

**IN RE: CUPID LIMITED (INFORMANT) AND MINISTRY OF HEALTH & FAMILY WELFARE
(OPPOSITE PARTY NO. 1), CENTRAL MEDICAL SERVICES SOCIETY (OPPOSITE PARTY NO.
2)**

Case No. 45 of 2018

Date of Decision: 26-12-2018

Keywords: abuse of dominant position, condom, exclusive supply agreement, refusal to deal

Rule: Section 3. Section 4

The Informant was a public limited company involved in manufacturing and supply of condoms and lubricant jelly, which were being supplied to OP-2 since 2002. Till 2013-14, OP-1 used to invite tenders for procuring condoms, which would, in turn, be distributed to various organizations in India for further distribution amongst the general public. OP-2, a society registered under the Societies Registration Act, 1860, was an independent agency for procurement of quality health sector goods and services required by OP-1

On 02.08.2016, OP-2 issued a tender for procurement of condoms to which the Informant, amongst other bidders, submitted its bid. The Informant, on account of submitting the lowest bid, was declared L1 bidder. Informant's bid was accepted. Pursuant to the terms of the acceptance letter, the Informant submitted security deposit amounting to 5 percent of the total value of the tender awarded. Thereafter, the Informant signed a Long Term Agreement (LTA) with OP-2 on 29.09.2017 for a period of one year.

The Informant has alleged that: (a) OP-2 abused its position as the dominant buyer and forced the Informant and other manufacturers to sign the LTA, a standard form agreement; (b) No opportunity for negotiation or objection to any of its terms was given to them; (c) the LTA contains one sided, unfair and abusive terms and conditions which not only contravene the provisions of Section 4 of the Competition Act but also impose vertical restraint on the Informant in violation of Section 3(4) of the Act.

The Informant had also alleged violation of Section 3(4)(b) [exclusive supply agreement] and Section 3(4)(d) [refusal to deal] of the Act. To substantiate this allegation, the Informant submitted that by mandating robust packaging specifications under Clause 9 of LTA and

imposing varied printing requirements under Clause 11 (printing of 'Central Government Supply- not for sale' on the strips, packs, blisters, vials, ampoules, etc.), OP-2 ensured that the product could not be sold to any other customer apart from OP-2.

Analysis of the Commission

The Commission noted that the Government's policy in relation to population control entails distributing condoms free of cost to the poor and at subsidized rates to the less economically sufficient sections of the population. Consequently, the Commission elaborated on the three types of markets encompassed within the markets for contraceptive in India-

1. Free Supply Market: Under the free supply scheme of the Government, condoms and other contraceptives are procured and distributed to the States/UTs. This market is the domain of the Government and consists of poor sections of the society.

2. Social Market: Under the Social Marketing Programme of the Government, OP-2 procures the non-branded condoms from the manufacturers including bidders and thereafter supplies them to Social Marketing Organizations (SMOs) who, in turn, distribute the said condoms to the rural/urban middle class population, under their own brand names at a price which is within the rate fixed by the Government.

3. Commercial Market: It is the free market where private sector manufacturers operate by selling their products in the open market under different brand names. These condoms are sold at the prices determined by the manufacturers.

The Commission noted that the functions of OP-1 include formulation of guidelines, regulations and policies for those matters that are incidental and ancillary to the health and public welfare sector in India. Since these activities cannot be regarded as commercial in nature, OP-1 did not fall within the definition of 'enterprise' under Section 2(h) of the Act. On the other hand, OP-2 was engaged in various commercial activities like tendering, bid evaluation, etc. and can be considered to be an 'enterprise' under Section 2(h) of the Act.

OP-2, in the instant case, was a procurer of condoms who distributed them to the public in accordance with the policy of the Government. OP-2 was on the demand side, whereas the Informant and other manufacturers were on the supply side. Since the Informant had alleged abuse of dominant position by OP-2 as a procurer of condoms, therefore this was a case of alleged abuse of buyer's power.

The Commission applied the concept of ‘demand side substitutability’ inversely, i.e. by assessing the availability of substitutes for suppliers and their ability to switch to alternative sales opportunities both in terms of products as well as geographies. The Commission considered that the suppliers of the product ‘male condoms’, including the Informant, had the option to supply their product either to the Government or in the commercial market anywhere in India or even export the product. Thus, the relevant product market could not be restricted to the narrow market of ‘male condoms supplied to OP-2’. The Commission regarded it appropriate to consider the broader relevant product market in the instant case i.e. ‘the market for male condoms’. Further, since the product can be supplied anywhere in India, the relevant geographic market for the purposes of assessing dominance in this case was deemed to be the ‘territory of India’. Therefore, the relevant market was delineated as ‘the market for male condoms in India’.

The Commission noted that in order to show dominance of OP-2, the Informant had relied on an online article which stated that the condom market in India was worth Rs. 800 crores. Further, the Informant had calculated the market share of OP-2 as 23.91% in 2016-17 and 36.38% in 2017-18 based on total procurement made by it in these years.

The Commission remarked that the market shares ascertained by the Informant did not necessarily depict the actual picture. Moreover, the Commission also said that even if the Informant’s calculation is accepted, OP-2’s dominance remains unestablished. This is so because, though the calculated market shares may show that OP-2 is the largest procurer, the suppliers were not excluded from the market if it does not procure from them. Even the unsuccessful bidders who did not win the tenders of the Government continued to have the option to sell in the commercial market, which as per Informant’s calculation of market shares constitutes around 65% to 75% of the relevant market. Remarking that without dominance, there cannot be a case of abuse of dominance, the Commission was of the opinion that the instant matter did not involve contravention of the provisions of Section 4 of the Act.

With respect to the contravention of Section 3(4)(b) and Section 3(4)(d), the Commission noted that under the Act “exclusive supply agreement” is defined to include “*any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person*”. Further, “refusal to deal” is defined to include “*any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought*”. In

the instant case, the printing and packing requirements of the LTA, as pointed out by the Informant, were only in relation to the product that was to be supplied to OP-2 by the Informant. The conditions of the LTA neither restricted the Informant from dealing in goods other than those of the OP nor impose any restriction on the Informant to sell its goods to any buyer other than OP. Thus, in view of foregoing, the Commission found the allegations of contravention of Section 3(4)(b) and 3(4)(d) of the Act made by the Informant against OP-2 to be misplaced.

In light of the above analysis, the Commission found no prima facie case of contravention of the provisions of Section 3(4) or Section 4 of the Act against the OPs in the instant case. The matter was ordered to be closed forthwith in terms of the provisions of Section 26(2) of the Act.