



**COMPETITION COMMISSION OF INDIA**

**Case No. 45 of 2018**

**In Re:**

**Cupid Limited**

**A-68, MIDC, Malegaon, Sinnar,  
District Nashik-422113, Maharashtra**

**Informant**

**And**

**Ministry of Health & Family Welfare  
Government of India, Nirman Bhawan  
New Delhi – 110011.**

**Opposite Party No. 1**

**Central Medical Services Society  
Annexe Building of Red Cross Society,  
1 Red Cross Road,  
New Delhi-110001.**

**Opposite Party No. 2**

**CORAM**

**Ashok Kumar Gupta  
Chairperson**

**Augustine Peter  
Member**

**U. C. Nahta  
Member**

**Appearances:**

*For the Informant* Shri Gautam Shahi, Advocate

Shri Sachin Prasad, Country Manager



### **Order under Section 26(2) of the Competition Act, 2002**

1. The present information has been filed by Cupid Limited (**Informant**) under Section 19(1)(a) of the Competition Act, 2002 (**Act**) against Ministry of Health & Family Welfare, Government of India (**OP-1**) and Central Medical Services Society (**OP-2**), alleging contravention of the provisions of Section 3 and 4 of the Act. (Hereinafter, OP-1 and OP-2 collectively referred to as the '**OPs**').
2. As per the information, the Informant is a public limited company engaged in manufacturing and supply of condoms and lubricant jelly. It has been supplying condoms to OP-1 since 2002.
3. OP-1 is the central ministry under the Government of India, in charge of public health and family welfare in India. Till 2013-14, OP-1 used to procure condoms by inviting tenders and thereafter, distributing them to various organisations in India at subsidised rates or free of cost, which in turn distributed the same to general public. However, with effect from 2014-15, OP-1 entrusted its procurement functions to OP-2.
4. OP-2 is a society registered under the Societies Registration Act, 1860. It is an autonomous body under OP-1 established in 2011 as a Central Procurement Agency for drug procurement and distribution system. It functions as an independent agency for procurement of quality health sector goods and services required by OP-1 and sends the goods so procured, at convenient locations for benefit of the users.
5. This information relates to a tender bearing no. CMSS/PROC/FWP/2016-17/002 issued on 02.08.2016 by OP-2 for procurement of condoms under a rate contract, in response to which various manufacturers, including the Informant, submitted their respective bids. The said tender was opened on 31.08.2016 and the Informant, with the lowest bid, was declared L1 bidder. However, there was



delay of more than one year in finalising the contract and the Informant's bid was accepted *vide* letter dated 04.09.2017 (**acceptance letter**) for three categories of condoms namely Free Supply, Deluxe Nirodh and Social Marketing Organisation (**SMO**).

6. Pursuant to the terms of the acceptance letter, the Informant submitted security deposit amounting to INR 1,20,64,997.64/- (*i.e.* 5 percent of the total value of the tender awarded) on 26.09.2017. Thereafter, the Informant signed a Long Term Agreement (LTA) with OP-2 on 29.09.2017 for a period of one year.
7. The Informant has alleged that OP-2 abused its position as the dominant buyer and forced the Informant and other manufacturers to sign the LTA, a standard form agreement. No opportunity for negotiation or objection to any of its terms was given to them. Further, the Informant has alleged that the LTA contains one sided, unfair and abusive terms and conditions which not only contravene the provisions of Section 4 of the Act but also impose vertical restraint on the Informant in violation of Section 3(4) of the Act.
8. The unfair and onerous clauses in the LTA which are alleged to be in contravention of the provisions of Section 4(2)(a)(i) of the Act are stated below:
  - a. Clause 8, which provides that the delivery of the product is to be completed within a short period of 60 days from the date of purchase order. In this regard, the Informant has submitted that prior to OP-2 taking over the procurement process, OP-1 did not impose any such rigid timelines on the manufacturers.
  - b. Clause 20, which provides that in case of delay in the delivery of supplies within time, liquidated damages at the rate of 0.5 percent per week for delayed supply and upto a maximum of 10 percent can be levied on the supplier irrespective of whether OP-2 has suffered any damage or loss on account of delay in effecting supply or not. On the other hand, as per Clause 3.4, OP-2 is required to make payments within 75 days (for items involving sterility test)/ 60 days (for other items) of delivery of goods after



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quality testing. However, there is no penalty on OP-2 for any delay in making the payment. In this regard, the Informant has submitted that taking undue benefit of absence of any penalty clause, OP-2 has not made a single payment to the Informant within the scheduled time.

- c. As per acceptance letter, the supplier is required to submit security deposit at the rate of 5 percent of the entire purchase value of accepted quantity before signing the LTA. However, Clause 5 states that OP-2 is not required to purchase the entire accepted quantity. Further, in terms of Clause 19, if the supplier fails to deliver the quantity ordered or commence deliveries as scheduled, OP-2 can cancel the entire contract without any show cause notice and force the supplier to pay to it for any loss by way of expenditure or other incidental expenses. However, there is no corresponding penal provision for OP-2, should it fail to place an order for the accepted quantity *i.e.* quantity accepted in terms of the acceptance letter. The Informant has stated that taking benefit of these provisions, OP-2 has failed to place order for approximately 40% of the accepted quantity.
  - d. In terms of Clause 8.1, OP-2 can increase/ decrease the procurement quantity during the tenure of the LTA, which creates further uncertainty for the suppliers/ manufacturers including the Informant as they are bound to provide the quantity demanded by OP-2 during the tenure of the LTA or face liquidated damages and other penalties under the contract.
  - e. In terms of Clause 10.3, the Informant cannot sub-contract the manufacturing of the product to any other manufacturer. The Informant has alleged that in view of the stringent timelines, possibility of firm demand beyond the accepted quantity and threat of penalty, this condition in the LTA is abusive.
9. Apart from alleging contravention of the provisions of Section 4 of the Act, the Informant has also alleged contravention of the provisions of Section 3(4)(b) and Section 3(4)(d) of the Act. In this regard, the Informant has submitted that by providing extensive packaging specifications under Clause 9 of the LTA and



imposing varied printing requirements such as printing of the identification mark/ code on the product itself (under Clause 11 of the LTA), printing of text 'Central Government Supply – not for sale' on the strips, packs, blisters, vials, ampoules and bottles and also on the external packing (under Clause 10 of the LTA), OP-2 ensured that such product could not be sold to any customer other than OP-2. Thus, it is alleged that OP-2's conduct is in violation of the provisions of Section 3(4)(b) and Section 3(4)(d) of the Act also which provide for exclusive supply agreement and refusal to deal, respectively.

10. The Informant has also defined the relevant product market in terms of the provisions of the Act. In broad terms, the Informant has defined the relevant market as '*the market for male condoms in India*' and narrow market as '*the market for male condoms procured by OP-1 and OP-2 in India.*'
11. In view of the above facts, the Informant has prayed that the Commission initiate an inquiry into the conduct of OP-1 and OP-2 in terms of the provisions of Section 19 of the Act and restrain them from indulging in anti-competitive conduct. It is also prayed that the Commission impose penalty on OP-1 and OP-2 to the extent of 10 percent of their average turnover in the last three preceding financial years.
12. The Commission has perused the Information and the material available on record and also heard the Informant on 20.11.2018. It is observed that the Informant has alleged contravention of the provisions of Section 3(4) and Section 4 of the Act by the OPs. The grievance of the Informant under both the provisions is arising from the alleged unfair and discriminatory clauses contained in the LTA.
13. In order to assess the allegations of the Informant under the Act, the Commission has considered Government of India's policy for procurement of contraceptives and the structure of the market of contraceptives in India. In this regard, it is observed that the Government's policy for population control aims



to distribute condoms free of cost to the poor and at subsidised prices to the less well-off segments of the population. As a result, the market of contraceptives in India comprises of free supply market, social market at subsidised rates and commercial market. These categories of markets are explained below:

- a. *Free Supply Market:* Under the free supply scheme of the Government, contraceptives namely condoms, Oral Contraceptive Pills (OCPs), intra uterine devices, *etc* are procured by OP-1 (now OP-2) and distributed by National AIDS Control Organization (NACO)/ State AIDS Prevention and Control Societies (SACS) to the States/UTs. The free supply market is the domain of the Government and consists of poor sections of the society.
- b. *Social Market:* Under the Social Marketing Programme of the Government, both condoms and OCPs are made available to people at subsidised rates through diverse outlets. 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 public under their own brand names. SMOs sell condoms and OCPs at a price, which is within the range fixed by the Government. The social market segment caters to the urban/ rural middle class where the products are sold at heavily subsidised price through SMOs. Presently, there are various SMOs operating in India including Population Health Services and Parivar Seva Sanstha, *etc*.
- c. *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.

14. The Commission notes that OP-1 was procuring male condoms for its free supply and social marketing programme through Department of Health and



Family Welfare till 2013-14. However, from 2014-15 onwards, the task of procurement of condoms was entrusted to OP-2. Since then, OP-2 has been procuring condoms for OP-1 based on the specifications and terms provided by OP-1. Further, as per the Cabinet Note dated August 26, 2005, 75% of the male condom requirements are procured from HLL Life Care Limited (**HLL**), a public sector undertaking and rest 25% from private players through invitation of bids.

15. Having observed as above, the Commission considered whether OP-1 and OP-2 fall within the purview of the Act *i.e.* whether they are enterprises within the meaning of Section 2(h) of the Act.
16. In this regard, the Commission observed that OP-1 is the Ministry of the Government of India, which is, *inter alia*, engaged in formulation of guidelines, regulations and policies for those matters that are incidental and ancillary to the health and public welfare sector in India. These activities are policy functions of the Government and cannot be said to be commercial in nature. Hence, the Commission is of the view that OP-1 does not fall within the definition of 'enterprise' as defined in Section 2(h) of the Act.
17. Further, with respect to OP-2, it is noted that OP-2 is involved in various economic/ commercial functions such as tendering, bid evaluation, procurement, concluding rate agreement, placing purchase order, receiving stores, sampling and testing, releasing payment to suppliers and keeping stocks of the drugs available in warehouses for distribution to state programme offices. Thus, based on the functions discharged by OP-2, the Commission finds OP-2 to be covered within the definition of 'enterprise' in terms of Section 2(h) of the Act.
18. The Commission notes that dominance of OP-2 can be ascertained only in the context of the relevant market in which OP-2 is operating. For this purpose, it is observed that in the instant case OP-2 is a procurer of condoms, which



thereafter distributes the product to public under the Government's policy for population control. Hence, OP-2 is on the demand side, whereas the Informant and other manufacturers are on the supply side. Since the Informant has alleged abuse of dominant position by OP-2 as a procurer of condoms, therefore this is a case of alleged abuse of buyer's power.

19. It is noted that the Commission has previously decided cases involving allegations of abuse of buyer's power. These include Case No. 70 of 2014 (*Shri Rajat Verma v. Public Works (B&R) Department Government of Haryana & others*), Case No. 16 of 2013 (*Adcept Technologies Pvt. Ltd. v Bharat Coking Coal Limited*) and Case No. 80 of 2015 (*V.E. Commercial Vehicles Limited v UPSRTC*) wherein the Commission delineated the relevant market by applying 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. On applying the same concept in the instant case, it is noted that the suppliers of the product 'male condoms', including the Informant, have the option to supply their product either to the Government under its free supply / social marketing programme or in the commercial market anywhere in India or even export the product. Thus, the relevant product market cannot be restricted to the narrow market of 'male condoms supplied to OP-2'. Given the foregoing, the Commission deems 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 is the 'territory of India'. Therefore, the relevant market is delineated as 'the market for male condoms in India'.

20. On the aspect of dominance of OP-2 in the above relevant market, the Commission notes that in order to show dominance of OP-2 in the market for male condoms in India, the Informant has relied on an online article published on 17.06.2017, which stated that the condom market in India was worth Rs. 800



crores. Ignoring the sale of female condoms and assuming that the relevant market is worth Rs 800 crores, the Informant has 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 from HLL as well as private players.

21. The Commission notes that the market shares calculated by the Informant are based on several assumptions and may not necessarily depict the actual position. Firstly, it is not definite whether size of the market is Rs. 800 crore and whether this includes supplies to the Government or not. Secondly, the Informant assumes that in the two years under consideration, the procurement by OP-2 from HLL was three times the quantity for which tenders were issued. Nothing has been stated in the information regarding the exact quantity procured. Even the tendered quantity is stated to be only tentative quantity, which the Government may or may not have procured from the bidders. Thus, the market share calculated by the Informant could easily have an upward bias.
22. Be that as it may, even if the market shares calculated by the Informant are accepted, the same still do not establish dominance of OP-2 in the relevant market. This is so because, though the calculated market shares may show that OP-2 is the largest procurer, the suppliers are not foreclosed from the market if it does not procure from them. Even the unsuccessful bidders who do not win the tenders of the Government continue 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. Moreover, as OP-2 is procuring for social objectives it does not appear to have any incentive to influence the relevant market, particularly when it can procure 75% or more of its required quantity from HLL that too at a rate lesser than the market rate. Thus, in absence of the ability or the incentive to affect the relevant market in its favour, OP-2 cannot be considered dominant in the relevant market for male condoms in India.



23. Considering that without dominance, there cannot be a case of abuse of dominance, the Commission is of the view that the instant matter does not involve contravention of the provisions of Section 4 of the Act.
24. Further, the Informant has alleged that OP-2 has contravened the provisions of Section 3(1) read with Section 3(4)(b) and 3(4)(d) of the Act. The Commission notes that these allegations emanate from the terms and conditions of the LTA entered into between the Informant and OP-2. The Informant has submitted that by giving extensive specification and varied printing requirement in the LTA, including the printing of code on the product itself, OP-2 ensures that the product cannot be sold to anybody other than OP-2. Further, the printing requirements in Clause 10 and 11 of the LTA and packing requirements in Clause 9 of the LTA ensures that the product cannot be offered to any other buyer. It is alleged that such requirements are in violation of the provisions of Section 3(4)(b) *i.e.* exclusive supply agreement and under Section 3(4)(d) *i.e.* refusal to deal.
25. In this regard, the Commission notes 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, are only in respect of the product that is to be supplied to OP-2 by the Informant. The conditions of the LTA neither restrict 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 finds 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.



26. In light of the above analysis, the Commission finds 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 is ordered to be closed forthwith in terms of the provisions of Section 26(2) of the Act.
27. The Secretary is directed to communicate to the Informant, accordingly.

**Sd/-**  
**(Ashok Kumar Gupta)**  
**Chairperson**

**Sd/-**  
**(Augustine Peter)**  
**Member**

**Sd/-**  
**(U. C. Nahta)**  
**Member**

**New Delhi**  
**Dated: 26/ 12/ 2018**