

BEFORE THE

**COMPETITION COMMISSION OF INDIA**

**M RTP Case No. 1/28 (C-97/2009/DGIR)**

**Date of decision: -09.05.2012**

**1. M/s Royal Energy Ltd.**

**- Informant**

**1. M/s Indian Oil Corporation Ltd.**

**2. M/s Bharat Petroleum Corporation Ltd.**

**3. M/s Hindustan Petroleum Corporation Ltd.**

**- Opposite Parties**

**Order u/s 26(6) of the Competition Act, 2002**

The present matter relates to information dated 11.05.2009 filed by M/s Royal Energy Ltd. (the informant) before the office of Directorate General of Investigation and Registration (DGI&R), Monopolies and Restrictive Trade Practices Commission (MRTPC) against M/s Indian Oil Corporation Ltd.(IOCL), M/s Bharat Petroleum Corporation Ltd. (BPCL) and M/s Hindustan Petroleum Corporation Ltd.(HPCL) alleging unfair and monopolistic trade practices in breach of the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act).



## 2. Facts and Allegations of the Case in Brief

- 2.1 The informant had submitted that it was the largest manufacturer of bio-diesel, having its plant in Maharashtra. It was earlier associated with many organizations like Indian Railways, BEST, Essar Steels, Kirloskar etc. as a vendor of bio-diesel. In addition, it was having its own retail bio-diesel pumps in Maharashtra.
- 2.2 The Informant alleged that since its product was causing a threat to diesel supplied by IOCL, BPCL & HPCL (hereinafter collectively called public sector OMCs), they started informing their clients that they would be supplying bio-diesel blended petro-diesel to them directly. It has also been stated that as per purchase policy of OMCs, they were supposed to purchase bio-diesel at a pre-determined rate, which at the time of filing the information was Rs.26.50/-per litre, while price of bio-diesel sold independently by the informant was Rs.31/-per litre. Since the consumers were bound to purchase blended bio-diesel only from the OMCs, the bio-diesel manufacturers were per force to sell their product to OMCs at a rate lower than the cost of manufacturing.
- 2.3 According to the informant, this act of OMCs constituted 'Monopolistic Trade Practice' prohibited under MRTP Act. The informant had also submitted a letter dated 15.06.2009 addressed to DGI&R, MRTPC informing that Ministry of Petroleum & Natural Gas (MoPNG) had issued a letter requesting the State Government to ensure elimination of the sale and possession of bio-diesel in the market. The informant contended that



this letter was issued on the complaints of the OMCs who did not want to face competition. Further, while on the one side the government was promoting the usage of green fuel; by issuing such a letter it intended to kill the green fuel industry.

3. The office of DGI&R vide its letter dated 09.07.2009 told informant that it might approach the MoPNG for its grievances. However, the informant vide letter dated 13.07.2009 requested the office of DGI&R for a hearing on the issue. Meanwhile, due to the repeal of MRTP Act, the case was transferred to the Competition Commission of India (the Commission) under section 66 (6) of the Competition Act, 2002 (the Act).
4. On receipt of the case from the MRTPC, the Commission vide its order dated 29.06.2010 decided that the comments of Ministry of Petroleum and Natural Gas and Ministry of New and Renewable Energy be obtained. Both the ministries submitted their replies and their representatives also appeared and made oral submissions before the Commission. The informant was also called to appear for the hearing, but no one turned up. An advisory dated 26.10.2010 was thereafter issued to both the ministries asking them to take suitable measures in the matter so that no competitive harm was caused in the market.
5. The Commission being of the opinion that there existed a *prima facie* case, vide its order dated 20.05.2011 directed the Director General (DG) to investigate the matter.



6. The DG conducted the investigation in the matter and submitted his report dated 16.11.2011 to the Commission.

6.1 During investigation into the matter, DG called for replies from various parties including three public sector OMCs. The three OMCs denied the allegations of forming a cartel. They submitted that Government of India through Ministry of Petroleum and Natural Gas (MoPNG) formulated a Biodiesel Policy (BPP) which was made effective from 01.01.2006. In line with this policy, OMCs were to purchase biodiesel (BIS B100) of the quality standards as prescribed by BIS standards (BIS15607:2005) for blending with diesel (HSD) from select purchase centres. As per Para 4.2(vi) of the said policy, the OMCs were to buy bio-diesel of BIS standards, at a uniform price, to be decided by OMCs from time to time, depending upon the conditions.

6.2 It has also been submitted by PSU OMCs that they were to purchase Bio-Diesel (B100) for blending with diesel (HSD) to the extent of 20% in phases. The price of HSD with which bio-diesel was to be blended was controlled by Government of India and OMCs could not increase or decrease the retail selling price of HSD on their own. According to OMCs, therefore, the purchase of bio-diesel for blending with HSD could only be done keeping the end selling price of HSD in view. Since the end sale prices of diesel are fixed, a backward calculation was made to find out what would be the maximum price to be paid for procuring bio-diesel.



6.3 The PSU OMCs also submitted that as per directions of MoPNG, w.e.f. 01.01.2006, OMCs were required to purchase biodiesel for blending HSD to the extent of 5% and it fixed an all-inclusive price for the purchase of bio diesel B100 at the designated collection centres at Rs.25 per Litre for the period January 1,2006 to June 30, 2006. Subsequently, MoPNG revised the procurement price at Rs.26.5 per Litre w.e.f August 22, 2006 to December 31, 2006. The OMCs submitted that the procurement price of Bio-Diesel was arrived at considering various components like prevailing ex-storage point price of HSD for the designated stock points, National rail freight ex-Refinery to the designated purchase center of Bio diesel, Excise duty and education cess as applicable for HSD less the normative gross margins to arrive at landed cost of HSD and blending cost of Rs. 500/ Kilo Litre.

6.4 It is stated that bio-diesel committee constituted by Secretary, MoPNG which had representatives from the Government, bio-diesel manufacturers and the oil companies, had indicated that OMCs could offer a price of Rs. 26 per Litre based on ex-storage point of HSD on July 2, 2009, whereas the Bio-Diesel manufacturers desired a rate of Rs. 34 per litre. It has also been brought out that the Ministry had no intention to subsidize the bio-diesel for its blending programme and the under recoveries of the OMCs could not be shared by the Government. With effect from 12.08.2011, the procurement price was revised to Rs.33 per litre.



6.5 The OMCs stated that till date, purchase of bio-diesel from the manufacturers could not be effected. Further, no discretion vests with OMCs to finalize or fix the purchase price of bio-diesel B100 since they are bound to follow Bio-diesel purchase policy, para 4.2 (vi) of which provided that the oil marketing companies were to buy bio diesel (B100) that meets the prescribed BIS standard, at a uniform price, as may be decided by the oil marketing companies from time to time depending on market conditions. Such a uniform price was to be inclusive of taxes and duties and transportation cost for delivery of Bio-Diesel at the purchase centre. The uniform price once fixed was to remain in operation for six months, at the end of which alone it could be reviewed.

6.6 It has also been submitted by the OMCs that it is commercially not viable to procure bio-diesel B100 for the purpose of blending above the notified rates. Since the retail diesel prices continue to remain uniform for all PSU OMCs, as directed by Govt. of India, there is no other way of arriving at the purchase price of the bio-diesel other than as per the methodology announced by MoPNG in para 4.2 (vi) of the Bio-Diesel Purchase Policy. The retail selling price of diesel and the purchase price of bio-diesel are not linked to the their actual cost of procurement and cost of its manufacturing and in case the purchase price of bio-diesel is fixed based on the cost of manufacture, this would result in varying purchase prices for different manufacturers of bio-diesel, a situation which cannot be sustained.



6.7 In its reply, Ministry of Petroleum & Natural Gas (MoPNG) has stated that the OMCs periodically revised the price of bio diesel B:100 in terms of the bio diesel purchase policy of 09.10.2005, whenever the price of diesel (HSD) was revised. The purchase price declared by the OMCs for bio-diesel B:100 was linked to the ex-storage point price of HSD and accordingly revised with the revision in the prices of HSD. The retail price of diesel was not market determined and was dependent on periodical directives of government. In view of this, it was not possible for OMCs to offer different prices for biodiesel to the different manufacturers. It is also stated that it was not possible for the OMCs to offer price higher than the Minimum Purchase Price (MPP) for biodiesel as decided by the National Bio-fuels Coordination Committee. The reply of Ministry of New and Renewable Energy (MNRE) before the DG was on similar lines as of MoPNG and PSU OMCs.

6.8 In its reply, Bureau of Indian Standards, has stated that as per IS 1460 clause 3.1.2, bio-diesel upto 5% (v/v) might be blended with automotive diesel fuel. Ministry of Petroleum in light of Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention of Malpractices) order, 1998 had made it mandatory to comply with Indian Standards on diesel and petrol. Therefore, more than 5% of biodiesel cannot be blended with diesel as it would not then meet mandatory standard.



6.9 The informant in its replies before DG had submitted that it had not sold any quantity of biodiesel to the OMCs as they have offered a very low rate not even enough to purchase the raw material for bio-diesel. It was not viable to sell bio-diesel to OMCs as the cost of production of bio-diesel was more than the price at which the bio-diesel was sought to be procured by OMCs. The informant had also drawn attention to the fact that it had filed a writ petition W.(L) No. 1286/1671 of 2009 before the High Court of Bombay against letter/ circular dated 22.04.2009 of MoPNG addressed to all the Chief Secretaries/Administrators of all the States/Union Territories, which required them to curb illegal marketing of bio-diesel for use as transportation fuel on the basis of Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005, under the Essential Commodities Act, 1955 to control the unauthorized trade of Motor Spirit and High Speed Diesel in the country. According to the informant, the Hon'ble High Court had restrained all concerned parties from taking further action till the final decision.

6.10 The Biodiesel Association of India in its reply had inter alia submitted that there were thirteen commercial biodiesel manufacturers in India. The association had also stated that not a single litre of bio-diesel B100 was sold to the OMCs as per their purchase policy of Rs. 25/- per litre, since 2006. It is submitted that the price of Rs. 26.50/- per litre of B100 offered by OMCs was not all viable for production since at current price of feedstock of vegetable oil derivatives, the cost of production of bio-diesel



comes to Rs. 49/- per litre at a minimum and even at a conservative minimum gross margin of 10%, the selling price would come to Rs. 54/- per litre.

6.11 Biodiesel Manufactures like Emami Biotech Ltd. and Universal Diesel also submitted that they could not sell even a single litre of biodiesel so far to the OMCs since it was not viable for them to sell bio-diesel to the OMCs at the offered rate as their cost of production was much higher than the price offered by OMCs.

6.12 Based upon replies received from various parties, DG reported that almost every facet of the bio-diesel industry was governed in the country by various policy decisions of the government. On the issue of the methodology to arrive at the purchase price of bio-diesel, it has been observed that OMCs adopted fundamentally the same pricing formulation as was adopted by the MoPNG and they did not take into account the cost of production of bio-diesel to the manufacturers. According to DG, it was therefore evident that the OMCs were not free in determining the prices of bio-diesel as the prices were essentially to be fixed on the basis of guidelines and policies of the government of India.

6.13 DG further submitted that mandate for the OMCs was to purchase BIS Certified bio-diesel only for blending with HSD to the extent of 5% (IS: 1460). Therefore, the pricing of B: 100 for purchase got linked to the retail selling price of HSD. The price of HSD was controlled by the Government of India and OMCs are not allowed to increase the retail selling price of



HSD on their own. As a result, the OMCs were adopting a practice of making a backward calculation to arrive at the price which can be paid for procuring bio-diesel in view of the end sale prices being fixed. The offered purchase price by OMCs, therefore, did not even factor the cost of production of bio-diesel.

6.14 DG also submitted that the OMCs were not in a position to offer higher prices for bio-diesel as they were not permitted to sell blended diesel at market determined rates since the government determines the retail selling price of diesel, which itself is not market determined.

6.15 According to DG, mere fact of fixation of uniform prices does not amount to the formation of cartel within the meaning of sub-section (3) of section 3 of the Competition Act, 2002. DG has stated that cartelization can occur only in a context where two or more parties acting independently strive to secure business for earning profits or reducing their losses. No such conduct of anti-competitiveness has been found to exist in the uniform fixation of price of bio-diesel by the OMCs.

6.16 DG also submitted that neither the conduct nor the intent of the OMCs was market oriented. Each of the OMC being an independent legal entity has distinct shareholding pattern. There is neither a concept of collective dominance in the Act nor it can be said that the one OMC was exercising 'control' over the other OMCs as part of 'group' within the meaning of Explanations (a) & (b) to section 5 of the Act. As such, there



was no evidence to suggest that there was a violation of section 4 (1) of the Act by the OMCs acting together. The bio-diesel pricing could not also be said to be on account of abuse of dominant position by the oil marketing companies since the decision to procure bio-diesel at uniform purchase price was a collective decision of the oil marketing companies but flowed from the various policy decisions of the Government.

6.17 DG concluded that there was no evidence to suggest existence of an anti-competitive agreement between PSU OMCs in violation to section 3 of the Act. Similarly, PSU OMCs were not found to be in contravention of section 4 of the Act.

6.18 A copy of report of DG received by the Commission was forwarded to the Informant for filing objections, if any. The Informant in its reply dated 29.02.2012 had not given specific comments on the findings of DG. The informant submitted that it only wished to state that the oil companies were not providing a clear and transparent picture of bio-diesel industry in the country. The informant also requested that the Ministry appointed to promote green energy/fuel should do something so that bio-diesel should be sold at least at the prevailing diesel rate less the blending and logistics cost.

7. The Commission carefully considered the report of the DG, reply of the informant and all other relevant materials and evidences available on record in light of various provisions of the Act.



7.1 In the light of the findings of DG and the background in which the policies of Government had been formulated, the Commission noted that in accordance with the need for a comprehensive national programme to utilize the available wastelands, forest and agro wastes to produce bio-fuels, the Planning Commission had constituted a committee on the 'Development of Bio-fuel' in 2002. The committee in its report recommended that a National Mission on bio-diesel should be launched with the objective of producing bio-diesel in quantities sufficient to enable its blending with HSD beginning with 5% in 2006-07 and raising it up to the extent of 20% by 2011-12. The committee also recommended that the blending of bio-diesel be taken up at the depot level of the diesel distribution and marketing company.

7.2 Subsequently, Ministry of Petroleum and Natural gas formulated the Bio-Diesel Purchase (BPP) Policy which became effective from 01.01.2006. Under this policy, OMCs were directed to purchase bio-diesel B-100, which met the fuel quality standards, through their identified purchase centers. The bio-diesel manufacturers, interested in supplying bio-diesel to OMCs, were required to approach the State Level Coordinators (SLCs) pertaining to a particular state for registration as authorized suppliers.

7.3 The Commission noted that as per Para 4.2 (vi) of Purchase policy, the oil marketing companies were to buy bio-diesel (B100), which met the prescribed BIS standard, at a uniform price, as might be decided by the oil marketing companies from time to time, depending on market conditions. The uniform price thus fixed was to remain in operation for six months, at the end of which it was to be reviewed.



7.4 Subsequent to the bio-diesel purchase policy, the Ministry of New and Renewable Energy (MNRE), Government of India formulated the National Policy on Bio-fuels (NBP) in 2009, according to which the responsibility of storage, distribution and marketing of bio-fuels was to rest with the OMCs. It also mentioned that the Minimum Purchase Price (MPP) for bio-diesel was to be determined by Bio-Fuel Steering Committee and the National Bio-Fuel Coordination Committee by the OMCs. This price would be linked to be prevailing retail diesel price.

7.5 The Commission observed that the purchase price declared by the PSU OMCs for bio-diesel (B:100) was linked to the ex-storage point price of petro-diesel and accordingly revised as and when there was a revision in the price of the latter. This system of fixing retail price of diesel was not market based and revision of such prices was also dependent upon the periodical directives from the government. Since the price of diesel was under the control of the Government, PSU OMCs were not allowed to fix, determine and enhance the retail selling price of diesel on their own. Consequently, for procurement of bio-diesel the OMCs had to make a backward calculation to arrive at the maximum price which could be paid to bio-diesel manufacturers.

7.6 The Commission further observed that for the reasons stated in preceding paras, the procurement price of bio-diesel offered by OMCs does not factor the cost of its production by the bio-diesel manufacturers. Since the price of the bio-diesel fixed by the OMCs was well below even



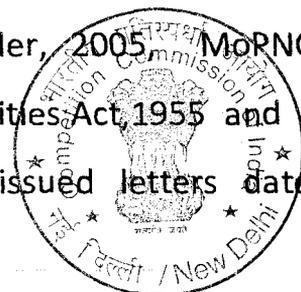
the production cost, therefore the bio-diesel manufacturers did not find it viable to sell the same to OMCs. Due to this reason, they had not sold even a single liter of bio-diesel to any of the three PSU Oil Marketing Companies to blend it with petro-diesel.

7.7 The Commission also noted that in exercise of powers conferred by section 3 of Essential Commodities Act, 1955, the MoPNG had issued the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005 (control order) dated 19th December 2005 which extended to the whole of India. Clause 3(5) and clause 4 of the Order stipulated as under;

*Clause 3(5) - " No person shall sell or agree to sell any petroleum product or its mixture other than motor spirit or high speed diesel or any other fuel authorised by the Central Government in any form, under any name, brand or nomenclature which can be and is meant to be used as fuel in any type of automobile vehicles fitted with spark ignition engines or compression ignition engines."*

*Clause 4 - No person, other than those authorised by the Central Government, shall market and sell motor spirit or high speed diesel to consumers or dealers."*

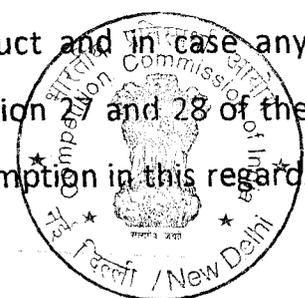
7.8 Bio-diesel (B:100) is meant to be a blend stock for diesel and is covered under Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005 MoPNG, exercising its authority under the Essential Commodities Act, 1955 and in accordance with delegation of business rules, issued letters dated



05.03.2009 and 22.04.2009 to prohibit unauthorized sale of bio-diesel. These letters were issued on the basis of a field report made by Hindustan Petroleum Corporation Limited (HPCL) as a State Level coordinator of Andhra Pradesh in respect of usage of B:100 as transportation fuel by private parties thereby violating the provisions of Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005.

7.9 The Commission noted that as per Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005, all authorized OMCs including private OMCs were authorized to market HSD IS 1460 which included B5 i.e. 5% bio-diesel blended with HSD. Although there was no price restriction on the private sector OMCs for purchasing B100 to be blended with HSD and sold as B5 (HSD blended with 5% bio-diesel) as per blended with HSD and sold as B5 (HSD blended with 5% bio-diesel) as per BIS specifications but due to subsidized HSD sale no private OMC could be expected to purchase bio-diesel at higher price and sell it at a subsidized price, footing the subsidy at their cost. The prohibition on sale in the open market other than to OMCs had reportedly been imposed on account of various concerns mainly of adulteration of diesel being marketed by OMCs.

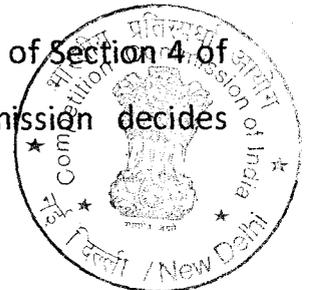
7.10 In the backdrop of these facts, the Commission observes that even if an anti competitive conduct flows from any policy of the Government, the Commission will still have jurisdiction to examine the impugned conduct and in case any violation is found, suitable orders can be passed under Section 27 and 28 of the Act. The Competition Act, 2002 has not been made any exemption in this regard.



However, the Commission finds that in the facts and circumstances of the present matter, the OMCs cannot be forced to buy bio-diesel at a price which is higher than the price of end product, that is, HSD in this case, as <sup>it</sup> would not be commercially viable. After taking into account the totality of circumstances and the constraints under which PSU OMCs are functioning, the Commission agrees with the conclusion drawn by the DG that the conduct of the OMCs in this case cannot be said to be anti-competitive.

7.11 There is no case of contravention of provisions of Section 4 also as PSU OMCs cannot be said to be dominant jointly as concept of collective dominance is not envisaged under the provisions of Section 4 and since each OMCs is an independent, legal entity and no company can be said to be exercising control over other PSU OMCs, they are not part of the group within the meaning of Section 5 of the Act.

8. In view of foregoing, the Commission finds no reason to disagree with the findings of DG that there was no evidence to suggest an anti-competitive agreement among PSU OMCs in violation of Section 3 of the Act, nor a case was made out against them for contravention of any of the provisions of Section 4 of the Act and the matter deserves to be closed. The Commission decides accordingly.



9. Secretary is directed to inform the parties as per relevant regulations

Sd/-  
Member (GG)

Sd/-  
Member (G)

Sd/-  
Member (AG)

Sd/-  
Member (T)

Sd/-  
Member (D)

Sd/-  
Chairperson

Certified True Copy

