**COMPETITION COMMISSION OF INDIA**

**Case No. 107 of 2013**

**In Re:**

**Association of Third Party Administrators** — **Informant**

**And**

1. **General Insurers' (Public Sector) Association of India** — **Opposite Party No. 1**
2. **New India Assurance Co. Ltd.** — **Opposite Party No. 2**
3. **National Insurance Co. Ltd.** — **Opposite Party No. 3**
4. **United India Insurance Co. Ltd.** — **Opposite Party No. 4**
5. **Oriental Insurance Co. Ltd.** — **Opposite Party No. 5**
6. **Department of Financial Services Ministry of Finance Government of India** — **Opposite Party No. 6**

**CORAM**

**Mr. Ashok Chawla**
**Chairperson**

**Mr. S. L. Bunker**
**Member**

**Mr. Sudhir Mital**
**Member**

**Mr. Augustine Peter**
**Member**

**Mr. U. C. Nahta**
**Member**

**Mr. Justice G. P. Mittal**
**Member**

| | | |
|---|---|---|
| **Appearances:** | *For the Informant:* | Shri Amir Singh Pasrich, Advocate<br>Shri Pratyush Prasanna, Advocate<br>Ms. Manasi Chatpalliwar, Advocate<br>Shri Dhruv Malik, and<br>Shri Anil Singh |
| | *For OP-1:* | Ms. Priyanka Bharti, Advocate<br>Shri K. Govindarajan, and<br>Shri A.K. Singhal |
| | *For OP-2:* | Shri Dinesh Mathur, Advocate |
| | *For OP-3:* | Shri Jaideep Gupta, Sr. Advocate,<br>Shri R. S. Mathur, Advocate<br>Shri M. Chandrashekhar, and<br>Shri Arvind Sharma |
| | *For OP-4:* | Shri Amitabh Marwah, Advocate |
| | *For OP-5:* | Shri Rudreshwar Singh, Advocate |
| | *For OP-6:* | Shri Amandeep Bawa, Advocate |

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

1. The information in the present case has been filed under section 19(1)(a) of the Competition Act, 2002 (**the 'Act'**) by Association of Third Party Administrators (**the 'Informant'**) against General Insurers' (Public Sector) Association of India (**'Opposite Party No. 1'/ 'OP-1'/ 'GIPSA'**), New India Assurance Co. Ltd. (**'Opposite Party No. 2'/ 'OP-2'**), National Insurance Co. Ltd. (**'Opposite Party No. 3'/ 'OP-3'**), United India Insurance Co. Ltd. (**'Opposite Party No. 4'/ 'OP-4**'), Oriental Insurance Co. Ltd. (**'Opposite Party No. 5'/ 'OP-5**') and Department of Financial Services, Ministry of Finance, Government of India (**'Opposite Party No. 6'/ 'OP-6'/ 'DFS'**) alleging *inter alia* contravention of the provisions of sections 3 and 4 of the Act. The public sector general insurance companies i.e. OP-2 to OP-5 have been hereinafter collectively referred to as PSGICs.

**Facts**

2. As per the information, the Informant is an association of third party administrators, registered as a trust under the Indian Trusts Act, 1882. It was set up in the year 2005 with the objective to ensure that the administration of services in the health insurance market is efficient, consumer centric and serves the needs of India's growing healthcare infrastructure. Its members are licensed by Insurance Regulatory and Development Authority of India (IRDA), as per the terms of the Third Party Administrators Health Services Regulations, 2001.

3. OP-1 is an association of PSGICs *viz*. OP-2 to OP-5. PSGICs are engaged in the business of general insurance. The ownership of these public sector insurance companies, subsequent to the amendment of the General Insurance Business (Nationalization) Act, 1972 in 2002, vests with the Central Government. The Informant has stated that PSGICs collectively hold/control about 60% of the health insurance business. It has been alleged that PSGICs constitute a "group" within the meaning of Explanation (b) to section 5 (b) of the Act and they are under common control of OP-6 and further act in concert being part of a cartel.

4. OP-1 (GIPSA) has been stated to be formed by the PSGICs as a platform to further their own interests and allegedly to facilitate anti-competitive practices. The Informant has pointed out the response provided by OP-3 dated 15.10.2012 to a Right to Information (RTI) application, wherein it was stated that GIPSA is "*not formed as a formal body and is not a legal entity by itself. It is simply an internal mechanism of coordination of 4 Public Sector General Insurance Companies and only provides a forum for facilitating consultations and deliberations amongst its Member Companies*". The Informant has alleged that in spite of being an *ad hoc*, unregistered and informal body, GIPSA issued the Expression of Interest (EOI) dated 14.08.2010 for setting up of a captive

Third Party Administrator (TPA) i.e. Health Insurance TPA India Ltd. (hereinafter, 'HITPA'), thus demonstrating that GIPSA is indeed a platform for furthering the anti-competitive agreements among the PSGICs. For investing in the said TPA, the PSGICs obtained an exemption from IRDA on "special grounds" in March 2013. The limited exemption was granted by IRDA based on the provisions of sections 27B(5) and 27B(9) of the Insurance Act, 1938, which restricts the insurance companies from investing in other companies, on the condition *inter alia* that each of them would hold only 23.75% of the paid-up capital in newly formed captive TPA. The formation of HITPA by the PSGICs was alleged to foreclose the market for existing as well as potential TPAs planning to enter that market. Thus, the Informant has alleged that the PSGICs, by collectively deciding to form HITPA, have acted in an anti-competitive manner.

5. The Informant has highlighted the majority order dated 08.07.2011 in Case No. 49 of 2010, which was filed by the same Informant against the same OPs, wherein the Commission opined that it would be premature to anticipate or imagine the emergence of dominance by only considering the invitation for an EOI floated by GIPSA for a yet to be formed new TPA. The Informant has stated that the formation of HITPA in June, 2013, only rendered the anti-competitive agreement as real, and is an abuse of dominance by the OPs 2 to 6, that constitute a group, and is a violation of the Act given the facts and circumstances.

6. Alluding to further evidence of GIPSA's illegal role, the Informant submitted that pursuant to an RTI request, OP-6 revealed that on 25.06.2012, one M/s Mankad & Associates Insurance Broking Pvt. Ltd. had written to OP-6 regarding the underwriting of group health insurance policies wherein it had mentioned that at the time of renewal insurance companies must take into account the claims ratio for previous year. The Informant has further stated that *vide* letter dated 18.10.2012,

OP-6 had forwarded the letter dated 25.06.2012 to the Chief Executive of OP-1 instead of Chairman-cum-Managing Directors (CMDs) of the PSGICs. This fact, as per the Informant, showed that OP-1 was taking joint decisions for and on behalf of the PSGICs in violation of section 3 of the Act.

7. It has been further alleged that the representatives/officials of PSGICs met on 03.06.2009 and discussed to carve out a market for all those group policy portfolios which had a net premium of above Rs. 1 crore. Further, the Informant has alleged that PSGICs arrived at a consensus that the renewal premium would be shared among them on a pre-arranged basis of 70:10:10:10 for all policies whether they are called upon to quote or not, and new business and renewal of new business existing with private insurers would be shared in the ratio of 40:20:20:20 which is evident from a circular dated 16.06.2009 of OP-6 wherein such arrangement has been clearly stated. This, as per the Informant, demonstrates a clear horizontal anti-competitive agreement amongst the PSGICs alleged to be *per se* in violation of section 3 of the Act. Furthermore, as per the Informant, it also violates section 4 of the Act as PSGICs have individually as well as collectively abused their dominance.

8. The Informant alleged that OP-6 *vide* circular (F.No.G 14017/115/2011-Ins.II) dated 24.05.2012 addressed to the CMDs of the PSGICs had *inter alia* directed that "*No Public Sector General Insurance Company shall obtain business of standalone Group Health Insurance from any of the other Public Sector Companies without the prior written and explicit 'No Objection' from the concerned CMD of the Other Company; All PSU insurers shall necessarily share the data concerning premium, claims etc. w.r.t. major accounts and ensure that there is no competition between them in any corporate/group account. Any deviation from this instruction will be viewed seriously*". The said circular was allegedly

superseded by a subsequent circular dated 18.07.2012 having similar guidelines mandating anti-competitive agreements between the PSGICs. It was further alleged that subsequently, the PSGICs issued internal underwriting guidelines for health insurance in July 2012 to give effect to the above mentioned circulars.

9. The Informant has stated that OP-1 had sent a letter to OP-6 dated 25.10.2012 regarding a complaint by "Concerned Insurance Industry Participants Group". In the said letter, OP-1 had denied the allegation that the policies stipulated by the Ministry were not being followed and averred "*That the GIPSA Member Companies have confirmed implementation of the Ministry's Guidelines. No complaints regarding violations of these guidelines have been received at GIPSA*".

10. Further, it was also alleged that OP-1 through its Chief Executive wrote a letter dated 06.05.2013 to OP-6, wherein it was clearly stated that the maximum rates for agency commission/ brokerage to be charged were informally discussed, to combat the issue of loss of health insurance business mainly due to the reduction in the commission rates. The Informant has alleged that letter written by OP-1 clearly reflects price fixing by formation of a cartel.

11. Based on the aforesaid allegations and averments, the Informant *inter alia* prayed for an inquiry against OP-1 to OP-6 for the contravention of the provisions of the Act besides praying for the remedies as provided there under.

**Directions to the DG**

12. The Commission, after considering the material available on record and hearing the counsel for the appearing parties, was of the opinion that there exists a *prima facie* case of contravention of provisions of section 3 of the Act. However, no contravention of section 4 of the Act was

observed by the Commission. Accordingly, *vide* its *prima facie* order dated 15.04.2014 passed under section 26(1) of the Act, the Commission directed the DG to cause an investigation and submit a report. In compliance of the said direction, the DG accordingly submitted the investigation report on 18.02.2015 (hereinafter referred to as the 'initial DG report').

13. On perusal of the initial DG report, the Commission noted that certain issues outlined in its *prima facie* order dated 15.04.2014 have not been appropriately dealt with in the initial DG report. Accordingly, the DG was advised to look into the matter and submit a comprehensive investigation report which covers all issues outlined in the order dated 15.04.2014. The DG accordingly submitted a comprehensive investigation report on 15.06.2015 (hereinafter both the reports are collectively referred to as the DG reports).

**Investigation by the DG**

14. The DG examined the allegations levelled by the Informant in the light of the provisions of section 3(1), 3(3) and 3(4) of the Act. It was observed that HITPA has been set up as a joint venture company by four public sector general insurers i.e. the PSGICs and General Insurance Corporation of India (GIC) for which consent was granted by IRDA to public sector general insurance companies to hold stake in the jointly formed captive TPA. It was found that though the captive TPA obtained the certificate from IRDA for working as TPA in the Health Insurance sector in June 2014, it was not operational as on the date of submission of the DG reports.

15. Investigation found that after amendment of IRDA Regulations in 2013, the role of TPAs in claim settlement and agreement with hospitals has changed and the primary responsibility of claim settlement is now on the

insurance companies. As per Health Regulations 2013, the authority to empanel, depanel and contract with hospitals to provide cashless treatment to insured patients is now with the insurer. TPAs are tripartite signatory to the main contract between insurer and hospital to the extent of facilitating cashless treatment. The DG observed that in the changed environment as per Health Regulations 2013 wherein the authority to contract, negotiate, empanel, depanel hospitals lies with insurance company, HITPA cannot lead to anti-competitive effects as such in the healthcare market.

16. Investigation further found that the insurance companies in India and elsewhere in the world are not compulsorily required or mandated to use the services of TPA. The claims management being an integral part of insurance business, the companies may or may not use the services of TPA depending on the need and business strategy. It was also observed that many private sector general insurers, which initially availed services of TPAs, established their own infrastructure to process the claims in-house primarily because they were not satisfied with the services of TPA in efficient settlement of claims. The private insurers also submitted during investigation that the quality and reach of service of TPAs has been very unsatisfactory, as the infrastructure and capacity of present TPAs was inadequate to match the fast and rapid growth in health insurance business. From annual figure of 37.83 lacs claims in 2011-12, the number increased to 55.22 lacs in 2013-14, whereas the infrastructure and capacity of TPAs has remained almost stagnant.

17. The Investigation, therefore, found that the services provided by the TPAs required improvement not only in terms of numbers but also in respect of use of technology, proper infrastructure and efficient manpower to handle the claims as well as improvement in other related services. Thus, the decision of PSGICs to have a new TPA which shall have no exclusive rights of their business was found to be a commercial

decision aimed at improving the level of services. The investigation further concluded that the formation of new TPA jointly would not foreclose the market or lead to any appreciable adverse effect on competition ('AAEC'). With regard to OP-1's role, the investigation observed that it was playing a role of nodal agency for OP-6 to co-ordinate on various common policy matters and also for implementation of government schemes.

18. In respect of the allegation relating to violation of provisions of section 3(4) of the Act, DG observed that there was no agreement amongst the PSGICs in respect of any vertical restraint in violation of the provisions of section 3(4) of the Act.

19. With regard to the Informant's allegation regarding pre-arranged agreement amongst the PSGICs in respect of sharing of the group health insurance business amongst them, the DG found that the evidence was inadequate. The DG found that the document submitted by the Informant dated 16.06.2009, wherein the meeting of the officials/representatives of PSGICs dated 03.06.2009 was recorded, was incomplete (without any name and unsigned) and hence unreliable. Further, in spite of being given an opportunity, the Informant could not submit the complete document till the submission of the comprehensive investigation report. However, the Informant submitted another unsigned document dated 04.08.2010 allegedly issued by OP-3 containing the anti-competitive clauses/ instructions. During the examination PSGICs denied the existence of the document dated 16.06.2009 or any other document relating to the meeting on 03.06.2009 mentioned in the said document. Further, upon examination, OP-3 also denied the issuance of any document dated 04.08.2010. The investigation has found that the Informant could not prove genuineness of the documents dated 16.06.2009 and 04.08.2010 despite being given enough opportunity to substantiate it. Further, the DG found that the examination of the conduct of PSGICs has also not indicated that they followed the

arrangements mentioned in the purported documents.

20. The Informant has further made allegations that OP-6 issued instructions dated 24.05.2012 and 16.07.2012 with a direction to PSGICs to act with an arrangement in order to avoid competition amongst themselves. However, based on the statements of the officials of PSGICs recorded during examination, the DG observed that PSGICs have continued to compete with each other to obtain/retain business even after the instructions by OP-6 through the above mentioned documents; instructions of OP-6 were not anti-competitive but only aimed at disciplining underwriting processes and none of the conditions of the said document were followed due to the inherent lack of practicability. The data obtained with regard to the actual conduct of PSGICs during the investigation also showed that no violation of the provisions of section 3(3) of the Act took place.

21. On the basis of aforesaid, the DG found that there was no attempt to determine the prices or limit or to restrict the supply of services in the market of Health Insurance or provision of services relating to TPAs. The investigation has rather shown that the formation of new TPA i.e. HITPA would bring efficiency in the market and benefit the consumers. Further, the allegations pertaining to the documents dated 16.06.2009 and 04.08.2010 were found to be not substantiated as the documents were found to be unreliable. Furthermore, with regard to the instructions dated 24.05.2012 and 18.07.2012 issued by OP-6, the DG found that since the actual conduct of PSGICs showed that they were in fact competing with each other, the instructions were not followed and hence no violation of the provisions of section 3 (3) took place.

22. The investigation, thus, found no violation of any of the provisions of section 3 of the Act against any of the Opposite Parties.

**Consideration of the DG reports by the Commission**

23. The Commission in its ordinary meeting held on 07.07.2015 considered the DG reports submitted by the DG and decided to forward copies of the investigation reports of the DG dated 18.02.2015 and 15.06.2015 to the parties for filing their respective replies/ objections thereto. The parties presented their oral arguments in Commission's ordinary meeting dated 15.10.2015 and filed their respective written submissions on the DG reports.

**Replies/ Objections/ Submissions of the parties**

*Replies/ objections/ submissions of the Informant*

24. The Informant filed its detailed objections dated 18.09.2015 to the DG report. In its preliminary objections, it stated that the findings of the DG in the report dated 15.06.2015 (comprehensive DG Report) appeared to follow a pre-meditated and mechanical procedure adopted only to lend force and support the earlier report. It was, thus, submitted that both the DG reports suffered from serious infirmities and the conclusions were unsustainable largely due to inadequate procedure and failure of the DG to address all the points raised in the order dated 15.04.2014.

25. The Informant argued that the DG failed to appreciate some relevant evidence (two circulars dated 16.06.2009 and 04.08.2010) placed on record by the Informant so as to avoid their significance to demonstrate the egregious nature of the PSGICs collusive actions and cartelization. The said documents, as per the Informant, showed that the PSGICs were sharing business in a pre-determined manner in the ratio of 70:10:10:10. It was submitted that these documents demonstrated the same pattern of business sharing recently confirmed and found to exist by the

Commission in *Suo Moto* Case No. 2 of 2014 against the PSGICs. Though the Informant admitted that documents dated 16.06.2009 and 04.08.2010 were indeed unsigned, it was contended that the DG ought to have probed/inspected more documents and questioned witnesses.

26. Further, the Informant stated that the PSGICs had held a meeting under the auspices of ICCC (Inter Company Coordination Committee) at Kochi on 07.12.2009, five months after their meeting at Chennai with the sole agenda to discuss the *"Tender Notice on RSBY dated 18.11.2009 of Government of Kerala"* and to discuss sharing of business and submission of quotations for the above business. It was apparent that the formula for sharing was maintained (70:10:10:10) reflecting clearly the same pattern of default i.e. cartel like behavior. It was averred that the DG did not inquire about the above meeting.

27. The Informant further alleged that the DG failed to address the anti-competitive directives issued by OP-6 through circular dated 25.05.2012 and accepted the submissions of PSGICs that the directions were issued to improve efficiencies and reduce losses by the PSGICs. Further, the DG was alleged to have erred insofar as he believed that the CMDs and other officials of the PSGICs were collaborating only for rationalizing their business operations when in fact their own remarks about the role of GIPSA pointed to a clearly significant coordinative role that appears to be infringing section 3 of the Act. It was alleged that each of the PSGICs has been rolling out identical policies, minutes, resolutions and actions in response to a competitive market so as to defy competitive forces to the detriment of the consumer and in violation of the general scheme of the Act.

28. It was contended that the DG did not refer to application/s made by the PSGICs to IRDA for exemption from operation of section 27(B)(5) of the Insurance Act, 1938 to understand why a permission was granted to

them by the IRDA with the specific condition that each of the four insurance companies would only hold 23.75% of the paid up capital in the newly formed TPA.

29. The Informant further remarked that the DG was probably influenced to decide in favour of the PSGICs because of their often repeated platitude being loss making entities without appreciating that health insurance is one of the fastest growing and most lucrative businesses in the long term resulting into their profitable balance sheets.

30. Further, it is submitted by the Informant that the DG has failed to appreciate the fact that formation of Captive TPA by PSGICs is an anti-competitive arrangement admittedly for leverage, market dominance and coordination agreement formed by a cartel of PSGICs. It is alleged that DG has ignored the merits of arguments submitted in the information.

31. It was contended that the DG, while dealing with the justification offered by the PSGICs regarding them being part of a single economic entity, has erred to a great extent. It was alleged that accepting such a justification itself amounts to acceptance of the existence of an agreement among PSGICs that shows they were acting in tandem to perpetuate anti-competitive activities.

32. The Informant further pointed out that various issues with respect to the contravention of section 3 of the Act which were also mentioned in the order dated 15.04.2014 remained untouched by the DG. Further, the Informant, while pointing out several other flaws in the DG report, prayed that the conduct of OP-1 to OP-6 be held to be in contravention of section 3 and 4 of the Act being anti-competitive and illegal in nature.

*Replies/ objections/ submissions of OP-1*

33. OP-1 endorsed the findings of the DG report and prayed that the same

may be accepted and accordingly, the matter be closed under section 26(6) of the Act.

34. In its submissions dated 09.10.2015 filed in response to the Informant's objections to DG's Report, OP-1 submitted that it is not an authority or body of self-government. Further, it was submitted that it has not been established or constituted under a notification issued or order passed by an appropriate government and is also not a body owned, controlled or substantially financed by the appropriate government. It is merely a coordinating mechanism put in place as a common discussion forum by PSGICs to act as a facilitation centre for common activities and purposes.

35. OP-1 submitted that the contention of the Informant about formation of HITPA jointly by the PSGICs to foreclose the market, is misplaced as it was clearly stated by PSGICs that other TPAs would remain on their panel and the newly formed HITPA would only be one amongst the other TPAs. It was stated that no preferential treatment or reservation would be accorded to HITPA and if its services are not found to be satisfactory the customers would have choice to decide on any of the other TPAs. Further, as per the approval granted by IRDA, the newly formed TPA would not compete with other TPAs for the business of Private Insurance companies. Thus, as per OP-1, about 40% business is foreclosed for the newly formed HITPA.

36. It was contended that neither the competition for TPA service providers nor the opportunity for a new entrant is affected by the joint venture of PSGICs; rather HITPA will improve the competition and lead to efficient services in the market.

37. It was further submitted that the statements and submissions made by the four PSGICs have shown that the document dated 16.06.2009

provided by the Informant was not issued by them. Furthermore, they have also categorically denied the implementation of any of the decisions contained in the said document. It was submitted that there was no instance of sharing of renewal business on a pre arranged ratio of 70:10:10:10 or sharing the new business at a pre arranged ratio of 40:20:20:20. The fact that the market share of PSGICs have not remained consistent as alleged in the information shows that they were not indulging in any such anti-competitive conduct.

38. With regard to the instructions issued by OP-6 to PSGICs, it was stated that the instructions were independently issued by OP-6 to all PSGICs to behave in a particular way to mitigate the losses. There was nothing on record to show that there was any common understanding amongst the PSGICs in respect of the subject matter of instructions in question. The intent and purpose of instructions issued by OP-6 was obviously to control the unhealthy and self-destructive competition and undercutting by the PSUs. This, as per OP-1, proved that there was fierce competition to retain and procure new businesses amongst the 4 PSGICs which led to issuance of guidelines by OP-6 to bring in discipline while quoting for new business.

39. It was stated that though the DG has observed that OP-1 is the nodal agency of OP-6 to coordinate on various common policy matters and also for implementation of government schemes, no anti competitive arrangement amongst the PSGICs was found which could be said to have been facilitated by OP-1. Citing the aforesaid reasons, OP-1 prayed that the matter be closed forthwith under Section 26(6) of the Act.

*Replies/ objections/ submissions of OP-2 to OP-5*

40. OP-2 to OP-5 concurred with the investigation reports submitted by the DG and prayed that the same may be accepted and accordingly, the

matter be closed under section 26(6) of the Act.

41. PSGICs (i.e. OP-2 to OP-5) filed their respective replies to the objections filed by the Informant to the DG reports by taking similar pleas. Accordingly, the pleas are illustratively noted from the response filed by OP-5. Agreeing with the DG's reports and denying the averments in the Informant's reply to the DG's reports, OP-5, in its written submission dated 09.10.2015, stated that the Informant was given adequate opportunity in the inquiry and all concerned have been examined by the DG. It was submitted that the DG's reports were comprehensive touching upon all aspects of the matter raised and correctly concluded that there was no contravention of section 3 of the Act by the PSGICs.

42. It was further stated that the DG has correctly observed that insurance companies in India and elsewhere in the world were not mandated to use the services of TPA and that the regulations in India do not prohibit in-house processing of health claims. While private insurers which were initially using TPAs started shifting to in-house processing of claims from 2008 onwards due to the poor and unsatisfactory performance of TPAs, public sector companies such as OP-2 to 5 have continued to utilize the services of TPAs to meet their business needs. Therefore, the decision to have a TPA which shall have no exclusive rights was found to be a commercial decision to improve the level of service and also plug the leakages. Further, in case of Group Insurance and policies having over Rs. 1 Crore premium, the clients have choice to decide the TPA. In such cases, the newly formed HITPA will have to compete with other TPAs and the PSGICs cannot impose its newly formed TPA on such clients.

43. It was stated that the Government of India was also in the process of shifting coverage of its employees and pensioners from the Central Government Health Scheme to Central Government Employees and

Pensioners Health Insurance Scheme which has already been formulated by the Ministry of Health and Family Welfare and could be implemented by one or more insurance companies through engagement of TPAs. With the expansion of market, the number of claims would also expand correspondingly. Under such circumstance, the number of claims which may need to be handled in future could be in crores. It was submitted that it was in this background that a joint venture agreement was entered into to set up HITPA under the Companies Act, 1956 to increase efficiency in the provision of services.

44. It was also submitted that IRDA, which is an Authority established by law under the Insurance Act for regulation of the insurance industry and protection of the policy holders, has also granted permission to HITPA to operate only on behalf of the PSGICs and has prohibited HITPA from soliciting business from outside. Therefore, it cannot be said that there was any material impact on competition when also as a matter of fact the insurance companies are permitted under law to execute their own back end work. All back end business outside the public sector insurance companies is open to the members of the Informant should the private sector insurance companies desire to avail their services.

45. It was contended that HITPA only executes back end work much after the sale of the policy and as such it cannot be said that HITPA or PSGICs had entered into any anti-competitive agreement which directly or indirectly determines purchase or sale prices or even limits or controls supply, investments or provisions of services in the market. It was further contended that it cannot also be said that there was allocation of services by geographical areas of market, number of customers etc. as insurance companies were permitted under law to execute their own back end services without a TPA.

46. OP-5 argued that the question of any tie-in arrangement, exclusive supply agreement, exclusive distribution agreement, refusal to deal or

resale price maintenance does not arise as HITPA was only executing services much after the policy has been sold by the Insurance Company and purchased by the consumer and only when in the event of the policy holder making a claim. Therefore, it was submitted that there was no soliciting of business.

47. To further strengthen its argument that the JV i.e. HITPA was to increase efficiency in the services, OP-5 stated that with the combined strength of four companies, it will be possible to bargain better prices from hospitals under Preferred Provider Network. It was another step to help customer avail healthcare services at reasonable cost.

48. As regards the purported document dated 16.06.2009 it was submitted that the DG, after due inquiry and examination and having afforded sufficient opportunities to the Informant to produce a complete authenticated document, has arrived at a correct finding that the said document is not reliable.

49. In addition to the points already elucidated above, OP-3, in its reply dated 09.10.2015 to the Informant's objection to the DG report, stated that the role of HITPA is to settle the claims of customers of the PSGICs. It was also stated that the insurance companies are free to decide whether they need to appoint a TPA or not.

50. It was also denied that there was any sharing of business in the ratio of 70:10:10:10 or 40:20:20:20 as alleged by the Informant. It was submitted that as per the annual reports of IRDA, it could be seen that the ratio of group health insurance business amongst the four PSGICs vary considerably and hence, there was no practice of sharing of renewal or new business on a pre-arranged basis amongst the PSGICs. It is submitted that only on case to case basis, there may be co-insurance of business with public and private insurance companies either on request of the customer or perceived need to mitigate the risk. For such situation,

the ratio is not fixed and varies on the basis of policy. It was further submitted that the concept of co-insurance has been duly approved by General Insurance Council, a statutory body for all non-life insurance companies and hence, there was no anti-competitive element in such co-insurance policies.

51. It was alleged that the document dated 16.06.2009 filed by the Informant Party is a fabricated document. It was also stated that the DG had duly examined and found that the document dated 04.08.2010 was an unsigned document though issued on the letter head of OP-3. OP-3 rather pointed out that there exists another circular bearing the same date i.e. 04.08.2010 with same reference number but having different contents. Further, the actual signed circular only contains "Guidelines for Underwriting Tailor-made Group Health Policies" and does not contain the clauses 3(A), 1(e) and 3(a) (b) and (c) as mentioned in the document dated 04.08.2010 filed by the Informant Party. That the said actual signed circular does not refer to any sharing pattern of business as referred in the document dated 04.08.2010 filed by the Informant and therefore the same was not anti-competitive under the provisions of the Act as alleged.

52. It was also submitted that the communications issued by OP-6 dated 24.05.2012 and 18.07.2012 were consistent with the regulations issued by (IRDA) from time to time in the area of health insurance and are not intended to undermine the healthy, fair and competitive functioning of the sector. It was submitted that the communications issued by OP-6 did not result in any AAEC as the same were independently issued by OP-6 to all the four PSGICs to behave in a particular way to mitigate the losses. There was nothing on record to show that there was any common understanding among the PSGICs in respect of the subject matter of communications in question.

53. It was further submitted that the Informant's reference to the judgment dated 10.07.2015 in *Suo Moto* Case No. *02 of 2014* passed by the Commission has no relevance to the facts of the present case. It was pointed out that on appeal, the Hon'ble Competition Appellate Tribunal *vide* its order dated 05.10.2015 had issued a notice in the matter and granted stay of the impugned order dated 10.07.2015.

54. In view of the above foregoing, the PSGICs prayed that based on the findings of the DG report, the case may be closed under section 26(6) of the Act.

*Replies/ objections/ submissions of OP-6*

55. OP-6, in its submissions dated 10.09.2015, agreed with DG's findings and stated that the PSGICs are public sector insurance companies with Government of India having 100% shareholding. It was further stated that as per the Allocation of Business Rules, 1961 made in exercise of the powers conferred under Article 77(3) of the Constitution of India, the Government of India transacts its business through concerned Ministries, which in turn, have various specialized divisions to advise the government in framing policies which are related to both the operational activities as well as the activities that affect the social interest. It was submitted that the Government of India, as the parent head of all the public sector general insurance companies (PSGICs), oversees their functioning through the Insurance Division of the Department of Financial Services of the Ministry of Finance i.e. OP-6. As part of its functions, a general review of the performance of these companies is also carried out based on certain key parameters like incurred claims ratio, management expenses, underwriting profitability, solvency ratios etc. In the year 2012, while doing such a review it was found that health insurance (both retail and group health insurance) in spite of being one of the fastest growing sectors in general insurance, was incurring losses. It was observed that on a total health insurance premium income of all

the four Companies of Rs. 8,148 Crore (out of which Group Health Business constituted Rs. 4,500 Crore), the net combined loss for the year 2011-12 was around Rs. 2,250 Crore (with a combined ratio of about 150%). It was, therefore, submitted that all four companies were making underwriting losses and their positive balance sheets were only on account of their incomes on accumulated investments.

56. It was thus observed that the PSGICs which are all Government owned companies are suffering losses in health portfolio and thus undermining their viability and long term fulfillment of the social purpose behind them. Thus, as a prudent business measure, some steps were undertaken with a view to protect and safeguard all four PSGICs against any unforeseen business situations and achieving the objective of the government. It was, therefore, submitted that the communications dated 24.05.2012 and 18.07.2012 were issued towards regulating the operational activities of the four PSGICs which were consistent with the regulations issued by the IRDA from time to time in the area of health insurance and were not intended to undermine the healthy, fair and competitive functioning of the sector.

57. It was stated that OP-6 had sent abovementioned communications to suggest the PSGICs not to indulge in scavenging practices and instead focus on promoting fair competition in the health insurance industry. OP-6 also stated that the shares of the PSGICs vest with the Hon'ble President of India and OP-6 is, *inter alia*, mandated with the duty of acting as the representative of the Hon'ble President of India executing the role of the shareholder of the PSGICs which is not resulting into any anti-competitive effect in the market.

58. In response to the Informant's objections to the DG reports, OP-6, *vide* its submissions dated 09.10.2015, submitted that it acts on behalf of the President of India, it monitors and revises the performance of PSGICs

and is empowered to issue necessary directions and instructions to PSGICs. It was further submitted that the instruction issued by OP-6 did not result in any AAEC. There was neither any entry barrier created by the PSGICs nor there was any foreclosure of the market for new entrants. Furthermore, the investigation has not indicated that there was any harm to the interest of consumers due to such decisions of OP-6. It was stated that the intent and purpose of instructions issued by OP-6 is to control the unhealthy and self-destructive competition and undercutting by the PSUs. It was thus reiterated that OP-6, being the owner of the public sector general insurance companies it was well within OP-6's right to issue directions/instructions to cut down losses and to ensure transparency and accountability in the business practices. It was thus prayed that the findings of the DG with regard to OP-6 be accepted.

**Analysis**

59. The Commission has carefully perused the information, the reports of the DG and the replies/ objections/submissions made by the parties and other material available on record.

60. At the outset, it may be pointed out that the Commission, while ordering investigation in the present matter, was *prima facie* concerned about two issues which were alleged to be anti-competitive. The first issue related to the formation of HITPA in the form of a JV by the PSGICs using OP-1 as a platform, which as per the Informant was an anti-competitive arrangement between horizontally placed players. Secondly, the alleged sharing of data regarding premium/ claims *etc.* among the PSGICs pursuant to the instructions issued by OP-6 was observed to be of concern.

61. With regard to the first concern i.e. formation of HITPA, the observations of the Commission as entailed in its order dated 15.04.2014 under section 26(1) are noted below:

> *20. It is observed that the said members of GIPSA have floated in-house TPA to reduce the claim ratio which, in turn, to meet their objective of lowering costs, may potentially result into rejection of claims on ad-hoc basis. The said practice is also not in line with the practices followed world over. Everywhere, the TPAs are kept independent of insurer to have unbiased settlement. If the TPA and insurer are not independent of each other, there is ample possibility of rejection of the claims by the insurers, in order to reduce the claim ratio. Moreover, said Joint Venture (JV) arrangement of GIPSA members becoming effective, not only the existing TPAs would be excluded from about more than 65% of the health insurance market but it may also restrain any new TPA from entering into the market.*

62. A plain reading of the above-stated excerpt from the order dated 15.04.2014 indicates that the *prima facie* concern of the Commission was with regard to the perceived ability of HITPA to lead to anti-competitive outcomes i.e. possibility of rejection of the claims by the insurers, in order to reduce the claim ratio and exclusionary effect on the existing as well as potential entrants in the TPA segment. The Commission is, therefore, of the considerate view that the limited question that arises with regard to the present issue is to assess whether HITPA has resulted into such apprehended anti-competitive outcomes in contravention of the provisions of section 3 of the Act in light of the facts and material available on record.

63. Before analyzing the impact of HITPA on the health insurance market and the market segment of TPAs, it may be pointed out that the Informant has placed reliance on the order of the Commission dated 08.07.2011 while disposing of the information filed in Case No. 49 of 2010. The Informant has alleged that the Commission found "*no prima facie case of contravention*" in that earlier case because the *joint venture TPA was yet to be formed*. And, by implication, since HITPA is now already formed, a case of contravention is made out as per the Informant. To analyze the propriety of the Informant's contention, the relevant

excerpts of the order dated 08.07.2011 are reproduced herein below:

14. *It is pertinent to mention here that the perusal of the EOI invited by the Opposite Party reveals that the only objective of the proposed JV is to reduce the mounting losses under the health insurance portfolio and to improve the customer service and create bench marking standard for the same. A TPA does not offer any independent service to the insured person but only receives a fee from the insurance company and settles claims as per the regulations of the insurance company and rates fixed by the company. In this, actually, it is the insurance company that is buying the services of the TPA and hence insurance companies are in the position of a consumer. If a consumer exercise its consumer choice and chooses one particular service provider over another or if it decides to do the task itself or through an entity created for the purpose, there is nothing anti-competitive about the economic decision.*

15. *After the formation of said JV TPA, the overall situation in the market for non-life insurance in India would remain the same for the consumer. The consumer will be served by a TPA selected by the insurance company as before and it would be open for the other TPAs to strive for the business of other insurance companies. If members of Opposite Party form a JV TPA and feel more satisfied by its services, while the consumer remains unaffected, it would be the case where one entity is "better off" without making another one "worse off" technically termed as "Pareto Improvement" or "Pareto-optimal move".*

16. *The proposed JV is clearly with an object to enhance efficiencies and cannot be construed as cartel like conduct. It is also not causing any appreciable adverse effect on competition between various insurance companies of the nature mentioned in section 19(3) of the Act. If the proposed JV proves to be inefficient, gradually customer would start switching to other insurance companies and the inter-brand competition would resolve the position in the market.*

17. *The perusal of the material on record reveals that together, members of Opposite Party may have market power in non-*

*life insurance business in India. But, possessing market power, in itself, is not objectionable unless there is any act which can be covered under the purview of abuse under Section 4 of the Act. In this case, there is no prima facie indication of any such abuse in the relevant market. Neither the dependence of consumers on the members of Opposite Party is getting affected in any manner through this proposal nor is any of its competitors facing any adversity. The proposed TPA when formed would be just another TPA in the market of TPAs (where insurance companies are consumers) and would have to compete with all other TPAs for acquiring business. At this stage, there is nothing to indicate that the proposed JV TPA of member of Opposite Party would either acquire dominance or abuse it.*

*18. The issue of an EOI for selection of partner for a yet to be formed joint venture for TPA services can't be termed as anti-competitive at this nascent stage. Selection of partners in any business, simple citer, by no stretch of imagination can be said to be anti competitive as the right of selection of partner or forming joint ventures or partnership can't be denied at this stage on grounds that it precludes competition. Further to anticipate or imagine the emergence of dominance of the proposed joint venture in TPA business is not envisaged under section 4 of the Act.*

64. A plain reading of the above quoted excerpts of the order of the Commission clearly shows that the Commission while closing the said case (i.e. Case No. 49 of 2010) was of the view that the JV TPA would not as such lead to any competition issues. Rather, the proposed JV TPA was perceived as an object to enhance efficiency and the Commission was of the view that it cannot be construed as a cartel like conduct. It was only an observation by the Commission that selection of partner for a yet to be formed JV TPA cannot be termed as anti-competitive at this nascent stage, which does not in any manner indicate that the mere formation of the same would automatically trigger the contravention of the provisions of the Act. In light of the forgoing, the Informant's contention seems to be misplaced and is hence rejected being devoid of

any merit.

65. Coming to the issue at hand, it has been alleged that by forming HITPA, the PSGICs have adversely affected the competition in the TPA segment by excluding the existing TPAs and discouraging new entrants (potential TPAs) from the market as the PSGICs collectively hold 60% of the market share in the health insurance sector. This has been alleged to be a *per se* violation of the provisions of section 3 of the Act, being an arrangement between horizontally placed players.

66. Section 3 of the Act deals with anti-competitive agreements wherein any agreement/arrangement/understanding is rendered void if it has an AAEC. Section 3(1) of the Act is a general prohibition on any agreement in respect of production, supply, distribution, storage, acquisition or control of goods, provision of services, which causes or is likely to cause an AAEC within India. Such agreements are rendered void under Section 3(2). Section 3(3), deals with horizontal agreements i.e. decisions made by a group of persons or associations, including cartels, operating at the same level of production, supply or distribution etc. Section 3(4) pertains to vertical agreements that may affect the competition in the Indian markets. Breaches under section 3(3) are presumed to have an AAEC, whereas agreements set out under Section 3(4) requires establishment of AAEC, so as to be in contravention of Section 3(1) of the Act.

67. In this regard, it is utmost relevant for the purposes of the present case to highlight that an exception has been carved out by the legislation for horizontal agreements which are in the form of a 'Joint Venture' i.e. JV agreements. Proviso to section 3(3) clearly states that '*[p]rovided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services*.' Therefore, such JV

agreements, even though horizontal in nature, are not presumed to have an AAEC; their anti-competitive effects need to be shown for proscribing them under section 3(1) of the Act. The question of them being *per se* anti competitive does not arise. Accordingly, if such a JV agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services, it does not fall foul of section 3 of the Act. In light of the foregoing, HITPA, being a JV, cannot be *per se* held to be anti-competitive; its impact needs to be assessed on the touchstone of the factors laid down under section 19(3) of the Act. For this purpose, it is primarily essential to briefly understand the health insurance sector and the role of TPAs in it.

68. The public healthcare system in India, in spite of its extensive network and increased infrastructure, was faced with difficulties in coping up with the healthcare needs of ever increasing population. Though the private healthcare facilities grew at a phenomenal pace, the accessibility remained minimal owing to the low paying capacity of the large section of Indian population. As a necessary response to such adversities, health insurance sector assumed relevance which made accessibility of the private healthcare facilities easier for the insured. However, various administrative challenges crippled the growth of health insurance sector. For addressing some of the administrative challenges, IRDA notified the TPA-Health Services Regulations, 2001 which marked the introduction of TPA in the system.

69. The basic role of TPAs is to function as an intermediary between the insurance companies i.e. the insurer and the policy holder i.e. the insured. TPAs facilitate the cash-less hospitalization and facilitate settlement of claims in consideration for a fixed percentage of the insurance premium as commission. TPAs thus provide hassle free services to the insured and cost efficient services to the insurer by managing the claims settlement. Before the introduction of TPAs, the processing of health insurance claim used to be handled by the in-house

department of the insurance companies.

70. As per the regulations framed by IRDA for TPAs, they are required to obtain a license from IRDA. The licensed TPAs provide their services for a fee or remuneration as may be specified in the agreement with the insurance company for the provision of health services. Further, the health insurance companies mostly appoint TPAs from their empanelled list of TPAs. It is observed that such TPAs are not tied to any single or particular insurance company and are free to align with multiple insurance companies even though such companies are otherwise competing with each other. It is further observed that appointment of TPA by the insurance company is not mandatory and, therefore, insurers are free to decide whether they require the services of a TPA or not. Apparently, the TPAs were introduced to act as an intermediary between the insurance companies and the insured wherein such TPAs were providing utilitarian services to both these parties for a commission. It is also of relevance that the extant IRDA regulations do not curb the stake-holding by any insurance company in the said TPAs.

71. The PSGICs have submitted that during 2008, the claim ratio under health portfolio for the PSGICs was 120% against an average of 80% for some of the private sector companies. It was also observed that the health service being provided by the TPAs was unsatisfactory. Further, the CAG in its Report No. 10 of 2010-11 in the context of tailor-made group policies also pointed out that the TPAs were not complying with the terms and conditions laid down in the Service Level Agreement (SLA) entered into between such TPAs and the respective insurance companies. The PSGICs contended that TPAs lacked the capabilities (in terms of robust technology and systems) required to deliver the services which were expected from them. It was also highlighted that TPAs failed to integrate fraud management packages in their systems which resulted into settlement of claims which were not even payable. These reasons,

*inter alia*, were stated to have led to the high loss ratio under health portfolio incurred by the PSGICs.

72. In order to combat the situation, PSGICs, after discussion with OP-6, prepared a concept paper analyzing the background of the matter and examined the role of TPAs. The paper assessed the performance of the existing system of TPAs as well as feasibility of having a common TPA for PSGICs. Further, KPMG Advisory Services Pvt. Ltd. was selected in 2009 to conduct the requisite study which also recommended formation of a new TPA. On 14.08.2010, the PSGICs floated global tender for JV partnership with an insurer/ TPA for the said purpose. The exercise was undertaken but could not be fructified and was ultimately called off in December, 2011.

73. Thereafter, the PSGICs decided to bring into existence a captive TPA. HITPA was accordingly incorporated on 14.08.2013 with the main objective of providing TPA Health Services as permissible under IRDA Regulations with ownership of the PSGICs and GIC of India. Each of the PSGICs held 23.75% of the shareholding and GIC held the remaining 5%. This joint venture body i.e. HITPA is alleged to be anti-competitive by the Informant under the provisions of section 3 of the Act.

74. The Commission has analyzed the contentions of the parties and the findings of the investigation in the light of provisions of section 3 of the Act as entailed above. It is apparent that the PSGICs were not satisfied with the services provided by TPAs as the TPAs failed to effectively perform the functions for which they were introduced as intermediaries in the health insurance sector.

75. The DG also found that the TPAs required improvement in terms of use of technology, proper infrastructure and efficient manpower to handle the claims and other services. The investigation revealed that the level of

service was deteriorating and the lack of proper monitoring had resulted in loss to the consumers as well as to the PSGICs. The increase in fraudulent claims due to inefficient TPAs was ultimately found to affect the consumers, the PSGICs as well as the common man at large. Therefore, the decision to form a common TPA i.e. HITPA was found to be a commercial decision to improve the level of service and also to plug the leakages. The contention of Informant that the formation of HITPA by the PSGICs was to foreclose the market was not found to be substantiated from the facts gathered during investigation.

76. Keeping in view the holistic picture, the Commission is of the opinion that the formation of HITPA by way of a JV by the PSGICs was a commercial decision aimed at combating the inefficiencies and deteriorated services provided by the existing TPAs. Even on analyzing the impact of the said JV i.e. HITPA in terms of the provisions contained in section 19(3) of the Act, it does not appear that HITPA would affect the market for TPAs in any appreciable adverse manner. Obviously, the existing TPAs would have to forego some business to the newly formed HITPA which is common phenomenon in any market facing new entrants. This, however, does not seem to cause absolute foreclosure for the existing TPAs. It has been clearly stated by the PSGICs that the existing TPAs would continue to remain on their panel and the newly formed HITPA would be one amongst other TPAs. Further, the choice of consumers largely based on the efficiency in services would be the sole criteria that would guide the PSGICs in their choice of TPAs. It was confirmed that no preferential treatment or reservation would be accorded to HITPA vis-à-vis other existing TPAs. Furthermore, it was also submitted by the PSGICs that if the services of HITPA are not found to be satisfactory by the customers, they will have a choice to switch or to avail the services of other TPAs.

77. Further, the PSGICs have highlighted that as per the approval granted by

IRDA, newly formed HITPA would not compete with other TPAs in the business of private insurance companies which comprise of 40% of the market. Therefore, in addition to the 60% market where HITPA have to compete with the other existing TPAs, 40% of the market is exclusively available for those other TPAs where HITPA is not allowed to provide services. Moreover, as submitted by the PSGICs, in case of Group Insurance and policies having over Rs. 1 Crore premium, the policy holders would have the liberty to choose their TPA. Therefore, considering all these factors, it seems very unlikely that the market would be foreclosed for the other existing or potential TPAs because of the formation of HITPA.

78. With regard to the pro-competitive effects of HITPA, the investigation indicated that the formation of HITPA would benefit the consumers by improving efficiency and quality of services. Investigation further revealed that the service being provided to policyholders by the TPAs whose services are being utilized by the public sector general insurance companies at present is not very efficient. Further, the DG also highlighted that the deficiencies of services by the TPAs were observed by both CAG as well as internal audit teams of the PSGICs. This deficiency in services resulted in poor customer service, inaccurate claim processing and increase in grievances. Therefore, formation of HITPA appears to be a solution to counter the deterioration of services provided by TPAs.

79. In view of the aforesaid, the Commission does not find any issue of foreclosure as such for the existing TPAs or the new potential TPAs intending to enter the market. Rather, HITPA appears to be an efficiency enhancing joint venture to facilitate the effectiveness of the health insurance sector and to ensure speedy cashless hospitalization for the policy holders, cost-efficient services to the insurance companies and timely reimbursements for the healthcare providers.

80. As mentioned earlier, HITPA, being an efficiency enhancing JV, falls under the exception/exemption provided in the proviso to section 3(3) of the Act. On careful perusal of the effect of HITPA on the competition in the market, the Commission is of opinion that the decision of four public sector general insurance companies (i.e. the PSGICs) is a mutually beneficial situation for PSGICs and the policy holders. It does not seem to contravene the provisions of section 3(1) read with section 3(3) of the Act. In fact, in the light of categorical assertion by PSGICs that there will not be any preferential or discriminatory treatment against other TPAs even after formation of HITPA, nothing survives in the allegations made by the Informant. Moreover, the Informant has not been able to produce any material which is indicative of *contra*. Therefore, the allegation with regard to HITPA is liable to be rejected.

81. In view of the foregoing, the Commission is of the view that the formation of HITPA by the PSGICs is not leading to any anti-competitive outcome under section 3(1) read with section 3(3) of the Act which would require the interference of the Commission.

82. Further, no vertical agreement was found between PSGICs and HITPA in contravention of the provisions of sections 3(4) of the Act as there was no tie-in arrangement amongst these companies in respect of the services of TPA in the market. Investigation did not show that there was any agreement amongst PSGICs in respect of any vertical restraint in violation of provisions of section 3(4) of the Act. It was categorically noted that the insured persons are not bound or compelled to avail the services of HITPA alone for processing of claims on the policies taken by them from PSGICs.

83. Further, the Commission looked into the allegations pertaining to the alleged agreement amongst PSGICs in respect of group health insurance business in contravention of the provisions of section 3(3) of the Act. In

this connection, the Informant relied upon a document dated 16.06.2009. This document notes the subject as "Guidelines for dealing with group and tailor-made group health insurance policies with premium over Rs. 1 crore". The said document referred to a meeting of the officials of 4 PSGICs at Chennai on 03.06.2009 where some kind of arrangement is claimed to have been made amongst the PSGICs to share the group health insurance policies.

84. The Commission notes that the said document is not only incomplete but is also unsigned. The Informant could not establish the authenticity and genuineness of the said document. From a bare perusal of the said document, it is clear that it does not even mention the name of the organization/ person/ authority who has issued the purported instructions/ guidelines. In fact, PSGICs categorically denied the existence of any such document. Moreover, CMDs of all the four PSGICs filed affidavits disputing the existence and the contents thereof. In these circumstances, the very *substratum* of the allegation of the Informant falls flat.

85. Moreover, the Informant instead of establishing the genuineness of the above document, submitted yet another document before the DG dated 04.08.2010 purportedly issued by OP-3. However, this document was also an unsigned one. OP-3 has categorically not only denied having issued the same, but has also pointed out that there existed another circular bearing the same reference number *albeit* with different contents. In view of this, the Commission finds it very difficult to place reliance on these documents (dated 16.06.2009 and 04.08.2010) submitted by the Informant. Even though the authenticity of the said letters was not established during investigation, the Commission examined the contents of the aforesaid documents *vis-à-vis* the actual conduct of PSGICs in order to ascertain whether the alleged arrangements/ agreements existed or not. In this regard, the Commission notes that the DG, after thorough examination of the conduct of the

PSGICs, concluded that the alleged decisions/ agreements contained in the said documents were not executed by the PSGICs. The Commission is in agreement with the findings of the DG in this regard as the examination of the conduct/ practices of the PSGICs did not reveal that they were having any kind of agreement not to compete and maintain their market share.

86. The Informant has recurrently relied upon the Commission final order dated 10.07.2015 passed in *Suo moto* case no. 02 of 2014 wherein the agreement amongst the PSGICs was found to be in existence relating to business sharing arrangement and submission of quotations (in response to the RSBY/ CHIS tender dated 08.12.2009 of the Government of Kerala). Accordingly, the Commission found the PSGICs, in that case, to be in contravention of the provisions of section 3(1) read with section 3(3)(d) of the Act. The Informant has argued that since the same business sharing pattern (i.e. 70:10:10:10) was demonstrated in documents dated 16.06.2009, the DG ought not to have discounted the credibility of the same. The Commission is not convinced with the arguments proffered by the Informant. The evidence in *Suo moto* case no. 02 of 2014 was sufficient to show that the PSGICs have colluded to rig the bid while submitting their respective quotations in response to the RSBY/ CHIS tender dated 08.12.2009 of the Government of Kerala and consequently penalties were imposed upon the PSGICs for their anti-competitive conduct. The evidence relied upon in *Suo moto* case no. 02 of 2014 was peculiar to the facts of that particular case. However, the same cannot be taken into account to presume that the PSGICs have pre determined the business sharing arrangement in a similar manner. It has already been stated that the documents dated 16.06.2009 and 04.08.2010 were unsigned and unreliable in the light of submissions made by PSGICs and investigation carried out by the DG. Therefore, the Commission does not find any merit in the reliance placed by the Informant on that earlier case where contravention was found against the

PSGICs.

87. Further, a perusal of the role played by OP-1 suggests that it is an informal association of four public sector general insurance companies for the purpose of co-ordination among them on matters of common interest particularly in the area of Human Resource Management. OP-1 (GIPSA) is not found to be engaged in any commercial activities as such. One of the important activities performed by GIPSA is in respect of providing assistance in conducing joint written examination as a part of annual promotion exercise for officers of member companies, maintaining seniority list, conducting screening and interviews *etc.*

88. The DG also, during the course of investigation, perused all the correspondence, minutes of meetings and e-mail exchanges by OP-1 which were found to be relevant to the case. The details furnished by OP-1 and the minutes of meeting of its Governing Board did not indicate any discussion which attracted the provisions of section 3 of the Act. The investigation did not find any anti-competitive arrangement among these PSGICs. The Commission is in agreement with these findings. OP-1 appears to be playing a role of nodal agency for OP-6 to co-ordinate on various common policy matters and also for implementation of government schemes. Though the PSGICs are run by the respective Board of Directors, there are many common issues which require interaction and co-ordination amongst them. Such coordination, as such, does not by itself lead to a contravention of the provisions of the Act. In view of the above, no violation of any provisions of section 3 of the Act has been found against OP-1.

89. Lastly, the issue regarding the purported instructions dated 24.05.2012 and 18.07.2012 issued by OP-6 needs to be examined. In this connection, it may be noted that the Informant has alleged that OP-6 issued a circular dated 24.05.2012 addressed to the respective CMDs of

PSGICs. The said circular had instructions regarding underwriting of group/ tailor-made group health insurance policies with net premium of above Rs. 1 crore and on sharing of data concerning premium, claims *etc*. with respect to major accounts. Instructions were also issued to the effect that no PSGIC shall obtain business of stand-alone group health insurance from any of the public sector companies without the prior written and explicit 'no objection certificate' (NOC) from the concerned CMD of the other company. The Informant has also filed a copy of the instructions dated 18.07.2012 issued by OP-6 which too was on similar lines. It has also been alleged that subsequent to the above mentioned instructions, the PSGICs issued underwriting guidelines for health insurance in July 2012 in compliance with the instruction of OP-6. A copy of the letter dated 25.10.2012 issued by OP-1 *i.e.* GIPSA to OP-6 has been annexed by the Informant to substantiate its contention in which GIPSA has stated – "*That the GIPSA member companies have confirmed implementation of the Ministry's guidelines. No complaints regarding violation of these guidelines have been received at GIPSA*".

90. This aspect was also examined at length by the DG. At the outset, it would be appropriate to notice the relevant extracts from the purported circular dated 24.05.2012 which appears to have been issued by OP-6 detailing the strategy to be adopted by the PSGICs in connection with underwriting group health insurance policies:

> *"A closer examination of these losses and a relative comparison with the private sector, it is clear that that these losses are due to the lack of prudent underwriting and a very unhealthy and self-destructive inter-company competition among these four Companies. Heavy discounts are being offered on premiums, so as to snatch the business from the other Public Sector Undertaking Companies. Such unhealthy competition has led to a state where premiums for Group Health insurance policies are settling down to a very low level and such policies become loss making the very moment*

*they are underwritten.*

*Health Insurance is one of the most important upcoming segment in the non-life sector and the business in Health Insurance is only going to grow up in coming years. While the desire to increase the GDPI by underwriting new premium policies including those in the Health Insurance business is understandable, this cannot be done by seriously compromising the bottom line. Growth in premiums portfolio cannot be at the expense of the bottom line and would make the entire Health Insurance Sector unviable in the long run. It is, therefore, necessary that a proper mechanism be put in place whereby an appropriate pricing mechanism for pricing Group Health Insurance is adopted which takes into consideration the existing ICR, management expenses, medical inflation, commissions, likely increase in the quantum of claims due to ageing of the covered group, cost of underwriting the business and other such associated factors.*

*In view of this, based on the interaction with CMDs on May17th, 2012 and based on the inputs received from the Committee consisting of ex-CMDs of PSU General Insurance Companies and other subject experts, the following strategy shall be adopted strictly with immediate effect, so far as the underwriting the Group Health Insurance policies is concerned…"*

91. Further, the concerns raised by OP-6 in the aforesaid circular were also echoed by CAG in its Report No. 10 of 2010-11 in the context of tailor-made group policies, inadequacies in the working of premiums, high adverse claim ratio *etc*. In this regard, it is pertinent to take into account the details furnished by the PSGICs before the DG in respect of the above instructions issued by OP-6. On analysis of the details submitted by these parties along with a scrutiny of the sworn statements of the Directors/ GMs of all the four PSGICs (i.e. OP-2 to OP-5), the following

emerged:

(i) Despite the instructions of OP-6, there was no practice of obtaining or issuing NOC from CMD of other company.

(ii) There was no meeting of Coordination Committee held as instructed by OP-6 in its instruction/ advisory dated 18.07.2012.

(iii) PSGICs have continued to compete with each other to obtain/ retain group health insurance business despite the instructions issued by OP-6.

(iv) OP-6 was concerned about the high loss ratios in group health insurance and wanted to bring in a robust and prudent underwriting mechanism. The instructions of OP-6 were not anti-competitive but only aimed at disciplining the underwriting processes.

(v) As quotes keep coming from all the interested public and private insurance companies till the last minute and, also, due to market dynamics and intense competition, it was not practically feasible to follow the instructions relating to NOC. It was further revealed that after this advisory also, one PSGIC has lost business to other PSGIC and gained business from other PSGIC without obtaining or issuing NOCs.

(vi) There was no mechanism of monthly meetings of OP-2 to OP-5 to monitor the observance of the said instructions of OP-6.

92. At the outset, the Commission disapproves the issuance of any such directions by any person, body or department of the government which may come in way of fair play in the market. However, it is to be noted that the issuance of such directions does not necessarily or conclusively indicate collusive arrangement between the recipients of such instructions. It needs to be seen whether the recipients, who are horizontally/similarly placed, in fact have followed such instructions and thus hampered the competition in the market in order to bring such recipients within the purview of section 3(1) read with section 3(3) of the

Act.

93. Before analyzing whether such a situation has arisen in the present case, the Commission considers it appropriate to deal with the contentions of the parties and the observation of the DG with regard to PSGICs being part of the 'single economic entity' wherein 100% of their shareholding remains with the Government of India (GoI).

94. In the present case, the issue as to whether GoI and the PSGICs constitute a 'single economic unit' would depend upon whether they first qualify as a 'group' as per the provisions of the Act. As per definition enshrined under explanation (b) of section 5 of the Act, *'group' means two or more enterprises which, directly or indirectly, are in a position to — (i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or (ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise*. It is apparent that to constitute a 'group', the entities in question must first qualify to be an 'enterprise'. Thereafter, the next qualification pertains to inter-se holding, directly or indirectly, 26% or more voting rights or power to appoint 50% or more of the members of the board of directors or control the management or affairs of the other enterprise. The term 'enterprise' has been defined in section 2(h) of the Act which essentially includes a department of the Government which is engaged in the activities relating to the economic functions as specified therein. Moreover, the term 'enterprise' excludes from its ambit the activities relatable to sovereign functions of the Government. Accordingly, if the Government is exercising control over the management or affairs of any PSU without itself engaging in the activities required to be undertaken as an 'enterprise', in such a situation, the Government would not be considered as an enterprise for that particular purpose. Therefore, OP-6, which is only functioning as an extension of the Government and acting

on behalf of the President to monitor the overall performance and functioning of PSGICs to achieve their objectives, cannot be termed as an enterprise within the meaning of section 2(h) of the Act. It is seen that except issuing policy level instructions, no interference with the operational functioning of these PSGICs is made by OP-6. All PSGICs are independent in their operational decisions. The prerogatives exercised by a State acting as a public authority rather than as a shareholder, in so far as they are limited to the protection of the public interest; do not constitute control within the meaning of the Act. Further even the PSGICs cannot be considered to be a group as none of them have cross holding in terms of voting rights, power to appoint board of directors or control on the management or affairs *inter se*. Therefore, the question of them being part of the single economic entity does not arise.

95. It is clear from the aforesaid that OP-6 as such can neither be termed as an enterprise within the meaning of section 2(h) of the Act nor it can be said to be similarly placed with the PSGICs to scrutinize its conduct under section 3(1) read with 3(3) of the Act. It is only functioning as an extension of the Government and acting on behalf of the President to monitor the overall performance and functioning of PSGICs to achieve their objectives. Therefore, though the Commission is of the view that OP-6 should restrain from issuing any such directions to the PSGICs which may come in the way of fair play in the market or hamper the otherwise competitive landscape, the mere issuance of such instructions by OP-6 cannot be relied upon to attribute liability on the PSGICs for a contravention of the provisions of section 3(1) read with section 3(3) of the Act. As stated earlier, it needs to be seen whether the PSGICs have actually followed such instructions and thus hampered the competition in the market or not.

96. Based on the material available on record, the Commission observes that the impugned instructions, even though issued by OP-6, were not

followed by any of the PSGICs. Therefore, in the absence of any evidence to the contrary, it cannot be concluded that the PSGICs have acted in a concerted manner in contravention of the provisions of section 3(1) read with section 3(3) of the Act.

97. In view of the above discussion, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against any of the Opposite Parties. Accordingly, the case is hereby closed under section 26(6) of the Act.

98. The Secretary is, hereby, directed to inform the parties accordingly.

**Sd/-**
**(Ashok Chawla)**
**Chairperson**

**Sd/-**
**(S. L. Bunker)**
**Member**

**Sd/-**
**(Sudhir Mital)**
**Member**

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

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

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

New Delhi
Date: 04.01.2016