



COMPETITION COMMISSION OF INDIA

Case No. 05 of 2018

In Re:

XYZ

Informants

And

Indian Oil Corporation Ltd.,
Northern Region Office, Indian Oil Bhawan,
1, Sri Aurobindo Marg, Yusuf Sarai,
New Delhi - 110016

Opposite Party No. 1

Bharat Petroleum Corporation Ltd.,
ECE House, Post Box No. 7,
Connaught Circus,
New Delhi - 110001

Opposite Party No. 2

Hindustan Petroleum Corporation Ltd.,
6th, 7th & 8th Floor, Core II,
Scope Minar, Laxmi Nagar,
Delhi - 110092

Opposite Party No. 3

CORAM:

Mr. Devender Kumar Sikri
Chairperson

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Appearances

For Informants : Shri. A. Mariarputham, Sr. Advocate
Shri Avneesh Arputham, Advocate
Shri Ram Sankar, Advocate

For OP-1 : Shri Rajshekhar Rao, Advocate
Shri Harman Singh Sandhu, Advocate
Shri Prateek Bhattacharya, Advocate



सत्यमेव जयते



Shri Anandh Venkataramani,
Advocate
Ms. Sonali Charak, Advocate
Shri Sanjay P. Khare, GM-Legal
Shri Anup K. Samantaray, GM-LPG
Shri O.P. Verma, GM-LPG, S & D

For OP-2 : Shri Rajshekhar Rao, Advocate
Shri Harman Singh Sandhu, Advocate
Shri Prateek Bhattacharya, Advocate
Shri Anandh Venkataramani,
Advocate
Ms. Sonali Charak, Advocate
Shri Sushant Padhi, GM-Legal
Shri Rajender Niraanjan, Chief
Manager-LPG Distribution

For OP-3 : Shri Rajshekhar Rao, Advocate
Shri Harman Singh Sandhu, Advocate
Shri Prateek Bhattacharya, Advocate
Shri Anandh Venkataramani,
Advocate
Ms. Sonali Charak, Advocate
Shri Rajendra Jairam Lade, GM-Legal

Order under Section 26(2) of the Competition Act, 2002

1. The present information has been filed under Section 19(1)(a) of the Competition Act, 2002 (hereinafter the '**Act**') by XYZ (Confidential) (hereinafter the '**Informant/IP**') against Indian Oil Corporation Ltd. (hereinafter the '**IOCL**'/'**Opposite Party No. 1/ OP-1**'), Bharat Petroleum Corporation Ltd. (hereinafter the '**BPCL**'/'**Opposite Party No. 2/ OP-2**'), and Hindustan Petroleum Corporation Ltd. (hereinafter the '**HPCL**'/'**Opposite Party No. 3/ OP-3**') (collectively referred to as '**Opposite Parties**'/'**OPs**') alleging contravention of the provisions of Sections 3 and 4 of the Act.



2. The Informants, who have claimed confidentiality of names, are individuals engaged in the business of providing services in relation to transport of bulk LPG through tank trucks (TT) for over a decade and operate as sole proprietors of their respective enterprises. They have challenged the alleged anti-competitive terms and conditions in the Notice Inviting Tenders ('NIT'/ '**Impugned Tenders**') floated identically/jointly/parallelly in different States of India ('States') by the three public sector oil marketing companies ('**PSU OMCs**') *i.e.* IOCL, BPCL and HPCL for the transportation of Bulk LPG by road through tank trucks from the loading point to the unloading/bottling point. Though the Informants have generally raised the issues in the practice of floating joint tender by the Opposite Parties, they have specifically highlighted issues in the recent tender floated by the Opposite Parties in Delhi (NIT LPG/Bulk/TT/IOC/DL/2018).
3. The Informants have stated that the Opposite Parties (PSU OMCs) are the only enterprises operating in the LPG market in India and therefore, collectively they have a monopoly in the LPG market throughout the territory of India. It is further stated that by floating identical tenders with identical terms and conditions across different states, the Opposite Parties have compromised the competition in the procurement of tank truck services for transportation of Bulk LPG and have acted in an anti-competitive manner.
4. The Informants have alleged that the Opposite Parties have introduced identical price band in the tenders within which the bidders are forced to quote. Such price band is said to be arbitrary with no commercial basis. It has been argued that the Opposite Parties, who are competitors in the procurement of the tank truck transportation services, have shared commercially sensitive information for determination of an identical price band and the floor rates. As per the terms and conditions in the tenders, a bidder cannot quote a price above the price ceiling or below the price floor. Further, the tender documents clearly state that preference



shall be given to bidders quoting the floor price, which is a clear indication that the bids must be at the floor rate.

5. The Informants have submitted that the Opposite Parties have sought separate price bids for two categories of tank trucks, *i.e.*, 18 MT and 21 MT, for which separate price bands have been fixed. Further, even though the price of the 21 MT tank truck is much more than the 18 MT tank truck, the Opposite Parties have artificially kept the floor as well as ceiling price for 18 MT truck at a much higher level in comparison to the 21 MT tank truck, which shows the illegality of the whole process of price band determination. As an illustration, the Informants have submitted the price bands given by the Opposite Parties in the tender floated in Delhi:

	18 MT TT	21 MT TT
Lower Band (price floor)	2.7520	2.4730
Upper Band (price ceiling)	3.0416	2.7334

6. The Informants have alleged that the said determination of the price band along with the fact that the bidders have to bid within the pre-defined range is *per se* illegal and restricts competitive bidding contrary to the provisions of the Act.
7. The Informants have further objected to the payment terms under the tenders (*Clause 23 of the Special Conditions For Bulk LPG Transportation By Road*), through which the Opposite Parties have tied forty percent of the total income earned by the successful bidder (TT owner) to be paid into the fleet/loyalty card which can only be used at the petrol pump of the concerned Opposite Party. This has been alleged to be a clear case of tying and bundling as it effectively amounts to guaranteed forced sales for the Opposite Parties, thereby contravening the provisions of Section 3(4) and Section 4(2) of the Act.



8. Further, the Informants have stated that under the Impugned Tenders, one tank truck can be used to bid in only one tender, in a State in which it is registered. First preference has been given in every category to the tank trucks registered in the State where the bottling plant is located. The Informants have alleged that this requirement is entirely arbitrary and not based on any rational nexus. Representations to this effect were made by the TT owners to various Ministries in the past. In response to one such representation, the Opposite Party No.1 *vide* its letter dated 22nd February, 2018 stated that the State-wise tenders with preferential treatment for State registered tank trucks have been floated in order to promote new entrepreneurs on a PAN India basis and also to encourage the recruitment of local transporter and crew, amongst other reasons.
9. It is submitted that the delineation of the entire country into States is an arbitrary bifurcation of the geographical market and is a clear violation of the Act as well as the Motor Vehicles Act, 1988. It was stated that there are around 20,000 tank trucks presently being used in India by the Opposite Parties for the transportation of Bulk LPG. If the Informants and other similarly placed bidders have to participate in the various tenders floated by the Opposite Parties, then they will have to re-register their tank trucks with different States. This is not only a time-consuming process entailing around 75-90 days but also carries financial repercussions. Also, the Informants have alleged that the Opposite Parties are not permitting the existing transporters to re-register their tank trucks in another State.
10. It has been alleged by the Informants that the aforesaid conduct of the Opposite Parties have, *inter-alia*, led to the contravention of Sections 3(3)(a), 3(3)(d), 3(4)(a), 4(2)(a)(i) and (ii) and 4(2)(d) of the Act.



11. Based on the aforesaid facts and allegations, the Informant has, *inter alia*, prayed for initiation of an investigation against the Opposite Parties under Section 26 (1) of the Act, appropriate directions to restrain the Opposite Parties from imposing restrictive and anti-competitive conditions in their tenders and subsequent contracts with the transporters of bulk LPG and imposition of penalty under the provisions of the Act.
12. The Commission considered the information on 17th April, 2018, and decided to have a preliminary conference with the parties. Due to the confidentiality consideration, the preliminary conference was held separately with the Informants on 02nd May, 2018 and with the Opposite Parties on 05th June, 2018. During the preliminary conference, the learned counsel for the Informants reiterated the facts stated in the information and prayed for the relief sought therein.
13. The learned counsel appearing for the Opposite Parties challenged the jurisdiction of the Commission to entertain the present matter, and argued that the same falls under the sole domain of the Petroleum and Natural Gas Regulatory Board ('**PNGRB**'). It was argued that the Informants have engaged in forum shopping, with the Commission being one of the forums before which similar issues have been agitated. A writ petition was filed before the Bombay High Court in *Jitesh Wadhwa and Ors. v. Indian Oil Corporation Limited and Ors.* (W.P. (C) No. 634 of 2018) under Article 226 of the Constitution of India, challenging the arbitrary and illegal terms and conditions in the E-tenders floated jointly by the Opposite Parties. This writ petition had challenged the condition in the impugned tenders providing preferential treatment to State registered TTs over TTs registered in other States as being arbitrary and unreasonable, and the same was alleged to be contrary to the provisions of the Motor Vehicles Act, 1988. On 9th April, 2018,



सत्यमेव जयते



the Hon'ble Bombay High Court pronounced its judgment and held that the impugned condition was neither arbitrary, nor unreasonable.

14. In another petition before the Hon'ble Delhi High Court, namely *Asian Pacific Bulk Movers and Ors. v. Union of India and Ors.* (W.P. (C) 3878/2018), the condition in the impugned tender whereby a fifteen percent cap was imposed on the 21 MT TTs from each State was under challenge. Upon consideration of the matter, the Hon'ble Delhi High Court observed that the formulation of tender conditions cannot be scrutinised by the Court as an ordinary dispute, and the parameters of judicial review would apply only where the process is tainted by illegality, procedural irregularity or *malafide*.
15. It was argued that the issues raised by the Informants before the Commission are devoid of any competition concern and in light of the judgments passed by the Hon'ble Bombay High Court and the Hon'ble Delhi High Court on similar issues, the present case does not merit investigation under the Act.
16. On the issue of prescribing price bands, the learned counsel for the Opposite Parties relied upon a two-pronged argument. First, it was stated that they are price regulated on both ends, *i.e.* the crude oil as well as the end-product. Thus, there is a need to keep a check on each component of cost that accounts toward the final cost and transportation of bulk LPG being one of them, price bands are prescribed. Second, it was argued that each TT owner has to incur certain costs *e.g.* fuel cost, insurance of the vehicle, wages to the drivers *etc.* To ensure that they do not cut on the necessary costs in order to quote a lower bid, which may later lead to delay in provisions of services, the Opposite Parties prescribe a minimum price to discourage such unviable low quotations. The Opposite Parties also clarified that their price bands are not arbitrary and are calculated after incorporating the cost of various components, along with an approximate ten percent profit margin.



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17. With regard to the differential price bands for TTs of different capacities (*i.e.*, 18 MT TT v. 21 MT TT), it was stated that despite the higher purchase cost of 21 MT TTs, their running cost is lesser, when compared to 18 MT TTs. It was also stated that the cost of transportation of Bulk LPG is regulated by the Government and is eligible for reimbursement by the Government. For a particular route, *i.e.* from the same point of loading to point of unloading, the Ministry of Petroleum and Natural Gas reimburse the lowest rate at which transportation cost has been incurred. Thus, Opposite Parties have no incentive to set arbitrary differential rates for the transportation cost, as any additional cost claimed by the Opposite Parties would not be reimbursed.

18. The learned counsel for the Opposite Party further submitted that under the terms and conditions of the impugned tenders, there is no bar on quoting TTs that are registered in a State other than the State for which the tender is floated, *i.e.* where the bottling plant is located. However, the TTs registered in the State where the tender is floated will be given preference subject to quoting of lower rate of the price band for that State, under the terms and conditions of the impugned tenders. The condition giving preference to State registered TTs is not arbitrary and was primarily introduced to encourage entrepreneurs and to generate employment opportunities in all the States for promoting healthy competition, and reducing the likelihood of the formation of a cartel. The Opposite Parties highlighted that maximum number of TT registrations in the past have taken place in Nagaland (5659 for the 2014-17 tender), which is disproportionate to the requirements of that State for the upcoming 2018-2023 period (*i.e.* 29 TTs). As per the Opposite Parties, Nagaland has been chosen by the TT owners only because of the tax benefits available on registration in that State. However, cluster of maximum TT owners registered in a particular State (*e.g.* Nagaland) may give rise to collusive tendencies and the condition giving preference to State registered TTs by the



सत्यमेव जयते



Opposite Parties is only to combat that situation. It was further submitted that this condition also leads to hiring of transporters who are better acquainted with the local ecosystem, ensure better utilisation of TTs and result in less operational issues for the Opposite Parties, in terms of intra-state and inter-state movement.

19. With regard to Fleet/ loyalty card as part of the payment, the Opposite Parties clarified that issuance of such card by the Opposite Parties to the transporters assures advance payment, centralised billing and vehicle tracking. It was further averred that since the fuel cost covers almost forty five to fifty seven percent of the operating cost of transportation, this condition does not cause any prejudice to the TT drivers. It was also stated that in the ordinary course of business, payment of a transporter's invoice raised against the Opposite Parties is processed after 15 days of raising of an invoice, which is raised only after completion of the transport service. While the RTGS payment is made after 5-6 days of processing of the invoice, the fleet/ loyalty care is loaded on the same day of processing. Therefore, fleet/ loyalty card takes care of the substantial time lapse between the fuel cost incurred by the transporter and the final receipt of reimbursement and assures the transporters of receipt of some payment in advance by way of a cashless transaction. *Vide* additional submissions dated 12th June, 2018, the OPs further clarified that the fleet/loyalty card issued to the TT drivers carries added benefits such as secured parking, cooking facilities, rest room and accommodation facilities, laundry and drying facilities, health check-ups including eye check-ups, loyalty rewards, accident insurance *etc.*

Observations and findings

20. The Commission has analysed the facts of the present case. The case pertains to alleged joint tendering/collusive tendering by the OPs *i.e.* the Oil Marketing Companies (IOCL, BPCL and HPCL) while procuring the services of the Tank Trucks for transportation of the LPG Cylinders. The Informants have alleged



these to be in the nature of price fixing, limitation/restriction of output/services and market allocation thereby in contravention of Section 3 of the Act. Further, the Informants have also alleged abuse of dominant position collectively by the OPs.

21. Before analysing the said allegations within the realm of the Act, it is pertinent to deal with the preliminary objection raised by the OPs regarding maintainability of the present case on account of lack of Commission's jurisdiction to entertain the present matter, which, as per the OPs, falls under the sole domain of the PNGRB.
22. During the hearing before the Commission held on 05th June, 2018, the learned counsel for the OPs challenged the jurisdiction of the Commission to enquire into, and to examine, issues in relation to petroleum products, including issues relating to transportation of LPG. It was submitted that PNGRB has the jurisdiction to decide all the matters pertaining to petroleum products, including those relating to anti-competitive conduct (including cartelisation, collusion, monopolisation, etc.), as provided in the Petroleum and Natural Gas Regulatory Board Act, 2006 (PNGRB Act). The PNGRB Act is a special legislation which envisages the setting up of a regulatory board (*i.e.* the PNGRB) for protecting the interests of consumers and entities engaged in specific activities relating to petroleum, petroleum products, and natural gas, including LPG and the transportation thereof. The Preamble to the PNGRB Act captures the broad policy, aims and objectives in the following terms:

“An Act to provide for the establishment of Petroleum and Natural Gas Regulatory Board to regulate, the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum product and natural gas excusing production of crude oil and natural gas so as to protect the interest of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate



supply of petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and to promote competitive markets and for matters connected therewith or incidental thereto.”

23. The PNGRB Act provides for the establishment of PNGRB and vests it with the power to regulate petroleum, petroleum products, and natural gas, including the power to promote competitive markets. The OPs also emphasised upon various provisions of the PNGRB Act, including Section 1(4), Section 2(z), Section 11, Section 12, Section 24, Section 25, Section 26, Section 28, Section 50 *etc.*, to argue that PNGRB Act is a complete code in itself and it seeks to deal with all issues relating to petroleum products and natural gas. It was also contended that these provisions of the PNGRB Act abundantly show the intention of the legislature to empower/enable PNGRB to deal with every issue arising in the sector, including those pertaining to anti-competitive conduct.
24. It was argued that PNGRB Act, under Section 24 & 25, confers wide ranging powers on PNGRB which includes power to investigate, power to impose penalty and the powers of a Civil Court in respect of certain matters. The PNGRB Act does not provide for application of any other statute, including the (Competition) Act, for the matters covered under PNGRB Act except as specifically mentioned in Proviso to Section 25(2) of the said Act which only refers to the Consumer Protection Act, 1986. Thus, PNGRB Act, being a complete code in itself, is empowered to consider any alleged anti-competitive conduct of market players in the petroleum industry, including OPs.
25. Further, PNGRB Act, being a later special enactment qua the (Competition) Act, impliedly repeals and excludes the applicability of the latter to entities in petroleum industry. In this regard, the OPs placed reliance on the decision of



Hon'ble Bombay High Court in the matter of *Ashok Organic Industries Ltd. v. Asset Reconstruction Company (India) Limited* [(2007) SCC Online Bom 85] wherein it is laid down that the “*existence of two sets of legal provision, one a complete code and the other not, by itself and without more leads to an inference of mutual irreconcilability or fatal inconsistency. The complete code then impliedly repeals the other statute. This result follows even without there being a non-obstante clause...*”

26. Further, OPs have referred to a few instances wherein PNGRB has exercised jurisdiction on similar issues in the past. *Vide* its order dated 02nd July, 2012, in Case No. 04 of 2008, PNGRB observed as under:

“56. [...] Any anti-competitive outcomes that have emerged as a result of pricing policies of PSU OMCs are not their own making, but they have been an unintended consequence of pricing policies thrust upon them by the Government. Therefore, charges of cartelisation and collusion have no basis.”

27. Also, the OPs have relied upon two orders of the Commission (Case No. 26 of 2010 and *Suo Motu* Case No. 03 of 2013) wherein the Commission held that it has jurisdiction to deal with issues pertaining to oil/petroleum sector but the said orders of the Commission in both the cases have been stayed by the Hon'ble Delhi High Court. It has been argued that since the issue of jurisdiction is pending before the Hon'ble Delhi High Court, the present proceedings should be kept in abeyance.
28. The OPs have further submitted that the Commission should consider referring the matter to PNGRB under Section 21A of Act, instead of commencing



investigation under the Act, to avoid any jurisdictional conflicts between the two regulators.

29. The Commission has considered the arguments raised by the OPs in support of their objection to the jurisdiction of the Commission. In the case of ***In Re: HPCL- Mittal Pipelines Limited and Gujarat Energy Transmission Corporation Limited & Ors.*** (Case No. 39 of 2017, decided on 31st January, 2018) (hereinafter, the '**HPCL case**'), the Commission dealt with a similar issue in the electricity sector, in detail. The Commission relied upon the decision of Hon'ble Supreme Court in *Ashoka Marketing Limited v. Punjab National Bank* [(1990) 4 SCC 406], wherein it was held that in the case of inconsistency between the provisions of two enactments, both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein. Based on such ruling, the Commission observed that both the Electricity Act, 2003 and the (Competition) Act *are special statutes with their designated spheres of operation. The former aims at regulating activities in the electricity industry and the latter aims at promoting competition in every sphere and sector of the economy. The jurisdiction of the Act extends to all sectors of the economy and sectors regulated by sector specific laws such as telecommunication, electricity, petroleum, insurance etc. are also included within the ambit of the Act for the competition related matters/issues. To this extent there is no conflict as both these statutes have their respective and mutually exclusive regulatory regimes.* (emphasis supplied)
30. Thus, the aforesaid excerpts from the HPCL case clarify that existence of a sectoral regulator cannot be understood to exclude the jurisdiction of the Commission. Under the Competition Act, the mandate of the Commission is to eliminate practices having adverse effect on competition, promote and sustain



सत्यमेव जयते



competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India. Sectoral regulators have necessary technical expertise to determine access, maintain standard, ensure safety and determine tariff. The issues relating to entry conditions, technical details, tariff, safety standards have direct control on prices, quantity and quality primarily seems to be within the exclusive ambit of sectoral regulators. Thus, sectoral regulators focus on the dynamics of specific sectors, whereas the Commission focuses on functioning of the markets by way of increasing efficiency through competition. In fact, the role played by the Commission and the sectoral regulators are complementary and supplementary to each other as they share the common objective of obtaining maximum benefit for the consumers.

31. The Commission observes that the OPs have relied upon an excerpt from the order given by Hon'ble Member Justice S.N. Dhingra in *Case No. 50 of 2011* and *Ref. Case No. 02 of 2011*, to argue that the exclusive jurisdiction of PNGRB has been accepted by the Commission in the said matter. The Commission, however, is of the opinion that the OPs have completely disregarded the majority order in the said matter which clearly supports the jurisdiction of the Commission to deal with matters akin to the present matter. In the said case, the issue under consideration was the alleged imposition of unfair/arbitrary condition as well as price hike by Gujarat Gas Company (Opposite Party in the said matter). The Commission referred the said matter to PNGRB to seek its comments. In response, PNGRB stated that '*the Opposite Party is a regulated entity covered under the provisions of PNGRB Act, 2006 and as per the relevant regulations, Competition Commission of India should take an appropriate view in the matter*'. The majority order in the said decision clearly recognised the exclusive jurisdiction of the Commission in matters arising out of anti-competitive conduct of the entities/enterprises. Accordingly, the Commission examined the said



matter but finding no contravention of the provisions of the Act, closed it under Section 26(2). Thus, the contention of the OPs that the Commission accepted jurisdiction of the PNGRB in the said matter is a misinterpretation.

32. Further, the Commission examined the contention of the OPs that the PNGRB Act stands at a different footing than the other sectoral legislations and the powers of PNGRB are wider than that of TRAI and Electricity regulator. In this regard, the Commission notes that though the provisions of PNGRB Act confers variety of powers on PNGRB meant for monitoring and regulation of gas prices which includes powers to correct and prevent restrictive trade practices, the same does not suggest exclusion of Commission's jurisdiction in matters covered by the provisions of the Act.
33. Even though, the PNGRB Act confers wider powers upon PNGRB, and is a special statute in matters relating to petroleum, natural gas and other crude oil products, the (Competition) Act is a special statute aimed at regulation of competition in the market. Thus, in matters related to fair functioning of the markets, the Commission has primacy over sectoral regulators. Accordingly, all issues relating to promoting and sustaining competition in the markets would fall squarely within the ambit of the Commission's jurisdiction. Further, Section 60 of the Act gives overriding effect to the provisions of the Act.
34. The Commission observes that the object and purpose underlying both the enactments *viz.*, the PNGRB Act and the Act (i.e. Competition Act, 2002), does not point towards any inconsistency. Undoubtedly, PNGRB holds domain over regulating matters relating to refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas. A plain reading of the provisions of the PNGRB Act, *e.g.* powers regarding complaints and resolution of disputes by the Board or settlement of disputes, suggests that the prominent role of the Board comes into play only after a dispute



सत्यमेव जयते



has occurred and damage has been done. On the other hand, the Commission has the power to take action, on its own or upon information provided, to identify any possible anti-competitive conduct in the market. Hence, the powers and duties of the Commission are much wider. The proceedings before the Commission are inquisitorial in nature and targeted toward overall market correction and subsequent effects which may or may not be confined to a specific sector. Therefore, any decision by PNGRB upon a *lis* between the parties will be a decision granting relief *in personam* as opposed to a ruling/ action by the Commission which is a decision *in rem*, intended to achieve market correction. The role of the two, the Board and the Commission are, thus, different in spirit. The Board, under the PNGRB Act, aims at resolving the disputes between the parties upon a complaint filed by an aggrieved party. Juxtaposed to this, the Commission aims to regulate the market and penalise the market player that is engaging in anti-competitive conduct/practice.

35. Before parting, the ratio of the Hon'ble Delhi High Court in the matter of *Telefonaktiebolaget LM Ericsson (Publ) vs. CCI* [WP (C) NO. 464/ 2014 AND WP (C) NO. 1006/2014] with respect to jurisdiction of the Commission *vis-à-vis* a sectoral regulator may be of relevance. The Hon'ble Delhi High Court held that there is no irreconcilable repugnancy or conflict between the (Competition) Act and the Patents Act. In the absence of any irreconcilable conflict between the two legislations, the jurisdiction of CCI to entertain complaints for abuse of dominance in respect of Patent rights cannot be ousted.
36. Further, in the recent judgement of the Hon'ble Supreme Court in *Competition Commission of India v. Fast Way Transmission Pvt. Ltd.* (Civil Appeal No.7215 OF 2014 decided on 24th January, 2018), while examining the role entrusted upon the Commission, the Supreme Court observed as follows:



सत्यमेव जयते



‘The Preamble of the Act, read with the aforesaid provisions, would show that the Commission set up by the Competition Act certainly has a positive role to play. A perusal of Sections 18 and 19 would show that it is a positive duty of the Commission to eliminate all practices which have an adverse effect on competition. Further the Commission should promote and sustain competition, apart from protecting the interest of consumers, so as to ensure freedom of trade carried on by all participants in markets all over India. Also, a positive role is given to the Commission to inquire, suo motu, into the dominant position of enterprises, and to prohibit anti competitive agreements. Section 60 then gives the Act overriding effect over other statutes in case of a clash between the Act and such statutes to effectuate the policy of the Act, keeping in view the economic development of the country as a whole.’

(emphasis supplied)

37. Thus, the Commission holds that it has jurisdiction to proceed with the present matter. Moving further with the main issues, the Commission observes that the Informants have alleged collusion as well as collective dominance by the OPs in floating joint NITs while procuring the services for transportation of bulk LPG.
38. At the outset, it may be highlighted that collective dominance is not recognised by the Act. The Commission had the occasion to deal with the issue of collective dominance in Case No. 6 & 74 of 2015. The Commission, *vide* its final order dated 19th July 2017, held that *the Act does not allow for more than one dominant player under Section 4. Rather the existence of two strong players in the market is indicative of competition between them, unless they have agreed not to compete, which also can be only be looked into under Section 3 of the Act, not Section 4.* Thus, the Commission notes that the allegation of the Informants related to collective dominance does not hold good under the provisions of Section 4 of the Act and requires no further deliberation.



39. With regard to Section 3 of the Act, the Commission notes that in the present case the Informants have alleged an existence of a buyer/purchase cartel. Section 3(1) and 3(3)(a) covers both sellers' as well as buyers' cartel, as is apparent from the following provisions:

Section 3(1): No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

[....]

Section 3(3)(a): directly or indirectly determines purchase or sale prices;

(emphasis supplied)

40. However, generally cartels are comprised of the sellers who agree to fix prices and/or output and since such agreement is to raise the price above the competitive levels or bring the output below the competitive levels, the same is considered to be anti-competitive. It needs to be recognised that the creation of 'buyer power' through joint purchasing agreements may rather lead to direct benefits for consumers in the form of lower prices bargained by the buyers. Thus, though the Act covers buyers' cartel within the purview of Section 3(1) read with Section 3(3) of the Act, treating buyers' arrangement/cartel at par with sellers' cartel may not be appropriate. For assessment of such cases, it is imperative to first, look at the potential theories of harm and then the conditions necessary for infliction of competitive harm need to be examined.
41. The Commission has, accordingly, analysed the allegations of the Informants in order to ascertain whether a case of anti-competitive cartel conduct is made out.



सत्यमेव जयते



42. The OPs have not refuted floating of joint NITs by them or prescription of price bands or issuance of fleet/loyalty cards. Rather they have provided justifications for their conduct. As pointed out by the OPs that they have not fixed the prices but only prescribed a price band within which the bidders can compete. Such price band is calculated upon incorporation of cost of various necessary components and includes a profit margin. The bidders get a window of around ten percent to give their quotations. The OPs clarified that they suggest a price floor to ensure that the bidders do not unnecessarily quote an unviable quotation which may lead to delay or irregular services in future. The OPs have also submitted that it is the prerogative of bidder to quote within the said price band which gives them enough margin to compete with other bidders. The Commission finds merit in the justification offered by the OPs.
43. Further, the OPs have clarified that the rates in the price bands for 18MT TT and 21 MT TT are based on their pay out on a km/MT basis. Since the 21 MT TT carries larger quantity of bulk LPG, i.e. 1.17 times that of an 18 MT TT, the yield generation is higher in case of 21 MT TT. Further, it was clarified that the net billing is based on capacity, per km/MT rate as well as distance. Such calculation ultimately leads to net billing for 21 MT TT higher than that of an 18 MT TT. The Commission finds the explanation plausible and finds no infirmity in the price bands prescribed by the OPs.
44. With regard to the fleet/loyalty card, the Commission notes from the submissions of the OPs that the issuance of such cards comes with commercial justification as well as advantages, not only for the OPs but also for the TT owners/drivers. During the hearing, the OPs also highlighted that many TT owners in fact had requested the OPs to issue such cards to keep a check on their respective drivers and to ensure that their drivers need not carry cash for fuel. Further, such fleet/loyalty cards come with various benefits *e.g.* secured parking, cooking



facilities, rest room and accommodation facilities, laundry and drying facilities, health check-ups including eye check-ups, loyalty rewards, accident insurance *etc.* Also, such cards also deal with the problem of the substantial lapse of time between the fuel cost incurred by transporter and the final receipt of reimbursement. Thus, the facts or material on record does not suggest any anti-competitive element involved in the issuance of such fleet/loyalty cards by the OPs. Moreover, the Informants have alleged contravention of Section 3(4) read with Section 3(1) of the Act because of the issuance of fleet/loyalty cards which does not seem to apply considering the facts of the Act.

45. Further, the Commission finds no merit in the allegation regarding a preference given to tank trucks registered in a particular State for participating in tenders in that State. Under the impugned tenders, there is no bar on quoting bids for TTs that are registered in a State other than the State for which tender is floated, *i.e.* the location of the bottling plant. It only states that TTs registered in the State where the tender is floated will be given preference provided bids are in the lower rate of price band for that State. Such condition does not appear to be arbitrary as long as registration in one State does not restrict from participation in the tender process in other States. The OPs have clarified that no such restriction has been placed on the bidders and the only objective of the preferential treatment accorded to State registered TTs is to discourage registrations clustered in a particular State like Nagaland. Based on these considerations, the conduct of the OPs is not found to have any adverse bearing on competition.
46. Based on the aforesaid discussion, the Commission is of the view that no case of contravention under Section 3 or Section 4 of the Act is made out against the OPs. Accordingly, the information is ordered to be closed forthwith in terms of Section 26(2) of the Act.



47. The Secretary is directed to inform the parties accordingly.

Sd/-
Mr. Devender Kumar Sikri
Chairperson

Sd/-
Mr. Sudhir Mital
Member

Sd/-
Mr. Augustine Peter
Member

New Delhi
Date: 04/07/2018