Competition Commission of India

Case No. 14/2012

26 July, 2012

India Glycols Limited	Informant

Vs

1. Indian Oil Corporation Ltd.	Opposite Party-1
2. Hindustan Petroleum Corporation Ltd.	Opposite Party-2
3. Bharat Petroleum Corporation Ltd.	Opposite Party-3
4. Indian Sugar Mills Association	Opposite Party-4
5. National Federation of Cooperative Sugar Factories Ltd.	Opposite Party-5
6. Ministry of Petroleum & Natural Gas.	Opposite Party-6
7. Ministry of Chemicals & Fertilizers	Opposite Party-7
8. Ministry of Consumer Affairs, Food and Public Distribution	Opposite Party-8

Order under Section 26(1) of the Act

1. Present information has been filed by M/s India Glycols Ltd. u/s 19 alleging contravention of various provisions of the Act (Abuse of dominance and anti-competitive agreements) against the various OPs. The IP (India Glycols Limited) is engaged in the business of manufacturing and marketing of Ethanol based chemical such as Ethyl Alcohol, Natural gums, Industrial

Gases etc. The IP thus, is dependent upon Ethanol as one of the basic inputs for running its core business.

2. Ethanol is produced from molasses which is a waste material of the sugar industry. Ethanol has emerged as a potential alternative to fossil fuels, both as fuel as well as feedstock for various industries Ethanol in India is obtained from molasses and is also imported whenever there is shortfall in the country. However, the landed cost of the same is higher than the domestically produced ethanol. In 2003, the Government of India came out with a Policy known as the EBP programme which mandated the use of 5 percent ethanol in petrol. Prior to the introduction of EBP Programme, ethanol was primarily used by potable liquor industry and as a feedstock in chemical industry. The chemical industry, for commercial reasons prefers indigenous ethanol because it is cheaper than the imported ethanol. The IP has expressed a concern that the availability of molasses is limited and therefore ethanol would be in short supply in India. Ethanol is primarily used in India for the following purpose:

(a) Use a potable liquor by diluting and blending etc;

(b) Industrial use for production of various chemicals;

(c) Blending with motor spirit (petrol) and use as a fuel since introduction of EBP programme in 2003.

According to the informant, India's ethanol production is not enough to meet the existing requirements of the various users including potable liquor, as a feedstock by the chemical industry and as fuel. A further widening of the demand supply gap can result due to blending of ethanol in petrol, thus squeezing the supply of ethanol to alcohol-based chemical industry.

3. The first phase of implementation of EBP began in 2006. A three-year programme was devised and single or joint tender were invited by Government owned Oil Marketing Companies (OMCs) from manufacturers of ethanol. The joint or single tenders were invited first in 2006 for supply of

indigenous ethanol to various Depots/Terminals of IOCL/BPCL/HPCL/IBP in State of Uttar Pradesh for a period of three years with effect from 15th October, 2006. It has been submitted that a single or joint tender was once again floated by the OMCs, excluding IBP, in 2009 on the advice of the Ministry of Petroleum. According to the informant, it has been learnt that the L1 bidder had quoted a price of Rs. 21.50/litre for supply of ethanol to the OMCs and the L1 bidder was not in a position to supply the entire requirement of the OMCs. Therefore, under the terms of the tender other bidders were required to supply their offered quantities at the negotiated price.

4. It was alleged by the informant that joint tendering by four OMCs is an agreement between horizontal players to procure ethanol from various suppliers. These suppliers too are players in horizontal relationship being sugar mill owners. Besides the above, the OMCs reserved the right to divide the bids at their sole discretion which clearly breaches the provisions of section 3(3)(a), (b) and (c) of the Competition Act, 2002 ("Act") and such a business misconduct in all probability were potentially prone to cause appreciable adverse effect on competition within India in the supply and distribution of ethanol. The intent of the operation of the supply arising out of the joint tender was to run till October 2010, much beyond the period after the Competition was brought into force in India.

5. It was stated that fixing of price of ethanol was discussed the Indian Sugar Mills Association (ISMA) meetings and it was decided that the price would be Rs. 27/- per litre. This price was fixed in meeting in New Delhi on 13.5.2010. The informant has annexed the copy of the minutes of the said meeting as Annexure 6 to its information. Subsequently, this cartel of sugar producers under the garb of Sugar Mills Association moved the Ministry of Petroleum, Ministry of Food and Consumer Affairs so that administrative direction could be issued by the Union ministries to the OMCs.

6. It was stated that sale of ethanol by sugar mills to the OMCs was a commercial activity and could not be considered a sovereign function of the Union Ministries. It was stated that Delhi High Court had held that Indian Railways was an enterprise under section 2(h) of the Act. It was further argued that sugar industry is a cyclical industry. As a result of this, there was a drop in the output of sugar in certain years and that this led to a corresponding drop in the production of ethanol.

7. The other issue which was raised was the issue of price. It was stated that Indian Sugar Mills Association continued lobbying with the group of minister and finally succeeded getting the price of ethanol fixed at Rs. 27/- per litre. In the ISMA's minutes of meeting held on 21.12.2009 there is evidence of admission by the OMCs that the total supply of ethanol in India would meet only 40% of the total demand. It was stated that the Indian Chemical Industry was fully dependent on the supply of Ethanol whereas the EBP Programme was an ancillary commercial activity of the OMCs. It was further argued that due to the collusive action of the sugar ministry the price of ethanol in the Indian market would go up and would drive the ethanol based Indian Chemical industry out of the market. The informant has also brought on record a copy of the minutes of ISMA held on 22.11.2011 wherein President of ISMA wanted to know from the members the sugar industry as to whether they refused to sign contracts with the OMCs for the supply of ethanol till the final price was fixed. It has been stated by the informant that the association wanted to jack pressure on the government to get the price of ethanol fixed and enforced. ISMA also wanted to stop the supply of ethanol to the OMCs since the price suggested by ISMA was not approved by the government. It was further argued that ISMA and National Federation of Surgar Cooperative Ltd. represented the entire sugar industry and therefore these two association together wanted a price to be fixed at Rs. 27/- per litre of ethanol.

8. It was stated by the informant that the National Policy of Biofuels is gazetted by the Government of India in 2003 and it stipulated that the sugar and distillery industry would be further encouraged to augment production of ethanol. This was due to the blending requirements from time to time while ensuring that these do not in any manner create supply constraints in production of sugar or availability of ethanol for industrial use. The National Policy also stated that the minimum purchase price of bio-ethanol would be based on the actual cost of production and import price of bio-ethanol. It was also stated by the informant that as the price fixed for ethanol of Rs. 27/- per litre and the import price of ethanol was much higher and than that Chemical Industry in India would suffer. It was argued that the administered price mechanism (APM) for fixing oil prices had been dismantled w.e.f. 1.4.2002. It was therefore stated that by fixing the price of ethanol the private oil marketing companies would be deprived of ethanol as the price would be higher. This was stated to be unfair and discriminatory between the PSU OMCs and private OMCs. It was stated that the CCEA press release categorically imposed a penalty on both the supplier sugar factories engaged in production of ethanol in case they failed to meet the target and also imposed similar stringent conditions upon the OMCs in case they failed to lift the contracted quantity. This penal conditions forced the parties to the agreement to continue to deal with the pre-fixed price of ethanol clearly devoid of any free market concept and also prohibits ethanol manufacturers to freely supply ethanol to the chemical industry. Further the directive of CCEA distinguishes between public OMCs and private OMCs. It was argued that the price of ethanol should be market determined and should not be the administered price. On the other hand the Petroleum Ministry had suggested that as ethanol was not available in plenty and as due to the high price of ethanol it was not economical to mix petrol with ethanol, the programme should be scrapped.

9. The informant then referred to a meeting of ISMA held on 14.10.2009 wherein the Committee was set up to review the position in respect of tenders issued by OMCs. A member of the Committee had a conference call with all the members of ISMA, regarding the pricing of ethanol for submission in the tenders. The Committee had reported that the members of ISMA generally quoted a price above Rs. 25/ per litre of ethanol ex-factory except in two cases, where Rs. 21.50 per litre was quoted. The Committee also informed the members of the ISMA that OMCs had approached the Ministry for revising the purchase price upward and as soon as a decision was taken and then the OMCs could finalise the tender. The Committee Members of the ISMA also reported that a committee had been constituted for the implementation of EBP programme which had recommended the purchase price of ethanol at Rs. 27/- per litre for a period of three years. The Committee Members also reported that the Department of Chemicals had objected to fixing of ethanol price at Rs. 27/- per litre.

10. It was stated that a perusal of the facts showed that there was a communication between members of ISMA before the submission of tenders by OMCs and that the members of the ISMA had acted like a cartel in fixing the price of ethanol. This was stated to be in violation of section 3(3)(a) of the Competition Act. It was further stated that the circular of ISMA dated 23.11.2011 highlighted the price of ethanol for EBP programme and indicated a joint decision along with NFCSF to close sugar mills and stop operations for one day in the third week of December. It was stated that this was a indication of jointly restricting production for one day. Further in this meeting it was decided that the price of ethanol be revised upward from Rs.27/- to Rs. 33/- per litre. A copy of the minutes of the meeting was enclosed by the informant. This was also stated to be in violation of section 3(3)(b) of Competition Act.

11. A perusal of the facts showed that the three PSU OMCs i.e. IOC, BPCL and HPCL had a combined market share of 75% and that they had fixed a price at which they were willing to buy ethanol. But as the price offered by the ethanol producers was higher than what they had fixed, the OMCs took up the issue with the Ministry of Petroleum so that the procurement price of ethanol be increased. The very action of the PSU OMCs of fixing a price for the procurement of ethanol is anti-competitive in terms of the Competition Act. In fact on similar facts of fixing of prices by wheat cartel also known as Trusts, the Sharman Act in the USA was enacted.

12. It was further argued that due to the purchase of ethanol by the OMCs many chemical units dependent on ethanol had to close down or had to review capacity utilization. It was further stated that as the private OMCs were not involved in the EBP programme the monopoly of public OMCs continued. It was also argued that the sugar mill owners had complete control of molasses and were able to operate independently within entire India since no competitor of this product existed in India. It was also stated that the joint tender by the OMCs of ethanol at a minimum floor price of Rs. 27 per litre fixed by sugar industry through the aegis of trade associations is implantation of price-fixing decision of the sugar industry. It was stated that the sugar industry for fixing price of ethanol had been exercising unfair and discriminatory condition of price and also using its position of dominance in the relevant product market of ethanol and had been entering into another relevant product market i.e. petroleum market and protecting the latter market which is an unambiguous act of 'abuse of dominant position' in terms of Sections 4(2)(a) and (e) of the Act. It was therefore stated that it was not only the sugar industry which fixed the price but that the PSU OMCs had also been continuing with the anti competitive conduct unabated over the years.

13. Considering the facts of the case, on prima facie basis there is material to hold that the OMCs in fixing the purchase price of ethanol have contravened to provisions of section 3(3)(a) of the Competition Act. Therefore an investigation against the OMCs is considered necessary for the purpose of ascertaining the correct facts. As far as the sugar industry represented by ISMA and NFCSF are concerned they also have fixed the price of ethanol by lobbying with the government that the price of procurement of ethanol should be Rs. 27/- per litre. This also is a case of price fixing in contravention of section 3(3)(a) of the Act and may be an operation of a cartel. Further these two associations and the sugar mills had threatened to go on strike, if the price was not increased to Rs. 27/- per litre. Thus there may a violation of section 3(3)(b) of the Competition Act. There appears to be an abuse of dominance by OMCs as well as by the two sugar mills associations.

14. The temporary fixing of price of ethanol by the Cabinet Committee on Economic Affairs (CCEA) raises competition concerns. There is no agreement between Sugar Mill owners and CCEA. CCEA fixed the price of Rs. 27/- till an expert body decided as to what price would be. A decision by the CCEA is not a policy decision of the government because a policy decision of the government has to be made in accordance with the Article 72 of the Constitution and published in the Gazette of India under Article 73 of the Constitution. It is an administrative direction of CCEA which would be in operation till the expert body decides as to what the price would be of ethanol.

15. It has been held in Appeal No. 50 of 2009 by the Appellate Tribunal for Electricity in its order dated 5.10.2009 that administrative instructions issued by one limb of government would not be a policy decision. Further in the case of Lucknow Development Authority vs. M. K. Gupta 1994 AIR 787

1994 SCC (1) 243, the Supreme Court while deciding the issue in protection of Consumer Act 1986 held as follows:

> *"Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law. Each hierarchy in the Act is empowered to entertain a complaint by the consumer for value of the goods or services and compensation."*

Therefore the Commission is not constrained from looking into Competition concerns which arise either from administrative orders or the powers exercised under a statute.

16. In any case the issue before us is not the issue of fixing the prices by the CCEA but the anti competitive behaviour of the Sugar Mill owners as well as the OMCs. The behaviour of both the sets of enterprises appears to be a cartelized behaviour in violation of Section 3(3) of the Competition Act. Further, by the action of these set of enterprises the price of ethanol which is around Rs. 21/- per litre would go up to Rs. 27/- per litre having adverse effect on competition in India, both for the chemical industry and the liquor industry in India. The fixing of price would lead to high prices of ethanol which would not be in the interest of consumers. It is for the market to fix

the price and if two different cartels agree to fix a price it is anti competitive behaviour which requires to be investigated.

17. The DG therefore is directed to investigate this issue and submit a report to the Commission.

18. Secretary is directed to send a copy of the order and all the relevant material to DG.

sd/-

(R. Prasad)
Member