druggists Associations (hereinafter “CDAs”). The Commission, in 2015, had penalised the CDA of Goa for similar conduct of demanding NOC for the appointment of Stockist from Pharma Companies.[3]

It was alleged by the informant that the CDAs mandated procurement of NOC/LOC from them prior to appointment of a distributor as a Stockist for a pharma company in a territory. These Certificates/Letters are modes of authorisation by these associations to conduct business in the territory and appointment as Stockists or ‘Carrying & Forwarding’ agents of a pharma company. Such approval is alleged to result in limiting consumer access to every individual/distributor who wishes to enter the market due to unfair preference given by associations to some distributors, and ultimately limiting supply of pharma products in the market. It was further alleged by the Informants that the practice of succumbing to requirements of associations makes Pharma companies complicit to the anticompetitive conduct of the associations.

The Commission had relied upon the evidence collected by the DG during its investigation which included E-mails & Letters sent by the President of the Madhya Pradesh CDA (OP-1) to various Pharma Companies (OP-12 to OP-14) to ensure compliance of obtaining approval from the associations for the appointment of Stockists.[4] The DG while evaluating the Appreciable Adverse Effect on Competition (“AAEC”) during its investigation, was of the opinion that such conduct by the associations resulted in the foreclosure of market and limitation of supplies of pharma products in the market of Madhya Pradesh.[5]

### Major takeaways from the Order

1. Placing reliance on the case of *CCI v. Bharti Airtel Limited*[6], it was contended by the OPs that the Commission did not have the jurisdiction to adjudicate upon the matter related to drugs and pharmaceuticals and that State Drugs Control Department was the only competent authority to take cognizance of the matter.

The Commission while rejecting the contention of the OPs laid down that the legislative intent behind the Competition Act was to act as a regulator in the event of unfair trading within respective Sectors, and hence the “regulations of such sectors and the Act complement each other and have to be interpreted harmoniously”. [7]

2. Relying on the Supreme Court’s decision in *CCI v. Steel Authority of India*[8], it was contended by the Himalaya Drug Co. (OP-12) that the Commission had erred in its application of Section 26(8)[9] to order a further investigation by the DG into the matter and should’ve made a further enquiry on its own as it cannot refer the matter back to the DG.

The Commission interpreted the word “inquiry” as used in the Section, and was of the view that the same is inclusive of every possible manner or procedure which results in proper adjudication in the matter. Thus, it laid down that further investigation by the DG is a subset of inquiry by the Commission and it is within its power to refer the matter back to DG for further investigation.

3. One of the contentions of the OPs was that they were not provided with the opportunity to conduct a cross-examination of the witnesses during the proceedings of the case. The Commission negated this argument on factual grounds that the opportunity was not availed by the OPs when due time and an opportunity was provided for the same, and the OPs which did apply for cross-examination was granted the opportunity. The Commission interpreted the scheme of General Regulation, 2009[10], and laid down that cross-examination may be allowed when the information provided to an investigation is based on “personal knowledge”[11] of a party, otherwise in cases of documentary evidence, the same may be rebutted vide affidavits.
4. Another stand of the Pharma companies was that abiding by the diktats of such associations is necessary from the standpoint of operation of a business in the market. However, while agreeing to some extent with the OPs, the Commission went on to say that the practice of seeking approvals for the appointment of Stockists is hindering with the independent decision-making capacities of the Companies.[12] Such hindrance results in foreclosure of the market by not providing equal opportunity to individuals to enter the market, while also violating the liberty of companies to enter into an agreement with entities of their choice. The Commission was of the opinion that the Pharma companies, instead of submitting to the associations should take a stand against these companies, otherwise they can be held liable to be complicit in such anti-competitive conducts of the associations[13].

## Conclusion

The commission in this order contemplates the reason for the continuing acceptance and complicit actions of pharma companies with the anti-competitive conduct of trade associations.[14] This is especially after various orders of the commission trying to uproot similar practice of such associations.[15] The Commission, thus, has interestingly ordered the Madhya Pradesh CDA to organise five, and CDA Indore to organise one, Competition Awareness Programmes in their

territories within six months of this order. They have also ordered the Pharma Companies to put in place Competition Compliance Programmes in their work culture. The order of the Commission is interesting as it expects the ordered parties to comply with the Competition Act in letter & spirit. The Commission wishes to achieve awareness within the employees of the trade-related organisations regarding anti-competitive practices of trade associations, as it may avoid companies to succumb to them in future.[16]

The Commission, vide this order, once again upheld its objectives as a watchdog overarching various sectors, which will interpret the provisions of the Act in letter and spirit to curb anti-competitive practices which result in hindrance to free and fair trade and independent decision making in the Markets of India.

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[1] *Madhya Pradesh Chemists and Distributors Federation (MPCDF) Vs. Madhya Pradesh Chemists and Druggist Association (MPCDA) & Others*, Case No. 64 of 2014.

[2] Section 3, Competition Act, 2002.

[3] *M/s Royal Agency vs. Chemists & Druggists Association, Goa & Others*, Case No. 63 of 2013.

[4] *Supra*, n. 1, at 14 & 15.

[5] *Supra*, n. 1, at 18.

[6] *Competition Commission of India v. Bharti Airtel Limited*, (2018) SCC online SC 2678.

[7] *Supra*, n. 1, at 57.

[8] *CCI vs. SAIL*, (2010) 10 SCC 744.

[9] Section 26(8), Competition Act, 2002.

[10] The Competition Commission of India (General) Regulations, 2009, (No. 2 of 2009).

[11] *Supra*, n. 1, at 60.

[12] *Supra*, n. 1, at 86.

[13] *Supra*, n. 1, at 93.

[14] *Supra*, n. 1, at 86.

[15] MM Sharma, *CCI Imposes Penalties On the Chemists' Associations in State of Gujarat and Three Pharma Companies for Indulging in Practice of "No Objection Certificate" Before Appointment of Stockists*, Mondaq, 08 Jan 2019, available [here](#).

[16] *Supra*, n. 1, at 104.

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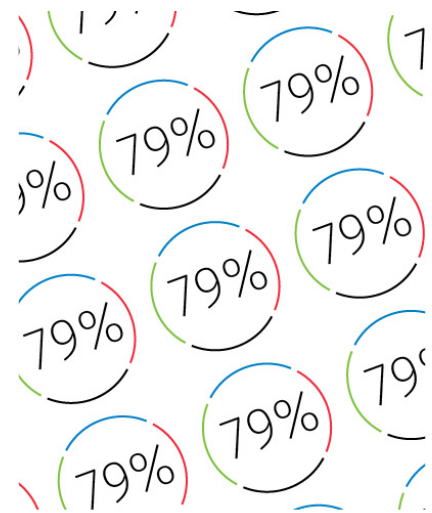
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