

COMPETITION COMMISSION OF INDIA

Case No. 10 of 2010

Date: 22.06.2011

M/s. Pankaj Gas Cylinders Ltd.

Informant

v.

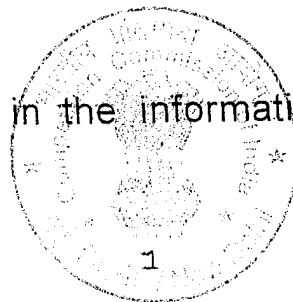
Indian Oil Corporation Limited

Opposite Party

ORDER

The present information has been filed under section 19(1) (a) of the Competition Act, 2002 ('the Act') by M/s Pankaj Gas Cylinders Ltd. ('the informant') on 25.02.2010 against Indian Oil Corporation Limited ('the Opposite Party') alleging, *inter alia*, abuse of dominant position in the procurement of 14.2 Kg Liquid Petroleum Gas (LPG) cylinders.

2. The facts as stated in the information, in brief, are as under:

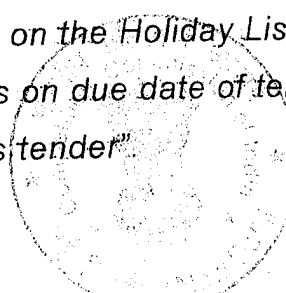


- 2.1 As stated in the information, the informant, viz., M/s Pankaj Gas Cylinders Ltd., a public limited company, is engaged in the business of manufacturing of LPG Gas Cylinders, SC Valves and Domestic Pressure Regulators which are used by the LPG distribution and retailing companies, viz., Indian Oil Corporation Ltd. (IOC), Hindustan Petroleum Corporation Ltd. (HPCL) and Bharat Petroleum Corporation Ltd. (BPCL) (to be referred to as 'the LPG Gas Companies' collectively).
- 2.2 The Opposite Party, Indian Oil Corporation Ltd., a Public Limited Company incorporated under the Companies Act, 1956, is engaged in the business of refining of petroleum, petrochemicals as well as distribution, marketing of oil, gas and other petroleum products.
- 2.3 It is alleged in the information that even though the end users of the products manufactured by the informant are general public at large and the commercial users but the informant and other manufacturers of the empty cylinders have no direct access to the end users. It is stated that the only way by which the products can be sold is through competitive bidding process conducted by the LPG Gas

Companies. It is further alleged that the entire volume of products manufactured is subject to the demand and subsequent procurement by the LPG Gas Companies through bid process.

2.4 As per averments the Opposite Party invited Tender No. LPG – O/M/PT-03/09-10 for the supply of approximately 105 lakhs of 14.2 Kg LPG Cylinders with SC Valves for its various bottling plants. It is stated that as per the tender documents, only those manufacturers having valid approval of Chief Controller of Explosives (CCOE) and license from Bureau of Indian Standards (BIS) for manufacture of 14.2 Kg LPG Cylinders as per IS-3196 (Part-I) as on the due date of the tender can bid for the tender. The informant is stated to have met the eligibility criteria. It is further stated that in the technical bid part of the tender documents, special terms and conditions which need to be complied by the bidder as condition precedent for participation in the bidding process have been mentioned. In particular, attention has been drawn to clause 6 of the Annexure-II to the technical bid and the same reads as follows:

"Any tenderer, who is on the Holiday List /Black Listed by IOCL/BPCL/HPCL as on due date of tender will be disqualified from this tender"



- 2.5 The informant has also stated that the above clause of Holiday Listing has been further clarified in Clause 18 of Annexure-I to the Technical Bid which specifies the grounds for Holiday Listing.
- 2.6 It is alleged by the informant that in all previous bids held by the Opposite Party, the present clause 6 was not there in the tender documents and the same has been incorporated for the first time in the present bid document. It has also been stated that no such clause ever appeared in any of the bid called by any of the LPG Gas Companies.
- 2.7 It has also been alleged that the Opposite Party invited another Tender No. LPG-O/M/PT-04/09-10 on 15.02.2001 for supply of domestic pressure regulators and in this bid also a similar clause has been incorporated in the bid documents.
- 2.8 It has been further stated that the usual practice is to restrain a bidder from bidding for a tender floated by a LPG company, where the company has holiday listed or black listed the bidder. It has been also stated that this restriction is not extended or applicable to bidders who are black listed or holiday listed by a company other than the one which has invited the tender.

- 2.9 It has been stated that the said clause is restraining the informant and other similarly situated bidders from taking part in the competitive bidding process of the Opposite Party due to the fact that the informant has been holiday listed and black listed by the other LPG Gas Company, viz., BPCL.
- 2.10 It has been further alleged that the informant was holiday listed by BPCL *vide* its letter dated 17.08.2009 for a period of one year from the date of this letter for non-acceptance of the Letter of Intent. It has also been stated that though BPCL had put the informant on holiday on list 17.08.2009, still it was buying cylinders and SC Valves from the informant till November, 2009 and the informant was supplying these items to the satisfaction of the BPCL at a much lower rate compared to other suppliers.
- 2.11 It has been alleged that the nature of holiday listing has nothing to do with the technical efficiency and the viability of the products of the informant. It has been stated that the informant was put under the holiday list for non-acceptance of the letter of intent and the said restraint was only for a period of one year and specific to the contract only. It has been reiterated that the informant is still supplying domestic pressure regulators

upto 50,000 units per month and SC valves to the Opposite Party as per its requirement and to its satisfaction.

- 2.12 Based on the above averments, it has been stated that the inclusion of the said clause would frustrate the objective of competitive bidding to get the product at a competitive price.
- 2.13 The informant has also alleged that the Opposite Party is having approximately 47% of the market share in the distribution and retailing of gas and accordingly, it has been submitted that it enjoys dominant position. Further, it has been alleged that the Opposite Party by the said clause of holiday listing has created a restraint on those players who in the ordinary course of business are not denied from participating in the bid and the same amounts to imposing unfair condition in purchase/sale of goods in contravention of section 4 (2) (a) (i) of the Act. It has been further alleged that the action of the Opposite Party in including BPCL and HPCL into the holiday listing clause has resulted into denial of market access to the informant and other similarly situated persons in contravention of section 4 (2) (c) of the Act.

2.14. Based on the above, the informant has prayed to the Commission seeking, *inter alia*, the following reliefs:

- a) *To pass an order directing the Opposite Party to modify Clause 6, Annexure II of Tender No. LPG-O/M/PT-03/09-10 due on 03.03.2010 and Clause 12 in Annexure II of Tender No. LPG-O/M/PT-04/09-10 due on 17.03.2010 respectively, by removing the reference of BPCL and HPCL in the respective clauses.*
- b) *To restrain the Opposite Party from proceeding with the above two bids with the presence of above two clauses in different Tenders.*
- c) *To restrain the Opposite Party from including the said clauses in future bid documents.*

3. The Commission, on consideration of the facts and circumstances of the case, found that there exists a *prima facie* case for making a reference to the Director General (DG) to conduct an investigation into the matter and accordingly, the Commission passed an order under section 26 (1) of the Act on 30.03.2010 directing the DG to conduct investigation into the matter and submit his report.

4. Pursuant to the order passed by the Commission, the DG conducted the investigations and after completing the investigation submitted his report on 15.09.2010 to the Commission.

5. Findings of DG Report

5.1 In order to analyze the issues/allegations raised by the informant, the DG, at the outset, proceeded to define the relevant market in the present case.

5.2 The DG, after taking into consideration the relevant provisions of the Act, defined the relevant market as *14.2 Kg LPG Cylinders as per the technical specifications prescribed in the tender documents of the Opposite Party for the supply of such cylinders all over India.*

5.3 Further, the DG, after detailed examination of the factors enumerated in section 19 (4) of the Act, has come to the conclusion that the Opposite Party is in a position of dominance. The DG has also reported that since IOC is having a market share of around 50%, it can exercise its market power by taking decisions independently and operate independently of competitive forces prevailing in the relevant market of procurement of 14.2 Kg LPG cylinders and can also affect consumers in its favour.

5.4 The DG has also noted that the impugned action on the part of the IOC may have a potential adverse effect on the competition since the informant and similarly placed bidders have been deprived, and in future also may be deprived, of the opportunity to participate in the competitive bidding process. The DG also found the conditions as unconscionable restraint

on trade so far as the bidding ability and competence of the informant are concerned.

5.5 Resultantly, the DG has concluded that the impugned tender condition under clause 6 of Annexure-2, is restrictive as it imposed unfair and discriminatory condition in procurement of 14.2 Kg LPG cylinders and hence found that the IOC has contravened provisions of section 4 (2) (a) (i) of the Act. The DG also found the impugned tender conditions as denying access to the market of supply of 14.2 Kg LPG cylinders in violation of section 4 (2) (c) of the Act.

6. The Commission considered the report of DG in its meeting held on 18.10.2010 and decided to send the copies of investigation report to the parties to file their replies/objections. The Commission also directed the informant as well as the Opposite Party to appear for oral hearing, if they so desire, either personally or through their authorized representatives.

7. The Opposite Party filed its reply/ objections to the DG report on 11.01.2011. Shri A.N.Haksar, Senior Advocate appeared for Opposite Party and made oral submissions on 27.01.2011.

8. Reply by the Opposite Party

8.1 It has been submitted by the Opposite Party that it has filed its detailed reply alongwith the documents before the DG during the course of investigation and hence, it requested the

Commission to treat its reply dated 27.05.2010 filed before the DG as a part and parcel of the present reply.

8.2 The Opposite Party also questioned the scope of investigation of the DG and submitted that the DG has extended the scope of investigation by dealing with the aspects of bid rigging and cartelization by the suppliers/manufacturer of cylinders which was beyond the purview of the investigation. It has been contended that the DG cannot investigate any new issue without the same having been brought to the notice of the Commission and without the *prima facie* opinion having been formed by the Commission in this regard.

8.3 The Opposite Party further submitted that the analysis of the allegations as contained in the report is factually incorrect. It has been also submitted that the allegations, even assuming to be correct, do not establish that the Opposite Party has violated the provisions of the Act. Further, it has been contended by the Opposite Party that it does not enjoy a dominant position in the relevant market.

8.4 The Opposite Party further submitted that the relevant product market as defined in the Act would include all those products which are regarded as interchangeable or substitutable by the consumers, by reason of the characteristics of the products, their prices and intended use. The relevant product in the present case would include the cylinders of all dimensions and shapes and cannot be confined to 14.2 Kg LPG cylinders as

contended by DG merely because the informant has complained of about a restrictive clause in the tender for procurement of 14.2 Kg LPG Cylinders.

8.5 The Opposite Party has submitted that the impugned condition in the tender document is neither unfair nor discriminatory. It applies uniformly to all the bidders and is not designed to prevent any enterprise or class of persons from participating in the tender. Further, it has been contended that the Opposite Party as a business enterprise is entitled to safeguard its interest as well as interest of the consumers while dealing with any other enterprise. A condition which is made known well in advance and inserted in public interest cannot be termed as practice resulting in denial of market access. It has been asserted by the Opposite Party that it is open for it to declare that it does not wish to do business with persons who have been found unreliable business partners.

8.6 It has been further contended by the Opposite Party that the clause relating to Holiday Listing is purely in public interest and to prevent unscrupulous and unreliable manufacturers/suppliers from abusing the tender process. It has been further argued that the analysis in the investigation report of the provisions of section 19 (4) of the Act to determine the dominant position of the Opposite Party is bad as it assumes dominant position on the sole criteria of market share and size in supply and distribution of LPG. The investigation report has not taken into account the fact that an enterprise is both a buyer and seller

of goods and merely because an enterprise has a sizeable market share in the sale of a particular product will not *per se* make it a dominant player in other market especially the market of raw materials used in such goods.

8.7 It has been submitted by the Opposite Party that the Holiday Listing clause is purely in public interest and in consonance with sound and ethical business practices accepted throughout the world and cannot by any stretch of imagination amount to imposing directly or indirectly, unfair or discriminatory condition in purchase or sale of goods.

9. The Commission has carefully considered the information, the documents filed therewith, the investigation report of the DG, the reply of the Opposite Party to the DG report and the other relevant material available on record.

10. Issues

From the analysis of the above, the following points arise for determination in the present matter:

- (a) What is the 'relevant market' in the present case?
- (b) Does the Opposite Party hold the 'dominant position in the 'relevant market'?
- (c) Whether the Opposite Party has abused its dominant position in contravention of section 4 of the Act?

11. Determination of Issue no. 1

11.1 The Commission has to determine the relevant market as defined in section 2(r) of the Act in the light of the provisions contained in section 19 (5), viz., the relevant product market and the relevant geographic market. The relevant product market as defined in section 2 (t) of the Act has to be determined in the light of the factors contained in section 19 (7) of the Act. Similarly, the relevant geographic market as defined in section 2 (s) of the Act has to be determined in the light of the factors contained in section 19 (6) of the Act.

11.2 For determining the relevant market in the instant case, it is also necessary to examine the various statutory aspects involved in the distribution and supply of LPG in India.

11.3 Prior to the year 1993, the private sector was not allowed to participate in the parallel marketing of LPG. In order to increase the availability of LPG and to foster competition, the private sector was allowed to participate in the scheme of parallel marketing of LPG in April, 1993 by decanalising imports of LPG.

11.4 The Central Government in exercise of the powers conferred upon it by section 3 of the Essential Commodities Act, 1955 issued the LPG (Regulation of Supply and Distribution) Order, 2000 ('the LPG Order') on 26.04.2000. It is seen from the perusal of the above order that cylinders, regulators and valves, to be used by the parallel marketers have to be distinctively different from those used by the

public sector oil companies. This position becomes clear by a combined reading of schedule II and schedule III of the notification.

11.5 Clause 4 (1) (e) and Clause 5 read with Schedule-II of the LPG Order prescribe standard size and specification of LPG Gas Cylinders applicable to distributors of a Government Oil Company. Similarly, Clause 4 (1) (e) and Clause 5 read with Schedule-III of the LPG Order provides that a parallel marketer under the parallel marketing system shall deal with, *inter alia*, cylinder of any size, shape, design and weight other than those specified in Schedule-II conforming to Indian Standard Specifications.

11.6 On the basis of the above, it may be noted that only PSU Oil Companies can supply LPG in 14.2 Kg cylinders as per given specifications in schedule II of the notification dated 26.04.2000.

11.7 In addition to the regulatory differentiation as highlighted above the specifications provided in the tender documents floated by IOC only those manufacturers of LPG cylinders were eligible to bid who were having valid approval from Chief Controller of Explosives (CCOE) and Bureau of Indian Standards (BIS) license for manufacture of 14.2 Kg LPG cylinder as per IS – 3196 (part I).

11.8 In the light of above factual and statutory position undoubtedly the relevant product market in the instant case would be 14.2 Kg LPG cylinders as specified in the tender documents of Opposite Party.

11.9 In the present case since the supply of the relevant product is made all over India and the LPG companies procure 14.2 Kg empty

cylinders on national level the relevant geographic market shall be the entire India.

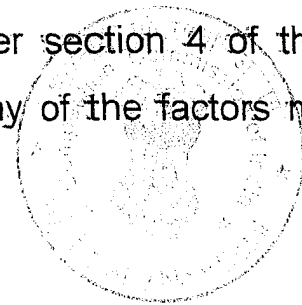
11.10 Therefore, the relevant market in the present case is delineated as 14.2 Kg LPG cylinders as per specifications prescribed in the tender documents of the Opposite Party. The DG has also defined the relevant market similarly.

11.11 In the backdrop of foregoing position the contention of the Opposite Party that the relevant product market should comprise of LPG cylinders of all weight category does not seem to have any force and is liable to be rejected.

12. Determination of Issue no. 2

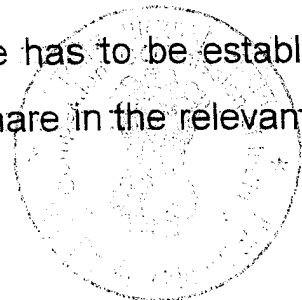
12.1 As per the explanation (a) to section 4 of the Act, dominant position means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.

12.2 Further, the Commission, while inquiring whether an enterprise enjoys a dominant position or not under section 4 of the Act, is required to have due regard to all or any of the factors mention in section 19 (4) of the Act.



12.3 It is seen that the DG has, after a detailed analysis of the factors mentioned in section 19 (4) of the Act, reached the conclusion that IOC is in a position of dominance in the relevant market. The DG has noted in the report that IOC is a market leader having around 50% market share in the LPG market, and is also dominant player in the market of procurement of 14.2 Kg LPG cylinders. It has been noted by the DG that out of total market share of 14.2 Kg LPG cylinders i.e. approximately 80-90 lac per annum the IOC procures 50% of them and rest is procured by BPCL and HPCL. In terms of size and resources of enterprise, the IOC has 89 LPG bottling plants having wide network consisting of regional offices in metros, 16 State offices and 39 Area offices. It is one of the largest commercial enterprise in terms of sales and its other competitors BPCL and HPCL are distant runners. It is thus clear that by commanding 50% market share in the relevant market and having huge size and resource, it is in a position to exercise its market power and operate independently of competitive forces prevailing in the relevant market of procurement of 14.2 Kg LPG Cylinders and can also affect the relevant market and consumers in its favour.

12.4 The Opposite Party has assailed the findings of DG report on dominance. It has been submitted that the DG has failed to establish the dominance of the Opposite Party when in the report of the DG itself the market share of IOC is pegged at less than 50%. It is further argued that dominant position of enterprise has to be established by the DG with empirical data of the market share in the relevant product market.



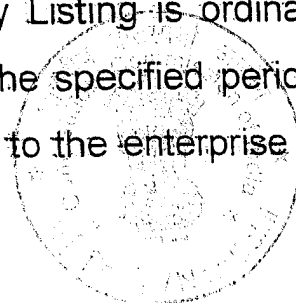
12.5 The contentions raised by the Opposite Party do not have any merit as the DG has not based his findings in respect of dominance solely on the market share enjoyed by the Opposite Party and has come to the conclusion on a detailed analysis of the various factors enumerated in section 19 (4) of the Act. As discussed above not only the market share of Opposite Party is 48.2% as against 25.8% of BPCL and 26% of HPCL but in terms of other parameters provided in section 19 (4) of the Act also, the IOC is way ahead of its competitors.

12.6 Thus, the Commission has no doubt that the Opposite Party is in a dominant position in the relevant market and issue no. 2 is decided accordingly.

13. Determination of Issue no. 3

13.1 After defining the relevant market and determining the dominant position of the Opposite Party in the said relevant market, the Commission has to consider whether the insertion of the impugned clause in the tender documents by the Opposite Party amounts to an abuse of dominant position in terms of the provisions of section 4 of the Act.

13.2 The DG in his report has noted that the inclusion of BPCL and HPCL in the clause of Holiday Listing in the tender document by IOC is unfair because it restricts the supply in the relevant market. It has also been observed by DG that Holiday Listing is ordinarily in the nature of a temporary restraint only for the specified period and the restraint is limited to the extent of supply to the enterprise which has



holiday listed any entity. This Holiday listing also usually pertains to that particular bid or the contract of supply. It does not affect the other contracts with the holiday listed company. However, the said clause puts a restriction which not only debars a company from bidding which has been holiday listed by the IOC but also by BPCL and HPCL as well.

13.3 The DG, in the light of the above has found substance in the allegations that action on the part of the IOC may have a potential adverse effect on competition since the informant and similarly placed bidders have been and in future also may be deprived of the opportunity to participate in the competitive bidding process. The DG also found substance in the allegation that by virtue of the said clause, the IOC has put unconscionable restraint on trade in so far as the bidding ability and competence of the informant is concerned. Thus, the DG has concluded that the tender conditions, particularly conditions under clause 6 of Annexure-II are restrictive since they have put unfair and discriminatory conditions in procurement of 14.2 Kg LPG Cylinders in violation of the provisions of section 4 (2) (a) of the Act. Further, the DG also drawn the conclusion that the same also denied access to the market of supply of 14.2 LPG Cylinders in violation of section 4 (2) (c) of the Act.

13.4 The Opposite Party in its reply to the DG report denied any violation of the provisions of section 4 of the Act. In the reply, it has been stated that the Opposite Party is entitled to take legitimate steps to protect its commercial interest as well as public interest and the same is sought to be achieved by putting only a temporary embargo

upon a known defaulter. It is further contended that, in any event, such a temporary embargo does not amount to abuse of any dominant position as it does not affect competition and on the contrary it sends a strong message to unreliable players.

13.5 It has also been contended that manufacturers of cylinders are a class of enterprises who manufacture cylinders for packing and transporting gas including LPG. The manufacturers are not confined to manufacture cylinders of 14.2 Kg weight and thus market access is not denied to any manufacturer as the impugned condition does not preclude the manufacturer from supplying cylinders of other dimensions to other users/buyers.

13.6 The Opposite Party in its reply has further submitted that the impugned condition in the tender documents is a condition which is neither unfair nor discriminatory. It applies uniformly to all the bidders and is not designed to prevent any one or a class of persons from participating in the tender. It is the term of the trade which IOC has disclosed in its tender which is known to all the prospective bidders. IOC, as a business enterprise, is entitled to safeguard its interest as well as the consumers' interest while dealing with any other business enterprise. A condition which is made known well in advance and inserted in public interest cannot be termed as a practice resulting in denial of market access. It is open to IOC to declare that it does not wish to do business with persons who have been found unreliable

business partners. It is not necessary that IOC has to burn its fingers and it is only thereafter that it has the freedom to refuse to deal with such persons. The impugned condition makes it abundantly clear that IOC does not wish to do business with undependable/unreliable persons which could have serious impact on its business of supply of LPG to domestic consumers.

13.7 The Opposite Party has further stated in its reply that restraint on trade to subserve public interest can never be construed as an abuse. It has been further submitted that it is a common business practice that a person with undesirable conduct is precluded from participating in the tender. The concept of black listing and holiday listing is a time tested principle and the same is followed across jurisdictions and economies so long as the reasons for such blacklisting/holiday listing are based on valid and justifiable reasons.

13.8 It appears that the impugned clause does not contravene the provisions of section 4 of the Act as neither it can be held as an unfair nor discriminatory condition in purchase of goods. It seems to be a reasonable business practice followed by the Opposite Party to safeguard against the default by the suppliers which may jeopardize the supply of gas cylinders to the consumers. Besides, the said condition applies uniformly to all the bidders and therefore the same cannot be considered as discriminatory as well. Furthermore, the impugned condition in the tender documents cannot be said to be denying market access to any supplier. If any supplier of cylinders has

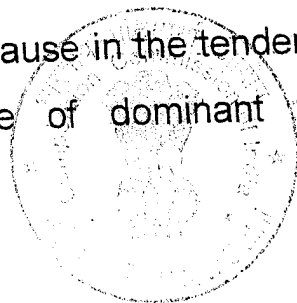
made default in supply the procurer company is well within its rights not to deal with the defaulting supplier. The necessary corollary of this is that any enterprise cannot allege wrongdoing because of being debarred from bidding when that enterprise is itself wrongdoer. It is also observed that in the instant case the informant had been put on holiday list by the BPCL because of the non-acceptance of letter of intent and the informant has not challenged the action of BPCL. Moreover, it is always open for the informant to supply cylinders of other dimensions to other users/buyers. Therefore, the impugned clause in the tender documents of IOC cannot be said to constitute an abuse in terms of the provisions of section 4 of the Act.

13.9 In the light of above analysis of facts and evidence the conclusion drawn by the DG cannot be accepted and no contravention of section 4 has been found to have been established against the party.

13.10 Issue no. 3 is disposed of accordingly.

14. Conclusion

In view of the above discussion, the Commission is of the considered view that the insertion of holiday listing clause in the tender floated by the Opposite Party is not an abuse of dominant position in



contravention of the provisions of section 4 of the Act and therefore the matter deserves to be closed.

15. In view of the above findings the matter relating to this information is disposed off accordingly and the proceedings are closed forthwith.

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

Sd -
Member (C)

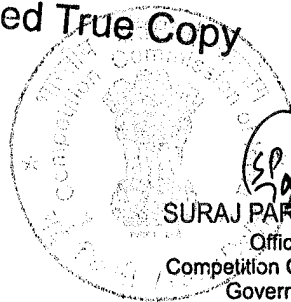
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