

COMPETITION COMMISSION OF INDIA

Case No. 38/2012

Date: 18 /10/2012

All India Genset Manufacturer Association

Informant

V.

**Chief Secretary, Government of Haryana
Civil Sectt. Chandigarh, Haryana**

OP-1

**Financial Commissioner & Principal Secretary,
Industries Department
Civil Sectt., Chandigarh, Haryana**

OP-2

**Director Supplies and Disposals, Haryana
SCO No.1032-33, Sector-22-B, Chandigarh, Haryana**

OP-3

ORDER UNDER SECTION 26(2) OF THE COMPETITION ACT, 2002

The informant in this case is an association of Genset manufacturer and Authorized dealers looking after grievances of its members concerning their trade. OP-3 is a department of Haryana Government and the nodal agency for the purpose of various types of stores required by various Govt. Departments, Public Sector undertakings, Boards and Local Bodies/Corporation and is also responsible for the disposal of unserviceable /surplus stores. OP-2 is the authority directly controlling OP-3 and OP-1 is the overall supervisory authority over OP-2 & 3.

2. As per the information, the Government of Haryana through the Joint Director, Directorate of Supplies & Disposals invited tenders for purchase of Diesel Generating Sets (DG sets) of various capacities on annual rate contract for the year 2011-12. One of the terms & conditions of the said tender reads as under:-

“The tendering firm should be a Original Equipment Manufacturer /Original Equipment Assembler (OEM/OEA) of Diesel Generating sets. OEA must submit a certificate from the engine manufacturer regarding their OEA along with the offer. Authorised dealers are allowed provided they submit a

certificate from the OEM/OEA that they do not supply to end consumers directly.”

3. The informant contention is that the requirement of obtaining a certificate by the authorized dealers from manufacturers about non selling the Genset to the end consumers directly, was an impossibility. This condition was also unfair and discriminatory. The above condition also restricted the market access to the authorized dealers as well the manufacturers, since such authorized dealers who sold their product to the end consumers directly, due to this condition, could not sell the product to OP-3 and if they wanted to bid for the tender, they could not sell to customers directly.

4. Informant also submitted that Department of PWD (B&R) Electrical Division, Gurgaon and HUDA Division Panchukula (both under Govt. of Haryana) and members of the Technical Committee invited item rate tenders for supply, erection, testing, commissioning and installation of DG sets of 320 KVA vide Tender Notice due on 05-06/2012 but no such condition was put in that notice to bar the authorized dealers from quoting for the tender.

5. It was pleaded by informant that the conduct of OPs was in violation of (i) section 4 (2)(a) for imposing an unfair and discriminatory condition; (ii) section 4(2)(b) for limiting or restricting the market and (iii) section 4(2) (c) for denying market access to the whole category of Authorized Dealers.

6. The informant has described the relevant market as “Purchase of Diesel Gensets” of various capacities on annual rate contract required for PWD (B&R) Department, HUDA, Public Health, Irrigation, Transport, Industrial Training and Vocational Education and other Departments of State of Haryana and the relevant geographic market was the ‘State of Haryana’. It was alleged that the Opposite Party No.3 being the only authorized department of State of Haryana to purchase the Genset, it was in a dominant position having monopolistic power to buy Gensets for all other departments. It is also stated that though it was a Government Department but was satisfying the definition of the enterprise as given in the Act. It is thus alleged that there was an abuse of dominance being exercised by OP-3 in purchase of Diesel

Gensets by way of putting unfair and discriminatory conditions which had no rational. The Action of OP-3 was also stated to be violative of section 4(2)(b) on the ground that it limited and restricted the market to only OEMs and OEAs as authorized dealers could never be in a position to furnish the required certificate and the authorized dealers in a way were prohibited from giving bids for the products. It is further pleaded that OEMs and OEAs were only 38 in Nos., whereas authorized dealers were 674 in No. By putting this condition, a large number of enterprises were ousted from the competition. This amounted to violation of section-4 (2) (c) as it was in a way denial of market to an entire category of authorized dealers.

7. From the information, it is apparent that OP-3 had floated tenders on behalf of different Govt. Departments of Haryana for purchase of Gensets. The purchase of Gensets obviously is a commercial activity of the department and OP-3 would satisfy the definition of an enterprise as given in section 2(h) of the Act. It is to be seen whether OP-3 was a dominant enterprise in the relevant market in the activity of purchase of Gensets. The relevant market in this case would be sale/purchase of Gensets. Gensets can be sold to the private enterprises who have requirement of Gensets or to the Government Departments who have requirement of Gensets. The market as envisaged by the informant is not the proper relevant market. One cannot define the relevant market in respect of one department or few departments of the Government. The relevant market has to be looked upon as the entire market of the product in the relevant geographic area. Since we are considering the geographic area of State of Haryana, we have to consider the market of sale/purchase of Gensets in State of Haryana as the relevant market. The Commission considers that the relevant market therefore would be 'purchase of Gensets by the enterprises within State of Haryana'.

8. In order to consider whether OP-3 was in a dominant position in this market, we will have to consider the total extent of market and the share of OP-3. Total turnover of the market of Genset in State of Haryana has not been given by the Opposite Party as the Opposite Party has not considered the relevant market in the above perspective. The share of OP-3 in this relevant market has also not been stated despite the fact that OP-3 has been procuring Gensets almost every year, as

is evident from the fact that in the year 2010, informant had filed a similar information before the Commission being case case 59/2010, wherein the issuance of tender for procurement of Gensets in the year 2010, was the subject matter of the information.

9. The grievance of the informant is about the Govt. procurement being done through OP-3 and not in respect of the entire Genset market. The entire market of Gensets is different from the Govt. procurement. OP-3 is only one of the enterprises who purchases Gensets. There will of hundreds of other enterprises who will be purchasing Gensets and while considering dominance of OP-3, the Commission has to keep in mind the entire relevant market. The Govt. purchase and the private purchase are substitutable and interchangeable and the two cannot be considered two separate markets.

10. There is total lack of information in respect of dominance of OP-3 in this case. The question of abuse of dominance therefore cannot be considered.

11. It would be noteworthy that in case No.59/2010 filed by the informant assailing the similar condition for the tender floated in 2010, the information was closed as the Commission considered that informant had filed the infringement of section 3 or 4 of the Act. The information fails to make out a prima facie case and is hereby closed under section 26(2) of the Competition Act.

12. The Secretary is directed to inform the parties.

Sd/-
(H.C. Gupta)
Member

Sd/-
(Geeta Gouri)
Member

Sd/-
(Anurag Goel)
Member

Sd/-
(M.L. Tayal)
Member

Sd/-
(Justice S.N. Dhingra) {Retd.)
Member

Sd/-
(Ashoka Chawla)
Chairperson