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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 94 of 2014

In Re:

India Glycols Ltd.

Informant

And

Indian Sugar Mills Association

Opposite Party No. 1

National Federation of Cooperative Sugar Factories Ltd.

Opposite Party No. 2

Indian Oil Corporation Ltd.

Opposite Party No. 3

Hindustan Petroleum Corporation Ltd.

Opposite Party No. 4

Bharat Petroleum Corporation Ltd.

Opposite Party No. 5

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

Mr. Justice G. P. Mittal
Member



Appearances: Shri Manas Kumar Chaudhuri, Shri Sagardeep Rathi and Shri Ebaad Khan, Advocates alongwith Shri Rakesh Bhartia, CEO for India Glycols Limited.

Ms. Bharati Balaji, Director (Legal) and Ms. Ritika Chatterjee, Executive Assistant for Indian Sugar Mills Association.

None, for National Federation of Cooperative Sugar Factories Ltd.

Shri M. L. Lahoty, Senior Advocate with Ms. Reeta Mishra and Shri Abhishek Verma, Advocates alongwith Shri Shantanu Gupta, GM (Operations) - IOCL, Shri R. M. Gaitonde, DGM - HPCL and Shri A. P. Verma, DGM - BPCL for Oil Market Companies (IOCL, HPCL and BPCL).

Order under Section 26 (6) of the Competition Act, 2002

1. The present information has been filed by India Glycols Ltd. ('the Informant') under Section 19 (1) (a) of the Competition Act, 2002 ('the Act') against Indian Sugar Mills Association ("Opposite Party-1"/ OP-1/ ISMA), National Federation of Cooperative Sugar Factories Ltd. ("Opposite Party-2"/ OP-2/ NFCSF), Indian Oil Corporation Ltd. ("Opposite Party-3"/ OP-3/ IOCL), Hindustan Petroleum Corporation Ltd. ("Opposite Party-4"/ OP-4/ HPCL) and Bharat Petroleum Corporation Ltd. ("Opposite Party-5"/ OP-5/ BPCL) (collectively, "the OPs") alleging contravention of the provisions of the Act.

Facts

2. The Informant is a company incorporated under the erstwhile Companies Act, 1956, and is engaged in the business of manufacturing and marketing ethanol



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based chemicals. The Informant is stated to be dependent upon sugar mills for securing uninterrupted supply of ethanol which is made from molasses, a by-product of sugar industry, and is one of the basic inputs required for running the core business of the Informant.

3. OP-1/ ISMA is an industrial association and is recognised by both the Central and the State Governments, as the central apex organization to voice the cause of the sugar industry in the country. Sugar mills in the private sector as well as the public sector are eligible to become members of ISMA.
4. OP-2/ NFCSF is an association of cooperative sugar factories which are owned and managed by sugarcane farmers. It is deemed to be a cooperative society under the Multi-State Cooperative Societies Act, 2002.
5. OP-3 to OP-5 are public sector oil marketing companies (collectively, PSU Oil Marketing Companies/ “PSU OMCs”).
6. As per the Informant, OP-1 and OP-2 hold the entire market for sugar mills in India and supply ethanol to chemical industries and to OP-3 to OP-5. It has been alleged that OP-1 is forcing the PSU OMCs to purchase ethanol at an artificially higher price and the same amounts to violation of Section 4 of the Act. It has also been alleged that the role of OP-2 is equally anti-competitive since it has colluded with OP-1 in artificially raising the price of ethanol in contravention of the provisions of Section 3 (3) (a) of the Act.
7. The Informant is also aggrieved at the mandatory Ethanol Blending Programme (EBP) promulgated by the Ministry of Petroleum and Natural Gas (‘MoPNG’) *vide* its notification dated 02.01.2013 whereby the OMCs were directed to sell only petrol blended with ethanol with percentage of ethanol upto 10%. It is alleged that such a programme has created anti-competitive conditions in the market for supply of ethanol by encouraging members of OP-1 and OP-2 to rig bids and to artificially increase the prices of ethanol. Thus, while seeking discontinuance of such a programme, the Informant has sought that joint tender



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mechanism of PSU OMCs be scrapped and the same be replaced by independent tendering by all the OMCs including private OMCs for procurement of ethanol at market-driven prices so that proper competition amongst all the OMCs is ensured and the Informant and other buyers of ethanol are also benefited by fair competition in the market for sale and purchase of ethanol.

8. The Informant has also alleged that the various joint tenders issued by the OMCs had failed or had to be cancelled as OP-1 and OP-2 colluded to restrict the production and supply in order to artificially raise the prices of ethanol.
9. It has been pointed out that the order dated 12.05.2014 issued by the MoPNG specified the formula for benchmark pricing for procurement of ethanol for EBP in such a manner that it establishes a viable correlation with the Refinery Transfer Price (RTP). However, sugar industry, through the conducts of OP-1 and OP-2, has been consistently demanding astronomically higher prices for ethanol in complete disregard to the order issued by MoPNG directing the sugar industry to benchmark the price of ethanol.
10. Based on the above and other averments and allegations made in the information, the Informant has filed the instant information against the OPs alleging contravention of the provisions of Sections 3 and 4 of the Act and made the following omnibus prayers to the Commission:
 - a) Institute an inquiry against the OPs under Section 19 (1) read with Sections 3 (3) (a) and 3 (3) (b) and 4 (2) (a) and 4 (2) (e) of the Act and form a *prima facie* view in terms of Section 26 (1) of the Act directing the DG to cause a detailed and thorough investigation against all the said the OPs;
 - b) Declare the joint tendering by the OMCs void as it breaches the principle of competitive neutrality;
 - c) Direct the MoPNG to abide by competitive neutrality and declare the procurement of ethanol open in terms of the notification of the MoPNG dated



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02.01.2013, especially in view of the ratio enunciated by the Commission in paragraph 201 of the order dated 31.10.2014 passed in Case No. 38 of 2011;

- d) Alternatively direct the MoPNG to adopt competitive neutrality to consider discontinuation of EBP in view of the failure of implementation and its effect on ethanol market in India;
- e) Declare by an order that the conduct of OP-1 is violative of Section 4 (2) (a) and 4 (2) (e) of the Act;
- f) Declare that the joint action by OP-1 and OP-2 suggesting a higher procurement price and artificial limiting the supply of ethanol to the OMCs are in direct breach of Section 3 (3) (a) of the Act;
- g) Declare EBP void since it failed to meet its objective for over nearly a decade and there are no signs of improvement;
- h) Restrain the OMCs by a suitable order to not give effect to July 2014 tender in view of fall in international crude prices of petrol causing appreciable adverse effect in the relevant market in India;
- i) Restrain the OMCs by a suitable order to not revive the tender of October, 2014; and
- j) Pass any other order as the Commission may deem fit in view of the continuity of the anti-competitive practices on behalf of the OPs.

Directions to the DG

11. The Commission considered the information and *vide* order dated 07.05.2015 passed under Section 26 (1) of the Act and observed that the allegations levelled in the instant information are substantially similar/ identical to the allegations being investigated in Case No. 21 of 2013 (*In Re: India Glycols Ltd and Others*),



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Case No. 29 of 2013 (*In Re: Ester India Chemicals Ltd. and Others*), Case No. 36 of 2013 (*In Re: Jubilant Life Science Ltd. and Others*), Case No. 47 of 2013 (*In Re: A B Sugar Ltd. and Others*), Case No. 48 of 2013 (*In Re: Wave Distilleries and Breweries Ltd and Others*) and Case No. 49 of 2013 (*In Re: Lord Distillery Ltd. and Others*). Accordingly, the Commission decided to club the instant information with the aforesaid cases in terms of the *proviso* to Section 26 (1) of the Act read with Regulation 27 (1) of the Competition Commission of India (General) Regulations, 2009 (“the General Regulations”).

12. However, subsequently, the DG *vide* application dated 15.05.2015 requested the Commission to de-club the present case from the other cases being investigated by the DG stating that the instant case has no connection with those cases being investigated by the DG. Besides, it was also pointed out that earlier 6 cases were at the final stage of investigation.
13. The Commission considered the aforesaid application of the DG and considered it appropriate to de-club the instant case from the other pending cases. Accordingly, the Commission *vide* its order dated 26.05.2015, directed the DG to conduct a separate investigation in the present case and submit an investigation report. It was also directed that in case the DG finds the conduct of the OPs in violation of the Act, he shall investigate the role of the persons who, at the relevant time, were responsible for the conduct of the OPs so as to fix the responsibility of such persons under Section 48 of the Act.
14. Accordingly, the DG conducted the investigation and submitted its report to the Commission on 14.09.2017.

Investigation by the DG

15. In order to investigate the matter comprehensively, the DG issued probe letters and notices to all the OPs and sought their replies. Probe letters were also issued



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to third party sugar mills situated in various States who are the manufacturers and suppliers of ethanol, to the Excise Departments of various States to get data on production and availability of ethanol and its utilisation, and to Confederation of Indian Alcoholic Beverage Companies (CIABC) which is a third party industry body representing companies which are involved in the branded segment of the liquor industry in India for the same purpose.

16. Before examining the allegations, the DG analysed the manner of production of sugarcane and sugarcane molasses, production process of ethanol and the regulatory and policy framework affecting supply of ethanol to the OMCs.
17. Further, variance in the production and supply of different derivatives of alcohol including ethanol between 2012-13 to 2014-15 was also examined by the DG with respect to the circumstances and reasons of such a variance. The data in respect of production/ availability of alcohol and its utilisation/ supply including supply of ethanol under the EBP for sugar from 2012-13 to 2014-15 was collected and collated for examination from the sugar mills/ distilleries which are the major producers and suppliers of alcohol including ethanol. The role of OP-1 and OP-2 in influencing the production and supply of ethanol was also investigated.
18. To begin with, the DG held that OP-1 is not an 'enterprise' for the purposes of Section 2 (h) of the Act at all. Hence, OP-1 cannot be a dominant 'enterprise' in making supply of ethanol to the OMCs and there is no question of OP-1 abusing its dominant position by demanding higher price for ethanol which may be in violation of Section 4 (2) (a) and 4 (2) (e) of the Act.
19. Further, the DG examined whether: (i) mandatory EBP notified by MoPNG; (ii) joint tendering by the OMCs; and (iii) procurement of ethanol by the OMCs at fixed notified prices instead of at market driven prices; breach the observance of principle of competitive neutrality?
20. In this regard, the DG noted that the allegation by the Informant that mandatory



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EBP notified by MoPNG breaches the observance of principle of competitive neutrality is not found to be substantiated. The allegation by the Informant that process of joint tendering by the OMCs for procurement of ethanol breaches the observance of principle of competitive neutrality is also not found to be substantiated. However, the decision of Government of India (GoI) on procurement of ethanol by the OMCs at fixed/ uniform notified prices instead of market driven prices under EBP seems to have a decisive impact on the price of ethanol and this decision does not take into account the market dynamics of production and supply of ethanol. It does not also take into account the efficiency/ inefficiency of players in the market for supply of ethanol which is the essence of a competitively free market. The existing policy framework of GoI in respect of procurement of ethanol by the OMCs at fixed/ uniform notified prices instead of market driven prices under EBP cannot, therefore, be considered desirable from the competition perspective. It is, therefore, useful if a thorough analysis of the benefits and disadvantages, or competition impact assessment of the existing process of procurement of ethanol by the OMCs at fixed/ uniform notified prices instead of market driven prices under EBP by GoI is carried out at the earliest.

21. Next, the DG examined whether OP-1 and OP-2 are in collusion to create an artificial scarcity of ethanol by limiting production and supply of ethanol at a low level and thereby forcing the OMCs (OP-3 to OP-5) to purchase ethanol at an artificially higher price in contravention of Section 3 (3) (a) and 3 (3) (b) of the Act?
22. In this connection, the DG found that production, availability and supply of molasses in the country has a huge and decisive impact on the production and supply of ethanol and OP-1 and OP-2 cannot be said to be in collusion to create any artificial scarcity of ethanol by limiting production and supply of ethanol at a lower level which may force the OMCs (OP-3 to OP-5) to purchase ethanol at an artificially higher price. No contravention of Section 3 (3) (a) and 3 (3) (b) of the



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Act by OP-1 and OP-2 is found.

23. While examining whether demand of higher prices by OP-1 and OP-2 led the OMCs to cancel the tender of October, 2014, the DG concluded that the tender of October, 2014 was cancelled due to fall of international crude prices, which was leading to wide variation of motor spirit RTP prevailing at that time and the prices offered by the Ethanol suppliers. This, as per the DG, involves no competition issue.
24. Furthermore, the DG examined whether OP-1 and OP-2 demanded higher price of ethanol in respect of July, 2014 tender from the OMCs in the absence of substitutable products and/ or competitors, and unilaterally distorted the market and whether the OMCs considered the adjustment of lower calorific value of ethanol as per the directions contained in the order dated 12.05.2014 of the MoPNG while working out the benchmark price for procurement of ethanol from OP-1 and OP-2 in respect of tender of July, 2014?
25. On the aforesaid issues, the DG concluded that allegation that OP-1 and OP-2 demanded higher price of ethanol in respect of July, 2014 tender from the OMCs in the absence of substitutable products and/ or competitors, and unilaterally distorted the market is found to be without any basis and substance. Similarly, the allegation of the Informant that the OMCs have not considered the adjustment of lower calorific value of ethanol while working out their benchmark price derived on the basis of average RTP of motor spirit in complete disregard to the letter dated 12.05.2014 of the MoPNG is also not found to be substantiated by facts.
26. Lastly, the DG examined whether information to the end consumers in respect of data of blending of petrol and ethanol and generated benefits and fuel efficiency achieved is available in public domain and whether OP-3 to OP-5 (OMCs) have provided the aforesaid information to the end consumers and/or made it available in public domain?
27. In this regard, the DG noted that though the OMCs have not directly informed the



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end consumers about the data of blended petrol, and generated benefits of blending and fuel efficiency achieved, information in this respect is available in public domain through statements and data provided by the concerned Minister before the Lok Sabha. Moreover, it was noted by the DG that this issue does not have any competition angle.

Consideration of the DG report by the Commission

28. The Commission considered the investigation report submitted by the DG in its ordinary meeting held on 08.11.2017 and decided to forward copies thereof to the parties for filing their respective replies/ objections thereto. Thereafter, the Commission heard the arguments of the parties and decided to pass an appropriate order in due course after conclusion of the arguments.

Replies/ Objections/ Submissions of the parties

29. The Informant filed its response to the DG Report besides reiterating the points made in the information. OP-1 and OP-2 filed their respective responses to the DG Report as well as to the Informant's reply to the DG Report. No response, however, was filed on behalf of any of PSU OMC (OP-2 to OP-5). The response of the parties shall be adverted to while deciding the points which arise for determination in the present case.

Points for determination

30. As noted above, the Informant filed the instant information seeking a series of reliefs which range from challenging the policies of the government to joint tendering by PSU OMCs to seeking a restraint upon the tenders already floated



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by the OMCs etc. The DG, on detailed investigation, identified six issues for the purpose of investigation. These have already been noted above alongwith brief findings of the DG thereon.

31. Before delving further into the matter, the Commission notes that when the matter came up for hearing before the Commission on 07.03.2018, following order was passed by the Commission:

“1. Today, the matter was listed for final hearing. At the outset, the parties were apprised by the Commission that as one of the issues involved in this case viz. joint tendering by OMCs was also involved in Case Nos. 21, 29, 36, 47, 48 & 49 of 2013 which are presently pending further investigation before the DG, the same shall not be considered and dealt with by the Commission in the instant case. The learned counsel(s) appearing for the Informant and OMCs agreed to such suggestion and decided to address the Commission accordingly.

2. Shri Manas Kumar Chaudhuri, the learned counsel appearing on behalf of the Informant opened the arguments and concluded his submissions. Thereafter, the representatives appearing on behalf of OP-1/ ISMA made submissions and supported the DG’s conclusions. None appeared on behalf of OP-2/ NFCSF.

3. Shri M. L. Lahoty, the learned senior counsel appeared on behalf of OMCs (OP-3 to OP-5) also supported the conclusions drawn by the DG qua them.

4. After hearing the learned counsel(s) and the representatives of the parties, the Commission decided to pass an appropriate order in due course.”

32. In view of the aforesaid, the Commission shall not examine the issue of joint tendering by the PSU OMCs in the present case and shall proceed to examine the other issues which arise and have been argued in the present case. These may be clubbed under the following heads:

I. Whether the process of mandatory EBP notified by the MoPNG as well as procurement of ethanol by the PSU OMCs at fixed notified



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prices contravene any provision of the Act?

II. Whether OP-1 has abused its dominant position in the market for supply of ethanol to the PSU OMCs in violation of the provisions of Section 4 of the Act?

III. Whether OP-1 and OP-2 acted in collusion to create an artificial scarcity of ethanol by limiting production and supply of ethanol to force the PSU OMCs to purchase ethanol at an artificially higher price in contravention of the provisions of Section 3 of the Act?

33. Apart from the aforesaid issues, some of the peripheral and incidental issues have been identified and investigated by the DG. The same shall be dealt with in the latter part of the order.

Issue No.I

Whether the process of mandatory EBP notified by MoPNG as well as procurement of ethanol by the OMCs at fixed notified prices contravene any provision of the Act?

34. On this issue, the Commission, at the outset, would like to highlight that the DG has framed different sub-issues under this head in abstract and not keeping in mind the statutory framework of the Act. In fact, as would be shown later, the DG has gone on to examine the policies and pricing strategies of the Government without bringing to light any anti-competitive issue which might arise within the framework of the Act. The first sub-issue examined by the DG relates to mandatory EBP notified by the MoPNG. In this regard, the Commission, first, notes that the DG should have sought the views of the MoPNG before embarking upon examination of such a policy. Be that as it may, the DG quoted *in extenso* from the National Policy on Biofuels announced by GoI in 2008 as well as from the report entitled 'Ethanol Blended Petrol and Bio Diesel Policy' presented by the Standing Committee on Petroleum and Natural Gas in Lok Sabha on



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13.08.2015 and opined that EBP has been notified by the GoI to ensure that by using more and more renewable source of energy such as ethanol, energy security of the country is safeguarded besides protecting the environment. Further, it was noted by the DG that production of ethanol in the country is dependent upon sugarcane molasses which, in turn, is dependent upon sugarcane production.

35. The DG further noted that mandatory EBP notified by the GoI is not acting as an entry and exit barrier for the enterprises into or out of the markets. Since production of different derivatives of ethanol by sugar mills/ distilleries depends upon the availability of sugarcane molasses with them, their decision on deciding the production mix is based on prevalent market conditions. There is no compulsion from the GoI on the sugar mills/ distilleries to mandatorily produce any variant of alcohol, including ethanol, for supply to the OMCs. It can then be said that the EBP policy is not controlling the production level of the sugar mills/ distilleries.
36. The DG has examined the issue of procurement of ethanol by the PSU OMCs at fixed notified prices instead of at market driven prices under the EBP and concluded that such a process cannot be considered desirable from the competition perspective. It has suggested a thorough analysis of the benefits and disadvantages or competition impact assessment of the procurement of ethanol by the OMCs at fixed/ uniform notified price instead of at market driven prices under the EBP of the GoI be carried out at the earliest.
37. The Commission is of the opinion that the approach adopted by the DG in examining these issues was not warranted. It needs no emphasis that a policy or pricing strategy of the Government cannot be examined in abstract by the Commission unless the same falls within the framework of the Act. The Commission observes that policy formulation is the prerogative of the Government. It is in its domain to effect a change in the *extant* policy by shifting the focus or changing the economic policies. No doubt, such changes could result in adversely affecting some of the existing interests, yet the same cannot be a



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ground to challenge them before the Commission. It is not for the Commission to consider the relative merits of different economic policies or the pricing mechanisms of the Government and decide as to whether a more wise or a better alternative can be evolved. The Commission is of the considered opinion that formulation of policies falls in the domain of the Executive and the Commission is not the appropriate forum to sit in appeal over such decisions unless such policies contravene any provision of the Act and can be examined within the existing regulatory framework.

38. Besides, the Commission notes that the Informant has already challenged various aspects of EBP by filing a writ petition (W.P. No. 247 of 2015) before the Hon'ble High Court of Delhi and the same is pending adjudication. For ready reference, the prayers made therein are excerpted below:

“(i) Prohibiting Ministry of Petroleum & Natural Gas from continuing further with Ethanol Blending of Petrol Programme (EBP) and from fixing a uniform purchase price for procurement of Ethanol for EBP programme and implementing the CCEA directive dated 10.12.2014 whereby CCEA has provided the mechanism for fixing the uniform price for procurement of ethanol by Public Sector Oil Marketing Companies (OMCs).

(ii) Direct Ministry of Petroleum & Natural Gas and OMCs to implement the suggestions of Dr. Saumitra Chaudhuri Committee as well as that of Dr. C. Rangarajan Committee by not imposing any quota/quantities resolution vis-a-vis user industry, namely, potable alcohol etc.

(iii) Permit trading of ethanol in Commodity exchanges for both spot and future deliveries.

(iv) Prohibit OMCs from procuring Ethanol for EBP through tender route.”

39. Thus, the Commission is of the opinion that the Informant is resorting to forum shopping before various fora by impugning the same issues before various authorities.



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Issue No.II

Whether OP-1 has abused its dominant position in the market for supply of ethanol to the PSU OMCs in violation of the provisions of Section 4 of the Act?

40. Before examining the issue of alleged contravention by ISMA of the provisions of Section 4 of the Act, it is necessary to ascertain whether it is an 'enterprise' or not within the meaning of Section 2 (h) of the Act, as Section 4 (1) of the Act forbids abuse of dominant position only by an 'enterprise' or a 'group'.
41. On examination of the activities of ISMA, the DG did not find it to be an 'enterprise' and, thus, did not pursue the issue of alleged abuse of dominant position by it in the market for supply of ethanol to the OMCs.
42. Challenging this conclusion of the DG, it was submitted by the learned counsel appearing on behalf of the Informant that the DG was in error to conclude that OP-1 (ISMA) was not an 'enterprise' within the meaning of the term as defined under the Act. It was submitted that OP-1 (ISMA) and OP-2 (NFCSF) are involved in the business of 'provision of services'. It was further submitted that the provision of services rendered by OP-1 and OP-2 to their members and other independent enterprises including the PSU OMCs are not in the form of 'trade union activities'. Relying upon the decision of the Hon'ble Supreme Court of India in *Competition Commission of India v. Coordination Committee of Artistes and Technicians of W.B. Film and Television*, (2017) 5 SCC 17, it was submitted that any entity, regardless of its form, constitutes an 'enterprise' within the meaning of Section 2 (h) read with Section 2 (l) of the Act when it engages in any economic activity. It was argued that the Hon'ble Supreme Court has distinguished the activities of 'trade unions' from the 'economic activities' of trade associations and held that if the individual members constituting the trade associations are engaged in economic activities, such trade associations come within the ambit of the Act. It was submitted that both ISMA and NFCSF are not



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engaged in any trade union activities and hence, are not exempted from the provisions of Section 4 of the Act. It was also pointed out that ISMA and NFCSF hold 55% and 45% market share respectively in the market for manufacture and supply of sugar in India and as such, ISMA alone is a dominant enterprise.

43. The Commission has examined the submissions advanced by the learned counsel and is of the opinion that these are misconceived and based upon a misreading of the statute and judicial pronouncements. The term 'enterprise' has been defined in Section 2 (h) of the Act, as a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.
44. Thus, it can be seen that Section 2 (h) of the Act, while defining the word 'enterprise' uses the words 'engaged in any activity' which means that only if any person is engaged in the production, storage, supply, distribution, acquisition or control of articles or goods, or provision of services *etc.*, it would fall within the purview of the term 'enterprise'. Section 2 (l) of the Act defines a 'person'. The definition is inclusive and includes an 'association of persons' or 'body of individuals' whether incorporated or not and whether in India or outside India. In order to make the definition vast, other juridical persons not falling within the different sub-clauses of Section 2 (l) have been included by Clause 2 (l) (ix) of the Act.



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45. Hence, a perusal of the above-stated definition would reveal that for an entity to fall within the definition of the term ‘enterprise’, it must be engaged in any activity which is relatable to the economic activities specified in the definition. In the present case, it may be noted that the primary activity of OP-1 (Indian Sugar Mills Association) is to provide a platform to its constituent members to discuss matters of common interest related to the sugar industry. Further, it is engaged in making representations from time to time in the form of correspondence and presentations with/ before the various GoI authorities and agencies relating primarily to matters of policy and procedures governing the sugar industry. The purpose of the correspondence and presentations seems to highlight the cause and concerns of the sugar industry before various authorities and agencies of the GoI.
46. Thus, it is obvious that OP-1 is not engaged in any economic or commercial activity as enumerated under Section 2 (h) of the Act for an entity to qualify as an ‘enterprise’.
47. The Commission also notes that the reliance placed by the learned counsel appearing on behalf of the Informant on the decision of *Coordination Committee of Artistes and Technicians (supra)* is of no assistance to its cause. First, on a plain reading of the said decision, it is observed that the same was rendered in the context of anti-competitive conduct of trade associations which was examined under Section 3 of the Act and which *inter alia* prohibits anti-competitive agreements. This is exemplified from the following observations made in the order:
- “...Thus, any entity, regardless of its form, constitutes an “enterprise” within the meaning of Section 3 of the Act when it engages in an economic activity. An economic activity includes any activity, whether or not profit making, that involves economic trade.”*
48. Secondly, the judgment emphasises on the nature of the activity undertaken by an entity (*i.e.* economic activity) to qualify as an ‘enterprise’.
49. Similarly, the reference made by the learned counsel appearing on behalf of the



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Informant upon the order dated 04.02.2015 of the Commission passed in the case of *Shivam Enterprises v. Kiratpur Sahib Truck Operators Cooperative Transport Society Limited*, Case No. 43 of 2013 is misplaced. In the said order, the Commission observed that normally associations do not themselves engage in any economic activities and as such, such associations are usually not 'enterprises'. However, the Commission emphasised on the need to examine the functional aspects of such associations to reach such a conclusion. After analysing the nature of the activities undertaken by the OP in the said case, the Commission, in light of the findings of the DG, observed as follows:

“The DG in light of the conduct of OP 1, held it to be an ‘enterprise’ as it is found to be engaged in activities relating to provision of services of freight transport by trucks.

The Commission agrees with the conclusion of the DG on this ground as from the report of the DG it is apparent that OP 1 takes the contracts in its own name and gets them executed through its members i.e. OP 2 according to its own internal procedure/ management and the customer has no choice or control over the various members i.e. OP 2 directly. The customer makes payment for the services to OP 1. OP 1 then passes the payment to the concerned member after retaining a commission/ its own administrative charges of Rs. 50 for each trip taken by truck operator/ member i.e. each of OP 2. From such functions discharged by OP 1, it is safe to conclude that this role played by OP 1 enables it to exercise control over supply of freight transport services.

In view of the above, it can be held that OP 1 is engaged in activities relating to provision of freight transport services and as such is an ‘enterprise’ within the meaning of the term as given in section 2(h) of the Act.”

50. As held, primary activities of ISMA are to provide a platform to its constituent members to discuss matters of common interest relating to the sugar industry besides making representations to the government authorities and agencies to espouse the cause of its members in respect of the matters of policy and procedures governing the sugar industry. Since ISMA is not undertaking any



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activity which is economic or commercial activity pertaining to production and supply of ethanol, allegations made by the Informant in this regard do not survive. As a result, question of ISMA being dominant in such a market does not arise. The argument of the Informant that ISMA is involved in business of 'provision of services' to its members to bring it within the scope of 'enterprise' is disingenuous. It needs no further analysis as the allegations made by the Informant are in respect of production and supply of ethanol and not in respect of the alleged services provided by ISMA to its members. It would indeed be a subversion of law if ISMA is held to be an 'enterprise' for providing its platform to the members as 'services' and to hold it guilty for altogether different activity *i.e.* production and supply of ethanol.

51. In view of the above, the Commission is of the considered opinion that ISMA cannot be considered to be an 'enterprise' within the meaning of the term as defined in Section 2 (h) of the Act and as such, the issue of abuse of dominant position by ISMA in respect of production and supply of ethanol does not arise.

Issue No.III

Whether OP-1 and OP-2 acted in collusion to create an artificial scarcity of ethanol by limiting production and supply of ethanol to force the PSU OMCs to purchase ethanol at an artificially higher price in contravention of the provisions of Section 3 of the Act?

52. The DG has examined the issue whether OP-1 and OP-2 were in collusion to create an artificial scarcity of ethanol by limiting the production and supply of ethanol to force the OMCs (OP-3 to OP-5) to purchase ethanol at an artificially higher price in contravention of the provisions of Section 3 (3) (a) and 3 (3) (b) of the Act. The issue was examined in great detail by the DG. On analysis, the DG concluded that availability and supply of sugarcane molasses in the country is dependent upon the production of sugarcane and, therefore, supply of molasses in the country is limited. It was noted that there are a number of sugar mills in the



country which do not have the capacity and means to produce ethanol for supply to the OMCs. Since production of all the derivatives of alcohol including ethanol depends upon availability of sugarcane molasses, sugar mills assess the market situation as well as demand of different derivatives of alcohol to decide the optimum production mix of different derivatives of alcohol. This in turn impacts the supply of each variant of alcohol including ethanol for supply to the OMCs. The investigation did not come across any material which may indicate that ISMA (OP-1) and/ or NFCSF (OP-2) played any role in deciding the production and availability of molasses and production of different derivatives of alcohol by the sugar mills/ distilleries. Further, the investigation did not come across any material which may indicate that ISMA (OP-1) and/ or NFCSF (OP-2) could have influenced the production and supply of ethanol with their act of collusion or concerted action and which may have influenced the price of ethanol procured by the OMCs. The investigation did not also find any evidence in respect of any concerted action between OP-1 and OP-2. When the DG examined the production and supply data of the three main sugar mills which produce and supply about 75-80% of the total ethanol supplied to the OMCs in State of U.P., the same revealed that the production and utilisation pattern of these mills of different derivatives of alcohol during financial years 2012-13 to 2014-15 significantly differ. It indicates that the sugar mills are independently taking decisions on their production mix and its utilisation including ethanol and such decisions seem to be market driven. It seems that these sugar mills are producing and supplying different derivatives of alcohol as per the demand and supply commitments made by each one of them looking to the market forces.

53. Further, the DG also alluded to several reports and studies undertaken by various government agencies and organizations working on policy matters, which seemed to unanimously indicate that production and supply of ethanol for EBP is at a lower level which is due to the fact that production of sugarcane in the country is inconsistent. Therefore, supply of molasses in the country is also not only inconsistent but limited too. Under such a scenario, it will be logical and



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prudent to compare and see the production and supply of ethanol in connection with the production and availability of molasses. In the light of these facts and analysis, the investigation came to the conclusion that the production, availability and supply of molasses in the country has a huge and decisive impact on the production and supply of ethanol and that OP-1 and OP-2 cannot be said to be in any collusion to create an artificial scarcity of ethanol by limiting production and supply of ethanol at low level which may force the OMCs (OP-3 to OP-5) to purchase ethanol at an artificially higher price.

54. For the reasons adumbrated, the Commission is of the opinion that no contravention of the provisions of Section 3 (3) (a) and 3 (3) (b) of the Act is made out against ISMA (OP-1) and NFCSF (OP-2).

Peripheral Issues

55. The DG also examined the issue as to whether demand of higher prices by OP-1 and OP-2 led the OMCs to cancel the tender of October, 2014 and concluded that the tender of October, 2014 was cancelled due to fall in international crude prices at that time, leading to wide variation of motor spirit RTP prevailing at that point of time and prices offered by the Ethanol suppliers. It was also noted by the DG that there appears to be no competition issue on this aspect. The Commission agrees with the DG on this count.
56. The DG further examined the allegation that OP-1 and OP- 2 demanded higher price of ethanol in respect of July, 2014 tender from the OMCs in the absence of substitutable products and/ or competitors and unilaterally distorted the market. The allegation was found by the DG to be without any basis and substance. Similarly, the DG examined allegation that the OMCs have not considered the adjustment of lower calorific value of ethanol while working out their benchmark price derived on the basis of average RTP of motor spirit in complete disregard to the letter dated 12.05.2014 of the MoPNG. The same was also not found to be



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substantiated by facts. The Commission agrees with the DG on these aspects that the allegations remained unsubstantiated and notes further that the alleged non-compliance by the OMCs of any directive issued by the Ministry cannot be examined by the Commission within the framework of the Act.

57. Lastly, the DG examined whether information in respect of data of blending of petrol and ethanol and generated benefits and fuel efficiency achieved is available in the public domain for the end consumers. Further, the DG also analysed an incidental aspect whether OP-3 to OP-5 (OMCs) have provided the aforesaid information to the end consumers. It was observed by the DG that though the OMCs have not directly informed to the end consumers about the data of blended petrol and benefits of blending and fuel efficiency achieved, the same is generally available in the public domain through statements and data provided by the concerned Minister before the Lok Sabha.
58. The Commission is of the opinion that the above-stated issue framed by the DG was not within the framework of the competition law regime. In any event, the DG found the requisite information to be in public domain.
59. In view of the above, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against OP-3 to OP-5 on the aforesaid count.
60. Before concluding, it may be pointed out that whereas the Informant in the present case has made diverse allegations as delineated in the order, in the bunch of cases against sugar mills (Case Nos. 21, 29, 36, 47, 48 and 49 of 2013) pending further investigation before the DG, issues under investigation are mainly two fold: first, the issue is joint tendering by the OMCs and second, is the bid rigging by sugar mills in respect of joint tender dated 02.01.2013 floated by the OMCs. Both these issues shall be dealt with in those cases separately.
61. Based on the above discussion, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against the OPs.



62. The Secretary is directed to inform the parties accordingly.

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

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

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

**Sd/-
(Justice G. P. Mittal)
Member**

New Delhi
Date: 11/05/2018