



Competition Law Update: Seeking No-Objection Certificates Limits Supplies – CCI Finds Pharma Companies and Trade Associations in Cahoots Yet Again.

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Background:

On receipt of information from a member of the chemist trade association alleging contravention of Section 3 of the Competition Act 2002 (“Act”) by rival trade associations including Madhya Pradesh Chemists and Druggist Association (“MPCDA”) and pharmaceutical companies, the Competition Commission of India (“CCI”) directed the Director General (“DG”) to investigate the matter. The crux of the allegations pertained to the influence exerted by MPCDA and its district factions (by way of issuance of no-objection letters) on the process of appointment of stockists by pharmaceutical companies in Madhya Pradesh.

The DG’s investigation revealed differing conduct of pharmaceutical companies with respect to their dealings with trade associations for appointment of stockists – one set of companies were able to demonstrate with evidence that they acted independently of MPCDA’s diktats while the other set were found to be complicit in their conduct with MPCDA.

With this background the CCI heard the parties, and on 03 June 2019 and passed an order penalizing MPCDA, Indore Chemists Association, Himalaya Drug Company (“Himalaya”) and Intas Pharmaceutical Limited (“Intas”) for contravention of provisions of Section 3 of the Act. The CCI observed that by mandating NOC for appointment of stockists, the potential stockists have been discouraged from entering into the distribution channel to ensure wider coverage to consumers and pharma companies.

For such contravention the CCI has imposed a penalty of **INR 18.59** crores (~ USD 2.7 million) and **INR 55.59** crores (~ USD 8.4 million) on Himalaya and Intas respectively. The CCI also imposed concomitant penalties on the office bearers of these entities held to be liable for the company’s conduct.

Key Takeaways:

- a. **Jurisdiction lies with CCI when assessing conduct:** The CCI did not see any conflict between between sectoral regulations (such as the Drug Price Control Order) and the Act. While the CCI acknowledged that in certain cases remedy for refusal to supply drugs may lie with the sectoral regulator, it stated that where refusals to supply drugs flow from diktat of an association, it takes a competition angle. Such issues are within the jurisdiction of the CCI as it is mandated to make the markets work in a fair, competitive and unfettered manner. [Paras 63 – 66]
- b. **Investigation is a subset of “inquiry”:** In the present matter, on receipt of the investigation report by the DG and after reviewing the same, the CCI impleaded additional parties and directed further investigation into the matter by passing an order under Section 26(8) of the Act. On receiving objections from the parties that 26(8) only envisages ‘inquiry’ by the CCI and not ‘investigation by the DG, the CCI observed that *investigation is a subset of inquiry and remanding of the matter to the DG for further investigation is within the scope of the inquiry by the CCI*. Further, it was noted that no prejudice was caused to the parties as they were granted an additional opportunity to present their case before the DG. [Paras. 67 – 70]
- c. **Despite CCI intervention, the practice of NOC subsists:** As with most previous investigations into NOC related cases, the DG and the CCI relied on certain email communications to hold the trade association liable. On an email written by Himalaya to MPCDA, the CCI noted that such emails were still being issued since the practice of NOC was still in existence. The CCI noted that MPCDA been serious about complying with the CCI’s directions it would have responded to the email condemning such practices instead of remaining silent. According to the CCI, MPCDA’s clout in the appointment of stockists is also evident from the fact that despite

submission of all relevant documents by the Informant, Intas initiated appointment only after MPCDA's assent. [Paras 90 and 97]

- d. **NOC is a hinderance to fair competition:** The CCI noted that requirement to seek NOC is a hinderance for both stockists and pharmaceutical companies as it dissuades expansion into the market. Ideally every pharma company should be free to select distributors as per their preference without any outside influence. Given that pharma companies are following the diktats of the associations instead of reporting them to the CCI, they are complicit in such anti-competitive activity. [Para 138]
- e. **Evidence did not support DG's finding against Torrent Pharmaceuticals Limited:** Differing with the DG's recommendation, the CCI noted that Torrent's internal KYC procedure was legitimate, and a stray instance of divergence was not enough to suggest that Torrent sought NOC for appointment of stockists. [Paras 125-128]
- f. **Competition Compliance Programs a must:** The CCI has recognized that both pharma companies and the trade associations should foster the culture of competition compliance. Here, *the CCI directed Himalaya and Intas to sensitize its employees with instituting a **Competition Compliance Program** and file a compliance report within 180 days from receipt of the order. Similar directions were also issued to the contravening trade associations.* Additionally, the CCI observed that with the associations being the converging points for its members, they should take the lead in educating them about the consequences of violation of the Act. [Paras 161-163]

ELP Comment:

First, the CCI's repeated interventions in the process of appointment of stockists demonstrates that it is deeply concerned about the practice of trade associations in meddling with the stockists appointment process of the pharmaceutical companies and that it will continue to monitor this in future.

Second, in context of the pharmaceutical sector, the CCI has once again sought co-operation from the industry in enforcing compliance with the Act. It has further emphasized on the need for competition compliance programs and accordingly it would be in the interest of trade associations and pharmaceutical companies to have such in-house program in place. In fact, the CCI's advisory on compliance program could also be relevant for other industry sectors who would benefit from having a robust compliance program in place.

The CCI's order may be accessed [here](#).

We trust you will find this an interesting read. For any queries or comments on this update, please feel free to contact us at insights@elp-in.com.

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