



COMPETITION COMMISSION OF INDIA

Ref. Case No. 06 of 2014

In Re:

**Cochin Port Trust
Willingdon Island, Kochi,
Kerala – 682009**

Informant

And

**Container Trailer Owners Coordination Committee
C/o Shri K.L. Gilbert, General Convenor,
Kochuthundathi House, ESI Road,
Palluruthy Village,
Cochin – 682006**

OP-1

**Shri K.T. Sanjeev
Korakal House, ESI Road,
Cochin – 682006**

OP-2

**Shri K.L. Gilbert
Kochuthundathi House, ESI Road,
Palluruthy Village,
Cochin – 682006**

OP-3

**Shri P.A. Shameer
House No. 7/277,
Padavunkal, Panayappilly,
Kochi – 682002**

OP-4

**Shri J.H. Latheef
14/1473, Karuvalipady,
Cochin – 682005**

OP-5

**Shri Tomy Thomas
2F SI, Mandalay Point,
By Pass Junction, Edappally,
Cochin - 682024**

OP-6

**Shri Rajeev Sharon
16/844,
Thoppumpady,
Kochi – 682005**

OP-7



Shri Priyan 17/1613 F, Koyikkal House, Near Santa Naria School, Mundamveli Kochi – 682507	OP-8
Shri Faizal Vahid 6/844, Malothparambu, Mattanchary, Cochin – 682002	OP-9
Shri K.K. Dileep Cheriyapazhayattu Parambil House, Palluruthy, Cochin - 682006	OP-10
Shri George Roshan Partner, Brothers Transport, Anjattuparambil, H. No. 14/2123, Cullickal, Cochin – 682005	OP-11
Shri C.K. Hari Prasad, Kalarikkal House, House No. 33/410A, Chalikavattom, Vennala P.O., Ernakulam-682028	OP-12
Cochin Container Carrier Owners D.B. Khona Building, Subramanian Road, Willingdon Island Cochin - 682003	OP-13
Vallarpadam Trailer Owners Association C/o Shri P. A. Shameer, Secretary, House No. 7/277, Padavunkal, Panayappilly, Kochi – 682002	OP-14
Kerala Container Carriers Owners Association C/o Shri K.L. Gillbert, General Secretary, Kochuthundathi House, ESI Road, Palluruthy Village, Cochin – 682006	OP-15



**Island Container Carriers Owners Association
C/o Shri Sunil Kumar, Secretary,
H. No. 191861, Chirattakattu House,
Palluruthy,
Cochin – 682006**

OP-16

**Shri Sunil Kumar
H. No. 191861, Chirattakattu House,
Palluruthy,
Cochin – 682006**

OP-17

CORAM

**Mr. Devender Kumar Sikri
Chairperson**

**Mr. Sudhir Mital
Member**

**Mr. U. C. Nahta
Member**

**Mr. Justice G.P. Mittal
Member**

Appearances:

For the Informant:

Shri Anuj Sharma, Advocate
Shri Girish Thomas, Dy.
Traffic Manager

For OP-1 to OP-10 and OP-12 to OP-17

Shri C.S. Sunil, Advocate

For OP-11

None

Order under Section 27 of the Competition Act, 2002

1. A reference was made to the Commission by the Cochin Port Trust (hereinafter, the 'Informant Port'), under Section 19(1)(b) of the Competition Act, 2002 ('the Act') against Container Trailer Owners Coordination Committee (hereinafter, the 'Opposite Party 1/ OP-1') and some of its office



bearers/executives, namely, Shri K.T. Sanjeev (hereinafter, the ‘Opposite Party 2/ OP-2’), Shri K.L. Gilbert (hereinafter, the ‘Opposite Party 3/ OP-3’), Shri P.A. Shameer (hereinafter, the ‘Opposite Party 4/ OP-4’), Shri J.H. Latheef (hereinafter, the ‘Opposite Party 5/ OP-5’), Shri Tomy Thomas (hereinafter, the ‘Opposite Party 6/ OP-6’), Shri Rajeev (hereinafter, the ‘Opposite Party 7/ OP-7’), Shri Priyan (hereinafter, the ‘Opposite Party 8/ OP-8’), Shri Faizal Vahid (hereinafter, the ‘Opposite Party 9/ OP-9’), Shri K.K. Dileep (hereinafter, the ‘Opposite Party 10/ OP-10’), Shri George Roshan (hereinafter, the ‘Opposite Party 11/ OP-11’) and Shri Prasad (hereinafter, the ‘Opposite Party 12/ OP-12’), collectively referred to as the ‘Opposite Parties/OPs’. The Informant Port alleged that the OPs have contravened the provisions of Section 3 of the Act by imposing a ‘Turn System’ on coastal operations.

Facts, in brief

2. As per the facts stated in the reference, the Informant Port had commissioned a container terminal in the name of Rajiv Gandhi Container Terminal (RGCT) in 1986 for handling containerised cargo originating from/destined to the hinterland of Cochin. Later, in 2005, the Informant Port, in terms of the provisions of the Major Port Trusts Act, 1963, licensed its space on Vallarpadam Island to M/s India Gateway Terminals Pvt. Ltd. (IGTPL), an entity incorporated by DP World (Dubai), for construction and operation of a container transshipment terminal under the Build-Operate-Transfer (BOT) model.
3. IGTPL essentially services the export-import (EXIM) trade of hinterland in Kerala, Western Tamil Nadu, South-Western Andhra Pradesh and South-Eastern Karnataka by providing transshipment services. To provide transshipment services at the Informant Port, the terminal seeks services of container trailers which cover short and medium distances to and from the hinterlands in Kerala, Western Tamil Nadu, South-Western Andhra Pradesh



and South Eastern Karnataka. These container trailers are operated by several transporters which, in some cases, are driver owned.

4. There are several container trailer transporter associations operating in Cochin port area, such as Cochin Container Carrier Owners Welfare Association (CCCOWA), Cochin Mekhala Lorry Owners Association (CMLOA), Vallarpadam Trailer Owners Association (VTOA), Kerala Container Carrier Owners Association (KCCOA) and Island Container Carrier Owners Association (ICCOA) *etc.*
5. It was alleged that some unscrupulous elements (OPs) had used these associations to exert undue influence on the pattern of deployment / allotment of trailers to compel users of these trailer services to hire them at the rates unilaterally fixed by them. Besides, under the garb of settlement of wages of the drivers and cleaners of the trailers / trucks, they had resorted to exorbitant hike in charges and often due to delay in settlement of wages, there had been sporadic strikes. Such strikes, apart from driving up the cost of operating through the Informant Port, had allegedly also affected the reputation of the Informant Port in terms of reliability of its services. The main grievance of the Informant Port, *inter alia*, is the imposition of a 'Turn System' by OP-1, sometime in January 2014, which allegedly had led to unilateral fixation of prices. It was alleged that, during the Turn System, the users and container trailers were obliged to book services only through this centrally controlled system and that OP-1 was restraining outside transporters from lifting the containers which was impeding the ability of the users to hire trailers of their choice.
6. The Informant Port relied upon a Circular dated 13th January, 2014 (hereinafter, the 'Circular') which was issued by OP-1 to all the members of the transporters' associations. The Circular specified the imposition of a 'Turn System' for creating a single window system for allocation of



service/work duty to the container trailer transporters, along with a request that no transporter takes a direct booking with effect from 15th January, 2014.

7. Under the Turn System, an empty trailer reported to the 'Turn Office'; wherein the trailer waited in queue for assignment of work. The booking for the trailer was made by a consignee/clearing party at the Turn Office. The Turn Office allotted work to the trailer on first come first out method after charging fees of Rs. 350 per container for intra-state movement. Out of the total fee of Rs. 350, Rs. 100 was retained by the Turn Office and Rs. 250 was passed on to the booking agent as commission. For inter-state movement, the charges were Rs. 600 out of which Rs. 100 was retained by the Turn Office and Rs. 500 passed on to the booking agent as commission. Thereafter, the nominated trailer collected the required documents (Form 13/Packing List/Invoices *etc.*) from the Turn Office and lifts the container for being delivered at the consignee's address.
8. The Informant Port has highlighted certain complaints which were allegedly received from some users of container trailers, after the imposition of 'Turn System', citing their hardship for being compelled to hire trailers / lorries required by them for transporting domestic containers, from OP-1 at unilaterally fixed prices. The complaints also highlighted that OP-1 was restraining outside transporters from lifting the containers which was impeding the ability of the users to hire container trailers of their choice.
9. The Informant Port's main grievance was that OP-1, under the garb of the 'Turn System', had unilaterally fixed higher rates for hiring trailer services from its Port, which was apparent from the alleged 25% increase in freight rates.
10. The Informant Port further alleged that the transporters, who were registered with the 'Turn System', were not allowed to operate for EXIM containers and if they did so, they were not allowed to get back into the 'Turn System'



again. Due to this, the supply of trailers for EXIM containers was also being affected, thereby raising rates for EXIM trade.

11. The Informant Port also referred to an earlier order of the Hon'ble Division Bench of the Hon'ble High Court of Kerala dated 20th June, 2002, in a case arising out of a dispute between two competing associations regarding a similar 'Turn System' which was prevalent at that point of time. *Vide* that order, the Hon'ble High Court of Kerala had directed the Informant Port to lay down the ground rules as to how the work of transport shall be carried on, whether the 'Turn System' should be continued, scrapped or modified and, if so, in what manner should it be modified. Accordingly, the Chairman of the Informant Port had prepared the 'ground rules' which were accepted by the Hon'ble High Court of Kerala which directed that the same shall be binding on all parties. The ground rules, *inter alia*, provided that the trailer operator associations or members of the associations or their workmen shall not prevent/obstruct a non-member from operating its trailers in the port area in the manner it would like to.
12. Based on the above allegations, the Informant Port contended that the activities of OP-1 (along with the other OPs) constituted an anti-competitive agreement as defined under Section 3(3) of the Act, which had an appreciable adverse effect on competition in the market for trailer services at Informant Port.
13. The Commission, after taking into consideration the material on record observed that the Turn System fixed the price to be paid by every user of the container transporter service which took away the competitive process of price negotiation that should ideally take place between hirer of transport and the container transport owner. The same was *prima facie* found to be in violation of Section 3(3)(a) read with Section 3(1) of the Act. It was further observed by the Commission that the alleged restriction on the transporters not to take orders directly from the importers/exporters is restrictive of supply of services in the market, in contravention of Section 3(3)(b) of the Act.



Based on these observations, the Commission referred the matter to the Director General ('DG') for detailed investigation by passing an order under Section 26(1) of the Act with directions to submit an investigation report. After conducting investigation, the DG submitted the investigation report before the Commission on 27th October, 2016.

DG's Findings and Analysis

14. The primary issue for investigation before the DG in the instant case was the imposition of the alleged Turn System by the OPs at the Informant Port and to examine the veracity of the allegations with regard to unilateral fixation of higher prices for transportation of containers between Informant Port and various inland destinations. Further, the DG also investigated if the Turn System was restraining the users from hiring trailers, other than those registered under the Turn System.
15. The Circular (dated 13th January 2014) which was submitted by the Informant Port along with the information, clearly indicated the existence of the Turn System. *Vide* the said Circular, the said Turn System was introduced on coastal cargo container transportation operations *w.e.f.* 15.01.2014.
16. The DG noted that the said circular highlighted the problems due to which the Single Window System (Turn System) was introduced by OP-1. During investigation, the DG found a letter dated 25th April, 2014, which was sent by OP-1, along with its four participating Associations of Container Trailer Operators/ owners operating at the Informant Port, namely, CCCOWA, KCCOWA, ICCOA and VTOA, to the Informant Port, offering justification for imposing the Turn System. This letter, which was a response to the notice dated 21st April, 2014 issued by the Traffic Manager of the Informant Port, corroborated the imposition of the 'Turn System' by OP-1. In the said letter, OP-1 and the aforementioned four Associations confirmed that OP-1 was operating as a committee constituted by them and further, justified the introduction of the Turn System (Single Window System). From the said



response, the DG, *inter-alia*, inferred that OP-1 was an informally constituted Association of Associations and that it imposed the 'Turn System' during the relevant time period.

17. OP-2, the Chairman of OP-1, confirmed before the DG that OP-1 was an Association of the above named four Associations, formed with the main purpose of providing a joint forum for finding solutions to various issues, including wages of employees and workers' strikes *etc.* OP-5 and OP-6, who were designated as executives in OP-1 Committee and who were from the same Association of which OP-2 was the President *viz.* CCCOWA, submitted replies on similar lines as OP-2.
18. Before the DG, these OPs submitted that the Turn System was based on the ground rules prepared by the Chairman of the Informant Port, in the year 2002, which were approved by the Hon'ble High Court of Kerala *vide* its judgment dated 26th July 2002 passed in WP(C) No. 3838 and WP(C) No. 5364. Further, it was claimed that the Turn System was reintroduced in January 2014 for the protection of valid commercial interests and to ensure the efficient and smooth functioning of the market for container trailer services. They also argued that OP-1's Circular did not indicate any coercive intention or threat to impose the decisions of OP-1 on its members. The issues raised in the Circular were stated to be in the nature of legitimate issues generally handled by a trade association such as toll charges, lack of parking space, exploitation by middlemen *etc.*
19. Further, the Turn System was contended to be a pro-competitive attempt to ensure efficient functioning of the market and to overcome the issue of exploitation by middlemen and excessive intermediation between the container trailer operators and their customers, Custom House Agents, shops and warehouses adding to the cost of provision of services. It was claimed that the said system provided an aggregating service, which is an acceptable practice in the transportation industry. The Turn System arguably ensured



that the payment owed to each container trailer was paid at the time of each trip, as opposed to the earlier system where customers used to switch between container trailers without clearing the arrears due to the first trailer. It was further contended that the system ensured pro-competitive benefits to all the stake-holders and increased the supply of container trailer service. Thus, by offering these explanations, the OPs sought to justify the existence of the Turn System.

20. To analyse the propriety of the aforesaid justifications, the DG examined the background of the evolution of the 'Turn System' and the methodology adopted under the said system.
21. The investigation revealed that the Turn System was initially introduced in the year 2002 by CCCOWA which was challenged in the Hon'ble High Court of Kerala, pursuant to a dispute between CCCOWA and the Cochin Custom House Agents Association. While disposing of the case, the Hon'ble High Court of Kerala had directed the Chairman, Informant Port to ascertain whether the Turn System adopted by CCCOWA should be continued, scrapped or modified and to lay down the ground rules for the same (in case the system was to be continued). Accordingly, the ground rules were framed by the Informant Port, which were approved by the Hon'ble High Court of Kerala. As per the ground rules, the owners of the container trailers had a right to form an association. Thus, the Turn System based on ground rules was not held to be illegal *per se*. At the same time, it was realised that the association should ensure that such system should not adversely affect the interests of other commercial entities interacting with them and not amount to a restrictive trade practice. It was therefore, *inter alia*, held that the association or members of the association shall not prevent a non-member to operate its trailers in the Port Area. In a nutshell, the rules prevented any kind of discrimination between the members and non- members to operate their trailers on the Informant Port. The methodology adopted under the Turn



System was that, empty trailers were lined up as waiting in queue on a first in first out basis and assigned to the users accordingly.

22. The DG compared the erstwhile Turn System prevailing in the year 2002 with the one which was introduced in the year 2014. It was observed that the Turn System upheld by the Informant Port and the Hon'ble High Court of Kerala in 2002 was applicable only on the members of CCCOWA. Opposed to that, the Turn System which got re-introduced in the year 2014, and which is the subject matter of the present case, was applicable on the members of all four transporter associations, *i.e.* CCCOWA, KCCOWA, ICCOA and VTOA. It was admittedly a collective action taken by these four associations that joined hands under the banner of OP-1 by pooling the container trailers owned by their members under the said Turn System.
23. On examination of various Allotment Slips, it was observed that the manually issued Slips as well as the computer generated Slips issued under the Turn System, besides reflecting the destination and the Registration number of the allotted vehicle *etc.*, also reflected the rates of transportation to be paid for different destinations. The rates were found to be similar to those fixed as per the rate list of CCCOWA and the amount of Rs. 100/- towards administrative expenses was required to be deposited at the time of booking a vehicle. Also, the commission of Rs. 250/- was paid by the driver to the transporter. OP-2 accepted that except the long term contracts and tenders, the rate list of CCCOWA was followed by everyone during the Turn System.
24. The DG relied on the booking slips, correlating with the rate list of CCCOWA, further corroborated by the submissions of OP-2, to conclude that the rates of transportation during the Turn System were fixed by OP-1 and were non-negotiable. OP-1 was following the rate list of CCCOWA prevailing during the year 2013.
25. A simple price comparison approach was adopted by the DG wherein the pre Turn System rates and the post Turn System rates were compared with the



rates prevailing during the Turn System for some destinations. It was observed that during the Turn System, except for a few instances, the rates were fixed and non-negotiable as opposed to the fluctuating prices in the pre/post Turn System regime. Based on this analysis, the DG concluded that OP-1 and its four participating Associations had directly or indirectly determined/ fixed the prices of container trailers to and from Cochin Port to various inland destinations under the Turn System implemented by them with respect to the coastal cargo during the period from January 2014 to the end of September 2014. The DG found that the Turn System was discontinued towards the end of September 2014, which was evident from the minutes of the Meetings of the Executive Committee of CCCOWA held in September 2014.

26. The OPs tried to justify the alleged increase in the container trailer transportation charges during the Turn System. The first justification offered by the OPs for higher rates during the Turn System, as compared to Pre/Post Turn System, was the shifting of dock from Wellington Island to Vallarpadam Terminal. The DG, however, discarded this reason on the ground that the alleged shifting took place way back in 2011 and thus, could not have affected the rate increase in the year 2014 *i.e.* during the Turn System period.
27. The second reason given by the OPs for increase in rates was on account of a steep hike in diesel prices during 2014; however, the same was also found to be implausible by the DG. The OPs argued that the price of diesel during 2013 was Rs 41/- per litre, which had increased to Rs 61/- per litre in 2014. The investigation, however, revealed that though the OPs' contention regarding diesel prices being Rs. 61/- per litre in 2014 was substantiated, the minimum average price prevailing during 2013, as per factual data, was Rs. 49.79 (in January 2013) and not Rs. 41/- per litre, as contended by the OPs. Moreover, no fuel surcharge was imposed during the major part of the Turn System period *i.e.* from January, 2014 till somewhere after 7th August, 2014. Thus, the contentions of the OPs regarding increase in transportation prices of



container trailers during 2014 on account of steep increase in prices of diesel was found to be misleading.

28. The OPs further contended that increase in the labour cost led to the increase in rates. The DG, however, found that the labour rates already stood increased with effect from 1st March, 2013 and thus, the argument of the OPs on this ground was also rejected.
29. Further, the last reason assigned by the OPs, *i.e.* inflationary pressure on the prices of Tyres and Lubes, was also found to be unacceptable. The DG found that the prices of Tyres and Lubes throughout the years 2013, 2014 and 2015 remained the same.
30. Based on the aforesaid reasons, the DG inferred that the increase in rates during 2014 were not attributable to any of the cost factors contended by the OPs. Further, the DG opined that, although it may not be within the ambit of the Act to ascertain as to what should have been the reasonable rates of container trailer transportation during the Turn System period, the material on record indicates that the rates during the Turn System were higher as compared to the periods prior to and subsequent to the implementation of the said system and that the reasons cited by the OPs (cost factors) for the increased rates do not hold ground to a large extent.
31. Importantly, the DG also found the following minutes of the Executive Committee meeting of CCCOWA held on 15th January, 2015 to be relevant for the purposes of inferring that the OPs were fixing rates during the Turn System, wherein the members expressed their dejection regarding reduction of rates after discontinuation of the said Turn System. The relevant extract of the said meeting is reproduced below:

‘The committee assessed the condition once ceasing the pool system. Members expressed the dejection they feel towards the devastation of rates. The committee decided to precisely watch new steps causing



to new turns or replacing systems. However, for the time being there won't be any commitments of any kind taken.'

32. Based on the aforesaid, the DG concluded that OP-1 and its four participating Associations namely CCCOWA, KCCOA, ICCOA and VTOA had, from January 2014 to September 2014, determined Container Trailer transportation charges with respect to Coastal Cargo between Cochin Port and various inland destinations under the Turn System, thereby contravening the provisions of Section 3(3)(a) read with Section 3(1) of the Act.
33. With regard to the allegation of limiting/restricting the provision of container trailer services during the Turn System, the DG analysed whether the Turn System affected the freedom of service providers from providing container trailer transportation services without using the Turn System. In this regard, the DG relied on the statement of OP-2, Chairman of OP-1, who had stated that the total number of container trailers operating at the Informant Port during 2014 was around 1500-1750. Out of these, the four Associations had a total of about 825-830 container trailers. About 600-700 trailers were owned by Custom House Agents and Shippers and 100 trailers were of individual owners who were not part of any Association.
34. The DG noted that Custom House Agents and Shippers owned a significant number of trailers but they were not available for other users. Thus, majority of trailers being owned either by the Associations or by the Shippers for their own use, the options for users to engage trailers from alternate sources were very limited. The Turn System was thus found to have resulted in limiting the provision of services as the users were locked in with specifically assigned trailers lined up in queue with no option to engage trailers of their choice, thereby contravening the provisions of Section 3(3)(b) read with Section 3(1) of the Act.
35. Based on the aforesaid findings and observations, the DG concluded that OP-1, along with its four constituent associations (CCCOWA, KCCOA, ICCOA



and VTOA), has contravened the provisions of Section 3(3)(a) and Section 3(3)(b) read with Section 3(1) of the Act. The DG further found that OP-2 to OP-10 and one Shri Sunil Kumar, were liable for the contravention on part of OP-1 and its constituent associations and thus, liable to be proceeded against in terms of Section 48 of the Act. The DG, however, found no evidence to sustain the allegations against OP-11 and OP-12.

36. On receipt of the investigation report, the Commission, *vide* its order dated 5th January 2017, decided to implead the four participating/constituent associations as Opposite Parties, as OP-13 (CCCOWA), OP-14 (KCCOA), OP-15 (ICCOA) and OP-16 (VTOA), respectively. *Vide* the same order the Commission also impleaded Shri Sunil Kumar, Secretary, ICCOA, as OP-17, noting that the DG has found him responsible under Section 48 of the Act for indulging in the anti-competitive conduct of the association to which he belonged.

Replies/objections/submissions of the parties to the Investigation Report

Replies/objections/submissions of the Informant Port

37. The Informant Port did not file any written submissions in response to the investigation report. During the oral hearing held on 3rd May, 2017, the learned counsel for the Informant Port stated that prior to the year 2002, when the Turn System was first established, the users were free to choose from the existing container trailer service providers. In 2002, the Turn system was introduced which was challenged in the Hon'ble Kerala High Court. The Hon'ble Kerala High Court upheld the Turn System but allowed the customers/users to choose trailers/transporters out of the queue. This led to collapse of the Turn System.
38. In the year 2014, the four participating associations (CCCOWA, KCCOA, ICCOA and VTOA), under the aegis of OP-1, imposed the Turn System again. Under this Turn System, the rates were fixed, high and non-negotiable.



The members of these associations ensured that non-members are not allowed to provide their services at the Informant Port. Thus, the users were deprived of the free choice which they were able to exercise in a free system. Lastly, the Informant Port submitted that the free system is a better system, even if some of the small trailer transporters may get exploited.

Replies/objections/submissions of the OPs

39. The OPs filed separate responses but the pleas taken by most of them, in response to the observations and findings of the DG, are largely similar. OP-11 and OP-12, against whom the DG has found no contravention of the provisions of the Act, have filed very brief responses stating that they have no involvement in the matter. Further, OP-1 to OP-17, except OP-11, were represented by the same counsel during the oral hearing held before the Commission on 3rd May, 2017. Thus, for the sake of brevity, the responses/submissions of OP-1 to OP-17, except OP-11 and OP-12, are dealt with together in the ensuing paragraphs, unless otherwise specified.
40. At the outset, the OPs have submitted that the formation of OP-1, which was formed by the four participating associations (*i.e.* CCCOWA, KCCOA, ICCOA and VTOA), was aimed at resolving labour disputes among the associations and other operators and the same is not functioning ever since the Turn System was discontinued in September 2014. The OPs tried to justify the existence of the Turn System on the basis of prevailing circumstances, which as per them led to the emergence of a collective action by the container trailer associations. The OPs stated that in the year 2006, a committee was formed at the initiative of the Informant Port to work out reasonable container transportation charges. The committee was allegedly formed due to the passive attitude of the Kerala Government in fixing proper freight charges for the container tractor trailers. However, with the passage of time, the above committee became defunct, as a result of which labour strikes at the Informant Port demanding higher *Batta* became a routine



exercise. The Government, having no other alternative, was forced to raise the *Batta* to appease the trade unions and the transportation charges were revised on the basis of the prevailing conditions. Thereafter, in 2010, another revised rate list was prepared, pursuant to pressure asserted by the Kerala Government to settle the ongoing strikes at that time. The indicative price list prepared was then circulated with the permission of the then concerned Ministers.

41. As per the above revised price/rate list, the transportation charges from Cochin to Trivandrum for a 20ft container was Rs. 16,815. As per the OPs, various users of the transportation services refused to pay even these rates and they often resorted to hire single owners who were offering regular work for lesser payments. This again led to a strike, called by various labour unions demanding more *batta* and hike in salary, in the year 2013. The dispute was settled after much deliberations and negotiations by offering *batta* of 10.5% and 5.25% of the transportation charge to the driver and cleaner. As per the revised rate, the freight charge for 20ft container trailer from Cochin Port to Trivandrum was fixed at Rs. 22,500/-. However, despite there being revised rate list, various coastal cargo owners were willing to provide transportation services for lesser amount (*i.e.*, 20ft container trailer was paid Rs. 15,450/- and Rs. 16,000/- only) which is evident from the various invoices produced by some of the users (*e.g.* M/s Benoy Marbles). Apart from that, even such lesser amount paid to the transporter was often delayed or deductions were made by the users of those services citing flimsy reasons. Thus, as per the OPs, this scenario led the container trailers owners to come to a single platform to ensure proper discipline among themselves and demand for proper transportation charges, based on the indicative rate list approved by the government.
42. The OPs submitted that the Turn System did not deprive any user of its freedom to engage trailer of its choice. Further, none of the trailer owners were coerced or influenced to become part of OP-1 and no traders were



obstructed or objected to in any manner, and not even a single case was registered or reported against any of the OPs in this regard. OP-1 only informed various associations of the importance of a single platform with a unified rate to avoid underquoting and unhealthy competition. The allegation that the queue system implemented by OP-1 took away the element of competition amongst the trailer owners was alleged to be incorrect. OPs submitted that the DG failed to appreciate the fact that in a world of stiff competition, the trailer owners agreed to put their vehicles in a queue system awaiting their call with great patience irrespective of the size of their fleet and volume of business they were doing. This happened solely to avoid the prevailing conditions at the Informant Port where all the transporters operating in the coastal consignments were competing aggressively to provide transportation services at bare minimum charges, which were not even sufficient to cover their expenses. The OPs also referred to the underquoted transportation rates paid by some of the users, while transporting more than the legally allowed capacity, to highlight the extremely unhealthy state of affairs prevailing during that point of time.

43. The OPs objected to the DG's conclusion regarding the Turn System (from January 2014 to September 2014) having an impact of limiting and controlling the provision of container trailer transportation services at the Informant Port. It was argued that there was no concerted attempt to cartelise or to demand for higher value for the service provided. It was contended that the freight charges were fixed almost a year back, that too not at the instance of the container trailer owners. As per the OPs, the unhealthy competition in the market instigated them to interfere and to form a Coordination Committee (*i.e.* OP-1).
44. It was further argued that forming an association is a fundamental right guaranteed under Article 19 of the Constitution of India and the same cannot be challenged *per se*. To support this contention, they also relied upon the



Hon'ble Kerala High Court's judgment in the year 2002 where the earlier Turn System was under examination.

45. Besides the aforesaid common responses, OP-3, the General Secretary of OP-15, submitted that he belongs to a poor family and does not even possess basic educational qualification. He also submitted about his health condition to contend that when the DG examined him on 14th July, 2016, he was not able to comprehend the statement he gave. It was stated that he was not very well versed with the language in which questions were put to him and the translation made to assist him was not correct. Citing language issues and health reasons, he submitted that he was misinformed and he could not gather proper information to assist the DG. Further, he has submitted that he had no intention to suppress any facts or to misguide the Commission.
46. As regards OP-11 and OP-12, they have submitted that they had no involvement in the alleged contravention. OP-11 has further submitted that the DG has not found his involvement in the alleged conduct of OP-1 and thus, he has no further submissions to make in this regard.

Observations and findings of the Commission

47. The Commission has perused the investigation report, the suggestions/objections filed by the OPs and the oral submissions made by the respective learned counsel for the parties. The main issue before the Commission in this case is whether there was any collusive/anti-competitive conduct on the part of the OPs which amounted to a contravention of the provisions of Section 3(3) read with Section 3(1) of the Act. The DG, on the basis of the observations recorded earlier, has found that OP-1, along with its four participating association (*i.e.* OP-13 to OP-16), introduced and implemented a 'Turn System' under which they not only unilaterally fixed the prices for coastal container services, but also led to limiting and controlling of such services at the Informant Port. Thus, the OPs have been found to be contravening the provisions of Section 3(3)(a) [price fixation]



and 3(3)(b) [limiting/controlling the provisioning of services] read with Section 3(1) of the Act.

48. The allegation in the present case is regarding anti-competitive understanding between various sub-associations (namely, CCCOWA, KCCOA, ICCOA and VTOA *i.e.* OP-13 to OP-16), under the aegis of OP-1. All these associations are operating in the same market or at the same level. The members of all these associations, some of which are also arraigned as OPs, are container trailer transporters and are similarly placed in the market in which they are ideally expected to compete for obtaining bookings from the prospective users/consumers. During the year 2014, from January 2014 till September 2014, the members of these associations (*i.e.* OP-13 to OP-16) were admittedly providing their services to the users of the container trailer services through a Turn System. The Circular *vide* which this Turn System was adopted and communicated to the members is reproduced herein below:

SINGLE WINDOW SYSTEM IN COASTAL AREA

Friends,

It is informed with pleasure that a coordination of the vehicle owners of Vallarpadam and Cochin Port area has been formed. For a long time, container traffic sector is totally in disorder due to the uncertainty among the vehicle owners.

Unable to drive the vehicle in the road freely, no space for parking vehicles, unhealthy competition etc. has arisen due to the exploitation of the vehicle owners by the middlemen. There are a number of unresolved problems in the traffic sector such as toll collection in the island, hike in the ro-ro charges, a situation where it is impossible to pay batta to the drivers promptly and the issues arising therefrom.



The awareness that the solution for all the problems is only through a collective action has prompted the owners to gather under one umbrella. Accordingly under the leadership of coordination we are preparing for a single window system from 15th January, 2014. All vehicle owners are requested to cooperate and work for the system.

By

Container Trailer Owners Coordination Committee

General Convener

49. There is enough evidence on record to establish the existence of the Turn System *e.g.* Circular dated 13th January 2014, letter dated 25th April, 2014 sent by OP-1 in response to the notice dated 21st April, 2014 sent by the Informant Port justifying the imposition of the Turn System *etc.* Further, there are emails on record (emails dated 7th February, 2014 and 8th February, 2014) which were sent by OP-1 to the members asking for their cooperation for the implementation of the Turn System. Moreover, this Turn System was admittedly followed by the members of the participating associations. All the OPs have admitted the existence of the Turn System from January 2014 to September 2014. Thus, it can be safely inferred that this arrangement was agreed upon by them through their respective associations. This Turn System, being in nature of a horizontal arrangement, needs to be assessed under the provisions of Section 3(3) read with Section 3(1) of the Act.
50. Section 3(1) of the Act is a general prohibition on any agreement in respect of production, supply, distribution, storage, acquisition or control of goods, provision of services, which causes or is likely to cause an ‘appreciable adverse effect on competition’ (AAEC) within India. Such agreements are rendered void under Section 3(2) of the Act. Section 3(3) and 3(4) of the Act provide guidelines regarding burden of proof in certain kinds of anti-competitive agreements. Section 3(3) deals with horizontal agreements *i.e.* decisions including cartels, made by a group of persons or associations,



operating at the same level of production, supply or distribution *etc.* Section 3(4) relates to vertical agreements that may affect competition in the Indian markets. Agreements falling under Section 3(3) of the Act are presumed to have an AAEC on competition, whereas agreements set out under Section 3(4) require proof of AAEC in India, so as to be in contravention of Section 3(1) and hence, void under Section 3(2) of the Act. Depending upon the kind of agreement, *i.e.* whether it is in the nature of a horizontal arrangement or a vertical one, the burden of proof tilts.

51. Considering the pernicious nature of the collusive agreements specifically listed under Section 3(3) of the Act, the scheme of the Act allows for a presumption to arise, regarding the existence or likelihood of AAEC once the agreement is established. Generally in cases concerning horizontal arrangement/collusive conduct falling under Section 3(3) of the Act, the most difficult or herculean task before the Commission is to prove the existence of the agreement/arrangement/understanding amongst the parties because such agreements are often perpetrated in secrecy. The present case before us is peculiar, in the sense that the existence of the agreement *i.e.* the Turn System or the fixation of price, *vide* a rate list, is not challenged by any of the OPs. Rather they have admitted the existence of the Turn System and have sought to justify it by citing the prevailing circumstances at the time when such Turn System came into existence and also by citing various reasons why the adoption or implementation of such system should not be considered as an anti-competitive arrangement under the Act. Thus, what is relevant in the present case is to see whether the burden of proof, which has now shifted on the OPs, to prove that their arrangement/agreement had no AAEC on the markets in India, has been successfully discharged or not.

52. Firstly, the OPs have submitted that the Turn System was a voluntary arrangement whereby the trailer owners as well as the users of the trailer transportation services were free to choose whether they wish to book a trailer through the Turn System or otherwise. There was no compulsion on the



members/non-members to join the Turn System. The Commission finds this argument without any merit. Section 3(1) or 3(3) of the Act does not require the agreement/understanding to be coercive in nature to qualify for a contravention. A mutually agreed upon collusive arrangement is as much a contravention, if not more, as a coercive *diktat* imposed by a trade association. Rather, collusive arrangement/agreement/understanding is an even bigger sin for the competitive markets. To rebut the presumption which has arisen against them regarding the AAEC caused by their arrangement the OPs were obligated to produce arguments/justifications. The present argument, that the Turn System was not coercive or mandatory in nature, is insufficient to rebut the presumption of AAEC that has arisen in this case.

53. Secondly, the OPs have tried to justify the existence or imposition of the Turn System in the year 2014 by citing various circumstances that prevailed during that time. It is explained that the Turn System came into existence to safeguard the rights of the members of the OP association. It is highlighted that prior to year 2013, there was a government rate list for transportation charges but the users of the container trailer transportation services used to avoid this rate list and often preferred to hire single owners who were offering lesser rates, which were exploitative in nature, for the same service. This led to a strike, called by the various labour unions demanding hike in salary, in the year 2013 which was settled after the transportation charges of the driver and cleaner were revised. However, despite there being revised rate list, various coastal cargo owners were willing to provide transportation services for lesser amount. Further, even payment of such minimal amount was often delayed or deductions were made by the users of the services citing flimsy reasons. Thus, the container trailers owners had no option but to come together to a single platform to ensure proper discipline among the container trailer transporters and demand for proper transportation charges, based on the indicative rate list approved by the government.



54. The Commission empathises with the prevailing conditions at that time and the willingness of the members of these OP associations to combat those circumstances. But the limited issue before the Commission is whether the OPs, in their stride of combating those circumstances, have transgressed the contours of legitimacy and have indulged in activities which competition law seeks to prohibit. In this regard, the Commission notes that two major issues which bothered the members of the OP associations, and which have also been cited as justifications for the Turn System, were—(i) under-quotation by certain container trailer owners; (b) delay in payment by users of the container trailer transport services.
55. The first issue, *i.e.* under quotation by certain container trailer owners, is rather an outcome of a competitive market. The incumbents cannot justify price fixing by stating that some of the competitors were quoting a lower price, thus prices were fixed. This justification is rather antithetic to the basic tenets of competition law principles and is, hence rejected. The second issue/justification given by the OPs is that some of the users/consumers were delaying payments to the container trailer transporters and thus, to ensure timely payments, Turn System was adopted. This argument though appears impressive, is insufficient to justify the solution devised by the OPs. Fixing prices under the newly introduced Turn System to ensure timely payment of transportation charges was, to say the least, an excessively restrictive remedy to meet the objective stated by the OPs. The OPs could have considered alternatives which may have been less restrictive while providing an effective achievement of the objective sought to be pursued. But by no stretch of imagination, the price fixing arrangement to which the OPs resorted to, in the garb of combating delayed payments, can be considered a justifiable or acceptable arrangement. Thus, for the foregoing reasons, the Commission is of the view that this justification does not help the OPs in rebutting the presumption.



56. Further, it is noted that before the DG, the OPs provided certain justifications for the higher price under the Turn System *e.g.* increase in diesel prices, increase in labour cost, shifting of the dock *etc.* However, none of those reasons were found to be plausible by the DG. Before the Commission, the OPs did not seek to justify the increased prices, thus, the same does not require further deliberation. Suffice to say that the Commission is in agreement with the observations and findings of the DG in this regard that firstly, the prices during the Turn System were higher than the pre/post Turn System period; and secondly, the justifications offered by the OPs are not found to be adequate.
57. For the reasons recorded herein above, the Commission is of the view that OP-1, along with the participating associations (OP-13 to OP-16), has resorted to price fixing under the garb of the Turn System. In terms of Section 3(3)(a) read with Section 3(1) of the Act, the presumption arose against the said arrangement leading to AAEC, which is not satisfactorily rebutted by the OPs, despite being given ample opportunity. Thus, the Commission holds OP-1, OP-13, OP-14, OP-15 and OP-16 to be in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act.
58. With regard to the allegation of Section 3(3)(b), the OPs have argued that the Turn System, which was operative only from January 2014 to September 2014, had no impact of limiting and controlling the provision of container trailer transportation services at the Informant Port. They have claimed that, during the existence of the Turn system, neither the container trailers were forced/coerced to provide their services through the Turn System nor the consumers/users were under any compulsion to book the transportation services through the Turn System.
59. From the information available on record, it is evident that during the period when Turn System was in place, the total number of container trailers operating at the Informant Port were 1500 (approx.), out of which 800 trailers



(approx.) were owned by four Associations (OP-13 to OP-16). Further, 600 trailers (approx.) were not accessible to the users as they were owned by Customs House Agents and Shippers, which implies that the total number of container trailers to which the users could have access to are 900 (approx.). Barring the 800 trailers which were owned by the four participating Associations, the remaining 100 trailers were of individual owners who were not part of any association. The Commission notes that there is no evidence in the investigation report which shows that these 100 trailers were denied any opportunity to operate on the Informant Port by OP-1. Also, there is no evidence to suggest that membership was denied to any of the transport operator or that the non-members were restricted to provide services to the users willing to avail the services of the independent trailers. Thus, considering the insufficiency of evidence on record in this regard, the Commission is hesitant to hold a contravention of Section 3(3)(b) read with Section 3(1) of the Act, by the OPs.

60. Before devising remedies under Section 27 of the Act for the contravention established under Section 3(3)(a) read with Section 3(1) of the Act, the Commission finds it relevant to deal with two arguments raised by the OPs. The OPs appealed during the oral hearing that the Commission may consider refraining from holding the 'Turn System' to be bad *per se*. Secondly, the learned counsel for the OPs submitted that forming an association (like OP-1) is a fundamental right under the Constitution of India and the same should not be held against the OPs.
61. In this regard, it may be clarified that the Commission has neither held the Turn System to be bad in itself or *per se* anti-competitive, nor has the Commission held the formation of the trade association to be anti-competitive. There can be legitimate reasons for forming trade associations and such associations undoubtedly serve an important platform for betterment of a particular trade, for establishing code of conduct, for laying down standards for fair trade, for facilitating legitimate co-operative



behaviour in case of negotiations with government bodies *etc.* However, there is a very thin line between legitimate trade activities and anti-competitive practices that take place through these trade association meetings/discussions. And when these trade associations are used as a charade to transgress that thin line to promote illegitimate/anti-competitive ends, it becomes necessary for the Commission to intervene, for lifting the charade to penalise the anti-competitive conduct.

62. In one of the earlier cases before the Commission (*Case No. 35 of 2013: Advertising Agencies Guild v. Indian Broadcasting Foundation and its members*), a similar issue arose. The allegation pertained to the agreement amongst the members of IBF and firstly, the decision taken by IBF to switch to a net billing method and; secondly, the decision taken by IBF to drop advertisements from TV during a particular period. The Informant Port in that case (Advertising Guild) argued that such collective boycott violated the provisions of Section 3 of the Act. Commenting on the relevance of trade associations in general and its legitimate behaviour in particular, the Commission held as follows:

‘Undoubtedly, there has been a collective action by OP 1 and its members but primarily the trade associations are for building consensus among the members on policy/other issues affecting the industry and to promote these policy interests with the government and with other public/private players. Such activities may not necessarily lead to competition law violation. To perceive otherwise will render the trade association bodies as completely redundant, being opposed to competition law. The trade association provide a forum for entities working in the same industry to meet and to discuss common issues. They carry out many valuable and lawful functions which provide a public benefit e.g. setting common technical standards for products or interfaces; setting the



standards for admission to membership of a profession; arranging education and training for those wishing to join the industry; paying for and encouraging research into new techniques or developing a common response to changing government policy. Therefore, membership and participation in the collective activities of a trade association cannot by itself amount to violation of competition law as such.'

63. The Commission further held that it is only when such trade associations transgress their legal contours and facilitate collusive or collective decision making with the intention of limiting or controlling the production, distribution, sale or price of or trade in goods or provision of services as defined in Section 2(c) of the Act, by its members, that it violates the provisions of the Act.
64. In the present case, it has already been highlighted above that OP-1 and its participating four associations were indulging in anti-competitive conduct. The platform of the OP-1 association was apparently used to conclude anti-competitive arrangement. Thus, the contention of the OPs that right to form an association is a fundamental right, is acknowledged but found to be an inadequate defense in light of the facts and circumstances of the present case.
65. Further with regard to the legality of the Turn System, suffice to say that though there can be efficiency justifications for introducing a turn system in a particular trade, the OPs have failed to demonstrate any such efficiency or redeeming virtue which could have come to their rescue and would have helped them to rebut the presumption of AAEC in the market. Neither they were able to appropriately justify why they resorted to unilateral price fixation for dealing with issues prevailing during the relevant time when the Turn System was imposed nor were they able to sufficiently explain the reasons for increased rates during the Turn System as compared to the pre/post Turn System period.



66. Thus, in the event of the OPs not being able to rebut the presumption of AAEC that has arisen because of the price fixation under the Turn System being in the nature of a horizontal agreement/arrangement specifically recognised under Section 3(3) of the Act, the Commission has no hesitation in holding that OP-1, along with its four participating associations (namely, OP-13 to OP-16), indulged in the anti-competitive conduct of unilateral price fixation during the Turn System, in contravention of Section 3(3)(a) read with Section 3(1) of the Act.
67. For the reasons recorded herein above, there was no rebuttal of presumption to hold otherwise. Thus, the OP associations (OP-1 OP-13, OP-14, OP-15 and OP-16) are held to be in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act.
68. With regard to the role of office bearers, the Commission notes that 11 individuals (OP-2 to OP-12) were arraigned as OPs in the information. Out of these, the DG has found OP-2 to OP-10 to have participated in the anti-competitive conduct of the association. Apart from them, one more individual, Shri Sunil Kumar, Secretary of ICCOA, who was later impleaded as OP-17, was found by the DG to be responsible under Section 48 of the Act. These OPs either held key positions in OP-1 and/or key position in any of the four sub-associations that constituted OP-1.
69. It may be noted that individual liability under Section 48 of the Act arises in two situations. Section 48(1) of the Act provides that where a person committing contravention of any of the provisions of the Act is a company (including a firm or an association of individuals), every person who, at the time the contravention was committed, was in-charge of, and was responsible for the conduct of business of the company/firm/association, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. Further, the *proviso* to Section 48(1) of the Act entails that such person shall not be liable to any punishment



if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the occurrence of such contravention. Section 48(2) of the Act, on the other hand, attributes liability on the basis of the *de-facto* involvement of an officer in the anti-competitive conduct/practice.

70. In light of the provisions contained in Section 48(1) and 48(2) of the Act, the role of the office bearers of the OP associations is analysed to evaluate whether the evidence on record substantiates their liability for the anti-competitive conduct of their association.
71. The DG found that Shri K.T. Sanjeev/OP-2, as per his own admission, held the position of Chairman of OP-1 and President of CCCOWA (OP-13) during the time period when the Turn System was in existence. The same is also evident from the letter dated 25th April, 2014 which was sent by OP-1 in response to the notice dated 21st April, 2014 issued by the Informant Port. Further, certain emails were found during investigation report, *viz.* emails dated 7th February, 2014 and 8th February, 2014, which were sent by the Chairman of OP-1 *i.e.* OP-2 to the members in connection with the modalities of the Turn System and seeking their cooperation for the implementation of the Turn System. Thus, OP-2, by virtue of the position/responsibility held by him in OP-1 and OP-13 at the time when the contravention took place, is found to be in-charge of and responsible for the anti-competitive conduct on the part of OP-1 and OP-13. Despite being given an opportunity, he has not been able to rebut his involvement. Thus, the Commission holds him liable under Section 48(1) of the Act.
72. With regard to Shri K.L. Gilbert/OP-3, the DG has relied upon minutes of the meeting held on 14th February, 2013, furnished by the Office of Additional Labour Commissioner, Thiruvanthhpuram, wherein Shri Gilbert had signed the Minutes as the Secretary of KCCOA (OP-15). Further, the DG also received a confirmation from Branch Manager, Wellington Island



Branch of Indian Bank who *vide* letter dated 1st October, 2016, confirmed that KCCOA has an account with the bank which is being jointly operated by its three office bearers, one of them being Shri K.L. Gilbert. Further, Shri Gilbert was found to be the Secretary of OP-15, contrary to his denial, during the existence of Turn system. With regard to Shri Gilbert's denial of being associated with any of the Associations, the Commission notes that in his latest response dated 20th February, 2017 and another Affidavit dated 18th April, 2017, he has admitted holding the position of General Convenor in OP-1 and General Secretary in OP-15. Thus, by virtue of the positions held by him in OP-1 and OP-15, it can be safely inferred that he was in-charge of and was responsible to the conduct of these associations. In the event of him not being able to rebut his involvement, despite being given an opportunity, the Commission holds him liable for the contravention of the provisions of the Act by OP-1 and OP-15, under Section 48(1) of the Act.

73. With regard to Shri P.A. Shameer/OP-4, the DG has relied upon the letter dated 25th April, 2014, written on behalf of OP-1 and its four participating Associations to the Informant Port, which was signed by Shri Shameer as Secretary of VTOA (OP-14). Further, Shri P.A Shameer has admitted that he was the Secretary of OP-14 up to July, 2014 and that he was the General Convenor of OP-1. Thus, by virtue of the positions held by him in OP-1 and OP-14, it can be safely inferred that he was in-charge of and was responsible to the conduct of these associations. In the event of him not being able to rebut his involvement, despite being given an opportunity, the Commission holds him liable under Section 48(1) of the Act, for the contravention of the provisions of the Act by OP-1 and OP-14.
74. Shri J.H. Latheef, OP-5 was also found to be liable by the DG under Section 48 of the Act on the basis of his own admission that he was an Executive of OP-1 and that he was the Secretary of CCCOWA (OP-13) till March, 2014 and that he had represented CCCOWA in some meetings of OP-1. Further, the investigation also revealed that he received emails from the email account



of OP-1 whereby details of container trailer bookings for the month of March and from 1st April, 2014 to 7th April, 2014 were communicated to him. This, as per the DG, showed his active involvement in the affairs of OP-1 and the implementation of the Turn System. Moreover, *vide* his latest response dated 20th February, 2017 to the investigation report, he has admitted being the Secretary of OP-13 till 6th March, 2014, after which he held the position of executive in OP-13. The Commission notes that by virtue of his involvement and the fact that he was an Executive of OP-1 and Secretary of OP-13 for some period during the existence of the Turn System, and in the event of him not being able to rebut his involvement, he is liable for the contravention found against OP-1 under Section 48(1) of the Act.

75. With regard to Shri Tomy Thomas/OP-6, the DG has relied upon his own admission that he was an Executive of OP-1 and the Secretary of OP-13 from March 2014. The Commission notes that apart from the position held by him in OP-13, he is also a signatory to the letter dated 25th April, 2014, written on behalf of OP-1 and its four participating Associations to the Informant Port. Despite being given an opportunity, he has not been able to rebut the inference of his involvement. Thus, based on the key positions held by him, it can be inferred that he was in-charge of and responsible for the conduct of these associations pursuant to the positions held by him, making him liable under Section 48(1) of the Act.
76. Shri Rajeev Sharon/OP-7 denied before the DG his involvement or association with OP-1 or OP-15. Even in his response to the investigation report, he has denied his association with OP-15. However, the DG had found an email attachment in one of his emails which was a letter dated 28th May, 2013, on the letterhead of OP-15, enclosing an invitation card, wherein he has signed in the capacity of the President of OP-15. Further, the letter dated 25th April, 2014, was also signed by him as President of OP-15. Since OP-7 denied his signature, the alleged signature of Shri Rajeev on the letter dated 25th April, 2014 was sent for forensic examination by the DG where at



it was confirmed that it was his signature. Based on these, the DG inferred that Shri Rajeev Sharon was not only the President of OP-15 during the Turn System Period but was also actively involved in the affairs of OP-1. Despite being given an opportunity, he has not been able to rebut the inference of his involvement. Thus, based on the key positions held by him, it can be inferred that he was in-charge of and responsible for the conduct of these associations pursuant to the positions held by him, making him liable under Section 48(1) of the Act.

77. With regard to Shri Priyan/OP-8 also, the Commission agrees with the conclusions drawn by the DG. Letter dated 28th May, 2013, which was on the letterhead of OP-15 retrieved from the email account of OP-7, shows OP-8's name as the Vice President of OP-15. Further, letter calling for a meeting on 30th December, 2013, issued on the letterhead of OP-1 also contained the name of OP-8 as an Executive. Based on these, it is held that OP-8 is liable for the contravention on the part of OP-1 as well as on the part of OP-15 under Section 48(1) of the Act for the positions held by him in these associations.
78. With regard to Shri Faisal Wahid/OP-9 and Shri K.K. Dileep/OP-10, the Commission observes that the DG relied upon their respective admissions regarding the positions they held in OP-1 and the other participating associations. OP-9 admitted being the Executive of OP-1 and the Joint Secretary of OP-14 till 23rd September, 2014. Further, OP-10 admitted that he was an Executive of OP-1 Committee and the Joint Secretary of OP-14 till 1st July, 2014. Thus, by virtue of the positions held by them, it can be safely inferred that they were in-charge of and were responsible for the conduct of OP-1 and OP-14. In the event of them not being able to rebut their involvement, despite being given an opportunity, the Commission holds them liable under Section 48(1) of the Act.



79. During investigation, apart from the specifically named office bearers, the DG also found the involvement of Shri Sunil Kumar, Secretary of OP-16 ICCOA, who was later impleaded as OP-17. The DG found that the letter dated 25th April, 2014, sent by OP-1, to justify the adoption of the Turn System was signed by Shri Sunil Kumar. Despite being given an opportunity, he has not been able to rebut his involvement in the anti-competitive conduct. Further, the DG also relied upon his admission that he had attended meetings of OP-1. Thus, the Commission holds him liable under Section 48(1) of the Act, for the contravention of the provisions of the Act by OP-16.
80. With regard to Shri George Roshan/OP-11 and Shri Prasad/OP-12, the Commission agrees with the DG that there is no evidence on record on the basis of which these OPs can be held liable under Section 48 of the Act.

ORDER

81. In view of the above and having regard to the fact that the OPs have already ceased the anti-competitive conduct, the Commission, in exercise of powers under Section 27 (a) of the Act, directs the erring OPs to desist from indulging in the anti-competitive conduct in future which has been found to be in contravention of the provisions of the Act.
82. With regard to the imposition of penalty, the Commission is of the view that there are certain mitigating circumstances which exist in favour of the OPs in the present case. The Turn System, during which the alleged rate list was followed by the OP associations and their members, was in operation for a very limited time period, *i.e.* from January 2014 to September 2014 and the Turn System was discontinued even before the investigation was ordered in this case. The purpose of imposing monetary penalties can be two-fold— first, for disciplining the erring party for its anti-competitive conduct and, second, for creating deterrence to stall future contraventions. Considering



that the contravention discontinued long-back and the parties are not indulging in such behaviour any more, the Commission does not find it appropriate to impose any monetary penalty in the present case. The direction of the Commission to desist from indulging in such anti-competitive conduct, in future, would meet the ends of justice.

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

**Sd/-
(Devender Kumar Sikri)
Chairperson**

**Sd/-
(Sudhir Mital)
Member**

**Sd/-
(U. C. Nahta)
Member**

**Sd/-
(Justice G. P. Mittal)
Member**

**New Delhi
Dated: 01/08/2017**