

Baby Steps of Competition Law Jurisprudence in Pharmaceutical Sector

K.K. Sharma*

November and December 2016 have seen a good number of orders by COMPAT. It was a culmination of a large number of hearings in the preceding months. One of the orders passed by COMPAT in concluding month of preceding year was in pharmaceutical sector. Although only one order but it disposed of more than one appeals pending before COMPAT. Despite being voluminous, this order barely goes into the details of the issues. Only two aspects- poor investigation and mechanical acceptance of the report by the Commission-proved to be the nemesis of all the labour and deliberations of the lower authorities for more than four years. The order, once again (as if it was needed), etches in bold relief the basic dictum that 'principles of natural justice' are inviolable. What this COMPAT order says is that unless investigation is up to the mark and if the investigation which is not up to the mark is not made up to the mark by the Commission by using its authority, there is hardly any future for any outcome arising from such deliberations.

The author who not only was closely involved in drafting of regulations for the functioning of the Commission but also developed the Antitrust Division of CCI to successfully deal with the reports of DG and take it to logical conclusion discusses the order passed by COMPAT.

The readers may recall an article published in March, 2016 issue of Competition Law Reports (CLRs) wherein a discussion was made on various prevailing anti-competitive practices in pharmaceutical sector which were dealt with by the Competition Commission of India ("CCI"/"Commission") in a number of successive orders. A look at the concluding paragraph from that article would almost prove to be prophetic. For a ready reference, the last and concluding paragraph in the above mentioned article is being reproduced below:

"The overview of the Pharmaceutical sector from the perspective of competition law shows that the competition law jurisprudence is yet to firm up in India. However, going by the instances in nearly similar situations, it can be seen that there is a rich history of competition law jurisdiction in other older jurisdictions which may come handy as we move along the journey of competition law enforcement."

As discussed in that article, the issues which have been taken note of by the

* Chairman, KK Sharma Law Offices and ex Director General and Head of Merger Control and Antitrust Divisions, CCI. The author can be contacted on kksharmairs@gmail.com or kksharma@kkslawoffices.com.

Commission as being violative of competition law, on which a number of multiple orders have been passed by the Commission, are being summarised below:

1. Establishment of a practice of issue of "No Objection Certificate" or "Letter of Consent/Cooperation" (NOC/LOC) from respective District/State Chemists and Druggists Association affiliated to All India Organisation of Chemist and Druggist Association of (AIOCD) which need to be furnished to the pharmaceutical companies by the prospective stockist for making an application to be appointed as a stockist.
2. The practice of obtaining Product Information Service (PIS) approval by the pharmaceutical companies from the respective State Chemists and Druggists Associations affiliated to the AIOCD. As has been recorded in the investigation of Director General (DG) as well as the order of the Commission or the order of the Competition Appellate Tribunal (COMPAT), the pharmaceuticals companies have to obtain PIS approval from the respective chemists and druggists associations affiliated to AIOCD before any new product can be introduced by them in the market. This PIS approval also entails a payment of a prescribed charge for the purpose of publication of the product information in the PIS bulletin which is published in a state wise format. This PIS bulletin is also, generally, a part of the magazine published at periodic intervals by respective State Chemists and Druggists Associations affiliated to AIOCD. Generally speaking, the charges are payable on a state wise basis except in Maharashtra where the district wise system is prevalent. This product information covers the information as per proforma (V) of the Drug Price

Control Order (DPCO) and its anti-competitive impact.

3. The issue of fixed trade margins being followed by various pharmaceutical companies. It was alleged by the information and held by the DG that industry follows a practice of fixing trade margins both for retailers and for wholesalers. The figures of these margins may slightly vary while some of the pharmaceutical companies may be giving 16% to retailers and 8% to wholesalers. Others may follow a pattern of 20% for retailers and 10% for wholesalers but the practice of fixing the trade margins is quite in vogue in which the maximum margin allowable to a customer is pre-fixed at the level of wholesalers as well as retailers. Generally, this is followed and enforced.

4. The instances of boycott which pharmaceutical companies frequently face on their products by AIOCD and its affiliated State/District Chemists and Druggists Associations for enforcing requirement of NOC/LOC, PIS approval and fixed trade margins. It was seen that in the allegations in the information as well as in the report of DG that pharmaceutical companies often stop supplies to the stockiest if they are in receipt of a threat of boycott of sale/ purchase of the products of the company by AIOCD and its affiliated State /District Chemists and Druggists Associations.

It may be recalled that the similar issues have come up in different informations before the Commission filed by various Chemists from across the country. The issue of multiplicity of informations arises from the fact that AIOCD has a branch affiliated in every state and further down the pyramid in every district there is an association of chemists & druggists called by whatever name. Thus, from time to time, different people have filed informations emanating from

the carrying on of these practices by the associations at different levels in various states. In most of the instances, the people who have come forth with the information before the Commission are either the retailers or the wholesalers to whom supplies were disturbed on account of these widely prevalent and substantially old anti-competitive practices. It was for this reason that there were not one or two informations which were filed before the Commission and disposed by the Commission but there were a large number of multiple informations which were filed before the Commission and, on having been held to be resulting in violation of competition law, have travelled to the COMPAT under various names and numbers. The cases and the appeals before COMPAT disposed of by this order of COMPAT dated 09.12.2016, putting all these appeals together by a single consolidated order, are as under:

S. No.	Appeal No.	Appellant
1	21/2013	1. All India Organization of Chemists & Druggists (AIOCD) 2. Mr. J.S. Shinde, President, AIOCD 3. Mr. Suresh Gupta, General Secretary, AIOCD 4. Mr. Sankha Roy Choudhury, Joint Secretary, AIOCD 5. Mr. M. Arulkumar, Treasurer, AIOCD
2	06/2014	1. All India Organization of Chemists & Druggists (AIOCD) 2. Mr. J.S. Shinde, President, AIOCD 3. Mr. Suresh Gupta, General Secretary, AIOCD

		4. Mr. Sankha Roy Choudhury, Joint Secretary, AIOCD 5. Mr. M. Arulkumar, Treasurer, AIOCD
3	07/2014	1. All India Organization of Chemists & Druggists (AIOCD) 2. Mr. J.S. Shinde, President, AIOCD 3. Mr. Suresh Gupta, General Secretary, AIOCD 4. Mr. Sankha Roy Choudhury, Joint Secretary, AIOCD 5. Mr. M. Arulkumar, Treasurer, AIOCD

From the above description, it is seen that a large number of appeals were disposed of by this common order by COMPAT on 09.12.2016.

If we look in the first 141 pages of the 192 pages appellate order of COMPAT, in this matter, we find that it is only replete with the details of these appeals and the facts and findings of DG and the judgements of the Commission in those cases. These need not be repeated here as the basic core issues running through all these orders have already been summarised in the beginning of this write up. It may also be mentioned that, as stated in the previously referred to article of Competition Law Reports of March, 2016, there were dissenting orders in nearly all these cases in which some of the members of the Commission either passed dissenting or separate orders if they either did not agree with the majority order on some of the issues or felt differently while concurring with the outcome of the majority order and passed separate orders. There is no need to go into the specifics of various instances as that does not add any value to discourse on the topic under discussion. As

mentioned in the beginning, there are only four nearly common issues on which the information came before the Commission and travelled onwards to COMPAT. These issues have well been enumerated in the beginning of this write-up and, therefore, need not be repeated again here. As regards the issue of dissenting judgement is concerned, the same has been frequently covered in the media and earlier articles where a series was being written on the significant dissenting orders which might prove to be of great help in tracing the evolution of competition law jurisprudence in the country as the time passes and we get any opportunity to look back. That series included an article or these very questions. That article was titled as "Counter Point-III: Anticompetitive Practices in Pharmaceutical Sector".

The actual discussion on the merits of the case in the order of the COMPAT dated December 09, 2016 begins from page number 142 of the order onwards. The main grievance of the appellant has been that the investigation conducted by DG was vitiated due to violation of the provisions of the Act and the regulations and also principles of natural justice in as much as the DG relied upon the material collected during the investigation without giving any opportunity to the appellant to explain the same. Another argument of the appellant has been that statements of some of the persons were recorded by the DG and were relied upon in support of the findings recorded by him on the four allegations summarised above in the beginning of this article but no opportunity was given the appellants to cross examine those persons. Further, it was argued by the appellant that as regards the Commission's finding on the recommendations of the DG are concerned, the Commission mechanically approved the findings and conclusions recorded by DG on all the four issues without even taking into

The main grievance of the appellant has been that the investigation conducted by DG was vitiated due to violation of the provisions of the Act and the regulations and also principles of natural justice in as much as the DG relied upon the material collected during the investigation without giving any opportunity to the appellant to explain the same.

consideration the objection raised by appellants before the Hon'ble Commission.

In addition to above arguments, the appellants also raised the issue that many of the practices came into existence on account of the recommendations made by Mashelkar Committee and this was claimed that it was a matter of record that a practices of NOC/ LOC was not mandatory and hundreds of wholesalers/ stockiest /distributers were appointed throughout the country without NOC and this fact was completely over looked by the DG and, therefore, the investigation lacked sustainability. After referring to the report of the DG, the appellants argued that there was no tangible evidence to show that that the appellants had made obtaining of NOC as a pre-condition for appointment of wholesalers/stockist/distributers and that the absence of NOC had adversely affected, limited or restricted supply of medicines in the markets or the consumers were not

getting medicines because of this practice.

Before going into the merits of either arguments extended by the appellants or looking into the merits of the order passed by the Commission or the quality of the investigation done by the DG, Hon'ble COMPAT considered it appropriate to record the detailed provision of Sections 3(1), (3) and (4), Section 19(1) and (3), 26, 27, 36(1) and 48 of the Act and regulations 19, 21 and 41 of the regulations. From page no. 144 onward till page no. 161 of the order of COMPAT, the above provisions have been extracted. Thereafter, a general discussion on these provisions of law and regulations in a narrative form is given in the appeal order from page no. 161 till page no. 167. The order of COMPAT only begins after the survey of the aforementioned provisions of the Act and regulations and a short discussions on them by COMPAT by stating that:

"The above survey of various provisions of the Act and the Regulations shows that even while amending the Act by Act 39 of 2007 and Act 39 of 2009, Parliament consciously decided to retain provisions relating to adjudicatory functions of the Commission in their full vigour and the mere fact that by virtue of substituted Section 22, the business of the Commission is required to be transacted in its meetings and the business would necessarily include exercise of adjudicatory functions/powers, cannot lead to an inference that while deciding the allegations contained in the information filed or reference made under Section 19(1)(a) and passing orders under Sections 27, 33, 39, 42, 42A, 43, 43A, 44 and 45, the Commission exercises purely administrative power or discharge administrative functions or that while passing orders under those sections and also under Section 28, which can have far-

reaching impact on the rights of the parties, the Commission is not required to act as per the accepted standard of fairness and render just decision after complying with the principles of natural justice as expounded by the Courts across the globe including the Supreme Court of India. Rather, on the basis of case law developed in this country, it must be held that like any other adjudicatory body, the Commission is bound to comply with various facets of the principles of natural justice and its proceedings confirm to the objective standard of fairness".

Thus from the above observations of the COMPAT, it is quite obvious that COMPAT is holding Commission responsible and duty bound for ensuring that various aspects of the principle of natural justice are complied with while passing its orders and its proceedings should conform to the objective standard of fairness.

Further to strengthen its point of view, Hon'ble COMPAT has relied on the judgement by the three-judge Bench of the Hon'ble Supreme Court in *CCI vs. Steel Authority of India Limited and Another - (2010) 10 SCC 744* and the case of *Rangi International Limited vs. Nova Scotia Bank and others (2013) 7 SCC 160*. The following observations of Hon'ble Supreme Court in the case of *CCI vs. SAIL* has been quoted by COMPAT as under:

CCI v. Steel Authority of India Limited and Another - (2010) 10 SCC 744

"The various provisions of the Act deal with the establishment, powers and functions as well as discharge of adjudicatory functions by the Commission. Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the

complaints or information leading to invocation of the provisions of Sections 3 and 4 read with Section 19 of the Act”.

After this COMPAT again quoted the observations of a two-judge bench in the case of *Rangi International Limited v. Nova Scotia Bank and others*, (2013) 7 SCC 160, the COMPAT extracted the observations of Supreme Court as under:

“The Competition Commission as well as the Competition Appellate Tribunal, are exercising very important quasi-judicial functions. The orders passed by the Commission and the Appellate Tribunal can have far-reaching consequences. Therefore, the minimum that is required of the Commission as well as the Appellate Tribunal is that the orders are supported by reasons, even briefly.”

Going by the above observations, Hon’ble COMPAT held that the entire exercise of quasi-judicial findings by CCI or the Appellate Tribunal has to ensure that the orders are supported by reasons even briefly. After having said this, Hon’ble COMPAT made an observation that neither the orders passed by the Commission under Section 26(1) nor the investigation report submitted by DG contain any indication that the appellants were guilty of abuse of dominant position in contravention of any of the clauses Section 4 (2) of the Act. Further, the Hon’ble COMPAT observed that while directing that copies of the investigation reports be given to the appellants and others, the Commission and for that reason none of the three members who recorded separate opinions expressed disagreements with the findings recorded by DG or gave any indication that they propose to hold the appellants guilty of acting in violation of Section 4(2) of the Act. One of the members of the Commission Shri R. Prasad, in his order, held that appellant number 1 is in a dominant position in the market of

medicines in Orissa and that it had acted in violation of Section 4(2)(a)(i), 4(2)(b)(i) and 4(2)(b)(c) of the Act and Shri S. N. Dhingra made general observations albeit without reference to any of the clauses of the section 4(2) that appellant number 1 is guilty of abuse of dominant position. Further, Hon’ble COMPAT held that, no doubt, findings/observations recorded by the two members on the issue of alleged abuse of dominant position by appellant number 1 are inconsequential, the same do reflect an extremely casual approach adopted by them in dealing with a serious issue which could adversely affect the appellants. The final damning remark of COMPAT was yet to come. It came when Hon’ble COMPAT observed that:

“It is difficult to appreciate as to how the members of a quasi-judicial body could act in complete disregard of the principles of natural justice which are statutorily engrafted in Section 36(1) of the Act and record an adverse finding against a person without giving him/it a reasonable opportunity of representing his/its cause”.

Thereafter, Hon’ble COMPAT relied on Mashelkar Committee recommendations to which a reference was made by the appellants. Mashelkar Committee consisted of an eminent scientist, eminent lawyer and former Police Commissioners, officials of the key ministries / Department of Central and State Governments, drug manufacturer, trade, Consumer and professional association. The Mashelkar Committee has submitted a report in November, 2003 titled as “A Comprehensive Examination of Drug Regulatory Issues, including the problem of spurious Drug”. Thereafter, this entire Mashelkar Committee reports as well as MOUs executed by appellants with IDMA and OPPI are extracted in their entirety in the order of Hon’ble COMPAT.

The order of the COMPAT, thereafter begins from page 186 onwards in which

Fixing of trade margins is done by the manufactures and not by the association and COMPAT expressed agreement with them and disagreed with the majority view of the Commission that trade margin to the wholesalers and the retailers have the effect of determining the sale and price of the drugs in the market in contravention of Section 3(3)(a) of the Act.

the COMPAT has pointed out the contradictions in the report of DG which has been mechanically accepted by the Commission without further elaborating reasons for acceptance of the same and the portion of the report which go on to contradict the final findings have also been highlighted in the order of Hon'ble COMAPT. In the end, Hon'ble COMPAT terms such findings which are not on the basis of any evidence as conjectural observations contradicting the earlier observations in the same report. A reference was made to an earlier order passed by COMPAT in appeal number 21 of 2014 in Chemists and Druggists Association, Firozpur city vs. CCI and others, in which it was noted by the Tribunal that several hundred stockiest were appointed by various pharmaceutical companies and yet pharmaceutical companies like Abbott India Ltd., Glenmark Pharmaceuticals, M/s. Invida India Private Limited, M/s. Macleods Pharmaceuticals Ltd., Sun Pharmaceuticals Industries Ltd. and

Zuventus Healthcare Limited had appointed several stockiest without insisting of obtaining of NOC from Chemist and Druggist Association, Firozpur.

Though COMPAT has refrained from making a surmise that in different parts of the country stockiest were appointed by various pharmaceutical companies without insisting of production of NOC from concerned State/District Chemists and Druggists Associations but it added that, in absence of cogent evidence, the Commission could not have approved the findings recorded by the DG that the obtaining of NOC had been made mandatory by Appellant number 1 and its affiliates and the same had effect on the limiting or restricting the market/supply of medicines or that the consumer interest had been adversely affected on the count. Similarly, the COMPAT dismissed as conjectural observations on the issue of PIS charge where DG, despite adverting to the provisions of Drugs (Prices Control) order, 1995 held these changes to be a violation of competition law. As this was not agreed to by Member R. Prasad and Dr. Geeta Gauri, the COMPAT finds the findings of these two members right and did not agree with the majority order and, once again, held that the Commission did not bother to deal with the rightful objections of the appellants and mechanically approved the findings recorded by DG.

On the issue of trade margins being violative of Section 3(1) read with Section 3(3)(b) of the Act, Hon'ble COMPAT did not approve of DG simply relying upon MOUs executed between appellant number 1, IDMA, OPPI for returning the findings that same have directly or indirectly led to the determination of the purchase of sale price of the drugs in violation of the Section 3(3)(a) of the Act. Despite having taking cognisance of the industry practice of granting 8% to 16% margins on scheduled drugs/imported drugs and 10% to 20% non-scheduled

drugs to the wholesalers and retailers respectively and that, in terms of para 19 of Drug (Prices Control) Order 1995, the margin is 16% for retailers. Here again, Hon'ble COMPAT agreed with the minority view of Sh. R Prasad and Dr. Geeta Gauri that fixing of trade margins is done by the manufactures and not by the association and COMPAT expressed agreement with them and disagreed with the majority view of the Commission that trade margin to the wholesalers and the retailers have the effect of determining the sale and price of the drugs in the market in contravention of Section 3(3)(a) of the Act.

About the last issue of boycotting of defaulting wholesalers and retailers, once again, Hon'ble COMAPT held with the Commission mechanically approved of the findings of the DG which was not supported by any evidence and therefore was not legally sustainable as the Informant did not adduce any cogent evidence to support the allegations contained in the information about the boycott of any wholesalers or stockiest at the instance of Appellant number 1 or its affiliates. Hon'ble COMPAT stated that the DG did not collect any evidence to show that Appellant number 1 had arbitrarily resorted to boycott or enforce boycott against any particular wholesalers/stockiest/distributers. Thus, holding that in absence of any cogent and legally admissible evidence, the DG and the Commission were not at all justified in returning and affirmative finding on the issue. Thus the penalty imposed by the Commission on appellant was held to be not sustainable and the appeals were allowed.

The parting shot is extremely significant. It says, however if the Commission were to receive any fresh information or suo-moto comes to know that the respondents or any other similarly situated persons have/had resorted to anti competitive practices like mandatory NOC, then this order shall not prevent them from ordering an

investigation under Section 26(1) of the Act and take appropriate decision in accordance with law.

The entire order is a great commentary on the quality of investigation and how it should be treated by the Commission. The parting shot in the order which says if any anti competitive practice comes to the notice of the Commission either on its own or through an information the Commission is free to take cognisance is quite interesting and speaks volumes despite looking routine. It says, in so many words that COMPAT despite allowing appeals and passing caustic remarks on the quality of investigation and the manner of acceptance of such reports by the Commission does not commit or claim that the alleged anti competitive practices are existing or not existing in the market. As enumerated above, it does not either agree or disagree on whether the practice of insisting on NOC exists or not Or whether it is universal or not Or whether it is being insisted or not insisted upon all over the country or in some places. All that has been left wide open by it without giving any opinion or committing either way.

What this order does say is that unless investigation is up to the mark and if the investigation which is not up to the mark is not made up to the mark by the Commission by using its authority, there is hardly any future for sustaining it. By high lighting the contradictions in the report of DG wherein the inside portions of the report do admit of not having found any concrete evidence but the final findings recommends contravention of the Act, the COMPAT has also seriously commented on the quality of drafting of the report of DG and how the Commission should ensure that such infirmities are taken care of before the report of the DG is exposed to public at large. All these observations are interesting especially in the light of the provisions of Section 36 of the Act.

Section 36 of the Act very clearly says that principal of natural justice have to be followed by the Commission. The consequences of violations of competition law are huge. When consequences of any powers given to any organ of the State are serious, these have to be seriously deliberated and seriously enforced and not casually enforced. Coming after seven years of functioning of CCI, it is a wakeup call and it essentially points out to the two actionables to the Commission and these are:

- *An investigation report which is not well done - where the basic tenets of investigation have not been followed - may not survive its own contradictions except by chance.*
- *Just a mechanical acceptance of DG report without application of mind by the Commission or its improvisation within the powers of the Commission or causing its own enquiry, if needed, by the Commission is no guarantee for getting the orders of the Commission sustained.*

Thus, the message coming from the COMPAT order is very loud and clear

and this is “put your house in order”. This is something very obvious and it was much better if this was done without having to listen from COMPAT. Hopefully, these issues will be taking care of in future . If that is done , the future orders might not meet this fate where they fail not on merit but merely on these basic technical flaws.

Clearly these are important but obviously faltering steps of evolving competition law jurisprudence in pharmaceutical sector in the country. It is hoped that with these hard raps on the knuckle , though unpleasant, would certainly lead to introspection and improved procedures and better investigations and better drafting of both the investigation reports as well as the orders of the Commission in the times to come. Otherwise , the holy war against the anti competitive practices will be failing not because these practices do not exist but because the warriors are ill equipped to wage the war in the first place and that shall be a sad commentary for any war reporter.