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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 16 of 2019

In Re:

M/s Maa Metakani Rice Industries
Represented through Shri Puneet Jhunjhunwala, Partner
Jhunjhunwala House, Nandapada,
Sambalpur – 768001
Odisha

Informant

And

State of Odisha

represented through
Commissioner-cum-Secretary,
Food Supplies & Consumer Welfare Department, Government of Odisha,
Odisha State Secretariat, Sachivalaya Marg,
Unit-2, Keshari Nagar,
Bhubaneshwar- 751001,
Odisha

Opposite Party No. 1

Odisha State Civil Supplies Corporation Ltd.

C/2, Nayapalli
Bhubaneshwar- 751012
Odisha
Also at:
Kacheri Road, Sambalpur- 768001, Odisha

Opposite Party No. 2

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member



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Appearances:

For Informant

Mr. Prabhu Prasanna Behera, Advocate
Mr. Abhishek Choudhary, Advocate
Mr. Puneet Jhunjunwala, Partner (M/s Maa
Metakani Rice Industries)

For State of Odisha (Food
Supply & Consumer Welfare
Department)

None

For Odisha State Civil Supplies
Corporation Ltd. (OSCSCL)

Mr. Rahul Tyagi, Advocate
Ms. Shruti Manchanda, Advocate
Ms. Jigyan Mishra, Manager (Law)

Order under Section 27 of the Competition Act, 2002

1. The Information in the present case was filed by M/s. Maa Metakani Rice Industries, a registered partnership firm represented by its partner Mr. Puneet Jhunjunwala (hereinafter, '**Informant**') on 07.05.2019 under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, '**Act**') alleging contravention of the relevant provisions of Section 4 of the Act, by the State of Odisha, represented through Commissioner-cum-Secretary, Food Supply & Consumer Welfare Department (FS & CW Department), Government of Odisha (hereinafter, '**Opposite Party No. 1/OP-1**') and Odisha State Civil Supplies Corporation Ltd. (hereinafter, '**Opposite Party No. 2/OP-2**'); collectively referred to as '**Opposite Parties/OPs**').

Background (in brief):

2. The Informant is in the business of rice (paddy) milling, production of rice, broken rice, bran, *etc.*, and sale thereof, and acts as Custom Milling Agent of OP-2 for the aforesaid purpose and also undertakes custom milling for the Food Corporation of India ('**FCI**'), National Collateral Management Services Limited ('**NCMSL**'), Orissa State Cooperative Marketing Federation Limited ('**MARKFED**'), Tribal Development Cooperative Corporation of Odisha Limited ('**TDCCOL**') and other Government Agencies.
3. According to the Informant, OP-2 was established on 03.09.1980 as a company under the erstwhile Companies Act, 1956, and is fully owned by the Government of Odisha. It has



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been stated that OP-2 is the largest agency involved in paddy procurement in the State of Odisha. It is further stated that all the rice mills in the State including that of the Informant, are totally dependent on OP-2 to run their rice mills.

4. The procurement is open-ended and carried out at Minimum Support Price ('MSP'), conforming to the quality specifications prescribed by the Government of India, and is purchased by Government agencies, including the FCI for central pool. Custom Milled Rice ('CMR') is manufactured by milling the paddy procured by State Government/State agencies and FCI.
5. The State of Odisha has been procuring paddy from farmers since the Kharif Marketing Season ('KMS') 2003–04. The season starts from 1st October and continues till 30th September of the following year. Two crops of paddy are cultivated in a KMS, namely, Kharif and Rabi. OP-1 is stated to play a significant role in supporting the activities of OP-2 by providing subsidies to recompense for its losses on account of procurement and milling.
6. The Informant entered into an agreement with OP-2 on 23.11.2015 for custom milling of paddy for the KMS 2015–16 (hereinafter, 'Agreement'). Clauses 25 and 26 of the Agreement provided for Standard Fire Insurance coverage of the stock of OP-2 kept and maintained at the custom miller's premises, *vis-à-vis* the Informant.
7. As per the Informant, the salient features of the insurance coverage clauses under the Agreement are as follows:
 - 7.1. OP-2 is responsible, on behalf of the custom miller, for taking out a comprehensive fire floater insurance policy for its stock. The Informant is required to pay a proportionate Insurance premium as decided by OP-2.
 - 7.2. The custom miller shall be responsible for any damage/deterioration in the quality of paddy belonging to OP-2 due to unsafe and unscientific storage by the miller.
8. During the said period, as per requirement, OP-2 purchased the Standard Fire Floater Declaration Policy, effective from 01.12.2015 to 30.11.2016. The Informant has alleged that neither the terms and conditions of the said policy nor a copy of insurance policy was



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- provided by OP-2 to the Informant, though part of premium was being collected from the Informant by OP-2.
9. As stated by the Informant, on 04.08.2016, OP-2's stock at the Informant's premises were damaged due to flood/inundation in the mill premises of the Informant caused by heavy rains. The Informant is stated to have taken all necessary steps for safeguarding the stock and fully cooperated with OP-2 in this regard. The final survey report assessed the net adjusted loss of stock at ₹87,15,892.76.
 10. The Informant alleged that, after completion of KMS 2015–16, the custom milling dues of the Informant were withheld by OP-2. The Informant was allowed to participate in custom milling for KMS 2016–17, but outstanding payments for 2015–16 were not released, and the total custom milling dues payable by OP-2 for the KMS 2015–16 and 2016–17 were approximately ₹1,20,00,000/-.
 11. The Informant stated that it approached OP-2 several times to release its dues. However, as per the Informant, OP-2 verbally communicated that the CMR dues of the Informant could not be released as the claims on account of the aforementioned loss of stock had not been settled by the insurance company, *i.e.*, New India Assurance Company Ltd.
 12. The Informant alleged that, after several attempts to realise its dues from OP-2, the Informant filed a consumer complaint, CC No. 96/2017, before the learned State Consumer Disputes Redressal Commission, Cuttack ('SCDRC') on 25.09.2017 against the said insurance company and OP-2, *inter alia*, praying to direct the insurance company to settle the claim as per the surveyor's reports and release payment to OP-2. The Informant also filed an application being Misc. Case No. 987/2017, against OP-2 before the SCDRC in CC No. 96/2017, seeking release of all pending dues of the Informant.
 13. After filing the said consumer complaint, OP-2 released certain amounts (₹33,73,980/-) but still withheld prior CMR dues to the tune of ₹85 lakhs (approximately). On 22.12.2017, the insurance company repudiated the insurance claim of OP-2. In Misc. Case No. 987/2017, SCDRC, *vide* order dated 27.12.2017, directed OP-2 to release payment of ₹83 lakhs towards CMR dues to the Informant within a period of two weeks pending adjudication of the case. As no dues were released by OP-2, the Informant filed



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an execution petition before SCDRC. Thereafter, OP-2 and the insurance company filed appeals before the Hon'ble National Consumer Disputes Redressal Commission ('NCDRC') against SCDRC's order dated 27.12.2017, which was stayed on 02.08.2018 and is pending adjudication before the same. The Informant had also filed a Misc. Case No. 1118/2018 (arising out of CC no. 96/2017) before the SCDRC with a prayer that OP-2 release the milling dues, pending finalisation of the insurance claim, subject to the Informant furnishing an equivalent bank guarantee of approximately ₹83 lakhs.

14. With respect to the repudiation action taken by the insurance company, OP-2 replied to the same *vide* its letter dated 08.03.2018, wherein, according to the Informant, OP-2 had allegedly admitted that the Informant had not violated any norms nor was any fault attributable to it.
15. As per the Informant, OP-2 also debarred it from participation in Rabi Paddy procurement and CMR operations for KMS 2017–18, which commenced from 14.05.2018 in the district of Sambalpur, citing slow delivery of CMR by the Informant. However, the Informant was not provided any specific document stating the grounds for its debarment. The Informant alleged that there was no prior intimation of criteria for the selection of custom millers for Rabi season for KMS 2017–18 and criteria was only issued on 28.04.2018, with the deadline for completion set on 30.04.2018. The Informant, *inter alia*, made a representation *vide* letter dated 30.04.2018, which was totally ignored and no reply was provided.
16. Further, according to the Informant, All Odisha Rice Millers Association ('AORMA') wrote a letter dated 06.11.2018 highlighting issues of non-payment of arrears, lack of framing of suitable policy, *etc.*, and all the millers refused to enter into any agreement for KMS 2018–19 with OP-2. The Informant alleged that millers were threatened, *vide* letter dated 22.11.2018, that differential custody and maintenance charges arising out of revised duration pertaining to KMS 2017–18 would not be paid unless they executed an agreement for KMS 2018–19 to participate in procurement.
17. The Informant alleged that it was forced to enter into an agreement with OP-2 for custom milling for KMS 2018–19. The Informant alleged that the said action of OP-2 is an abuse



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- of dominant position and the letter dated 22.11.2018 created an anti-competitive environment, resulting in ousting of players from the market.
18. The Informant is, thus, aggrieved by the fact that OP-2 is directly and/or indirectly imposing unfair and discriminatory conditions in purchase of service from the Informant and acting in an exploitative and exclusionary manner, due to which the Informant and other millers are suffering substantial economic hardship. Further, OP-2, by adopting high-handed approach, thus, delayed the settlement of the CMR dues, and also not settled the claim with the insurance company and paid off the legitimate dues of the Informant.
19. Accordingly, the Informant prayed, *inter alia*, to the Commission that an inquiry be made into the matter and direct OP-2 to discontinue abuse of its dominant position. It further prayed that OP-2 be directed to pay all pending dues of KMS for the period 2015–16 and 2016–17, amounting to ₹85 lakhs along with interest @18% per annum w.e.f. 2015 and the cost of litigation of ₹2 lakhs.
20. After considering the information, the Commission called both the Informant and OP-2 for a preliminary conference on 03.09.2019. However, OP-2 neither appeared for the preliminary conference nor filed response to the information, as directed. After hearing the Informant in the preliminary conference, the Commission decided to pass an appropriate order in due course.

Directions to the Director General (DG):

21. The Commission, after considering the material on record, *vide* order dated 01.11.2019 passed under Section 26(1) of the Act, directed an investigation into the matter against the OPs under the provisions of Section 4 of the Act. While giving directions to the DG for investigation, the Commission had *prima facie* noted that, *inter alia*, OP-2 was a dominant entity in the delineated relevant market of ‘*procurement of custom milling services for rice in the State of Odisha*’ and further noted that the allegations against OP-2 of non-settlement and withholding of dues for KMS 2015–16 and 2016–17 of the Informant, threatening of millers by letter dated 22.11.2018, arbitrary disclosure of criteria *vide* letter dated 28.04.2018 for participation in Rabi season of KMS 2017–18 and issues like non-clearance of dues/arrears, *etc.* merit investigation.



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22. The DG, after due extensions, completed the investigation in the matter and submitted the investigation report to the Commission on 30.09.2020 (“**Investigation Report**”).

Investigation by the DG:

23. For examination of the allegations and investigation of issues involved in the matter, the DG collected information from the Informant, the Opposite Parties and various third parties such as AORMA, NAFED, MARKFED, TDCOOL, FCI, etc.
24. The DG identified the following issues for the purposes of the investigation:
1. *Whether OP-1 and OP-2 are ‘enterprises’ as per Section 2 (h) of the Act?*
 2. *What is the Relevant Product and Geographic Market?*
 3. *Whether the OPs are dominant players in the identified Relevant Market?*
 4. *Whether the conduct of OPs tantamount to abuse of dominant position as per Section 4 of the Act?*
25. With respect to issue no. 1, the DG found that OP-1 is engaged in the formulation and implementation of policies, regulations and guidelines and for matters incidental and ancillary to the food supplies and consumer welfare sector in the State of Odisha. OP-1 is the nodal department in the State of Odisha for the implementation of the Decentralised Procurement System (DCP) of the Government of India for procuring foodgrains such as rice and wheat towards its objective of food security in the State. Under its mandate towards the implantation of DCP, OP-1 issues guidelines in the form of Food and Procurement Policy every year for the procurement, processing and distribution of foodgrains for the Public Distribution System (PDS) in the State. After examining the modalities of the Food and Procurement Policy, the DG found that the issuance of the Food and Procurement Policy, when considered holistically, is in the nature of non-delegable and inalienable function of the State, which is in a sovereign domain. Thus, OP-1 does not fall under the definition of ‘enterprise’ as defined under Section 2(h) of the Act. Further, the DG observed that OP-2 is a company registered under the Companies Act, 1956 (now Companies Act, 2013), and its main activities are the procurement of paddy and storage, transportation and distribution of rice and wheat under Targeted Public Distribution System (TPDS). After further examination of its activities under



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Operational Guidelines issued by OP-2, the DG found that, though OP-2 operates on a no profit no loss basis, yet the absence of profit motive would not result in its activities falling outside the purview of the provisions of Section 2(h) of the Act. Thus, the DG concluded that OP-2 is involved in commercial activities of procurement of paddy, distribution of and delivery of CMR through PDS in the State of Odisha and would fall under the definition of 'enterprise'.

26. As regards issue no. 2, the DG observed that OP-2, being the procurer/consumer of rice milling services, lies on the demand side while the Informant is on the supply side. While determining the relevant product market, the DG examined the relevant cases, wherein the Commission had delineated the relevant product 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 product as well as geographies. After examining the entire ecosystem, beginning from the procurement of paddy to its milling into rice and its distribution through PDS in the State of Odisha along with the relevant factors, the DG concluded that custom milling of rice is a specified and regulated activity undertaken by the notified agencies of the state by employing custom millers. The custom millers predominantly have micro and small mills, and their options to switch to alternate opportunities outside custom milling are very limited. Based on the observations, the DG delineated the relevant product market as '*the market for procurement of Custom Milling Services*'.
27. While determining the relevant Geographic Market, the DG analysed various factors under Section 19(6) of the Act, such as regulatory limitations and costs of transportation, and observed that the Custom Milling Order, 2016 of the Government of Odisha extends to the whole of the State of Odisha, and every custom miller is governed by the said order. After examining the related operational guidelines and policy, the DG concluded that a custom miller can only provide its services to the agencies notified in the regulations inside the geographical boundaries of the State of Odisha. Another factor considered by the DG was the transportation cost. The DG observed that the proximity of a custom miller to the paddy producing and procurement area is an essential requirement. Having considered the above said factors, the DG delineated the Relevant Geographic Market as



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‘State of Odisha’. Thus, the DG delineated the relevant market as ‘market for procurement of custom milling services for rice in State of Odisha’.

28. The third issue determined by the DG was whether OP-2 is a dominant player in the identified Relevant Market for which various factors provided under Section 19(4) of the Act were analysed by the DG. First, the DG scrutinised the relevant regulations to assess dominance, and it was observed that Custom Milling Order, 2016 prescribes OP-2 as one of the Procuring Agencies for purchasing paddy from farmers directly or through a sub agency. While referring to clauses 4 and 4.1 of the Food and Procurement Policy for KMS 2015–16, it was observed that OP-2, on behalf of the Government of Odisha, procures paddy, mills it through custom millers and uses the milled rice to meet the needs of the State’s PDS. The DG opined that, as per government regulations and policy, OP-2 has been a significant entity in the procurement of paddy for Custom Milling of Rice in the State of Odisha.
29. Further, the DG analysed the strength of OP-2 from the perspective of size and resources. It was observed from the profit and loss statement of OP-2 that it had received an amount of ₹54,07,56,65,543/- and ₹55,62,88,32,115/- as subsidy from the State Government during Financial Years 2015–16 and 2016–17 respectively. Thus, OP-2 depends on subsidies from the government to run its operations.
30. The DG also analysed the market share of OP-2. For the assessment of its market share *vis-à-vis* other enterprises in the delineated relevant market, data was evaluated with respect to procurement of paddy and rice by various State agencies in the State of Odisha during the period 2014–15 to 2018–19. Based on the same, the DG opined that OP-2 had procured between 94–99% of the total government procurement of paddy in the State of Odisha. As the majority of government procurement of paddy is made by OP-2, the relevant market is also inclined in favour of OP-2. The Herfindahl-Hirschman Index (HHI) value varies from 9025 in KMS 2015–16 to 9802 in KMS 2018–19 which reflects that OP-2 has been enjoying substantial market power in the State of Odisha.
31. Then, the DG analysed the data of various procurement agencies in engaging custom millers during KMS 2015–16 to 2018–19, as depicted in Table A below, which clearly indicates that OP-2 is dominant in engaging custom millers during Kharif and Rabi



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seasons. Thus, the DG concluded that OP-2 is not only a dominant player but its dominance is near monopoly.

Table A: Custom Millers Engaged by Various Agencies

Agency	2015–16		2016–17		2017–18		2018–19	
	Kharif	Rabi	Kharif	Rabi	Kharif	Rabi	Kharif	Rabi
OSCSC	1280	415	1285	472	1284	423	1306	442
FCI	2	0	1	0	2	0	0	0
MARKFED	174	29	144	74	153	34	68	0
NAFED	0	0	0	0	0	0	0	0
TDCOL	93	3	31	21	27	0	0	0
NACOF	69	16	0	0	0	0	0	0

32. The DG compared the Revenue/Turnover of competitors of OP-2, such as TDCCOL, FCI (for Odisha region); MARKFED, Odisha; and NAFED, Odisha, with OP-2 for the period 2014–15 to 2016–17. Based on this data, the DG observed that the competitors do not have comparable resources to OP-2. The role of competitors in the State of Odisha is limited and they only play a supporting role to the primacy of OP-2. Thus, the DG concluded that OP-2 has a commanding presence and overwhelming dominance in the Relevant Market.
33. The DG observed that OP-2 has its presence in all three verticals of procurement, milling and distribution, and is completely vertically integrated to fulfil the objective of the Government for Food Security for the state. As per the information received from MSME Odisha, the DG observed that nearly 80% of the millers in the state of Odisha are exclusively undertaking custom milling and are totally dependent on custom milling for their business, of which 96% of rice mills are Micro and Small units covering 94% of the total rice milling capacity in the state.
34. Having analysed the above factors, the DG found that OP-2 enjoys a near total dominance in the identified relevant market.
35. After finding OP-2’s dominance in the identified relevant market, the DG delved into the examination of alleged abuses by OP-2.
36. The DG first examined the non-settlement and consequent withholding of custom milling rice dues of the Informant for KMS 2015–16 and 2016–17. The DG examined the facts



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of the case in relation to this issue and thereafter, considered the reply dated 09.01.2020 filed by OP-2 before it. After examination, the DG observed that admittedly OP-2 withheld the custom milling dues of the Informant amounting to ₹1.20 crores without informing any reasons. An amount of ₹33,73,980/- was released by OP-2 only after filing the consumer complaint but had withheld the remaining CMR dues. As per the order dated 27.12.2017, in Misc. Case nos. 1529/2017 and 987/2017, OP-2 had admitted that it withheld the CMR dues of ₹83 lakhs of the Informant till the finalisation of the insurance claim. The SCDRC in the said order, dated 27.12.2017, had directed OP-2 to release the withheld dues of the Informant, as OP-2 *'has not made any cogent ground to resist payment of custom milling charges to the complainant'*. The DG also found that OP-2, *vide* its letter dated 08.03.2018 to the insurance company, had unequivocally stated that all compliances with respect to documents, records and clarifications had been submitted numerous times, and the insurance company was in gross violation of the terms and conditions of the service agreement executed with OP-2.

37. In view of the above position of the parties involved, the DG concluded that the issue basically involves dispute between two parties for release of payment as per contractual terms, and an appropriate forum to agitate such matter would be SCDRC under the Consumer Protection Act, 1986. Thus, the DG concluded that such conduct of OP-2 is not an abuse of its dominant position in the relevant market as per the provisions of Section 4 of the Act.
38. The DG then examined the alleged abuse of arbitrarily disclosing the criteria for selection of custom millers for participation in Rabi season KMS 2017–18 by OP-2. The DG examined OP-2's replies dated 09.01.2020 and 08.05.2020 as submitted to it. Based on the submissions made by the parties, the DG found that the policy guidelines of the Government of Odisha, operational guidelines issued by OP-2 and the custom milling agreement did not have any clause that clearly specified the criteria for eligibility for the Rabi season and the millers were informed about the same only towards the end of the Kharif season. The DG found that the criteria for Rabi KMS 2017–18 was abruptly modified from that was prescribed for Rabi KMS 2015–16 and 2016–17, *i.e.*, from 75% delivery of CMR to 100% CMR by 30.04.2018 for the districts of Bargarh, Kalahandi, Koraput, Naupada, Sambalpur and Subarnpur, which was intimated to millers on



28.04.2018. Thus, the DG observed that such unilateral modification of selection criteria was abrupt and its communication just before the Rabi season was unfair to the other stakeholders as it left very little time for a miller to plan and put additional resources for achieving the target for the Kharif season on the required security norms. Further, the DG observed that OP-2 did not pay heed to the letter dated 19.04.2018 of the Assistant Civil Supplies Officer, Sambalpur (ACSO) and the Informant's representation dated 30.04.2018, which informed that slow delivery by the Informant was due to its weak financial position as dues were withheld, there were frequent power cuts, disruption of mill due to expansion of National Highway, *etc.* The DG concluded that OP-2's actions in abruptly changing the selection criteria for the Rabi season of KMS 2017–18 and its communication just before the start of the season was unilateral and unfair *qua* millers, and deprived the millers including the Informant, of an opportunity to participate in Rabi procurement, resulting in loss of earnings. The DG, thus, found that the aforesaid conduct of OP-2 was an abuse of dominant position as per the provisions of Section 4(2)(a)(i) of the Act.

39. The DG investigated into the third alleged abuse of forceful signing of agreement by the millers by threatening that differential custody and maintenance charges arising out of KMS 2017–18 would not be paid to the millers unless they executed the agreement for KMS 2018–19. OP-2 submitted that a clear intention from the participant in the procurement season was required, in the absence of which, it cannot carry out its micro level planning of procurement. Therefore, such a letter was issued in order to ensure timely participation and lifting of paddy in a timebound manner. No force was applied and the millers applied pressure tactics. The DG, on examining the Policy Guidelines, Operational Guidelines and agreement with custom miller for 2017–18, concluded that no such clause was present, which stipulated withholding of dues of the miller for KMS 2017–18, till it provides its willingness or unwillingness to undertake custom milling for the next KMS 2018–19. A very transparent process had been prescribed in the policy document for a miller willing to undertake custom milling operation for OP-2. Thus, the DG found that the said action of OP-2 was unjustifiable and unfair as the differential custody and maintenance charges for KMS 2017–18 were already due to the millers, and to deny the same on any pretext was totally unfair and an abuse of its dominant position as per the provisions of Section 4(2)(a)(i) of the Act.



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40. Lastly, the DG delved into the alleged abuse of non-disclosure of charges for KMS, not properly reimbursing the charges incurred by millers and unilaterally reducing rates of some services. The DG first examined the issue of prior declaration of rates or their insertion in the agreement. The DG examined the letter dated 06.11.2018 of AORMA to all the Collectors in the State and AORMA's reply dated 16.03.2020 submitted to the DG, and opined that delay in intimation and settlement of custom millers' dues is a common issue concerning all the millers and has been continuing for some time. The DG reproduced the reply of OP-2 in this regard, wherein OP-2, in sum and substance, submitted that the cost of procurement operations under different incidentals is being fixed by the Government of India and communicated for each KMS under Provisional Economic Costing (PCS). The government allows reimbursement of incidentals incurred on procurement as per the rates allowed in the PCS, subject to compliance of guidelines, and hence, the rates of incidentals for reimbursement to custom millers for different services depend upon the communication of PCS. Since the entire procurement operation takes place under Government of India guidelines, the rates are communicated on receipt of PCS and approval of rates by Board of Directors/Government of Odisha. These are mandatory requirements. Based on the submissions, the DG concluded that rates cannot be declared prior to or inserted in the agreement or changed until they are duly communicated to OP-2. Thus, this conduct of OP-2 cannot be termed as unfair and an abuse of its dominance under the provisions of Section 4 of the Act.
41. Next, the DG examined the alleged abuse of not properly settling the dues of custom milling by OP-2. In this regard, the Informant submitted a reply dated 19.02.2018 from OP-2 to the draft notes issued by AG Odisha, highlighting OP-2's alleged abusive conduct. In the said reply, OP-2 had submitted that *'the custom millers as per agreement are to get their bills dues for the quantity of CMR delivered to OSCSC. Such bills dues of custom millers are supposed to be paid by OSCSC in the next month of delivery. For instance, for CMR delivered by the millers in the month of January, OSCSC is supposed to release their bill dues in February. But in actual such payment of bills is deferred for a period ranging from one month to 4 months and sometimes bills are released after 4 months even OSCSC have saved interest on such deferment.'*



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42. Thereafter, the DG sought OP-2's response on its claim of saving interest. In this regard, OP-2 submitted that this was in response to the audit para and was made in a different context and was generic in nature. OP-2 submitted that the terms and conditions for payment of miller dues is KMS specific and not same/identical for all KMS. Mere submission of bill does not *ipso facto* entitle the miller to receive the amount released by OP-2. It was observed by the DG that the Operational Guidelines and agreements for the years 2015–16, 2018–19 and 2019–20 did not stipulate any timelines for settlement of millers' bills/dues; however, Operational Guidelines issued by OP-2 for the years 2016–17 and 2017–18 prescribed that the bill submitted by millers would be settled within 15 days. Further, it was observed by the DG that the holding charges or penalty on custom millers for delayed delivery of CMR beyond the stipulated time, without any justifiable reason, did not find mention in all the Operational Guidelines issued by OP-2 from 2015–16 to 2019–20. Thus, the DG rejected the submissions of OP-2 in this regard and found that there was deliberate delay in the settlement of dues of custom millers with an objective to save interest on the outgoing amount and therefore, such conduct of OP-2 is arbitrary, unfair and an abuse of its dominance as per the provisions of Section 4(2)(a)(i) of the Act.

Consideration of the Investigation Report by the Commission:

43. On 10.11.2020, the Commission considered the Investigation Report of the DG and decided to forward it to the Informant and the Opposite Parties for filing their suggestions/objections, if any. The final date of hearing was fixed for 05.01.2021 through Video Conferencing mode (“VC”).
44. The Informant filed its objections/suggestions to the Investigation Report dated 21.12.2020 and rejoinder to OP-2's objections/suggestions to the Investigation Report dated 21.12.2020. OP-2 filed its objections/suggestions dated 11.12.2020.
45. On 29.12.2020, due to non-receipt of objections/suggestions of OP-1 and financial statements of OP-2, the Commission decided to postpone the final hearing of the parties on the Investigation Report in the matter to 19.01.2021.



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46. On 19.01.2021, with the consent of the parties, the Commission deferred the final hearing to 02.02.2021. On 02.02.2021, the parties made their detailed submissions before the Commission. The Commission also noted from the contents contained in letter no. 991 received from OP-1 dated 15.01.2021, that it had authorised Managing Director OSCSCL (OP-2) to represent the Principal Secretary to Government, FS & CW Department (OP-1) in the matter. It was stated therein that OP-1 was a proforma party in the matter, and the submissions of OP-2 may be treated as the submissions of OP-1 as well.
47. The Commission decided to hear the parties further on the Investigation Report on 04.03.2021.
48. On 04.03.2021, the Commission resumed the hearing. After hearing the parties, the Commission, on their request, granted them liberty to file their written submissions. The Informant and OP-2 filed their written submissions dated 22.03.2021 and 08.04.2021, respectively. The Commission considered the written submissions of the said parties on 15.06.2021 and decided to pass an appropriate order in due course.

Submissions of the Parties

49. In their objections and suggestions to the Investigation Report, during the oral hearings held on 02.02.2021 and 04.03.2021, and in their written arguments/submissions, the parties made the following submissions:

Informant:

50. The Informant accepted the findings of the DG as to enterprise, relevant market and the dominant position and its abuse found against OP-2. However, the Informant did not agree with the findings of the DG as to the issues of abuse and withholding of CMR dues for KMS 2015–16 and 2016–17 and non-disclosure and non-declaration of rates for milling and incidental charges.
51. The Informant submitted that the issue of withholding of legitimate dues of the Informant is completely distinct from the non-settlement of the insurance claim. The withholding of the admitted CMR dues in itself is an abuse of dominant position since the quantum of



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insurance and liability to pay can be decided by the consumer forum, but withholding of CMR dues, which is a subject matter here, can only be decided by the Commission, as the Informant is dependent upon OP-2 only for providing its services.

52. The remedies provided in the customer protection law are additional remedies.
53. OP-2 in its reply dated 08.03.2018 to the repudiation letter categorically mentioned that the Informant had committed no wrong as to safe and scientific storage. It is the admitted position of OP-2 that there was no violation of any norms by the Informant.
54. While referring to the physical verification report of the authorised officer dated 24.08.2016, the Informant submitted that there was no misappropriation/diversion and the paddy and rice had been stored safely, and therefore, the Informant cannot be penalised by OP-2 by withholding its legitimate dues. Even if the insurance company repudiated the claim, it did not warrant OP-2 the right to recover the loss from the Informant.
55. The SCDRC, *vide* order dated 27.07.2017, had already directed OP-2 to pay its admitted dues of ₹83 lakhs. The same is under challenge in appeal.
56. As regards the non-communication of rates to custom millers, the Informant submitted that the information/data shared by OP-2 was false and misleading and it received sufficient documents and information to substantiate that declaration of various rates prior to execution of agreement is a necessity for any contract. It is incorrect to state that the rates are communicated by the Government of India at a belated stage and only after the receipt of PCS, is the approval of rates by the Board of Directors sought. The rates communicated by the Government of India are provisional only, and OP-2 can fix rates as per the market rate.
57. It is unfair on the part of OP-2 to ask/force millers to execute the agreement without having informed the price/rate of charges. The rates are disclosed in most cases after the execution of work, which affects the right of the millers. The non-disclosure of consideration amount and rates violates the basic conditions of valid contract. The process is itself unfair and arbitrary, which makes the agreement bad in law.



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58. The Informant submitted that AORMA stated that OP-2 was misleading the Commission. The rates can be fixed and finalised as per market rates and actual profit margin. OP-2 neither specifically mentioned the date of notification of charges payable to millers for each item separately in respect of KMS nor stated the date of PCS issued by the Government of India for each KMS 2014–15 to 2018–19.
59. The Informant prayed that both withholding of custom CMR dues and non-disclosure of rates ought to be treated as abuse of dominant position.
60. In its rejoinder to OP-2's objections/suggestions, the Informant submitted that the Informant and the other millers were not informed about the criteria in any manner whatsoever that 100% delivery of CMR Kharif was mandatory for participating in the Rabi season. Moreover, the cut-off date for delivery of 100% CMR was never intimated earlier. OP-2 fixed the date for 100% delivery of CMR by itself two days before 30.04.2018. Therefore, the letter dated 28.04.2018 issued by OP-2 was in itself an abuse of the dominant position.
61. The submission of OP-2 that the shortfall in delivery (about 40%) could not be expected from the Informant to be completed within 15 days was based on wrong and prejudiced assumption. There were seven other millers with lesser delivery than the Informant who were allowed to participate. The Informant faced considerable difficulty in delivering the CMR due to illegal withholding of money of the Informant.
62. The conditions and threat as stated in letter dated 22.11.2018 restricted the players in the market from participating in the business.
63. In addition to the above, the Informant submitted that the stock is owned and insured by OP-2 and hence, it is the actual beneficiary of the insurance claim. Repudiation by the insurance company was never challenged by OP-2 in any manner whatsoever.
64. While referring to the contents of the letter of ACSO to the Collector, Sambalpur, dated 19.04.2018, the Informant submitted that there was high-handedness and arbitrariness from OP-2 in dealing with the Informant.



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65. The Informant also submitted that the criteria for delivering 100% CMR by 30.04.2018 as communicated *vide* letter dated 28.04.2018 was applicable only for the districts of Bargarh, Kalahandi, Koraput, Nuapada, Sambalpur and Subarnpur, whereas other districts had a different criterion, as reflected in the letter dated 30.04.2018. Thus, fixing different criteria in different districts by OP-2 was not only arbitrary but also an abuse of its dominant position. The submission of OP-2, that 100% CMR delivery was a normal practice, is entirely wrong and misleading.
66. OP-2 allowed several rice millers who had not achieved 100% CMR as on 30.04.2018, which is apparent from Sambalpur District Miller Control Account for KMS 2017–18 (Kharif). Out of 45 rice millers, 25 millers, including the Informant, had not achieved 100% CMR delivery. Barring the Informant, all other millers were allowed to participate in Rabi paddy procurement. Further, as on 30.06.2018, all the above millers of Sambalpur district, including the Informant, had achieved 100% CMR. However, the Informant, even after achieving delivery of 100% CMR, was not allowed to participate in Rabi season.

OP-2:

67. OP-2 submitted that the millers who participated in KMS 2017–18 were well aware that 100% delivery of CMR (Kharif) was mandatory for participating in Rabi season as it is depicted in letter dated 11.04.2018. As per the said letter, the Informant had delivered only 63.3% from the date of procurement, *i.e.*, from December 2017 (3 ½ months) and the remaining 40% could not have been expected to be delivered within 15 days and the Informant's request was only to gain time when the participation criterion was uniformly applied to all other millers. Hence, the disqualification of the miller to participate was as per guidelines which cannot be treated as an abuse dominant position.
68. While referring to the contents of letter dated 22.11.2018, OP-2 submitted that the millers were not pressurised to enter into the agreement. OP-2 had made it clear that the differential maintenance charges would be paid if the millers expressed their unwillingness to participate in writing and hence, no contingent was imposed. Rather, it



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was the millers who applied pressure tactics. OP-2 relied upon its written reply dated 09.01.2020 made during the investigation.

69. OP-2 submitted that it had never held up any bills without any genuine reason of any miller at any point of time. The terms and conditions for the payment of miller dues is KMS specific and are not same/identical for all KMS. As per clause 54.2 of the procurement guidelines for KMS 2015–16, payment to the miller is not on a monthly basis and is dependent upon delivery of rice in specified quantity. The release of bills to the custom millers is also subject to satisfactory performance of the millers. Hence, mere submission of bill does not *ipso facto* entitle the millers to get the amount released by OP-2. OP-2 always runs the risk of mis-appropriation of its paddy stock for which, while making payments to the millers, abundant caution is observed in the interest of OP-2 and the public at large. OP-2, in the past, incurred a loss of about ₹143 crores towards misappropriation of its stock by the custom millers taking advantage of receiving paddy more than the security norms.
70. OP-2 further submitted that the Commission had no jurisdiction to initiate proceedings against the OPs as OP-2 functions with the objective of ensuring welfare of the consumers of the State of Odisha through a wide network of public distribution system. Any agreements entered into with the millers are in pursuance of Food and Procurement Policy issued by the Government of Odisha. Hence, there is no scope on the part of OPs to impose, directly or indirectly, any unfair or discriminatory condition in the purchase of goods or services.
71. OP-2 submitted that an exhaustive agreement for KMS 2015–16 was entered into between the Informant and OP-2 containing the entire methodology, such as insurance, custody and maintenance, role of authorised officer and responsibilities of the Informant (custom miller). The clauses were prepared on the basis of the Food and Procurement Policy. As per the agreement, the procured stock remains under the joint custody of the Informant and OP-2. The paddy so delivered remains under safe and scientific storage by the Informant. OP-2, on behalf of the Informant, takes up the insurance against the stock delivered. It referred to clauses 25, 26 and 39 of the said agreement.



72. After gaining intimation of loss of stock from the Informant in 2016, the surveys were carried out. OP-2 submitted a claim to the insurance company *vide* memo dated 26.09.2016. While referring to a physical verification report dated 24.08.2016, OP-2 submitted that the officer nowhere verified/mentioned that, at the time of the incident, the stocks at the premises of the Informant was kept in a scientific and safe manner.
73. OP-2 referred to the repudiation letter of the insurance company dated 22.12.2017 and submitted that the actions/activities of the Informant were under dispute and the Informant was also the beneficiary of the claim. OP-2 extended all sort of cooperation as and when required by the Informant for the realisation of the claim money. For the same, consumer complaints are pending before consumer fora. It had been admitted by the Informant before SCDRC that, as per the terms and conditions of the Fire Floater Policy, the policy holder was OP-2 and the beneficiary of the policy was the Informant, since the risk in the policy undertaken by the insurance company covered the risk of the godown which belonged to the Informant. On 27.12.2017, SCDRC directed OP-2 to release payment of ₹83 lakhs towards CMR dues to the Informant. The same was challenged in appeal and the Hon'ble NCDRC stayed the operation of order dated 27.12.2017 on 02.08.2018.
74. OP-2 submitted that non-substantiating the cause of loss leads to unscientific storage, and the responsibility of the Informant would continue till total recovery of stock/cost is made and would not reduce the liability of the Informant to return the stock to OP-2, as is clear from clause 26(1) of the said agreement. Hence, OP-2 had withheld the Informant's bills against the milling and ancillary charges of ₹83 lakhs on invocation of clauses 25 to 28 of the said agreement, which clarified that the entire stock of paddy delivered to the Informant should be recouped through CMR after milling, and in case of shortage/damage/misappropriation, it is implied to recover the cost of the stocks by adjusting it out of the bills payable as per the set off clause of the agreement and the balance, if any, through depositing by the custom miller. Therefore, the non-settlement of the insurance claim involves disputes between the two parties for release of payment as per contractual terms. The same is *sub judice* before a competent forum which may grant/reject reliefs sought by the Informant.



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75. OP-2 submitted that since the quantity of procurement depends upon the conducive climate and availability of potential millers the same can only be assessed and estimated after completion of the Kharif season and accordingly, the participating criteria in Rabi procurement for the Rabi season is disclosed. Hence, declaration of guidelines for Rabi procurement cannot be said to be arbitrary. As per policy communicated *vide* letter dated 28.04.2018, even the custom miller who had completed delivery of CMR Kharif after 30.04.2018 could also participate in Rabi procurement for KMS 2017–18 in 1:3 security norms, subject to availability of Rabi paddy in the concerned district, as the Rabi procurement was limited for only two months, beyond which no Rabi paddy could be procured. Hence, disqualification of the Informant from participating in Rabi procurement 2017–18 was as per guidelines.
76. OP-2 submitted that there was no arbitrariness in criteria/policies for paddy procurement. They were framed to ensure timely delivery of Kharif CMR and secure sufficient milling capacity. Accordingly, the clearance/cut-off date had been fixed on 30.04.2018 for the districts, where Kharif procurement started in November, and it was the contractual obligation of the participant miller to clear delivery of Kharif CMR by 30.04.2018. The Informant was left with balance CMR for delivery of 10,484 Quintals as on 30.04.2018, for which general/universal debar provision was made applicable to the Informant. It was only after a prolonged follow-up by the district office, did the Informant deliver the remaining 40% of Kharif CMR for KMS 2017–18 on 29.06.2018, as reported by the Civil Supply Officer *vide* email dated 30.06.2018.
77. OP-2 submitted that the rates of incidentals to be paid to the custom millers for the services rendered for custom milling is dependent on economic costing issued by Government of India in each KMS. All the terms of the agreement between the custom millers and OP-2 are well within their knowledge. OP-2 had been carrying out the procurement, distribution and delivery of CMR in the State of Odisha for more than 20 years and had been dealing with more than 1200 millers for the larger public good. OP-2 supported the finding and reasons of the DG that there was no abuse in not prior declaring the various rates for milling or inserting the rates in the agreement.



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78. In response to the specific queries posed by the Commission to OP-2 *vide* order dated 04.03.2021, OP-2 provided the following information, which have been extracted in the following tables –

Table B1: Total Number of Millers for the KMS 2017–18

S. No.	District	No. of millers participated
		Below is the list of Custom Millers who own milling, participate in the same district in which they own their milling premises. At times, a custom miller owning mills in another district, participates in milling in another district
1.	Angul	7
2.	Balasore	22
3.	Bargarh	105
4.	Bhadrak	25
5.	Bolangir	58
6.	Boudh	9
7.	Cuttack	7
8.	Deogarh	2
9.	Dhenkanal	12
10.	Gajapati	46
11.	Ganjam	381
12.	Jagatsinghpur	1
13.	Jajpur	10
14.	Jharsuguda	10
15.	Kalahandi	77
16.	Kandhamal	1
17.	Kendrapara	20
18.	Keonjhar	12
19.	Khordha	20
20.	Koraput	86
21.	Malkangiri	21
22.	Mayurbhanj	13
23.	Nabarangpur	75
24.	Nayagarh	20
25.	Nuapada	24
26.	Puri	18
27.	Rayagada	106
28.	Sambalpur	54
29.	Subarnapur	39
30.	Sundargarh	14
	Total	1295



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**Table B2: Custom millers who delivered 100% CMR due for KMS 2017-18
(Kharif)**

S. No.	District	No. of millers participated
		Below is the list of Custom Millers who own milling, participate in the same district in which they own their milling premises. At times, a custom miller owning mills in another district, participates in milling in another district
1.	Angul	7
2.	Balasore	21
3.	Bargarh	103
4.	Bhadrak	25
5.	Bolangir	56
6.	Boudh	9
7.	Cuttack	7
8.	Deogarh	2
9.	Dhenkanal	12
10.	Gajapati	46
11.	Ganjam	381
12.	Jagatsinghpur	1
13.	Jajpur	10
14.	Jharsuguda	10
15.	Kalahandi	77
16.	Kandhamal	1
17.	Kendrapara	20
18.	Keonjhar	12
19.	Khordha	20
20.	Koraput	86
21.	Malkangiri	21
22.	Mayurbhanj	13
23.	Nabarangpur	72
24.	Nayagarh	20
25.	Nuapada	24
26.	Puri	18
27.	Rayagada	106
28.	Sambalpur	54
29.	Subarnapur	39
30.	Sundargarh	14
	Total	1284

**Table B3- Custom Millers who were allowed to undertake custom milling for Rabi KMS
2017-18**

S. No.	District	No. of millers participated
		Below is the list of Custom Millers who own milling, participate in the same district in which they own their milling premises.
1.	Angul	6



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2.	Balasore	19
3.	Bargarh	104
4.	Bolangir	13
5.	Boudh	3
6.	Cuttack	7
7.	Jajpur	3
8.	Jharsuguda	3
9.	Kalahandi	59
10.	Kandhamal	1
11.	Khordha	14
12.	Koraput	2
13.	Mayurbhanj	5
14.	Nabarangpur	20
15.	Nuapada	13
16.	Puri	18
17.	Rayagada	27
18.	Sambalpur	44
19.	Subarnapur	35
	Total	396

79. With reference to Table B3, OP-2 submitted that there are various reasons for the participation of 396 millers in KMS 2017–18. Firstly, some millers, despite delivering 100% CMR, are not able to participate, as mills of some custom millers like Koraput District are not suitable for the milling of Rabi paddy. Secondly, since the quantum of Rabi paddy is comparatively less than Kharif paddy, millers of the sub-divisions or nearest sub-divisions where Rabi paddy was procured are allowed to participate in Rabi and millers situated farther although in the same district like Rayagada district and delivered 100% Kharif rice, are not allowed.
80. On the aspect of issue of separate eligibility criteria for different districts, OP-2 submitted that, out of 30 districts in the State of Odisha, only 18 districts procure Rabi paddy. OP-2 submitted that, for Rabi procurement, OP-2 had issued guidelines on the eligibility of millers to participate *vide* letter dated 30.04.2018 (applicable for 12 districts—First Category) and letter dated 28.04.2018 (applicable for 6 districts, including district of Sambalpur—Second Category). OP-2 then submitted that procurement of Kharif paddy commenced late in districts for which letter dated 30.04.2018 was issued in comparison to the districts mentioned in the letter dated 28.04.2018. The millers falling in the second category are from highly procured districts, where procurement begins early, and hence, 100% delivery is mandatory. On the other hand, the millers in the first category were not



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in a position to deliver 100% of Kharif paddy when the Rabi season approached. OP-2 relied on the eligibility criteria for Rabi participation in different KMS years 2015–16, 2016–17 and 2017–18.

81. On the issue of policy/guidelines adopted by OP-2 for communicating the rates of CMR charges to millers, OP-2 reiterated its dependence on the communication of economic costing by the Government of India. The rates are then communicated to the District Managers for implementation who, in turn, inform the custom millers. The procurement of Kharif paddy starts from November in western 7-8 districts and from December in the remaining districts. The Kharif paddy is procured upto the following March and paddy under Rabi crop is procured (in some districts) during May and June. However, the millers deliver rice till the end of September/October. The rates are communicated in the course of procurement, milling and delivery of CMR. However, in exceptional cases of delay in receipt of economic costing, OP-2 declares the rate provisionally for payment to custom millers. OP-2 provided the information stating the dates when OP-2 received the intimation from the Government of India as regards various charges payable to custom millers and the dates on which OP-2 communicated to the Civil Supply Officer and District Managers of all 30 districts. OP-2 also developed an Online Billing Management System (OBMS) to facilitate quick processing and settlement of bills of custom millers.
82. With respect to the timing of communication of differential rates of custom milling charges to custom millers, OP-2 submitted that, usually, the Government of India announces a flat rate for the transportation of paddy from mandi to mill, and rate of custody and maintenance is charged for a maximum of three months, which is payable after completion of delivery of rice by the custom miller, *i.e.*, in the month of October/November every year; prior to this, the actual holding period of stocks by the miller cannot be ascertained. However, OP-2 pays *ad hoc* custody and maintenance charges in advance to the millers, and after completion of delivery and calculating the actual holding period by the millers, OP-2 pays the differential rates.
83. OP-2 finally submitted that all its function and operations are aimed at mitigating the maladies of hunger and poverty, owing to which there is no room for it to adopt any abuse of dominance practice and policy. OP-2 was established in 1980 with the sole objective



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of carrying out centralised, fair and transparent activity of timely milling and distribution of rice in the State of Odisha.

Analysis of the Commission:

84. The Commission has perused the information along with the documents, the Investigation Report of the DG and the respective submissions of the parties both oral and in writing in the present case.
85. With regard to the challenges to the jurisdiction of the Commission to entertain the information posed by OP-2, stating that it performs functions with the objective of the welfare of the consumers of the state through PDS, the said aspect is covered by the Commission while dealing with issue no. 1.
86. The Commission notes that the DG in its report framed the following four issues while investigating the matter —

Issue No. 1: Whether OP-1 and OP-2 are ‘enterprises’ as per the provisions of Section 2(h) of the Act?

Issue No. 2: What is the Relevant Product and Geographic Market?

Issue No. 3: Whether the OPs are dominant in the identified Relevant Market?

Issue No. 4: Whether the conduct of OPs tantamount to the abuse of their dominant position in the identified Relevant Market as per the provisions of Section 4 of the Act?

87. The Commission observes that neither in the statement of objections nor during the course of hearing did the parties advance arguments on issues No. 1, 2 and 3 nor did they raise any objections as to the findings of the DG in its report. Nevertheless, the Commission has independently examined the findings on these issues and is in agreement with the DG.
88. The Commission, at the outset, finds that the very nature of activities with regard to the issuance of the Food and Procurement Policy by the State cannot be termed as an economic activity, and consequently, OP-1, while laying down such a policy, cannot be



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said to be an ‘enterprise’ within the meaning of Section 2(h) of the Act. With regard to OP-2, the Commission notes that it is a corporate entity involved in the economic activity of the procurement of paddy and distribution of and delivery of CMR through PDS in the State of Odisha, and therefore, qualifies as an ‘enterprise’ within the contours of Section 2(h) of the Act, irrespective of the fact that whether such an activity is undertaken by OP-2 with or without an underlying profit motive. With regard to delineation of the Relevant Market, the Commission notes that the relevant market in the present matter is ‘*Market for procurement of custom milling services for rice in the State of Odisha*’, and OP-2 is a dominant enterprise, *inter alia*, on account of its market share coupled with its unparalleled size, the vast resources at its disposal and the substantial dependence of millers on OP-2 for their milling activity in the State of Odisha with respect to the procurement of custom milling services for rice.

89. After having examined the first three issues, the Commission notes that the DG framed the following sub-issues in relation to issue no. 4, as regards allegations of abuse of dominance by OP-2—

Issue No. 4 (i): *Whether OP-2 had abused its dominant position in the Relevant Market as per the provisions of Section 4 of the Act by non-settlement and consequent withholding the CMR dues of the Informant for KMS 2015–16 and 2016–17?*

Issue No. 4 (ii): *Whether arbitrary disclosing the criteria for selection of Custom Millers for participation in Rabi Season KMS 2017–18 by OP-2, vide its letter dated 28.04.2018 is an abuse of its dominant position in the Relevant Market, as per the provisions of Section 4 of the Act?*

Issue No. 4 (iii): *Whether threatening of Custom Millers that the differential custody and maintenance charges arising out of revised duration pertaining to KMS 2017–18 would not be paid to them unless they execute the agreement for KMS 2018–19, vide OP-2’s letter dated 22.11.2018, is an abuse of its dominant position in the Relevant Market, as per the provisions of Section 4 of the Act?*

Issue No. 4(iv)- *Whether by not timely disclosing the charges for KMS, not properly reimbursing the charge incurred by millers in providing services since last several years*



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and unilaterally reducing the rates of some services and whether the said conduct of OP-2 is an abuse of its dominant position in the Relevant Market, as per the provisions of Section 4 of the Act?

90. As regards issue no. 4 (i), the Commission notes that OP-2 justified its action of withholding the Informant's milling and ancillary charges amounting to ₹83 Lakhs on account of Clauses 25 to 28 of the Agreement for recouping the price of the entire stock of paddy delivered to the Informant. According to OP-2, if the targeted CMR is not delivered due to shortage/misappropriation/damage, it is implied the the cost of the stocks will be recovered in the shape of adjustment out of the bills payable as per the 'set off' clause of the agreement. OP-2 stated that the agreement is as per the policy guidelines mandated in the Food and Procurement Policy. As per the agreement, the paddy is delivered to the custom miller after procurement by OP-2 from farmers and is kept in the godown of the Informant and the Informant is liable for the safe and scientific storage/preservation of paddy stocks. While referring to Clause 26 of the agreement, OP-2 stated that the procured stock remains under the joint custody of the Informant and OP-2. OP-2 clarified that the paddy so delivered ought to remain under the safe and scientific storage of the Informant/custom miller, for which it is to be paid custody and maintenance charges. In August 2016, the stock was lost to flood, and after carrying out survey, OP-2 submitted a claim of ₹97.17 lakhs (approximately) to the insurance company. OP-2 relied upon the physical verification report dated 24.08.2016 and stated that the concerned officer had nowhere certified that, at the time of the incident, the stocks were kept in a scientific and safe manner at the Informant's premises. On 22.12.2017, the insurance company repudiated the claim on certain grounds which, according to OP-2, revealed that the actions/activities of the Informant were under dispute and the Informant was also the beneficiary of the claim, and till the total recovery of the stock/cost had not been made, the liability of the Informant would continue towards OP-2. OP-2 extended all sorts of cooperation to the Informant in realisation of claim money.
91. OP-2 submitted that the Informant approached the SCDRC, Cuttack, against OP-2 and the insurance company with a consumer complaint for the release of CMR dues for the loss of stock on account of flood/inundation in its rice mill premises. OP-2 further stated that, in the said consumer complaint, the Informant admitted that, as per the terms and



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conditions of the Fire Floater Policy, OP-2 is the policyholder and the Informant is the beneficiary of the policy to the extent that the risk in policy covers the risk of the godown, which belongs to the Informant. OP-2 reiterated clause 26(1) of the Agreement to contend that even if the stock so delivered to the Informant was insured, it would not reduce the liability of the Informant in any manner to return the stock of OP-2, and therefore, on account of the operation of clauses 25 to 28 of the Agreement, OP-2 withheld the Informant's dues against milling and other ancillary charges of ₹83 lakhs. OP-2 further submitted that the Informant cannot escape its responsibility in the event of damage to the stock of OP-2 which may have occurred due to unforeseen circumstances. The paddy delivered to the Informant was public property and OP-2 was compelled to withhold the dues of the Informant until finalisation of claims by the insurance company. Moreover, the non-settlement of the insurance claim involves dispute between the two parties, and the proper forum ought to be the consumer forum under the Consumer Protection Act, 1986, since the issue of withholding of custom milling dues is *sub judice* before the learned NCDRC.

92. The Commission notes from the reply dated 09.01.2020 of OP-2 submitted before the DG that OP-2 realised ₹83 lakhs from bill dues payable to the Informant towards the cost of undelivered paddy. From the statement of objections filed by the Informant, it is noted that the same has not been disputed by the Informant, but has stated that withholding of admitted custom milling dues to the Informant in itself is an abuse of dominant position. The Informant has submitted in this regard that the quantum of insurance claim and the liability of the insurance company to pay the same are the subject matters before the consumer forum, but unjust withholding of admitted custom milling dues by OP-2 is a subject matter within the ambit of the Commission. Both issues are distinct. The Informant has no option other than providing milling services to OP-2 only. The Informant has placed reliance upon two documents, namely, OP-2's reply dated 08.03.2018 to the repudiation letter of the insurance company contending that OP-2 admitted that there was no lapse on the part of the Informant as regards safe and scientific storage of stock as well as the physical verification report dated 24.08.2016 of the authorised officer of OP-2 that there was no '*misappropriation/diversion by the miller and the paddy and rice available*' was stored safely. Thus, the Informant cannot be penalised by OP-2 on account of the same. The stock is owned and insured by OP-2, and



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OP-2 is the actual beneficiary of the insurance claim. Despite the insurance company having repudiated the claim, the same had not been challenged by OP-2 in any manner. Thus, OP-2 was not correct in withholding the dues of the Informant subject to realisation of insurance claim money.

93. In order to appreciate the contentions of the Informant, the Commission examined the preliminary report dated nil and final survey report dated 31.12.2017 annexed with the Information on damage of stock by inundation of rainwater. It is revealed that the inspection of the Informant's premises took place on 06.08.2016 in the presence of authorised officials of OP-2, and the Informant and the details of the damages were determined on 10.08.2016 by the preliminary surveyor. The Commission notes that the preliminary surveyor observed that both OP-2 and the Informant had insurable interest as both were the custodians of government property (paddy and rice stock). The report confirmed that the '*stock of paddy (common) and rice*' kept within the premises of the Informant belonged to OP-2, and the claim was found to be acceptable. The final surveys were carried out on 13.08.2016 and 04.01.2017, and accordingly, the final survey report was prepared. The said report confirmed that the cause of loss was '*accidental in nature*' and fell '*within the preview of the policy*' and was not under any exclusion of the policy. The payment of the claim was made subject to terms and conditions of the insurance policy. On examination of the physical verification report dated 24.08.2016, which has been relied upon by both the Informant and OP-2 to state their contentions, the repudiation letter of the insurance company dated 22.12.2017 and the reply of OP-2 dated 08.03.2018 to the insurance company, the Commission notes that whether the affected stock was kept in a safe and scientific manner on the date of loss, *i.e.*, 04.08.2016, appears to be somewhat an issue of contention *inter se* the parties and the insurance company and is a subject matter of litigation before the learned SCDRC and NCDRC.
94. Thus, the Commission observes that it appears that the fact whether paddy was scientifically stored on the date of accident, *viz.* the intervening night of 3rd and 4th August 2016, is under dispute *inter se* the parties and the insurance company before the consumer fora. Further, the DG already observed that *vide* order dated 27.12.2017, SCDRC had directed OP-2 to release the withheld dues of the Informant and the same had been stayed,



thereby indicating that the issue is already under consideration and is still pending before the consumer forum. Therefore, it may not be appropriate for the Commission to delve into and give a finding on this aspect, which is beyond the realm of the Commission in the facts and circumstances of the case. The Commission observes that, subject to terms of the contract entered by the parties, any unjustified, gross and unreasonable delay in release of dues or withholding of legitimate dues by a dominant enterprise *vis-à-vis* another entity within the fold of such contractual relationship may be examined within the provisions of Section 4 of the Act, when such conduct leads to affecting the competitive landscape, the commercial ability, sustainability, existence and even bargaining power of the entity involved. The Commission notes that, in the facts and circumstances of the case, the issue relating to tenability of the insurance claim and the withholding of the amounts is *sub judice* in another forum. Thus, the Commission would not like to delve further into this matter.

95. Adverting to issue no. 4 (ii), the Commission perused the copy of Operational Guidelines for KMS 2015–16 to 2019–20 and eligibility criteria for Rabi season of KMS 2015–16 to 2017–18 for further analysis. The same has been encapsulated in the following table:

Table C: Operational Guidelines and Eligibility Criteria for Rabi Season

Period	Operational Guidelines					Eligibility criteria for Rabi Season
2015–16	Clause 4.2- Paddy Procurement Period					Guidelines dated 05.05.2016
	Season of KMS 2016–17	Procurement Period		[..]	Last date for CMR delivery	
		From	To			
	Kharif	15-11-2015	31-03-2016	[..]	30-6-2016	
Rabi	01-05-2016	30-06-2016	[..]	30-9-2016		
2016–17	Clause 4.2- Paddy Procurement Period					Guidelines dated 01.05.2017
	Season of KMS 2016–17	Procurement Period		[...]	Last date for CMR delivery	
		From	To			
	Kharif	01-11-2016	31-03-2017	[..]	30-6-2017	
Rabi	01-05-2017	30-06-2017	[..]	30-9-2017		
2017–18	Clause 4.2 – Paddy Procurement Period					Letter dated 28.04.2018 & 30.04.2018 and Guidelines dated 15.05.2018
	Season of KMS 2017–18	Procurement Period				
		From	To			
	Kharif	01-11-2017	30-04-2018			
Rabi	01-05-2018	30-06-2018				
2018–19	Clause 4.2 – Paddy Procurement Period					-----



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	Season of KMS 2018–19	Procurement Period			
		From	To		
	Kharif	01-11-2018	30-04-2019		
	Rabi	01-05-2019	30-06-2019		
2019–20	Clause 4.2 – Paddy Procurement Period				-----
	Season of KMS 2019–20	Procurement Period			
		From	To		
	Kharif	01-11-2019	31-03-2020		
	Rabi	01-05-2020	31-06-2020		

96. The Commission notes from Table C that procurement periods in respect of Kharif and Rabi seasons for different KMS between 2015–16 to 2019–20 have been somewhat similar. The Commission further notes that the security deposit, milling capacity of the custom millers and CMR delivered with reference to Kharif paddy were being taken into account for delivery of paddy to custom millers (eligibility criteria for Rabi season KMS 2015–16 and 2016–17). OP-2 had already submitted that the Rabi procurement season for paddy is limited only to two months, *i.e.*, 1st May–30th June and participation also depends on the availability of Rabi paddy in the concerned district.
97. With regard to issues involved, the Commission notes that the question that needs to be answered is whether the modification in eligibility criteria for participation in Rabi season of KMS 2017–18 and its communication on 28.04.2018 was unfair to custom millers. The custom miller accounts as on 30.04.2018 and 30.06.2018 for the district of Sambalpur, Odisha, for KMS 2017–18 and letters dated 11.04.2018 and 28.04.2018 pertaining to the said district, are on record. Besides, the Commission also notes that, in its written submissions/arguments, the Informant had raised the issue for the first time of fixation of different criteria (percentage of CMR delivery) for different districts by OP-2 as being tainted by abuse.
98. The Commission notes that the DG, after examining the replies dated 09.01.2020 and 08.05.2020 of OP-2, found that the millers are only informed about the criteria for the eligibility for the Rabi season at the end of Kharif season. The DG found that the eligibility criteria for participation in Rabi season of KMS 2017–18 was modified from that of 2015–16 and 2016–17, *i.e.*, from 75% CMR delivery to 100% CMR delivery, for 6 districts, including the district of Sambalpur, and the same was intimated belatedly on



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28.04.2018 when Kharif procurement season activities were drawing to a close, on 30.04.2018. Thus, the Commission notes that the DG gave a finding that the modification of selection criteria for Rabi season of KMS 2017–18 was abrupt, unilateral and its communication just before the opening of Rabi season was unfair for custom millers, since it left little time for them to put additional resources to achieve the target for the Kharif season in order to be eligible for the Rabi season. The DG concluded that OP-2's actions in abruptly changing the selection criteria for Rabi 2017–18 and its communication just before the start of season deprived the Informant and other millers of an opportunity of participating in the Rabi procurement.

99. On the other hand, the Commission notes the stand of OP-2 that custom millers who had participated in KMS 2017–18 had been aware of the criteria that 100% delivery of CMR (Kharif) was mandatory for participation in Rabi season as contained in letter dated 11.04.2018 issued by OP-2.
100. The Commission notes the contents of letter dated 11.04.2018. It appears from the contents of the said letter that delivery status of CMR due (performance) of the custom millers in the district of Sambalpur for KMS 2017–18 was reviewed on 04.04.2018, wherein 18 millers (including the Informant) were identified as falling short of the district average of 73%. The expression used was, *'as 100% delivery of CMR due for the Kharif season has become mandatory, participation of above millers during coming Rabi season seems to be under threat with the present pace of delivery'*, from which it appears that the criteria of 100% CMR delivery for participation in Rabi season KMS 2017–18 was made mandatory and appears to have been communicated to the concerned custom millers to expedite delivery by 15.04.2018 as stated. The Commission also notes the representation of the ACSO, Sambalpur, dated 19.04.2018, made on behalf of the Informant, which makes reference to the said letter of OP-2, dated 11.04.2018. In the said representation, there is no grievance raised with regard to making of 100% CMR delivery criteria by millers as mandatory. Further, from Table C, the Commission notes that the operational guidelines for KMS 2017–18 only provided for 30.04.2018 as the last date for the Kharif period forming a part of the agreement. These guidelines were issued on 30.10.2017. From a bare reading of these documents, the Commission is of the view that the relevant custom millers, including the Informant, were sufficiently aware of the



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requirement of the mandatory nature of 100% CMR delivery, with such requirement being necessary for the participation of millers in the ensuing Rabi season for KMS 2017–18. The DG had already found that the millers are only informed about the criteria for eligibility for the Rabi season at the end of the Kharif season, which was due to start from 01.05.2018, as noted above.

101. Traversing further, the Commission will now examine the issue of eligibility criteria for Rabi KMS 2017–18 with respect to the district of Sambalpur, Odisha.
102. On 04.03.2021, the Commission had sought certain clarifications from both the Informant and OP-2. From the reply of OP-2, it became clear that, in the State of Odisha, there were about 18 districts out of 30 districts procuring paddy for the Rabi season, comprising 396 millers who were allowed to undertake CMR for Rabi season of KMS 2017–18. These 18 districts were further divided into 12 districts (first category) and 6 districts (second category). For the first category of districts, OP-2 issued guidelines on the eligibility of millers to participate in Rabi season 2017–18 on 30.04.2018, and for the second category, guidelines were issued on 28.04.2018. The district of Sambalpur fell in the second category. OP-2 submitted that the reason for two separate eligibility criteria for two sets of districts was that the procurement of Kharif paddy usually commenced late and procurement is less in first category districts compared to districts in the second category. Therefore, by the time when Rabi season approached, the millers under first category were not in a position to deliver 100% Kharif paddy. On the other hand, second category districts were highly procured districts, and procurement started early, hence, the criteria for 100% delivery was mandatory in these districts. From this, the Commission observes that OP-2 is competent to determine the manner in which it seeks to procure paddy and consequent milling and provide for separate criteria for different districts based on its requirement of efficient discharge of its functions. The Commission would not like to comment on the same unless it is shown to be unfair or discriminatory *qua* the stakeholders.
103. With regard to the issue of whether the criteria disclosed in letter dated 28.04.2018 for Rabi participation for KMS 2017–18 was unfair, from a perusal of guidelines issued by OP-2 on 28.04.2018 for the second category of districts (including Sambalpur), the



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Commission notes that there was no absolute bar on participation of even those millers who could not complete the target delivery of 100% CMR for KMS 2017–18 (Kharif) by 30.04.2018. Such millers, according to OP-2, could participate in Rabi procurement on deposit of 1:3 security norm from the date of completion of 100% CMR delivery of KMS 2017–18 (Kharif). Further, in its reply to the DG, the Commission notes that OP-2 submitted that the participation in Rabi procurement was subject to availability of Rabi paddy in the concerned district, as the Rabi procurement period was limited to two months only, *i.e.*, from 1st May to 30th June, beyond which no paddy could be procured. OP-2 further submitted that, after a prolonged follow-up, the Informant delivered the 100% Kharif CMR for KMS 2017–18 on 29.06.2018 as reported by the Civil Supply officer *vide* email dated 30.06.2018. The Commission notes that since the 100% Kharif CMR delivery had to be completed whether by 30.04.2018 or beyond 30.04.2018, the same had to be done during the availability of Rabi paddy in the concerned district for a miller to undertake milling for Rabi season. The Commission notes the submission of OP-2 that the Informant delivered 100% CMR (Kharif) on 29.06.2018. The Commission notes that this was possibly the time by which not much Rabi paddy would have been available for procurement/allocation as the season was shortly nearing an end.

104. Whether the custom millers were sufficiently aware of 100% CMR delivery criteria and its impact on the ensuing Rabi season for KMS 2017–18 is being observed further. In this regard, the Commission places reliance upon the data shared by the Informant and OP-2 in their written submissions in response to clarifications sought by the Commission on 04.03.2021. Though OP-2 has not provided the break-up of millers along with their names in the district of Sambalpur who were allowed to participate in Rabi season of KMS 2017–18 despite having less than 100% CMR (Kharif) as on 30.04.2018, however, the documents (Sambalpur District Miller Control accounts) as filed by the Informant along with its written submissions and the data provided by OP-2 are encapsulated in the table hereinbelow-

Table D: 6 districts’ break-up

28.04.2018 guideline for districts	No. of Millers for KMS 2017–18	Status of CMR (Kharif) delivery of custom millers as on 30.04.2018	Allowed in Rabi KMS 2017–18
Bargarh	103	-----	104



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Sambalpur	54 (45 + 9)	= 100%	< 100%	44
		21 (20 + 1)	33 (25 + 8)	
Subarnapur	39	-----		35
Kalahandi	77	-----		59
Nuapada	24	-----		13
Koraput	86	-----		2

105. It appears that, out of 54 millers in the district of Sambalpur, about 45 millers were engaged in boiled rice (highlighted in bold in Table D) and 9 millers in raw rice. It is observed that out of these 45 millers (boiled rice), there were about 25 millers (including the Informant- highlighted in bold in Table D) who had less than 100% CMR (Kharif) delivery on 30.04.2018 and about 20 millers who had achieved 100% CMR (Kharif) delivery by 30.04.2018, which was about 44%. Further, OP-2 had submitted that 44 millers were allowed to participate in Rabi season of KMS 2017–18. Based on the Sambalpur District Miller Control accounts for the KMS 2017–18 (Kharif) as on 30.04.2018 and for KMS 2017–18 (Rabi) as on 30.06.2018, as provided by the Informant in its written submissions, it is observed that 44 out of 45 millers participated in Rabi season for KMS 2017–18.
106. Thus, the Commission opines that the said 44 millers were allowed or able to participate in Rabi KMS 2017–18 since there was no absolute bar on participation even of millers who were falling short of the ‘mandatory’ 100% CMR delivery (Kharif) on 30.04.2018 as noted earlier. Thus, the figure of 44 millers indicates that, in the district of Sambalpur even those millers with less than 100% CMR (Kharif) as on 30.04.2018 were able to participate in Rabi KMS 2017–18 despite modification in eligibility criteria and enhancement in security norms by OP-2. Further, the fact that 20 millers were able to complete CMR (Kharif) delivery by 30.04.2018 also indicates that millers were sufficiently aware of the mandatory nature. This indicates that there was no absolute foreclosure effect on custom millers operating in the district of Sambalpur either with respect to fixation of cut-off date or security norms or modification in criteria for participation in Rabi season for KMS 2017–18. Moreover, the Commission notes that nothing has been filed on record that indicates that the custom millers were unfairly affected or were absolutely foreclosed by the modification of eligibility criteria by OP-2 in the district of Sambalpur, which deprived them of an opportunity to participate in Rabi KMS 2017–18. The representation dated 30.04.2018 of the Informant to OP-1 indicated



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the issues faced by the Informant, due to which it was not able to complete the delivery of CMR (Kharif) within the stipulated period of time though in another representation of even date addressed by the Informant to OP-2, it stated that on account of non-payment of dues, it was impaired from effecting delivery in time. Regardless of the genuineness, if any, of the financial difficulties expressed by the Informant, the Commission, in the facts and circumstances, notes that the Informant failed to get Rabi paddy for milling on account of its belated completion of CMR delivery for Kharif season 2017-18 only on 29.06.2018, by which time Rabi procurement was coming to an end, whereas other millers were able to get Rabi paddy for milling, as discussed above.

107. Therefore, having considered the above position holistically, the Commission is not inclined to agree with the DG's finding of abuse with respect to issue 4(ii) under Section 4(2)(a)(i) of the Act, that the modification of criteria for Rabi KMS 2017-18 was abrupt, unilateral and its late communication deprived the millers of an opportunity to participate in Rabi procurement/milling season and potential earnings. Despite the above findings, the Commission is of the view that, though in the facts and circumstances of the matter, no serious prejudice appears to have been caused to the millers in the district of Sambalpur such that they were prevented from undertaking CMR for the Rabi season, it will be in the interest of all stakeholders (OP-2 and the millers alike) that changes, if any, in the criteria and the deadlines are adequately communicated sufficiently in advance to avoid misgivings.
108. As regards issue no. 4(iii), the Commission notes that OP-2 had stated that the letter dated 22.11.2018 was issued to ensure timely participation of millers and lifting of paddy in a timebound manner. It further stated that clear intention of custom millers is necessary to carry out micro-level planning of procurement by OP-2. OP-2 further claimed in its written submissions that the said letter provided that differential maintenance charges would be paid if the custom miller expressed their unwillingness to participate in writing. The DG found the said reasons to be non-justifiable and unfair, as the differential custody and maintenance charges were already due to millers and to deny the same on any pretext was anti-competitive.



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109. The Commission observes that *ex facie*, the linking of payment of differential custody and maintenance charges to millers while obligating them to execute the agreement for KMS 2018–19 does not stand to good reason, even if OP-2 stated that the same was with the purpose of carrying out micro level planning of procurement. The Commission, while noting the submissions of OP-2, that the said letter dated 22.11.2018 was not in the nature of pressurising the millers to enter into an agreement, cannot lose sight of the fact that the tenor of communication has to be seen from the viewpoint of the recipient millers. To the Commission, a bare reading of the said letter does disclose that the payment of legitimate dues of millers were predicated somewhat, if not entirely, on them committing to a future relationship. It cannot be said that some element of *quid pro quo* was not present, more so when the millers have not been receiving the dues in a time-bound manner. The Commission also notes that the differential charges pertained to a prior period with respect to a work which has already been completed by the millers and stands on an independent footing, unrelated to KMS 2018–19. The Commission is, therefore, not convinced with the arguments of OP-2 that the linkages sought to be drawn was with the purpose to carry out any micro level planning of procurement. OP-2 cannot be expected to introduce new terms and conditions upon millers without valid and cogent justifications. The Commission, thus, holds that, with regard to issue no. 4(iii), OP-2 introduced unfair terms which is not in consonance with the provisions of Section 4(2)(a)(i) of the Act and agrees with the findings of the DG on that count.
110. On issue no. 4(iv), the Commission notes that, the DG, while examining the issue, considered the reply dated 16.03.2020 received from AORMA during the investigation. In the said reply, the Commission notes that AORMA had submitted that the issues raised in its letter dated 06.11.2018 pertained to all the districts in the State of Odisha. Overall, AORMA, in its reply to the DG, highlighted the issues of non-intimation of rates before the start of procurement of operations and delay in settlement of dues. In this regard, AORMA submitted that it also had been making representations to OP-2 from time to time.
111. The Commission notes that the DG, after analysing the replies of OP-2 as received, split the issue into two parts. For non-communication of rates, the DG noted that, under the Decentralisation Procurement Programme of the Government of India, the rates under



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various heads are decided by the Government of India, which allocates funds for providing subsidy to the State Agencies undertaking the entire operations. These rates need to be duly approved, and until such time, rates for various services and incidentals cannot be intimated. The rates are communicated on receipt of Provisional Costing Sheet (PCS) and approved by the Board of Directors/Government of Odisha. Only then can OP-2 declare or change the rates or insert these in agreement for custom milling services as per the approved PCS, communicated to it. In its objections to the Investigation Report, the Informant objected to the said contention of OP-2 and submitted that the rates communicated by the Government of India are provisional, and rates can be fixed as per the market rate. It submitted that rates are the basic ingredient of a valid contract. The rates are disclosed after the execution of the agreement and, in most cases, after the execution of work. The process in itself is unfair and arbitrary. The Informant submitted that OP-2 specifically mentioned neither the details of the notification of charges payable to millers for each KMS nor the date of the PCS for each KMS from 2014–15 to 2018–19. Thus, the Informant prayed that non-disclosure of rates while entering into an agreement is tainted with abuse, and OP-2 be directed to disclose the same (atleast the minimum rates) to encourage fairness.

112. In the hearing on 04.03.2021, the Commission had asked, *inter alia*, OP-2 about the practice adopted by OP-2 for communicating the rates of custom milling charges/differential rates to millers. In response thereto, OP-2 submitted that the rates of incidentals allowed to the custom millers for the services rendered for custom milling of paddy depends upon economic costing issued by the Government of India through the Ministry of Consumer Affairs, Food and Public Distribution in each KMS. OP-2 makes decision on the rates after receipt of such costing from the Government of India. The decision taken on the rates allowed to custom millers are communicated to the District Managers for implementation. The custom millers are informed by the District Managers. Thus, the timing of such decision and communication to the districts depends upon the receipt of economic costing from the Government of India. The KMS activity begins with the procurement of paddy from November, passing through process of procurement, milling, delivery of Kharif and the process for Rabi paddy/rice, which continues till the end of September/October. The rates are communicated in course of procurement, milling and delivery of CMR. In support, OP-2 presented the following table, extracted below,



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stating the dates that OP-2 received the intimation from the Government of India regarding various charges payable to custom millers and the dates on which OP-2 communicated to the Civil Supplies Officer and District Managers of all 30 districts —

Table E: Provisional Economic Costing Sheet received from the Government of India

KMS Year	PCS received from Government of India	Incidental Communicated to Civil Supplies Office and District Managers
2015–16	Letter bearing No. 192(17)/2015 dated 14.10.2015 Letter bearing No. 192(13)/2015 dated 14.01.2016 (revised)	L.No. 6559 dated 11.04.2016
2016–17	Letter bearing No. 192(18)/2016 dated 11.01.2017	L.No. 19064 dated 05.11.16 L.No. 18357 dated 03.11.2017 L.No. 6356 dt. 18.04.2017
2017–18	Letter bearing No. 4535 dt. 08.03.2019	L.No. 2735 dt. 08.02.18 (to Govt. for revision) L.No. 22904 dt. 09.11.17 (to Govt. for Revision) L.No. 5658 dt. 02.04.2018
2018–19	192(19)/2018 dt. 03.12.2018	L.No. 1041 dt. 22.01.2019 Transportation charge <i>vides</i> L.No. 4484 dt. 26.03.19 Mandi Labour charge L.No. 6163 dt. 25.04.19
2019–20	192(26)/2019 dt. 07.04.2020	L.No. 5506 dt.22.04.2020
2020–21	Not yet received	L.No. 4309 dt. 16.03.21

113. OP-2 also submitted that the Government of India announces a flat rate for transportation of paddy from mandi to mill and a rate for custody and maintenance charges for a maximum period of three months, which is payable after completion of delivery of rice by the custom miller, *i.e.*, in the month of October/November every year, because prior to this, the actual holding period cannot be ascertained. However, OP-2 pays *ad hoc* custody and maintenance charges in advance to the millers, and the differential rates are paid after completion of delivery and calculation of actual holding period by the millers.
114. On this issue, the Commission is inclined to agree with the DG that OP-2’s action cannot be termed unfair and an abuse of dominant position as far as communication of rates to



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- millers are concerned. The Commission in this regard has taken note of OP-2's submission that when there is an abnormal delay in the receipt of economic costing from the Government of India, OP-2 declares the rates provisionally for payment to custom millers. The Commission has further taken note of the submission of OP-2 that, in current KMS 2020–21, though economic costing had not been received from the Government of India, the rates of incidentals for payment to custom millers were communicated *vide* letter no. 4309 dated 16.03.2021.
115. The Commission adverts to the second limb of issue no. 4(iv) as regards delay in the settlement of dues. The Commission notes that the DG has heavily relied upon OP-2's reply dated 19.02.2018 to the draft notes issued by the office of AG Odisha. The DG noted that OP-2 claimed to be saving interest by not acting in consonance with the terms and conditions of the custom milling agreement. In its reply dated 21.09.2020 to the DG, the DG noted that OP-2 submitted that *'this office letter dated 19.02.2018 which has been referred by you was sent in response to the Audit Para and is generic in nature and not a case specific. The reply was submitted in a different context with reference to the points raised in the Audit Para'*. Further, OP-2 had stated that *'the terms and conditions for payment of miller dues is KMS specific and are not same/identical for all KMS. Mere submission of bill does not ipso facto entitle the miller to get the amount released by the corporation.'*
116. After analysing the Operational Guidelines and agreements for 2015–16, 2018–19 and 2019–20, the DG opined that they did not stipulate any timelines for the settlement of millers' dues. Only the operational guidelines issued by OP-2 for the years 2016–17 and 2017–18 provided for a timeline of 15 days for settlement of bills submitted by millers. The DG also noted that holding charges or penalty on custom millers for delayed delivery of CMR beyond the stipulated period without any justifiable reasons do find mention in all the operational guidelines issued by OP-2 from 2015–16 to 2019–20.
117. The Commission notes that OP-2 relied upon clause 54.2 of the Procurement Guidelines 2015–16 to highlight that payment to custom millers was not on a monthly basis, but depends upon the delivery of rice of specified quantity and thereafter, release of bills was subject to satisfactory performance of the miller. OP-2 stated that it had been dealing with



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more than 1200 millers and operating for 20 years. All custom millers had been aware of the procedure. OP-2 submitted that it has to observe abundant caution while making payments in the interest of public at large, and approximately ₹143 crores still remains recoverable from the defaulting custom millers. It settles the bills after scrutiny and ensuring compliance by custom millers, in accordance with the terms of agreement and the policy guidelines issued by the Government of India. As regards the Informant, OP-2 submitted that, barring the amount of ₹83 lakhs, no other dues of the Informant had been withheld or was outstanding.

118. Having a conspectus of the nature of issue relating to the settlement of dues between OP-2 and the custom millers, and difficulties associated with it from both the sides and the findings of the DG on the issue, the Commission is of the considered view that withholding legitimate dues without a justifiable reason is onerous on the millers and denudes them from reward of services rendered and deprives them of timely financial resources to undertake work. From the findings of the DG and the statement made to the office of AG Odisha by OP-2, the Commission is of the view that the reasons for delaying dues are untenable. Therefore, the Commission agrees with the finding of the DG in relation to the second limb of issue no. 4(iv), about unfairly delaying settlement of dues of the custom millers and holds that the conduct of OP-2 is in violation of Section 4(2)(a)(i) of the Act.
119. Notwithstanding the above, the Commission notes the submission of OP-2 that, from KMS 2018–19, it developed an Online Billing Management System (OBMS) to facilitate quick processing and settlement of bill of custom millers. The custom millers submit monthly bills online, and OP-2 settles their bill online. The bill payments are made to the accounts of custom millers through Real-Time Gross Settlement/National Electronic Funds Transfer (RTGS/NEFT). However, the Commission is of the considered view that timelines for settlement of legitimate bills/dues should not only be communicated sufficiently in advance to all stakeholders but also be adhered to in intent. Needless to mention, non-settlement of legitimate dues in time to the millers could tend to jeopardise the competitiveness of the millers and their ability to provide the services.



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ORDER

120. In view of the foregoing, the Commission holds that the impugned conduct of OP-2 is in violation of the provisions of Section 4(2)(a)(i) of the Act for the reasons adumbrated in this order. However, on a holistic assessment and taking into consideration that certain measures, as regards online billing management system, have been implemented by OP-2 as noted in the order, the Commission is of the considered view that a desist order under Section 27 of the Act would subserve the ends of justice in the matter.
121. The Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi
Date: 05/08/2021