



COMPETITION COMMISSION OF INDIA

Suo Motu Case No. 01 of 2017

In Re: Alleged Cartelisation in Flashlights Market in India

Against

Eveready Industries India Ltd.	Opposite Party No. 1
Panasonic Energy India Co. Ltd.	Opposite Party No. 2
Indo National Ltd.	Opposite Party No. 3
Geep Industries (India) Pvt. Ltd.	Opposite Party No. 4
Association of Indian Dry Cell Manufacturers	Opposite Party No. 5

CORAM

Mr. Sudhir Mital
Chairperson

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Appearances:

For Eveready Industries India Limited *Mr. Sagardeep Rathi, Advocate*
(Opposite Party No. 1/ OP-1) *Mr. Aman Singh Baroka, Advocate*
Mr. Amritanshu Khaitan
Mr. Suvamoy Saha



<i>For Panasonic Energy India Company Limited (Opposite Party No. 2/ OP-2)</i>	<i>Mr. Arun Kathpalia, Senior Advocate Mr. Karan Singh Chandio, Advocate Ms. Kalyani Singh, Advocate Mr. Mohith Gauri, Advocate Ms. Bani Brar, Advocate Mr. Siddharth Nath, Advocate</i>
<i>For Indo National Limited (Opposite Party No. 3/ OP-3) Mr. P. Dwarakanath Reddy Mr. R. P. Khaitan</i>	<i>Mr. Rajshekhar Rao, Advocate Ms. Shweta Shroff Chopra, Advocate Ms. Manika Brar, Advocate Mr. Gaurav Sansanwal, Advocate Mr. Supritha Prodaturi, Advocate Ms. Akkriti Bhatt, Advocate Ms. Gayatri Pradhan, Advocate</i>
<i>For Geep Industries (India) Pvt. Ltd. (Opposite Party No. 4/ OP-4)</i>	<i>None</i>
<i>For the Association of Indian Dry Cell Manufacturers (Opposite Party No. 5/ OP-5) Mr. Ravindra Grover</i>	<i>Mr. Karan Lahiri</i>
<i>For Mr. S. K. Khurana, (Former Chairman and Managing Director of OP-2 and Former Chairman of OP-5)</i>	<i>Mr. Ashish Mohan</i>
<i>For Mr. S. Kumaraswami, Former Secretary of OP-5</i>	<i>Mr. S. Kumaraswami in person</i>



ORDER

Introduction

1. The instant case was taken up by the Competition Commission of India (hereinafter, the 'Commission') *suo motu*, pursuant to the application dated 03.09.2016 filed by OP-1 under Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 (hereinafter, the 'Lesser Penalty Regulations') read with Section 46 of the Competition Act, 2002 (hereinafter, the 'Act') and subsequent submission dated 26.09.2018.
2. OP-1 in its Lesser Penalty Application submitted that there was exchange of information pertaining to sales and production of flashlights through the medium of an association *i.e.*, Association of Indian Dry Cell Manufacturers (hereinafter, the 'AIDCM/ OP-5'). It was alleged that the details of production and sales data were being provided to the AIDCM by OP-1, OP-2 and OP-3 on monthly basis from year 2008 till 2016, while the exchange of data with OP-4 was only till April 2012. Further, OP-1 also revealed instances of communication amongst OP-1, OP-2 and OP-3 whereby information in relation to intended price increase or market information in relation to prices, discount schemes, *etc.* was exchanged amongst them regarding the product 'flashlights' to monitor the activities of competitors in the market in contravention of the provisions of Section 3(3) read with Section 3(1) of the Act.
3. Subsequently, on 07.09.2016, OP-2 also filed an application under Regulation 5 of the Lesser Penalty Regulations read with Section 46 of the Act and subsequent submission dated 22.09.2018. Through its application, OP-2 disclosed evidence of information exchange in relation to sale of flashlights between OP-1, OP-2 and OP-3 through OP-5, discussions at meetings of OP-5 on the state of the market for



flashlights and direct communication between OP-1, OP-2 and OP-3 discussing competition in the market for flashlights in India.

4. After examining the material on record, the Commission was of the *prima facie* view that the case involved contravention of the provisions of Section 3 of the Act. Accordingly, the Commission, *vide* its order dated 08.02.2017 passed under Section 26(1) of the Act, directed the Director General (hereinafter, the 'DG') to conduct an investigation into the matter and submit an investigation report. The DG was also directed to investigate the role of persons / officers of OPs who were in-charge of and responsible for the conduct of the businesses of such parties at the time of the alleged contravention. Further, the DG was directed to conduct a detailed investigation into the contraventions disclosed in the information up-to date without restricting or confining itself to the duration mentioned in the information.

Industry Overview

5. The instant case involves alleged infringement of the provisions of the Act in relation to flashlights market in India. Therefore, it is useful to have a glance at the product involved *i.e.* flashlights, in general.
6. Flashlight is a portable device that provides light and runs on batteries. At present, there are three types of flashlights available in the market; (i) Brass; (ii) Aluminium and (iii) Plastic. Initially there were brass flashlights where Eveready and Geep were the leading suppliers respectively. However, in 2005-06, the market shifted towards LED (Light Emitting Diode) flashlights. Further, flashlights/torches can be broadly categorized into various sizes on the basis of their battery consumption.

Flashlights Market in India

7. The flashlights business is mainly driven by rural economy. The organized market of flashlights consists of four main players *i.e.* OP-1, OP-2, OP-3 and OP-4 (hereinafter,



collectively ‘OPs’). This market is extremely concentrated, with OP-1, OP-2 and OP-3 controlling about 98% of the organized flashlight market.

8. The details of market shares of the OPs the annual turnover of the OPs from flashlights in absolute terms as well as in terms of percentage of total turnover of organized market from flashlights for the financial year 2009-10 to 2016-17 is tabulated below:

Turnover (Rs. in Crores)

Year	Eveready (OP-1)	Nippo (OP-3)	Panasonic (OP-2)	Geep (OP-4)	Total
2009-10	172.72 (78.44 %)	36.54 (16.59%)	2.93 (1.33%)	8.00 (3.63%)	220.19
2010-11	171.46 (77.48 %)	39.75 (17.96%)	2.08 (0.94%)	8.00 (3.62%)	221.29
2011-12	189.09 (78.32%)	39.80 (16.49%)	4.53 (1.88%)	8.00 (3.31%)	241.42
2012-13	212.52 (78.21 %)	44.14 (16.24%)	7.07 (2.60%)	8.00 (2.94%)	271.73
2013-14	208.62 (77.08 %)	48.9 (18.07%)	9.15 (3.38%)	4.00 (1.48%)	270.67
2014-15	205.92 (81.08 %)	35.54 (13.99%)	8.50 (3.35%)	4.00 (1.58%)	253.96
2015-16	181.10 (79.77 %)	33.16 (14.61%)	8.77 (3.86%)	4.00 (1.76%)	227.03
2016-17	175.53 (83.10%)	25.32 (11.99%)	6.38 (3.02%)	4.00 (1.89%)	211.23

9. From the above table, it is evident that as far as the *inter-se* market shares are concerned, Eveready has been a market leader whose market share has increased to 83.10 % in 2016-17 from 78.44% in 2009-10. Nippo is the next player with 11.99% market share in the year 2016-17. However, its market share has gradually declined over the years. Similarly, Geep’s market share which was 3.63% in 2009-10 came down to mere 1.89% in 2016-17. However, PECIN consolidated its market share from 1.33 % in 2009-10 to 3.02 % in 2016-17.



10. Further, it is noted from the annual turnover of the OPs that the aggregate annual turnover/ demand of flashlights in the organized market (comprising of the OPs), was at a peak of Rs.271.73 Crore in 2012-13. But the demand gradually declined in subsequent years. In 2016-17, the aggregate demand of flashlights came down to Rs. 211.23 Crore, which was even below the aggregate demand of 220.19 Crore in the year 2009-10. In other words, though the market of flashlights witnessed an upturn from 2009-10 to 2012-13, it has been shrinking from year 2013-14 onwards. This decline in demand can be attributed to various factors such as improvement in availability of electricity in rural areas, increased use of smart phones with inbuilt flashlight features, etc.

Profile of the parties

Eveready Industries India Ltd. (OP -1)

11. The brand Eveready entered the Indian market in 1905. The company was incorporated in 1934 under the erstwhile Companies Act 1913. Previously, the company was a subsidiary of Union Carbide Corporation, USA. Shri B. M. Khaitan and the Williamson Magor Group of Companies acquired OP-1 in 1993. OP-1 is headquartered in Kolkata and is currently involved in the marketing of various product categories such as, batteries (including dry cell and rechargeable batteries), flashlights and lanterns, general lighting products like lamps and luminaires, packet tea, devices like mobile power banks, rechargeable fans, radio etc. and small home appliances.
12. As per its annual report for the year 2016 – 2017, OP-1 was selling over 25 million units of flashlights annually, which amounted to around 75% market share in the Indian organised flashlights market. The sales of OP-1 from flashlights was about Rs. 196.73 Crores, which constituted 13.59% of its total turnover.



Panasonic Energy India Co. Ltd. (OP-2)

13. OP-2, established in 1972 as Lakanpal National Limited, is a subsidiary of Panasonic Corporation, Japan. It is a public listed company headquartered in Vadodara (Gujarat) and is a manufacturer and supplier of dry cell batteries and lighting products like torches/ flashlights. While OP-2 manufactures dry cell batteries, it does not manufacture torches/ flashlights. It only trades these products in India. Out of the three types of flashlights, OP-2 sells only plastic torches in India. The business of torches/ flashlights constitutes approximately 3% of total business of OP-2. According to data provided by OP-2, it had sold around 0.97 million units of flashlights in 2016-17 generating a turnover of Rs. 6.38 Crores.
14. As per its annual report for the year 2016-17, out of OP-2's total turnover for the year *i.e.* Rs. 246.66 crores, sales from dry cell batteries constituted 92% of the total turnover and sales from flashlights constituted only 2.59% of its total turnover.

Indo National Limited (OP-3)

15. OP-3, incorporated in 1972, has its registered office at Chennai. It is primarily engaged in the business of manufacturing certain types of zinc carbon dry cell batteries. In addition, OP-3 is in the business of trading alkaline batteries, torches, CFL bulbs, LED lights, inverters (power backup), inverter batteries and solar powered lights. It is stated that OP-3 does not manufacture flashlights rather procures them from various suppliers which are then sold by OP-3 in India under the brand name 'Nippo'. Further, OP-3 does not sell any brass or aluminium flashlights and only sells plastic flashlights. According to data provided by OP-3, it had sold around 4 million units of flashlights in 2016-17 generating turnover of Rs. 25.32 Crores.
16. As per OP-3's annual report for the year 2016 – 2017, out of its total turnover for the year *i.e.* Rs. 358.13 Crores, sales from dry cell batteries constituted 92% of the total turnover and sales from flashlights constituted only 7% of its total turnover.



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Geep Industries (India) Pvt. Ltd. (OP-4)

17. OP-4 was incorporated in November 2002 as Geep Batteries (India) Pvt. Ltd. On 22.10.2010, its name was changed to Geep Industries (India) Pvt. Ltd.. OP-4 is the flagship company of the Thanewala Group of Companies. It is engaged in manufacturing and marketing of the product range in dry cell battery and torch products segment under the brand name of Geep in India as well as globally. The group acquired the batteries and torch business from Gillette India Ltd. along with the manufacturing and the sourcing facility. OP-4 has a manufacturing facility at Mysore in Karnataka, which was manufacturing battery products since mid of financial year 2006 -07 and another manufacturing facility at Baddi in Himachal Pradesh, which has been manufacturing torches since 2005. According to OP-4, it has stopped production of batteries since financial year 2008-09 and has started procuring locally from OP-2 and OP-3.

The Association of Indian Dry Cell Manufacturers (OP-5)

18. AIDCM is an unregistered association of dry cell manufacturers primarily comprising of three members *i.e.* Eveready, Nippo and Panasonic. The DG has gathered that till 1987, there were 12 to 13 members of AIDCM who were all manufacturers. However, most of them have since closed down.
19. AIDCM has described its main activities as, *inter alia*, to encourage good relations amongst the manufacturers and marketers of dry cells in general and members of the association in particular; to promote dry cell / battery industry in India, including manufacturers of raw materials and components used in batteries, as also manufacturers of battery operated appliances; to communicate with Chambers of Commerce and other commercial, industrial and public bodies to promote trade and commerce in dry cell industry and to be a central point of contact for queries on dry cells and torches for different ministries and departments of the Government.



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DG's Investigation

20. With respect to the alleged contravention of Section 3 of the Act by OPs, investigation by the DG has brought to the fore the details/ conducts of OPs, mentioned in the succeeding paragraphs.
21. During investigation, the DG examined the documentary and electronic evidence furnished by the OPs including emails and other incriminating material and documents submitted with the Lesser Penalty Application and/ or the responses to the notices of the DG. Further, the DG also recorded the statements on oath of certain individuals of the OPs as well as the association AIDCM.
22. From the evidence gathered in the case, the DG found that the OPs were sharing production and sales data, exchanging emails and having discussions regarding flashlights much prior to 20.05.2009, the date on which Section 3 of the Act became enforceable. Such practices continued upto 31.07.2016. However, since the provisions of Sec 3 of the Act became enforceable *w.e.f.* 20.05.2009 prohibiting anti-competitive agreements, the DG observed that the period of contravention of the provisions of Section 3 of the Act in the present case be considered from 20.05.2009 to 31.07.2016.
23. In order to analyse the conduct of the OPs and the association *i.e.* OP-5, the DG considered three types of evidence *i.e.* (i) evidence of sharing of data of flashlights, (ii) evidence of draft press release and (iii) evidence of exchange of commercially sensitive information.

Sharing of data of Flashlights:

24. With respect to sharing of data of flashlights, the DG observed that the OPs through OP-5 used to share production and sales data of all the three types of flashlight/torches *i.e.* brass, aluminium and plastic on monthly basis for several years



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and even prior to 2009. OP-5, as a matter of practice, collected, compiled and circulated the data to its members.

25. The DG found that while OP-4 discontinued the practice of sharing the data of flashlights in 2012 as it ceased to be a member of the association from mid-2012, the practice of data compilation and circulation relating to flashlights by the association continued for remaining three OPs i.e. OP-1, OP-2 and OP-3 till 31.07.2016. In this regard, Shri Ravindra Grover, Secretary of OP-5, in his statement to the DG submitted that:

“The monthly data of production and sales of Flashlights used to be provided by Eveready, Nippo and Panasonic since 2009-10. Further, Geep who was also a member of the Association, having insignificant market share used to provide monthly data till mid- 2012, after which it ceased to be a member of the association.”

26. In relation to the compilation and sharing of sales and production data by OP-5, the DG confronted the minutes of the AIDCM meeting held on 19.04.2016, containing the year-wise sales of various types of torches by OP-1, OP-2 and OP-3 for the years 2012-13 to 2015-16, to the concerned persons of OP-1, OP-2, OP-3 and OP-5. From the statements of the said concerned persons, the DG concluded that the exchange of data on production and sales of flashlights enabled OP-1, OP-2 and OP-3 to monitor each other's market shares in the organized market of flashlights in India, which facilitated collusion in the flashlights market.

Draft Press Release:

27. In order to assess whether there was an anti-competitive agreement among the OPs, the DG examined the email trails of 23.03.2012 to 26.03.2012 exchanged between concerned persons of OP-1, OP-2, OP-3 and OP-5, whereby OP-1, OP-2 and OP-3 while contemplating price increase measures of dry cell batteries and flashlights in India, roped in AIDCM for publication of a press release.



28. The contents of the email trail indicates that Shri Suvamoy Saha of OP-1 after consulting with Shri R. P. Khaitan of OP-3, had forwarded a draft on price increase measures of the member companies (OP-1, OP-2 and OP-3) to Shri Subramania Kumaraswami of OP-5 and requested him to seek concurrence of Shri S. K. Khurana of OP-2. Consequently, Shri Subramania Kumaraswami contacted Shri S. K. Khurana and wrote back to Shri Suvamoy Saha conveying that Shri S. K. Khurana was okay with the idea, but to proceed further in the matter, required details of the modalities of newspaper advertising *etc.* However, later, Shri Subramania Kumaraswami, after an informal discussion with one Shri Gupta (of TPM Consultants), advised Shri Suvamoy Saha against such press advertisement so as to avoid 'attention of the Competition Commission of India'. Shri Suvamoy Saha and Shri R. P. Khaitan have admitted in their depositions that they wanted to announce price hike of flashlights through the Association.
29. When confronted with the e-mail trail, Shri S.K Khurana contended that PECIN was an insignificant player in the flashlights market, therefore PECIN had to give a go by to the proposed press release. However, the DG has not found this to be a plausible justification for indulging in anti-competitive agreements/understandings among the competitors for concerted price increase, which are expressly prohibited under Section 3(1) of the Act.
30. Further, with respect to the e-mail trail, Shri Subramania Kumaraswami submitted that the proposed press release was intended to prepare consumers to pay higher price of the products in future. In this regard also, the DG has noted that this is not a valid justification as it is beyond the scope of an association to get involved in the price coordination activities of its members, which is prohibited under the law.
31. Consequently, from the emails exchanged among Shri Suvamoy Saha of OP-1, Shri R. P. Khaitan of OP-3, Shri S. K. Khurana of OP-2 and Shri S. Kumaraswami former



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Secretary of OP-5 and the statement of above persons, the DG has concluded that the OPs had a clear agreement/ understanding to increase prices of dry cell batteries and flashlights, and had planned to announce a press release through AIDCM. The argument that the intended press release on price increase was not implemented (so as to 'avoid attention' of the Competition Commission of India) is found inconsequential by the DG as the existence of agreement/understanding among the parties for concerted price increase of flashlights remained undisputed.

Documentary evidences and emails regarding the exchange of commercially sensitive information:

32. The DG has gathered several evidences in the form of printed documents and emails pertaining to the exchange of commercially sensitive information including pricing, wholesale pricing, margins, promotional schemes, launch of new products, etc. The findings of the DG are brought out in succeeding paras.
33. The DG has first analyzed the printed document dated 01.11.2010 provided by OP-1, which was prepared by Shri R. P. Khaitan of OP-3 for discussion with Shri Suvamoy Saha of OP-1. The document mentions about multiple schemes and lower pricing offered by OP-1 for selling torches. When Shri Suvamoy Saha was confronted with the document, he explained that this document depicted a general principle/ understanding among the competitors not to operate multiple schemes or pricing in the market. In his deposition, Shri R.P Khaitan justified the discussion by stating that this was because OP-1 was undercutting battery prices. However, the DG did not find this explanation of Shri R. P. Khaitan to be plausible as the document related to flashlights and not dry cell batteries.
34. Another document examined by the DG is a printed document dated 29.05.2012 provided by OP-3 pertaining to discussion between OP-3 and OP-1 which contained the details of average discount offered by OP-1 in the multiple schemes on its three models of plastic torches viz. JOSH, DL02 and DL07. When confronted with this



documentary evidence, Shri Suvamoy Saha contended that the document might have been prepared by Shri R. P. Khaitan of OP-3 to discuss the schemes being operated by OP-1 and high margins offered to the trade by it. Shri R. P. Khaitan in his deposition admitted to the preparation of such document. He further stated that OP-1 was offering extra margins on torches for creating budget at their channel level to destabilize the battery prices in the market. Therefore, OP-3 requested OP-1 to lower down the margins offered by it on torches/ flashlights.

35. The DG has also analysed the document dated 28.09.2015 which contained the discussion points regarding the sale and market trends of various models of Eveready torches viz. LED torch, DL01, DL36, DL54, DL42 and DL44. In his deposition, Shri Suvamoy Saha of OP-1 submitted that the document was prepared by Shri R. P. Khaitan of OP-3 for understanding the volume of business done by OP-1 in flashlights business and that he gave the relevant information to Shri R. P. Khaitan. On being questioned by the DG as to what was the need to know the sales price and volume of OP-1's torches, Shri R. P. Khaitan explained that the information was required for advising the management of OP-3 for putting emphasis on these segments. The DG found this to be a naïve argument as no 'competitor' much less a market leader like OP-1 should have disclosed such information to another 'competitor' like OP-3, which might result in compromising competition in the market.
36. Further, upon examination of the document dated 06.11.2014 provided by OP-2, the DG has observed that this document contained the points of discussion between OP-3 and OP-1 regarding market information about top five torch selling states, brass torch sales areas and rechargeable plastic torch sales by OP-1. Shri Suvamoy Saha submitted that the document was prepared by Shri R. P. Khaitan. When confronted with the document, Shri R. P. Khaitan admitted that this information was sought by him from OP-1 to know about market information regarding their torch sales in order to ascertain the direction in which market was moving.



37. Lastly, the DG also considered an email dated 19.05.2015 sent by Shri Suvamoy Saha to Shri R. P. Khaitan and Shri S. K. Khurana whereby he shared the market information about entry of a new market player Godrej GP in the flashlights/ torches market in Bareilly, Central Uttar Pradesh. The DG has observed that sharing of such information, which has also been admitted by the parties, clearly demonstrates that the three OPs felt alarmed by the potential disruption due to entry of new competitor.

DG's Conclusion

38. Conclusively, the DG, in view of the foregoing evidences gathered during investigation, has observed that the OPs through OP-5 used to share production and sales data of all the three types of flashlight/torches *i.e.* brass, aluminium and plastic on monthly basis, which enabled them to monitor *inter se* market share in the organized market of flashlights in India. Further, the documentary/ e-mail evidences regarding exchange of commercially sensitive information among OP-1, OP-2 and OP-3 established concerted practice within the meaning of 'Agreement' under the Act. Moreover, the e-mail exchange in March 2012 regarding announcement of price increase of flashlights through a press release by AIDCM established the existence of 'Agreement' among OP-1, OP-2 and OP-3 to determine price of flashlights in the domestic market in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act.
39. With respect to OP-4, the DG noted that it was a member of AIDCM and used to provide monthly data to AIDCM till mid-2012. However, once it ceased to be a member of AIDCM, it discontinued the practice. The DG has not found any evidence that OP-4 indulged in any concerted/ strategic decision to raise price of flashlights as was done by other OPs. Further, no other evidence of sharing of commercially sensitive information with regard to flashlights could be found against OP-4.



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40. With respect to AIDCM (OP-5), the DG found that it facilitated cartel activities amongst its members by providing a convenient platform for sharing /discussing prices and other commercially sensitive issues on the pretext of discussing the market conditions. Further, by collating and providing regular information on production/sales data of the member companies, it provided information that assisted the Manufacturers in monitoring the cartel implementation.
41. Based on foregoing analysis, the DG concluded that OP-1, OP-2, OP-3 and OP-5 had indulged in anticompetitive agreement/ conduct and concerted practices, in the domestic dry cell battery market of zinc carbon batteries, during the period 20.05.2009 to 31.07.2016 and thereby contravened the provisions of Section 3(3)(a) read with Section 3(1) of the Act.
42. After finding contravention as above, the DG identified certain persons in terms of Section 48 of the Act who played active role in the contravention of the provisions of Section 3 of the Act and also those who were incharge of and responsible to the respective companies for the conduct of their businesses. In this regard, the DG found active involvement of the top management of OPs including their Managing Director, Joint Managing Director and Whole-time Director, Head of Marketing & Sales *etc.* as well as other officers/ office bearers.
43. The DG, with the above findings, submitted its investigation report to the Commission on 20.03.2018.

Consideration of the investigation report of the DG

44. The Commission considered the investigation report of the DG on 09.05.2018 and decided to forward an electronic copy of the same to OPs and the persons identified by the DG to be liable under Section 48 of the Act, for filing their suggestions/objections thereto. On 08.06.2018, OP-3 filed an application requesting for cross-examination of Mr. Suvomay Saha of OP-1, which was allowed by the



Commission on 05.07.2018. The cross-examination was conducted and concluded on 16.07.2018. The arguments of the OPs with respect to the investigation report of the DG were heard on 24.09.2018, 25.09.2018 and 26.09.2018.

Submissions of OPs to the DG's Investigation Report

Submissions of OP-1 and its individuals

45. OP-1 has agreed with the findings of the DG in the investigation report except the exoneration of OP-4. OP-1 has stated that it had filed an application under the Lesser Penalty Regulations admitting the cartelisation by way of exchange of commercial information. The DG has concluded on merits and facts that there is contravention of the provisions of the Act by OP-1, OP-2, OP-3 and OP-5 (excluding OP-4).
46. OP-1 has stated that it provided a full, true and vital disclosure about cartelisation in the flashlights market amongst the OPs and the association OP-5. Further, it provided full co-operation to the Commission and the DG during the course of investigation. Therefore, OP-1 and its officers should be granted the benefit of 100 percent reduction in penalty under the Lesser Penalty Regulations. Also, the Commission should consider implicating OP-4 for breach of Section 3(3) read with Section 3(1) of the Act for the period 20.05.2009 until 2012.
47. Further, OP-1 has submitted that it had disclosed the fact that the monthly sales and production data of various types of flashlights were shared amongst the members of OP-5 since 2008 and this continued till August 2016. Such sharing of data was done, as per the format prescribed in the guidelines issued by the association, for the purpose of calculation of market size and market shares of OP-1 and its competitors. In this regard, it was also disclosed that Geep was a member of AIDCM till 2012.
48. Further, OP-1 also submitted a draft press release dated 26.03.2012 that specifically mentioned purported increase in the prices of flashlights by the manufacturers and



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was intended to be released by OP-5. However, this draft press release was not released not because there was no anticompetitive conduct in relation to flashlights but because of the apprehension that it would attract attention of Competition Commission of India. In support thereof, OP-1 had also provided copies of email trails in relation to said draft press release.

49. OP-1 has stated that there are clear instances/ evidences in the investigation report which show that commercially sensitive details about flashlights were discussed between OP-1 and OP-3. The notes prepared by Mr. R. P. Khaitan of OP-3 had specific points of discussion about flashlights with OP-1, which included details about new products in the flashlights market, prices, discounting schemes and operating margins of OP-1. These notes were handed over to Mr. Suvamoy Saha of OP-1 during meetings between OP-1 and OP-3, which in turn were provided to the DG by OP-1 during investigation. Mr. R. P. Khaitan in his deposition before the DG has admitted that the need to know the sales price and volume of OP-1's flashlights was to know the trends so that he could advise his management to put emphasis on those segments. Such exchange of information between OP-1 and OP-3 is clearly anti-competitive.
50. Further, OP-1 has submitted that the market for 'flashlights' and 'dry cell batteries' are two distinct and separate markets and one is not substitutable by the other. It has averred that the contention of OP-2 that it did not actively track market intelligence for flashlights nor did it interact with competitors and also that all the interactions with competitors on flashlights, either direct or through OP-5, were ancillary and in relation to the market for dry cell batteries in India, which often helped in understanding the trends of dry cell batteries, is erroneous in law should be rejected. Also, OP-2 cannot connect the application for lesser penalty filed in dry cell batteries case *i.e.* *Suo Motu* Case no. 02 of 2016, to the present matter by way of this argument.



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51. Further, OP-1 has pointed out that OP-2 by contending that the application for lesser penalty was filed by way of abundant caution and they do not believe that the conduct in relation to flashlights was anti-competitive, is trying to abuse the due process of law established under the Lesser Penalty Regulations by filing an application for lesser penalty.

Submissions of OP-2 and its individuals

52. OP-2 has submitted that based on evidence on record, no case of separate cartelisation by the OPs can be concluded in relation to flashlights. OP-2 had filed the Lesser Penalty Application for the product flashlights by way of abundant caution stating that the conduct disclosed therein in relation to flashlights formed part of single continuous infringement with cartelisation in relation to the dry cell batteries case *i.e. Suo Motu Case no. 02 of 2016*.
53. Further, OP-2 has submitted that the investigation report of the DG fails to show any conduct by OP-2 that amounts to independent infringement of the provisions of the Act by it. The evidence in the investigation report of the DG through which the DG concludes a contravention of the provisions of the Act by OP-2 can be divided into three sections: (i) sharing of data of flashlights: AIDCM; (ii) draft press release and (iii) exchange of commercially sensitive information.
54. With respect to evidence regarding the data exchanged in relation to flashlights, OP-2 has submitted that the said data exchange was done to track and monitor the sale and production of dry cell batteries by the OPs, as each manufacturer of torches includes two to three batteries in the torch for its operation. This was to reinforce the coordination in dry cell batteries market. Moreover, the data exchange was on an aggregated basis rather than individualised and divided on per model basis. Further, the DG also does not consider mere data exchange to be a contravention of the provisions of the Act, which is evident from exoneration of OP-4 by the DG though it was a member of OP-5 till 2012 and was sharing data with other OPs till then.



Further, the aggregation of data for flashlights can also not be considered as an infringement of the provisions of the Act as aggregation was on the basis of volume and not value. The investigation report of the DG does not show how volume based information facilitated collusion for fixing prices under Section 3(3)(a) of the Act.

55. As regards the evidence of draft press release, OP-2 has submitted that, firstly, the draft press release was not shared with OP-2 and only its contents were orally communicated to it. Secondly, the draft press release pertained to announcing a price increase for dry cell batteries and flashlights and cannot be read in isolation to only refer to price increase in flashlights. OP-2's involvement in this communication pertained solely to dry cell batteries. Notably, OP-1 had provided the same draft press release as part of its lesser penalty application in dry cell batteries case *i.e. Suo Motu* Case no. 02 of 2016 also. This draft press release does not discuss any prices or methodology of increase of prices which is in contrast to how press releases used to be put out, discussed and implemented in detail in case of dry cell batteries. Further, the draft press release was admittedly never implemented, therefore, it cannot fall foul of Section 3(3)(a) of the Act. The Commission has recognised in *In Re: Sugar Mills (Suo Motu* Case no. 01 of 2010, order dated 30.11.2011) and in *Shri Nirmal Kumar Manshani v M/s Ruchi Soya Industries Ltd.* (Case no. 76 of 2012) that if an agreement does not lead to actual price fixing then no contravention under Section 3(3)(a) of the Act is made out. Also, failure to implement draft press release itself demonstrates absence of any appreciable adverse effect on competition.
56. With regard to the evidence relied upon by the DG to conclude exchange of commercially sensitive information by the OPs, OP-2 has submitted that four out of five communications relied upon by the DG do not involve OP-2. One communication that involves OP-2 is an e-mail which contains general discussion regarding another competitor *i.e. Godrej*, which cannot be considered as commercially sensitive as this relates to public information about entry of new



competitor in the market and can be found out by anyone. The communication does not demonstrate any direct or indirect fixing of prices.

57. Further, OP-2 has contended that the market structure of flashlights is not conducive to cartelisation. The observation of the DG that the organised segment for flashlights is highly concentrated is incorrect, as there is no formal distinction between the organised and unorganised segment. There are other players in the market such as Godrej, Bajaj and Phillips, which could be considered as part of the organised segment. Additionally, the structure of market for flashlights is such that it disfavours possible coordination amongst competitors because there are differentiated products (OP-1 alone sells 100 different models of flashlights), numerous players, different cost structures, no active association specific to flashlights and competitive constraints imposed by unorganised players. Moreover, the demand for flashlights is also declining.
58. OP-2 has asserted that it is not a manufacturer but only a trader of flashlights. OP-2's sales in comparison to OP-1 are inconsequential. Therefore, OP-2 is an insignificant player in the flashlight market and did not have incentive to participate in any illicit arrangement as flashlights were sold by it only in order to increase sale of its dry cell batteries.
59. OP-2 has also submitted that the DG report was arbitrary *vis-à-vis* OP-2 as it exonerated OP-4 due to lack of evidence pertaining to the sharing of commercially sensitive information. However, the DG did not demonstrate any such additional evidence to conclude OP-2's involvement in anti-competitive arrangement. Thus, OP-2 has requested the Commission to exonerate it since no additional evidence was found against it pertaining to flashlights.



Submissions of Mr. S. K. Khurana

60. The learned counsel appearing on behalf of Mr. S. K. Khurana reaffirmed all submissions made by OP-2 on the investigation report of the DG. He reiterated that as an individual who interacted with OP-1 and OP-3 on behalf of OP-2, all his interactions with OP-1 and OP-3 were in relation to zinc carbon dry cell batteries. Further, the DG while arriving at the findings in the matter ignored not only his submissions but also those of OP-2 and Mr. Kumaraswamy of OP-5 that the exchange of information regarding production and sale of flashlights between the OPs was to facilitate the dry cell cartel and the OPs were not concerned with the flashlights market. Moreover, the evidences in the investigation report of the DG failed to demonstrate that OP-2 had indulged in contravention of the provisions of Section 3(3) of the Act in the market of flashlights.
61. As regards the liability of Mr. S. K. Khurana in his capacity as the Chairperson of OP-5 during February 2012 to September 2015, it was clarified that Mr. S. K. Khurana was appointed as Chairman of OP-5 during this period due to Mr. Deepak Khaitan of OP-1 not keeping well. As Mr. S. K. Khurana was seniormost amongst Mr. Suvamoy Saha of OP-1, Mr. R. P. Khaitan of OP-3 and himself, he was named Chairman of OP-5. Thus, he cannot be construed as an active office bearer of OP-5. He only held a perfunctory title in OP-5. He was only an acting Chairman of OP-5 and received no income from OP-5, as the same was an honorary position. He was not independently responsible for functioning of OP-5 and all decisions in which he participated were pursuant to mutual decisions amongst all members. Thus, he did not exert any managerial power over OP-5 and no penalty should be imposed upon him for any conduct attributed to OP-5.



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Submissions of OP-3 and its individuals

62. OP-3 in its submission has stated that the information exchange regarding flashlights was to in relation to the cartel in dry cell batteries, which has already been dealt with by the Commission in the dry cell batteries case *i.e. Suo Motu* Case no. 02 of 2016. The DG in his investigation report in that Case had concluded that flashlights and batteries are complementary products and the data on flashlights are compiled to assess the overall demand of the dry cell. The DG had also observed therein that the flashlights market had more number of players and was not conducive to cartelisation. Thus, the Commission is now barred from investigation of the present flashlights case by the principle of *res-judicata*.
63. OP-3 has submitted that the legal standards for establishing an agreement have not been met by the DG in the instant case. The information shared with the association itself does not establish existence of any agreement as exchange of commercially sensitive information in itself is not sufficient to establish the existence of a cartel. It can only be treated as a 'plus factor'. Further, the DG did not appreciate that the exchange of information was to monitor the cartel in dry cell batteries and also to pursue other legitimate business considerations such as analyse markets trends, to make representations to the government of India regarding cheap imports *etc.*
64. Further, OP-3 argued that the draft press release and emails pertaining to the same are not conclusive of an anti-competitive agreement as (i) the draft press release was never implemented and mere discussion on prices without implementation of those prices does not amount to a price fixing, (ii) the draft press release does not indicate meeting of minds as it refers to the term "flashlights" in only two places and it does not mention by what amount will the price rise or when such price rise will happen and (iii) the emails pertaining to draft press release have no discussion on future prices.



65. As regards the other documentary evidences relied upon by the DG, OP-3 has submitted that these also do not meet the evidentiary standard in order to establish an agreement under Section 3 (3)(a) of the Act. The document dated 01.11.2010 does not show any discussion on percentage by which the prices would increase, what the final prices would be, what models/ types of flashlights would be affected or when the alleged price increase will be implemented. The point was discussed because the OPs had an understanding as a part of the cartel in dry cell batteries not to undercut the prices of batteries by offering schemes giving extra margins. The document dated 29.05.2012 contains information regarding past wholesale prices and margins of OP-1's flashlight with no discussion on future margins or prices. Such information was collected by OP-3 through market intelligence to monitor cartel in dry cell batteries, as depicted by point 4(a) of the document, and not provided by OP-1. The document dated 28.09.2015 pertains to publically available prices of certain flashlights of OP-1 which was collected as the sales of flashlights are intrinsically related to sale of batteries. There is no evidence of exchange of commercially sensitive information or implementation of any agreement in this document. The document dated 06.11.2014 only contains generic statements and the e-mail dated 19.05.2015 merely reports entry of Godrej in the market, an information which is publically available.
66. OP-3 has contended that the DG has not provided any other evidence of conduct of the OPs or price parallelism to arrive at a finding of concerted practice or agreement. There is no document relating to price revision in MRP of flashlights or revision in wholesale price or dealer landing cost, *etc.* Further, the documents relating to (a) discount schemes and promotional offers and (b) competitor contacts for monitoring prices were related to batteries cartel.
67. OP-3 has also stated that the markets for flashlights is not conducive for cartelization as there are no barriers to entry in the market for flashlights. Further, unlike the batteries case, there is no symmetry among the OPs in flashlights business as (i) OP-1 is the dominant supplier in the organised segment and would hardly agree to fix



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prices with smaller players (ii) OP-2 and OP-3 only trade in flashlights while OP-1 manufactures flashlights, (iii) the product ranges are different as OP-2 and OP-3 sell only plastic flashlights while OP-1 sells brass, plastic and aluminium flashlights and lastly (iv) the products are differentiated in flashlight market, which makes it difficult to achieve collusion. Moreover, there is no predictability of demand to sustain collusion.

68. Further, OP-3 has averred that as there is no cartel amongst the OPs for flashlights, there is no appreciable adverse effect on competition in the flashlights market. In the instant case, there was no implementation of any alleged price increase following the draft press release, no schemes were changed pursuant to the exchange of information amongst the OPs and no prices were changed pursuant to the exchange of information amongst the OPs.
69. OP-3 has argued that Mr Saha's oral statements lacked credibility and the DG erred by relying on the same. OP-3 has alleged that Mr. Saha has failed to fulfil the mandatory obligations under law as the statements made by him before the DG and the Commission revealed blatant gaps and inconsistencies. Further, his statement also demonstrated that it was made with a pre-determined intention to mislead the DG into believing that there was a collusion between OP-1, OP-2 and OP-3. Additionally, OP-3 has requested the Commission to reject OP-1's Lesser Penalty Application as it did not provide a vital disclosure to establish a cartel.
70. Regarding penalty, OP-3 has requested that no penalty should be levied on OP-3, Mr. Reddy and Mr. Khaitan as penalty has already been levied upon them for the same time-period and conduct, based on same evidence. Further, if penalty were to be levied then the same should be based on relevant turnover or relevant profit of OP-3 and the computation of penalty for the relevant persons should be based on the income derived from their association with OP-3 rather than the total income.



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71. OP-3 has also requested the Commission to consider various mitigating factors while imposing penalty, such as the fact that there was minimal or no loss/damage suffered by consumers as a result of the act. Further, the flashlights industry was facing severe pressures from imports and the unorganised sector. OP-3 was under the *bonafide* belief that the information on flashlights was being provided as a part of ordinary procedure of the Association and for the sole purpose of assessing the demand for batteries. Moreover, there was a minimal profit/ turnover derived by OP-3 from the alleged contravention as flashlights constituted only a small portion of their revenue.

Submissions of OP-5 and its individuals

72. OP-5 has stated that it is not a body corporate. It is an unincorporated, unregistered entity and nothing more than an agglomeration of its members. Therefore, it cannot go beyond the defence of its members and adopts the same. At the outset, OP-5 has submitted that it was never involved in pricing decisions of flashlights and it did not serve as a platform for discprice-fixing or cartelisation in respect of flashlights. This position has been corroborated by OP-3 and OP-4. Further, OP-2 also took the position that interactions (including those under the aegis of OP-5) in respect were ancillary and in relation to dry cell batteries in India, in order to understand the trends in respect of dry cell batteries. Similarly, OP-1 also took a stand that OP-5 functioned as a medium of exchange for production and sales data, making it clear that it was not a forum for making price decisions in respect of flashlights in India.
73. OP-5 also submitted that OP-2, OP-3 and OP-4 were small players in the flashlights segment and treated the flashlights business as ancillary, thus they did not any incentive to cartelise in respect of flashlights business. Further, OP-1 being the largest player, also had no incentive to cartelise owing to its decidedly superior market position.
74. As regards the collection and dissemination of statistical data in respect of production and sales of flashlights is concerned, OP-5 has stated that this was admitted as normal



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by the DG. Furthermore, pure information exchange alone does not constitute a violation of Section 3 of the Act.

75. As regards the Minutes of the OP-5's meeting dated 19.04.2016, OP-5 has submitted that the document itself corroborates the statement of Secretary of OP-5 that this was basically being used to analyse the steady decline in sales and to assign reasons, including the import and availability of cheap rechargeable torches. Further, the focus of the data exchanged in respect of flashlights was linked to ultimate impact that the sales of flashlights would have on the main business of OP-5's members, namely sale of batteries. The Secretary of OP-5 in his deposition before the DG had made this position clear.
76. Regarding Draft Press Release, OP-5 has submitted that it was not a price co-ordination but an attempt to convey general information in respect of price increase already brought into effect. In any event, former Secretary of OP-5, Mr. Kumaraswami had stated that no such announcement was ultimately implemented through the Association and the erstwhile Secretary had himself advised against such press release. With respect to the purported exchange of commercially sensitive information, OP-5 has stated that the same clearly took place outside the purview of OP-5's meetings and for such communication OP-5 was not used as a platform. Any meetings taking place on the sidelines of association meetings between the functionaries of individual members cannot be taken to mean that the association was involved in the same.
77. In view of the foregoing submissions, OP-5 has requested the Commission to close the proceedings against OP-5 in light of the fact that it did not act as a platform for cartelisation and in any event take a lenient view on the matter. Further, since penalty has already been imposed on the association (maximum penalty under Section 27 of the Act) on the same set of facts in respect of the cartelisation in dry cell batteries market, there is no distinct cartel /cause of action *qua* the flashlights market,



especially since flashlights are complementary/ancillary products, which utilise dry cell batteries.

Submissions of Mr. Ravindra Grover

78. At the outset, Mr. Ravindra Grover has contended that since an individual covered by Section 48 of the Act cannot be ‘punished’ for contravention of Section 3 of the Act under Section 27 of the Act, Section 48 cannot be applied to cases of contravention under Section 3 of the Act. This is so because under Section 27(b) of the Act, penalty can only be imposed on a company or a person/ entity with turnover which can at best be sole proprietorship or partnership. The said term cannot be stretched to include salaried employees.
79. Further, Mr. Ravindra Grover has argued that Section 48 does not apply to an entity, which is an unregistered association and not a body corporate or an association of companies (as opposed to an association of individuals). Section 48 of the Act is titled as “contravention by companies”. Therefore, for a Secretary to be proceeded against under Section 48(2) of the Act, must be the Secretary of a ‘Company’. ‘Company’ is defined in the Explanation to Section 48 of the Act itself, as ‘a body corporate and includes a firm or other association of individuals’. Thus, to qualify as a ‘company’, the entity in question must be a body corporate. OP-5 is an unregistered association, which neither is a distinct legal entity nor registered under any law. It cannot, therefore, qualify as a ‘body corporate’. Moreover, OP-5 is also not an ‘association of individuals’. It is an association of companies. The term ‘individual’ denotes a natural person. There is no definition in the statute that extends the meaning of ‘individual’ beyond its ordinary meaning. Therefore, only an association of natural persons can fall within the definition of company provided such association is a body corporate. Therefore, in view of forgoing, position, Section 48 of the Act cannot be employed to proceed against the Secretary of OP-5, an unregistered association of companies.



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80. Mr. Ravindra Grover has averred that it is premature to proceed against him at this stage when the contravention of the provisions of the Act by OP-5 are not yet concluded. Further, Mr. Ravindra Grover has submitted that there is neither a clear statement of allegations against him nor clarity on the exact portion of Section 48 pressed against him. The only substantive allegation against him are in Chapter 7 of the DG report set out in the Table at Para 7.6.1. In this regard, Mr. Ravindra Grover has submitted that mere sharing and circulation of pure data/ information does not violate Section 3 or any other provision of the Act. Moreover, the intent behind compilation of such data was only to monitor demand/ consumption of dry cell batteries. There was no cartelisation *qua* the flashlight market. In any case, there was no participation on his part in alleged cartelisation or price fixing or any intention to participate in the same. He was not privy to any of the press releases/ e-mails/ meetings referred to in the investigation report by the DG at pages 48 to 56 and many of these events pertain to period prior to his assuming office as Secretary of OP-5.
81. Arguing that there is no evidence of collusion or connivance against him and his role, if any, is negligible, Mr. Ravindra Grover has prayed that the Commission ought to close the proceedings against him and in any event take a lenient view on the matter. Further, since penalty has already been imposed on him (maximum penalty under Section 27 of the Act) on the same set of facts in respect of the cartelisation in dry cell batteries market, there is no distinct cartel /cause of action *qua* the flashlights market, especially since flashlights are complementary/ancillary products, which utilise dry cell batteries. Moreover, he has been wrongly identified for the purposes of Section 48 of the Act.

Submissions of Mr. S. Kumaraswami

82. Mr. S. Kumaraswami in his submissions filed with the Commission has denied all the allegations against him in the investigation report of the DG. With respect to the



allegation that he was person in-charge of the business of OP-5, Mr. Kumaraswami has submitted that as the Secretary of OP-5 he was merely discharging administrative functions without being conferred any responsibility or authority to make any decisions relating to the business strategy of its members. The factual position and the conduct of the Member's representatives would indicate that in fact they were in charge of the affairs of OP-5. The investigation report also does not cite any instance in support of allegation that he was decision maker or in charge of OP-5.

83. Regarding allegation that Mr. Kumaraswami had compiled and circulated monthly data amongst the members, he has accepted that he was responsible for collecting and circulating production and sales data of dry cell batteries and flashlights on monthly basis. With respect to flashlights, Mr. Kumaraswami has explained that flashlights are highly differentiated products with dozens of sub-brands and varied light output and constantly changing internal and external designs and price points. The varieties being too numerous, the data was collected and reports to members of OP-5, as decided by them, under three broad heads *i.e.* Brass Aluminium and Plastic, based on the material used to construct the case of the flashlights. As per his knowledge, the members used this data to estimate the derived demand of dry cell batteries. Further, he has stated that out of OP-1, OP-2 and OP-3, only OP-1 was the manufacturer of flashlights (all three types). OP-2 and OP-3 were merely traders that too of only one type of torches *i.e.* plastic torches. With respect to plastic torches, Mr. Kumaraswami has averred that the members were outsourcing a large portion of these torches from small / medium scale sectors. Only less than 5% were being manufactured by OP-1. Consequently, he has stated that due to the complexities arising from highly differentiated flashlights market, he did not know how the data being compiled by OP-5 could be used to indulge in anti-competitive activities. In any case, he was not a party to the members' decisions in this regard. Also, the investigation report did not cite any evidence to show his involvement in this regard.



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84. As regards, the allegation that Mr. Kumaraswami was involved in pricing discussions of flashlights, he has stated that four out of five OPs have stated that OP-5 was not involved in any pricing decision of the members. Further, he has stated that there had been 12 meetings of OP-5 during the investigation period but there was hardly any discussion on flashlights in these meetings, leave alone pricing decisions. The list of points prepared by OP-3 were only for purposes of discussion with OP-1 and not OP-2 or OP-5. From the dates of these notes, he has observed that no meeting of OP-5 was held on those dates except on 08.02.2010 and has submitted that the list prepared by OP-3 for discussion on that date and the Agenda prepared for discussion in the meeting on that date were totally different.
85. Mr. Kumaraswami has accepted the allegation that he had obtained concurrence of Mr. S. K. Khurana of OP-2. However, he has stated that he had neither recommended nor decided upon the proposed price increases. In fact he had never seen the price list of any of the manufacturers in his tenure as the Secretary of OP-5. He had merely shown the draft of a press release to one Member on the directions of another Member. He had no option but to act as a dutiful messenger. This process did not make him the author or contributor to the document. Rather when he came to know that the draft press release may be viewed adversely under the Act, he shared his apprehension with Mr. Saha, who then dropped the proposal for issuing press release. This act of averting a possibility of legal violation on the part of his employer OP-5 has ironically been interpreted by the DG as a contravention on his part under the Act.

Analysis:

86. The Commission has considered the Lesser Penalty Applications filed by OP-1 and OP-2, the investigation report of the DG and the submissions of OPs and their individuals. It is noted from the investigation report of the DG that out of five OPs in this case, four OPs *i.e.* OP-1, OP-2, OP-3 and OP-5, have been found to be in



contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act. However, no contravention could be established against OP-4. Further, out of the two OPs who filed Lesser Penalty Application with the Commission, OP-1 has admitted to the cartel but OP-2 has denied its involvement in the cartelisation of flashlights. Also, OP-3 and OP-5 have denied the finding of cartelisation against them in the flashlights market. OP-4 has not furnished any response to the investigation report of the DG.

87. Before proceeding further, the Commission notes that both OP-2 and OP-3 have contended that since the Commission has passed a decision in *Suo Motu* Case no. 02 of 2016, which related to cartelisation in zinc-carbon dry cell battery, no separate case in relation to flashlights market subsists against them. The arguments extended by the learned counsel before the Commission in this regard are: (i) Flashlights and dry cell batteries are complementary products and conduct in flashlights market is related to cartel in zinc carbon dry cell market. Further, the evidence regarding conduct in flashlights market was already in consideration before the Commission in *Suo Motu* Case no. 02 of 2016 and (ii) the contravention in flashlights market and dry cell battery market are part of single-continuous infringement.
88. Upon consideration of the first argument put forth by both the learned counsel for OP-2 and OP-3, the Commission is of the opinion that even if flashlights and dry cell batteries are complementary products, they are still separate products in terms of physical characteristics, end use, price as well as consumer preferences and, hence, belong to separate product markets. Further, merely because products are complementary in nature does not necessitate a common investigation/ inquiry into both products. Secondly, even if, as argued, the conduct in flashlights market was a corollary to the conduct in zinc carbon dry cell battery market, the same was not for consideration before the Commission in that case. A plain reading of the order under Section 27 of the Act passed by the Commission in *Suo Motu* case no. 02 of 2016 on 19.04.2018, would demonstrate this position. Even the penalty in that case was



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imposed by taking into consideration the relevant profit of OP-1, OP-2 and OP-3 from dry cell batteries. Further, much prior to passing of order dated 19.04.2018 in that case, the Commission had initiated a separate investigation into allegations of cartelisation in flashlights market *vide* its order dated 08.02.2017 passed under Section 26(1) of the Act. Consequently, the facts and evidence in relation to flashlights market were neither considered nor decided upon in *Suo Motu* Case no. 02 of 2016. Accordingly, the Commission deems it appropriate to proceed to decide this case.

89. As regards the argument of single continuous infringement put forth by OP-2, the Commission finds this argument to be misconceived. In the instant case, a separate investigation into the allegations of cartelisation in flashlights market was based upon the Lesser Penalty Application of OP-1. Though, subsequently OP-2 also filed a Lesser Penalty Application, it did not categorically admit to the cartelisation in flashlights market. Further, even in the Lesser Penalty Application filed in the zinc-carbon dry cell battery case (*Suo Motu* Case no. 02 of 2016), OP-2 neither admitted to the cartel in the flashlights market nor provided any material evidence in relation to the same. Considering that, OP-2 has not acknowledged the fact of infringement of the provisions of the Act in flashlights market, its argument of single continuous infringement seems misplaced.
90. Coming to the evidence of cartelisation in the flashlight market in the instant matter, it is observed that the first evidence relied upon by the DG is the exchange of data relating to production and sales of flashlights by OP-1 to OP-4 on a monthly basis for several years and even prior to 2009. The DG has concluded that the collection and compilation of this data enabled the OPs to monitor each other's market share and facilitated collusion in the organised market of flashlights, which is concentrated with OP-1, OP-2 and OP-3 controlling about 98% of the market.



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91. The Commission observes that all the OPs including the association have admitted to the practice of exchange of monthly data relating to production and sales of flashlights through their association *i.e.* OP-5. However, OP-2, OP-3 and OP-5 have argued that they compiled data regarding flashlights only to monitor demand of zinc-carbon dry cell batteries and/ or their agreement in the zinc-carbon dry cell batteries market and not for the purpose of coordination in the flashlights market. Further, OP-2 and OP-3 have contended that they have no commercially justifiable reason for cartelising with OP-1, which holds more than 80 % of the said 98% market share, whereas each of them hold only a negligible market share.
92. Upon considering the observations of the DG, statements of Mr. Suvamoy Saha of OP-1, Mr. R. P. Khaitan of OP-3 and Mr. Ravinder Grover of OP-5 and submission of OPs thereon, the Commission observes that even if the contention of the OPs that the exchange of production and sales data of flashlights helped to monitor zinc carbon dry cell batteries market is accepted, it cannot be denied that such exchange also enabled monitoring of *inter se* market shares of OP-1, OP-2 and OP-3 in the organized market of flashlights in India. The concerned persons of OP-1, OP-3 and OP-5, named hereinbefore, have also admitted to this fact. Further, considering that around 98% of the organised market was controlled by OP-1, OP-2 and OP-3, such practice could have facilitated collusion in the organised segment of the flashlights market. It can be surmised that the benefits of collusion could have been reaped in terms of increased price/ quantity of sales by OP-2 and OP-3 and in terms of reduced competition by OP-1. In any case, the exchange of data relating to production and sales of a product only indicates possibility of collusion and can be considered as a 'plus factor'. The mere fact that certain information was exchanged amongst the OPs does not constitute enough evidence for the Commission to conclude that the OPs were acting in a coordinated manner contrary to the provisions of the Act. Such evidence has to be considered in conjunction with other evidence in the matter to establish contravention of the provisions of the Act.



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93. *Ergo*, it is noted that apart from evidence of collection and compilation of data on production and sales of flashlights, the DG has relied upon an e-mail exchange amongst the OPs in March 2012 whereby OP-1, OP-2 and OP-3 were contemplating issue of a press release on 26.03.2012 to indicate increase in the prices of dry cell batteries and flashlights. On examination of the e-mails, the DG has concluded that the OPs had a clear agreement/ understanding to increase the prices of dry cell batteries and flashlights.
94. However, OP-2 and OP-3 have contended that the draft press release does not establish an anti-competitive agreement amongst OP-1, OP-2 and OP-3 as in the absence of discussion on methodology of increase in prices or future prices this does not reflect meeting of minds. Further, the draft press release was never implemented and mere discussion to increase prices without implementation of the same does not amount to a price fixing. Thus, the draft press release cannot fall foul of Section 3(3)(a) of the Act. In this regard, OP-2 has also quoted previous decisions of the Commission, as stated in Para 56 above. Further, OP-3 has quoted the decision of the Commission in *In Re: Sugar Mills (supra)* and in *Film & Television Producers Guild of India v MAI (Case no. 37 of 2011, order dated 03.01.2013)*.
95. The Commission has perused the impugned e-mail exchange reproduced in the investigation report. The trail mail reveals that a draft press release was prepared by Mr. Suvamoy Saha of OP-1 and sent to Mr. R. P. Khaitan of OP-3 and Mr. S. Kumaraswami of OP-5. The contents of the e-mail dated 23.03.2012, through which Mr. Suvamoy Saha of OP-1 forwarded the draft press release to Mr. Kumaraswami, show that he had asked Mr. Kumaraswami to get agreement and/ or suggestions for changes, if any, from Mr. S. K. Khurana of OP-2 on the draft press release. It is noted that Mr. Kumaraswami responded to the email of Mr. Suvamoy Saha on the same day wherein it was, *inter alia*, stated that “*Mr. Khurana is ok with the idea and the draft...*”. However, subsequently on 24.03.2012, Mr. Kumaraswami wrote another e-mail to Mr. Saha of OP-1 wherein it was, *inter alia*, stated that



“...such a release by the Association may attract the attention of Competition Commission of India - very active these days- should be avoided...”. Thereafter, in response, Mr. Saha wrote an e-mail to Mr. Kumaraswami on 26.03.2012 with a copy to Mr. R. P. Khaitan and Mr. S. K. Khurana, stating that “...in view of your apprehension in the matter, we should not go ahead with the press release from the association. Individual companies may do at their end what is suitable to them...”.

96. When DG confronted the above e-mail exchange to Mr. R. P. Khaitan of OP-3, he, *inter alia*, stated that “On account of increase in input costs/ excise duty/ service tax, the industry wanted to increase the price of dry cell battery and flashlights...”. Further, Mr. S. K. Khurana of OP-2 stated that “...though the document contained reference to pricing of batteries and flashlights, the pricing of batteries was of paramount concern to PECIN”. Mr. Kumaraswami of OP-5, *inter alia*, stated that “...The draft press release had come from Eveready but I had also taken the concurrence of Panasonic and Nippo. However, the above scheme of announcement was not implemented through the Association”.
97. The Commission observes that the e-mail exchange and aforesaid statements of the concerned persons discloses that OP-1, OP-2 and OP-3 had arrived an agreement amongst themselves to increase prices with respect to not only dry cell batteries but also flashlights. Mr. S. K. Khurana’s statement to the DG that only pricing of batteries was of paramount concern to him appears to be an attempt to downplay his involvement in the pricing of flashlights. It is noted that in his e-mail dated 23.03.2012, Mr. Saha of OP-1 through Mr. Kumaraswami of OP-5 had asked for Mr. S. K. Khurana’s agreement as well as suggested changes to the draft press release. At that time, he could have suggested removal of the proposal relating to flashlights. However, there is no evidence or averment by Mr. Khurana stating that he sought such a change. Thus, there appears to be an understanding amongst OP-1, OP-2 and OP-3 to give effect to increase in prices of flashlights. However, the last e-mail dated 26.03.2012 from Mr. Suvamoy Saha to Mr. Kumaraswami on 26.03.2012 with a copy



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to Mr. R. P. Khaitan and Mr. S. K. Khurana indicates that the agreement was not implemented.

98. In order to ascertain whether the agreement to increase prices was implemented by the OPs individually, the Commission looked at the third set of evidence relied upon by the DG. This set of evidence is titled as 'exchange of commercially sensitive information' and includes (i) printed notes of Mr. R. P. Khaitan of OP-3 whereby he was seeking information from OP-1 regarding pricing, wholesale price, margins and promotional schemes adopted by it and (ii) an e-mail exchange amongst OP-1, OP-2 and OP-3 regarding entry of new player Godrej in the market.
99. The Commission observes that the printed notes of Mr. R. P. Khaitan and statements of concerned persons of OP-1 and OP-3 thereon depict exchange of commercially sensitive information amongst OP-1 and OP-3 regarding pricing of OP-1's products. However, these notes and statements do not establish that the concerned persons agreed upon the actual terms of increasing or determining prices. In other words, the prices discussion amongst OP-1 and OP-3 does not categorically establish that they fixed prices. Further, the e-mail exchange amongst OP-1, OP-2 and OP-3 shows that these OPs were monitoring market of flashlights for entry but does not establish contravention of the provisions of the Act.
100. Based on the discussion in the foregoing paras, the Commission comes to the conclusion that in the instant case though there is evidence of exchange of production/ sales data, draft press release and price information amongst OPs indicating possibility of collusion, there is hardly any evidence to show that such activities of OP-1, OP-2 and OP-3 did in fact result in determining the prices of flashlights. Further, there is no information or evidence in the case to establish that the agreement depicted by the e-mail exchange in March 2012 was acted upon by the OPs. Even OP-1, who disclosed the alleged anti-competitive behaviour of the OPs in the instant case, expressed inability during the course of hearing to provide any definite evidence of increase in prices of flashlights due the conduct of the OPs.



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101. Thus, in the absence of sufficient cogent evidence, it cannot be concluded that OP-1, OP-2, OP-3 and OP-5 formed a cartel and acted in a concerted manner to directly or indirectly determine purchase or sale price of flashlights in violation of the provisions of Section 3(3)(a) of the Act.
102. In conclusion, the Commission is of the view that no case of contravention of Section 3(3)(a) read with 3(1) of the Act is made out in the present case. Further, in absence of a finding of infringement by the OPs, no liability is made out against their officers under Section 48 of the Act as well. Accordingly, the matter is ordered to be closed.
103. The Secretary is directed to inform the parties accordingly.

Sd/-
(Sudhir Mital)
Chairperson

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi

Date: 06.11.2018