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COMPETITION COMMISSION OF INDIA

Ref. Case Nos. 03 & 04 of 2013

Ref. C. No. 03 of 2013

In re:

Delhi Jal Board

Informant

And

- | | |
|---|-----------------------------|
| 1. Grasim Industries Ltd. | Opposite Party No. 1 |
| 2. Aditya Birla Chemicals (India) Ltd. | Opposite Party No. 2 |
| 3. Gujarat Alkalies and Chemicals Ltd. | Opposite Party No. 3 |
| 4. Kanoria Chemicals & Industries Ltd. | Opposite Party No. 4 |

WITH

Ref. C. No. 04 of 2013

In re:

Delhi Jal Board

Informant

- | | |
|---|-----------------------------|
| 1. Grasim Industries Ltd. | Opposite Party No. 1 |
| 2. Aditya Birla Chemicals (India) Ltd. | Opposite Party No. 2 |
| 3. Punjab Alkalies and Chemicals Ltd. | Opposite Party No. 3 |
| 4. Kanoria Chemicals & Industries Ltd. | Opposite Party No. 4 |



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CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Appearances: Shri Sangram Patnaik, Ms. Tehsina, Ms. Rupam and Shri Kashish Khurana, Advocates for Delhi Jal Board.

Shri Amit Sibal, Senior Advocate with Shri Samir Gandhi, Shri Rahul Rai, Ms. Kadambari Chinoy, Shri Dhrupad, Ms. Krithika Ramesh, Shri Tahir Ashraf Siddiqui, Shri Namit Suri and Shri VR Shankar, Advocates for Grasim Industries Ltd. (GIL); Aditya Birla Chemicals (India) Ltd. (ABCIL); Shri K. C. Jhanwar, Group Vice-President of ABCIL & GIL; Shri Shailendra Deshpande, Senior Vice-President (Sales & Marketing of Value Added Products) of ABCIL & GIL and Shri Mayank Sharma, Vice-President (Sales & Marketing, Chlor Alkalies) of ABCIL & GIL.

Shri Jayant Mehta and Shri Nikhil Pillai, Advocate for Shri Ajay Todi, Senior Vice-President (Sales & Marketing of Value Added Products) of ABCIL and GIL.

Shri Rajshekhar Rao, Shri Sameer Dawar and Shri Toshit Shandilya, Advocates for Gujarat Alkalies & Chemicals Ltd. (GACL) and for Shri G. S. Paliwal, General Manager (Marketing) of GACL.



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Shri Karan Lahiri and Ms. Gauri Puri, Advocates for Shri U. N. Karogal, General Manager (Marketing) of GACL.

Shri Swetank Shantanu, Advocate for Shri Mukesh Mishra, General Manager (Marketing) of GACL.

Shri A. N. Haksar, Senior Advocate with Ms. Anju Thomas, Shri Sahil Sharma, Shri Sandeep Bajaj and Shri Soayib Qureshi, Advocates alongwith Shri Pradeep Nauharua, Co. Secy. & Sr. G.M. (CO. Affairs), Shri S K Garg, Dy. Manager and Shri Ajay Pal Singh GM (Finance) for Punjab Alkalies & Chemicals Ltd. (PACL) and Shri Naveen Chopra, General Manager (Marketing) (In-person) of PACL.

Shri Manas Kumar Chaudhuri, Shri Pranjal Prateek and Ms. Nikita Agarwal, Advocates for Kanoria Chemicals & Industries Ltd. (KCIL).

Order under Section 27 of the Competition Act, 2002

1. Ref. Case No. 03 of 2013 was filed under Section 19(1)(b) of the Competition Act, 2002 ('the Act') by Delhi Jal Board ('the Informant'/ DJB) against Grasim Industries Limited ('the Opposite Party No. 1/ GIL), Aditya Birla Chemicals (India) Limited ('the Opposite Party No. 2'/ ABCIL), Gujarat Alkalies and Chemicals Limited ('the Opposite Party No. 3'/ GACL) and Kanoria Chemicals and Industries Limited ('the Opposite Party No. 4'/ KCIL) alleging *inter alia* contravention of the provisions of Section 3 of the Act.
2. Ref. Case No. 04 of 2013 was filed under Section 19(1)(b) of the Act by Delhi Jal Board ('the Informant'/ DJB) against Grasim Industries



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Limited ('the Opposite Party No. 1/ GIL), Aditya Birla Chemicals (India) Limited ('the Opposite Party No. 2'/ ABCIL), Punjab Alkalies and Chemicals Limited ('the Opposite Party No. 3'/ PACL) and Kanoria Chemicals and Industries Limited ('the Opposite Party No. 4'/ KCIL) alleging *inter alia* contravention of the provisions of Section 3 of the Act.

Facts

3. Facts, as stated in the information, may be briefly noted.

Ref. Case No. 03 of 2013

4. In Ref. Case No. 03 of 2013, the Informant - a statutory body constituted under the Delhi Water Board Act, 1998 - is engaged in water supply and sewage disposal activities and any other function connected therewith within NCT of Delhi. The Opposite Parties are the companies registered under the Companies Act, 1956 and are manufacturing water purification chemical (Poly Aluminium Chloride and Liquid Chlorine conforming to Bureau of Indian Standards *i.e.* BIS specification IS: 15573:2005) in India. The Opposite Party Nos. 1, 2 and 4 are private companies whereas the Opposite Party No. 3 is promoted by Government of Gujarat.
5. As per the Informant, for production of potable water three chemicals which are Poly Aluminium Chloride (PAC), Alum (coagulant) and Liquid Chlorine (disinfectant) are widely used, but PAC is mostly used as it is easy to handle. The Informant has been procuring PAC from the Opposite Parties for purification of water through tendering process. Since the Opposite Parties are the only manufacturers of PAC conforming to the standards laid down by Bureau of Indian Standards (BIS) in the market, therefore in response to every regular press tenders



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and e-tenders by the Informant only the Opposite Parties come out and bid.

6. The Informant has alleged that in case of negotiations over the bid price of PAC, the Opposite Parties used to negotiate/ decrease the prices, to an equal extent. The Informant has further alleged that in negotiation over the bid price all the Opposite Parties used to decide as to how much amount is to be decreased or negotiated from bid/ quoted price.
7. The Informant has also alleged that the Opposite Parties were bidding collusively by quoting similar prices with a difference of INR 200-400 for certain quantity of the said chemicals from the year 2006-07 till the year 2012. The same is alleged to be done to vitiate the whole purpose of tenders as the Informant had no other option but to accept the prices as determined by the Opposite Parties themselves.
8. The Informant has submitted that the Opposite Parties also took the benefit of clause 8 of the tender notice NIT No. 01(12-13) dated 18.04.2012 which indicates that supply order would be placed in three lots, Lot No. 1- 50% of the tendered quantity, Lot No. 2- 35% of tendered quantity and Lot No. 3- 15% of the tendered quantity with a condition that material of the above three lots would be procured from three sources of supply at L1 rates. It has been alleged that all the participants knew as to whatever price they would offer or bid for, had to be accepted by the Informant as per this clause.
9. The Informant has further submitted that there were three bidders namely GIL, GACL and KCIL during the period of 2006-07 to 2011-12. The Opposite Party No. 2 participated in the bidding process only in the year 2012-13. It has been submitted that the rates quoted by GACL, GIL and KCIL were similar, though not identical, for all the years starting from 2006-07 till 2011-12 except the year 2008-09 wherein the price



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quoted by KCIL and GIL were exactly the same *i.e.* INR 9,300 PMT.

10. As per the information furnished, in the year 2012-13, there were three bidders namely- GACL, GIL and ABCL, out of which two companies namely GIL and ABCL belong to a single group of companies *i.e.* Aditya Birla Group. It has been alleged that all these three bidders again quoted similar rates with a difference of approximately INR 200 Per Metric Tonne (PMT) from highest to lowest bid. The Informant has alleged that there was no scope for procuring the PAC at economical price as there was collusion in the bidding process.
11. It has been further submitted by the Informant that three of the bidders succeeded in securing the tender at much higher price *i.e.* INR 12,001 PMT in the year 2012-13 in comparison to preceding year negotiated rate of INR 10, 908 PMT. The Informant has further submitted that there has been continuous increase in the negotiated rates except for the year 2009-10 where the bid price was less than that of preceding year.
12. The Informant has further submitted that the rates quoted need not necessarily be the same or identical. Even if similar rates are quoted and there are circumstantial evidences showing the meeting of minds or agreement, then the possibility of cartel does exist. It has been further stated that the opposite parties are the only manufactures of PAC of prescribed standards and they quoted identical or near identical price in tender documents, indulged in collusive price setting during negotiation and thus indulged in price cartelization and collusive tendering.

Ref. Case No. 04 of 2013

13. Ref. Case No. 04 of 2013 has also been filed by the same Informant against the same companies except that instead of GACL, PACL - a company promoted by Government of Punjab - is made a party in the present reference.



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14. The Informant has been procuring Liquid Chlorine (LC) and other chemicals from the Opposite Parties for purification of water through tendering process. As per the Informant, it purchases Liquid Chlorine by inviting regular press tenders as well as through e-tenders. In response, only the Opposite Parties come out and bid as they are the only manufacturers of Liquid Chlorine conforming to the standards laid down by Bureau of Indian Standards (BIS).
15. The Informant has alleged that in case of negotiation over the bid price of Liquid Chlorine, the opposite parties used to negotiate/ decrease the prices, to an equal extent. The Informant has further alleged that in the negotiation over the bid price all the Opposite Parties used to decide how much amount is to be decreased or negotiated from the bid/ quoted price.
16. It has also been alleged that all the Opposite Parties bid collusively for the tender quantity by quoting similar prices for certain quantity of the said chemical from the year 2006-07 till the year 2012. The same was alleged to have been done to vitiate the whole purpose of inviting tenders as the Informant had no other option but to accept the prices as determined by the Opposite Parties themselves.
17. The Informant has further alleged about collusive behaviour of the Opposite Parties in price negotiation process. It has been submitted that each year after negotiations all the Opposite Parties agreed on one price and were reluctant to negotiate further which clearly demonstrates meeting of minds between the Opposite Parties during pre-bidding as well as before negotiation with the Informant.
18. It has also been submitted that in the year 2005-06, GIL and PACL quoted the same price of INR 11,500 per MT. In the year 2007-08, three applicants namely - GIL, PACL and KCIL participated in the tender invited by the Informant and out of which GIL and KCIL quoted the



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same price of INR 6,400 per MT. Again in the year 2012-13, ABCIL and PACL quoted the same rate of INR 9,500 per MT of liquid chlorine.

19. It has been submitted that two (ABCIL & GIL) out of three applicants in the year 2012-13, belong to Aditya Birla Group of Companies. It has been alleged that GIL and ABCIL must have bid after consulting each other, which clearly shows the meeting of minds. It has been further submitted that during negotiations with the Informant, GIL refused to share its cost of production and also refused to provide an undertaking that it has not supplied Liquid Chlorine at rates lower than the rates supplied to the Informant to other customers in recent past.

Directions to the DG

20. The Commission in Ref. C. No. 03 of 2013 after considering the entire material available on record *vide* its order dated 02.01.2014 passed under Section 26(1) of the Act found *prima facie* the Opposite Parties to be in contravention of the provisions of Section 3 of the Act. Accordingly, the Commission directed the DG to cause an investigation to be made into the matter and submit a report.
21. Subsequently, the Commission in Ref. C. No. 04 of 2014 also passed an order under Section 26(1) of the Act on 16.01.2014 after finding the Opposite Parties therein to be in contravention of the provisions of Section 3 of the Act. Further, *vide* this order, the Commission ordered the clubbing of this case with Ref. C. No. 03 of 2014 and directed the DG to submit a combined report of its investigation in the two matters.

Investigation by the DG

22. The DG, after receiving the directions from the Commission, clubbed the investigation of both the cases and submitted a combined report on



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29.10.2015. Part I of the Report deals with the bid rigging in procurement of liquid PAC and Part II deals with the bid rigging in procurement of Liquid Chlorine.

Part I (Liquid PAC)

23. The DG concluded that there was an understanding amongst the bidders (ABCIL, GIL and GACL) for all the tenders floated by DJB from 2009-10 to 2014-15 and they acted in a collusive manner to artificially jack up the bid prices without offering any real competition. Accordingly, it was concluded that these bidders contravened the provisions of Section 3(1) read with Section 3(3)(d) of the Act. The DG, however, noted that no contravention was established against KCIL.

Part II (Liquid Chlorine)

24. The DG concluded that there was an understanding amongst the bidders (ABCIL, GIL and PACL) for all the tenders floated by DJB from 2009-10 to 2014-15 and they acted in a collusive manner to artificially jack up the bid prices, forcing DJB to divide the tender quantity, without offering any real competition. Accordingly, it was concluded that these bidders contravened the provisions of Section 3(1) read with Section 3(3)(d) of the Act. The DG, however, noted that no contravention was established against KCIL.

Consideration of the DG report by the Commission

25. The Commission in its ordinary meeting held on 04.02.2016 considered the investigation report submitted by the DG and decided to forward copies thereof to the Parties/ Persons, as specified therein, for filing their respective replies/ objections thereto. The Commission heard the arguments of the Parties/ Persons on various dates and decided to pass appropriate order in due course after conclusion of arguments.



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Replies/ Objections/ Submissions of the Parties

26. The Parties filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions.

Replies/ objections/ submissions of the Informant

27. The Informant in both the cases viz. Ref. C. Nos. 03 & 04 of 2013, while broadly supporting the findings of the DG, has filed specific objections to the portions of the DG Report wherein it was observed by the DG that DJB itself facilitated bid rigging by putting certain conditions such as the requirement of Toxicity Certificate from IITR, Lucknow only and also the condition that supplier must be a manufacturer in the tender documents and has thereby created entry barriers for new entrants. Besides, objection has been taken to other observations made by the DG against DJB in the investigation report. Written submissions and rebuttal to the arguments advanced by the Opposite Parties were also filed on behalf of the Informant.

Ref. C. No. 03 of 2013

Replies/ objections/ submissions of GIL/ ABCIL

28. Besides a detailed joint reply dated 25.04.2016 filed on behalf of GIL and ABCIL in both the cases, post-hearing written submissions dated 27.06.2016 were also filed. For sake of easy reference, brief reply specific to the respective reference case is excerpted below:
29. At the outset, it was argued that the Commission erred in passing the *prima facie* order. In this regard, it was submitted that on 09.07.2013, the Commission called DJB for a preliminary conference. Subsequently, the Commission passed an order under Section 26(1) of the Act, directing



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the DG to investigate the matter. However, DJB has averred erroneous facts both in the information and at the preliminary conference. For instance, in support of its allegation that ABCIL and GIL, as well as GACL and KCIL (ABCIL, GIL, GACL and KCIL collectively referred to as ‘**PAC Case OPs**’) had entered into an agreement in violation of Section 3 of the Act, DJB submitted that during the round of negotiations, the PAC Case OPs agreed to supply PAC at identical prices. Relying on the above statement of DJB, the Commission formed the *prima facie* view that the PAC Case OPs negotiated with DJB to supply PAC at the same rates. In fact, DJB held negotiations only with the L1 bidder, and counter-offers were made to L2 and L3 bidders to supply at L1 prices. Hence, L2 and L3 bidders were expected to supply either at L1 prices or not supply at all. Consequently, the Commission’s failure to test the allegations made by DJB by inviting the parties to offer their views at the preliminary stage itself has resulted in grave injustice to the parties, who were not granted the opportunity to present their case at the time of the preliminary conference.

30. It was further contended that the DG has failed to adhere to the principles of natural justice by failing to place on record the entire evidence provided to it. From the DG Report, ABCIL and GIL note that the DG has conveniently ignored significant portions of the information submitted during the course of the investigation, the DG has selectively relied on parts of the information provided by the parties while reaching its conclusions. For example, during the investigation, the DG has collected over 7000 pages of information, but the DG Report spans only 428 pages. Therefore, there is a reasonable apprehension to believe that DG has excluded majority of the submissions made to him during the course of the investigation, and has not relied on that information. According to ABCIL and GIL, an investigative report, which will form the very basis of a decision, and has the ability to significantly impact



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the business of a party, should disclose/ contain all the evidence and submissions made by relevant parties to the adjudicating authority, and that DG's failure to do so vitiates the Report in entirety.

31. It was also alleged that the DG has exceeded the scope of the investigation. In the *prima facie* order, Commission had observed that there appeared to be *prima facie* cartelisation between the PAC Case OPs continuously for the years 2008-09, 2009-10, 2011-12 and 2012-13. However, since the Commission cannot take cognizance of bid rigging / cartelization for the years prior to the Act coming into force (*i.e.* 20 May 2009), DG was directed to investigate the cartel for the years 2009-10, 2011-12 and 2012-13. There are several instances of the DG relying on information from the period 2013-14 to 2014-15 as evidence against the parties. In doing so, the DG has gone beyond the mandate of the Commission's *prima facie* order in conducting its investigation and relied on material beyond the period of investigation *i.e.* from 2009-10 and 2012-13, to support its conclusions.
32. It was contended that GIL and ABCIL do not exercise any competitive constraints on each other as they are part of the Aditya Birla Group of companies. They have common promoters, shareholders, directors and customers. Further, the day-to-day management of the chemical business of ABCIL and GIL is managed by a centralized marketing team. Therefore, the parties constitute a single economic entity, and do not exercise any competitive constraint on each other, a pertinent fact ignored by the DG while coming to conclusions in the Report.
33. In order to establish an agreement under Section 3(3) of the Act, it was incumbent on the DG to show that participants have entered into an "agreement", as defined in Section 2(b) thereof. However, DG in the present instance has failed to provide any evidence, direct or indirect to



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establish the existence of any agreement or understanding between the PAC Case OPs. Having failed to gather or adduce any direct or circumstantial evidence to support the allegation of a bid rigging agreement between the PAC Case OPs, DG has relied on economic evidence, statements made by various deponents and other additional evidence to come to the conclusion that the PAC Case OPs have acted in violation of Section 3(3)(d) of the Act. It was argued that even the “additional evidence” relied upon by the DG does not support the finding of bid-rigging against the PAC Case OPs.

34. It was pointed out that the DG has not been able to adduce direct evidence of an agreement between the PAC Case OPs. Even the economic evidence, statements made by various deponents and other additional evidence relied upon by the DG, do not in any way reflect instances of bid-rigging by the PAC Case OPs. For instance, DG has observed that the prices quoted by the PAC Case OPs for the supply of PAC were similar with a difference of INR 200-400 PMT. In coming to this conclusion, DG has failed to take account of the fact that PAC is a standardized product and that a price difference in the range of INR 200 to 400 per MT is very significant in the market for PAC, which is a commodity product.
35. The DG has presented selective facts and evidence devoid of any context and has resultantly misconstrued the facts placed on record to reach an erroneous conclusion. For instance, DG has incorrectly compared the reasons of increase in the cost of production of ABCIL and GIL for two different years and on this basis disregarded their cost of production data, as being unreliable. Further, DG has incorrectly compared the prices at which PAC is supplied by GIL to DJB to the prices at which SVS Chemicals supplies PAC to its customers. In making the above observation, DG has completely overlooked the additional charges



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(earnest money deposit, interest on overdue payments, inspection, charges for loading and unloading) that are incurred for supply of PAC to DJB.

36. ABCIL and GIL have provided the DG with reasonable justifications for the prices quoted by them in DJB tenders. Elaborating, it was submitted that the parties, through the course of the investigation, have made detailed submissions to the DG about their cost of production, additional charges incurred for supply of PAC to DJB and profits. These submissions indicate that the parties not only independently determined their prices, but also had limited flexibility in arriving at their price quotation, which could vary within the INR 200 - INR 400 per MT range. Therefore, there was no correlation between prices quoted by the PAC Case OPs. However, DG has, merely on a simple price comparison, considered that the close difference in price would be indicative of collusion, and has not recorded any cogent reasons for not taking into account the submissions made by the parties.
37. It was further submitted that none of the “additional evidence” referred to by DG to support its conclusions, leads to the inference of bid-rigging or collusive bidding. For instance, when analyzing the negotiated prices and reaching the conclusion that the negotiation meetings leaves scope for the PAC Case OPs to have some understanding, DG appears to have over-looked the fact that a negotiated price is determined between DJB and the L1 bidder. Should the bidders qualifying as L2 and L3 wish to supply the remaining quantity (as per the tender terms), they are required to supply at the L1 price. The L2 and L3 bidders do not have any say in the negotiated price decided between L1 and DJB. Further, DG has selectively looked at the data for the years 2012-13, 2013-14 and 2014-15 to conclude that there is bid rotation between GACL, ABCIL and GIL. In making this observation, DG has not explained, as to why GACL would agree to take the L3 position for two consecutive years, if



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there were an agreement of any form amongst the PAC Case OPs (a disadvantageous position).

38. On price parallelism, it was submitted that this alone cannot be evidence of bid rigging. The DG heavily relies on the fact that prices quoted by the PAC Case OPs are very similar (within the range of INR 200-400 MTs) to establish that the PAC Case OPs violated Section 3(3)(d) of the Act. A difference of INR 200-400 PMT is substantial for a homogeneous product like PAC and, therefore, it is incorrect to come to the conclusion that there was an agreement of bid rigging between the PAC Case OPs with respect to DJB tenders for supply of PAC, on the basis of similar prices alone. Through the course of the investigation, parties have made detailed submissions on the evidence providing that they determined the prices for supply of PAC independently, which has been disregarded by DG.

39. Lastly, it was submitted that there is no appreciable adverse effect on competition (AAEC) in India. It was pointed out that Section 3 of the Act prohibits agreements among competitors that result in collusive bidding or bid rigging (Section 3(3)(d) of the Act). Agreements that are shown to have this effect are presumed to have an AAEC in India. In the present instance, DG has failed to show that the PAC Case OPs entered into an agreement. Therefore, there cannot be any presumption of AAEC. However, without prejudice to the aforesaid submissions, the parties submit that since (i) they continuously participated in DJB tenders and (ii) supplied PAC at negotiated rates, there was no AAEC in India.

Replies/ objections/ submissions of GACL

40. GACL, in its written submissions submitted that the conclusion of the DG that GACL and other bidders have violated Section 3 of the Act is



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devoid of merits and unsustainable. The findings of the DG suffer from a number of legal infirmities and deserves to be set aside for non-adherence to legal and evidentiary standards laid down by the Commission and the Hon'ble Competition Appellate Tribunal.

41. GACL contends that DG has utterly failed to demonstrate any evidence of existence of an agreement to rig bids, and instead, has built the case on pure speculations and conjectures. The inference of collusive conduct on the basis of pricing decisions of the bidders can at best fall under the realm of circumstantial evidence. It is pointed out that the DG has failed to discharge the burden of proof by failing to demonstrate the clinching inference and the evidence that leads to no other plausible explanation than collusion among the companies.
42. It was also contended by GACL that DG in his Report has not concluded that the bid prices increased by the same amount or that the price increase was identical. In fact, DG did not even consider, whether the price increase was by the same amount or was proportional. The DG has only noted that the bid prices were increasing. GACL submits that the DG did not even consider it necessary to ask the parties for reasons for their respective price increase before arriving at the conclusion of parallel behavior. Therefore, DG's conclusions do not even pass muster in suggesting parallel behavior.
43. Arguing further, GACL submits that mere price parallelism is not sufficient and that the DG was required to consider plus factors in addition to parallel conduct to behavior. Reference was also made to case law to argue that plus factors need to be considered before arriving at the conclusion of contravention of Section 3 of the Act. It was contended that the DG has not considered any plus factors, which would support its inference that OPs have indulged in collusive behavior.



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Further, the DG has not analysed OPs' conduct to rule out an alternative explanation to the alleged parallel conduct.

44. It was submitted that DG has ignored the justification and rationale behind the pricing decision of GACL but has only superficially noted that OP's justification and rationale were not sufficient. The DG was under an obligation to provide detailed reasons for rejecting submissions provided by GACL in relation to its participation in DJB tenders. It was pointed out that GACL had provided its cost information and price details to the DG in relation to all other tenders. However, DG has not only failed to consider these submissions but also failed to relate the submissions to the fact that GACL has acted independently.
45. Further, it was argued by GACL that DG has failed to provide any analysis of how and in what manner was GACL able to coordinate with ABCIL and GIL to rig the bid. GACL submits that DG has not been able to establish a link between GACL's prices and that of its competitors and has simply made certain observations on the pricing trends in DJB tenders. That the PAC DG Report is based merely on conjectures and surmises with a view to support a pre-determined hypothesis, which demonstrates a complete non-application of mind.
46. The mere fact that capacity may be available, cannot automatically lead to a conclusion that the capacity is available to service a particular market or tender. GACL is located farthest from DJB supply areas and therefore, transportation cost is a major component of its delivered price to DJB. Accordingly, it was not in GACL's commercial interest to commit significant quantities to DJB. It is axiomatic that a decision to service a market depends on a variety of factors including the capacity to cater the demand, prevailing and anticipated price levels, EBIDTA margins that a particular sale may generate.



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47. GACL states that it is an accepted legal position that, to investigate into allegations leveled against one party, the investigating authority ought to investigate not only the veracity of the allegations leveled but also the intention of the person who is leveling such allegations and not doing so is contrary to the basic principles of justice, equity and good conscience. It is submitted that a bare perusal of the investigation report clearly indicates that DG has simply followed the path lit by the Informant.
48. It was contended that DG has employed a pick-and-choose approach to conclude that the answering OP has indulged in collusive behavior. It was submitted that DG on the one hand stated that GACL has consistently been L3 bidder even though it had the competitive wherewithal to become L2 bidder and this is indicative of collusive conduct. Subsequently, when GACL became L1 bidder in the 2014-2015 DJB Tender, DG concludes that GACL and the other OPs were indulging in the collusive practice of bid rotation in as much as each bidder for three successive years managed to be at L1 position in DJB Tenders. The DG failed to appreciate that GACL was declared the L1 bidder for the first time in last few years and that other companies have been bagging the L1 status earlier. Therefore, there is no rotation of bids as such.
49. GACL argued that the tender conditions of DJB are not conducive to collusion. It is submitted that GACL acts unilaterally and independently while conducting its business, that it faces stiff competition from other established players in the market of PAC to supply to DJB. It was pointed out that DG had clearly noted that GACL had continued to remain L3 bidder in all the tenders under investigation except for the 2014-15 tender by DJB. Therefore, there can be no indication that GACL has colluded with the other OPs participating in DJB Tenders. It was submitted that DG has merely drawn inferences and made erroneous



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observations on certain aspects of tender conditions to conclude that GACL and other bidders were acting in concert.

50. GACL submits that mere existence of favourable tender conditions for cartelization, in the absence of credible evidence to support the findings, is not sufficient to prove a violation under Section 3(3)(d) of the Act. Accordingly, no adverse inference can be drawn against GACL on the basis of alleged restrictive conditions contained in DJB Tenders.
51. It was submitted that the conclusion drawn by DG that the bid prices offered by the OPs were quite close to each other and the bid price indicate simultaneous increase over the years is misplaced and incorrect. It contends that GACL determines its prices unilaterally and independently. GACL has a streamlined, standard and well-documented pricing mechanism. The tender is initially analysed by the General Manager, Marketing and his team who prepare a proposal for the approval of the Managing Director of GACL. The proposal comprises the price, the quantity and calculation based on which the price and quantity are determined to be quoted for the relevant tender. The proposal is then reviewed and approved by the Managing Director of GACL. Further, in terms of components of price, GACL's bid price consists of variable cost, fixed cost and taxes. It was also stated that while determining price, GACL considers the price bid in the previous tender, prevailing market price, price bids placed with other parties and whether the tender would provide a good rate of return to GACL, *etc.*
52. GACL points out that DG has concluded that the cost of production of liquid PAC as submitted by GIL and ABCIL cannot be relied upon and that the entire Section in the Report on this was dedicated to GIL and ABCIL. However, DG immediately in the next paragraph for reasons best known to him, concludes that GACL has colluded. It is submitted



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that GACL's costs have not been considered at all by the DG which demonstrates non-application of mind.

53. It was argued that DG has wrongly stated that GACL has acted in a collusive manner to maximize its profits. It was submitted that PAC business of GACL is a very small portion of its entire business and that it has not been able to break-even on its investment in the PAC business.
54. It was also submitted that DG has failed to appreciate the complete set of facts placed before it by GACL. GACL has provided the prices which it quotes to customers as well as the prices which it quotes in DJB Tenders. That the prices quoted by GACL to all its customers are at par with each other. Therefore, it is submitted that it cannot be said that in relation to DJB Tenders, GACL had quoted prices after colluding with its competitors. This has been categorically assessed by DG and DG has correctly observed that "*...price offered by GACL to DJB is at par with other customers*". GACL points out that this shows clear non-application of mind on the part of the DG.
55. It was further stated that the DG's analysis on the data of prices quoted by GIL and SVS Chemicals (a distributor of GIL) and its conclusion that there was a vast difference between the basic prices charged by manufacturer *i.e.* GIL and distributor *i.e.* SVS Chemical was only based on GIL's conduct. Therefore, GACL is not in a position to provide a response to this for want of knowledge. Additionally, it was also submitted that no adverse inference can be drawn against GACL in relation to this.
56. On the DG's analysis of the list of persons who attended the negotiation meetings for the OPs, it was pointed out that Shri Satinder Bhatnagar attended the negotiation meetings on behalf of GACL on 4 occasions, *i.e.* in relation to Tender No. 3 for the year 2009-10, Tender No. 13 for



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the year 2010-11, Tender No. 1 for the year 2012-13 and Tender No. 5 for the year 2013-14. Subsequently, Shri G.S. Paliwal attended the meeting in relation to Tender No. 15 for the year 2014-15. For Tender No. 7 for the year 2009-10 and Tender No. 1 for the year 2010-11, GACL was not even called for negotiation at all. Thus, it was clear that GACL was not represented by the same person in all negotiations year after year. It contends that the DG has completely glossed over this evident fact.

57. It was further stated that in the initial years, GACL had to rely on certain liason officers present in Delhi who would file bids on GACL's behalf and also attend the negotiation meetings with DJB. GACL also employed certain individuals for this purpose from time to time,. As such, year after year, these persons represented GACL before DJB. In the recent years, GACL started sending its own employees, specifically, the General Manager, Marketing, for the purposes of DJB Tenders. It was submitted that no adverse inference can be drawn based on the fact that same persons attended negotiation meeting with DJB on GACL's behalf.
58. With regard to bidding pattern in case of other Jal Boards, GACL submits that the DG has failed to appreciate standard commercial business practice. It was submitted that dealers participate for and on behalf of GACL and as such, there was no requirement for GACL to participate in the same tender. That the DG has completely failed to analyse the relationship between GACL and its dealers when the dealers are participating in the PAC tenders of other Jal Boards. GACL also submits that it has not restricted its dealers from participating in the tenders. Moreover, in any event, where dealers and manufacturers participate in head-to-head competition, there will be no incentive for the dealers to compete given that manufacturers can always out-price the



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dealers. Further, as the dealers are representing GACL, they also have to obtain price approvals from GACL.

59. It was stated that the market for PAC is at a nascent stage with few manufacturers and low demand. Therefore, given the number of suppliers, one competitor will be L1 and the other L2 from time to time. To infer that this is an outcome of collusive behavior is not only misconceived but is also not maintainable in law or on facts. The DG has ignored to investigate these aspects while concluding that the OPs had indulged in alleged collusive behavior.

60. Lastly, it was submitted that in a process involving direct price negotiations between the bidders and the customers, possibility of this having any adverse effect on competition is negligible. Further, it was not the case of DJB or the DG that the supply of PAC to DJB was disrupted or the PAC supplied to DJB was at high prices. The DG has not demonstrated that there was any exchange of information between the bidders. In fact, there was no occasion or a platform for exchange of information where the price quotations could be discussed among the bidders. The price bids are shared in the sealed envelopes to DJB and negotiations only happen with DJB. It was thus submitted that in the absence of any evidence to show collusion among the bidders, DG should have abstained from concluding any adverse inference against GACL.

61. Mention was also made of the fact that the DG has not conducted an analysis under Section 19 (3) of the Act to assess the conduct of GACL before arriving at the conclusion of violation of Section 3 of the Act. There was no evidence which even remotely suggests that existing competitors have been driven from the market. It was also stated that GACL's entry into the PAC market has in fact added a new player to a concentrated market. It has not foreclosed any competition among



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different players in the PAC business. There is no consumer harm caused in relation to the alleged collusion as there was no point where PAC supply to DJB was disrupted or stopped. Therefore, GACL submits that there can be no presumption of consumer harm in this case and, in fact, on the contrary, there has been an accrual of benefits to the consumers.

Ref. C. No. 04 of 2013

Replies/ objections/ submissions of GIL/ ABCIL

62. It was submitted that the Commission erred in passing the *prima facie* order in this reference as well. On 09.07.2013, the Commission called DJB for a preliminary conference. Subsequently, the Commission passed an order under Section 26(1) of the Act, directing the DG to investigate the matter. However, DJB has averred erroneous facts both in the information and at the preliminary conference. For instance, in support of its allegation that ABCIL and GIL, as well as PACL and KCIL (ABCIL, GIL, PACL and KCIL collectively referred to as LC Case OPs) had entered into an agreement in violation of Section 3 of the Act, DJB submits that during negotiations, the LC Case OPs agreed to supply LC at identical prices. Relying on the above statement of DJB, the Commission formed the *prima facie* view that the LC Case OPs negotiated with DJB to supply LC at the same rates. In fact, DJB held negotiations with the L1 bidder while L2 and L3 were only made to give counter-offers to supply at L1 prices. Therefore, they were expected to supply either at L1 prices or not to supply at all. Consequently, the Commission's failure to test the allegations made by DJB by inviting the parties to offer their views at the preliminary stage itself has resulted in grave injustice to the parties, who were not even granted the opportunity to present their case at the time of the preliminary conference.



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Specifically, the failure to grant a preliminary conference has resulted into the Commission not appreciating the unique nature of the market for LC and volatile nature of demand and supply which operates in this market. Further, due to lack of a preliminary conference, the Commission was unable to appreciate the fact that it is highly onerous from a commercial standpoint to supply LC to DJB. Accordingly, the parties' commercial consideration while supplying to DJB are unique and cannot be used to arrive at an adverse conclusion in isolation.

63. Allegations were made to the effect that DG has failed to adhere to the principles of natural justice by failing to place on record. The entire evidence provided to it. From the DG Report, parties note that the DG has conveniently ignored significant portions of the information submitted during the course of the investigation.
64. In this reference also, it was reiterated that DG has exceeded the scope of investigation. It was pointed out that in the *prima facie* order, the Commission had observed that there appeared to be *prima facie* cartelisation between the LC Case OPs continuously for the years 2008-09, 2009-10, 2011-12, 2011-12 and 2012-13. However, since the Commission cannot take cognizance of bid rigging/ cartelization for the years prior to the Act coming into force (*i.e.* 20 May 2009), DG was directed to investigate the matter for the years 2009-10, 2011-12 and 2012-13. However, DG has gone beyond the mandate of the Commission as provided in Section 26(1) order in conducting its investigation and has relied on material beyond the period of investigation, *i.e.* from 2009-10 and 2012-13, to support its conclusions. A relevant example would be letters submitted by the LC Case OPs citing supply constraints while submitting bids for two DJB tenders in 2014-15. The DG has not only failed to appreciate the legitimate commercial reasons of the parties for wanting to limit their exposure to DJB (due to the highly commercially onerous nature of supply of LC to



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it) but has also relied on instances from beyond the period of investigation to prove an allegation of cartelization within it.

65. Arguments relating to ABCIL and GIL forming part of Single Economic Entity were reiterated in this case as well.

66. It was submitted that the DG has failed to establish an agreement amongst the parties in the present case. In order to establish an agreement under Section 3(3) of the Act, it is incumbent on the DG to show that participants have entered into an “agreement”, as defined in Section 2(b) of the Act. However, DG in the present instance has failed to provide any evidence, direct or indirect, to establish the existence of any agreement or understanding between the LC Case OPs. Having failed to gather or adduce any direct or circumstantial evidence to support the allegation of a bid rigging agreement between the LC Case OPs, the DG has relied on economic evidences, statements made by various deponents and other additional evidence to come to the conclusion that the PAC Case OPs have acted in violation of Section 3(3)(d) of the Act. Even the “additional evidence” relied upon by the DG does not support a finding of bid-rigging against the LC Case OPs.

67. The DG has not been able to adduce any direct evidence of an agreement between the LC Case OPs. Even the economic evidence, statements made by various deponents and other additional evidence relied upon by the DG do not in any way reflect instances of bid-rigging by the LC Case OPs. For instance, the DG on the basis of the invoice data gathered during the course of the investigation has come to the conclusion that there is a huge fluctuation in prices varying between INR 10 -15000 per MT. In coming to the above conclusion, the DG has failed to appreciate the unique nature of LC which is a by-product of caustic soda production. This is hazardous and hence cannot be stored as the same



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also hampers further production of the main product. In view of this, manufacturers of caustic soda are obligated to dispose of the same at the earliest and at whatever price the market can offer on that particular day. Therefore, factors such as (i) rate of production of caustic soda, (ii) market availability of LC, (iii) availability of storage containers (tonners) and (iv) geographical distance are also considered while determining the price of LC which make the prices of LC extremely dynamic and these factors change with higher frequency. However, given that prices quoted to DJB have to be firm for one year and there can be no changes in the prices, except in case of variation in statutory taxes, parties have to account for the same while quoting a price for DJB tenders. The parties are also required to transport LC in special containers called tonners. DJB has a slow tonner rotation and therefore, in order to meet the tight supply timelines, the parties need to use more number of tonners in comparison to other customers that have a higher tonner rotation.

68. Unlike most customers, DJB imposes certain additional charges on the parties for supply of LC such as charges for loading and unloading. The DG has also erroneously compared the prices quoted by the parties to DJB to the prices quoted by the parties to other customers for supply of LC, without taking into account factors like frequency of tonner rotation or the period of supply for which the prices are quoted.
69. The DG has presented selective facts and evidence devoid of any context and has resultantly misconstrued the facts placed on record to reach an erroneous conclusion. For instance, DG has observed that since the same persons from PACL attended the negotiation rounds at DJB, there was always some scope of having some understanding with each other to work out the strategy to divide the tender. This conclusion was refuted as being misleading, since



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- (i) DJB only negotiated with the L1 and made a counter offer to L2 and L3 for supply of LC at L1 rates and
- (ii) DJB was the one that divided the tender and the Parties merely complied with DJB's tender conditions.

Further, the DG has used the following facts to come to the conclusion that GIL submitted the cover bid:

- (i) DJB divided the tender between ABCIL and PACL
- (ii) GIL was L3 and
- (iii) GIL has never supplied LC to DJB.

70. The DG reached this conclusion, despite being aware that

- (i) it was DJB that split the tenders between ABCIL and PACL and
- (ii) DJB never placed a supply order on GIL.

Thus, it was sought to be contended that the DG has misconstrued facts in a manner to support his conclusions.

71. It was also pointed out that the parties have provided the DG with reasonable justification for the prices quoted by them and supply constraints in DJB tenders. After failing to adduce any cogent evidence of an agreement between the LC Case OPs, the DG has carried out a cursory analysis of the bid prices submitted by the LC Case OPs to DJB for the period 2009-10 to 2014- 15. Based on a simple comparison of the prices in Table 22 on Page 88 of the DG Report, DG notes that:

- (i) the prices quoted by ABCIL and PACL are in a "close range";
- (ii) the trend in prices shows that they converge over a period of time;
- (iii) ABCIL is always the lowest bidder followed by PACL;
- (iv) that in 2011-12 and 2012-13 although the market trend shows a decline in the prices of LC, the bid prices submitted by the LC Case OPs increased substantially.

These submissions clearly evidence that the parties independently determined their prices.



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72. The DG's Report refers to "additional evidence" to support its conclusions. However, none of the additional evidence leads to the inference of bid-rigging or collusive bidding for the reasons detailed in the reply. For instance, when analyzing the negotiated prices and reaching the conclusion that the negotiation meetings leaves scope for the LC Case OPs to have some understanding, DG appears to have overlooked the fact that the negotiated price is determined between DJB and the L1 bidder. Should the bidders qualifying as L2 and L3 wish to supply the remaining quantity (as per the tender terms), they are required to supply at the L1 price. The L2 and L3 bidders do not have any say in the prices at which they supply. Further, DG has not placed on record any cogent evidence to come to the finding that GIL always submitted a cover bid.
73. It was contended that the DG, to establish that the LC Case OPs violated Section 3(3)(d) of the Act, heavily relied on the fact that the prices quoted by the LC Case OPs were very similar. However, the DG forgot to consider a well-established principle of law that price parallelism alone cannot be used as an evidence for cartelization. In the absence of any other cogent evidence against the parties, DG's finding on price parallelism alone cannot be relied upon.
74. Lastly, it was submitted that Section 3 of the Act prohibits agreements among competitors that result in collusive bidding or bid rigging (Section 3(3)(d) of the Competition Act). Agreements that are shown to have this effect are presumed to have an AAEC in India. In the present instance, DG has failed to show that the LC Case OPs entered into an agreement. Therefore there cannot be any presumption of AAEC. However, without prejudice to the submissions made above, parties submit that since (i) the parties continuously participated in DJB tenders and (ii) supplied LC at negotiated rates, there was no AAEC in India.



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Accordingly, the parties request that the DG Report be disregarded in its entirety and that the investigation against the parties be closed.

75. Common pleas were advanced on the quantum of penalties by the parties in both the cases. It was submitted that since DG has failed to establish any agreement in contravention of the provisions of the Act, therefore, no penalty should be levied under Section 27 thereof. However, without prejudice to the submissions made in the reply, should the Commission reach a finding of contravention against the parties and consider levying a penalty under Section 27 of the Act, Commission must be mindful of the relevant statutory principles, as well as the principles of reasonableness and proportionality, while arriving at its decision under Section 27 of the Act. Accordingly, the Commission at a minimum should take into account the following mitigating factors such as the fact that (i) prices were finally negotiated with DJB, (ii) there is no AAEC, (iii) parties have fully cooperated with the DG and the Commission during the course of the investigation and (iv) that this is the first allegation against the parties.

76. Further, in accordance with the provisions of the Act, and applicable precedents, it is submitted that in calculating the quantum of penalty, the Commission must consider only the relevant turnover *i.e.* the turnover/ profits accrued to the parties on account of sale of liquid PAC and LC to DJB for the years 2012-13, 2013-14 and 2014-15.

Replies/ objections/ submissions of PACL

77. At the outset, PACL contends that it is not involved in any kind of bid rigging and there is no direct or indirect evidence to show the violation of any provision of the Act. The Report has failed to demonstrate the conditions precedent for violation of the provisions of the Act. Moreover, the report ought to have shown existence of an agreement between the OPs to limit or control the production or sale or price of LC.



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It was further submitted that the DG has adopted a theoretical approach and wrongly relied upon the economic principles of price parallelism, ignoring the facts put forth by PACL. The entire report of the DG is based on his own prejudicial perceptions about the industry rather than based on documents and data produced by PACL.

78. It was contended that for bringing a case within the purview of Section 3(1) and 3(1)(d) of the Act, the DG ought to have established or at least placed on record some evidence to substantiate collusion between the parties. Further, the DG ought to have established that the alleged bid rigging had an impact on the competition in the country. The DG has drawn a conclusion in the present case only on the basis of proximity of the bid price quoted by the OPs. In this regard, it is stated that the tender by the Informant being an yearly tender, rates were quoted by PACL on the basis of the average price of the similar customers (with similar quantity and slow tonner rotation) for the preceding four quarters and market intelligence/predictions. That it is noteworthy to state that the rates quoted by PACL to the Informant were lower than the rates which had been quoted for other similar consumers *i.e.* customers with similar quantity and slow tonner rotation. In case, there was any intention of bid rigging/ price fixation, PACL would have quoted higher bids in order to gain some profit, which was never the case.

79. The DG has incorrectly compared the prices of the Informant with the customers of PACL mentioned in Table 19 at page 83 of the Report as first two customers *i.e.* SRF and Paryag are having very fast tonner rotation *i.e.* tonners come back in 7-10 days due to which PACL was able to maintain its production level with low number of tonners. Therefore, these two customers, being bulk customers, are not at all comparable with slow tonner moving customers like Dhruv Chemicals, Saurav Chemicals and the Informant. In addition, the period of



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comparison when the prices were quoted to the Informant and to other customers were not considered by the DG.

80. The DG Report is based on assumptions and presumptions. The DG has based its opinion on the analysis of the bid prices quoted by the OPs, which have been analyzed in reference to the term "market trend". It is submitted that the analysis carried out by the DG is flawed in as much as the term "market trend" has not been defined anywhere in the Report and further the material on the basis of which the DG has defined or interpreted market trend has not been placed on record. The DG has failed to appreciate that the bid prices being quoted for the tender of the Informant were yearly prices and the same were compared by the DG with the monthly prices of the customers of OPs. The comparison of monthly rates with annual rates vitiates the Report completely.

81. PACL has mentioned the conclusion of the DG, wherein it was stated that *"The plea of PACL that tonner rotation is slow in case of DJB therefore PACL refused to supply more than 1500 MT in May, 2014 is not consistent with the fact as PACL had earlier supplied 2000 MT to DJB. PACL has submitted that it has arranged 600 new chlorine tonners in the year 2013-2014, which indicates that tonners can be arranged as per requirement"*. In this regard, it is argued that the DG has assumed on its own that the PACL can arrange tonners as per requirement. The DG completely failed to appreciate that the approximate price for each tonner is about INR65,000/- (Rupees Sixty Five Thousand only) which was also brought to the notice of the DG in the statements recorded. However, without considering the financial implications of buying new tonners to accommodate the request of Informant, the DG has on its own reached to an erroneous conclusion.

82. It was also stated that PACL has been incurring huge losses and is a loss making entity. Hence, it is beyond commercial wisdom for it to buy



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more tonners, as that would result in the PACL suffering extra losses only to accommodate the quantity requested by the Informant. To elaborate on this, it has enclosed a copy of the financial statement of the last five years of the PACL showing the profit and loss account. Further, it stated that the DG on its own assumed the fact that tonners can be arranged as per requirement without considering the number of tonners available with PACL in the previous years.

83. It was argued that the quotation of near identical rates by PACL may be suggestive or indicative of bid rigging, but the same in itself is not conclusive and determinative of the issue. The same has to be proved by leading evidence and placing relevant documents on record. Further, it was stated that PACL has not even been given an opportunity to rebut the case of the Informant, as such the present Report is liable to be discarded.
84. It was submitted that the finding of the DG that PACL in collusion with other bidders have forced the Informant to divide the tender quantity is completely erroneous and without any basis. It was stated that LC is a critical commodity for the Informant. Hence, it was always preferable to the Informant to procure the supply of commodity from two different sources. In the year 2009-10 and 2010-11, PACL quoted for the total tendered quantity. However the Informant had distributed the quantity among two suppliers as a result of which PACL got only 50% of the tendered quantity. The preference of the Informant to divide the tender is also evident from the minutes of Technical Committee dated 29.05.2014 and the Notice Inviting Tender for 2013-2014.
85. With regard to the tender in the year, 2011-2012 (November, 2011), it is stated that the Informant had floated e-tender to procure 4200 MT of LC for which PACL had bid and as in the e-bid, there was no provision for reduction in quantity. PACL *vide* letter dated 27.12.2011, brought to the



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knowledge of the Informant that the rates quoted were only for 2100 MT. A perusal of the Report of the DG would reveal that no clarification was sought from PACL with regard to the quotation for half of the quantity of the tender. The Learned DG has on its own reached to the conclusion that there was a concerted behavior without asking for explanation from PACL. It is averred that said assumptions of the DG clearly show that the investigation has not been carried on in a fair manner and the DG has proceeded with a predetermined mind.

86. With regard to Tender of 2014-15 (May, 2014), it was submitted that PACL was again constrained to request for a 50% reduction due to slow consumption of LC at different water works of the Informant; the number of tonners which are required at the water works of the Informant were high in number compared to other consuming sectors. Further, the tonner rotation was slow. In case, PACL had quoted the entire tender quantity, it would have to curtail supplies to other regular customers where tonner rotation was very fast and which significantly helped PACL to maintain production level. That in case PACL had quoted for a total quantity of 3000 MT, the tonners required to supply pro-rata monthly quantity for the Informant would be double which PACL could not afford. Therefore, the quantity was quoted keeping in mind the availability of tonners.
87. It was submitted that the above facts clearly show that the refusal on the part of PACL to supply less than the tender quantity was a commercial decision based on facts and circumstances. In view of the above and as the Informant was itself desirous of splitting the tender, there was no occasion for PACL to create circumstances to do so.
88. It was denied that there was any collusive bidding between the parties. With regard to the issue of proximity of bid price, it was submitted that the DG has failed to consider that the bid prices of PACL included three



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factors, namely, base price, freight and taxes. It was submitted that the parties to whom PACL was supplying LC had their own arrangements for loading and unloading of chlorine tonners at their premises. However, in the case of Informant, PACL had to arrange for loading and unloading of the chlorine tonners. Hence, the cost of the same was also part of the bid prices. Therefore, the rates quoted by PACL was quoted keeping in view these ancillary charges.

89. It was submitted that the prices quoted by the PACL were based on the past trends and market forecast for the period of yearly contract. The DG has contended that the increase in bidding price was not in consonance with the market trend. However, it has failed to appreciate that the prices quoted in November, 2011 were as per the average price of the four previous quarters preceding to November 2011 and market forecast/ intelligence/ assumptions. As such, there was basis for the increase in the bid prices as warranted by the market trend of the prices of preceding quarters. The Informant on its own after the bid prices had been submitted by PACL, sought to take bid prices from third parties which were not even part of the bidding process. Even these parties admittedly had quoted similar prices. The same is evident from the letter dated 17.01.2012 sent by the Informant to PACL. Therefore, the bidding price was clearly in consonance with the market trend at that time.

90. PACL stated that the DG has opined that the increased production of liquid chlorine in 2010-2011 and 2011-2012 should also have reduced the prices of liquid chlorine. It submits that the DG has lost sight of the fact that upto November 2011, average price for other similar customers (with similar quantity and slow tonner rotation) for the preceding four quarters was INR 8920/- PMT and keeping market intelligence/ forecast in view, PACL had quoted INR 9500/- PMT. However, prices started declining in 2012-13 which would have impacted and affected the tender for the year 2012-2013. But no tender was issued by the Informant in



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2012-2013. As stated PACL had quoted price of INR 7295/- PMT in November 2010 to the Informant as its average price for similar consumers from October, 2009 to September, 2010 was INR 8886/- PACL had quoted price of INR 9500/- PMT to the Informant in November, 2011 and the average price of its similar customers for the period October, 2010 to September, 2011 was INR 8920/- PMT. However, in March, 2013, the Informant did not call for the tender. Rather it allotted the contract to GACL @ INR 8738/- per PMT without inviting the tender. If the Informant would have called the tender then as per past practice PACL would have quoted rates based on average rates of similar customers of PACL from January, 2012 till December, 2012 which was INR 3195/- PMT.

91. It was pointed out that the DG was clearly misguided in its approach when it reached to a conclusion that the refusal by PACL in 2011 and 2014 to supply the entire quantity indicated the concerted behavior on part of the Opposite Parties. It is submitted that between the years 2009-10 and 2010-11, PACL had time and again quoted for the total tendered quantity.
92. That DG has further stated that the refusal to supply more than 1500 MT in May 2014 is not consistent with facts as in the past PACL had supplied 2000 MT to the informant. In this regard, PACL submits that in September, 2013, it had quoted for 2000 MT quantity as PACL had arranged 600 chlorine tonners and was hopeful that in coming days more tonners will be arranged. However, due to adverse financial conditions in 2013-14 and 2014-15, PACL could not arrange more tonners. Further, without prejudice to the above, in the absence of any evidence of bid-rigging/ price-fixation, mere refusal to supply a particular quantity is of no consequence, and more particularly when the Informant admittedly prefers to have supply of the critical commodity *i.e.* LC from two different sources. It is submitted that PACL cannot be held accountable/



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liable for refusing to supply 50 % of the quantity when the same would affect its production.

93. Further, in reference to the bidding during October, 2014, it is stated that PACL was apprehending reduction in the production level, due to heavy imports of caustic soda from April to September, 2014 leading to reduction in prices of caustic soda. These imports affected PACL production as its cost of production is higher than that of other manufacturers and as its power cost/ consumption is higher. PACL was forced to reduce its production as it could not recover its production cost so to convert this situation into opportunity, PACL reduced the supply of low realization but fast tonners moving customers *i.e.* SRF *etc.* so that the tonners could be made free. Further, it was thought that these very tonners can be utilized in slow tonner moving, but higher realization customers *i.e.* DJB *etc.* Accordingly, the bid was submitted in October, 2014.
94. To prove that PACL's forecast was true, it has enclosed figures of production of the company. Referring to the figures, it has stated that the decision taken by PACL to bid in October 2014 for the tender of the Informant was reflected in coming month's production level and curtailment in supply for fast tonner moving customers. Hence, the bidding in the month of October was completely justified.
95. It was explained further that PACL did not offer 3000 MT *i.e.* full quantity order in October, 2014 since from April,2015 onwards PACL was hopeful of increasing its production level as in the month around April to June it generally faced water crisis which affected their production. Therefore, there were chances for other manufacturers to increase their production. Also from April,2015 onwards, PACL was hopeful that its power cost will go down which will help it to increase



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the production for which it will need fast tonner moving customers..

96. It was averred that the DG has reached an erroneous conclusion that the statement of Shri Naveen Chopra, General Manager (Marketing), was full of contradictions. The DG has construed the statements of Shri Naveen Chopra as per its own convenience.
97. With regard to the production of liquid chlorine, DG has only considered SRF as a customer and has remained oblivious to the fact that there were other fast tonner moving customers of PACL also and due to the low production of chlorine, the tonners were free.
98. To explain the logic behind the figure of 1500 MT, PACL has stated that in the year 2009-10 and 2010-11, it had quoted for the total tendered quantity. However, the Informant had distributed the quantity between two suppliers as a result of which PACL got only 50% of the tendered quantity.
99. It was contended that the DG has again given an erroneous logic wherein the statement of Shri Naveen Chopra has been blown out of proportion. Shri Naveen Chopra for the bid in 2014, October submitted that due to huge import of caustic soda, its rates dropped drastically below the cost of production of PACL, leading to curtailment of production by PACL and thereby decreasing the Chlorine production due to which there would have been availability of tonners. In this regard, DG instead of checking the production of chlorine in the plant of PACL, relied on the production data submitted by the Alkali Manufacturers Association of India. It was clear from the data that there was a considerable increase in production of Caustic Soda. However, the production of PACL decreased during November to March, 2015 *vis-à-vis* in April to October 2014. Therefore, the explanation of PACL ought to have been accepted. Further, Shri Chopra had contended that the upto September, there was a



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huge import of caustic soda. The DG, instead of comparing the imports till September, 2014, sought to compare the quantities throughout the year and stated that there was no inconsistency in the statement of Shri Chopra.

100. It was also averred that the DG has reached an erroneous conclusion that if tonners can be shifted from fast tonner rotation customers to the Informant, then why has PACL expressed inability in supplying more than 1500 MT of liquid chlorine, in May, 2014 and again in October, 2014. PACL explains that in May, 2014, the production of the company was at peak and to maintain that production level, it was forced to supply more chlorine to fast moving tonners rotation customers despite having less realization *i.e.* SRF *etc.* That if PACL would have offered more or all quantity, it would have resulted in the reduction of production because of availability of less tonner for filling because in Delhi Jal Board tonners rotation is very slow.

101. Furthermore, in October 2014, PACL again participated in the Informant's tender and booked 1500 MT *i.e.* 50% tendered, quantity because its production was going to decrease from October/ November, 2014 due to huge import of caustic soda up to September, 2014. This would lead to reduction in caustic soda's rates resulting in reduction of production and PACL would be in a position to spare tonners by curtailing the supply of fast moving tonner rotation customers (less realization customers) to slow moving tonners customers *i.e.* Delhi Jal Board (high realization customers).

102. On the question that the PACL did not take 3000 MT, it is stated that the DG has failed to appreciate that the PACL was apprehending/ forecasting that there will be increased production from April, 2015 onwards and for that it would require fast tonners moving customers instead of slow moving tonner customers.



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103. It was argued that the DG has completely failed to show how PACL incurred no loss or how the accounting method was wrong. It was submitted that the price of chlorine is always fluctuating. It is treated as a co-product when its price is high but cannot be stated to be a by-product when its prices fall for the sake of maintaining uniformity of accounting policy. It was stated that PACL is treating chlorine as co-product and takes its sale separately in the figures of profit and loss account. It does not treat the same as income from other sources, as is usually done in the case of by-products. PACL has followed the said accounting policy since its inception and the same cannot be faulted with, especially by the DG.

104. It was also submitted that the procurement system of the Informant is itself defective which as admitted by the DG encourages bid rigging. That the Informant itself does not follow the CVC guidelines, which mandate calling the lowest bidder for the purpose of discussion. However, in the present case, the Informant involves all the parties in the discussion though separately and is itself keen on dividing the tender. In such circumstances, the Informant itself being at fault, the allegations leveled by the Informant on PACL are unwarranted in the facts and circumstances of the case, more-so, when there is no material to substantiate the allegations.

105. PACL points out that despite several requests made by it, the DG did not allow any opportunity for cross-examination of the officials of the informant, till date no opportunity has been afforded to the PACL to examine the Informant. That further, various statements were made by the Informant on affidavit, the same could not have been read in evidence unless the Informant was examined. It is submitted that in the present case, the statements of the Informant have been construed as the truth which is in complete contravention to the principles of natural justice.



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106. It is also averred that the DG ruled out the possibility of leaking of the bid price by the Informant. The DG failed to consider this factum of the investigation and has not acted impartially, but with a predetermined mind.

107. It is further contended that it is fundamental principle of natural justice and Article 20 of the Constitution of India that no person accused of any offence shall be compelled to be a witness against himself. That in present case, the DG not only cross-examined the representatives of PACL at length but also used the statement in the manner suited to him. That the findings recorded by the DG cannot be sustained as the investigation was held in utter violation of the principles of natural justice in as much as no opportunity was granted to PACL to examine the Informant.

108. In the result, it was prayed that the Report of the DG may be discarded and the investigation *qua* the answering party be dropped.

Replies/ objections/ submissions of KCIL

109. In both the reference case 03 and 04 of 2013, the DG, noted that no contravention was established against KCIL. As such, KCIL supported the conclusions drawn by the DG and, therefore, it is not necessary to record the reply in any greater detail in this order. Accordingly, KCIL reiterated its prayer to the Commission for deletion of its name from the Cause Title of Reference Case Nos. 03/2013 and 04/2013 in terms of Regulation 26 of the Competition Commission of India (General) Regulations, 2009 since no contravention of the provisions of Act by KCIL has been established even after the detailed investigation of the DG. KCIL further prays that the inquiry and the investigation initiated by the Commission on the basis of the information filed by DJB may be considered to be dismissed since no contravention was proved against KCIL for the period from 20 May 2009 until the sale of the Renukoot



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Division by KCIL to ABCIL.

Analysis

110. The Commission has perused the references, Report of the DG, objections/ suggestions filed, submissions made by the parties and other material available on record.
111. Before advertng to the merits of the cases, Commission deems it appropriate to address certain preliminary issues raised by GIL and ABCIL which has an important bearing on the present cases.
112. The ABCIL and GIL have argued that the Commission erred in passing the *prima facie* order and failure on the part of the Commission to test the allegations made by DJB by inviting them to offer their views at the preliminary stage has resulted in grave injustice to them. It is the settled position of law that neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor any party can claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26(1) of the Act that a *prima facie* case exists for issuance of a direction to the DG to cause an investigation to be made into the matter. Thus, this plea of ABCIL and GIL is not maintainable.
113. Another contention raised by ABCIL and GIL is that the DG has exceeded the scope of investigation under the direction under Section 26(1) of the Act because the DG was directed to investigate cartel for the years 2009-10, 2011-12 and 2012-13. However, the DG relied on information from the period 2013-14 to 2014-15 as evidence against the OPs, thus going beyond the mandate of the Commission. The Commission has considered the objections of ABCIL and GIL and the order passed under Section 26(1) of the Act. In the *prima facie* order, the



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Commission observed that cartelization between the OPs seems to be there continuously in 2008-09, 2009-10, 2011-12 and 2012-13. However, the Commission highlighted the fact this opinion expressed was based on facts available to it (Commission) at the *prima facie* stage and directed the DG to investigate the matter for violation of any/all provisions of the Act, and not only in respect of the provisions therein. The DG was further asked to investigate the matter thoroughly for violation of any/all provisions of the Act and not only with respect to certain specific tenders. Thus, the *prima-facie* view does not restrict the DG and he was duty bound to carry out a comprehensive investigation. We, therefore, cannot accept this argument of ABCIL and GIL.

114. It was also argued that there is no question of collusion between these two entities (GIL and ABCIL) since they constitute a single economic entity within the meaning of Explanation (b) to Section 5 of the Act. Reference was made to the Commission's order dated 31.08.2015 in Combination Case. No. C-2015/03/256. It was contended that the fact that both the parties are part of the same group was already known to DJB as well as the Commission. Further, reference was made to several US as well as European cases such as *Copperweld Corp v Independent Tube Corporation* [467 US 752 (1984)], *American Needle, Inc. v. National Football League*, [560 U.S. 183 (2010)], *Mausegatt v. Haute autorite*, [C-13/60], *Viho Europe BV v. Commission* [1996] ECR I-5457, *Akzo Nobel NV v. Commission of the European Communities* [Case C-97/08], *Imperial Chemical Industries Limited v. Commission of European Communities* [Case No. 48/69], etc. to contend that when two subsidiaries of the same parent company interacted with each other, the consequences of each one's conduct is imputable to the same parent company. The European Commission's Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (2011) was also quoted to highlight that companies that form part of the



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same ‘undertaking’ within the meaning of Article 101(1) are not considered to be competitors for the purposes of these guidelines.

115. Reliance was also placed upon the Commission’s orders in *Exclusive Motors Pvt. Ltd. v. Automobili Lamborghini*, [Case No. 52 of 2012] and *Kansan News Pvt. Ltd. v. Fastway Transmission Pvt. Ltd.* [Case No. 36 of 2011], wherein it was observed that agreements between entities that are part of the same ‘group’ would not be subjected to scrutiny under Section 3(3) of the Act, since they are in the nature of ‘internal agreements’ and therefore, cannot be said to be a cartel.

116. It was pointed out that both the entities have common management/ employees, promoters, directors, customers, logo, *etc.* Personnel common to both ABCIL and GIL take decisions on participation and prices to be quoted in tenders including in the tenders issued by DJB. The central marketing team is responsible for evaluation of tenders, determination of proposed approach and final submission of bids to the respective tender issuing bodies, including DJB. It was also stated that the parties’ key business decisions are taken by the same set of personnel, which indicate that they essentially belong to one single entity.

117. It was also submitted that GIL has also disclosed before the regulators as being controlled by Aditya Birla Group. To substantiate, the parties have enclosed a ‘*Letter of Offer*’ dated 28.04.2003 issued by GIL and filed with Securities and Exchange Board of India (SEBI). It is stated that it is evident from this offer letter that “*GIL is presently under the control of the Aditya Birla Group, headed by Shri Kumar Mangalam Birla*”. GIL and ABCIL have contended that the DG Report itself proceeds on the fact of the parties forming part of the same group to establish an agreement between them. This further substantiates the fact that the parties are sister concerns and that they cannot be subjected to scrutiny



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under Section 3 (3) of the Act.

118. To appreciate this issue in its perspective, Commission deems it appropriate to highlight the importance of competition in the public procurement process. It may be noted that public procurement is a process through which the public authorities acquire resources from outside suppliers either for its own consumption or for other purposes. Competitive bids are solicited from qualified suppliers from all over the country as well as from outside to get the best value and price for the work/ services, which the suppliers can offer. The supplier with the best deal *i.e.* offer that meet the requirements of the tender at the lowest or economical rate, is generally awarded the tender. Thus, it is clear that competition in a bidding process is an important aspect.
119. It is also important to understand that competition is the driving force behind an efficient market, for it promotes productivity, innovation, growth and consumer welfare. It is requisite for a well-functioning market system which will ultimately benefit the consumers as well as the economy of the nation. Competition in the market ensures that pressure is exerted on the market players, which in turn leads to efficient allocation of the resources where it is most needed and where it can be used effectively. Similarly, in a competitive bidding in public procurement, suppliers are given equal opportunity to compete and offers the best options/ resources that are available in the market with them. This is to ensure the procurer value for money with quality services. Therefore, it is axiomatic that competition amongst the market players has a crucial role in bringing about efficiency, profitability and sustainability in the market.
120. Further, a fair and transparent tendering process is a reflection on the procurer's conduct in the market. If the procurer favours a particular



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organization or individual for the work without any due process, it will lead to distortion of competition in the market. Hence, it is important that transparency and fair process are maintained throughout. However, this does not preclude suppliers' role in contributing to the said process. They play an equally important role in either encouraging the competition in the tender process or otherwise. Suppliers with their offers compete with each other to win the bid. If a set of suppliers/bidders make arrangements amongst themselves to allocate the market, quote agreed rates or withdraw bids, display a pattern in winning and losing of the bids and the winning bidder repeatedly sub-contracts work to unsuccessful bidders, *etc.*, it will no doubt defeat the objective of having a competitive bidding process. Such a conduct will not only discourage proper allocation of resources which could be utilized efficiently but also impede competition in the market.

121. To appreciate the concept of single economic entity, a review of the cases quoted by GIL and ABCIL was done. In *Copperweld Corp v. Independent Tube Corporation*, the conduct in question was the action of Copperweld Corp. and its wholly owned subsidiary attempting to enforce a non-compete clause on an erstwhile employee of the entity which was under a non-compete obligation. In *American Needle Inc v. National Football League*, the pertinent question was whether the collective decision of the 32 National Football League teams regarding the joint licensing of team intellectual property constituted a concerted action subject to scrutiny under Section 1 of the Sherman Act. In *Viho Europe BV v. Commission*, the distribution policy pursued by Parker Pens Ltd., whereby it required its subsidiaries (in which it held 100% shareholding) to restrict the distribution of Parker products to their allocated territories was challenged as an infringement. In *Akzo Nobel NV v. Commission of the European Communities*, the ECJ recognised the concept of single economic entity to impose fines on the parent



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company for contravention by its subsidiary, without having to establish the personal involvement of the parent company in the infringement. In *Imperial Chemical Industries Limited v. Commission of European Communities*, the subject matter of the case was the concerted practice of increasing prices of dyestuff since 1964 in the countries of the Community by its producers. The European Commission concluded that the parties had engaged in concerted action and imposed penalty on the parent entities which were not within the Community area for infringement by their subsidiaries inside the Community area since the parent company exercised decisive influence over the subsidiaries. *Mausegatt v. Haute autorite* [C-13/60] was a case where mining companies of the Ruhr valley had agreed to sell part of their production through a single selling agency and applied to the High Authority under the Treaty establishing the European Coal and Steel Community to authorize the arrangement. The High Authority rejected the application as the agreement excluded normal operation of competition between these mining companies. This rejection was challenged before the Court of Justice where the Opinion of Advocate General K. Romer was sought. GIL and ABCIL have sought support of an observation made in the opinion of the Advocate General in this case. Appointment by Automobili Lamborghini S.P.A of its group company, Volkswagen Group Sales Pvt. Ltd. as the exclusive importer of its cars was the bone of contention in *Exclusive Motors Pvt Ltd. v. Automobili Lamborghini*. Such an agreement was alleged to be in contravention of Section 3(3)(a) as they determined sale and purchase of car, Section 3(4)(c) for being an exclusive distribution agreement and Section 4 for abuse of dominance. The allegation under Section 3(3) of the Act in *Kansan News Pvt. Ltd. v. Fastway Transmission Pvt. Ltd.* was that three multi systems operators, who belonged to the same group, had terminated contract of retransmission of Kansan's news channel.



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122. It is observed that GIL and ABCIL have culled out observations made in these judgments in isolation without appreciating the facts and circumstances in which such observations were made. Although in most of the cases, the concept of single economic entity was invoked, the references made therein were for making the parent entities vicariously liable for the conduct of their subsidiaries or for the concerted action of fixing price/limiting service undertaken. Further, it is noted that the judgments highlighted by GIL and ABCIL do not refer to any case of public procurement. None of these cases pertain to a scenario where two entities, which were part of a single economic entity, colluded to defeat a scheme of public procurement. Since public procurement involves use of taxpayer's money and consumer welfare, bid rigging should be viewed as one of the most pernicious anticompetitive conduct inviting serious penalty to serve as a deterrent.
123. In the instant case, DJB floated tenders for the procurement of PAC and LC in Ref. Case Nos. 03 & 04 of 2013, respectively. The Opposite Parties including ABCIL and GIL participated in the tenders by submitting their respective technical and commercial bids as per the requirement of the said tenders. After qualifying in the technical bids, bidders entered the second stage of financial bidding wherein the rates quoted by them were examined by DJB. Thereafter, DJB negotiated the prices with the selected bidders. Meanwhile, ABCIL purchased the chloro chemical division of KCIL in 2011. It is noted that ABCIL did not participate in the tender for supply of PAC till 2010-11, i.e. till the acquisition of chloro chemical division from KCIL. However, pursuant to such acquisition, rather than submitting a single bid, GIL and ABCIL continued to submit separate bids to the invited tenders. It is clear that at every stage of the bidding process, suppliers including ABCIL and GIL were treated as opponents/ competitors and these bids were assessed individually and not collectively. Therefore, the Commission finds no reason not to treat ABCIL and GIL as competitors irrespective of the



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fact that they are related to each other by virtue of common shareholders, employees, *etc.*, if any.

124. At this stage, it is pertinent to note that had ABCIL and GIL been a single enterprise, it is not understood as to why, in the first instance, they participated in the bidding process as separate bidders instead of one entity. By bidding as separate entities, GIL and ABCIL were behaving like two separate competing companies in the market and before the procurer. DJB cannot be expected to know the intrinsic details of day to day management of the business of GIL and ABCIL. It appears that GIL and ABCIL were giving DJB the impression that they are separate decision making centres. To illustrate, in addition to submitting separate bids with separate costing, it is observed that GIL and ABCIL have different units of manufacturing and different addresses for correspondence. It can also be seen from the statement of Mr. Shailendra Deshpande, Senior Vice President (Sales & Marketing Value Added Products) of GIL, that different individuals attend the bid negotiation meetings with the DJB. However, the final price is concluded after consultation with the common head. Mr. Deshpande attended the meeting on behalf of GIL while his assistant general manager, Mr. Alok Singh, attended on behalf of ABCIL. Previously, Mr. V.P. Pandey used to attend such meeting on behalf of GIL and Mr. D.K. Jain used to attend on behalf of ABCIL. In this regard, Mr. Deshpande stated that Mr. Alok Singh took direction from him and that even during the meetings he took final confirmation from him and concluded the negotiated price. Previously, Mr. Pandey and Mr. Jain were taking directions from the head of sales & marketing of value added products and even during the bid negotiation meeting itself, they would take final confirmation from common head and conclude the negotiated price. Further, ABCIL and GIL have not, in their written or oral submissions, stated that DJB was informed of the fact that the bid amounts were decided by the same



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person. Under these circumstances, the DJB could not have ascertained or contemplated the possibility of the quotes of GIL and ABCIL being decided by the same persons. Being aware of the fact that both the companies are part of a business group cannot be equated with knowing the complete details of management of business. Rather it appears that before the DJB, GIL and ABCIL presented themselves to be separate entities and before the DG they took the argument of being a single economic entity.

125. While an enterprise should have the freedom to conduct its business in any manner as it desires, such a freedom should not be used to circumvent the purpose of law. In these circumstances, the Commission is constrained to note that ABCIL and GIL, far from being a single entity as explained above, participated in the bidding process as separate entities to create a facade of competitive bidding process when, in fact, the bids were designed and coordinated by the same set of professionals. Such a conduct needs to be frowned upon by the Commission as it creates a smokescreen of independent bids when none existed. This tantamounts to perpetrating a fraud upon the public authority in its procurement exercise as it robs the exchequer of the benefit of competitive bidding and ultimately harms the public at large.
126. Even otherwise, the Commission observes that the contention of the parties that they form part of a same “group” as defined in Explanation (b) to Section 5 of the Act and hence is outside the scope of Section 3 of the Act, is completely misplaced because the concept of “group” is applicable only in the context of regulation of combinations under Sections 5 and 6 of the Act. This has no application, whatsoever, to the proceedings under Section 3 of the Act which prohibits anti-competitive agreements by and between enterprises. In this connection, it is pertinent to point out that the Legislature in its wisdom extended the concept of



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“group” as provided in clause (b) of the Explanation to Section 5 to the proceedings under Section 4 of the Act. This follows from Explanation (c) to Section 4 of the Act which states that “group” shall have the same meaning as assigned to it in clause (b) of the Explanation to Section 5. No such extension has been made by the Legislature in the context of the proceedings under Section 3 of the Act and, in these circumstances, it is not only futile but legally untenable for GIL and ABCIL to take recourse to such an argument. To accede to such a submission of ABCIL and GIL would not only require rewriting of the Statute but would also be subversive of the entire scheme of the Act because in as much as “group” entities would quote ostensibly “independent” and “competitive” bids to project a competitive landscape in the bidding process and at the same time, would remain, under the garb of a single entity, outside the purview of the competition law dealing with anti-competitive arrangement. Hence, such a plea is misconceived and is rejected.

127. At this stage, reference may also be made to a recent decision of the Hon’ble Competition Appellate Tribunal (Tribunal) in Appeal Nos. 94/2015, 95/2015, 96/2015 & 97/2015 arising out of Suo Moto Case No. 02 of 2014 where it confirmed the importance of competition in a market. In this case, four general public insurance companies were found guilty of bid rigging by the Commission and the decision of the Commission was upheld by the Hon’ble Tribunal in its order dated 09.12.2016. The main contention of the insurance companies in this case was that they were under Central Government which has 100% shareholding and as such were Single Economic Entity within the meaning of the Act. It was argued that Central Government through Department of Finance Services (DFS) was providing general insurance services through these four insurance companies. Therefore, the provisions of Section 3 of the Act would not be attracted by virtue of



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them being a single economic unit. The Hon'ble Tribunal, after appreciating the legal structure of the insurance companies and the statutory framework of General Insurance Business (Nationalization) Amendment Act, 2002 (GIBNA), observed that Central Government and the insurance companies are distinct and separate entities. It was stated that GIBNA empowers Central Government to issue directions in matters of policy involving public interest and further Section 19 thereof requires the insurance companies to be guided by such directions. Therefore, DFS which is the part of Ministry of Finance discharging functions of the Central Government, is separated by a statutory wall from the insurance companies.

128. While upholding the order of the Commission, the Hon'ble Tribunal observed that the Objects and Reasons of GIBNA was to promote competition between the four insurance companies so that effective services in the field of general insurance may be rendered by them in all parts of India. That the reason for creating these four companies by the process of mergers was to encourage competition, which was reinforced in Section 18(2) of GIBNA which mandated Central Government to keep in mind "*the desirability of encouraging competition amongst the Appellants (insurance companies)*". It was further added that the acknowledgment of need for competition is manifest in the very fact that instead of merging all the companies under one entity with various units or divisions, the Legislature created a structure of four companies.

129. Thus, the plea of single economic entity as urged by GIL and ABCIL does not hold and the same is accordingly, rejected. The Commission notes that these two companies are separate legal entities and that they participated in these tenders individually and separately. Where two or more entities of the same group decide to separately submit bids in the same tender, they have consciously decided to represent themselves to the procurer that they are independent decision making centres and



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independent options for procurement. They will, under such circumstances, have to comply with the provisions of the Act in letter and spirit. Any argument by such entities to the effect that they decided to submit separate bids but the prices were decided by the same person, which fact is not known to the procurer, cannot be used to escape the provisions of law. Such a behaviour, apart from manipulating the price discovery process of public procurement, is contrary to the objective of the Act and should be condemned. Accordingly, ABCIL and GIL cannot avoid the responsibility cast under Section 3(3)(d) read with Section 3(1) of the Act under the garb of belonging to the same group.

130. Now, the Commission proceeds to deal with the issues involved in each reference separately.

Ref. Case No. 03 of 2013

131. The issue that needs to be assessed in this reference is as to whether the Opposite Parties have acted in collusive manner while bidding for the tenders floated by DJB during the period 2009-10 to 2014-15 and thereby violated Section 3(1) read with Section 3(3)(d) of the Act?

132. In this regard, DG first analysed the bid prices quoted by the Opposite Parties from the year 2009-10 to 2014-15. The comparative table is excerpted below:



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Table-1
Details of various tenders invited by DJB w.r.t PAC from 2009-10 to 2014-15

| Tender | Year | Date | Quantity (MT) | Rates quoted by each bidder (in INR/MT) | | | | Negotiated price (in INR/MT) |
|--------|---------|------------|---------------|---|-------|------|-------|------------------------------|
| | | | | GACL | GIL | KCIL | ABCIL | |
| 3 | 2009-10 | 17.07.2009 | 7000 | 9082 | 9250 | 9170 | | 8800 |
| 7 | 2009-10 | 24.12.2009 | 3700 | 9400 | 8900 | 9272 | | 8784 |
| 1 | 2010-11 | 21.05.2010 | 1200 | 9500 | 8916 | 9220 | | 8916 |
| 13 | 2010-11 | 02.01.2011 | 14000 | 11325 | 10908 | | 11098 | 10908 |
| 1 | 2012-13 | 18.04.2012 | 12300 | 12850 | 12411 | | 12664 | 12001 |
| 5 | 2013-14 | 01.05.2013 | 9600 | 11599 | 11498 | | 11440 | 11300 |
| 15 | 2014-15 | 05.03.2014 | 12000 | 12099 | 12440 | | 12140 | 11750 |

133. The DG noted from the above table that the bid prices offered by the Opposite Parties were close to each other and they have seen simultaneous increase over the years. The DG further conducted an analysis of price break-up by bifurcating the negotiated prices in terms of basic price, taxes and freight charges of individual OPs in the respective tenders. The relevant details are as noted below:

Table-2
Tender-wise bifurcation of prices submitted by each bidder

| Year | Tender | Party | Negotiated Price (INR) | Freight (INR) | Tax (INR) | Basic Price (INR) | Quoted Price (INR) |
|---------|--------|-------|------------------------|---------------|-----------|-------------------|--------------------|
| 2009-10 | 03 | GACL | 8800 | 2507 | 593 | 5700 | 9082 |
| | | KCIL | | 1850 | 776 | 6174 | 9170 |
| 2009-10 | 07 | GIL | 8784 | 1846 | 656 | 6282 | 8900 |
| 2010-11 | 01 | GIL | 8916 | 1800 | 834 | 6282 | 8916 |
| 2010-11 | 13 | GIL | 10908 | 2100 | 1029 | 7779 | 10908 |
| | | ABCIL | | 2133 | 975 | 7800 | 11098 |
| | | GACL | | 2900 | 890 | 7118 | 11325 |
| 2012-13 | 01 | GIL | 12001 | 2301 | 1300 | 8400 | 12411 |
| | | ABCIL | | 3101 | 1134 | 7766 | 12664 |
| | | GACL | | 3500 | 1084 | 7418 | 12850 |
| 2013-14 | 05 | GIL | 11300 | 2800 | 1085 | 7415 | 11498 |



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| Year | Tender | Party | Negotiated Price (INR) | Freight (INR) | Tax (INR) | Basic Price (INR) | Quoted Price (INR) |
|---------|--------|-------|------------------------|---------------|-----------|-------------------|--------------------|
| 2013-14 | | ABCIL | | 3277 | 1022 | 7000 | 11440 |
| 2013-14 | | GACL | | 3750 | 962 | 6588 | 11599 |
| | | | | | | | |
| 2014-15 | 15 | GIL | 11750 | 2800 | 1218 | 7732 | 12440 |
| 2014-15 | | ABCIL | | 3298 | 1077 | 7375 | 12140 |
| 2014-15 | | GACL | | 3998 | 988 | 6764 | 12099 |

134. Apart from noting that that basic price charged by GACL was the lowest among the three manufacturers and GIL the highest, DG noted that given the locational differences of the manufacturing facilities of the three companies, bidding price were yet so close so as to suggest a collusive behavior. GIL (Nagda plant) has the nearest manufacturing facility which is about 776 km from Delhi whereas distance from Renukoot (ABCIL) to Delhi is around 908 km and distance from Vadodara (GACL) to Delhi is 1015 km. It is pointed out by DG that the freight component of GIL was the lowest if compared with ABCIL and GACL. Despite this, the final bid price was almost the same.

135. Further, it is observed by DG that basic prices of liquid PAC charged by GIL was the highest amongst three suppliers even though the cost of production of liquid PAC was the lowest till 2012-13. No satisfactory explanation was offered by GIL for increase in the cost of production in 2013-14 and 2014-15. It was noted that in 2013, GIL had purchased a new plant at Vilayat and started production of PAC from that plant also. In order to purchase that plant, it took loans and the cost of finance increases as a result. Similarly, depreciation also increased because of new machinery. Further, it was noted by the DG that the average basic price charged by GIL as well as ABCIL was the highest for DJB as compared to other three major customers of GIL whereas price offered by GACL to DJB was at par with other customers. This indicated that both ABCIL and GIL charged lower prices from other customers compared to that charged to DJB. Besides, on a detailed scrutiny of the



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cost of production and basic prices charged to top customers, it was observed by DG that on some occasions, the product was sold below the cost price. The same was found to be not logical in as much as production of PAC is neither mandatory nor is it a by-product.

136. In view of the above, the DG proceeded to ascertain the methodology adopted for calculating the cost of production of PAC. Summons were issued to GIL and ABCIL for explaining the costing of liquid PAC. The depositions made by Shri C. P. Bansal, Senior Vice President (F&C), who appeared on behalf of both GIL and ABCIL were noted by DG as evasive in nature. Reasons like overhauling of plant, sale of liquid PAC in HDP drums to some customers, inclusion of retirement benefits, *etc.* were found to be unsatisfactory. It was opined by DG that these costs could not be attributed to one year alone and they have to be amortised over number of effective years for the purpose of calculating the cost of production. Including cost of HDP Drums was noted as highly illogical because ABCIL did not supply liquid PAC to DJB in HDP Drums.

137. Based on the above analysis, cost of production of liquid PAC, as submitted by GIL and ABCIL, was found to be unreliable by DG. It was pointed out that despite selling liquid PAC to its major customers at a basic price which is even below cost of production, ABCIL was able to make profit from the business of liquid PAC in 2013-14 and 2014-15. Further, it was observed that all the three bidders *i.e.* ABCIL, GIL and GACL have a huge variation in variable cost of production, fixed cost of production, transportation cost, taxes and policy of profit margin and, thus, every time close margin in the bids quoted by them to DJB in the tenders year after year cannot be a matter of coincidence.

138. Additionally, DG also conducted an analysis of bidding scenario in respect of liquid PAC amongst the Opposite Parties and observed that GACL remained at L3 position for five (5) times in a row despite not



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facing any problem of production and despite the capability to supply the entire quantity assigned to L1 in the table below.

Table-3
Tender-wise comparative position of bidders and quantity of PAC procured by DJB between 2009-10 and 2014-15

| Tender | Year | Date | Lowest Bidders | | | Quantity Procured (MT) | | |
|--------|---------|------------|----------------|-------|------|------------------------|------|------|
| | | | L1 | L2 | L3 | L1 | L2 | L3 |
| 3 | 2009-10 | 17.07.2009 | GACL | KCIL | GIL | 1440 | 1800 | NIL |
| 7 | 2009-10 | 24.12.2009 | GIL | KCIL | GACL | 2500 | NIL | NIL |
| 1 | 2010-11 | 21.05.2010 | GIL | KCIL | GACL | 1200 | NIL | NIL |
| 13 | 2010-11 | 02.01.2011 | GIL | ABCIL | GACL | 7000 | 4900 | 2100 |
| 1 | 2012-13 | 18.04.2012 | GIL | ABCIL | GACL | 6150 | 4305 | 1845 |
| 5 | 2013-14 | 01.05.2013 | ABCIL | GIL | GACL | 4800 | 3360 | 1440 |
| 15 | 2014-15 | 05.03.2014 | GACL | ABCIL | GIL | 6000 | 4200 | 1800 |

139. The DG also observed from Table-4 that difference between the negotiated price and GACL's bid price is much more than the bid price of GACL and bid price of L2. This pattern indicated that GACL had sufficient cushion in its bid price but never utilized that to become L2. The DG opined that such outcome may happen on one or two occasions, but five times in a row could not be a mere coincidence. On inquiry, Shri G.S. Paliwal, General Manager of GACL, confirmed the fact that GACL was not facing any problem of production and was capable enough to supply the quantity assigned to L1.

Table-4
Tender-wise analysis of bids placed by GACL

| Tender No. | Year | Bid Amount of GACL (a) | Bid Amount of L2 (b) | Negotiated Price (c) | Difference (a-b) | Difference (a-c) |
|------------|---------|------------------------|----------------------|----------------------|------------------|------------------|
| 7 | 2009-10 | 9400 | 9272 | 8784 | 128 | 616 |
| 1 | 2010-11 | 9500 | 9220 | 8916 | 280 | 584 |
| 13 | 2010-11 | 11325 | 11098 | 10908 | 227 | 417 |
| 1 | 2012-13 | 12850 | 12664 | 12001 | 186 | 849 |
| 5 | 2013-14 | 11599 | 11498 | 11300 | 101 | 299 |

140. The DG also found that a pattern of bid rotation amongst GACL, ABCIL and GIL and the same is illustrated below:



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Table-5
Pattern of bid rotation amongst the bidders

| Tender | Year | Quantity (MT) | Position of each bidder | | |
|--------|---------|---------------|-------------------------|-------|------|
| | | | L1 | L2 | L3 |
| 1 | 2012-13 | 12300 | GIL | ABCIL | GACL |
| 5 | 2013-14 | 9600 | ABCIL | GIL | GACL |
| 15 | 2014-15 | 12000 | GACL | ABCIL | GIL |

141. Further, it was observed by DG that there was a vast difference in the basic prices charged by the manufacturer (GIL) and its distributor (SVS Chemical). From Table 6, it is apparent that GIL was charging much higher basic prices to DJB than the price charged by its distributor to various other municipal corporations.

Table-6
Year-wise comparison between the basic price charged for PAC by GIL and SVS Chemical to different municipal corporations

| Year | (INR/ MT) | | | |
|--|-----------|---------|---------|---------|
| | 2010-11 | 2012-13 | 2013-14 | 2014-15 |
| Pimpri Chinchwad Municipal Corporation | NIL | 6457 | NIL | NIL |
| MIDC, Ambarnath | 6000 | 6390 | NIL | NIL |
| MIDC, Baramati | 6000 | 6390 | NIL | 5000 |
| MIDC, Pune | NIL | 6800 | 6280 | 6000 |
| MIDC, Aurangabad | NIL | NIL | 6000 | 5000 |
| Municipal Corporation of Greater Mumbai, Panjarpur | 5915 | 6360 | 6250 | NIL |
| Municipal Corporation of Greater Mumbai, Bhandup | 5830 | 600 | 6230 | 5250 |
| Pune Municipal Corporation | 6500 | 6005 | NIL | 5000 |



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| Year | 2010-11 | 2012-13 | 2013-14 | 2014-15 |
|---|----------------|----------------|----------------|----------------|
| Basic Price charged by GIL to DJB | 7779 | 8400 | 7415 | 7732 |
| Difference between price charged by GIL and SVS Chemicals (lowest) | 1949 | 2395 | 1415 | 2732 |

142. The DG has stated that due to the linkage between ABCIL and GIL, information was shared between these two parties. Both ABCIL and GIL have a common leadership and executive management as well as common marketing, procurement and human resource teams. It was stated that both companies are under common management and control and that such arrangements indicate that both GIL and ABCIL have vested interest in each other.

143. The DG gathered through the investigation that the persons who attended negotiation meetings on behalf of GIL and ABCIL took directions from a common person. Furthermore, it was gathered from the statements of Shri C.P. Bansal, Shri Shailendra Deshpande, Senior Vice President (Sales & Marketing of Value Added Products) and Shri C.F. Steven, Assistant Manager (Marketing) that all of them handle the same responsibilities in both the companies and in case of tender work, all arrangements such as preparation of bid documents, price to be quoted, *etc.* were taken care of commonly. Therefore, DG came to the view that information with regard to the bids was shared between GIL and ABCIL.

144. In view of the above, the DG concluded that there was an understanding amongst the bidders *i.e.* ABCIL, GIL and GACL in respect of the tenders floated by DJB between 2009-10 to 2014-15 for procurement of liquid PAC and the same amounted to contravention of the provisions of



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Section 3(1) read with Section 3(3)(d) of the Act.

145. As far as involvement of KCIL in the aforesaid collusive arrangement between ABCIL, GIL and GACL was concerned, it was concluded by DG that it participated in the liquid PAC tenders thrice in two years *i.e.* 2009-10 and 2010-11. It was the second lowest bidder in 2009-10 and supplied 1800 MT. ABCIL acquired the Chloro Chemical division of KCIL on 24.05.2011. The decision to acquire was approved by the Board of Directors in the meeting held on 16.05.2011. Due diligence for acquiring the Renukoot plant of KCIL was done by an in-house team between March and April, 2011. In view of all these factors and on the basis of the information submitted by KCIL and gathered from other sources, DG did not find any contravention of the provisions of Section 3 of the Act against KCIL.
146. The Commission has carefully perused the DG's findings and response of the parties thereon. Besides, the Commission has also heard the learned counsel for the parties.
147. To appreciate the impugned conduct, it may be seen from Table-1, as noted earlier, that bid prices offered by the Opposite Parties were converging in a narrow range besides simultaneously increasing over the years. No doubt, the law is well settled that price parallelism *per se* is not sufficient to establish collusion. Therefore, Commission proceeds to examine whether the aforesaid parallel behavior of the Opposite Parties in quoting bid prices in response to the tenders floated by DJB was an outcome of any concerted act.
148. The Commission notes that parallel pricing cannot be explained if one looks at the locational differences in the manufacturing facilities of ABCIL, GIL and GACL. The Commission observes from the investigation report that GIL's liquid PAC plant at Nagda, M.P. is the



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closest plant to DJB. ABCIL's liquid PAC plant is located at Renukoot, U.P. GACL's liquid PAC plant is located at Vadodara, Gujarat and is the farthest from DJB. Thus, the freight component of GIL will be the lowest and the same is also borne from Table 7 which compiles the freight rates quoted by the bidders in the various tenders.

Table-7
Tender-wise freight rate quoted by bidders

| Tender | Year | Party | Freight Rate (INR/MT) | Distance (Km) | Cost INR/Km/MT |
|---------------|-------------|--------------|------------------------------|----------------------|-----------------------|
| 13 | 2010-11 | GIL | 2100 | 776 | 2.71 |
| | | ABCIL | 2133 | 908 | 2.35 |
| | | GACL | 2900 | 1015 | 2.86 |
| 1 | 2012-13 | GIL | 2301 | 776 | 2.97 |
| | | ABCIL | 3101 | 908 | 3.42 |
| | | GACL | 3500 | 1015 | 3.45 |
| 5 | 2013-14 | GIL | 2800 | 776 | 3.61 |
| | | ABCIL | 3277 | 908 | 3.61 |
| | | GACL | 3750 | 1015 | 3.69 |
| 15 | 2014-15 | GIL | 2800 | 776 | 3.61 |
| | | ABCIL | 3298 | 908 | 3.63 |
| | | GACL | 3998 | 1015 | 3.94 |

149. It may be noted that the freight charges should have ideally brought about difference in the final bid price quoted by each OP. However, this is not the case here. For instance, in Tender No. 13 dated 02.01.2011, the final rates quoted by the three bidders were as follows:

| | |
|-------|--------------|
| GIL | INR 10,908/- |
| ABCIL | INR 11,098/- |
| GACL | INR 11,325/- |

Likewise, for Tender No. 1 dated 18.04.2012, the final rates quoted by the three bidders were as follows:

| | |
|-------|--------------|
| GIL | INR 12,411/- |
| ABCIL | INR 12,664/- |
| GACL | INR 12,850/- |



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Similarly for Tender No. 5 dated 01.05.2013, the final rates quoted by the three bidders were as follows:

| | |
|-------|--------------|
| GIL | INR 11,498/- |
| ABCIL | INR 11,440/- |
| GACL | INR 11,599/- |

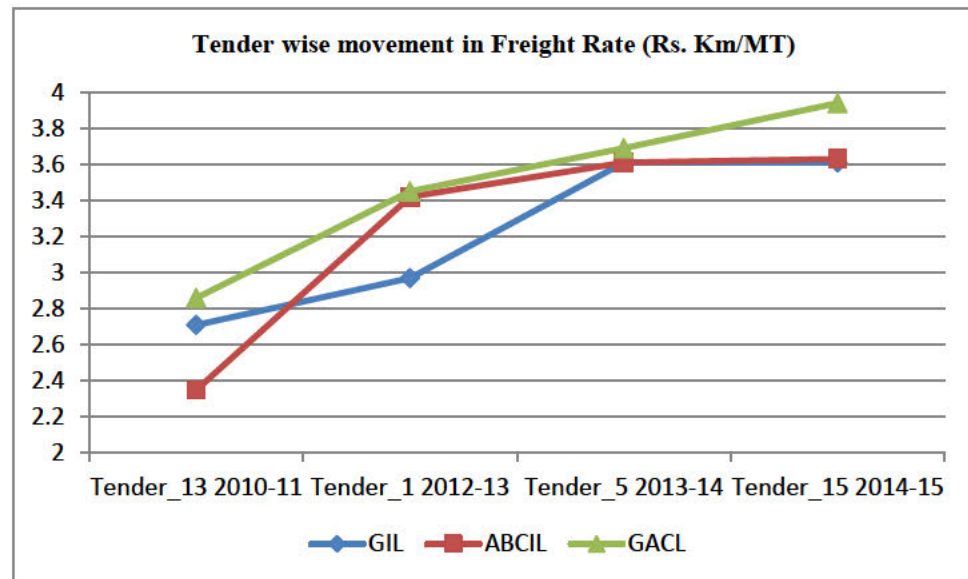
In addition, for Tender No. 15 dated 05.03.2014, the final rates quoted were:

| | |
|-------|--------------|
| GIL | INR12,440/- |
| ABCIL | INR12,140/- |
| GACL | INR 12,099/- |

Thus, it is evident that despite the fact that the plants are located in different geographical areas and the cost as well as logistics involved will be different, rates quoted by all these bidders have remained substantially similar. The Commission observed that by its own admission, GACL has stated that since its liquid PAC plant is located farthest from DJB's supply areas, transportation cost is a major component in its pricing for DJB, whereas the final rate quoted by GACL does not seem to take this into account as a major component, thereby contradicting the said claim.

150. Further, the transportation cost per kilometer per MT for each bidder was calculated from the freight rate per MT as available in the DG report. The following graph illustrates the freight rates per kilometer per MT quoted by the bidders:

Chart 1



151. As is evident from the graph above, there is no discernible pattern, other than increasing price, emerging from the stated freight charges of the bidders. There is a 45% increase in ABCIL's freight rate between the Tender 13 of FY 2010-11 and Tender 1 of FY 2012-13. Over these tenders, GACL and GIL show an increase of only around 20% and 9%, respectively, in the freight rates per MT quoted by them. Moreover, contrary to the telescopic tariff structure, whereby the freight rate decreases with the increase in distance to be covered, it is observed that the freight rate of GACL, which is farthest from DJB, has the highest freight rate per km per MT. Also, in Tender 5 of 2013-14, convergence in the freight rates of the bidders is observed regardless of the difference in their locations and distance from DJB.

152. The Commission then considered the cost of production of the three bidders along with the quoted price and the basic price of each of the bidders.



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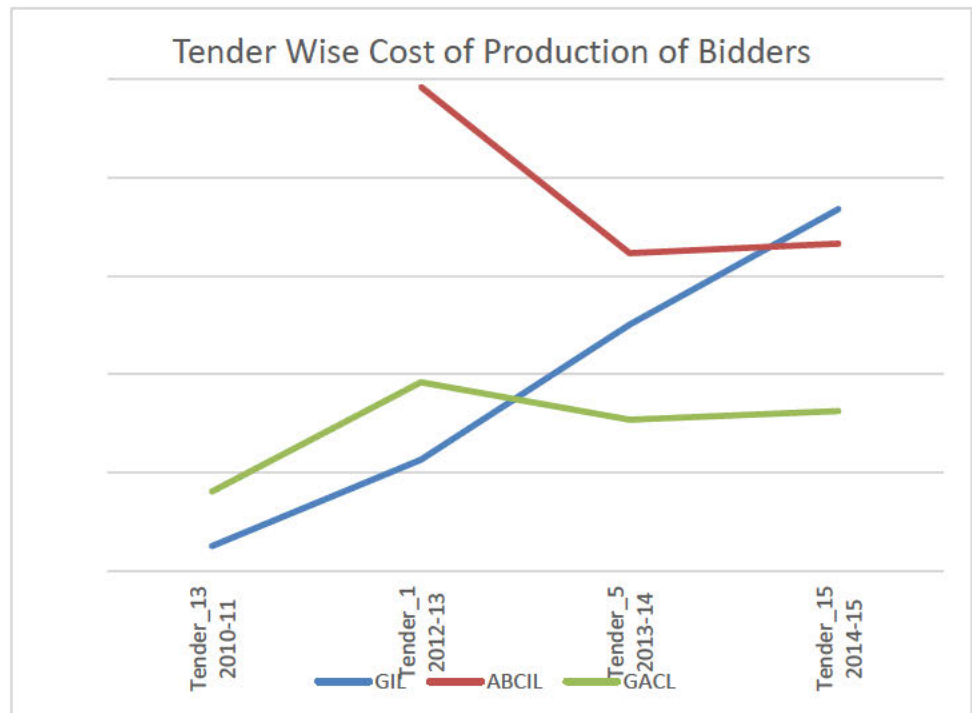
Table 8
Cost of production and quoted Price of bidders

| Year | Party | Bid Amount | Basic Price* (cost of PAC) | Cost of Production# (INR) |
|---------|-------|------------|-------------------------------|------------------------------|
| 2010-11 | ABCIL | 11098 | 7800 | - |
| 2012-13 | ABCIL | 12664 | 7766 | █ |
| 2013-14 | ABCIL | 11440 | 7000 | █ |
| 2014-15 | ABCIL | 12140 | 7375 | █ |
| 2010-11 | GACL | 11325 | 7118 | █ |
| 2012-13 | GACL | 12850 | 7418 | █ |
| 2013-14 | GACL | 11599 | 6588 | █ |
| 2014-15 | GACL | 12099 | 6764 | █ |
| 2010-11 | GIL | 10908 | 7779 | █ |
| 2012-13 | GIL | 12411 | 8400 | █ |
| 2013-14 | GIL | 11498 | 7415 | █ |
| 2014-15 | GIL | 12440 | 7732 | █ |

* As provided by DJB for each bidder (Annexure A-16 of the DG Report)

As given by the Opposite Parties to the DG (Chapter 4 of the DG Report)

Chart 2





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153. Upon an examination of the data in Table 8 and Chart 2, it is observed that the cost of production of each bidder is showing a different trend. Over the tenders, the cost of production of GACL has been nearly constant. However, the cost of production of GIL has been increasing, while that of ABCIL has been decreasing. This is not in consonance with the argument of the bidders that PACL is a homogeneous product due to which the quoted prices fall within a narrow range.
154. Notwithstanding the cost of production, it is noted in the DG Report that GIL and ABCIL continued charging DJB higher rates than the rest of their customers. The explanation offered by them for such a behavior was that in regard to DJB they considered certain other factors like EMD, interest on holding back amount, manpower, freight charges, *etc.* It may be noted from the statements of Shri Shailendra Deshpande and Shri C.P. Bansal - representatives of ABCIL and GIL – that they follow certain procedures and directions from their concerned officers even before coming up with the ‘negotiated price’. This indicates that there was a methodology involved in deciding with the rates quoted to DJB. Likewise, GIL and ABCIL would have a methodology for each of their customers. Assuming that each customer’s requirement may be different from the others, and after considering other relevant factors, one may arrive at a certain rate for customers including that of DJB’s. However, it is observed from their submissions that the parties could offer only generic explanation with respect to the bid prices quoted that holds for all customers such as profit expectation, customer relationships, commercial decision to offer rebates and discounts, demand and supply situation *etc.* No specific methodology offered or illustration for any particular customer of ABCIL and GIL so that the Commission could appreciate the specific aspects of their pricing strategy. It is also noted that GACL has also not provided details of their pricing methodology but has simply offered some general explanation citing various economic factors in the market.



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155. Thus, the Commission is constrained to note that despite all the three bidders *i.e.* ABCIL, GIL and GACL having huge variation in variable cost of production, fixed cost of production, transportation cost, taxes as well as policy on profit margin, close margin in bid prices quoted by them in DJB's tenders year after year cannot be a matter of coincidence. The narrow range of quoted prices, seen in conjunction with the inexplicable trends and patterns in cost of production and freight rates stated by the bidders, lends support to the conclusion that the various cost components were adjusted to arrive at the quoted prices agreed upon by the bidders in concert. Examination of the cost structure of each bidder shows that there was significant variation and, therefore, quoting of similar prices by all the bidders in all the tenders, cannot be coincidental.

156. Furthermore, the Commission notes that ABCIL/ GIL/ GACL had a bid pattern which may be seen from Table-3 (Tender-wise comparative position of bidders and quantity of PAC procured by DJB between 2009-10 and 2014-15). It may be seen that GACL was the lowest bidder *i.e.* L1 in Tender No. 3 dated 17.07.2009 but in the next five tenders, it was L3. Despite its cost of production being nearly constant and the lowest amongst the three bidders across the tenders in 2012-13, 2013-14, 2014-15, GACL has remained L3 in all the tenders except in Tender 15 (floated in 2014-15), thereby choosing not to compete. Further, it was gathered by DG that despite having adequate capacity to meet DJB's PAC requirement, it did not quote a lower rate and chose to remain L3 in those five tenders so as to only provide 15% of the total tender quantity in these tenders. Given this fact, the question, which is looming large, is as to what could be the plausible explanation in quoting higher rates continuously for five years despite having sufficient cushion in its bid price. The justification given by GACL was that transport cost was too high and it was not in its commercial interest to commit significant



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quantities to DJB is not convincing. Other factors stated such as delayed rotation, risk relating to safety and handling of filled chlorine tonners, *etc.* do not hold. The Commission is not convinced with the arguments put forth by GACL. It (GACL) is not an ordinary or a small company. It has several customers including the State Jal Boards across India, has a number of distributors and a large customer base. It also has the experience in handling similar kind of services with other customers. Therefore GACL is a company with standing and experience. In that case, pleas such as transport cost, tonner rotation, *etc.* seem not only feeble explanations but appear to be actuated by afterthought. The reasons given by GACL are not compelling enough for it to have remained in L3 position continuously for five years. In fact, such a prolonged *supra*-competitive pricing by GACL coupled with economically irrational behavior, only affirms the conclusion of collusive conduct.

157. In this context, the DG has interestingly examined the bidding pattern of dealers of GACL and GIL in other Jal Boards where they bid against each other. The bidding pattern in tenders floated by Pune Municipal Corporation, Bombay Municipal Corporation and Kalyan Dombivili Municipal Corporation is reflected in the Tables 9 and 10 below:

Table - 9
Status of GACL Dealers in tenders at various Municipal Corporations Tenders

| (Tenders from 2009-10 to 2014-15) | | | | | | | | | |
|--|---|---------------------------------------|--|---------------------------------------|------------------------|---------------------------------------|---|---------------------------------------|-------------------|
| Status of GACL Dealers in tenders at various Municipal Corporations Tenders | | | | | | | | | |
| Year | Pune Municipal Corporation Maharashtra | | Bombay Municipal Corporation, Maharashtra | | | | Kalyan Dombivili Municipal Corporations, Maharashtra | | |
| | | | Panjrapole | | Bhandup | | | | |
| | Tender Position | Supplied through GACL Supplier | Tender Position | Supplied through GACL Supplier | Tender Position | Supplied through GACL Supplier | Tender Position | Supplied through GACL Supplier | |
| 2009-10 | L2 | Chemical People, Pune | L2 | Heetu Chemicals, Mumbai | L1 | Heetu Chemicals, Mumbai | L1 | Ideal | Chemicals, Mumbai |
| 2010-11 | L2 | Chemical | L2 | Heetu | L1 | Heetu | L1 | Ideal | Chemicals, |



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|---------|----|-----------------|----|-------------------------|----|-------------------------|----|-------------------------|
| | | People | | Chemicals, Mumbai | | Chemicals, Mumbai | | Mumbai |
| 2011-12 | L2 | Chemical People | L2 | Heetu Chemicals, Mumbai | L1 | Heetu Chemicals, Mumbai | L1 | Ideal Chemicals, Mumbai |
| 2012-13 | L2 | Chemical People | L2 | Heetu Chemicals, Mumbai | L1 | Heetu Chemicals, Mumbai | L1 | Ideal Chemicals, Mumbai |
| 2013-14 | L2 | Chemical People | L2 | Heetu Chemicals, Mumbai | L1 | Heetu Chemicals, Mumbai | L1 | Ideal Chemicals, Mumbai |
| 2014-15 | L3 | Chemical People | L1 | Heetu Chemicals, Mumbai | L2 | Heetu Chemicals, Mumbai | L1 | Ideal Chemicals, Mumbai |

Table -10
Status of GIL Dealers in tenders at various Municipal Corporations Tenders

| (Tenders from 2009-10 to 2014-15) | | | | | | |
|--|--|-------------------------------|---|-------------------------------|-----------------|-------------------------------|
| Status of GIL Dealers in tenders at various Municipal Corporations Tenders | | | | | | |
| Year | Pune Municipal Corporation Maharashtra | | Bombay Municipal Corporation, Maharashtra | | | |
| | Tender Position | Supplied through GIL Supplier | Panjrapole | | Bhandup | |
| | Tender Position | Supplied through GIL Supplier | Tender Position | Supplied through GIL Supplier | Tender Position | Supplied through GIL Supplier |
| 2009-10 | L1 | SVS Chemical Corporation | L1 | SVS Chemical Corporation | L2 | SVS Chemical Corporation |
| 2010-11 | L1 | SVS Chemical Corporation | L1 | SVS Chemical Corporation | L2 | SVS Chemical Corporation |
| 2011-12 | | | | | L2 | SVS Chemical Corporation |
| 2012-13 | L1 | SVS Chemical Corporation | L1 | SVS Chemical Corporation | L2 | SVS Chemical Corporation |
| 2013-14 | | | | | L2 | SVS Chemical Corporation |
| 2014-15 | L1 | SVS Chemical Corporation | L1 | SVS Chemical Corporation | L1 | SVS Chemical Corporation |

158. It is important to note that even in the tenders where the Opposite Parties are not participating directly, a discernible pattern in the tender positions of the dealers of the Opposite Parties is visible.

(a) Pune Municipal Corporation:

In the tenders floated by Pune Municipal Corporation, the dealer of GACL, Chemical People, Pune is L2 from FY 2009-10 to FY2013-14, whereas, SVS Chemical Corporation (GIL's dealer) is L1 in the four



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times that it participated in the tenders.

(b) Bombay Municipal Corporation for Panjrapole:

In the tenders floated by Bombay Municipal Corporation for Panjrapole, dealer of GACL – Heetu Chemicals, Mumbai is L2 in five out of the six tenders, while SVS Chemical Corporation (GIL’s dealer) is L1 in the four times that it participated in the tenders.

(c) Bombay Municipal Corporation for Bhandup:

In the tenders floated by Bombay Municipal Corporation for Bhandup, dealer of GACL – Heetu Chemicals, Mumbai is L1 in five out of the six tenders (from FY2009-10 to FY2013-14), while SVS Chemical Corporation (GIL’s dealer) is L2 in these five tenders. In the tender for FY2014-15, SVS Chemical Corporation (GIL’s dealer) is L1 and Heetu Chemicals, Mumbai is L2.

159. DG has done this analysis only for two of the three Opposite Parties, namely, GACL and GIL. Similar data in respect of the dealers of ABCIL has not been provided. ABCIL, in their oral or written submissions, have only raised a question on this and have not supplied any details to the contrary. That being the case, this behaviour of the dealers cannot be disregarded. In fact, if one looks at the similarity of the details in Tables 9 and 10 and compares them with the data in Table 3, one observes an uncanny resemblance in the behaviour of the companies (*i.e.* manufacturers) when they submit quotes as well as when their dealers submit quotes to the Municipal Corporations/Jal Board. The Commission is of the opinion that this behavioural pattern where the dealers of GIL and GACL are occupying similar positions in the tenders floated by other municipal corporations and by GACL and GIL in the tenders floated by DJB cannot be a matter of mere coincidence and lends credence to the collusive behavior in the sale of PAC.



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160. The Commission notes that it is established not only from the DG Report but also from the submissions of GIL and ABCIL that the employees responsible for the tender proposals coordinated with each other at every stage of the tender process. Shri Shailendra Deshpande has stated that he is the final authority to finalise the bid documents and prices to be quoted for both GIL and ABCIL in DJB tenders. He also stated that Shri Alok Singh, who has attended negotiation meetings on behalf of ABCIL with DJB, takes direction from him only and then concludes the negotiated price. Similarly, Shri V.P. Pandey and Shri D.K. Jain used to attend meetings on behalf of GIL and ABCIL respectively, and have taken directions from the common heads. The argument by ABCIL and GIL that since they are a single economic entity and, therefore, they have a common management team which looks after all the tender work resulting in exchange of information, is misdirected. The Commission has already dealt with and rejected the plea of single economic entity as urged by ABCIL and GIL. Such a brazen attempt by ABCIL and GIL in taking this plea when they were submitting two separate bids to create a panorama of competitive landscape in public procurement process, needs to be frowned upon and deprecated.

161. Price competition is the keystone of an effective and well-functioning market. Any agreement that restricts such activity is bound to come under the scrutiny of the Act. An enterprise's conduct in the market should be a reflection of its independent commercial decision by intelligently adapting to the market conditions and understanding the conduct of its competitors. If such a conduct was a result of confidential and sensitive information being exchanged between the enterprises whether directly or indirectly with the objective of influencing the market, then the market condition will be a staged one. Exchange of sensitive information such as price may make the price competition still and have negative effects on the market. In this scenario, GIL and



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ABCIL have been continuously and throughout these tender processes, exchanging all vital information with each other whether it is sharing of the bid documents, prices to be quoted and later, even the negotiated prices to be offered. The Commission finds it paradoxical that notwithstanding ABCIL and GIL claiming to be one economic entity, they continued to submit separate bids, after exchange of information, which were purportedly and supposedly to be competitive. Their credibility comes into question since admittedly they have exchanged all the information including the pricing strategy before submitting their separate bids as competitors to DJB. If the prices were already known, it is obvious that they would know who would be left behind.

162. As stated earlier, parallel pricing is not *per se* violative of the Act. There have to be plus factors *i.e.* some additional evidence tangible enough to come to the conclusion that prices have been quoted as a result of concerted action or as a result of meeting of minds. In the instant case, Commission could not find any economic rationale behind the behavior of quoting similar rates by the bidders despite having their plants located at different locations. Further, when examined on the methodology arrived at for pricing of PAC, none could give a concrete answer and could only offer a general response. In addition, GACL's prolonged *supra*-competitive pricing for five continuous years and then the bid rotation by the parties for three years from FY2012-13 to FY 2014-15 (as seen in Table 5 above), with no plausible economic rationale offered for it, strengthens the possibility of a concerted behaviour. Added to this, the similarity in the behavior of the dealers of GIL and GACL in the tenders floated by other municipal corporations and the behavior of the Opposite Parties in the tenders floated by DJB as well as the exchange of vital information relating to the bids including sensitive information such as the price of bid between GIL and ABCIL bolster the circumstances of price manipulation in the tenders floated by DJB. These factors and



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circumstances taken in totality are sufficient enough as ‘plus factors’ and these affirm the fact that prices have been quoted as a result of concerted action as well as meeting of minds.

163. So far as involvement of KCIL is concerned, it was concluded by DG that it participated in the liquid PAC tenders thrice in two years *i.e.* 2009-10 and 2010-11. It was the second lowest bidder in 2009-10 and supplied 1800 MT. ABCIL acquired the Chloro Chemical division of KCIL on 24th May, 2011. The decision to acquire was approved by the Board of Directors in the meeting held on 16th April, 2011. Due diligence for acquiring the Renukoot plant of KCIL was done by an in-house team. Due diligence was conducted between March and April, 2011 of the legal and financial documents. In view of this and the information submitted by KCIL as well as that gathered from other sources, DG did not find any evidence indicating contravention of the provisions of Section 3 of the Act against KCIL. The Commission is in agreement with the conclusion drawn by DG in this regard.
164. Based upon the above discussion, Commission is of considered view that the bidders *i.e.* ABCIL, GIL and GACL were acting in concert in respect of the tenders floated by DJB during 2009-10 to 2014-15 for procurement of liquid PAC. Such an action resulted in bid rigging/ collusive bidding in terms of provisions contained in Section 3(3)(d) of the Act.
165. It may be noted that in terms of the provisions contained in Section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the



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provisions contained in sub-section (1) shall be void. By virtue of the presumption contained in subsection (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.

166. The OPs have argued that the DG has failed to show that there is AAEC. At the outset, it is stated that in case of agreements as listed in Section 3(3) (a) - (d) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition and there is no further need to have actual proof as to whether it has caused appreciable effect on competition. The onus to rebut the presumption would lie upon the Opposite Parties. The specific reason given by the OPs that there is no AAEC because supply of PAC was not disrupted or stopped by the bidders, does not hold. Section 19(3) of the Act has set out the factors to be considered while determining whether an agreement under Section 3 has AAEC. One of these factors is 'accrual of benefits to the consumers'. Accrual of benefit to consumer cannot be viewed only from the perspective of continuous supply of the tendered product or supply at negotiated price. The procurement should be at a competitive price, more so when the procurer is a public



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authority. When the bids are quoted pursuant to a collusive action by the bidders, even post bid negotiations cannot guarantee lowest rates because the procurer cannot ascertain the most competitive price prevalent in the market. This causes loss to the public exchequer and, in turn, harms the public at large.

167. In view of the above discussion, the Commission is of considered opinion that the bidders *i.e.* ABCIL, GIL and GACL have acted in a concerted manner in respect of the tenders floated by DJB during 2009-10 to 2014-15 for procurement of liquid PAC in contravention of the provisions of Section 3(1) read with Section 3(3)(d) of the Act.

Ref. Case No. 04 of 2013

168. The Informant, DJB, in the second reference alleged contravention of the provisions of Section 3 of the Act in the matter of procurement of Liquid Chlorine (LC) by GIL, ABCIL, PACL and KCIL. A gist of the allegations has already been recorded and hence it is not necessary to reproduce the same herein again. Suffice to note that DJB procures LC, which is a by-product of caustic soda industry and is used for disinfection of drinking water, through e-tendering.

169. It may be observed that the plea raised by GIL and ABCIL relating to single economic entity and their consequential conduct have already been dealt with elaborately in the earlier part of this order and as such, the same are not being adverted to and dealt with herein again.

170. At the outset, the Commission notes that there are certain features of LC and its market which distinguishes it from PAC. The Commission is cognizant of the fact that LC is a by-product of caustic soda production and unlike PAC, is not the primary product. There is high demand for caustic soda in India, but the demand for LC may not be similar. The



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price of LC is inversely proportional to the production of caustic soda.

171. Another factor which gravely affects the pricing of LC is its hazardous and toxic nature, which can cause damage to human life and environment on prolonged exposure. For this reason, it cannot be stored for a long period of time and has to be transported in special containers (tonners or small cylinders). Moreover, storage of such hazardous by-product also hampers further production of the main product itself. In view of this, manufacturers of caustic soda tend to dispose of LC at the earliest and at the price the market can offer on a particular day.
172. The Commission also observed that the bidders followed different approaches with respect to the cost of production of LC. PACL estimated the cost of production by apportioning the total cost upto the stage of electrolysis in the ratio of production of three joint products – caustic soda lye, chlorine gas and hydrogen i.e. 1(MT):0.89(MT):280(NMs). Against this, ABCIL and GIL stated that as LC cannot be manufactured independently, they cannot ascertain its cost of production as well as profits earned from sale of LC. In the absence of cost of production of two out of the three bidder, no comparative analysis could be done by the DG or by the Commission as was done in Ref. Case No. 03 of 2013.
173. It is also seen that in Ref Case No. 3 of 2013, the break-up of the negotiated prices of PAC into basic price, transportation cost and taxes was analysed. However, such an analysis was not done in Ref Case No. 04 of 2013. Keeping these points in mind, the Commission proceeds to deal with the issues involved in this reference.
174. In the present case, DG, after detailing about the product under consideration and outlining the industrial structure, examined the manner of pricing of LC by the Opposite Parties and noted that the price of LC is mainly driven by the supply and demand for caustic soda as demand for



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chlorine is low in India. Based upon the submissions made by the Opposite Parties, it was noted by the DG that the hazardous nature of the chemical and substantial storage & transportation cost force the producers to sell chlorine at throwaway prices or even at their own expense. It was, however, noted that the demand for LC by Water Treatment Plants (WTP)/ Jal Boards is inelastic in nature as Jal Boards need regular supply of LC. It was also mentioned that LC market is segmented by location.

175. To examine the allegations of bid rigging against the Opposite Parties, it would be appropriate to first examine the conduct of the Opposite Parties in quoting prices in a narrow band in DJB tenders for procurement of LC:

Table -11
Year-wise bid prices of LC quoted by the Opposite Parties

(INR/MT)

| Year | NIT No. | Date | ABCIL | PACL | GIL | KCIL | GACL | |
|---------|---------|------------|---------------------------|------|-------|------|------|------|
| 2009-10 | (3) | 30-11-2009 | 3582 | 3596 | 3681 | 7359 | | |
| 2010-11 | (2) | 29-11-2010 | 5997 | 7295 | 6579 | 8100 | | |
| 2011-12 | (3) | 29-11-2011 | 9500 | 9500 | 10500 | | | |
| 2012-13 | | 28-03-2013 | Direct purchase from GACL | | | | | 8738 |
| 2013-14 | (1) | 16-09-2013 | TNQ | 4990 | TNQ | | 7250 | |
| 2014-15 | (1) | 21-05-2014 | 7000 | 7100 | 7500 | | | |
| 2014-15 | (2) | 27-10-2014 | 7400 | 7460 | 8000 | | | |

TNQ- Technically not qualified

176. From the above, it was gathered that
- (i) the prices quoted by the Opposite Parties were in a close range specifically for ABCIL and PACL;
 - (ii) trend of the prices indicated that the prices almost converge towards each other over a period of time;
 - (iii) ABCIL is always the lowest bidder followed by PACL;
 - (iv) year 2012-13 was an exception as DJB procured LC from GACL on direct quotation basis without calling for tenders; and
 - (v) in 2013-14 both ABCIL and GIL failed to qualify technical bid due to non-submission of requisite documents.



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177. It was also pointed out in the investigation report that while the general market trend indicated that the prices of LC declined in the two years *i.e.* 2011-12 and 2012-13, bid prices submitted by the Opposite Parties increased substantially in the year 2011-12. In the year 2012-13, DJB procured LC directly from GACL. Further, it was noted that the market trend showed that prices improved slightly in the year 2013-14 but further declined in the year 2014-15. However, in the year 2013-14 PACL quoted INR 4,990/ MT whereas ABCIL as well as GIL failed to qualify on technical grounds. In the subsequent two tenders floated in the year 2014-15, bid prices quoted again increased substantially while the market trend showed decline in chlorine prices.

178. Thus, analysis on price parallelism conducted by the DG revealed that the prices quoted by ABCIL and PACL were in a close range and sometimes even identical. Similarly, the prices submitted by GIL and ABCIL were in a close range and the difference between the quoted prices was in the range of INR 500/- to INR 1,000/-. Further, GIL and ABCIL failed to qualify in the technical bid in the year 2013-14 on the same ground. However, to reach a finding of collusion amongst the bidders, such conscious parallel behaviour needs to be substantiated with the additional evidence or plus factors. The Commission noted the plus factors analysed by the DG in the investigation report.

179. In this regard, DG examined the growth rate of the prices quoted and the prices negotiated. The relevant figures in this regard is extracted below:

Table -12

Tender-wise actual bids submitted and the negotiated prices of liquid chlorine

| Year | NIT No. | Date | Price (in Rs.) | | | Negotiated Prices | Growth rate (YoY) (%) | | | Negotiated price |
|---------|---------|------------|----------------|------|-------|-------------------|-----------------------|-------|------|------------------|
| | | | ABCIL | PACL | GIL | | ABCIL | PACL | GIL | |
| 2009-10 | 3 | 30-11-2009 | 3582 | 3596 | 3681 | 3582 | | | | |
| 2010-11 | 2 | 29-11-2010 | 5997 | 7295 | 6579 | 5997 | 67.4 | 102.9 | 78.7 | 67.4 |
| 2011-12 | 3 | 29-11-2011 | 9500 | 9500 | 10500 | 9000 | 58.4 | 30.2 | 59.6 | 50.1 |



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| Year | NIT No. | Date | ABCIL | PACL | GIL | Negotiated Prices | ABCIL | PACL | GIL | Negotiated price |
|---------|---------|------------|-------|------|------|-------------------|-------|-------|-------|------------------|
| 2013-14 | 1 | 16-09-2013 | TNQ | 4990 | TNQ | 4990 | | -47.5 | | -42.9 |
| 2014-15 | 1 | 21-05-2014 | 7000 | 7100 | 7500 | 6900 | -26.3 | 42.3 | -28.6 | 38.3 |
| 2014-15 | 2 | 27-10-2014 | 7400 | 7460 | 8000 | 6150 | 5.7 | 5.1 | 6.7 | -10.9 |

TNQ: Technically Not Qualified

180. It was deduced from the bid figures presented in Table 12 that there was a substantial increase in the price of LC in the year 2010-11 and 2011-12 as compared to 2009-10, with the prices peaking in 2011-12. In this regard, DG pointed out that factors such as increase in production of LC and the consequent decline in demand during this period should actually have reduced its price. However, the prices increased in comparison to the bidding prices for the previous year.
181. Further, from the minutes of the meetings of the Technical Committee, it was observed that there was a small difference between the price quoted by the lowest bidder and the negotiated price at which the tender was allotted. This appeared to lend credence to the allegation made by the Informant that the Opposite Parties not only quoted identical or near identical rates in response to the tenders floated by the Informant but they also reduced the rates by an identical amount during negotiations.
182. The DG also analyzed the year wise quantity procured from the bidders and the relevant table in this regard is noted below:

Table-13
Tender-wise quantity of LC procured from bidders

(quantity in MT)

| Year | NIT No. | L1 | L2 | Reasons |
|---------|---------|---------------|---------------|---|
| 2009-10 | (3) | ABCIL 2100 | PACL 2100 | |
| 2010-11 | (2) | ABCIL 2100 | PACL 2100 | Although GIL was the second lowest bidder, procurement was done from PACL |
| 2011-12 | (3) | PACL 2100 | ABCIL 1500 | ABCIL & PACL both quoted same price |



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| Year | NIT No. | L1 | L2 | Reasons |
|---------|---------|---------------|--------------|---|
| 2012-13 | (1) | GACL 1000 | | Direct procurement on L1 basis |
| 2013-14 | (1) | PACL 2000 | | ABCIL & GIL were technically disqualified |
| 2014-15 | (1) | ABCIL 1000 | PACL 1000 | |
| 2014-15 | (2) | ABCIL 1500 | PACL 1500 | |

183. From Tables 11 and 13 above, it emerged that ABCIL was the lowest bidder in four out of seven tenders followed by PACL. Yet the quantity was split in half between these two companies. The third bidder, *i.e.* GIL, never supplied LC to DJB even in 2010-11 where GIL was the second lowest bidder and the chlorine was procured from PACL instead of GIL.

184. DG has further analyzed the refusal of the parties for their inability to supply to DJB beyond a specified quantity of LC. To ascertain the veracity of the conduct, DG analyzed the production capacity of ABCIL and GIL besides looking at the data of order booked with ABCIL and GIL. The DG has also quoted *in extenso* the deposition made by Shri Naveen Chopra, General Manager (Marketing) of PACL in order to understand as to why PACL expressed its inability to supply more than 1500 MT and pointed out the contradictions made therein.

185. From the analysis made, the DG concluded the following:

- (i) Both ABCIL and GIL were not facing any production constraint. But still they independently submitted to DJB that they would not be able to supply more than 1500 MT. In fact, the deposition of Shri Mayank Sharma, Vice President (Sales & Marketing Chlor-Alkalis) of GIL shows that there were no production constraints and no business reasons for ABCIL and GIL to write letters to DJB conveying their inability not to supply more than 1500 MT of LC;



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(ii) Shri C P Bansal, Senior Vice President (F&C) of GIL & ABCIL, in his statement, stated that ABCIL and GIL can purchase or sell products to each other. In that case, when ABCIL and GIL can individually supply 1500 MT each then together, they could have easily supplied 3000MT;

(iii) PACL could not give any logical justification for writing to DJB that it would not be able to supply more than 1500 MT because of tonner shortage; and

(iv) None of these three companies could provide any methodology for arriving at a figure of 1500 MT.

186. The aforesaid deductions were refuted by the Opposite Parties. The counsel appearing on behalf of PACL submitted that the DG was misguided in its approach when it reached a conclusion that refusal by PACL in 2011 and 2014 to supply the entire quantity indicated concerted behaviour on the part of the Opposite Parties. It was pointed out that in the years 2009-10 and 2010-11, PACL had quoted for the total tendered quantity. However, DJB had distributed the quantity among two suppliers, as a result of which PACL got only 50% of the tendered quantity. Hence, it was argued that there was no refusal on part of PACL to supply the entire quantity.

187. Further, it was contended on behalf of PACL that for the year 2011-2012, it expressed its inability to supply the desired quantity due to decreased availability of tonners. Again, in May 2014, a 50% reduction was sought and PACL expressed its inability to supply more than 1500 MT quantity for the following reasons:

- (i) slow consumption of LC at different water works of DJB;
- (ii) number of tonners which are required at the water works of DJB were high compared to other consuming sectors;



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- (iii) Slow tonner rotation; and
- (iv) In May 2014, PACL production level was at the peak. In case, PACL had quoted for the entire tender quantity, it would have had to curtail supplies to other regular customers whose tonner rotation was very fast which in turn helps PACL maintain production level.

188. DG, however, did not find the above explanation satisfactory as it was pointed out by the DG that the refusal to supply more than 1500 MT in May, 2014 was not consistent with the fact that in the past PACL had supplied 2000 MT to DJB. PACL replied to this observation by pointing out that in September 2013, PACL had quoted for 2000 MT quantity as it had arranged 600 chlorine tonners and was hopeful that in the coming days more tonners could be arranged as there were net profits in 2011-12 and 2012-13. However, due to adverse financial conditions in 2013-14 and 2014-15, PACL could not arrange more tonners.

189. Moreover, it was pointed out by the Opposite Parties that the DG failed to consider that the bid prices of DJB included 3 factors viz. base price, freight and taxes. It was argued that the parties to whom the Opposite Parties were supplying LC had their own arrangements for loading and unloading of chlorine tonners at their premises. However, in the case of DJB, the Opposite Parties had to arrange for loading and unloading of the chlorine tonners, hence the cost of these ancillary charges also formed part of the bid prices.

190. Furthermore, while controverting the finding of the DG that the increase in bid price quoted by the Opposite Parties in the year 2011-2012 is not in consonance with the market trends, it was pointed out by PACL that the price quoted in November, 2011 was as per average price of the four previous quarters preceding to November, 2011 and market forecast/intelligence.



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191. The Commission has perused the explanation offered by the Opposite Parties and is of the opinion that the same can neither be termed as extraneous nor is it indicative of a concerted behavior. The Commission has also noted the details furnished by PACL with respect to pricing being in consonance with market trends and the Commission is of opinion that plea of PACL that there was a basis for the increase in the bid prices in light of the market trends in the preceding quarters cannot be altogether ignored.
192. To support the finding of bid rigging, DG then made a reference to the linkages between ABCIL and GIL to note that both the entities belong to the same group which helped in facilitation of information exchange between them. From the depositions of Shri Mayank Sharma, Vice President (Sales & Marketing Chlor-Alkalis) of GIL and Shri C. F. Steven, Assistant Manager (Marketing) of ABCIL, it is evident that the same persons were discharging the common responsibilities of both the entities. In this regard, the Commission is of opinion that this aspect has already been dealt with in detail in the earlier part of this common order.
193. The DG also examined the timings of the submission of bid and observed that the same were quite close to each other. It was pointed out that only three bidders were participating in the tenders, and they were submitting their bids on the last date or around the same period. The relevant details are noted below:

Table-14

Comparative table on timings of bid submission

| Year | Last date of Bid submission | Bidder Company | Date of Bid submission | Time of Bid submission |
|-------------|------------------------------------|-----------------------|-------------------------------|-------------------------------|
| 2011-12 | 29-11-2011 | PACL | 28-11-2011 | 05.17 pm |
| | | ABCIL | 29-11-2011 | 11.54 am |



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| Year | Last date of Bid submission | Bidder Company | Date of Bid submission | Time of Bid submission |
|---------|-----------------------------|----------------|------------------------|------------------------|
| | | GIL | 29-11-2011 | 12.05 pm |
| 2013-14 | 16-09-2013 | ABCIL | Could not be traced | |
| | | GIL | 15-09-2013 | 05.32 pm |
| | | PACL | 16-09-2013 | 12.31 pm |
| 2014-15 | 21-05-2014 | PACL | 20-05-2014 | 04.03 pm |
| | | GIL | 20-05-2014 | 04.58 pm |
| | | ABCIL | 20-05-2014 | 05.22 pm |
| 2014-15 | 27-10-2014 | GIL | 27-10-2014 | 11.58 am |
| | | PACL | 27-10-2014 | 12.10 pm |
| | | ABCIL | 27-10-2014 | 01.33 pm |

194. The DG has also examined the details of the company representatives who participated in the negotiation meetings with the Technical Committee of DJB which conducts such meetings to negotiate the bid prices with the two lowest bidders.

Table - 15**Representatives attending the negotiation meetings with DJB**

| S. No. | Tender (NIT) Number | Date of technical committee meeting | Firm name | Name of the representative attending meeting |
|--------|---------------------|--|--|--|
| 1 | 03 (2009-10) | TC was not held and CEO gave direct approval to award work | | |
| 2 | 02 (2010-11) | 4.1.2011 | PACL | V.P. Goyal |
| | | | GIL | S.M. Goswami |
| | | | ABCIL | S.M. Goswami |
| 3 | 03(2011-12) | 8.02.2012 | PACL | S.K. Garg |
| | | | ABCIL | S.M. Goswami |
| 4 | 01(2012-13) | Direct procurement | | |
| 5 | 01(2013-14) | 24.09.2013 | No negotiation. Contract awarded on L1 rate. | |
| 6 | 01(2014-15) | 29.05.2014 | PACL | S.K. Garg |
| | | | ABCIL | S.K. Chaturvedi |
| 7 | 02(2014-15) | 27.11.2014 | PACL | S.K. Garg |
| | | | ABCIL | S.M. Goswami |

195. Further, based upon the depositions of Shri Mayank Sharma Vice President (Sales & Marketing Chlor-Alkalis) of GIL, it appeared that the persons who were attending the negotiation meetings used to take the directions from a common person.



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196. Lastly, the DG has adverted to the disinvestment proceedings of PACL in which ABCIL and GIL conducted due diligence. Though none of the attempts to disinvestment fructified, yet in the process, ABCIL and GIL got access to the information about PACL.
197. In this regard, the DG has noted that in January, 2011, officials of GIL along with officials of ABCIL (Shri R.D. Sao) conducted the due diligence. DJB floated the tender for procurement of LC in the month of October 2011. In this tender, ABCIL and PACL quoted exactly the same price *i.e.* INR 9,500/MT each while GIL quoted INR 10,500/MT. Further, ABCIL examined documents of PACL under due diligence on 29th October 2014, 30th October 2014 and 31st October 2014. In the year 2014-15, DJB floated two tenders first in the month of May and the second tender in the month of October. Bid prices quoted by ABCIL, PACL and GIL in the second tender were INR 7,400/-, INR 7,460/- and INR 8,000/- respectively. ABCIL submitted tender on 27th October, PACL on 28th October and GIL submitted the tender on 29th October, 2014. ABCIL submitted the tender two days before examining the documents and GIL submitted tender on 29th October *i.e.* the same day of due diligence.
198. Based upon the above, it has been observed by DG that in the various attempts of disinvestment of PACL, either ABCIL or GIL was always an interested party and as such it was deduced that there was a possibility that ABCIL and GIL could develop understanding with PACL and bring PACL to their side to act in a collusive manner for bidding of DJB tenders.
199. The Commission has carefully examined each of the additional evidence pieced together by the DG to reach a finding of collusion amongst the parties.



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200. Apart from similarity in the timing of bid submissions, the Commission observes that there are no other factors indicative of a concerted action by the Opposite Parties. Similarly, the allusion by the DG of the same representative attending negotiation meetings on behalf of GIL and ABCIL, is of no consequence in light of the Commission's order with respect to them being single economic entity.

201. Coming to the conclusion drawn by the DG from the disinvestment of PACL and due diligence conducted by ABCIL, suffice to note that the DG has not given a definite finding but has only noted the following which is again speculative in nature:

“.... There is always a possibility that ABCIL and Grasim can develop some understanding with PACL and bring PACL to their side to act in a collusive manner while bidding for DJB Tender....”

202. Having considered all the factors analysed by the DG, the Commission is of opinion that the investigation conducted by the DG has not been able to bring on record sufficient evidence to hold that ABCIL, GIL and PACL have acted in concert.

203. The Commission is also cognizant of the fact that LC is a by-product of caustic soda production and due to its hazardous and toxic nature, manufacturers of caustic soda tend to dispose of LC at the earliest at a price the market can offer on a particular day. The Commission has already noted that no comparative analysis could be done by the DG with respect of the cost of production of LC since ABCIL and GIL stated that LC cannot be manufactured independently. Hence, they cannot ascertain its cost of production as well as profits earned from sale of LC. The Commission has also observed that no analysis has been made with respect to basic price, transportation cost, taxes and policy of profit margin of the parties as was done in Ref. Case No. 03 of 2013. In the absence of any analysis in this regard, the Commission is of the opinion



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that no finding of contravention can be recorded against the bidders based on the conclusions drawn by the DG.

204. The bidders had also raised other objections such as incorrect comparison of prices offered by PACL to DJB and prices offered to customers with fast tonner rotation. PCL highlighted that DG had incorrectly interpreted of the statement of Shri Naveen Chopra (General Manager, Marketing). ABCIL and GIL also stated that unlike as alleged by DJB, GIL was never required by DJB to submit its cost of production or an undertaking that it had not supplied LC to other customers at lower costs than rates negotiated with DJB and that fluctuation in price quoted by bidders to different municipal authorities is not indicative of collusion. ABCIL and GIL also argued that the conclusions drawn by the DG from the statement of Mr. Mayank Sharma were erroneous. In the light of the fact that Commission in this case is of the opinion that the no finding of contravention can be recorded against the bidders based on the conclusions drawn by the DG, it (the Commission) will refrain from delving further into the additional objections raised by the bidders.

205. Lastly, the Commission is of opinion that so far as involvement of Kanoria Chemicals and Industries Ltd. is concerned, it was concluded by the DG that it participated in the liquid chlorine tenders in two years *i.e.* 2009-10 and 2010-11. It was the highest bidder in both the years and did not get any order from DJB. ABCIL acquired the Chloro Chemical division of KCIL on 24th May, 2011. The decision to acquire was approved by the Board of Directors in the meeting held on 16th April, 2011. Due diligence for acquiring Renukoot plant of KCIL was done by an in- house team. The due diligence was conducted between March and April, 2011 on the legal and financial documents. In view of the above discussion and on the basis of information submitted by KCIL and gathered from other sources, the DG did not find any contravention of



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the provisions of Section 3 of the Act against KCIL. The Commission is in agreement with the conclusion drawn by the DG in this regard.

ORDER

206. Based on the above discussion, the Commission is of opinion that the impugned act/ conduct of the OPs (*i.e.* ABCIL, GIL and GACL in Ref. C. No. 03 of 2013 are found to be in contravention of the provisions of Section 3(3)(d) read with Section 3(1) of the Act thereof.

207. Such OPs are directed to cease and desist from indulging in the acts/ conduct which have been found to be in contravention of the provisions of the Act.

208. The Commission, for the reasons recorded below, finds the present case fit for imposition of penalty. Under the provisions contained in Section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreement or abuse. Further, in cases of cartelisation, the Commission may impose upon each such cartel participant, a penalty of upto three times of its profit for each year of continuance of the anti-competitive agreement or ten per cent of its turnover for each year of continuance of such agreement, whichever is higher.

209. It is evident that the legislature has conferred wide discretion upon the Commission in the matter of imposition of penalty. It may be noted that the twin objectives behind imposition of penalties are: (a) to reflect the seriousness of the infringement; and (b) to ensure that the threat of



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penalties will deter the infringing undertakings. Therefore, the quantum of penalties imposed must correspond with the gravity of the offence and the same must be determined after having due regard to the mitigating and aggravating circumstances of the case.

210. The Commission has given its thoughtful consideration to the issue of quantum of penalty. The impugned tenders were for procurement of products by a public utility which are used in the purification of water. The nature of public procurement and the importance of the products procured for public distribution of a good needs hardly any emphasis. At the same time, the Commission has also noticed the tender designs which created entry barriers which made collusion amongst the bidders conducive. ABCIL and GIL also argued that they are multi-product companies, generating revenues from sources other than the supply of PAC and LC to DJB and as such only the relevant turnover should be taken into consideration while imposing penalties.

211. In this connection, it would be apposite to refer to a recent decision of the Hon'ble Supreme Court of India in *Excel Crop Care Limited v. Competition Commission of India & Anr.*, Civil Appeal No. 2480 of 2014 decided on 08.05.2017. One of the issues which fell for consideration before the Hon'ble Supreme Court in this case was as to whether penalty under Section 27(b) of the Act should be imposed on total/ entire turnover of the offending company or only on "relevant turnover" *i.e.* relating to the product in question?

212. After referring to the statutory scheme as engrafted in Section 27 of the Act and analysing the case law at length, the Hon'ble Supreme Court opined that adopting the criteria of 'relevant turnover' for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties. While reaching this conclusion, the Hon'ble Supreme Court



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recorded the following reasons:

When the agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section 3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the 'maximum penalty' imposed in all cases be prescribed on the basis of 'all the products' and the 'total turnover' of the enterprise. It would be more so when total turnover of an enterprise may involve activities besides production and sale of products, like rendering of services etc. It, therefore, leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of 'relevant turnover'.

213. Thus, the starting point of determination of appropriate penalty should be to determine relevant turnover and thereafter, to calculate appropriate percentage of penalty based on facts and circumstances of the case.

214. In the instant case, the Commission notes the egregious conduct of ABCIL and GIL in submitting apparently separate bids, yet, as noted by the Commission, the same were virtually prepared, finalized and submitted through common channels. Such a conduct sought to create a façade of competitive landscape when none existed. Hence, the Commission considers intentional infringement by these OPs as an aggravating factor. Besides, the impugned tenders were for procurement of products by a public utility which are used in the purification of water. The nature of public procurement and the importance of the products procured for public distribution of a good needs hardly any emphasis. The Commission considers criticality of the procured product for public health as an aggravating circumstance



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215. Accordingly, after taking into account the aforesaid, the Commission finds it appropriate to impose a penalty on ABCIL and GIL at the rate of 8 % of their average relevant turnover and on GACL at the rate of 6 % of their average relevant turnover for the last three financial years based on the financial statements filed by them. Details of the quantum of penalties imposed on these OPs are set out below:

(INR In crore)

| S. No. | Name of OPs | Relevant Turnover for 2012-13 | Relevant Turnover for 2013-14 | Relevant Turnover for 2014-15 | Average Relevant Turnover for Three Years | @ 8 % of average Relevant Turnover |
|--------|--------------|-------------------------------|-------------------------------|-------------------------------|---|------------------------------------|
| | ABCIL | 25.19 | 26.83 | 26.41 | 26.14 | 2.09 |
| | GIL | 28.63 | 30.78 | 26.85 | 28.75 | 2.30 |

(INR In crore)

| S. No. | Name of OP | Relevant Turnover for 2012-13 | Relevant Turnover for 2013-14 | Relevant Turnover for 2014-15 | Average Relevant Turnover for Three Years | @ 6 % of average Relevant Turnover |
|--------|-------------|-------------------------------|-------------------------------|-------------------------------|---|------------------------------------|
| | GACL | 28.81 | 33.12 | 32.30 | 31.41 | 1.88 |

216. Accordingly, a penalty of INR 2.09 crore, INR 2.30 crore and INR 1.88 crore is imposed upon ABCIL, GIL and GACL respectively.

217. The Commission directs the above OPs to deposit the penalty amount within 60 days of receipt of this order.

218. Lastly, the Commission notes that some of the parties have filed confidential as well as non-confidential version of their response to the DG Report and the confidential versions were directed to be kept separately during the proceedings before the Commission. It is, however, made clear that such direction shall enure for a further period of 60 days only from the date of passing of this order. However, no such



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confidentiality claim shall hold in so far as the data that might have been referred to in this order.

219. It is ordered accordingly.

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

**Sd/-
(S. L. Bunker)
Member**

New Delhi
Date: 05/10/2017



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DISSENT NOTE

PER

Sudhir Mital
Member

1. This order of the Commission disposes two references received from Delhi Jal Board (**'the Informant'/DJB**), alleging, *inter alia*, contravention of the provisions of section 3 of the Competition Act, 2002, by Gujarat Alkalies & Chemicals Ltd (**'GACL'**), Grasim Industries Ltd. (**'GIL'**), Aditya Birla Chemicals (India) Ltd. (**'ABCIL'**), and Kanoria Chemicals & Industries Ltd (**'KCIL'**), (Ref. Case No. 03 of 2013), and Grasim Industries Ltd., Aditya Birla Chemicals (India) Ltd., Punjab Alkalies & Chemicals Ltd. and Kanoria Chemicals & Industries Ltd., (Ref. Case No. 04 of 2013).
2. Besides the material on record, I have also had the benefit of going through the majority order of the Commission. I am in complete agreement with the majority order in Ref. Case No. 04 of 2013. However, in Ref. Case No. 03 of 2013, whereas I fully agree with the majority order as far as it relates to the violation of the Act by GIL and ABCIL, both on merits as well as on the preliminary procedural issues raised by the said parties, I do not subscribe to the majority view in respect of the alleged violations by GACL (a State Public Sector Undertaking of Government of Gujarat) for the reasons recorded in the subsequent paras. For the sake of brevity, I shall not again recapitulate the background and facts of the matter in hand which has already been dealt with in detail in the majority order, and shall confine to the reasons for disagreeing with the majority view.
3. The issue that I am agitating upon in my dissent is whether based on the facts of the case and the evidence on record, GACL can be held liable for collusive bidding in contravention of Section 3 (3) (d) of the Act. In doing so, the facts and evidence on record have been examined to ascertain whether the



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impugned conduct of GACL can be attributed to a practice in concert with GIL and ABCIL. Does the evidence amply show that GACL's behavior defies economic rationale for an enterprise behaving independently and its actions cannot be objectively justified but for a cartel?

4. This is a case where no direct evidence of meeting of minds or of entering into an agreement is available on record. However in the absence of direct evidence, which would be the case in most cartel matters, an agreement can still be inferred from parallel pricing, in conjunction with a number of other plus factors, **but only in the absence of any plausible justification** (*emphasis provided*). The majority while accepting that parallel pricing alone cannot be taken as evidence of existence of an agreement, have observed that the bid prices offered by the Opposite Parties were converging in a narrow range and also recording a simultaneous increase over the years indicating that the parties acted in concert. Before recording my reasons for departure from the majority opinion, mainly on account of numerous plausible justifications given by GACL to its impugned conduct, it would be appropriate to refer to the Hon'ble Supreme Court's decision in the Excel Crop case.

40) A neat and pellucid reply of Mr. Kaul, which commands acceptance, is that argument of parallelism is not applicable in bid cases and it fits in the realm of market economy. It is for this reason the entire history of quoting identical price before coming into operation of Section 3 and which continued much after Section 3 of the Act was enforced has been highlighted. There cannot be coincidence to such an extent that almost on all occasion's price quoted by the three appellants is identical, not even few paisa more or less from each other. That too, when the cost structure, i.e. cost of production of this product of the three appellants sharply varies with each other. Following factors in this behalf need to be highlighted:



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(a) There is a 10 years' history of quoting identical prices;

.....

43. “We are here concerned with parallel behaviour. We are conscious of the argument put forth by Mr. Venugopal that in an oligopoly situation parallel behaviour may not, by itself, amount to a concerted practice. It would be apposite to take note of the following observations made by U.K. Court of Justice in *Dyestuffs*:

“By its very nature, then, the concerted practice does not have all the elements of a contract but may *inter alia* arise out of coordination which becomes apparent from the behaviour of the participants. Although parallel behaviour may not itself if identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not respond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.....”

In *Makers UK Ltd v Office of Fair Trading*, the Competition Appeal Tribunal observed that:

“57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules”.

5. The above decisions of the Hon'ble Supreme Court of India and the international jurisprudence provide adequate guidance that parallel behaviour by itself does not indicate concerted practice. To reasonably infer the existence of agreement or concerted practice, parallel conduct is to be supplemented with a set of actions, which are inconsistent with unilateral best-response behaviour. Parallel conduct in oligopolistic markets, in many



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instances, may be dictated by economic necessity, the underlying demand-supply conditions and oligopolistic interdependence. Thus, it is imperative to first rule out all plausible explanations to parallel behaviour in order to arrive at a conclusive view that the observed parallel behaviour is unlikely but for an agreement or collusion. This assumes even greater significance in the context of bidding markets, where narrow range of bids could also demonstrate competitive bidding. I now proceed to look at the plausible explanations to the conduct of GACL, which has not been adequately investigated by the DG.

6. At the outset, it is observed that the prices quoted by GACL, are neither identical nor near identical to that of its competitors i.e. ABCIL and GIL. As per DG in his report, the Informant DJB itself has alleged, that the companies bid almost similar prices with a difference of Rs.200-400 Per Metric Tonne. In fact, in some of the bids, the difference between the bids is even much higher, which, in no way can be considered to be near identical. The contention of the DG and the majority order is that the quoted prices of the bidders are in a narrow range and this behavior has then been attributed to an act in concert by bid participants. As mentioned above, prices being in a narrow range can as much be explained by aggressive bidding as by collusion. This parallel behavior is quite distinct from the parallel behavior that has been accorded a *per se* treatment by the Hon'ble Supreme Court in the Excel Crop case where there was a ten years' history of identical pricing.
7. It is well understood that PAC is a homogeneous commodity and there is little difference in the product across producers. The raw material inputs required to produce PAC are same across the producers; a fairly standardized production process is used to manufacture the product and finally, after accounting for any potential differences in product and service quality, a procurer's choice of a supplier depends primarily upon the price and available quantity of PAC. Given the similarity of the nature of product



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across various producers, the prices are subject to the same demand and supply factors and as such would also show some degree of similarity amongst the bidders.

8. The narrow range of quoted prices has been viewed with deep suspicion both by the DG in his Investigation Report and in the majority order, based on the differences in cost of production and transportation costs across the bid participants. It has been argued that cost of production of each bidder is showing a different trend. Over the tenders, the cost of production of GACL has been nearly constant. However, the cost of production of GIL has been increasing, while that of ABCIL has been decreasing. Hence it has been concluded that since there is no alignment in cost of production of the three bid participants, a narrow alignment in prices quoted cannot be explained but for a coordination.
9. I do not agree with this majority view on two counts. First, coordination could possibly be understood if GACL with low cost of production/basic prices coupled with low cost of transportation was quoting within a very narrow range of ABCIL and GIL, but on higher side to remain L3. Similar doubts could arise if with low cost of production/basic prices but with no locational differences, GACL was still quoting marginally higher prices. However, quite differently in this case, the advantage of lower cost of production/basic price of GACL has been largely offset by significantly higher transportation cost, on account of its Vadodara plant (Gujarat) being located furthest from DJB as compared to GIL's plant at Nagda in Madhya Pradesh which is closest to DJB and ABCIL's plant at Renukoot. The majority in its order has acknowledged that 'the plants are located in different geographical areas and the cost as well as logistics involved will be different'. The DG has not even attempted to examine/question the cost of transportation of the parties but for a bald statement that in the year 2012-13 the freight rate of GACL increased by Rs.600 P/MT and that of ABCIL by



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Rs.1000 as against marginal increase of Rs.200 by GIL and that the freight component given by GIL is lowest as compared to ABCIL and GACL. The DG has assumed without any evidence or undertaking any analysis that given the locational differences, bidding prices which are in narrow range indicate collusive behaviour. GACL has explained the offsetting/evening out of its low cost of production/basic prices on account of significantly higher freight charges by way of transportation costs as compared to GIL/ABCIL. In my view, in the absence of any analysis/finding by the DG to the contrary, the explanation given by GACL appears to be quite plausible to justify its bid price in the DJB tenders. I also do not find any inconsistency in GACL's own bidding behaviour over the years given the fixed distance of its plant from DJB and its near constant cost of production. However variation on account of transport charges, which is a major component of the total quoted price cannot be ruled out. Secondly, to draw any inference from GACL's cost of production and that of GIL/ABCIL is not tenable, as the DG has rejected the detailed submissions of GIL and ABCIL regarding their costs of production. No such independent analysis was undertaken by the DG for GACL. The majority order too, based on DG report, has similarly dismissed the cost submissions of GIL/ABCIL that the parties did not provide specific details regarding the methodology involved in deciding rates to DJB and their other customers.

10. In the DG Report, it has been stated that in order to determine the methodology for calculating cost of production of PAC it summoned Shri C. P. Bansal, Senior Vice President (F&C), who appeared on behalf of both GIL and ABCIL. Here DG observed that not only Mr. Bansal was evasive but also gave unsatisfactory reasons concerning variations in cost of production of ABCIL and GIL such as overhauling of plant, sale of liquid PAC in HDP drums to some customers, inclusion of retirement benefits, etc. It was observed by DG that these costs could not be attributed to one year alone and they have to be amortised over number of effective years for the purpose of



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calculating the cost of production. Even cost of HDP Drums was noted as highly illogical because ABCIL did not supply liquid PAC to DJB in HDP Drums. Based on these the DG concluded with certainty that justifications given for variation in cost of production of liquid PAC, was not tenable and the cost submissions were unreliable and doctored. The analysis however, as mentioned earlier was limited/confined to ABCIL and GIL and not to GACL though the latter had submitted all cost details and calculations and indicated that it had taken unilateral and independent decisions based on sound commercial and economic justification. It was obligatory on part of the DG to have done such an analysis as done for GIL/ABCIL and given an opportunity to GACL to explain in detail its methodology for calculating its cost of production/transportation rates and give reasons for rejecting the same before arriving at any adverse conclusions. This shows that the DG giving a complete bye-pass to Principles of Natural Justice by not independently questioning/analysing GACL's data, has erroneously clubbed/juxtaposed the conduct of GIL/ABCIL with/on GACL without any basis and therefore its conclusion is at most a mere assertion. In fact in the DG report in the chapter on 'Cost of production of PAC' only the pricing conduct of GIL and ABCIL has been discussed/analysed thread bare but surprisingly conclusion of coordination has been drawn for all three including GACL.

11. In terms of treatment of transportation cost of the bid participants and its importance in the total cost, the majority order has argued that the transportation cost per metric ton per kilometer of GACL does not conform to the principle of telescopic tariff structure where the per kilometer per metric ton freight should correspondingly be lesser for longer distances, implying therein that transportation costs indicated by GACL are doctored on the higher side than may have been actually incurred in order to narrowly align its bid with ABCIL/GIL.



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Table
Tender wise freight rate quoted by bidders

| Tender | Year | Party | Freight Rate (INR/MT) | Distance (KM) | Cost INR/Km/MT |
|---------------|-------------|--------------|----------------------------------|--------------------------|---------------------------|
| 13 | 2010-11 | GIL | 2100 | 776 | 2.71 |
| | | ABCIL | 2133 | 908 | 2.35 |
| | | GACL | 2900 | 1015 | 2.86 |
| 1 | 2012-13 | GIL | 2301 | 776 | 2.97 |
| | | ABCIL | 3101 | 908 | 3.42 |
| | | GACL | 3500 | 1015 | 3.45 |
| 5 | 2013-14 | GIL | 2800 | 776 | 3.61 |
| | | ABCIL | 3277 | 908 | 3.61 |
| | | GACL | 3750 | 1015 | 3.69 |
| 15 | 2014-15 | GIL | 2800 | 776 | 3.61 |
| | | ABCIL | 3298 | 908 | 3.63 |
| | | GACL | 3998 | 1015 | 3.94 |

12. It is difficult to accept this assumption when the DG has not only not examined the parties on their cost of transportation but has also not given/ suggested any scientific basis or analysis as to what could/should be the per kilometer per tonne cost of transportation of the parties under the telescopic tariff structure for inter-state road transportation of goods. The DG did not empirically verify the applicability of telescopic tariff structure to road transportation and no opportunity was given to the parties to explain/rebut the same. Moreover in the case of long distance inter-state road transportation, the telescopic freight structure may not necessarily be applicable on account of wide differences in road conditions and intensity and nature of traffic over the distance, vintage of vehicles, local wage structure, manpower, fuel costs, taxes and other levies, round tripping, empty haulage for longer distances etc. as well as other unforeseen charges generally associated with inter-state road transportation of goods. Greater the distance more the imponderables and



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uncertainties. Telescopic tariff structure, on the other hand is more applicable to rail transportation which is fairly homogenous in nature unlike road movement and as such telescopic structure for road movement may not have any empirical basis in this instance, all the more so when the freight charges submitted by the parties have not been questioned by the DG and no analysis of the same has been undertaken

13. Furthermore, the DG report and the majority order emphasize the “cushion” that GACL had between its cost of production and basic price (as quoted to DJB). This, allegedly, indicated a conscious non - competitive strategy of GACL. The majority order has stated that GACL’s prolonged supra competitive pricing for five continuous years is bereft of any plausible economic rationale and hence is construed as an act in concert. The two plausible explanations given by GACL for this non-aggressive bidding behavior appear to have been overlooked. First, the tender conditions which split the tendered amount to **only three participants** force at least 15% of the total amount to the L3 bidder. Such tender conditions do not encourage competitive price discovery as the 15% has to be provided at the price negotiated with L1. Second, it is equally possible in the absence of any incentive to compete due to the specificities of the tender design that GACL’s bid may have been non serious and thus searching for any price cost alignment would be a redundant exercise. In the extreme, had GACL bid been even say five times its quoted price, given the specific structure of DJBs bidding market it would still be offered to supply 15% of the tendered amount at the negotiated price of L1. There is no such condition in the tender conditions that the L3 has to be within certain range of L2 to be eligible to get 15%. With only three manufacturers who can supply to DJB as per its restrictive tender conditions, a L3 would get an opportunity regardless of its quoted rate to supply 15% of the tendered quantity and as such there was no reason for GACL to deliberately bid within a narrow range. It may also be pointed out that the tender conditions have been identified as reasons for



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discouraging competitive quotes in some of the earlier orders of the Commission. Third, it is equally possible that had GACL aggressively bid and become L2, the differential in its contracted volume, *i.e.* 20%, may not be a commercially attractive proposition to GACL, who could profitably divert the sales to nearby customers. No such analysis has been done by the DG and the behavior of GACL is being assumed as an economically irrational behavior. In fact in the course of the hearing before the Commission, GACL clarified that its bidding decisions were solely guided by independent commercial considerations and that the prices quoted by it to all its customers are at par with each other and as such it cannot be said that in relation to DJB tenders GACL quoted prices after colluding with its competitors. It has been accepted by DG that GACL's prices quoted to its other customers were at par with DJB. The assumption of economically irrational behavior without understanding the overall PAC market and the importance of DJB or other customers of GACL in the market, is erroneous. Underlying this assumption is the premise that GACL has an obligation to supply to DJB, which is not so.

14. Just because GACL had capacity available/ sufficient cushion to compete and its cost of production had been constant does not mean that GACL would commit the capacity to DJB tender or a particular market as it did not have sufficient incentive to do so. I find merit in GACL's argument that it was not in its commercial interest to service such quantities to DJB or other market coupled with the fact that it is common knowledge that a decision to service a market depends upon variety of factors including the capacity to cater to the demand, prevailing and anticipated price levels, EBIDTA margins that a particular sale may generate.
15. Further, the tender analysis done by the DG does not bring out any consistent, coherent theory of the collusive mechanism. Collusion has to be accompanied by some form of rent-seeking for the participants. In identical bidding situation, a fair share of the contract volume is distributed amongst the



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participants, whereas in complementary or cover bidding, where the winner is pre-decided and the other participants place non-serious bids, the participants take turns in getting the award or the contracted amount is subcontracted. The data in the instant case is not consistent with any of these collusive theories. According to the DG though the Informant DJB has submitted that the cartelisation was of ongoing nature from 2003-05 onwards, the analysis was carried out only from 2009 onwards, since the Competition Act, 2002 came in force in the year 2009-10. However, for identification of any discernible pattern for the purpose of comparison, data should have been collected for a longer period of time *i.e.* at least a year or two both before and after period of alleged cartelisation. This would have enabled to establish conclusively any theory of collusion. Similarly, when establishing bid rotation by the OPs, one cycle of bid rotation alone may not be sufficient to implicate GACL by cherry picking the last three bids alone as in five previous tenders GACL was L3. Thus, in my view, the majority orders observation that GACL was a participant in a bid rotation, cannot be sustained with this limited data.

16. Moreover, had DG done an independent analysis it would have appreciated the fact that PAC business of GACL comprises a very small portion of its entire business. In 2014-15 PAC comprised only 1.67% of the total operational revenue of GACL. Further, GACL has not been able to break-even on its investment in the PAC business. It is pertinent to note that that the total investment by GACL in relation to PAC business was approximately INR 3800 Lakhs; however, as of 2014-15, GACL has suffered a net loss of approximately INR 2726.96 lakhs. GACL has only earned annual profit in the year 2012-13 and 2013-14 in relation to PAC business.



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Profitability of PAC Business

| <u>Sr. No</u> | <u>Financial Year</u> | <u>Profit/(Loss)</u> <u>(In INR Lakhs)</u> |
|----------------------|------------------------------|---|
| 1. | 2006-2007 | (509.02) |
| 2. | 2007-2008 | (709.04) |
| 3. | 2008-2009 | (304.55) |
| 4. | 2009-2010 | (537.96) |
| 5. | 2010-2011 | (403.77) |
| 6. | 2011-2012 | (364.41) |
| 7. | 2012-2013 | 90.82 |
| 8. | 2013-2014 | 113.47 |
| 9. | 2014-2015 | (102.5) |
| | | (2726.96) |

17. With respect to bidding pattern in other Jal Boards, the majority has stated that even here a discernible pattern was visible where the dealers of GIL and GACL also occupy similar positions in the tenders floated by other municipal corporations. The GACL has explained that manufacturers and suppliers do not compete in the same market as the latter would always be at a disadvantage in competitive bidding *vis-à-vis* the manufacturer. Moreover, suppliers are totally independent of the manufacturer in deciding their prices to the customers and on which the manufacturer has no influence/control. In my view, GACL cannot be condemned for the independent conduct of its suppliers when the DG has even not called or given an opportunity to the dealers to justify or rebut their bidding conduct and as such ought to be rejected as an assertion devoid of any detailed examination by the DG.
18. Finally, though the majority has observed that parallel pricing is not *per se* violative of the act and acknowledged that there have to be plus factors *i.e.* some additional evidence tangible enough to arrive at the conclusion that prices quoted by the Opposite parties are a result of concerted action or as a result of meeting of minds, but then the plus factors identified in the majority



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order do not, in my view, meet the standard of proof when direct evidence is lacking.

19. To, elaborate, the majority found certain circumstantial evidence enough to be considered as ‘plus factors’ to affirm that the Opposite Parties had acted in concert. The factors being:

- *The bid prices offered by the Opposite Parties were close to each other and they have seen simultaneous increase over the years.*
- *The three bidders i.e. ABCIL, GIL and GACL having huge variation in variable cost of production, fixed cost of production, transportation cost, taxes as well as policy on profit margin, close margin in bid prices quoted by them in DJB’s tenders year after year cannot be a matter of coincidence. It can only happen when there is a meeting of mind with the objective of bidding in collusive manner and to maximise their profits.*
- *Despite GACL cost of production being nearly constant and the lowest amongst the three bidders across the tenders along with the bidding pattern indicates that GACL had enough cushion to become L2 but it chose not to.*

20. Though direct evidence is considered the best in cartel cases, however, the non-availability of such evidence in most cases necessitates reliance on circumstantial evidence that meets the standard of proof of ‘preponderance of probabilities’ as opposed to ‘beyond reasonable doubt’ required in criminal cases. The Commission in its various decisions has also laid down that in identifying an agreement the benchmark has to be ‘preponderance of probabilities’. The Commission has adopted this test based on the assumption that there is rarely any direct evidence of action in concert to determine whether there was some form of an understanding. In the LPG case, the Commission held as follows:



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“In case of contravention the Commission has been conferred power to impose only civil fines and it does not have criminal jurisdiction. It is also pertinent to mention that under section 36 of the Act, the Commission is vested with some powers of the civil courts in conduct of its inquiries. Hence, cartelisation not being a criminal offence, the test of proof will only be ‘balance of probabilities’ and ‘liaison of intention’ which can be established with the support of indirect or circumstantial evidence. Since, in criminal cases the offence has to be proved beyond reasonable doubt, the law makers in the beginning have opted to make cartel a civil offence only.”

In *Aluminium Phosphide* Case also, the Commission reiterated this point:

“The existence of an anti-competitive agreement is required to be tested on the principle of ‘preponderance of probability; same need not be proved ‘beyond reasonable doubt.’”

The Commission notes at paragraph 183 of the Cement Order:

*“existence of an anti-competitive practice or agreement must be inferred from a number of co-incidences and indicia which, taken together, may, in **the absence of any other plausible explanation,** constitute evidence of the existence of an anti-competitive agreement”. (emphasis added).*

21. Although, the Commission has consistently set out the standard of proof required to be met in horizontal agreement cases – that of “preponderance of probabilities”, the application of the same standards do not appear to have been applied when assessing the conduct of GACL in this case. In my opinion, the plausible explanations by GACL, mentioned in the earlier paras fully satisfy the bidding conduct of GACL as being independent of other parties, in the various DJB tenders. In not considering the plausible



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explanations – explanations that may be perfectly rational economic decisions and in line with the independent commercial objectives of GACL – the majority order, in my view, does not meet the requirement of “standard of proof” as implied in “preponderance of probabilities”.

22. In conclusion, given the evidence on record and based on the fact that plausible justifications to the conduct of GACL have not been tested by the DG or in the majority order, I am of the opinion that GACL’s conduct does not adequately fit the ‘plus factors’ or gets covered by the “standard of proof” in cartel cases as promulgated in the various decisions of the Commission. Therefore, I do not find GACL liable of collusion in contravention of Section 3(3)(d) of the Competition Act, 2002.

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

New Delhi
Date: 05/10/2017