

BEFORE THE
COMPETITION COMMISSION OF INDIA
NEW DELHI

[Suo-motu Case No. 02/2011]

Dated: 23.04.2012

In Re:- Aluminium Phosphide Tablets Manufacturers

Order under Section 27 of the Competition Act, 2002

The present matter relates to the allegations of anti-competitive acts and conduct in the tender for procurement of Aluminium Phosphide Tablets (ALP) required for preservation of central pool food grains by Food Corporation of India. The Chairman and Managing Director (CMD) of Food Corporation of India (FCI) vide letter dated 04.02.2011 while drawing attention towards rise in cost of procurement due to anti-competitive agreement among the manufacturers of ALP in the tenders of FCI, had requested the Commission to make inquiries in the matter as per the provisions of the Act.

2. The facts and allegations in the letter, in brief, are as under:-

2.1 It has been stated that there are four known manufacturers of the ALP in India, namely, M/s United Phosphorous Limited (UPL), M/s Sandhya Organic Chemicals Private Limited (SOCL), M/s Excel Crop Care Limited (ECCL) and M/s Agrosynth Chemicals Limited (ACL) (hereinafter collectively referred as "Opposite Parties") who are



making supplies to FCI. On the basis of a statement showing the details of tenders floated by FCI for the procurement of ALP during the last 8 years, it was informed that the Opposite Parties had quoted identical rates in those tenders and on negotiations reduced the rates by the same margin.

- 2.2 The letter of CMD, FCI also alleged that since the Opposite parties quoted identical rates under an anti-competitive agreement or understanding, the very purpose of floating tenders was defeated. It has also been apprehended in the letter that the manufacturers of ALP have formed a cartel. Further, it has also been stated that it is possible that one of the manufacturers may be using its dominant position to compel the other manufacturers to quote the same rates in tenders which is quoted by the dominant manufacturer.
- 2.3 The letter also brings out that as a result of the anti-competitive conduct of the ALP manufacturers, the price of ALP Tablets has nearly doubled during the period 2007 to 2009 and in all probabilities, the price is likely to rise further in future as the suppliers are aware that the Tablets are required in large quantities by FCI, Central Warehousing Corporation (CWC) and State Agencies for preservation of food grains.

Prima Facie Opinion

3. Looking into the contents of the letter, the Commission took suo-motu cognizance and vide order dated 24.02.2011 directed the DG under section 26(1) of the Act to investigate the matter



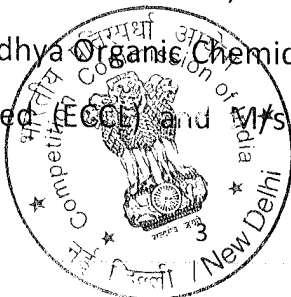
Findings of DG

4. The DG, after conducting investigation, submitted his report dated 14.10.2011 to the Commission. For the purposes of investigation, information was collected from FCI, Central Insecticides Board & Registration Committee, Faridabad (CIB), the Opposite Parties and other government agencies dealing in warehousing and storage of food grains. Besides, officials of FCI and representatives of the Opposite Parties were also examined in course of proceedings. The findings of the DG, in brief are, as under: -

4.1 As per DG, the main market of ALP in India, is that of Institutional sales and majority of buyers are government agencies like FCI, Central Warehousing Corporation, State Warehousing Corporations etc. There are private buyers licensed by Central Insecticide Board, Faridabad also. However, their number is not very significant.

4.2 DG has submitted that Aluminium Phosphide is sold in two to three packs; 56% 3 gram tablets, 15% 12 gram tablets and sachet of 10 gram powder. The sale of 3 gram tablets is restricted to the government agencies as well as approved Pest Control Operators (PCOs) and cannot be sold in the open market; whereas 12 gram tablets can be sold in the open market through licensed pesticide dealers.

4.3 For production of ALP, approval of CIB, Faridabad is required. In India there are only 4 manufacturers of ALP, namely, M/s United Phosphorous Limited (UPL), M/s Sandhya Organic Chemicals Private Limited (SOCL), M/s Excel Crop Care Limited (ECCCL) and M/s Agrosynth Chemicals Limited



(ACL), although as per the records of CIB, 19 manufacturers have been granted licence to manufacture ALP. According to DG, the total annual turnover of ALP by all the manufacturers is about Rs. 175 crore, out of which the procurement of about Rs. 40 crore is done annually by the govt. agencies. The procurement is generally done through invitation of tenders by the government agencies.

4.4 As regards the process of tender adopted by FCI, DG has submitted that on receipt of the consolidated requirement of various Zonal and Regional offices, the proposal is submitted to the CMD, FCI for floating an open/global tender for purchase of ALP Tablets. In the tenders two bid system (one, Techno Commercial and the other, Financial Bid) is followed in accordance with the instructions of Central Vigilance Commission (CVC). Rate Running Contracts are executed with successful bidders at Headquarters level. As per specifications mentioned in the tender, ALP Tablets need to conform to BIS specifications No. IS: 6438-1980.

4.5 A committee comprising of three General Managers, viz; General Manager (Purchase), General Manager (Accounts) and one General Manager from the other division is constituted with the approval of the CMD for opening of the tenders, evaluation of Technical and Price Bids and giving recommendations to the CMD for award of the contract.

4.6 DG has brought out that as per practice, the lowest bidder (L-1) is invited by the committee for negotiations. After negotiations, the committee submits the report giving its recommendations with respect to award of the contract. The contract is finally awarded by CMD in consultation with Executive Director (Finance). After execution of the Rate



Contracts, the Regional Offices of the Corporation purchase the ALP Tablets by placing the Supply Orders on the suppliers as per their requirements. The payment for the same is also released by the concerned Regional Offices of FCI, necessary budget for which is allotted to the Zonal Offices by the purchase division of Headquarters after the approval of Executive Director (Purchase).

4.7 Based upon the replies of FCI, DG has stated that only four firms participate in all the tenders and they have been quoting identical rates. DG has examined the tenders floated by the FCI from the year 2002 onwards, details of which have been summarised as under:

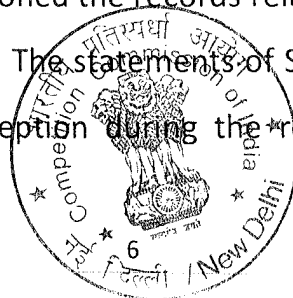
S.No.	Tender year	Rates quoted	Rates finalised	Remarks
1	2002	245/- by all the parties	245/-	FCI awarded Rate running contract to all the four parties
2	March 2005	310/- by all the parties	-	Tender was scrapped and material was purchased from CWC at the rate of 290/-
3	November 2005	None participated	-	All the parties abstained
4	2007	200-UPL 235-ECCL 236-SOCL 234-ACL	200- to UPL	The UPL had quoted a price which was much below the price of other competitors as well as the prices of 2002.
5	2008	None participated	-	
6	2009	388/-UPL 388-ECCL 388-SOCL	386/- after negotiation to all the three participants	Agrosynth did not participate in the tender. The Contract of equal quantity was awarded to all the three participants



4.8 On the basis of the statements of the representatives of the Opposite Parties, DG has reported that the tender documents are submitted in person by them and rates are also normally filled in hand in the tender documents. While submitting bids, the cost of sales is considered as the major factor for determining the price to be quoted in the tenders. Normally a profit margin of about 20-25% is added in the cost of sales by the Opposite Parties.

4.9 DG has submitted that in the year 2009, a Global Tender was floated for procurement of a fixed quantity of 600 MT \pm 10% with a view to break the suspected monopoly/cartel of the Indian manufacturers of ALP. However, no foreign firm participated in the tender and bids were submitted only by the three Indian firms, M/s United Phosphorous Limited (UPL), M/s Sandhya Organic Chemicals Private Limited (SOCL) and M/s Excel Crop Care Limited (ECCL) who had earlier been quoting in the tenders of FCI. Like in earlier tenders, in this tender also, these firms quoted identical rates and after negotiations agreed for the common negotiated rates.

4.10 According to DG, as the tender issued by FCI in March 2009 was not an e-tender, the companies had submitted the documents manually. The tender documents were to be submitted by 2.00 PM on 08.05.2009 and the time for opening the bids was 3.00 PM, the same day. In order to find out the details of persons and date/time of the submission of tender documents, the DG requisitioned the records relating to entry of visitors in the office of FCI, New Delhi. The statements of Security In-Charge and the official on duty at the reception during the relevant period were also

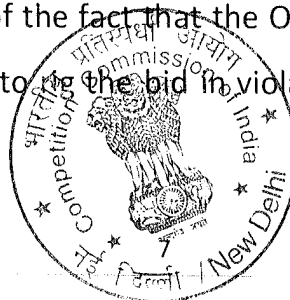


recorded. The visitors' register of the relevant period was also examined.

It was found by DG that on 08.05.2009 which was the last date of submission of tender, common entries were made in the visitors' register on behalf of the representatives of UPL, Excel Crop Care and Sandhya Organics.

4.11 Since common time of 1.25 PM was recorded on the visitors' register for all the persons, to ascertain the correct position, Shri S.K. Basu of Excel Crop Care, who had made one of the entries in the register was summoned by DG for examination. Shri S.K. Basu in his statement accepted that all the entries were made by him on behalf of other representatives of the competitors. He also stated that he had gone to submit the tender form on 08.05.2009 to the office of FCI and also attended the tender opening at 3.00 PM, the same day. He, however, did not accept that he had gone together with the representatives of other companies to the office of FCI. He argued that he met them only at the entry gate of FCI and from there they all went inside together. On being asked as to how it was possible that representatives of other companies also accompanied him to the office of FCI without any prior discussion or planning, that too when the tender was advertised almost 40 days ago, Shri S.K. Basu was not able to give any plausible explanation.

4.12 DG has further submitted that it could not be a mere coincidence that all the representatives chose to submit the bids same day and at the same time and quoted the same price of Rs. 388/- per Kg. All these evidences are indicative of the fact that the OPs were acting in a collusive and coordinated manner to ~~to~~ ~~be~~ ~~the~~ ~~bid~~ ~~in~~ ~~violation~~ ~~of~~ ~~the~~ ~~provision~~ ~~of~~ ~~the~~ ~~Act~~.



4.13 During the course of investigation it was gathered by DG that in addition to the FCI there were also other government agencies who procured the ALP tablets. The information gathered from these agencies by the DG also exhibited similar pattern as seen in the tenders of FCI. As per the report of DG, the information collected from various government agencies revealed that all the four manufacturers had been quoting more or less the identical prices in almost every tender.

4.14 In order to substantiate the above, DG has tabulated a chart showing the instances of identical prices quoted by the Opposite Parties for the supply of the ALP Tablets to different agencies as under;

Sl. No.	Tendering agency	Tender opening date	Rates quoted (Rs. per kg.)			
			Excel	United	Sandhya	Agro
1.	UP State Warehousing Corp	14/03/2007	225	225	--	--
2.	Punjab State Civil Supplies Corp.	28/04/2008	260	260	--	--
3.	Central Warehousing Corp.	06/08/2008	450	--	450	--
4.	UP State Warehousing Corp	19/09/2008	449	449	--	--
5.	Punjab State Co-op ss& Mktg. Fed.	26/12/2008	419	419	--	--
6.	Central Warehousing Corp.	06/01/2009	414	414	--	--
7.	Punjab State Civil Supplies Corp.	27/02/2009	409	409	--	--
8.	Food Corporation of India	08/05/2009	388	388	388	--
9.	Punjab State Civil Supplies Corp.	15/06/2009	399	--	--	399



10.	UP State Warehousing	03/11/2009	399	399	--	--
11.	Director, SS & Disposal, Haryana	01/12/2009	--	--	399	399
12.	Punjab State Civil Supplies Corp.	18/03/2010	419	--	--	419
13.	Central Warehousing Corp.	13/07/2010	421	421	421	--
14.	MP State Warehousing Corp.	15/07/2010	436	--	436	--
15.	Punjab State Co-op ss & Mktg. Fed.	14/02/2011	415	415	--	--
16.	Punjab State Civil Supplies Corp.	15/03/2011	--	415	--	415

4.15 Since it was found by DG that the OPs had quoted identical prices in unusual or unrounded figures like Rs.449, 419, 409, 399 and 421 etc. they were confronted by the DG. However, they could not give any satisfactory answer except stating that it might be a coincidence. According to DG, the OPs were not able to justify the reasons for quoting the identical prices in the various tenders issued by the different agencies. The Opposite Parties have commonly replied that since the last bid price finalized by any agency like Central Warehousing Corporation (CWC) becomes the reference price in future tenders during a year, their bid prices have shown commonality.

4.16 Refuting the aforesaid contention, DG has submitted that this argument is not justified. At the time of tender of FCI for 2009, the price finalized by CWC was Rs. 399 per Kg. However, the Opposite Parties quoted Rs. 388 to FCI. The parties could not explain as to how all of them arrived at a common price of Rs. 388 when in the case of CWC, the tablets were supplied at Rs.399. According to DG, this establishes that the OPs



were acting in coordinated manner and quoted the prices in consultation with each other in order to rig the bid.

4.17 In the course of investigation, the cost of manufacture and sale of ALP Tablets was inquired by the DG from the OPs to ascertain the benefit of not competing with each other. As per DG, the cost of ALP was substantially increased during 2008-09 and accordingly the price for supplies to government agencies was also increased by the manufacturers. During investigation, the OPs submitted that Phosphorous, one of the raw materials was imported from China and during the Beijing Olympics the price of Phosphorous had increased substantially due to heavy taxes imposed by the Chinese Government. Thus the cost of manufacturing of ALP had also gone up. However, subsequently even when cost of Phosphorous reduced between 2009-10 and 2010-11, the OPs had continuously been increasing the price of ALP in the tenders. According to DG, this shows that the manufacturers are quoting higher price in the tenders with a view to earn more than normal profit on the sale/supply of ALP.

4.18 During proceedings, details of cost structure of each company have also been analysed by the DG. It has been found by the DG that there is no similarity in costing of the product among the companies and even the raw materials are procured at different prices. There is no similarity among different companies in various elements of costing. Thus, according to DG, the reason for quoting similar prices cannot be attributed to the similar cost structure of manufacturers.

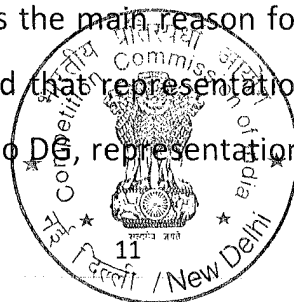


4.19 After making a comparison of price charged by the four Opposite Parties, DG has submitted that the price quoted to the government agencies in tenders were a little higher than the price in export market and for the domestic private buyers. Further, since 2009 onwards, the profit margin of Opposite Parties has also increased.

4.20 On the basis of the statements of the Opposite Parties, the DG has reported that the manufacturers of ALP have no separate forum or association to discuss the business matters relating to ALP. However, since there are only four manufacturers in India, the exchange of information amongst them in the form of informal meetings/discussions cannot be ruled out and for this they may not require holding large or pre-planned meetings.

4.21 As per DG, during the course of investigation, the information gathered from FCI shows that all the Opposite Parties have jointly boycotted some of the tenders issued by FCI. The tender floated by FCI in November, 2005 was not participated by any of the manufacturers. Similarly, in 2008 also none of the parties submitted the tender documents. In a Global tender for e-procurement of ALP Tablets floated by FCI in May 2011, no bid was submitted.

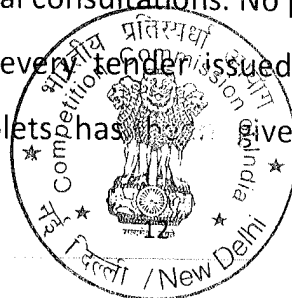
4.22 The Opposite Parties were asked by the DG to explain the boycott of the e-tender issued by the FCI. In their defence, they have cited the adverse tender conditions as the main reason for non-participation in the said tender. They also stated that representations were sent by them to FCI on the issue. According to DG, representations were sent by M/s Excel



Crop Care Ltd. and M/s Sandhya Organic Chemicals Pvt. Ltd. vide their letters dated 26.05.2011 and 27.05.2011. These letters were sent through ordinary post and were received by FCI on 01.06.2011 and 07.06.2011 respectively, whereas the tender had closed on 27.05.2011. The main supplier M/s United Phosphorous and other firm, namely, M/s Agrosynth Chemicals Ltd. did not submit even a representation. According to DG, timing of representations clearly indicated that the purpose of raising the issues at a belated stage was mainly to create an alibi for not participating in the tender otherwise they could have raised these issues well within the period during which the tender had remained open.

4.23 As per DG, the above mentioned facts indicate that the Opposite Parties had taken collective decision to boycott the Global tender of FCI. The conditions in the tender claimed to be difficult could have been raised by them before FCI during the tender period only. Further, considering the installed capacity and financial strength of two of the four Opposite Parties, viz. United Phosphorus and Excel Crop Care, the conditions in Tender also do not seem to be stringent. According to DG, behaviour of the Opposite Parties is indicative of the fact that they were acting in a concerted manner to boycott the tenders floated by FCI.

4.24 DG has stated that the OPs have been found quoting the identical prices in the tenders issued by FCI and other govt. agencies on many occasions. The OPs have been found quoting unrounded figures which is not possible without mutual consultations. No plausible reason for quoting identical price in almost every tender issued by the govt. agencies for procurement of ALP tablets has been given by the OPs. The price



quotations could not have been identical, unless there was pre-consultation to quote the price since the Opposite Parties are located in different parts of the country and they have different cost of production. Further, the rates quoted by the OPs are much higher than the cost of production which shows the absence of competition among them.

4.25 According to DG, the Opposite Parties have collectively boycotted the tenders floated by FCI on many occasions including the e-tender of 2011. The OPs by their action, thus, have eliminated competition among themselves for supply of ALP to FCI resulting in payment of higher price by the tendering agency. Since agencies like FCI need ALP for the preservation of the food grains, the Opposite Parties are in a position to join hands and quote the tender rates.

4.26 On the basis of the above facts and circumstances, DG has concluded that the OPs have acted in a concerted manner to eliminate the competition among themselves by indulging in collusive bidding in the tender for procurement of goods by FCI in 2009 and collectively boycotting the e-tenders floated by FCI in 2011, in violation of the provisions of sections 3(3)(a), 3(3)(b) & 3(3)(d) read with section 3(1) of the Competition Act.

5. The Commission considered the report of DG and decided to send a copy of same to the concerned parties for filing their replies/objections in the matter.



Reply of M/s Agrosynth Chemicals Limited (OP-1)

6.1 M/s Agrosynth Chemicals Limited (OP-1) filed its reply/objections to the report of DG vide its letter dated 19.11.2011. The reply of the (OP-1), in brief, is as under:-

6.1.1 The OP-1 has refuted the allegations that it has been part of any alleged cartel in the tenders of FCI. It has submitted that it has not quoted in the tenders of FCI since 2007 and its name has been unnecessarily dragged. According to OP-1, it had given ample evidence and explanations as to why it abstained from the tenders of FCI, which was totally ignored by the DG.

6.1.2 It has been stated that DG has also not taken into consideration the explanations given by it during the course of investigation as regards its costing. It has been working with full captive power and since the power supply was extremely erratic and unreliable in the villages, it was incurring a higher cost of power compared to other manufacturers. Further, keeping in view the safety concerns of the workers, it has been using Red Phosphorous as a raw material for ALP which is about 20% more expensive than White Phosphorus being used by the other manufacturers.

6.1.3 The OP-1 has further submitted that it has never tried to earn exorbitant profit as alleged by FCI. As per the Opposite Party, its profit during the years 2006-09 was approximately Rs. 35 lac, Rs. 10 lac and Rs.32 lac respectively. Therefore, the question of making profit by unfair means does not arise.

6.1.4 According to the OP-1, it is not a member of any association. It has contended that it has not participated in the tenders floated by the FCI



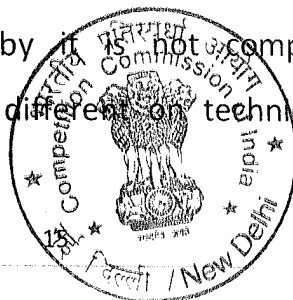
during the years 2007-2009 when the price of the ALP in the tenders was allegedly hiked. It stopped participating in tender of FCI from 2007 onwards because FCI refused to consider its request that as a member of NSIC, it was entitled for free tender forms, exemptions from EMD and security deposits etc. In the Global Tender of 2009 also, due to the enormous amount of EMD and security deposits, it did not participate in the said tender.

6.1.5 The OP-1 has further submitted that it is a co-incidence that its quoted price for the Punjab State Civil Supply Corporation (PUNSUP) & Haryana was identical with the other suppliers. The DG has not examined the relevant officers of the FCI and solely relied upon the letter of the FCI and the statement of the receptionist to establish that there was a meeting of mind among the bidders.

6.1.6 The OP-1 has further submitted that there have been attempts by Excel and UPL to take over the company. As a matter of fact in 2008, UPL had reduced the rate to Rs.200/- per Kg with an ulterior motive of eliminating competition. UPL, however, incurred heavy losses since it had quoted very low price and was even penalized by FCI because it could not complete their supplies. This itself proves that there was no cartelisation or agreement among the manufacturers.

6.2 The OP-1 also filed its additional reply on 31.01.2012 and denied that it was part of any alleged cartel of ALP manufacturers. While reiterating its earlier submissions, it further contended as follows;

6.2.1 The ALP manufactured by it is not comparable with other manufacturer as its product is different on technical and commercial



parameters from others. It has been using a different raw material which has a different cost of procurement, handling and storage.

6.2.2 As per OP-1, since its size is too small compared to the other players in the market, it has no say in the overall supply of the goods to the government agencies. The other players could operate independent of it. A comparison of size and resources with the other Opposite Parties will clearly establish that it being an insignificant player could not have and did not indulge in bid rigging or any collusive bidding.

6.2.3 The OP-1 has submitted that there is no evidence against it to show that it was a part of any arrangement or agreement in violation of section 3(3) of the Act. It has been submitted by the OP-1 that while the installed capacity of ALP in the country is around 5000 MT per annum, the total requirement in the country does not exceed 3500 MT per annum. The supply of ALP outstrips the demand at present and therefore there can be no cartelisation since each player in the market would like to have a return on his investment and would like to utilize his capacity to manufacture more and sell more.

6.2.4 According to OP-1, it does not make any economic or commercial sense to control or withhold production when the installed capacity is more than the demand for the product in the market. Further, in govt. contracts, the govt. is a dominant buyer and is not bound to accept the price quoted by the bidders and will always resort to post tender negotiations for the finalisation of prices. The government agencies can resort to imposing stiff conditions for making supplies. Due to these reasons, it was in no position to even participate in the tenders floated by FCI post 2007 as the terms were too onerous. Since it was not in a position



to have any say in the production, supply or sale of the relevant product, it cannot be said that it has indulged in collusive bidding or withholding supplies.

6.2.5 The OP-1 has further submitted that the very objective of a cartel is to make huge profits. However, it has always maintained its profits between 10-15% unlike the other manufacturers who have shown profit around 20%. Since the profit earned by it has been extremely reasonable and there has been no increase in the installed capacity over the last ten years, it is conclusively proved that it has not been part of any cartel and it has not indulged in any bid rigging.

6.2.6 As regards identical rates, it has been submitted by OP-1 that over last six years there were only 8 tenders where the price quoted by it turned out to be identical to the price quoted by others. Significantly the price quoted by it were not identical to price quoted by all the three other respondents. It is accidental that the price quoted by it was identical with one or two co-bidders only. Further the bid quotes were identical in the tenders pertaining to the states of Punjab and Haryana since the bidders were required to quote the price approved and prevailing in the other govt. contracts in the corresponding period. Due to this reason, it was natural that the price would be identical. There is no evidence whatsoever in the report of DG to show that it has acted in concert with the other bidders in quoting an identical price.

6.2.7 According to OP-1, since it did not even participate in 2009 tender floated by FCI, it cannot be alleged of quoting identical rates in agreement with other bidders. There is no question of boycott of any tender of FCI by



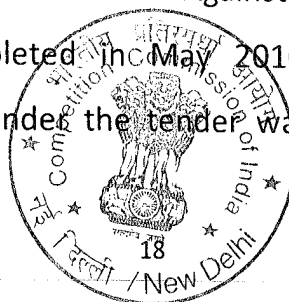
it. It had given a detailed reason as to why it chose to withdraw and not to participate in the FCI tenders. It cannot be compelled to deal with FCI if it was not able to meet its terms. There is no law that compels a person to deal with every person irrespective of whether the commercial terms are viable or otherwise. Being a small unit, it was not capable of complying with the terms of FCI and therefore it was not in a position to participate. The inability to participate cannot be considered to allege that it boycotted the tender.

Reply by M/s Excel Crop Care Ltd.(OP-2)

6.3 M/s Excel Crop Care Ltd. in its reply/objections dated 13.01.2012 to the report of DG has submitted the following;

6.3.1 The OP-2 has contended that the tenders for the years 2002 to 2009 were prior to the notification of section 3 and 4 and therefore, the said tenders could not be inquired by the Commission. More specifically, the Global Tender of 2009 was floated on March 28, 2009 and opened on May 8, 2009; both these dates fall well before notification of section 3 and 4 of the Act. Further, suo-motu investigation as initiated by the Commission was based on letter dated 4 February 2011 of FCI which did not refer to 2011 tender at all. Hence, tender of 2011 was beyond the scope of DG's investigation.

6.3.2 The OP-2 has further submitted that, if the term of agreement/tender, the subject matter of inquiry, has expired, then the notice of inquiry becomes infructuous. Against the Global Tender of 2009, the supplies were completed in May 2010. It was only after the provisioning of the ALP under the tender was completed by the three



parties that FCI as a matter of afterthought, undertook to harass it by abusing its dominant position. The OP-2 has submitted that after taking the supplies of ALP from it, FCI was stopped from making complaint for cartelization for tenders. It is a settled principle under law that if the notice of inquiry relates to a period after the expiry of the term of an agreement/tender; then such a notice of inquiry is discharged having become infructuous. In order to support its contention, the Opposite Party has relied upon judgements and orders passed in case of All India Organization of Chemicals and Druggists Association (2002) CTJ 4 (SC) (MRTP); and Director General v. Voltas Limited (2010 CTJ4 (COMPAT) (MRTP).

6.3.3 It has been contended by the OP-2 in the light of the provisions of section 26 of the Act and Regulation 27 of the General Regulations, 2009, only the Commission has the power to refer any matter for investigation to the DG. Secondly, only the Commission has the power to club previously received information with substantially same newly received information. Even after receiving an order for commencing investigation on an information under section 26(1), if the DG, is satisfied, that the matter raised in any information or reference received subsequently for investigation from the Commission was directly and substantially similar, then the DG could request the Commission to consolidate such similar information or reference, as the case may be, for common investigation. All this implies that the DG does not have the power on his own to club similar information and that the DG can merely request the Commission to club/consolidate similar/substantially similar information.



6.3.4 As per the contention of the Opposite Party, in terms of orders of the Commission in the present case, the scope of the present investigation would be limited to the alleged acts and omission of the Opposite Parties between 2007 and 2009 in respect of the tenders of FCI. DG has no jurisdiction to investigate any acts/omission of the Opposite Parties which lie beyond 2009 and not covered under the original order of the Commission.

6.3.5 It has been contended by OP-2 that increase in price of ALP over the years has been due to increase in price of 'Yellow Phosphorous' procured by way of imports from China and not because of any alleged bid-rigging/ cartelization. As per the Opposite Party, 'Yellow Phosphorous' from China attracted Export duty, which was 10% to begin with and which was increased to 20% in June 2005 and further raised to 120% in May 2008, when the prices of ALP had allegedly doubled.

6.3.6 It had repeatedly communicated (oral and written) the fact of price escalation in Yellow Phosphorous and acute shortage/ non-availability of Yellow Phosphorous to FCI and other government authorities. The written communications unambiguously stated that the rise in price of Yellow Phosphorous not only hampered its production plan but was also contributing to rise in its cost of production.

6.3.7 The OP-2 has further submitted that the increase in the export duty on Yellow Phosphorus has been a cause of worry for most companies that use it as a main raw material. Neither the Government of India nor the FCI specifically have also been unaware of such increase in the price of Yellow Phosphorous.



6.3.8 The Opposite Party has also contended that the allegation of bid rigging in the global tender of 2009 is grossly erroneous. Attention of the Commission has been drawn towards the internal noting of FCI in this regard wherein it has been stated that “the theory of cartel formation is presumptuous”. The Opposite Party has further submitted that bid rigging takes place when businesses, that would otherwise be expected to compete, secretly conspires to raise prices of goods or services for the purchasers. However, in the instant case the price dropped from the previous prices. Hence, the question of bid rigging does not arise. As per the Opposite Party, the price (and quantities) of the bids submitted by it were never ‘too high to be accepted’ or ‘contained any terms that could be unacceptable to the buyer’. In fact, the bids submitted by it for FCI and other government agencies were on most of the occasions below the prices charged by them to their exporting customers and private sector customers.

6.3.9 According to the Opposite Party, it is settled position of law that a simultaneous movement of prices, especially for homogenous products, is not by itself sufficient to prove a cartel. The Opposite Party has also relied upon the Judgments pronounced in cases of Alkali and Chemical Corporation of India Limited, Calcutta and Bayer (India) Limited, Bombay RTPE 21 of 1981, (1983) CTJ 7 (MRTPC), Association of State Road Transport Undertakings v. Kar Mobiles Limited, 2002 CTJ 433 (MRTP) and Union of India V. Hindustan Development Corporation (AIR 1994 SC (988)) to support its contention on the issue.

6.3.10 The Opposite Party has further submitted that the statement of the receptionist of FCI to establish meeting of minds by the DG cannot be



considered as a price parallelism plus factor leading to the determination of alleged bid rigging by the Opposite Parties. The practice of one person entering the names of the others in the visitors' register is an ordinary/usual practice. As per the Opposite Party, ALP price quoted by it in various tenders was based upon the market trend and not necessarily always governed by its cost of production. The said practice, however, cannot be termed as cartelisation.

6.3.11 It has been contended by the OP-2 that it has only been recovering its cost and earning a reasonable profit by charging the lowest possible price for the ALP Tablets tendered by FCI and other government agencies. It is unreasonable to expect a business entity to forego its trade interest and incur losses; especially when such business entity has kept the interest of public at foremost priority and has continued to supply the Aluminium Phosphide Tablets whenever sought (either under a negotiated tender price or otherwise), even at a short notice.

6.3.12 According to OP-2 it was willing to participate in the tender of May, 2011 but due to the unreasonable demands/terms and conditions prescribed in that tender, it could not. It had even written a letter to FCI on May 26, 2011 detailing the reasons for its non-participation which was not even replied to by the FCI.

6.3.13 It has been further contended by the OP-2 that the DG has not undertaken the process established under law while conducting the investigation since he has not analysed factors listed under section 19(3) of the Act which may have a bearing on the final decision that the Commission may take with respect to the alleged bid rigging amongst the four producers of ALP.

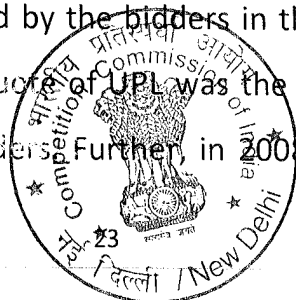


6.3.14 As per the contentions of the Opposite Party, the DG has given his findings on assumed facts without appreciating that its actions were only for the benefit of the consumers. In fact, it has suo-motu offered ALP at lower price as and when the price of raw materials went down. The Opposite Party has further contended that whenever requested by FCI, it has supplied ALP, keeping in view the public/consumer's interest.

6.3.15 It has further been submitted that the letter filed by CMD, FCI is malafide, frivolous and with a view to harass it. DG has not taken into consideration the replies filed by the Tamil Nadu Civil Supplies Corporation and the Food Corporation of India, Thiruvananthapuram which brings out clearly that the Opposite Parties have quoted different price in several tenders.

6.3.16 FCI as dominant player has been unilaterally dictating final purchase price of ALP, a practice which started with award of purchase orders in 2002 for the supply of ALP. As per the OP-2, FCI along with other Corporations have misled the Commission and DG by making blatantly false statements that no substitute for ALP was available in the market, whereas 'methyl bromide' could substitute ALP. In fact, many Corporations have been buying 'methyl bromide' as well as ALP and have been using both the products.

6.3.17 It has also been submitted by the OP-2 that FCI has itself admitted that no price fixing could take place in 2007 and therefore the price of ALP came down to Rs. 200 per kg. However, FCI has purposefully concealed the fact that the rates quoted by the bidders in the tender of 2007 were much higher and since the quote of UPL was the lowest one, no counter offer was given to other bidders. Further, in 2008, when UPL refused to



supply ALP at Rs 200 per kg, FCI on its own asked other parties to supply ALP at the previously quoted rates. The same is sufficient to establish that UPL had quoted much lower prices as were not feasible / justifiable in an open market and subsequently failed to supply the Tablets. The said contract and purchase price, therefore, could not be taken as basis for alleging that the prices were lower in 2007 and increased in subsequent years because of collusive price fixing by the Opposite Parties.

6.3.18 As regards meeting of minds in terms of entries in visitors' register made by one bidder for all other bidders, it has been contended by the OP-2 that it is normal at FCI that if more than one person arrives for meeting with the same official, the receptionist would not request each one of them to separately make an entry. Instead, it is an accepted and practicable norm for only one of the several persons to make an entry and all others merely put their signatures to confirm. A closer examination of the visitors' register would reveal that several entries have been made by one person in same handwriting and other visitors have signed against their names so entered in the register by that person. Further, tender boxes are kept ready only on the last date and most of the time in the last hour before closure of tender and the bidders usually drop their quotes at the last minute. This practice can also not be construed as meeting of minds.

6.3.19 DG has failed to appreciate that it has taken all along the best possible measures to supply the ALP to FCI and other corporations at the lowest possible price in spite of the fact that it can sell ALP at much better price/terms to the other domestic customers.



6.3.20 The Opposite Party has also submitted that the DG has investigated four parties. However, there are 19 companies registered with CIB for the manufacture of ALP. The DG has not examined the other manufacturers of ALP as to why despite having the registration, the remaining 15 companies do not produce and/or supply ALP.

6.3.21 According to the Opposite Party, without analysing the reasons for absence of other domestic and international producers/suppliers of ALP in the tender process, terms of the tender of FCI and other Corporations, it would not be appropriate to comment on the competitiveness of the government procurement system. DG has also failed to investigate the reasons for lack of participation by any foreign company even when the tenders of 2009 and 2011 were the Global Tenders.

6.3.22 The Opposite Party has further submitted that the DG has ignored certain documents placed on record by it to support that FCI abuses its dominant position. As regards the tender of 2009, in their notes on file, the officials of FCI have mentioned that the bidders had quoted lower rate of ALP at Rs. 388 per Kg as against the Running Rate Contract with Central Warehousing Corporation at Rs. 399 per Kg. The note has further mentioned that despite any (alleged) cartelization by tenderers, FCI stood benefited by lower rates and scrapping of the tender would not help FCI.

6.3.23 As per the Opposite Party, if, FCI was of the opinion that there was a cartel in the tender, it would have rejected the said tender, forfeited the EMD and also recommended the case to the authorities for appropriate action in term of the clause 13(10) of the tender. Although FCI has alleged that since 2002, the OPs have indulged into cartelization / bid rigging; no



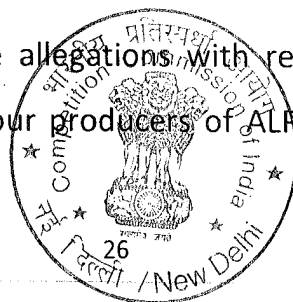
attempt has been made by FCI in the said last 9 years to make any formal complaint before the appropriate forum.

6.3.24 Furthermore, FCI placed the orders on it vide letter no. PUR-15(4)/2009TE/ALP dated 21st July 2009 for 200 MT in terms of the tender conditions. The supply of ALP under the said order was completed by May 2010. Pursuant to that upon request of FCI, it supplied additional quantities of ALP. After taking the supplies of ALP, FCI was estopped from making complaint for cartelization for a tender under which supply of the product was completed in May 2010.

6.3.25 The OP-2 has also submitted that in terms of tender of the Central and State Corporations including FCI, any bidder cannot quote higher price than the price at which bidder is supplying ALP to any other government corporation/body. Further, if the price of ALP, pursuant to award of contract becomes lower in any other tender, the successful bidder is obligated to match that price in the existing contract.

6.3.26 In order to support its aforesaid contention, the OP-2 has relied upon the letter dated 16.01.2007 of Andhra Pradesh State Warehousing Corporation wherein it was asked to revise its quotes to match the rates quoted by M/s Sandhya Organics and further warned it that in case it was unwilling to revise the prices, the contracts would be considered as terminated. As per the Opposite Party, the aforesaid evidence was enough to establish the abuse of dominant position, bargaining power and arm twisting tactics adopted by various corporations including FCI.

6.3.27 As per the OP-2, the allegations with regard to tender of 2002 floated by FCI that all the four producers of ALP quoted the same price



were bogus and incorrect. There were 8 participants for this tender and not 4 as mentioned in the report of DG and all the parties had quoted different prices. Thus, the remarks of FCI that it had to award rate running contract to all the tenders as they stuck to the same rate was factually wrong. The contract was awarded to a Chinese Manufacturer of ALP. However, FCI had to scrap the tender since it did not care to take import licence for import of ALP as a result of which the Chinese Company could not supply ALP. Unable to procure ALP from the Chinese Company, FCI approached the Opposite Parties named in this matter to supply ALP at a rate of Rs.245 per Kg and asked them to accept the same. In the subsequent future tenders, the prices as fixed by FCI in the tender of 2002 became the benchmark. According to the OP, therefore, it is wrong on the part of FCI to allege that any anti-competitive practice was initiated by it in conjunction with other suppliers/producers of ALP.

6.3.28 With regard to the tender of March 2005 issued by FCI, the OP-2 has contended that the informant has not disclosed true facts to the DG. According to the OP, it was forced by FCI to reduce the rate from Rs. 310 per kg to Rs.290 per Kg. In spite of this, the tender was scrapped by the FCI and it was decided to purchase ALP at Rs. 290 per Kg against the Rate Contract from CWC. FCI subsequently floated another tender in November 2005. Since FCI had scrapped the tender of March 2005 which was negotiated at Rs. 290 per Kg, it presumed that the rate of Rs. 290 per Kg might not be acceptable to FCI and therefore it did not see much use in participating in the tender and consequently abstained from quoting in that tender.



6.3.29 With regard to tender floated by FCI in 2007, the Opposite Party has contended that the FCI has itself admitted that no price fixing could take place in 2007 as the prices of ALP came down to Rs.200 per Kg and the contract was awarded to UPL being the L-1 bidder and no counter offer was given to other bidders.

6.3.30 As regards tender of August 2008 issued by FCI, the OP-2 has submitted that allegations of cartelization are baseless especially when subsequent to its meeting with FCI officials, it had submitted a letter dated 12.08.2008, citing reasons for not participating in the tender. The sole reason for non-participation in that tender was non-availability of the chief raw material, Yellow Phosphorous. Non-participation in the tender process, even after duly intimating FCI of the reasons for such an act could not be termed as anti-competitive or cartelisation.

6.3.31 As regards the tender of 2009, the OP-2 has submitted that the allegations made by FCI are false that since the Opposite Parties had formed a cartel, price of ALP nearly doubled since 2007. The price of ALP had increased in 2009 due to the increase in cost of raw materials especially Yellow Phosphorous and excise duty. According to OP-2, it will be absolutely against the spirit of the free economy to force any company to sell its products to any statutory or government authority at a loss or at a price as may be dictated by such statutory authorities.

6.3.32 Further, any increase in price of ALP because of increase in cost of raw material i.e. Yellow Phosphorous was justified and could not be termed as anti-competitive.



6.3.33 With regard to Tender floated by FCI in May 2011, the OP-2 has submitted that the terms of the tender were absolutely one sided without giving any due regard to the difficulties that might be faced by the suppliers of ALP. The difficulties in participating and supplying ALP under the said terms were communicated to FCI in a letter dated 26th May 2011. The letter was received by FCI on 26th itself. Since it did not receive any feedback regarding revision in terms of tender, it had no other option than abstaining from the bidding process.

6.3.34 The OP-2 has also objected to the allegations that it had quoted identical rates in case of tenders issued by various other state corporations and regional offices of FCI. As regards the tender of UP State Warehousing Corporation, the OP-2 has submitted that the contract was awarded at a price of Rs. 449/- Kg. However, after decline in the cost of raw materials, it suo-motu reduced the price of ALP from Rs. 449/- Kg. to Rs. 399/- Kg, a down ward reduction of Rs. 50/-. The same is enough to establish that it has not been acting in a cartel and has always kept national interest as supreme.

6.3.35 As regards the tender of FCI, Hyderabad, the OP-2 has submitted that no tender was floated during 2007 and 2009. FCI Hyderabad had floated a tender vide reference No. QC.15/Melathion/08-09/AP/T.E dated 21.08.2008. Order was placed vide supply order No. QC/15(ALP SO) 2008-09/AP dated 3.11.2008 for 10 MT ALP and it had supplied 10 MT of ALP vide its invoice no. 9202506284 dated 3.9.2008, 9202506600 dated 19.11.2008 for 5 MT each. FCI Hyderabad had also floated another tender No. QC/15 (Genl. Corresp.)/2008-09/Vol.II dated 20.03.2009 for 20 MT ALP; wherein it quoted a price of Rs. 399/- Kg.



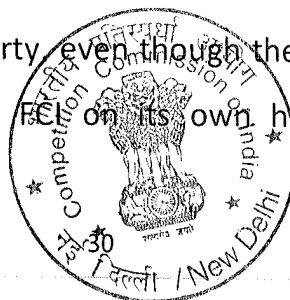
6.3.36 According to OP-2 it could have continued to supply ALP at Rs. 450 Kg as per terms of the agreement; but upon reduction in cost of raw materials it reduced price of ALP by Rs. 51 per Kg. The same proves that it never had any intention to fleece FCI by over-pricing, despite being one of the major producers of ALP in India.

6.3.37 FCI alongwith other State Corporations have not only abused their dominant position but during negotiations have repeatedly forced the opposite parties to either match the prices dictated by them or match the prices as offered by any one of the Opposite Parties.

6.3.38 The OP-2 has submitted that in order to conceal its own anti-competitive practices FCI has abused the process of law by filing a frivolous information with the Commission alleging anti-competitive practices on part of the Opposite Parties. The DG by summarily relying on the letter of CMD FCI and without investigating the tender terms, has failed in its duty to conduct fair and impartial investigation and therefore any reliance on DG's Investigation would be bad in law.

6.3.39 According to OP-2, it is pertinent to note that FCI, Thiruvananthapuram has admitted that in the tenders floated in 2008 and 2009, it had quoted different rates which were not same as that of the other bidders. Although its rates were the lowest, FCI unilaterally decided to scrap the said tender. Even in the tender of CWC floated in 2008 and 2010, it had quoted different rates, which were not the same as other bidders.

6.3.40 As per the Opposite Party, even though the procurement of ALP is done through public tender, FCI on its own has been scrapping the



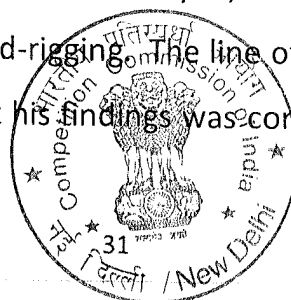
tenders, cancelling the purchase orders placed on successful bidders; thereby causing financial loss to the suppliers. FCI is well aware of its dominant position in the domestic market and knows that it can arm-twist the producers of ALP.

6.3.41 The OP-2 has further submitted that the DG has come to the conclusion that normally the cost of sale is the major factor for determining the price and 20-25% margin is added to cost by all the Opposite Parties. However, DG has not taken into consideration its submissions that it is the market price of ALP which is taken into consideration while bidding for the tenders and the cost of the production and margins are only indicative in nature.

6.3.42 The OP-2 has submitted that the price quoted in tenders cannot be considered in isolation and should be looked alongwith the quantity slabs. In the tender of 2009, the prices quoted by the bidders to FCI were not identical in the context of different quantities offered by the bidders.

6.3.43 According to OP-2, DG has acknowledged that he did not find any direct evidence of any agreement among the ALP manufacturers. He has merely relied on circumstantial evidence collected during investigation and has failed to use any economic analysis to support his conclusions. He has not even conducted any economic analysis of the industry and on unjustified grounds has arrived at the presumptive conclusions.

6.3.44 According to OP-2, DG's analysis is based on the identical price quoted by the parties. Based on this analysis, he has concluded that there was evidence of cartel and bid-rigging. The line of arguments advanced by DG (Investigation) to support his findings was completely untenable. Price



parallelism analysis suffered from a number of serious methodological issues. Price parallelism by itself did not prove information sharing. There could be parallel pricing in an industry where every firm acted in its self-interest and in an economically rational manner. There is a rich economic literature that supports this point of view. It is common knowledge that one needs to go beyond price parallelism to show an anti-competitive effect. The DG has not proved anything; he has just assumed a conclusion which was not sufficient to prove cartelization in any industry.

6.3.45 Careless and erroneous approach and consideration of misrepresented facts and non-verification of the same, raises serious doubt about the analysis presented by the DG, which makes it impossible to put any credence on conclusions based on such analysis.

6.3.46 According to OP-2, section 3 (3)(a), 3(3)(c) and 3(3)(d) presuppose existence of an agreement between the parties acting in concert. For an agreement to exist there has to be an act in the nature of an arrangement, understanding or action in concert including existence of an identifiable practice or decision taken by an association of enterprise or persons. An agreement is a conscious and congruous act that has to be associated to a point in time. The word "Agreement" for the purposes of the Act has wide connotations as defined under Section 2(b). However, it is imperative that existence of such an "Agreement" is required to be unequivocally established. The European Court of Justice has clearly laid down this principle with respect to infringements of Article 81 (1) of the EC Treaty in several cases wherein the Commission has said that precise and coherent proof must be produced by the party or authority alleging infringement for



anti-competitive agreement. The existence of any "agreement" cannot be conjectured or even circumstantially adduced.

6.3.47 For the purpose of present case, it needs to be seen whether the DG's report dated 25th October, 2011 has produced any precise or coherent proof of any agreement of the nature covered in section 3. If existence of Agreement among the Opposite Parties has not been categorically and clearly established in the DG's report, the Commission may come to conclusion that there is no evidence to establish that the practice is a result of some action in concert or emerges from a collusive decision as was concluded in its decision dated 02nd December 2010 in the case of Neeraj Malhotra Vs Deutsche Bank.

6.3.48 According to the OP-2, it has discharged the onus of establishing that it was neither cartelizing nor participating in any 'bid' rigging/price parallelism/identical prices' as alleged by the DG. However, no evidence has been produced by FCI and/or DG before the Commission to establish 'meeting of minds' and 'cartelization'.

6.3.49 According to OP-2, the prices quoted to private parties by it in some cases have been equal or negligibly lower as compared with FCI and CWC. The price charged to the private parties could be lower due to various factors like faster payments from private parties, no requirement of payments of EMD and various other factors like in case of government tenders, freight and testing charges were also taken into account while quoting price, in cases of supplies to the private parties, freight and testing charges were borne by the buyers.



6.3.50 On the basis of the above, the Opposite Party has contended that it has neither been part of any anti-competitive agreement nor has indulged in any bid rigging leave alone cartelization.

Reply of M/s United Phosphorus Limited (OP-3)

6.4 The reply/objections of M/s United Phosphorus Limited (OP-3), in brief, are as under:

6.4.1 The OP-3 has submitted that it has complied with all the directions, has not concealed any material fact and furnished all the relevant documents and information to the DG. It has contended that although the DG did gather some information related to the tender documents floated by FCI for the years 2002-2011, he did not examine any officials of FCI in relation to the tendering process or the methodology of cost and price fixation.

6.4.2 As per OP-3, the cognisance of the instant matter was taken up suo-motu by the Commission on the basis of a letter dated 04.02.2011 from the CMD of FCI. The aforesaid letter did not contain any detail of the alleged cartel among the suppliers. For taking suo-motu cognizance, the act imposes onerous responsibilities on the Commission. In the instant case, the aforesaid letter of the CMD of FCI contained only bare allegations; hence, the Commission should have carried out some in house inquiry or analysis before passing any order u/s 26(1) of the Act.

6.4.3 According to OP-3, the order dated 25.10.2011 u/s 26(1) of the Act did not talk about the period of inquiry or contravention of the provisions of the Act or the period of commencement and continuance of the alleged cartel.

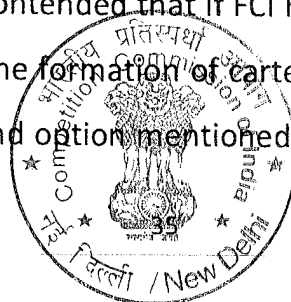


6.4.4 As per OP-3, the allegations contained in the letter of FCI are related to the period 2002-2009. However, the DG proceeded to conduct the investigation into the activities/transactions of 2010 and 2011 without taking the permission from the Commission. The DG has concluded that the Opposite Parties have violated the provisions of the Act through their act of collusive bidding in the tenders floated by FCI in the year 2009 and e-tender floated by FCI in the year 2011. However, as far as year 2011 is concerned, no allegation was made by the Informant. Even the Commission has not given any direction to the DG to investigate the tender of 2011. DG has exceeded his powers in this regard.

6.4.5 According to OP-3, the information collected for the years 2002-2008 cannot be covered under the purview of the Act which were notified and enforced w.e.f. 20.05.2009 only. It has also contended that the DG has not examined any other supplier or private purchaser or any expert of this sector. There are 19 registered manufacturers who have been granted license by the CIB but none of them have been examined by the DG. No member of the purchase department/committee of FCI was also examined by the DG.

6.4.6 The OP-3 has contended that the stand taken by the FCI before the Commission was self-contradictory and vague. While on one hand the tender committee of FCI has accused the suppliers of ALP of forming a cartel, on the other hand the ED (Finance), FCI has termed the rates offered by the suppliers as competitive.

6.4.7 The OP-3 has also contended that if FCI had found that the OP-3 and others were involved in the formation of cartel way back in the year 2009 and there was a clause and option mentioned in the terms and conditions



of tender that the tender could have been scrapped in case of cartel formation, why did it not take such steps in the year 2009 itself rather than raising this issue at a later date in the year 2011.

6.4.8 According to OP-3, it was neither allowed inspection of investigation records of DG nor did it get relevant information through RTI from FCI and other agencies so that it might rebut all the findings of DG.

6.4.9 The OP-3 has denied that it has entered into any agreement with the other manufacturers for rigging the bids. Rather it has filed a civil suit bearing No. 161/1996 in the Court of Civil Judge (S.D.) Valsad, Gujarat against Sandhya Organic Chemicals Pvt. Ltd., one of the Opposite Parties for grant of permanent injunction for adopting, using and restoring the new process as invented by it for manufacture of Aluminium Phosphide and Zinc Phosphide and also against selling such products in open market. The said civil suit is still pending for adjudication before the concerned Court. This shows that it has no contractual, business or agreement with Sandhya Organic Chemicals Pvt. Ltd. or with any other Opposite Party.

6.4.10 The OP-3 has further submitted that Excel Corp Care Ltd. (OP-2) or any other firm were its competitors and therefore, in no manner it would enter into any agreement with them, which would be detrimental to it.

6.4.11 According to OP-3, the issue of identical price quoted by the Opposite Parties to the FCI and other buyers as a result of collusion has been wrongly raised by FCI and upheld by DG. Whenever a tender is floated either directly or through newspaper or website, it buys the tender form through its representatives. The price to be quoted is calculated in consultation with various departments taking into consideration the total

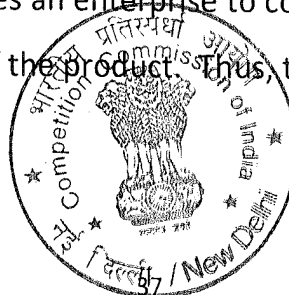


cost of the raw and packaging materials, direct and indirect cost, transportation, overheads, labour cost, finance, taxes and other marketing expenses.

6.4.12 Generally a profit margin of 20%-25% is added to the cost before quoting the final price in the tender. The tender form is then filled up and sealed and is submitted personally in the office of the concerned party. The whole process is confidential in nature and is accomplished without any consultation with any other manufacturer.

6.4.13 The OP-3 has further submitted that the rate finalized in the tender of CWC or the tender finalized in the beginning of a particular year is considered to be the bench mark for the other tenders for that year and this is the reason that the price quoted in some of the tenders may appear identical. Another reason for the identical price may be a clause mentioned in the tender of the CWC that if the price quoted in any other tender appears to be unreasonable or higher than the market price, the CWC may revise the price or terminate the contract at any stage.

6.4.14 On the question of entry barrier in the market, the OP-3 has submitted that the manufacture and supply of ALP is regulated under the provisions of Insecticides Act, 1968 and rules framed thereunder. The provisions of this Act are for grant of license and sale etc. The relevant provisions are section 5(1), 9, 13(1), 18, 23 and 27(1). The provisions do not discriminate between enterprises. It is only the capacity and eligibility under the Act which enables an enterprise to compete in the market in the manufacture and supply of the product. Thus, there is no entry barrier.

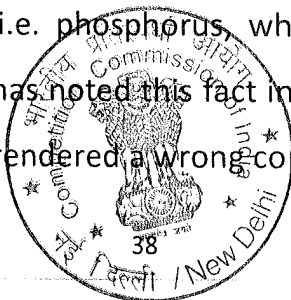


6.4.15 However, due to rigid and strict conditions of licensing, the enterprise may not find it convenient or viable to enter the market. Perhaps this is the reason why only 19 enterprises have been able to obtain license for manufacture and supply of ALP so far and out of these only four have actually been into the activity of manufacturing and supplying the product. If there is any entry barrier for other manufacturer, it is due to the Legislative Acts and the policies of Government and it has no role in putting any restraint or entry barrier on any other manufacturer or supplier.

6.4.16 It has further been contended by the OP-3 that ALP cannot be sold or supplied in open market. The 3 gm tablets can be supplied only to government or statutory corporations involved in the process of dealing and storing of food grains. Thus, the supply of the relevant product is also restricted. Therefore, it cannot be said that it has acted to limit and control the price and supply in the market and no role could be assigned to it for the same.

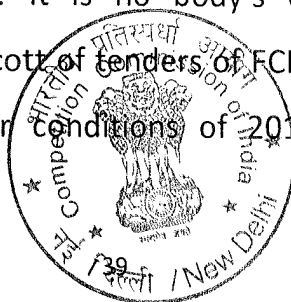
6.4.17 The OP-3 has submitted that DG has picked up the figures to suit his convenience. DG has totally ignored different rates quoted by UPL in tenders of FCI and other corporations in earlier years. In the tender floated in 2006 by FCI, it had quoted the price of Rs. 200 per kg which was the lowest.

6.4.18 As per the contentions of the OP-3, in 2008 there was tremendous increase in the production cost due to heavy duties imposed by China on the cost of raw material i.e. phosphorus, which is imported from that country. Although the DG has noted this fact in his report but has ignored this aspect totally and has rendered a wrong conclusion.



6.4.19 It is submitted by OP-3 that conclusions and observations of the DG regarding the meeting of mind and exchange of information amongst the Opposite Parties with regard to the tender of 2009 are based upon his whims and personal convictions which are not corroborated by any cogent reason or material on record. The findings regarding meeting of mind have been recorded after taking into account the evidence regarding the visit of representatives of suppliers in the office of FCI at 1:25 PM on 08.05.2009. This evidence for drawing conclusion on collusion or meeting of minds was not based upon proper appreciation of relevant facts and circumstances. For the finalization of tender and for negotiations for this purpose, the representatives were called by the FCI and therefore they had to visit the office of FCI on that date. The time of their entry in the office of FCI could just be a coincidence. Merely on the basis of timing of entry, meeting of mind or conspiracy amongst them for fixing price of tender could not be inferred. The testimony of the officials of FCI recorded by DG could not be treated to be sufficient to conclude that the action of the Opposite Parties was in violation of the provisions of the Act.

6.4.20 As regards global tender of 2011, it has been contended by the OP-3 that it was not correct as has been concluded by the DG that there was a cartel behind boycott of the said tender. The tender of 2011 was a global tender and was open even to foreign manufacturers/suppliers of APL. Neither the FCI could find out as to why the foreign companies did not participate, nor has the DG attempted to find out the reasons for their non participation in the tender. It is no body's case that even foreign companies joined in the boycott of tenders of FCI for 2011. It needs to be appreciated that the tender conditions of 2011 were very rigid and



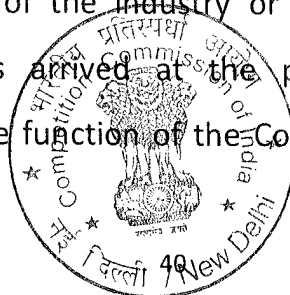
stringent and due to such tender conditions, the parties were reluctant to participate in the said tender.

6.4.21 As per the submissions of OP-3, in the present case, there was no agreement, arrangement, understanding or action in concert as to any formation of cartel or any agreement to limit, control or attempt to limit or control, production, distribution, sale or price of ALP in the relevant market. It has never been involved or participated in any such agreement, arrangement, understanding or action in concert.

6.4.22 As per record, there were only four manufacturers of ALP in India and they have not formed any association. In a cartel there must be a proof of concerted action. In absence of same, independent action by any of the OPs in regulating their individual business practices could not be treated as illegal.

6.4.23 As per the contentions of OP-3 certain plus factors are required to be considered to determine that parallel conduct of parties resulted from an anticompetitive agreement. Mere quoting of identical prices on its own was not a proof of cartel formation.

6.4.24 The OP-3 has further contended that structure of the industry has not been examined by the DG for detecting collusion among the firms. DG has no direct evidence of any agreement among the ALP manufacturers and he has merely relied on circumstantial evidence collected during investigation. Neither the DG has used any economic analysis, nor has conducted any analysis of the industry or the market of ALP and on unjustified grounds has arrived at the presumptive conclusions of existence of a cartel. The function of the Commission is inquisitorial and



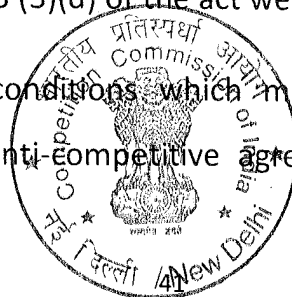
the Competition Act is economic law. Hence, economic, financial and commercial factors, cost analysis, price patterns, market dynamics, supply and demand side constraints etc. are relevant aspects for determining the relevant issues and for proper adjudication of the matter. These aspects have not been examined and considered by the DG. Unless these aspects are properly examined, the inquiry shall remain an incomplete inquiry.

6.4.25 According to OP-3, the ALP industry in India has been facing great difficulties and the industry has to struggle hard to increase the capacity which has been causing a lot of burden for the industry. The manufacturers as on date have been offering ALP in India at a reasonable price and compared to export markets, price has been lower in the domestic market.

6.4.26 The OP-3 has alleged that it is the informant i.e. FCI who has abused its dominant position by imposing certain conditions favourable to it in its tenders.

6.4.27 According to OP-3, in the instant case it has submitted on record, the tender wise bench mark price analysis justifying the price quoted by it. The analysis shows beyond any doubt that the price quoted in the course of tender was followed by the benchmark of the preceding year and was not as a result of any collusion or cartel. Accordingly, the presumption raised under section 3(3)(d) stands fully rebutted. There was nothing on record to controvert the explanation given by it. In such circumstances, the provisions of section 3 (3)(d) of the act were not attracted.

6.4.28 There are two conditions which must be fulfilled before any allegation of cartel or anti-competitive agreements would stand. First,



there has to be an agreement, arrangement or understanding and second it has to cause an appreciable adverse effect on competition in the market. In the present case neither of these factors has been proved. Hence, the allegation of cartel is baseless and deserves no credence. In a cartel there must be proof of concerted action. Independent action of the Opposite Parties for regulating their individual business practices and determining their prices cannot be treated as illegal.

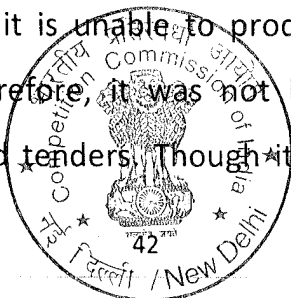
Reply of M/s. Sandhya Organic Chemicals Private Ltd (OP-4)

6.5 The reply/objections of M/s. Sandhya Organic Chemicals Private Ltd (OP-4) to the findings of DG, in brief, are as under;

6.5.1 The OP-4 has denied that it has colluded with any other competing companies/other opposite parties either in global tender floated in March 2009 or global e-tender floated in April 2011 by FCI.

6.5.2 As per OP-4, the terms and conditions of global tender floated in 2011 were onerous to be complied by OP leading to its non-participation in the tenders. The conditions in tender stipulated that a tenderer should be in position to supply 75MT per month failing which the offers would be rejected. As per the Opposite Party, it is a small scale unit registered with the National Small Industries Corporation Ltd. which entitles it for participation in the Central Government Stores Purchases Programme as per the single point registration scheme.

6.5.3 Its quantitative capacity per month is specified as 25 MT in a single shift and even if it runs the second shifts, although the same is not possible on regular basis, it is unable to produce 75 MT of the tender product in a month. Therefore, it was not in a position to fulfil the conditions of the aforesaid tenders. Though it was not obligatory on its



part but the OP informed FCI regarding its non-participation in the tender by its registered letter dated 27.05.2011. The Opposite Party has contended that the FCI vide its letter 09.06.2011 to the DG has misrepresented the facts and stated that the letter was sent by the OP through the ordinary post.

6.5.4 The Opposite Party has further submitted that the tender conditions of 2011 prescribed deposit of Rs. 30 lakh as EMD whereas in the earlier global tender floated in the years 2009 and 2005, prescribed EMD was of Rs. 10 lakh and 8.25 lakh respectively. The Opposite Party being a small scale unit was unable to afford to deposit the aforesaid EMD amount of Rs. 30 lakh. Further, as per the contentions of the Opposite Party, at the time of the aforesaid tender, a huge amount of outstanding was lying with the FCI in respect of the supplies earlier made by it, which had caused liquidity problems.

6.5.5 As per the Opposite Party, at the time of floating of global e-tender in April 2011, a huge amount of the OP was blocked by the FCI in respect of the global tender opened on 08.05.2009 in form of security deposit and performance guarantee. The OP also suffered loss on account of non-receipt of 'C' forms. FCI had also recovered a sum of Rs. 15.44 lac from the bill dated 14.05.2010 of Rs. 19,28,842 raised by the Opposite Party towards the liquidity damages for the marginal delay in the supplying of the tender products.

6.5.6 According to the Opposite Party, it had suffered losses due to blockage of aforesaid huge amount. In view of this background, its non-participation in global tender 2011 may not be treated as violation of section 3 of the Act.



6.5.7 The Opposite Party has further contended that as per regulation 20(4) of CCI (General) Regulations, 2009, the scope of investigation was limited to the letter sent by the CMD FCI in which no allegation was made regarding the tender floated by FCI in April 2011. Therefore, the DG has acted beyond the scope of investigation. The Opposite Party has relied upon the judgement of Lakhanpal National Ltd. vs MRTP Commission, AIR 1989 SC 1692 to buttress its argument on this point.

6.5.8 Regarding global tender floated by FCI on 28.03.2009, the Opposite Party has submitted that as per clause 10 of the said tender, FCI could have rejected the said tender, forfeited the EMD in case of any cartel existence in its opinion. However, the FCI in its internal noting dated 10.07.2009, dispelled existence of any cartelization and mentioned that the rate agreed by the parties was less than the rates fixed by CWC / State Agencies. As per the Opposite Party, pursuant to the aforesaid tender, FCI took the supply from the Opposite Party and therefore in terms of the clause 10 of the tender, FCI was estopped from making any complaint to the Commission. The Opposite Party has further submitted that the agreement for the supply of the tender product has come to an end after the supply of 220 MTs by it in October 2010 and as per the Judgment of Hon'ble Supreme Court in All India Organisation of Chemists and Druggists Association, 2002, CTJ 4 (SC) (MRTP) and the order of COMPAT in Voltas Ltd. (Supra), the Commission has no jurisdiction to entertain the said complaint, once the agreement under question itself does not remain in existence.

6.5.9 The Opposite Party has further contended that after the completion of the supplies for the tender of 2009 also, FCI has taken the supplies for it



on the basis of annual rate contract dated 13.10.2010 with the CWC. Hence, the grievance of FCI, regarding the global tender floated in March 2009, does not survive.

6.5.10 As per the Opposite Party, the allegation of cartelization against the four Indian manufacturers fails as only three manufacturers participated in the FCI tender of 2009 although more than 19 parties/ manufacturers have obtained registration from CIB Faridabad for manufacturing the product.

6.5.11 The Opposite Party has also submitted that if the parties would have colluded in quoting the prices, then there was no reason why the prices quoted by them were below the established/prevailing price of Rs. 399 per Kg.

6.5.12 As per the OP-4, the global tender of 2009 of FCI for 600 MT of the tender product was opened on 8th May 2009 whereas section 3 of the Act was notified with effect from 20th May 2009. The OP participated in the tender by its letter dated 07.05.2009 and the action on part of OP was completed before 20.05.2009. Thus, allegation under section 3 cannot be entertained since alleged anti-competitive conduct took place prior to the date of enforcement of section 3 of the Act. In order to support its contention, the OP also relied upon the order passed by COMPAT in the case of Shri Sanwar Mal Agarwal Vs the Punjab National Bank.

6.5.13 As per the Opposite Party, there is no continuing breach of the provisions of the section 3 of the Act for which the Commission has the jurisdiction.



6.5.14 The OP-4 has also submitted that the conclusions of the DG are incorrect that there are no substitutes to ALP since there are substitutes in the form of Methyl Bromide available in the market. As per the Opposite Party, it sold 12% and 14% of ALP produced to the licensed fumigators during the year 2009-10 and 2010-11. In the same period, it supplied 82% and 73% respectively of its total production of ALP to the Government agencies. Thus, the contention of the DG that the sale ratio of private buyers to government agencies was 50:50 is incorrect.

6.5.15 As per the Opposite Party, DG has wrongly recorded that global tender was floated in 2009 to break monopoly/cartel of Indian manufacturers of ALP, since earlier also the FCI had floated an International tender in the year 2002 and it was not the first time that a global tender was floated.

6.5.16 As per the Opposite Party, the DG has incorrectly stated that all parties quoted the same rate of Rs. 245 for the tender floated in 2002. The correct fact is that Opposite Party had quoted rate of Rs. 300 per Kg for supply up to 150 MT, Rs. 285 per Kg for supply up to 150-250 MT and Rs. 270 per Kg for supply up to 250-500 MT. As per the knowledge of Opposite Party, the tender of 2002 was awarded to an international manufacturer. On failure of FCI to obtain import license, the international manufacturer could not supply ALP. Having failed to get the supply for whatever reason, FCI called the Opposite Party for discussion in October 2002. The OP vide letter dated 11.11.2002 accepted rate of 245 per Kg for making supplies on Rate Running Contract for one year extendable to another year.



6.5.17. According to OP-4, it supplied a total of 68.4 MT of ALP from February/March 2003 to February 2005 to the various zones of FCI. It was, therefore, FCI who had offered a price of Rs. 245 per Kg and OP had no role but to accept the price and make supplies. It is FCI which dictates prices to the ALP suppliers and not vice-a-versa.

6.5.18 As per the contentions of the Opposite Party, the DG has wrongly stated that there is normally a profit margin of 20-25% added in the cost of sales while quoting in a tender, since the profit of OP was less than 15% for the year 2009 and 2010.

6.5.19 As per the Opposite Party, the complaint by FCI was made after more than 20 months of the date of opening of global tender, a conduct which has not been explained by complainant. As per the Opposite Party, the DG has failed to establish any agreement and has himself admitted that there is no direct evidence of cartelization in the matter.

6.5.20 The Opposite Party also brought out that due to the Olympic Games in China, the Chinese Government had increased the import duty on the Yellow Phosphorus nearly by 120% which resulted into the increase in its cost of production during 2008. After the reduction of the import duty by Chinese Govt. during 2009-10, the cost of production of ALP of the Opposite Party also got reduced. Accordingly, the selling rate quoted in tenders while was about Rs.449/- during 2008-09, it got reduced to Rs. 390/- during 2009-10.

6.5.21 The Opposite Party has also contended that from January 2009 to 8th May 2009 (the date of the opening of impugned tender) about 10 tenders were floated by various government agencies for procurement of



ALP such as CWC, A.P. State Warehousing Corporation, Tamil Nadu Civil Supplies Corporation, Punjab State Civil Supplies, Chhattisgarh Warehousing, FCI Hyderabad, Rajasthan State Warehousing Corporation, FCI Mumbai etc. In these tenders, the contract was awarded at a rate of 399 per Kg. The Opposite Party quoted a lower price of Rs. 388 per Kg in the tender of 2009 as huge quantity was offered by FCI. The Opposite Party made a further discount of Rs. 2/- after negotiations with officials of FCI who had informed it that other parties had also given a similar discount.

6.5.22 The Opposite Party has also given its explanation on the various tenders floated by FCI in earlier period and various state agencies and has submitted that wherever the terms of the tender floated by FCI or other agencies were not suited to the Opposite Party being a Small Scale Unit, it refrained from participating in the tender.

6.5.23 As per the contentions of the Opposite Party, out of 64 tenders floated by various government agencies during June 2006 to March 2011, it participated in about 14 tenders keeping in view its production capacity. The quantity offered for purchase in these tenders was very small in the most of the tenders and it was in the year 2009 only when the FCI offered huge quantity of 600 MTs.

6.5.24 As per the Opposite Party, for quoting the price in tender of a particular agency, it keeps in mind the prices at which in immediate past the other agencies have awarded the tenders as it becomes a benchmark. From January 2009 to April 2009, various government agencies awarded the tender at a price of Rs. 399 per Kg irrespective of price quoted by Opposite Party. In view of the benchmark set by government agencies, it



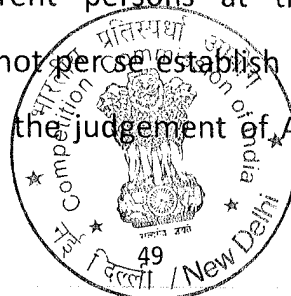
may be coincidence that price quoted by the Opposite Parties were identical in the tender of FCI in 2009. As per the Opposite Party, it has participated only in 5 tenders out of 16 tenders floated by govt. agencies from March 2007 to March 2011. Thus, the conclusion of DG regarding coordinated behaviour of the ALP manufacturers in all the tenders does not hold good.

6.5.25 As per the Opposite Party, it has never earned extra ordinary profit in tenders. While the profit is generally less than 15%, during 2007-08, it had suffered losses in supplies made to CWC since the annual rate contract was awarded in January 2007 for one year and in the mid year, the price of Yellow Phosphorus had gone up drastically.

6.5.26 The Opposite Party has denied that any information is exchanged among Opposite Parties through telephone or in formal meetings/discussions. The DG has not disclosed any circumstantial evidence before concluding meeting of mind among the OPs.

6.5.27 The Opposite Party has stated that if FCI called everyone at the same time for negotiations, all parties are bound to come at the same time. Thus, entry of representatives of the OPs to the premises of FCI at the same time does not prove any agreement or understanding.

6.5.28 The Opposite Party has also relied upon the judgment of the COMPAT in the matter of Delhi Development Authority vs. Shri Cement Ltd. and others, 2010 CTJ 17(COMPAT) (MRTP) to say that quoting of identical prices by different persons at the most is a suspicious circumstance. But it does not per se establish cartelization. The Opposite Party has also relied upon the judgment of Alkali Chemical (Supra) and



the Judgement of MRTP Commission in the matter of DGIR vs. Caprihans India Ltd and Others reported at 2001 CTJ (377 MRTP) to state that mere price parallelism is not sufficient to sustain charge of concerted action.

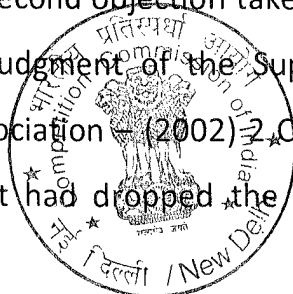
6.5.29 On the basis of the aforesaid contentions, the Opposite Party has denied its participation in the alleged cartel or bid rigging.

Contentions of Food Corporation of India (FCI)

6.6 FCI has also made oral and written arguments to support its contention that the Opposite Parties have manipulated the process of bidding for the procurement of ALP Tablets. The arguments of FCI, in brief, are as under;

6.6.1 FCI has submitted that all the Opposite Parties have taken the same legal objections regarding maintainability of the proceedings on the ground that the tender floated in 2009 could not be investigated since when the said tender was floated, section 3 of the Act had not been notified. This objection has to be rejected at the outset because there was nothing in the information which limits it to the tender floated in the year 2009 and in any case the investigation included the tender of 2011 as well. The tenders floated during 2002-2008 were cited in the information as evidence to the effect that the Opposite Parties had been acting as a cartel on earlier occasions as well due to which the Informant had to pay unusually high price for ALP tablets.

6.6.2 According to FCI, the second objection taken by the Opposite Parties was on the basis of the Judgement of the Supreme Court in All India Chemists and Druggists Association (2002) 2 CTJ 4 (SC) (MRTP) wherein the Hon'ble Supreme Court had dropped the proceedings because the



agreement under complaint had come to an end. This is of no relevance to the present proceedings since the Judgment cited by the OPs pertain to a single agreement against which the complaint was lodged. In the present the complaint was not about any particular agreement but about the general conduct in the tenders floated by FCI since 2002 onwards till date which is a continuing cause of action. Hence, the objection of the OPs on this count was liable to be rejected.

6.6.3 FCI has further brought out that another objection taken by one of the Opposite Parties, M/s Excel Crop Care is that although clause 10 of the tender permitted FCI to take action like rejecting tenders, forfeiting EMD etc., FCI had not taken any action on the issue. Therefore, the complaint was liable to be rejected. In this regard, it may be relevant to point that clause 10 also provided that in addition to the above rights, FCI could take action by complaining to the appropriate authorities. The present complaint was one of the actions that could have been initiated under clause of the contract. Hence this objection is also liable to be rejected.

6.6.4 According to FCI, it was also pointed out on behalf of some of the Opposite Parties that in the noting sheets of FCI which is included at pages 268 to 272 of the DG's report, there was clear finding that there is no cartelization and consequently the proceeding initiated in the matter was bad in law. However, it is settled law in a large number of Judgments that noting on files cannot be looked in by the Courts since they are views expressed by the individual officers. Individual view cannot be taken cognizance of and it is the final decision that matters. In view of the fact that FCI itself has chosen to submit the information before the

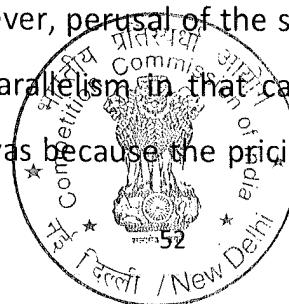


Commission regarding cartelization, there cannot be any objection in this regard.

6.6.5 FCI has argued that certain Judgments were also submitted by the Opposite Parties on price parallelism pointing out that merely because similar prices were being offered there could be no finding of cartelization. In the present case, the issue is not just parallel pricing being offered by the manufacturers. In fact the issue is of identical pricing and concerted bidding which is evident from the fact that in certain years all the manufacturers have chosen not to bid. There are other factors clearly found by the DG in its report which lead to the clear conclusion of cartelization by the manufacturers. In any case an agreement for cartelization is a surreptitious activity and it is impossible to prove the same with direct evidences because it is done in a covert manner.

6.6.6 According to FCI, it is incorrect on part of OPs to say that they were quoting much less than the market price to the government agencies. The fact that in the recent past the government agencies have been saddled with higher prices by the manufacturers is clearly an admitted fact which is also evident from replies of the Opposite Parties wherein it is mentioned that during the period, March 2010 to March 2011, the government had been charged higher prices than others for the procurement of ALP.

6.6.7 FCI has further brought out that one Judgment that has been relied upon by the OPs to argue that mere price parallelism could not lead to the inference of formation of a cartel is the Judgment cited in 2010 CTJ 17 (COMPAT) (MRTP). However, perusal of the said judgment shows that the real reason why price parallelism in that case was not held to indicate formation of the cartel was because the pricing break up showed that the



same was entirely different and different basic rates were charged to which other items like rail freight etc. were added. In the absence of any other material to show cartelization and the fact that there was no rise in price on account of alleged cartelization, the Tribunal came to the conclusion that there was no cartelization in that case.

6.6.8 In the present case, however, the prices quoted in all the tenders were identical. Moreover the OPs have not discharged the burden of showing that there was no cartelization in terms of the law while the DG in his investigation had established that there was cartelization among the four manufacturers of ALP tablets.

6.6.9 According to FCI, details filed by the OPs clearly show that in more than 50% of the tenders, identical prices have been quoted by the various manufacturers. The argument that identical prices have been quoted due to the practice of adopting the negotiated price in the last tender as the bench mark is also incorrect as can be seen from the details produced in the investigation report of DG which clearly shows that the last tender price is not the quoted price for the tender in any of the state organizations involved in the process of procurement of ALP through tenders.

6.6.10 FCI has submitted that ALP being the only substance available for preservation of foodgrains, cartelization by the manufacturers has resulted in huge increase in its prices not only to FCI but also to other Central/State Government agencies, which is against the public interest. Hence, appropriate orders may be passed by the Commission in the matter.



Decision of the Commission

7. The Commission has carefully considered the contents of the letter of CMD, FCI, findings of the investigation conducted by the DG, replies of all the concerned parties and other relevant materials on record. The Commission notes that the only issue that arises for determination in this case is whether the four Opposite Parties mentioned in the information, under an agreement or understanding have indulged in anti-competitive activities while participating in the tenders of FCI for procurement of ALP Tablets.

Determination

7.1 The instant matter was brought to the notice of the Commission by the Chairman and Managing Director of Food Corporation of India vide his letter dated 04.02.2011. The letter inter-alia brings out that FCI has been facing difficulties in the matter of purchase of Aluminium Phosphide Tablets due to cartel formation by four known manufacturers of the Tablets, namely, M/s. United Phosphorus Ltd., M/s. Sandhya Organics Ltd., M/s. Excel Corpcare Ltd. and M/s. Agrosynth Chemicals Ltd. It has also been brought out that a perusal of tenders floated by FCI for purchase of ALP tablets during the last eight years shows that these firms quote same rates and on negotiations they reduce the rates by the same margin. The letter also brings out that due to the anti-competitive agreement among the ALP Tablet manufacturers, who quote in the tender floated by FCI, the price of the tablets has gone up during the period 2007-2009.

7.2 The letter of CMD, FCI has also enclosed details of tenders floated by FCI for purchase of ALP tablets during 2002- 2009 to establish that the four firms have shown common conduct and acted together in quoting



identical rates and collectively boycotting the tenders. The details given in the letter of CMD, FCI are as under;

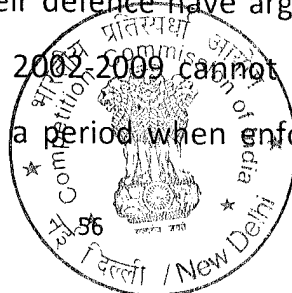
Year	Name of Tenderers	Rates Quoted	Tender awarded to	RRC Rates	Remarks
2002	United Phosphorus Ltd.		United Phosphorus Ltd.	Rs. 245/- per kg inclusive of all charges and taxes F.O.R. destination against issue of 'C' Form.	FCI had to award Rate Running Contract to all the tenderers as they struck to the same rates. This shows that the parties had formed Cartel and had anti-competitive agreement among them.
	Excel Cropcare Ltd.		Excel Cropcare Ltd.		
	Sandhya Organic Chemicals Ltd.		Sandhya Organic Chemicals Ltd.		
	Agrosynth Chemicals Ltd.		Agrosynth Chemicals Ltd.		
Mar-05	United Phosphorus Ltd.	Rs. 310/- per kg by all the parties	Tender was scrapped	Tender was scrapped	Tenderers had quoted same rates and upon negotiations all the parties reduced to the same rate of Rs. 290/- per kg. Tender was scrapped DG (Zones) were requested to take up the matter with CWC for purchase of ALP against the RRC executed by them @ Rs. 290/- per kg.
	Excel Cropcare Ltd.				
	Sandhya Organic Chemicals Ltd.				
	Agrosynth Chemicals Ltd.				
Nov-05	United Phosphorus Ltd.	No party submitted tender	Tender was scrapped	Tender was scrapped	All the parties abstained from tender which shows cartel formation among them.
	Excel Cropcare Ltd.				
	Sandhya Organic Chemicals Ltd.				
	Agrosynth Chemicals Ltd.				
2007	United Phosphorus Ltd.	Rs. 200/- per kg	United Phosphorus Ltd.	Rs. 200/- per kg	The parties could not form cartel. Resultantly, the rates were reduced to Rs. 200/- per kg whereas two years
	Excel Cropcare Ltd.	Rs. 235/- per kg			
	Sandhya Organic	Rs.			



	Chemicals Ltd.	236/- per kg			back FCI had to purchase the chemical at a much higher rate of Rs. 290/- per kg from the same parties and that too through CWC. The period of RRC was extended for another year as per Tender terms but the party failed to supply ALP during the extended period.
	Agrosynth Chemicals Ltd.	Rs. 234/- per kg with 'C' Form & Rs. 247.50 without 'C' Forms			
2008	Fresh tender was floated at the Risk & Cost of M/s UPL but no party participated in the tender which shows that they were acting as a cartel. ALP was purchased from CWC to meet the urgent requirement.				
2009	United Phosphorus Ltd.	Rs. 388/- per kg	United Phosphorus Ltd. , Excel Cropcare Ltd. , Sandhya Organic Chemicals Ltd.	Rs. 386/- per kg inclusive of all taxes & duties FOR destination anywhere in India	This contract was for a fixed quantity of 600 MT \pm 10% accordingly contract for 200 MT \pm was awarded to each of the three tenderers. In this tender also the parties formed a cartel as is evident from the rates quoted and negotiation.
	Excel Crop care Ltd.	Rs. 388/- per kg			
	Sandhya Organic Chemicals Ltd.	Rs. 388/- per kg			
2010	NIL				

7.3 The details furnished by the FCI and investigation carried out by the DG reveal that the parties named in the information have been quoting identical prices not only in the tenders of FCI but also in the case of other government agencies during 2002-2009. Further, they have also collectively boycotted the e-tender of 2011 issued by FCI.

7.4 The Opposite Parties in their defence have argued that their conduct concerning the tenders during 2002-2009 cannot be examined since the tenders in question pertain to a period when enforcement provisions of



the Act were not even notified. The parties have also contended that the global tender of 2009 was issued prior to notification of the provisions of the Act and bids were also submitted by them before that date. It has also been contended that the supplies under the tender were completed in May 2010 well before the letter of FCI, CMD and thus there was no cause of action when the letter was written by the Chairman, FCI to the Commission. Therefore, the alleged conduct of quoting identical rates in the tender of 2009 also cannot be examined under the provisions of the Act. As far as boycott of e-tender is concerned, the contention of the Opposite Parties is that the e-tender of 2011 was neither a subject matter of information in the letter of CMD, FCI nor was a subject matter of order of section 26(1) of the Act vide which the matter was referred to DG for carrying out investigation. Thus, their alleged act of boycott of tenders of 2011 cannot be inquired into by the Commission.

7.5 The Commission also notes that M/s Agrosynth in its submissions has brought out that it had stopped quoting in the tenders of FCI since 2007 due to the reasons that the tender conditions were considered unviable by it. Therefore, it cannot be alleged that it boycotted the tender of FCI in 2011 under an agreement or understanding. Further, since it never quoted in the tender of 2009, it cannot be said that it was a part of any alleged agreement or understanding to quote identical bid rates in that tender.

7.6 The Opposite Parties have also objected to the fact that the DG should not have drawn adverse inference in the matter in absence of any evidence of agreement among them in his possession and without carrying any economic analysis or analysis of factors mentioned in section 19(3) of the Act.

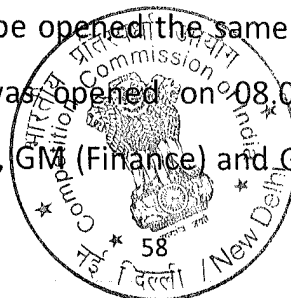


7.7 The Commission has carefully considered the aforesaid objections of the parties. The Commission observes that as far as the contention of M/s Agrosynth is concerned, since from the records it is revealed that it has not quoted in the tenders of FCI after 2007 due to the reasons that it did not consider it viable to do that, the Commission holds that its conduct cannot be made a subject matter of examination under section 3 of the Act, since the section was notified only with effect from 20.05.2009 and conduct of a party prior to that date cannot be made a subject matter of examination.

7.8 However, the Commission also holds that as far as other three Opposite Parties who have quoted in the tender issued by FCI in 2009 are concerned, their conduct is liable for examination in light of provisions of the Act.

7.9 The Commission observes on the basis of available records that the other three Opposite Parties, namely, M/s United Phosphorous Limited (UPL), M/s Sandhya Organic Chemicals Private Limited (SOCL) and M/s Excel Crop Care Limited (ECCL) have submitted bid documents in the global tender of 2009 issued by FCI for the supply of ALP Tablets. The sequence of events shows that Global Tender Enquiry no. Pur-15(4)/2008 dated 28.03.2009 for purchase of 600 MTs \pm ALP Tablets conforming to BIS Specification no. IS:6438-1980 was floated in the leading newspapers all over India on 09.04.2009.

7.10 The tender forms were to be received upto 08.05.2009 till 2:00 PM and Technical Bid was to be opened the same day i.e. 08.05.2009 at 3:00 PM. The technical Bid was opened on 08.05.2009 by the committee consisting of GM (Pur/Qc), GM (Finance) and GM (Procurements). Against



above mentioned Tender Enquiry only three tender forms were sold and in response only three bids were received from M/s Sandhya Organic Chemicals Pvt. Ltd, M/s Excel Crop Care Limited, and M/s United Phosphorus Limited.

7.11 Price bid was opened on 01.06.2009 and rates were negotiated with parties on 17.06.2009. Approval for award of contract was accorded on 17.07.2009 and letters for award of contract to parties were given on 21.07.2009.

7.12 The above sequence of events shows that although tender inquiry was issued in March 2009, contract through a letter addressed to the bidders was awarded only on 21st of July 2009. The price bids which show that the OPs had quoted identical rates were also opened on 01.06.2009. Thus, the events leading to the finalisation of contract though commenced in March 2009, continued even after 20.05.2009.

7.13 The Commission observes that the crucial event which established that rates quoted by all the parties were common was the date of opening of price bid which was 01.06.2009. Since this event took place after 20.05.2009, the Commission is well within its jurisdiction to inquire under the provisions of the Act whether there was any anti-competitive agreement among the bidders in respect of that tender. The process of award of tender which commenced in March 2009 continued till 21st of July 2009 when the tenders were finally awarded. Since all the events regarding award of contract in the case were concluded after 20.05.2009, the Commission holds that as per provisions of the Act it can proceed to inquire and determine whether there is a contravention of the provisions



of the Act in the whole matter. The contention of the Opposite Parties on this account, therefore, does not have any merit.

7.14 The Commission also observes that the argument of the Opposite Parties that since the supplies under the global tender of 2009 were completed before the letter sent by CMD, FCI the said tender cannot be examined is also not valid. What is being inquired under the Act is the conduct of the bidders in a tender and not the terms and conditions of a tender. If conduct of the parties has been anti-competitive in a particular matter, there is no specific bar as per provisions of the Act that the same cannot be looked into only because the supply or provision of goods or services has been completed. The competition agencies all over the world have looked into the anti-competitive conduct of parties in respect of past transactions and even penalised such a conduct. The currency of anti-competitive agreement is not material for taking action. What is important is to inquire into and punish such agreements which have adversely affected the market. In the matters of procurement, if the fact of existence of anti-competitive conduct of parties comes to the notice at a later stage, the competition agencies are not inhibited from taking any measures against such erring parties.

7.15 The Commission further holds that the Opposite Parties cannot take shelter behind their arguments that since FCI did not take action against the anti-competitive conduct of the bidders and went ahead with award of the contract, their conduct cannot be examined. The Commission holds that this does not provide immunity to the parties from facing inquiries. FCI could not have taken chances of cancelling the on-going process tenders and issue fresh tenders since it was faced with the problem of

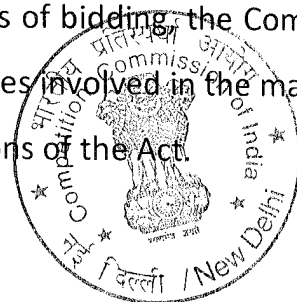


procurement of ALP Tablets to preserve food grains otherwise it would have caused huge national loss and dent to the food security of the country. Thus, the argument of the Opposite Parties on this account has no merit whatsoever.

7.16 The Commission further holds that the alleged act of collective boycott of the global tender of 2011 is also subject to inquiry as per the provisions of the Act. The Commission had passed an order under section 26(1) directing the DG to conduct investigation into the alleged anti-competitive conduct of the Opposite Parties in the tenders of FCI. The order of directing investigation was not event specific. It was rather based upon allegations of conduct of the Opposite Parties with reference to the tenders for supplies of ALP Tablets to FCI.

7.17 The Commission has also taken note of objections raised by the OPs that while making inquiries and determining the issue whether the Opposite Parties have manipulated the process of tender of FCI issued in 2009 and 2011, it is required to establish existence of some sort of an agreement among them to indulge in such an act and it is also required to prove that harm has been caused to the competition through analysis of various factors as per the provisions of the Act.

7.18 The Commission observes that the aforesaid contention of the OPs cannot be disputed. Accordingly, while determining whether the OPs have manipulated the process of bidding, the Commission has analysed the act and conduct of the parties involved in the matter on various parameters in the backdrop of provisions of the Act.



7.19 The Commission notes from the records that in response to the tender of 2009 issued by FCI, three parties quoted rates as under:-

S.No.	Name of the Party	Rate
1.	Excel Crop Care Ltd.	Rs. 3,88,000/- Per MT
2.	United Phosphorous Ltd.	Rs. 3,88,000/- Per MT
3.	Sandhya Organic Chemicals Pvt. Ltd.	Rs. 3,88,000/- Per MT

7.20 While the price bid of Sandhya Organic Chemicals Pvt. Ltd. is dated 07.05.2009, the price bids of two other firms, United Phosphorous and Excel Corp Care Ltd. is dated 06.05.2009. After negotiations, all the three parties agreed to reduce the rate to Rs. 3, 86,000/- Per MT.

7.21 The Commission observes that the aforesaid data establishes beyond doubt that identical rates have been quoted by the three bidders in the tender. Further, they all agreed to reduce rates by an identical margin. The Commission notes that the parties have in their argument contended that since the reference point for quoting price in the tender of FCI was the price of Rs. 399/- Per Kg. at which ALP tablets were supplied to CWC, the parties have submitted a rate near to that, which by coincidence turned to be identical. It has also been submitted that the price quoted in the tender at Rs. 388/- Per Kg. was lower than Rs. 399/- quoted in the tender of CWC and therefore, it has given benefit to FCI while supplying ALP tablets.

7.22 The Commission, in this regard, observes that in spite of that fact that the companies are situated at different locations they have quoted the same rates. This cannot be mere coincidence since cost of transportation and of manufacturing tablets would be different for the companies. Once



there is a difference in cost of production and transportation, the quoted price would also be different. The analysis of cost done by DG vis- a- vis price quoted in the tender of FCI for 2009 reveals that the cost structures of the three companies are different from each other.

Name of Company	Cost of Production	Price quoted to FCI
United Phosphorous	267.81	Rs. 388/-
Excel Corp	260.16	Rs. 388/-
Sandhya Organics	342.15	Rs. 388/-

7.23 The above details regarding cost of production shows that there is a marked difference in the cost structure of the three firms. However, all three have quoted identical prices. The Commission observes that normal prudence suggests that if the companies have different cost structure, sale price of goods produced by them would be different unless and until there is an understanding among them to sell goods so produced at an identical rate.

7.24 The Commission further observes that events relating to award of tender suggest that the three parties have acted in a coordinated manner. On 08.05.2009, the last day of submission of tender, the representatives of the three bidders entered the premises of FCI, Delhi together as it is clear from the Visitors' Register. In his statement before DG, Shri S.K. Basu of Excel Corporation has admitted that he alongwith representatives of two other companies had entered the premises of FCI together at 1.25 PM on 08.05.2009. While Sh. Basu filled up the entries in the register, the other persons signed against their names. The details noted in the register in this connection are as under;



Sl. N.	Date	Name	Address & Occupation	Officer to be visited	Purpose of visit	Time	Sig-nature	Rem-arks
26	08/5/09	S.K. BASU	Excel	TENDER		1.25	Sd/-	
27	"	M.T. VASUDEVAN	UPL	"		1.25	Sd/-	
28	"	M. WAZIRAM	UPL	"		1.25	Sd/-	
29	"	SMIT PATEL	SANDHYA	"		1.25	Sd/-	

7.25 Initially in his statement before DG, Sh. Basu submitted that he had visited only between 2.30 PM and 3.00 PM on 08.05.2009 to FCI. Later on when he was confronted by DG with the entries made in the visitors' register, he admitted that he had visited together with other representatives at 1.25 PM. The relevant portion of the statement of Shri Basu recorded by the DG shows that Shri Basu was not quite forthcoming in his statement;

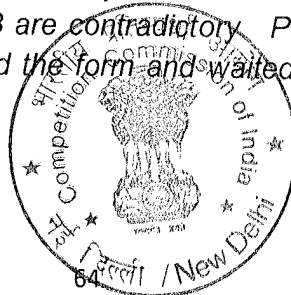
“ Q.13: You have told that you visited on 08.05.2009 between 2.30 p.m. to 3.00 p.m. to the office of FCI, please confirm that whether this is the correct statement? Please also tell whether you visited to the office of FCI on 08.05.2009 earlier before your stated time, also? Whether there were two visits by you on the same date?

Ans: I visited once between and around 2.30 p.m. to 3.00 p.m.

Q.14: Whether the entry in the visitor register on 08.05.2009 were entered by you in your handwriting?

Ans: Whenever I visit the FCI, I have to make the entry in the visitor register in my own handwriting therefore, on 08.05.2009 I would have entered my details in the visitor register.

Q.15: I am showing you the visitor register maintained in the FCI. At page no.470 of this register entries on 08.05.2009 are entered. At 26 Sl. No. of this page, your name at 1.25 p.m. is found entered. Please confirm whether this entry was written in your own handwriting, if yes, why the time stated by you in Q.13 are contradictory. Please also state whether you yourself had deposited the form and waited there till opening of the tender?



Ans: Since the matter is two years old, I might have forgotten the exact details. But since you have shown me the visitor register of FCI, I confirm that I went there at 1.25 p.m. and deposited the tender form and thereafter again went there at the time of opening of tender. The entries in the visitor register against my name at Serial no.26 were filled in by me. I confirm that this is my handwriting.

Q.16: I am showing you the entries made at Sl. No. 27, 28 & 29 on the page no.470 of the visitor register of FCI exactly below your entry at Sl. No.26. Please state whether the details of the representatives of other competitor companies were also filled by you in your handwriting?

Ans: Yes, I confirm that all the entries from Sl. No.26 to Sl. No.29 at Page No.470 of the visitors register of FCI were made by me but the signatures were made by the respective persons. This has happened because when for the same purpose when some people enter the reception, the receptionist at times, ask one of them to fill up the register and request others to sign against their respective names."

7.26 The Commission on the basis of aforesaid observes that it is evident that Sh. Basu did not divulge the correct facts to the DG initially that the representatives of all the parties had visited the premises of FCI together. This establishes that Shri Basu was not keen to disclose the correct facts. The entry of representatives of all companies who submitted bids to the premises of FCI together at the same time could not have been a mere coincidence since the companies are located at different places at Mumbai and Delhi unless all had decided that they would enter the premises together at the same time.

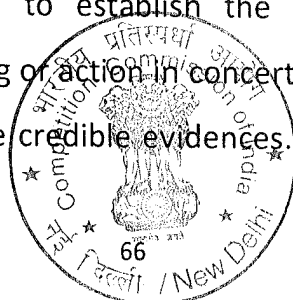
7.27 The Commission also observes that for entry in any official premises, if a person wants to fill up visitors' register for all others present in queue, the official present there to oversee the process, ensures that there is a fair degree of acquaintance among the person filling up the details and others who are there in queue. Unless all are known to each other and also claim to have come together for a common purpose, it is insisted that



the register is filled up separately by each person. Moreover, unless all the visitors are known to each other, for the person who is filling up the details in visitors' register for others, it would be necessary to ascertain the details of name etc. from other persons in queue, unless he knows their particulars in advance. The way the register has been filled by one person (Shri Basu) in his own handwriting shows that he was well aware of the names and other particulars of the other persons, who happened to be the representatives of competing bidders.

7.28 Since the three firms were essentially competitors in the tender, their behaviour should have been different and they should have tried to act independent of each other. However, they have shown collective behaviour in submitting tenders on the last date in closing hours of the tender.

7.29 The Commission finds this behaviour as an evidence of coordinated behaviour on part of the three Opposite Parties in respect of tender of FCI. The Commission observes that in cases of secret or clandestine understanding, it is difficult to get hold of a written plan, well documented piece of evidence showing agreement and understanding among the parties of such agreement. The provisions of section 2(b) of the Act, therefore, do not restrict agreement to mean a written form of agreement only. As per the provisions of that section, agreement includes even an arrangement, understanding or action in concert is not formal or in writing. In absence of evidence of a written agreement, the Commission is certainly not handicapped to establish the fact of existence of an agreement or understanding or action in concert since reliance can also be placed upon other available credible evidences. The existence of an anti-



competitive agreement is required to be tested on the principles of 'preponderance of probability'; the same need not be proved 'beyond reasonable doubt'.

7.30 The Commission in this context observes that in the case of American Tobacco Co. vs. United States [328 U.S. 781 (1946)], the US Supreme Court had stated that 'no formal agreement' is necessary to constitute an unlawful conspiracy. MRTPC in case of Ghai Enterprises Private Limited and Quality Ice creams (RTPE 18 of 1983) had concluded that 'preponderance of probabilities' in a case might lead to an inference of concerted action. In Bengal Tools Limited (1988) 63 Comp cas 468 and Excel Industries Limited in re (1988) 64 Comp Cas 531, it has been held that quoting identical rates or prices even when cost of production varies is a presumption in favour of a cartel and the same is a restrictive trade practice.

7.31 Certainly identical pricing has been considered evidence leading to establish an illegal agreement.(United States vs. CHAS. PFIZER Co. 217 F.Supp. 199 (1963). Identical bids have been condemned likewise in case of United States of America vs. James P.Heffernan (No. 94-1080, US Courts of Appeals, Seventh Circuit).

7.32 The facts and evidence which exist in this case in form of identical rates in the price bids in spite of varying cost structure of the bidding parties, common entry in the visitors' register of FCI lends credence to the allegations that they have acted under an agreement or an understanding.

7.33 In the instant case, the Opposite Parties have contended that the Commission should not only rely upon 'price parallelism' in form of



identical bid rates quoted by them in the tender of FCI, but, also look for certain 'plus' factors over and above 'price parallelism', which is required to conclusively establish that there was an anti-competitive agreement among them. In this regard, the Commission observes that the issue involved in this case is not price parallelism. The issue involved here is submission of identical bids by the three Opposite Parties. To any normal prudent mind, it seems quite improbable that identical bids can be submitted by the competing parties in a tender as an outcome of their own independent decision and that too when such outcomes are observed in repetition. The Commission holds that the competing parties can submit identical bids in a tender only when they decide to join hands and cooperate instead of competing with each other.

7.34 The collective action of identical bids, common entry in the premises of FCI before submission of bids are indicative of 'plus' factors in support of existence of an understanding among the three parties. The issue in the matter is not of parallel pricing but that of identical bid price, which the common prudence would suggest is not possible unless there is some sort of prior understanding. The entry in the premises of FCI at the same time might have facilitated and provided opportunity of communication among the bidders about their bidding strategy. Moreover, the analysis of bidding in tenders of FCI and other government agencies over a period of time also shows a consistent coordinated behaviour among the Opposite Parties.

7.35 The Commission is of view that the competitors would have certainly behaved in a manner different from what has been displayed in the present case. Any one of the three parties could have quoted a lower rate than the other two and got the contract for entire quantity of 600 MT in



the tender of 2009 issued by FCI. However, they quoted identical rates and shared the volumes, a behaviour which was not normal and not expected from a rational business entity. Any rational behaviour would have caused the Opposite Parties to submit bid rates independent of each other. However, instead of following business strategies independent of each other, they quoted identical rates in the tender of 2009 of FCI, which is possible only when parties act under some kind of prior agreement or understanding.

7.36 The Commission observes that the Opposite Parties are acting together under an agreement or understanding is also clear from the fact that they boycotted the global e-tender of 2011 together. FCI floated a global tender in 2011 for e-procurement of ALP Tablets using the portal of centre for e-governance, Government of Karnataka, Bangalore. The tenders were opened on 30.05.2011. However, no bids were received against the aforesaid tender enquiry. The three companies, who have quoted identical prices in the global tender of 2009, also did not participate in the tender enquiry. While the tender was closed on 27.05.2011, the two companies M/s Excel Crop Care Ltd. and M/s Sandhya Organics Pvt. Ltd. sent their representations which could reach FCI only on 01.06.2011 and 07.06.2011 respectively. The representation of M/s Sandhya Organics Pvt. Ltd. was sent on 28.05.2011 i.e. after the close of the tender as is evident from the details of postal dispatch. United Phosphorus Ltd. did not even send its representation and just boycotted the tender.

7.37 The Commission further observes that non-participation of all these three Opposite Parties in the e-procurement of 2011 suggests that there



was a meeting of mind among them to collectively boycott and avoid competing in a transparent electronic procurement procedure.

7.38 The Commission notes that the three Opposite Parties have quoted identical prices in earlier years also prior to the global tender of 2009 as is brought out in the information and also found by DG in course of investigation. The Opposite Parties have also abstained collectively from the tender earlier in 2005.

7.39 In the context of conduct of collective boycott of e-tender in 2011 and tenders of earlier years of FCI the Opposite Parties have raised an objection that no party can be forced to supply if the terms of supplies are adverse. The issue, however, is not a decision of an individual firm but collective decision of the competing firms, which in view of the Commission, is against the tenets of Competition.

7.40 The Commission holds the act and conduct of the three Opposite Parties as above is in violation of the provisions of section 3 (3) (b) and 3 (3) (d) read with section 3(1) of the Act which reads as under:

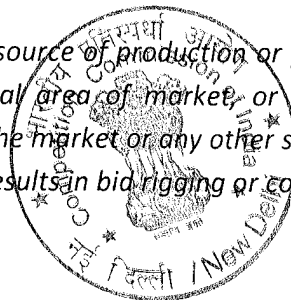
“ (3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

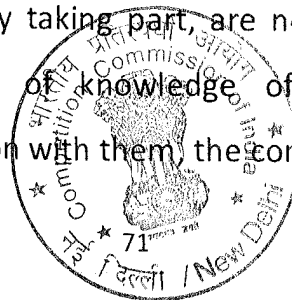
(d) directly or indirectly results in bid rigging or collusive bidding,



shall be presumed to have an appreciable adverse effect on competition:

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding."

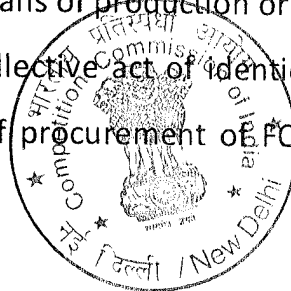
7.41 The Opposite Parties have indulged in collusive bidding and thereby contravened the provisions of section 3(3) (d) of the Act. Further, by collectively boycotting the tender of 2011 and thereby limiting the supplies of ALP Tablets to FCI, the Opposite Parties have violated the provision of section 3 (3) (b) of the Act. Collusive tendering or bid rigging is a practice whereby firms agree among themselves to collaborate over their response to invitations to tender. Collusive tendering takes many forms. At its simplest, the firms in question simply agree to quote identical prices, the hope being that in the end each will receive its fair share of orders. This kind of tendering is normally not resorted to because it is extremely suspicious and is most likely to attract the attention of Competition Authorities. This is also the crudest form of bid rigging. In the present case, the perusal of record of the OPs of tendering for ALP tablet right from 2002 till the investigation was taken over by DG shows that except for one instance at all other instances, the parties quoted identical price for the product year after year for different organizations including FCI. The entire conduct of the parties leaves no doubt in the mind that the parties had quoted identical rates for all the bids in order to kill the competition. In the system of tendering, competition is of essence. If the tenders submitted by taking part are not the result of individual economic calculation but of knowledge of the tenders by other participants or a consultation with them, the competition is prevented and



distorted. In this case, the OPs adopted practice of consulting each other and quoting identical price for different government agencies including informant, thereby wiping out competition amongst themselves. The result was that the procurement of entire quantity was shared by them at the price of their choice, instead of competing with each other.

7.42 Since it is established that the OPs have violated the provisions of Section 3(3)(b) & 3(3)(d) of the Act, the appreciable adverse effect on competition is to be presumed per se. This presumption could have been rebutted by the OPs by leading cogent evidence. However, in this case, there is no evidence on record led by the OPs to show that identical prices quoted by them was due to identical cost incurred by them and identical profit margin. In fact the costing and the profit margin of the OPs show the converse and it stands established beyond reasonable doubt that all the three parties had joined hands to kill competition.

7.43 Even when the conduct of the Opposite Parties is analysed in terms of factors mentioned in section 19(3) of the Act, it does not seem that it has led to accrual of any benefit to FCI, which is a consumer (procurer) in this case. Since the major players joined hands, FCI as a consumer had no option but to procure ALP Tablets at a higher price as collectively quoted by them. Further, it also cannot be said that the conduct of the Opposite Parties has led to either improvements in production or distribution of goods or provision of services or promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services. The collective act of identical rates quoted by the bidders has raised the cost of procurement of FCI which is entrusted by



the government with the duty of preservation of food grains for which ALP tablets supplied by OPs are required.

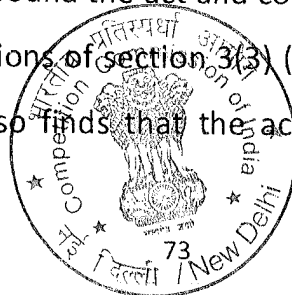
7.44 The analysis of net sales realisation and cost of goods sold carried out by DG in respect of United Phosphorus and Excel Corp reveals that the two Opposite Parties are earning huge margins. The analysis carried out for the year 2009-10 is as under;

Name of Company	Net sales realization	Cost of Goods sold	Margin
United Phosphorus	364	260	104
Excel Corp Care	369	275	94

7.45 As regards cost of production and price at which supplies to FCI were made by the two companies, it is noted from the report of DG that while the cost of production in case of United Phosphorus and Excel Crop Care was Rs. 267.81 and Rs.260.16 per Kg respectively during the year 2009-10, price quoted by them for making supplies in the tender was Rs. 388 per Kg. In case of Sandhya Organics Limited also, the rate quoted in the tender of FCI is far more than its cost of production. This gives rise to irresistible inference that the OPs have colluded to quote identical rates to earn more than normal profit.

8. Order under section 27 of the Act

8.1 The Commission has found the act and conduct of the Opposite Parties as violative of the provisions of section 3(3) (b) and section 3(3) (d) of the Act. The Commission also finds that the act of the Opposite Parties of



acting together and quoting identical prices has deprived FCI of competitive bid rates in matter of procurement of ALP Tablets.

8.2 Accordingly, the Commission decides to impose penalty at a rate of 9% on average of three years turnover on the three opposite parties under section 27(b) of the Act as under;

'in Rs. crore

Name of Firms	2008-09	2009-10	2010-11	Average of Three years Turnover	Penalty at 9 % of Average Turnover
Excel Crop Care Limited	730.43	650.82	749.01	710.09	63.90
Sandhya Organics Chemicals Pvt. Ltd.	13.41	21.13	18.01	17.52	1.57
United Phosphorus Limited	2542.16	2738.98	3133.71	2804.95	252.44

8.3 The Commission also directs the Opposite Parties to 'cease and desist' from engaging in practices of manipulating process of bidding in any manner.

9. The aforesaid directions must be complied with within a period of 90 days from the date of receipt of this order.



10. Secretary is directed to convey the decision of the Commission to the Parties as per regulations accordingly.

Sd/-
Member (G)

Sd/-
Member (GG)

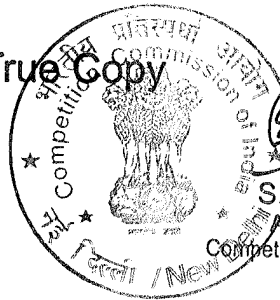
Sd/-
Member (AG)

Sd/-
Member (T)

Sd/-
Member (D)

Sd/-
Chairperson

Certified True Copy



S.P. Gahlaut
28/4/2012
S.P. GAHLAUT
Assistant Director
Competition Commission of India
New Delhi