



COMPETITION COMMISSION OF INDIA

Case No. 36 of 2019

In Re:

JSW Paints Private Limited

Jindal Mansion,
5A, Dr. G Deshmukh Marg,
Mumbai- 400026

Informant No.1

And

Asian Paints Limited

6A, Shantinagar,
Santacruz (E),
Mumbai- 400 055

Opposite Party

With

Case No. 17 of 2021

Sri Balaji Traders

31, Mailam Road,
Tindivanam – 604002
Tamil Nadu

Informant No.2

And

Asian Paints Limited

6A, Shantinagar,
Santacruz (E),
Mumbai- 400 055

Opposite Party

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member



Appearances during the final hearing held on 31.05.2022

<i>For JSW Paints Private limited (Informant No: 1)</i>	:	Mr. Gopal Jain, Senior Advocate
	:	Mr. Vivek Agarwal, Advocate
	:	Ms. Aayushi Sharma, Advocate
	:	Mr. Divyansh Prasad, Advocate
	:	Mr. A.S. Sundaresan, Authorised Representative
 <i>For Sri Balaji Traders(Informant No: 2)</i>	:	Mr. Vaibhav Gaggar, Advocate
	:	Mr. Sumit Garg, Advocate
	:	Mr. Nipun Bansal, Advocate
	:	Mr. Ketan Sarraf, Advocate
	:	Mr. Akash Chatterjee, Advocate
	:	Ms. Kokila Kumar, Advocate
 <i>For Asian Paints Limited(Opposite Party)</i>	:	Mr. Neeraj Kishan Kaul, Senior Advocate
	:	Mr. Rajshekhar Rao, Senior Advocate
	:	Mr. Harman Singh Sandhu, Advocate
	:	Ms. Nikita Dwivedi, Advocate
	:	Ms. Raveena Kumari Sethia, Advocate
	:	Ms. Ami Parikh, Authorised Representative
	:	Mr. Sumit Midha, Authorised Representative

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

Facts, in brief (Case No. 36 of 2019)

1. In this case, Information was filed by JSW Paints Private Limited ('JSW Paints')/‘**Informant No. 1**’) under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the ‘**Act**’) against Asian Paints Limited ('**Asian Paints**'), alleging contravention of the provisions of Sections 4 and 3(4) of the Act.
2. JSW Paints is stated to be part of the JSW group of companies, which is engaged in several sectors, including steel, energy, cement, etc. JSW Paints was incorporated in the year 2016 and launched its decorative paints in May 2019 in Bengaluru and Hubli in Karnataka. JSW Paints is stated to have introduced many innovative approaches in the paints industry in India.



3. Asian Paints is a listed company and is primarily engaged in the manufacture and sale of decorative and industrial paints. According to its Annual Report for FY 2018–19, it is the third largest paint company in Asia and the largest in India. It has eight manufacturing plants for decorative paints and two for industrial paints in India.
4. Starting January 2019, JSW Paints approached several dealers in Bengaluru, Hubli, Kochi, Kozhikode, Hyderabad and Chennai and explained the unique nature of their paints, proposed pricing, benefits to dealers in terms of tinting and delivering paints, etc. JSW Paints stated that it offered dealers better margins and incentives than those offered by its competitors. JSW Paints had a positive response from several dealers/retailers. In order to confirm their interest, JSW Paints asked for cheque of Rs. 1 lakh as advance from the dealers to be set off against their launch orders. Based on receipt of the cheque, such dealers were invited to the Retailers Launch Meet organised by JSW Paints, where it provided them with an overview of their strategy and how they would work together to promote the JSW brand, place orders, receive stocks, billing, inventory, etc.
5. After three years of investing in building up the business and spending sums of money on developing its brand, JSW Paints launched its decorative paints in May 2019 in Bengaluru and Hubli. The launch was covered by several mainstream media. Subsequently, JSW Paints launched its products in Kerala (Kochi and Kozhikode) in June 2019, followed by Telangana (Hyderabad) and Tamil Nadu (Chennai) in August 2019.
6. JSW Paints alleged that, immediately after the launch of its decorative paints, Asian Paints began pressurising dealers who had agreed to stock and display decorative paints manufactured by JSW Paints. Asian Paints targeted dealers/distributors/retailers partnering with JSW Paints, directing them to stop dealing with JSW Paints, stopping supplies to these dealers, dropping service levels by delaying supplies and deliveries, asking dealers to remove displays of JSW Paints products from their retail shelves and dealer signboards, threatening dealers by not allowing them discretionary discounts, not inviting them for trips and loyalty schemes, etc. Asian Paints did this through its sales personnel in the relevant regions. Such conduct has been alleged to have created fear



amongst retailers/dealers, as a result of which a number of them stopped dealing with JSW Paints despite having provided the initial cheque of Rs. 1 lakh.

7. It has been alleged that JSW Paints has been denied access to dealers, which is essential for operating in the relevant market, due to punitive action taken by Asian Paints against the dealers. JSW Paints is stated to have faced problems in the states of Karnataka, Tamil Nadu and Telangana. JSW Paints had planned to launch its products in more states and cities in South and West India, such as Andhra Pradesh, Goa, Maharashtra, Gujarat, etc., and also introduce its products to dealers in upcountry towns, supplying from its warehouses in larger towns. JSW Paints, however, believed that it would be denied access to dealers even in these states and would face the same resistance in other regions due to coercive action taken by Asian Paints against the dealers.

Instances in the State of Karnataka

8. Several dealers were appointed by JSW Paints in the State of Karnataka. Although JSW Paints provided necessary signage and other promotional material such as danglers, posters, etc., the dealers were compelled to remove all signage and other promotional material from conspicuous locations in their premises to the back of the premises or to their godowns at the behest of Asian Paints. For fear of losing the dealership of Asian Paints, certain dealers decided to discontinue purchase JSW Paint's products. An instance of a dealer has been cited, whereby the dealer requested Asian Paints to unblock its dealership ID and resume supply of its products. Further, it was alleged that a written assurance was given by this dealer to Asian Paints that he would never purchase and sell any of JSW Paint's products.
9. In addition to abovementioned acts against the dealers, Asian Paints allegedly also pressurised enterprises that provided infrastructure facilities like warehouses to JSW Paints to not stock products of JSW Paints. In an instance cited, the enterprise that provided warehouse facility rescinded the contract with JSW Paints on account of Asian Paints requiring it to choose between Asian Paints and JSW Paints for a business relationship. It has been alleged that the sheer volume of business given by Asian Paints and the potential loss in revenue resulted in the enterprise succumbing to the pressure of



Asian Paints. The rescission of contract with JSW Paints led to delay in the launch of JSW's products in Hubli, which resulted in loss of revenue, reputation and credibility.

Instances in the State of Tamil Nadu

10. In Chennai, although several dealers agreed to partner with JSW Paints before the launch, many of them were directed by Asian Paints to not attend JSW Paints' Retailers Launch Meet. After the launch of products, at least 12 dealers did not place any orders with JSW Paints fearing reprisal from Asian Paints. Dealers were allegedly prevented from undertaking any business with JSW Paints. It was alleged that if the dealers did not comply with the demands of Asian Paints, the dealers would face punitive action from Asian Paints.
11. Allegedly, Asian Paints had taken punitive action against a dealer in the past on account of its decision to stock and sell paints manufactured by Nippon Paint India Private Limited ('Nippon'). Asian Paints is stated to have resumed its supplies only after the dealer agreed to cease business relations with Nippon. In the year 2015–16, Nippon had attempted to enter the decorative paints market in Chennai. However, Asian Paints took similar action against the dealers who entered into commercial relationship with Nippon.

Instances in the State of Telangana

12. Several dealers were appointed by JSW Paints in the State of Telangana. Due to harassment at the hand of Asian Paints, the dealers were compelled to remove danglers, boards and products relating to JSW Paints from conspicuous locations on their premises. Several instances of harassment faced by the dealers in Hyderabad were cited. The dealers refrained from dealing with JSW Paints due to the pressure exerted by Asian Paints.
13. Asian Paints was alleged to be hindering the entry of JSW Paints by virtue of its dominance in the market for the manufacture and sale of decorative paints by the organised sector in India, in contravention of provisions of Section 4(2)(c) of the Act. It was alleged that the conduct of Asian Paints is aimed at preventing JSW Paints from establishing its presence in the said market. By taking action, Asian Paints had not only denied market access to a competing entity but also restricted the freedom of contract to



dealers. Such practices not only led to an effective and efficient competitor being driven out of a market or restricted from entering a market, but also limited consumers' choice. It was stated that the decorative paints market is dependent upon the direct distributorship model. Without access to dealers, which is an essential feature of this business, there is no scope for new or existing entity in this market to survive. Asian Paint's conduct allegedly led to the denial of access to necessary distribution channels in the relevant market, which prevented JSW Paints from entering the relevant market in contravention of the provisions of Section 4(2)(c) of the Act. Asian Paints deliberately and maliciously sought to pressurise dealers, who are mainly small and medium scale enterprises, from stocking and selling JSW Paint's products.

14. Based on instances highlighted in the States of Karnataka, Telangana and Tamil Nadu, it was alleged that the conduct of Asian Paints is a case of enforcing an exclusive supply agreement in terms of Explanation (b) to Section 3(4) of the Act and refusal to deal as provided in Explanation (d) to Section 3(4) of the Act. Allegedly, the said conduct caused appreciable adverse effect on competition by creating barriers to entry, driving existing competitors out of market and foreclosure of competition by hindering entry of JSW Paints into the market. All the instances of abusive conduct are tantamount to perpetuating anti-competitive agreements as Asian Paints enjoys a dominant position in the relevant market. Such agreements cause appreciable adverse effect on competition and are in contravention of provisions of Section 3(4) read with Section 3(1) of the Act.
15. In light of the averments made in the instant information, JSW Paints prayed to the Commission to pass an order under Section 26(1) of the Act, directing the Director General ('DG') to cause an investigation to be made into the matter; direct Asian Paints to cease and desist from carrying on any of the alleged anti-competitive activities; pass an order under Section 27 of the Act penalising Asian Paints; and pass any other orders that the Commission may deem fit and proper in the facts and circumstances of the case.

Prima-facie consideration of the Commission in Case No.36 of 2019

16. The Commission noted that Asian Paints *prima facie* appeared to enjoy a dominant position in the relevant market for "*manufacture and sale of decorative paints by the organised sector in India*". As regards the allegations with respect to abuse of dominant



गर्वयमेव जयते



position, the Commission noted that denial of market access is a severe form of abuse of dominant position. It was observed that, without access to the dealers, there is no scope for a new or existing entity to survive in the market, as the dealers are the interface of business with customers and help the products of manufacturers reach them. In the facts of the present case, the Commission noted that the alleged conduct of Asian Paints of threatening and pressurising dealers as highlighted by JSW Paints *prima facie* brought out that Asian Paints attempted to prevent JSW Paints in establishing a presence in the relevant market, and this conduct *prima facie* appeared to be tantamount to abuse of dominant position by Asian Paints, wherein Asian Paints denied access to necessary distribution channels in the relevant market and limited the availability of alternate products in the relevant market for consumers, thereby reducing the competition in the market in contravention of provisions of Section 4(2)(c) of the Act. The Commission also observed that, as a result of the conduct of Asian Paints, the final consumers may also be deprived of the choice to purchase different kinds of paints at competitive prices. The Commission was of the view that evidence provided by JSW Paints was *prima facie* sufficient to indicate that Asian Paints denied access to the distribution channels in the relevant market to JSW Paints by threatening and coercing such dealers through various means. In view of foregoing, Asian Paints *prima facie* appeared to be in contravention of provisions of Section 4(2)(c) of the Act.

17. With respect to alleged contravention of Section 3(4) of the Act, the Commission observed that the restraints imposed by Asian Paints appeared to be in the nature of exclusive supply agreement and refusal to deal. Such restrictions *prima facie* appeared to limit the dealers from procuring same/similar products from other sources at a cheaper price. The Commission observed that this restriction on the choice of dealers could limit benefits that consumers may have received otherwise. The Commission noted that the alleged restrictions on dealers not to deal with JSW Paints or any other company manufacturing paints could create barriers for suppliers of paints who compete with these suppliers, besides not allowing the benefit of better prices to consumers. It was observed that a stipulation that appeared to create barriers to entry and restricted the choice of consumers is likely to result in appreciable adverse effect on competition, resulting in higher prices for consumers. Thus, the Commission was *prima facie* satisfied that the imposition of said restraints amounted to contravention of Section 3(1) of the



गत्यमेव जयते



Act read with Sections 3(4)(b) and 3(4)(d) of the Act by Asian Paints, which is *prima facie* found to enjoy market power. Accordingly, the Commission directed the DG to cause an investigation to be made into the matter under the provisions of Section 26(1) of the Act.

Facts, in brief (Case No.17 of 2021)

18. The Information was filed by Sri Balaji Traders ('**Balaji Traders'**/'**Informant No.2**') against Asian Paints alleging contravention of provisions of Sections 3(4) and 4 of the Act. It was alleged that, soon after Balaji Traders began dealing with JSW Paints in February 2021, its Critical Retailer status, given by Asian Paints since 2010, was revoked in March 2021 without prior notice. Resultantly, the tinting software installed on Balaji Traders' computer by Asian Paints, which enables a retailer to make critical shades, was also removed. It was alleged that removal of the said software has prevented Balaji Traders from placing new orders of the Critical Retailer products of Asian Paints and from tinting the leftover material to create shades exclusively offered to a critical retailer. It was stated that the leftover material with Balaji Traders worth Rs. 3,50,000/- had become dead stock that could not be sold to any customer. It was also alleged that Asian Paints told Balaji Traders that its Critical Retailer status would be restored after a three-month review period if it signs a letter that it had no problem with Asian Paints. It was alleged that the sales supervisor of Asian Paints attempted to coerce Balaji Traders into signing a certificate stating that Asian Paints had never taken any coercive steps against Balaji Traders because of its dealings with the competing brand ,i.e., JSW Paints. The above discussed conduct of Asian Paints was alleged to be in contravention of provisions of Sections 4 and 3(4) of the Act. Balaji Traders also relied upon the earlier decision of the Commission in Case No. 36 of 2019 (*JSW Paints Private Limited Against Asian Paints Limited*), wherein the Commission *prima facie* found Asian Paints to be in contravention of provisions of Sections 4 and 3(4) of the Act and directed the DG to investigate into the conduct of Asian Paints. Balaji Traders requested the Commission to club the said information with Case No. 36 of 2019 in terms of proviso to Section 26(1) of the Act and order an investigation into the alleged anti-competitive conduct of Asian Paints.



Prima-facie consideration of the Commission in Case No.17 of 2021

19. On 20.07.2021, the Commission considered the aforementioned information and was of the opinion that the subject matter of the instant Information was substantially the same as that contained in the Information in Case No. 36 of 2019, which was under investigation by the DG. Thus, in the exercise of powers conferred under proviso to Section 26(1) of the Act read with Regulation 27 of the Competition Commission of India (General) Regulations, 2009, the Commission decided to club the matter with Case No. 36 of 2019. Accordingly, the DG was directed to investigate the said matter alongwith Case No. 36 of 2019 and submit a consolidated investigation report in the matters.

Findings of Investigation

20. The DG, pursuant to the directions of the Commission, investigated both the matters and, after seeking due extensions of time, submitted a consolidated Investigation Report on 17.12.2021, both in confidential and non-confidential versions. For the sake of brevity, the evidence relied upon by the DG would be referred to and dealt with appropriately while analysing the matter on merits. A brief of the findings of investigation by the DG is as under:

a. *Relevant market:* The DG stated that “decorative paints” and “industrial paints” constitute separate markets. The DG also stated that there is no unorganised sector in the market, and far-reaching policy moves such as implementation of GST and demonetisation have significantly altered the landscape of the paints industry and virtually eliminated the unorganised sector. As per the DG, due to implementation of new regulations ,i.e., Lead Regulation 2016, all players were compelled to organise. The DG observed that, though the paints industry still comprises unbranded paints manufacturing units, which merit exclusion from the relevant market under assessment, the policy moves compelled the DG to relook at the relevant market, as the face of organised players has seen significant transformation after November 2017. The investigation relied upon a study undertaken by Toxic Links and International Pollutants Elimination Network published in 2018 in relation to brand



preference among consumers. The said study revealed that 58% of the respondents preferred to buy specific brands as they are mostly durable, cost effective and good quality. It was found that 95% of the respondents use or prefer leading brands. Only 5% of the respondents use local brands and most of these consumers belong to low-income groups and preferred these paints because of their low cost. Accordingly, the DG concluded that the relevant product market in the present case has been delineated as “*market for manufacturing and sale of decorative paints by the organised sector*”. With respect to the relevant geographic market, the DG noted that the condition of competition for the decorative paints industry is homogeneous throughout the country, and therefore, the whole nation is the relevant geographic market. Accordingly, the relevant market for the purpose of assessment of market power in the present matter has been delineated by the DG as “*market for manufacturing and sale of decorative paints by the organised sector in India*”.

b. *Assessment of dominant position of Asian Paints:*

- i. *Market share of enterprise:* The DG noted that, as per the data published by CMIE (Centre for Monitoring Indian Economy), Asian Paints has the highest market share ,of 38.99% in 2019–20, with Berger Paints as the second-placed manufacturer, at 12.98%. Historically, the market share of Asian Paints is around three times its closest competitor in the relevant market. The DG also noted that the market share of an enterprise is an indicator of market power, but the determination of dominant position merely on the basis of market share of the enterprise could be misleading.

- ii. *Size, resources of enterprise and competing firms:* Asian Paints has been able to maintain its market position as a market leader even though its market share reduced. Based on the revenue and the number of depots/warehouses, the DG observed that Asian Paints is so deeply rooted with dealers across the country that its nearest competitor is less than half of its network. The revenue from the operations of Asian Paints is three times that of its nearest competitor. Notwithstanding the above, JSW Paints is part of a well-established conglomerate and has an advantage of well-established network in allied sectors, which can be leveraged for gaining a strong foothold in the



relevant market. Thus, the DG observed that Asian Paints may have the largest market share, but the economic advantages of other players—existing and prospective—pose strong competitive threats to the market leader.

- iii. *Barriers to entry and expansion:* The decorative paints industry does not have any barriers to entry for a new player. The DG observed that the relevant market facilitates free entry of firm as evidenced by at least five new entrants in the last 20 years, and the recent expansion initiatives undertaken by both the existing players as well as prospective entrants in the relevant market. Further, there are four major paint producers who have added significant capacity or are in the process of adding additional capacity to their operations. Thus, there are no barriers of expansion.
- iv. *Vertical integration and financial strength:* Unlike new competitor JSW Paints and prospective entrant Grasim Industries (Ultratech Paints), Asian Paints does not enjoy the advantage of vertical integration, as none of its group companies operate in upstream/downstream activities and /or allied industries. Further, a few existing competitors – Kansai Nerolac, Jotun Paints and Nippon Paints – represent MNCs in India with significant economic strength in terms of financial power, making the domestic decorative paints market all the more competitive.
- v. *Countervailing buyer power:* The DG noted that the countervailing buyer power of the dealers is strong enough to withstand any kind of unreasonable pressure of the manufacturer. The dealers are a direct interface for decorative paints with the consumer and play an instrumental role in effecting the sales for paint companies. The DG observed that the dealers engage in the sale of more than one decorative paint brand; generally, a dealer handles five to six paint companies. Therefore, the paint company is more dependent on the dealers due to their strong buyer power, and not vice-versa.
- vi. *Conclusion on dominant position of Asian Paints:* The DG concluded that Asian Paints enjoys a position of dominance in the relevant market on the basis of its highest market share for substantial period of time. The



investigation has considered and examined the relevant factors enumerated in Section 19(4) of the Act, including market share, number of firms, size and resources of the firm, countervailing buyer power, barriers to entry, ease of expansion vertical integration, and financial strength of the competitors.

c. *Abuse of dominant position under Section 4 of the Act:*

- i. *No denial of market access:* The DG stated in its report that Asian Paints, the market leader, was able to make a net addition of 401 and 816 dealers during 2019–20 and 2020–21 (total of 1217) against the new entrant JSW Paints' net addition of 722 and 869 dealers during the same period (total 1591). Therefore, the fact and figures of net addition of dealers during the relevant period contradicts the allegation of denial of market access to JSW Paints, as it was able to add more new dealers to its network than the market leader, Asian Paints. The DG found that even the allegation of dealers of being under pressure from Asian Paints not to deal with JSW Paints is not substantiated, as the percentage of dealers who discontinued their relationship with Asian Paints is much higher for Asian Paints in terms of new additions, and vice-versa for JSW Paints. The DG concluded that JSW Paints was able to appoint more dealers compared to even the market leader, Asian Paints. Therefore, the allegation regarding denial of market access pertaining to the distribution network is not supported by the facts. This belief gains further credence with the disparity in the number of dealers claimed to be engaging with both Asian Paints (654) and JSW Paints (1378). The allegation further stood depreciated in view of the fact that only 15 dealers, out of 1378 allegedly common dealers (taking the higher estimate), came forward and levelled allegations against Asian Paints. Further, none of the 15 dealers submitted enough evidence to substantiate their allegations, so that contravention could be legally demonstrated.
- ii. *Denial of access to infrastructural facilities:* With regard to the allegation on denial of market access by Asian Paints, by restricting access to the infrastructural facilities to JSW Paints, the DG noted that the reason for termination of the lease agreement between Mrs. Sajida Kalebudde and



JSW Paints seemed to be a dispute regarding the extension of Carrying and Forwarding Agent and logistics services between the parties to the agreement. The DG, however, noted that there was a possibility of Asian Paints influencing the submissions of Mrs. Kalebudde. The investigation revealed that there was no evidence on record to indicate that the lease agreement entered into by JSW Paints for its warehouse at Hubli was terminated at the instance of alleged pressure by Asian Paints. Therefore, the allegation regarding denial of market access to infrastructural facilities is also not supported by evidence on record.

Vertical restraints under Section 3(4) of the Act:

- i. The DG observed that, *prima facie*, Asian Paint's conduct may seem anti-competitive from a plain reading of some of the allegations/submissions of the dealers, but these allegations lose their sheen when read in consonance with specific responses to each allegation submitted by Asian Paints and when the same was confronted by it following the principles of natural justice.
- ii. All the allegations made by the dealers appear to be misconceived/motivated, as Asian Paints was able to adduce substantive evidence to prove that the act of reduction in credit of a dealer was not due to the alleged business association of a dealer with a competitor but their own mutual business relationship. However, in case of a few dealers, such as Siva Sankara Agencies, Sagar Hardware and Paints and Nayak Traders, though reduction might be justified on merits, substantial reduction in credit limit may not be commensurate with the default in payment and/or going into overdue (OD) by the dealers. But Asian Paints followed a similar trend even for resumption/increase in credit limit of the dealers, when they improved their off-take.
- iii. As regards the alleged stoppage of supplies to such dealers who started business with the competitor brand, Asian Paints was able to justify its specific action in almost all cases. Asian Paints' conduct did not show any abnormal trends in terms of orders serviced for any specific dealer during



the period of 13 months (6 months before and after start of the dealers' business with JSW Paints).

- iv. It may be a mere coincidence that the dealers were reprimanded for their default by Asian Paints around the time they had started doing business with JSW Paints. Asian Paints' action against the dealers, however, seemed to be independent of their engagement with other paint companies. Asian Paints substantiated its contentions by adducing evidence in the form of the details of 500 dealers in the relevant geographies, whose credit limit was increased/decreased as a matter of routine, dependent purely on the performance of the concerned dealer.
 - v. The DG could not unearth credible evidence from any dealer which could prove Asian Paints' attempt to pressurise them to return JSW materials and/or tinting machines.
 - vi. Two dealers (out of 15), who had complained of the anti-competitive conduct of Asian Paints, also placed on record an affidavit affirming fair and transparent conduct by Asian Paints as a business partner, which further erodes the credibility of complainant dealers. Additional evidence submitted by JSW Paints towards the end of investigation by JSW Paints relating to Neelam Hardware Paints and Hardware showed that dealers were being manipulated by paint companies to fabricate allegations/evidence.
 - vii. In view of the foregoing, the allegations against Asian Paints imposing restraints in the nature of exclusive supply agreement and refusal to deal under Section 3(4)(b) and 3(4)(d) of the Act could not be substantiated and was untenable.
- d. *Findings on Case No.17 of 2021:* The downgrade of the dealer Balaji Traders from Critical Retailer to Colour World by Asian Paints was fully justified and had no relationship with the starting of business with the competing brand. The inference has been drawn on the basis of the following facts:



सत्यमेव जयते



- i. The change in retailing tier was affected on 28.04.2021 as against the alleged claim of February 2021 by the dealer.
 - ii. The dealer was consistently reducing off-take from Asian Paints, which reduced to less than half over a period of 10 months, from October 2020 to July 2021.
 - iii. Updating of tinting software was undertaken by Asian Paints on a regular basis.
 - iv. Retailing tier of the said dealer was restored in June 2021 along with seven other dealers after a review exercise undertaken by Asian Paints on the basis of sales, expected sales, customer outreach and other relevant factors.
 - v. Retailing tier of the said dealer was changed from Ezy Critical Retailer Status to Critical Retailer in 2018–19, when the dealer had not even started business with any competing brand, which corroborated with the fact that Asian Paints' conduct with respect to its business partners is independent of their association with competitors.
- e. *Investigation regarding digital/electronic evidence in the form of audio/video recordings:*
- i. With regard to audio/video evidence submitted by the Informants/collected during the investigation from the dealers, the investigation revealed that, in the conversations, dealers deliberately tried to elicit a response from the official of Asian Paints to convey that Asian Paints' actions were carried out in retaliation of their newly formed relationship with JSW Paints.
 - ii. The DG concluded that the digital evidence on record may not be considered in isolation but in the context/background to the conversation made by the persons concerned in view of the legal precedents. Further, the recorded conversation may be interpreted in congruence with documentary evidence already on record, which seems to validate the conduct of Asian Paints. Nonetheless, minor indiscretions were observed on part of Asian Paints officials during the recorded conversation, but the same was insufficient to establish anti-competitive conduct on part of Asian Paints.



Consideration of Investigation Report by the Commission

21. The Commission considered the Investigation Report submitted by the DG, in its ordinary meeting held on 11.01.2022 and decided to forward an electronic copy of the non-confidential version of the Investigation Report to the Informants and the Opposite Party for filing their respective objections/suggestions thereto, if any. The Opposite Party was directed to file its objections/suggestions to the Investigation Report, if any, latest by 07.02.2022 and serve a copy thereof on each of the Informants in advance. The Informants were directed to file their separate objections/suggestions to the Investigation Report and their respective reply(s) to the submissions made by the Opposite Party, if any, latest by 07.03.2022 and provide each of their copy(s) thereof in advance to the Opposite Party. The Commission further decided to hear the parties on the Investigation Report on 15.03.2022 through video conferencing.
22. Thereafter, an application dated 27.01.2022 was filed by the Opposite Party seeking extension of time by three weeks to file their objections/suggestions to the Investigation Report. The said request of the Opposite Party was considered by the Commission on 02.02.2022 and the Commission granted extension of time by three weeks to the Opposite Party to file its objections/suggestions latest by 28.02.2022 and serve a copy thereof on each of the Informants, in advance. The Informants were directed to file their objections/suggestions to the Investigation Report and reply to the submissions made by the Opposite Party latest by 28.03.2022. The Commission further decided to hear the parties on the Investigation Report on 07.04.2022.
23. In terms of order dated 23.02.2022, the Opposite Party filed its objections/suggestions to the Investigation Report on 28.02.2022.
24. Thereafter, *vide* application dated 14.02.2022, Asian Paints requested that the date of the oral hearing of the matter be rescheduled to any date on or after 18.04.2022. The Commission considered the aforesaid request made by Asian Paints and decided to reschedule the hearing of the parties on the Investigation Report on 05.05.2022. The Commission further directed the Opposite Party to file its objections/suggestions latest by 08.03.2022 and serve a copy thereof on each of the Informants in advance. The Informants were directed to file their objections/suggestions to the Investigation Report



and reply to the submissions made by the Opposite Party latest by 08.04.2022 and provide a copy of each of their objections/reply in advance to the Opposite Party.

25. Thereafter, on 28.03.2022, JSW Paints filed an application (in confidential and non-confidential version) raising certain issues which, according to it, must be addressed by the DG by way of supplementary investigation before the Commission considers the submissions/objections of the parties to the Investigation Report and hear the parties on merits. The Commission considered the aforesaid application filed by JSW Paints on 04.04.2022 and decided to list the same on the date already fixed for hearing of the parties on the Investigation Report, i.e., 05.05.2022, and also directed JSW Paints to serve a non-confidential version of the aforesaid application upon the Opposite Party.
26. Subsequently, JSW Paints filed an application on 08.04.2022 seeking extension of time to file its objections to the Investigation Report. *Vide* order dated 18.04.2022, the Commission considered the request made by JSW Paints and decided to grant extension of time to file its objections/suggestions to the Investigation Report, if any, latest by 29.04.2022 and serve a copy to the Opposite Party. In view of the aforesaid, the Commission decided to reschedule the hearing of parties on the Investigation Report as well as on the application dated 28.03.2022 filed by JSW Paints on 31.05.2022.
27. In terms of the orders passed by the Commission, the Informants filed their respective objections/suggestions to the Investigation Report.
28. On 31.05.2022, the Commission heard the parties at length on the Investigation Report as well as on the application dated 28.03.2022 filed by the Informant and decided to pass an appropriate order in due course. The Commission also gave liberty to the parties to file their written submissions/synopsis of their oral arguments (not more than 5 pages) within two weeks. In terms of order dated 31.05.2022, the parties filed their respective written submissions within the time prescribed by the Commission.

Suggestions/objections/submissions of Asian Paints

29. Asian Paints, in its suggestions/objections/written submissions, has stated that it is in broad agreement with the findings of the investigation. It has been stated that, as the investigation by the DG found that Asian Paints is not engaged in anti-competitive



conduct, the Commission may leave the issue of relevant market or dominance open. Without prejudice to above, it has been further stated that the relevant market in the present case should include all manufacturers and sellers of decorative paints, including waterproofing products and solutions, given the homogenous conditions of competition, uniform rules and laws applicable to all dealers and the substitutability of products. It has also been stated that the space between organised and unorganised players has blurred and there is no separate unorganised sector. All players selling decorative paints in the market impose competitive constraints on each other and are subject to the same rules and regulations. Accordingly, the relevant market be defined as "*market for manufacture and sale of decorative paints in India*". Asian Paints cannot operate independently or affect competitors or consumers or the relevant market in its favour. The fact that integration and expansion initiatives have been successfully launched by other competitors, as identified by the investigation, undermines the allegation of Asian Paints' dominance in such a competitive industry. With respect to the allegation of dominant position enjoyed by Asian Paints, it has been stated that, though the investigation has noted that holding the market leader as dominant on the basis of market share may not be correct, it has considered Asian Paints dominant solely for the purpose of assessing its alleged conduct. The investigation has not made any conclusion of dominance of Asian Paints. It has merely presumed Asian Paints' dominance to proceed further to review its alleged abusive conduct. It has been stated that, given that there is no abusive conduct, the Commission may leave the question of dominance open. It has been stated that Asian Paints faces competition from new entrants, with evidence of at least five new players in last 20 years, faces expansion efforts by existing players, lacks the advantages of vertical integration possessed by JSW Paints and Grasim and faces significant constraints from dealers who exercise significant countervailing buyer power. Accordingly, Asian Paints is not dominant by any measure in any given market. Asian Paints has concurred with the findings of the DG in relation to abuse of dominant position to state that Asian Paints has not abused any hypothetical dominant position. Asian Paints has not abused its alleged dominant position with respect to denying JSW Paints access to the dealership network or infrastructural facilities. It has been stated that JSW Paints has been able to add more dealers than Asian Paints in 2019–20 and 2020–21, which refutes the allegation of denial of access. Asian Paints has concurred with the findings of the investigation that it has not denied access to any paint company, including JSW Paints to



infrastructural facilities. It has been stated that Asian Paints' dealings with its dealers have been fair and reasonable, and Asian Paints has reduced the credit limits or not serviced orders where there have been objective reasons for doing the same. With respect to Case No. 17 of 2021, Asian Paints agreed with the findings of the DG that the dealer's tier was changed on the basis of objective factors and restored again. It has been further stated that there has been no foul play on the part of Asian Paints with respect to servicing of its orders. It has been stated that the audio/video recordings are manipulated. With respect to allegations pertaining to vertical restraints imposed by Asian Paints upon the dealers, Asian Paints stated that it has not entered into any anti-competitive agreements with its dealers or hindered them from conducting business with any other paint company of their choice.

Suggestions/objections/submissions of JSW Paints

30. JSW Paints, in its submissions, has, *inter alia*, stated that JSW Paints is in agreement with the delineation of the relevant market as the “*market for manufacturing and sale of decorative paints by the organised sector in India*”. It has been stated that the DG has also concurred with the Commission after conducting an analysis of the negligible impact of the Lead Regulation 2016 on the brand image of paint manufacturers and consumer preferences. JSW Paints has agreed with the DG’s conclusion that consumer preference is still with leading brands and the unorganised sector, even after the implementation of Lead Regulation 2016, which is not posing any competitive constraints on such manufacturers. The Lead Regulation suffered from poor implementation and it could not be relied upon to conclude that the unorganised sector has been virtually eliminated. In this regard, JSW Paints has relied upon a study titled “How Safe is your Paint—Compliance of Lead in Paint Regulations in India” published in 2020 by Toxic Link (Toxic Link Study) to suggest that there are serious concerns on the implementation of the Lead Regulation, 2016, and minimal progress has been made by Small and Medium Enterprises in eradicating hazardous heavy metal from their paints. Therefore, owing to the negligible impact of the Lead Regulation 2016 on the market practices, there continues to be a substantial difference in the brand image, pricing and quality of paints and there remains no reason to alter the definition of the relevant market to include the unorganised sector.



31. As regards the dominant position enjoyed by Asian Paints in the relevant market, JSW Paints has stated that the DG has relied on an erroneous and misleading analysis of certain factors under Section 19(4) of the Act to raise doubts regarding Asian Paints' dominance. Any reliance on events/announcements post the *prima facie* order, such as the announcement by Grasim regarding its entry in the relevant market and the listing of Indigo Paints in 2021, bear no relevance to the analysis of the dominant position of Asian Paints in FY 2019–20, which was the period of key abuse. As per JSW Paints, a proper analysis of the factors under Section 19(4) of the Act demonstrates that Asian Paints is dominant in the relevant market. Asian Paints' market share being consistently higher, by almost three times, than the second largest player in the market (Berger), is a clear indication of the dominance of Asian Paints. It has been further stated that Asian Paints is a company with large resources and turnover. Asian Paints' increase in revenue has been nearly three times that of its nearest competitor. Superior financial strength, large dealer network and increase in the number of tinting machines clearly indicate Asian Paints' market strength. Asian Paints increased its active distribution/dealer network from 53,000 in 2017–18 to 70,000 in FY 2020–21. Asian Paints also increased the number of its tinting machines supplied to dealers from 35,000 in 2017–18 to 46,000 in 2019–20. Asian Paints has a strong brand name as well as a vast distribution network, which provides it an advantage over its competitors. Given that Asian Paints is considered a must-stock brand for paint dealers, dealers are dependent on it for their success. It has been stated that the DG has taken a time period of 20 years to judge ease of entry in the market in order to create an impression that there are no entry barriers in the market. In the last 10 years, there has been no significant change in market conditions and no major new players have entered the market. It has been submitted that paint dealers are typically small 'mom and pop' shops and do not have any countervailing power to pose any constraints on a dominant player like Asian Paints. The dealers are completely dependent on Asian Paints not only to procure paints but also the incentives offered by the company. It has been stated that Asian Paints is the price leader in the market and has a strong brand value amongst consumers, which places it in a position of strength and enables it to act independently of competitive forces, and thus, it has a dominant position in the relevant market.



32. As regards the analysis of abuse of dominant position by Asian Paints, it has been submitted that the DG's analysis is superficial and incomplete as the DG has erroneously limited the analysis of abuse to Asian Paints' actions against JSW Paints and has ignored the evidence submitted by third-party dealers. The DG has failed to consider that there were the following two facets to Asian Paints' abuse: Asian Paints attempted to deny market access to a new entrant (exclusionary abuse) and took punitive actions against dealers who were dealing with JSW Paints (exploitative abuse). It has been further stated that DG has also failed to investigate how Asian Paints uses its discretionary and complex incentive schemes to arm-twist the dealers and disincentivises them to deal with certain competitors, such as JSW Paints. The dealer incentive schemes offered by Asian Paints are quite complex and, as a result, most dealers are at Asian Paints' mercy on target achievement and their entitlement of various incentives. If a dealer does not comply with the directions of Asian Paints (e.g., not to deal with a particular player), Asian Paints threatens such dealers by saying that Asian Paints would not support such dealers. The DG also failed to analyse and consider the discretionary and loyalty-inducing nature of various other incentives/schemes offered by Asian Paints, which are used to arm-twist dealers, resulting in denial of access to the distribution network for new entrants like JSW Paints. It has been submitted that Asian Paints has attempted to deny access to the distribution network to JSW Paints, and the extent of the denial is irrelevant to establish a contravention, as even a partial denial of access can result in violation of Section 4(2)(c) of the Act. It has been further stated that the DG has solely relied on an incorrect and misleading metric of additions of dealers and wrongly concluded that JSW Paints had a smooth entry into the market owing to higher net addition of dealers. The DG has erroneously compared the growth pattern of a dominant company which has the largest distribution network in the country with a new entrant which was at the stage of starting to build its distribution network from scratch. It has been submitted that the discrepancy in the number of common dealers submitted by JSW Paints and Asian Paints was clear evidence that a large number of dealers were not able to deal with JSW Paints openly. The DG has failed to probe into the discrepancy in the number of common dealers and has failed to form any opinion or conduct any analysis on this critical point, which seems to be consistent with the DG's attempt to shield Asian Paints. It has been stated that a total of 148 dealers discontinued dealing with JSW Paints in FY 2019–20, out of which 137 were common dealers (92.56%). A total of 250 dealers



ગુજરાત



discontinued dealing with JSW Paints in FY 2020–21, out of which 201 were common dealers (80.4%). It has been submitted that the DG has failed to investigate this key allegation of returning the tinting machines of JSW Paints and failed to record any reasons for the same. The only observation from the DG in this regard comes under the analysis of Asian Paints' action under Section 3(4), where it has been observed that the 15 dealers have not been able to submit any evidence to show that Asian Paints forced them to return the tinting machine, whereas JSW Paints had submitted details of 107 dealers who discontinued dealing with JSW Paints despite investing in tinting machines. The lack of depth in the DG's investigation is also evident from the fact that the DG placed reliance on Mrs. Kalebudde's submission that she was willing to lease the property to JSW Paints as on the date of her response (23.12.2020) if the CFA and logistics business is allocated to her firm. It has been stated that her offer does not affect or offset any monetary/reputational loss which JSW Paints had to face in April–May2019. The fact that Asian Paints attempted to disrupt the operations of a new entrant, JSW Paints, by manipulating a warehouse owner to rescind her agreement with JSW Paints was enough to return a finding against Asian Paints.

33. As regards the findings of the DG in relation to vertical restraints, JSW Paints has submitted that the DG analysis of Asian Paints' conduct under Section 3(4) of the Act is incomplete, as it has failed to analyse the conduct of the dealers who were successfully coerced by Asian Paints not to deal with JSW Paints. It has been submitted that the DG Report has been limited to the investigation done in relation to only 15 dealers, most of whom did not succumb to the diktats of Asian Paints and continued to deal with JSW Paints. JSW Paints had submitted a list of 107 dealers who invested in JSW Paints tinting machines and had to completely stop dealing with JSW Paints. JSW Paints also submitted a list of 13 dealers who purchased JSW Paints tinting machines but were not able to use them. JSW Paints had also submitted detailed reasons as to why these dealers did not install the tinting machines. The fact that such a larger number of dealers refused to even come forward to call out Asian Paints' abusive practices demonstrates the fear of a giant like Asian Paints among dealers. Paint dealers are small 'mom and pop' stores, and any coercive action by Asian Paints impinges on the daily livelihood of such dealers. It has been submitted that the multiple instances of Asian Paints' coercive actions and imposition of restrictions highlighted also amount to the contravention of Section 3(4)(b)



and Section 3(4)(d) of the Act. For example, imposing unfair restrictions on dealers to not to deal with JSW Paints and punishing such dealers by stopping supplies/withdrawing support/withholding incentives, if they continue to procure supplies from JSW Paints, also results in an arrangement covered under Section 3(4)(b) and Section 3(4)(d) of the Act, and the restrictions imposed by Asian Paints have caused AAEC in the relevant market under Section 19(3) of the Act as the business practices of Asian Paints have created barriers for a new entrant and Asian Paints' actions are also aimed at driving competitors out of the market. Nippon, in its submissions before the DG, stated some instances where certain dealers doing business with market leaders refused to deal/supply with Nippon decorative paints. For the sake of brevity, the suggestions/objections/submissions of JSW Paints would be dealt with by the Commission appropriately while analysing the case on merits.

Submissions/objections/submissions of Balaji Traders

34. Balaji Traders has made submissions similar to JSW Paints. It has been stated that the DG's analysis is flawed and there is enough evidence in terms of consistently high market shares of Asian Paints in the relevant market and its huge dealership network to conclude that Asian Paints holds a dominant position in the relevant market. It has been submitted that the DG made no attempt to reach out to the Informant post the *prima-facie* order to understand the nature of allegations and evidence. The DG did not inform the Informant about the justification given by Asian Paints to defend itself or check with the Informant if the justifications were true. Only one email was sent in November 2021 stating that the Informant may provide further evidence within three days. It has been submitted that, with a view to close the investigation in a hurried manner, the DG merely forwarded the allegations made by the Informant to Asian Paints and accepted the justification offered by Asian Paints without reaching out to the Informant. It has been submitted that the sudden revocation of the Critical Retailer status without prior intimation is indicative of the fact that the actual reason for changing the retailing tier was to punish the Informant for dealing with JSW Paints, and the argument relating to the ineligibility was an afterthought which was used to cover up Asian Paints' actions after the Informant decided to take action against Asian Paints. It has been further stated



that the DG failed to reach a proper conclusion on how discretionary tiers are being used by Asian Paints to punish dealers who do not comply with the conditions of exclusivity.

Analysis and findings of the Commission

35. The Commission has carefully perused the Investigation Report and evidence in support thereof submitted by the DG, objections/suggestions filed by the parties, the oral submissions made by the parties on 31.05.2022, the synopsis of arguments subsequently submitted and other material available on record. Upon consideration of the aforesaid, the following issues arise for determination in the present matter:

- (a) *Issue 1: Whether Asian Paints is liable for contravention of provisions of Section 4 of the Act.*
- (b) *Issue 2: Whether Asian Paints is liable for contravention of provisions of Section 3(4) of the Act.*

Issue 1: Whether Asian Paints is liable for contravention of provisions of Section 4 of the Act.

36. In order to assess the conduct of the Asian Paints under the provisions of Section 4 of the Act, a relevant market needs to be delineated first, followed by an assessment of Asian Paints' position in the said relevant market and then the alleged abusive conduct.

37. *Relevant market* consists of *relevant product market* and *relevant geographic market*. The relevant product market as defined under Section 2 (t) of the Act means “*a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use*”.

38. The determining factor for defining the relevant product market is demand side interchangeability/substitutability of the product from the point of view of factors like characteristics, prices and intended end-use.



गत्यमेव जयते



39. The relevant geographic market, on the other hand, defines the contours with regard to territory within which the conditions of competition for supply of goods or provision of services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.
40. In the present case, JSW Paints is aggrieved by the alleged abusive conduct of Asian Paints, whereby it has been denied access to distribution channels in the decorative paints segment which, in turn, prevented JSW Paints from entering the market.
41. The Commission notes that JSW Paints has agreed with the delineation of relevant market by the DG. On the other hand, Asian Paints has stated that all players selling decorative paints impose competitive constraints on each other regardless of the organised or unorganised sector and are subject to the same rules and regulations and thus, defined the relevant market as "*market for manufacture and sale of decorative paints in India*".
42. The Commission notes that decorative paints and industrial paints constitute separate segments as there is a clear distinction between the two segments based on characteristics, intended use and price. Further, players in the unorganised sector do not appear to pose competitive constraints upon players in the organised sector due to various reasons such as brand image, difference in pricing, quality, etc. The Commission is in agreement with the DG's finding that consumer preference is still with leading brands, and the unorganised sector, even after the implementation of Lead Regulation 2016, does not pose any competitive constraints on manufacturers in the organised sector. The Commission also notes that the DG, despite stating that there is no organised sector and the distinction between organised sector and unorganised sector has blurred, finally concluded that the relevant product market in the present case has been delineated as "*market for manufacturing and sale of decorative paints by the organised sector*". As regards the relevant geographic market, the Commission is of the view that conditions of competition in the paint sector are homogeneous across India. Thus, the relevant geographic market could be defined as "*whole of India*". Accordingly, the Commission is of the opinion that the relevant market for the purpose of assessment in the present



case is defined as “*market for manufacture and sale of decorative paints by the organised sector in India*”.

43. Having delineated the relevant market, the Commission now proceeds to examine whether Asian Paints holds a position of dominance, as alleged, in the said relevant market.
44. The Commission notes that the Act defines the term “dominant position” under explanation (a) to Section 4 as “*a position of strength enjoyed by an enterprise, in the relevant market, in India, which enables it to (a) operate independently of competitive forces prevailing in the relevant market; or (b) affect its competitors or consumers or the relevant market in its favour*”.
45. The Commission notes that the underlying principle for assessing the dominance of an enterprise is linked to the market power enjoyed by the enterprise. An enterprise is regarded as dominant if it enjoys/possesses a position of strength in the relevant market, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour.
46. JSW Paints and Balaji Traders have stated that Asian Paints enjoys a dominant position in the relevant market, as has been discussed in the preceding paragraphs. On the other hand, Asian Paints has submitted that it has no ability to affect its competitors or consumers or relevant market in its favour and cannot be said to enjoy a position of dominance under the provisions of the Act. Based on an analysis of factors under Section 19(4) of the Act, Asian Paints has stated that it does not have a dominant position in the relevant market delineated by it. It has been stated that Asian Paints faces competition from new entrants, with evidence of entry of at least five players in the last 20 years, lack of advantages of vertical integration available to it like to Grasim and JSW, constraints exercised by its dealers, etc.
47. The Commission has considered the findings of the DG and has weighed the objections of the Informants as well as that of Opposite Parties, which are being discussed in the succeeding paragraphs, in order to assess whether Asian Paints has a position of dominance in the relevant market so delineated as above.



48. In this regard, the Commission has analysed the factors provided under Section 19(4) of the Act, which is as under:

- a. *Market share of the enterprise*: Upon examination of data published by the Centre for Monitoring of Indian Economy (CMIE) of more than 150 companies manufacturing paints and varnishes in the last five years (FY 2014–15 to FY 2019–20) based on revenue, the investigation brought out that Asian Paints had the highest market share of 38.99% in the year 2019–20, with the second manufacturer placed with a market share of 12.98%. Historically, the market share of Asian Paints has been around three times that of its closest competitor in terms of revenue. The table indicating the market share of Asian Paints and its competitors for FY 2014–15 to FY 2019–20 is as under:

Table1 : Market Shares of Players in the Paints Industry (CMIE Database)

Name of the firm	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20
Asian Paints Ltd.	40.85	41.54	40.56	37.35	37.61	38.99
Berger Paints India Ltd.	13.38	12.93	11.9	12.59	12.64	12.98
Kansai Nerolac Paints Ltd.	12.78	12.75	11.42	11.61	11.07	10.5
Akzo Nobel India Ltd.	8.42	7.5	7.21	7.24	6.67	6.09
PPG Asian Paints Pvt. Ltd.	2.54	2.42	3.02	3.2	2.95	2.73
Indigo Paints Ltd.	0.29	0.37	0.72	1.06	1.26	1.44
Esdee Paints Ltd.	1.55	1.62	1.42	1.46	1.44	1.44
Jotun India Pvt. Ltd.	1.13	1.2	1.03	1.22	1.15	1.27
Asian Paints PPG Pvt. Ltd.	1.04	1.09	0.91	1.08	1.11	1.14
Sheenlac Paints Ltd.	0.47	0.44	0.44	0.45	0.99	0.98
Shalimar Paints Ltd.	1.66	1.44	0.99	0.72	0.73	0.86

In this respect, the Informant has stated that, from FY 2012–19, Asian Paints' market share has been consistently around 60–70%, and the closest competitor (Berger) holds only around 10–15 % of the market share. Reliance has been placed upon the case of *Kapoor Glass Private Limited vs. Schott Glass India Private Limited (Case No. 22 of 2010)*, wherein the Commission observed that the market share of Schott Glass was much larger than its closest competitor and remained high over a period, which was indicative of the position of strength of Schott Glass. Reliance has also been placed upon the guidance on the Commission's enforcement



priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings to state that higher the market share and longer the period of time for which it is held is an important indication of existence of dominant position. Accordingly, the Informant has submitted that Asian Paints' market share, which has consistently been higher by almost three times that of the second largest player, Berger, is clear indication of the dominance of Asian Paints. On the contrary, Asian Paints has submitted that the DG's assessment is not indicative of dominance in any manner and market shares are only one of the factors to assess the dominance of an enterprise. Asian Paints has also placed reliance on certain decisions of the Commission in support of its submissions. The Commission, however, notes that Asian Paints has consistently held a market share in the range of 40% for the period 2011–12 to 2020–21 in the market of paints and varnishes, based on revenue, as per the CMIE database, which shows that it is an undisputed leader. The Commission further notes not only is the market share of Asian Paints large but there is also a big disparity between its share and those of its largest competitors, i.e., Berger, Kansai Nerolac and Akzo Nobel, which is evident from the table below:

Table 2: Market Share of Players in Paints and Varnishes Segment (CMIE Database)

Rank	Companies	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21
1.	Asian Paints Ltd.	40.33	40.24	40.5	41.15	41.83	40.87	37.59	37.92	39.24	40.96
2.	Berger Paints India Ltd.	13.32	13.27	13.07	13.48	13.02	11.99	12.68	12.75	13.06	12.98
3.	Kansai Nerolac Paints Ltd.	13.87	13.46	12.51	12.87	12.84	11.51	11.68	11.16	10.57	9.85
4.	Akzo Nobel India Ltd.	9.68	9.64	9.23	8.48	7.56	7.26	7.29	6.73	6.13	5.44
5.	P P G Asian Paints Pvt. Ltd.	2.85		2.53	2.56	2.43	3.05	3.22	2.97	2.8	2.41
6.	Indigo Paints Ltd.	0.2	0.22	0.27	0.29	0.37	0.73	1.07	1.27	1.45	1.63
7.	Esdee Paints Ltd.	1.65	1.57	1.56	1.56	1.63	1.43	1.47	1.45	1.45	1.44



8.	Asian Paints P P G Pvt. Ltd.		1.26	0.98	1.05	1.09	0.92	1.09	1.12	1.15	1.21
9.	Jotun India Pvt. Ltd.	1.52	1.23	1.14	1.14	1.21	1.03	1.22	1.16	1.28	1.07
10.	Sheenlac Paints Ltd.				0.47	0.45	0.44	0.45	1	0.99	1.03

Thus, the Commission is in agreement with the Informant that Asian Paints' market share has been consistently higher by almost three times than that of Berger over a very long period of time, which is indicative of the dominant position enjoyed by Asian Paints in the relevant market. It is also noteworthy that not only has consistently high market share been held over a considerable length of time but also that other competitors have not been able to increase their share and the gap between Asian Paints and its competitors have been almost steady. The Commission has also taken note of the report on the paints sector by Nirmal Bang, dated 01.09.2020, which was relied upon by the DG. As per the said report, Asian Paints is India's largest paint company, commanding over 40% of the overall domestic paint industry and 55% in domestic decorative paint industry as against second largest paints company, Berger Paints, which commands 12% market share of the overall paint industry and over 20% market share of the domestic decorative paints segment. Thus, the competitors based on their market shares do not appear to have posed any competitive constraints on Asian Paints during these periods.

- b. Size, resources and economic power of the enterprise:* The Informant has stated that Asian Paints has the largest installed capacity in the market. In FY2019–20, the total installed capacity in the organised paint sector was 3.5 million kilo litres per annum (KLPA), out of which Asian Paints had an installed capacity of 1.8 million KLPA, i.e., more than half of the total capacity of the sector. It has also been stated that the installed capacity of Asian Paints was twice that of its closest competitor, Berger. Asian Paints is a company with large resources, and its turn-over and its revenues from the paints segment increased from Rs. 10,300 crores to Rs. 16,189 crores over a period of five years (FY 2014 to FY 2019), whereas the revenues of its closest competitor, Berger, increased from Rs. 3,735 crores to Rs. 5,515 crores. Asian Paints' increase in revenue has been nearly three times that of Berger's during the



said period (Asian Paints' closest competitor). JSW Paints has further stated that superior financial strength, large dealer network and increase in number of tinting machines indicate Asian Paints' market strength. It has been stated that Asian Paints increased its active distribution/dealer network from 53,000 dealers in FY 2017–18 to 70,000 in FY 2020–21. In comparison, Berger only has over 25,000 dealers across India. Further, Asian Paints also increased the number of its tinting machines from 35,000 in 2017–18 to 46,000 in 2019–20. Asian Paints has a strong brand name as well as a vast distribution network which provides it an advantage over its competitors. The Commission notes that Asian Paints has the largest revenue of Rs. 17,194.1 crores and largest number of dealers (more than 70,000) for FY 2019–20 compared to its competitors. Berger, its closest competitor, has a revenue of Rs. 6,366 crores, which is about $1/3$ rd the revenue of Asian Paints for FY 2019–20. If the resources in terms of number of dealers are compared, Berger has around 25,000 dealers, which is again about $1/3$ rd the size of the dealers with Asian Paints. The following table shows the relative strength of Asian Paints vis-à-visits competitors:

Table 3: Strength of Asian Paints and its Competitors

S. No.	Name of Company	Revenue (Rs. Crores) 2019-20	Decorative Paints Segment (latest)	Number of Depots/War ehouses (latest)	Number of Dealers (latest)
1.	Asian Paints	17194.1	83.7%	135	70000+
2.	Berger Paints	6366	90%	129	25000+
3.	Kansai Nerolac	4943.2	55%	104	25000+
4.	Akzo Nobel	2661.8	60%	52	9000+
5.	Indigo Paints	624.79	64%	44	13214

The Commission notes that the DG in its report has also observed that Asian Paints is so deep-rooted with dealers across India that even its nearest competitor is less than half of its network.

- c. *Entry barriers and market structure:* The Informant has stated that the DG has taken a time period of 20 years to judge ease of entry in the market to create an impression that there are no barriers to entry in the market. However, the fact is that in the last ten years, there has been no significant change in market conditions and no new players have entered the market. JSW Paints has stated that Jotun India Private



Limited, Nippon and Indigo entered the market in the years 2010, 2006 and 2000, respectively. As regards the exit of players from the market, JSW Paints has stated that Sherwin Williams, which is the second largest paints company in the world by revenue, had exited the decorative paints business in the year 2013 by selling its business to Berger Paints. Further, it has been stated that the top four players, i.e., Asian Paints, Berger Paints, Kansai Nerolac and Akzo Nobel, have always held 80% of the market share in the organised decorative paints market segment. It has been further stated that manufacturing and distribution of paints is a cost-intensive business, which includes initial cost of setting up business, marketing costs, etc. As per JSW Paints, other entry barriers include development of an extensive distribution network through long-term relationship with dealers, ability to set up tinting machines, etc. Asian Paints, on the other hand, has relied upon the entry of Grasim, with a capital outlay of Rs.5,000 crores in the decorative paints segment, to show that the market is competitive. Asian Paints has also relied upon the expansion plans of younger competitors like Indigo and Kamdhenu and players like Akzo Nobel to show that there are no barriers to entry or expansion. In this regard, the Commission notes that, for the last 10 years, as per the CMIE data, the paint market has seen the presence of four major players, which are Asian Paints, Berger Paints India Limited, Kansai Nerolac Paints Limited and Akzo Nobel India Limited, with the entry of players like Jotun, Indigo, etc. The Commission notes that players like Jotun and Indigo appear to be small players, and their entry in the recent past do not seem to be of such magnitude and scope so as to pose sufficient competitive constraint upon a large player like Asian Paints. This is corroborated by the market shares of these players, which have only been in the range of 0–2% for the period between 2011–12 and 2019–20 (as is evident from the table referred above). This shows that these players have not been able to garner sufficient market share in the paints market in the last 10 years. The Commission further notes that reliance upon entry of Grasim by Asian Paints, which was revealed in its Annual Report of 2020–21, is also misplaced. The Commission observes that this has no bearing on the assessment of dominance of Asian Paints in the year for which allegations of abuse were made, i.e., FY 2019–20. Further, the evidence of an international player, Sherwin Williams, exiting the market, sustainability in the paint industry may be an issue.



- d. *Countervailing buying power:* The Commission notes that, as stated by Asian Paints in its response, does at times alter the credit limit of the dealer based on parameters, such as performance, demand in the market, market reputation, etc. It seems that Asian Paints exercises great influence over the decision-making of its dealers. Moreover, paint dealers are generally small ‘mom and pop’ stores and do not appear to have any countervailing buyer power and seem to be totally dependent on it not just for procurement of paints but also for the incentives. It appears that the dealer cannot even determine the inventory it can stock. The Commission also notes the submission of JSW Paints that decorative paints industry works on a ‘direct distribution model’, where a paints manufacturer directly supplies to dealers without appointing any distributors or wholesalers. In such a distribution model involving distributors/wholesalers, JSW Paints further submitted that dependency of dealers on a paints company and the influence of a paints company is much greater compared to a distribution model involving distributors/wholesalers. Thus, this brings out that dealers do not possess any countervailing buyer power and are at the mercy of Asian Paints and not vice-versa, as claimed by Asian Paints. Accordingly, the Commission does not find any merit in the submissions of Asian Paints that dealers have significant countervailing buyer power.
49. In view of the foregoing, the Commission concludes that Asian Paints appears to be in a dominant position in the relevant market of “*market for manufacture and sale of decorative paints by the organised sector in India*”.
50. Once the relevant market has been delineated and the position of dominance of the Asian Paints therein established, the Commission now examines whether Asian Paints sought to exclude JSW Paints by threatening and coercing dealers in the paint industry, thereby acting in contravention of provisions of Section 4 of the Act.
51. With respect to contravention of provisions of Section 4 of the Act, the Commission notes that the DG has carried out a two-prong analysis, one in relation to alleged denial of access to distribution channels and the second with respect to alleged denial of infrastructural facilities to JSW Paints. The DG noted that Asian Paints, the market



leader, was able to make a net addition of 401 and 816 dealers during 2019–20 and 2020–21 (total of 1217) as against the new entrant JSW Paints' net addition of 722 and 869 dealers during the same period (total 1591). Therefore, the fact and figures of the net addition of dealers during the relevant period contradict the allegation of denial of market access to JSW Paints, as they were able to add more new dealers to their network than the market leader, Asian Paints. The DG concluded that JSW Paints had been able to appoint more dealers compared to even the market leader, Asian Paints. Therefore, the allegation regarding denial of market access pertaining to the distribution network is not supported by the facts. As per the DG, this belief gains further credence given the significant number of dealers engaging with both companies, (654 according to Asian Paints and 1378 according to JSW Paints), as on 31.03.2021. As per the DG, only 15 dealers came forward and levelled allegations against Asian Paints out of 1378 allegedly common dealers (taking the higher estimate). Further, none of the 15 dealers submitted evidence sufficient enough to substantiate their allegations, so that contravention could be demonstrated. With regard to the allegation of denial of market access by Asian Paints by restricting access to infrastructural facilities to JSW Paints, the DG noted that the reason for termination of the lease agreement between Mrs. Sajida Kalebudde and JSW Paints seemed to be a dispute regarding extension of relationship of Carrying and Forwarding Agent and logistics services between the parties to the agreement. The investigation revealed that there was no evidence on record to indicate that the lease agreement entered into by JSW Paints for the warehouse at Hubli was terminated at the instance of pressure exerted by Asian Paints. Therefore, the allegation regarding denial of market access to infrastructural facilities was not supported by the evidence on record.

52. Asian Paints, in its suggestions/objections to the Investigation Report, has concurred with the findings of the DG that it has not abused any hypothetical dominant position. There is no foreclosure or limit on the access to the dealership network of JSW Paints. Asian Paints has not denied JSW Paints access to the dealership network, which is not exclusive to Asian Paints in any case. As per the data submitted by JSW Paints, the fact that JSW Paints has approximately 86.6% of its dealer network common with Asian Paints proves beyond doubt that Asian Paints has not obstructed dealers from dealing with JSW Paints, and JSW Paints has no response on this data point. Asian Paints has further submitted that there was no limit on the access to infrastructural facilities.



Accordingly, Asian Paints submitted that there is no contravention of provisions of Section 4 of the Act.

53. JSW Paints has disagreed with the analysis undertaken by the DG in this regard. The Informant has stated that the DG has failed to consider the following two facets to Asian Paints' abuse: Asian Paints attempted to deny market access to a new entrant (exclusionary abuse) and punitive actions against dealers who were dealing with JSW Paints (exploitative abuse). It has been stated that there is no analysis of exploitative abuse vis-à-vis dealers, specifically under Section 4(2)(a) and 4(2)(d) of the Act. The analysis has been carried out in relation to Section 3(4) of the Act. Even if no violation of Section 3(4) is assumed, no conclusion on violation of Section 4 of the Act by Asian Paints can be reached, as there was no analysis by the DG in this respect. The allegations of exploitative abuse raised by the dealers, i.e., unfair credit blocks, unfair supply disruptions, loyalty-inducing incentive schemes and forcing them to sign affidavits are more relevant to the analysis under Section 4 of the Act than a Section 3(4) analysis. Notwithstanding any violation of Section 3(4) of the Act, these allegations certainly result in violation of Section 4 of the Act.
54. JSW Paints has further stated that the DG has failed to take into account certain critical emails sent by the dealers, demonstrating the attempts by Asian Paints to coerce them into signing affidavits in Asian Paints' favour. Instead of asking the dealers why they gave such affidavits to Asian Paints contrary to their complaints, the DG decided to use such affidavits to raise doubts about the credibility of the complainant dealers. Reliance has been placed upon an email written by Karavali Enterprises dated 09.04.2021, wherein it has been stated that the dealer was forced to sign a letter that it did not face any problem with Asian Paints. As per JSW Paints, the DG did not investigate this issue. There were other dealers who had submitted such emails against Asian Paints, and it was critical for the DG to have analysed and examined the veracity of such affidavits submitted by Asian Paints on behalf of the dealers. JSW Paints has further submitted that the investigation by the DG did not focus on the key period of abuse, i.e., May 2019 to January 2020. It has been submitted that, after the *prima-facie* order, Asian Paints made its abusive practices more discreet to ensure that no concrete evidence was left behind. It has been submitted that Asian Paints also discontinued its RVM scheme,



which is reflective of Asian Paints' attempt to cover its tracks as soon as the Commission commenced investigation. It is surprising that the DG did not find violation of provisions of Section 4 of the Act despite holding that RVM seems to be anti-competitive in nature to promote exclusivity.

55. It has been further stated that incentive schemes for the dealers offered by Asian Paints are quite complex and, as a result, most dealers are at Asian Paints' mercy for the information on target achievement and their entitlement of various incentives. If a dealer does not comply with the directions of Asian Paints (e.g., not to deal with a particular player), Asian Paints threatens such dealers by saying that it would not support them. The DG also failed to analyse and consider the discretionary and loyalty-inducing nature of various other incentives/schemes offered by Asian Paints which are used to arm-twist dealers, resulting in denial of access to the distribution network for new entrants like JSW Paints. It has been further stated that the DG has solely relied on an incorrect and misleading metric of net additions of dealers and has wrongly concluded that JSW Paints had a smooth entry into the market owing to higher net addition of dealers. It has been stated that a total of 148 dealers discontinued dealing with JSW Paints in FY 2019–20, out of which 137 were common dealers (92.56%). A total of 250 dealers discontinued dealing with JSW Paints in FY 2020–21, out of which 201 were common dealers (80.4%). This data was ignored by the DG. It has been further submitted that the extent of denial is irrelevant, and denial in any manner would also amount to contravention of provisions of Section 4(2)(c) of the Act. It has been submitted that the DG has failed to investigate this key allegation of returning of the tinting machines of JSW Paints by dealers and has failed to record any reasons for the same as well as dealers who had expressed interest in dealing with JSW Paints by depositing an initial confirmation amount of Rs. 1 lakh but never purchased paints from JSW Paints. The DG has also failed to analyse the detailed evidence provided by JSW Paints in terms of dealers who were being disincentivised by Asian Paints from dealing with JSW Paints. With respect to denial of access to infrastructural facilities, the DG failed to conduct an investigation into the extent of influence of Asian Paints exercised over the decision of Kalebudde family to deny access to JSW Paints and ignored the detailed evidence submitted by JSW Paints in this regard.



56. Having regard to the submissions of parties, the Commission notes the submissions of the DG that JSW Paints added 1591 dealers over 2019–20 and 2020–21 vis-à-vis Asian Paints, which added only 1217 new dealers during the same period. The Commission also notes that, out of 1591 dealers of JSW Paints as on 31.03.2021, 1378(86.6%) dealers dealt with Asian Paints also. This figure of common dealers clearly demonstrates that JSW Paints' entry into the market has not been impeded as claimed by it, and JSW Paints has made considerable inroads into the dealer network in a short span of time. With regard to the allegations of emails sent by dealers to the DG regarding alleged anti-competitive conduct, the DG, as per records, gave ample opportunity to parties/third parties to make their submissions, even till the time of finalisation of report. Also, as per records, many of the complainants later during the course of investigation stated that there is no coercion exercised on part of Asian Paints. This was also stated by them on sworn affidavits. In view of the foregoing, the Commission agrees with the DG that the allegation in relation to denial of market access to distribution network to JSW Paints under Section 4(2)(c) of the Act is not substantiated in the facts and circumstances of the present case through credible evidence.
57. With respect to the allegation pertaining to denial of access to infrastructural facilities, the DG found that, even though Mrs. Kalebudde stated that she had not leased any of her properties to any paints company, JSW Paints has been able to corroborate from Bhoomi records that warehouse leased to Asian Paints is owned by members of Kalebudde's family. The DG has observed that Mrs. Kalebudde has not disclosed correct facts, and the incorrect facts could be due to pressure of Asian Paints. However, there is no evidence on record to prove that the lease agreement entered into between her with JSW paints was terminated at the behest of Asian Paints, as was alleged by the Informant.
58. The Commission observes that Mrs. Kalebudde, based on the DG's finding, does not appear to have given correct information, which raises doubts as to her response furnished to the DG. However, the email dated 15.05.2019, written by Mr. Thanvi of JSW Paints to Srivastan of Kalebudde Logistics, highlights that the contract was mutually terminated. It has also been stated in the said email that the alternate options provided by Kalebudde Logistics were not suitable for the operations of JSW Paints. In a



गोप्यमेव जयते



subsequent email dated 22.08.2019, written by Mr. Thanvi of JSW Paints addressed to Mr. Parvez Kalebudde, Mr. Thanvi had sought a refund of security deposit and also mentioned the pressure exerted by Asian Paints. Upon perusal of the said emails, the Commission observes that initially, when the commercial contract for leasing of warehouse was breached, JSW Paints “*respected their decision of not going ahead with the leasing of the property*” and just sought a refund of the security deposit. In fact, as per the evidence on record, it appears that the reason for termination of the said lease agreement seems to be a dispute regarding extension of CFA and logistics services between the two parties to the agreement. Therefore, the Commission is of the view that there appears to have existed some *interse* disputes between JSW Paints and Mrs. Kalebudde, which cannot be attributable to Asian Paints in the absence of any concrete evidence. Thus, the allegation of denial of infrastructural facilities is not supported by evidence on record. Accordingly, the Commission is of the view that no case of contravention of provisions of Section 4 of the Act is made out in the facts of the present case due to lack of evidence on abusive conduct of Asian Paints.

Issue 2: Whether Asian Paints is liable for contravention of provisions of Section 3(4) of the Act.

59. The next issue that arises for consideration of the Commission is whether the restraints imposed by Asian Paints upon the dealers to not deal with JSW Paints when they are dealing with Asian Paints are in the nature of exclusive supply agreement and refusal to deal and amounts to contravention of provisions of Section 3(4)(b) and 3(4)(d) of the Act. In order to substantiate the allegations raised by JSW Paints against Asian Paints in this regard, the responses of JSW Paints, Asian Paints and certain dealers who dealt with both Asian Paints and JSW Paints were sought by the DG. Upon scrutiny of the replies of thirty party dealers who came forward before the DG, the DG observed that a majority of the dealers claimed that supplies from Asian Paints were unstable and eventually stopped after they took dealership of JSW Paints/other manufacturer. It was also mentioned that the credit limit was also reduced without any prior intimation. On account of the fall in supplies and reduction in credit limits, dealers' sales of products of Asian Paints decreased, which denied them of different incentives, schemes and other benefits. It was also submitted that dealers were forced to purchase the products of Asian



Paints from other dealers to meet customer demand. Certain dealers also claimed that their access to the My Awaaz app was also blocked. Due to blocked access, some dealers were unable to substantiate their claims of stoppage of supplies and non-service of orders. As per the DG, the allegations *prima facie* appeared to be substantiated by their replies. It was also noticed that two dealers, Amutha Hardware and Kumaraan Hardware, claimed that supplies from Asian Paints were unstable from the time they had obtained dealership of Nippon Paints in July 2018. Given their past experience, they had not focused on the sale of products of JSW Paints despite opting for its dealership. The dealers had also submitted that representatives of Asian Paints came to know of the fact that a given dealer decided to go for a dealership of products of JSW Paints from the presence of the JSW Paints tinting machine at the dealer's premises. These representatives further threatened dealers with actions such as strict enforcement and reduction in credit limit and stoppage of supplies unless the dealer stops doing business with JSW Paints and returns JSW Paints materials along with its display materials and tinting machines back.

60. Upon analysis of the responses of Asian Paints in respect of specific allegations made by 14 dealers, namely, Amutha Hardwares, Chennai; Ventakeshwara Cement and Steels, Eluru; Sri Naga Sai Maruthi Agencies, Guntur; Siva Sankara Agencies, Guntur; Sagar Hardware and Paints; Sri Surya Paints, Ibrahim patnam; Ess Vee Enterprises, Dharwad; PS Enterprises; Sri Sai Balaji Traders, Hyderabad; Kumaraan Hardware, Chennai; Nayak Traders; Karavalli Enterprises; Damini Enterprises; and Sri Laxmi Agencies, the DG found that, on the face of it, the allegations made by the dealers against Asian Paints seemed anti-competitive. However, the allegations raised by the dealers lost their sheen when read with specific responses from Asian Paints submitted before the DG.
61. With respect to the allegation in respect of reduction of credit limit of the dealers, the DG found that all the allegations made by the dealers appeared to be misconceived/motivated, as Asian Paints was able to adduce substantive evidence to prove that the act of reduction in credit of a dealer was not due to the alleged business association of a dealer with a competitor but its own mutual business relationship. The reduction in credit limit in most of the cases was necessitated either due to reduction in offtake of the dealer concerned or unpaid accumulated dues over a period of time. The



action taken by Asian Paints was claimed to be well-reasoned, based on objective criteria and uniformly applicable and transparently applied by Asian Paints to protect its business interest. The DG, however, found that, in case of a few dealers, such as Siva Sankara Agencies, Sagar Hardware and Paints and Nayak Traders, though reduction might be justified on merits, substantial reduction in credit limit may not be commensurate with the default in payment and/or going into overdue (OD) by the dealers. But Asian Paints resumed/increased the credit limit of the dealers when they improved their off-take.

62. In respect of alleged stoppage of supplies to such dealers who started a business with the competitor brand, the DG found that Asian Paints was able to justify its specific action in almost all cases. Asian Paints' conduct did not show any abnormal trends in terms of orders serviced for any specific dealer during the period of thirteen months (6 months before and after start of the dealers' business with JSW Paints). The DG observed that Asian Paints substantiated its contentions by adducing evidence in the form of details of certain dealers in the relevant geographies, whose credit limit was increased/decreased as a matter of routine, dependent purely on the performance of the concerned dealer. The Commission thus notes that it cannot be said merely because of drop-in servicing the orders by Asian Paints, the same can be attributed to relationship of a particular dealer with JSW Paints.
63. As regards the allegations of attempts by Asian Paints to pressurise the dealers to return JSW Paints tinting machine, the DG could not unearth credible evidence from any dealer that could corroborate the allegation against Asian Paints. Accordingly, the DG observed that the restraints in the nature of exclusive supply agreement and refusal to deal under Section 3(4)(b) and 3(4)(d) of the Act could not be substantiated with concrete evidence.
64. In this regard, the Commission notes that Asian Paints has stated that it has not entered into any anti-competitive agreement with dealers or hindered them from conducting business with any other paint company of their choice. It has been stated that reduction in credit limits was justified and based on objective criteria, and the DG has made fleeting observations regarding Sivasankara Agencies, Sagar Hardware and Paints, Sri Naga Sai Maruthi Agencies and Naga Traders. With respect to Siva Sankara Agencies, Sagar Paints and Nayak Traders, it has been clarified that the DG's investigation found



that even though Asian Paints reduced their credit limit for certain objective reasons, as soon as their offtake/credit status improved, Asian Paints restored their credit limit as well. It has been stated that Asian Paints should have commercial freedom to determine its commercial decisions, and the Commission should not spend its valuable time and resources on ascertaining the commercial aspects of Asian Paints business. The practice of Asian Paints with respect to supply and servicing of orders have been justified. Asian Paints did not pressurise or influence any dealer to remove the JSW signage, material or tinting machines. Asian Paints has further submitted that the fleeting observations regarding the Retail Value Maximiser (RVM) programme should not be read as conclusive findings on anti-competitive conduct. In any case, the RVM programme is objectively justified and does not cause any appreciable adverse effect in the relevant market. Asian Paints has reiterated that its dealings with all the dealers have been reasonable and based on objective criteria. Further, according to investigation, the evidence provided by the dealers and JSW Paints appeared to be misleading and created at the behest of JSW Paints. It has been stated that after nearly 1.5 years of investigation, JSW Paints filed a letter dated 21.08.2021, which was purportedly written by one Ram Kumar Mistry (Proprietor of Neelam Hardware, Thane West, Mumbai. As per Asian Paints, JSW Paints had obtained this letter from the dealer without providing the dealer with the true context. It has deployed this tactic with a means to manipulate the dealer into assuming that the letter is a requirement for JSW Paints' audit team but the company instead used the letter in the ongoing investigation by submitting it to the DG, without any consent from the dealer or even informing the dealer that it is doing so. On 25.11.2021, the dealer wrote to the DG dismissing the allegations against Asian Paints and shared the same with Asian Paints setting out the context why the letter dated 21.08.2021 was written. Thereafter, Asian Paints had submitted a voluntary affidavit from the said dealer stating that the said dealer was coerced and manipulated to issue the letter dated 21.08.2021.

65. JSW Paints, while disagreeing with the DG analysis of Asian Paints' conduct, stated that the analysis by the DG under Section 3(4) of the Act is incomplete, as there is a failure on the part of the DG to analyse the conduct of the dealers who were coerced by Asian Paints not to deal with JSW Paints. It has been stated that the DG Report has carried out an investigation in relation to only 15 dealers, most of whom did not succumb to the



गोप्यमेव जयते



diktats of Asian Paints and continued to deal with JSW Paints. As per JSW Paints, the focus of investigation should have been upon dealers who succumbed to the pressure of Asian Paints and stopped dealing with JSW Paints. The DG has failed to take into account the detailed evidence submitted by JSW Paints regarding the dealers who fell prey to the pressure exerted by Asian Paints and stopped dealing with JSW Paints. Many such dealers had to stop dealing with JSW Paints despite depositing initial confirmation cheques. JSW Paints had submitted a list of 107 dealers who invested in JSW Paints tinting machines but had to completely stop dealing with the company. JSW Paints also submitted a list of 13 dealers who purchased the JSW Paints tinting machines but were not able to use them. JSW Paints had also submitted detailed reasons as to why these dealers did not install the tinting machine. JSW Paints has stated that the fact that such a larger number of dealers refused to even come forward to call out Asian Paints' abusive practices itself demonstrates the fear of a giant like Asian Paints among dealers, as paint dealers are small 'mom and pop' stores and any coercive action by Asian Paints impinges on the daily livelihood of such dealers. JSW Paints had also explained to the DG that most of the dealers are scared of Asian Paints and are afraid of coming forward against Asian Paints, as any coercive action by Asian Paints would result in losses which such dealers cannot bear. Instead of taking such dealers into confidence, the DG decided to not even attempt to investigate these dealers and simply relied on Asian Paints' submissions on how it decided on credit reductions and supply stoppages.

66. JSW Paints further stated that the analysis of the DG's finding with respect to the 15 dealers is also erroneous and follows faulty line of investigation. The DG has used Asian Paints' broad submissions about general factors considered while reducing credit limit/stopping supply to justify the specific submissions of the dealers, which established a clear nexus between Asian Paints' actions and dealers' association with JSW Paints. JSW Paints has submitted that, even with respect to the specific replies by Asian Paints for each of the fourteen dealers, the DG has failed to analyse that Asian Paints never took such extreme actions against the dealer in the past when similar situations of overdue/reduction in off-take arose. Such an analysis would have clearly demonstrated that the real reason behind Asian Paints taking such extreme action (credit/supply block) was the dealer's association with JSW Paints in defiance of Asian Paints' directions. JSW Paints has stated that Asian Paints provided approximately 7,600 instances of



सत्यमेव जयते



reduction in credit limits and 9,900 instances of increase/restoration of credit limits across dealers in AP, Telangana, Karnataka and Tamil Nadu between July 2018 to October 2020. On the basis of this data, the DG concluded that the credit limit changes were routine business decisions implemented in view of the dealers' reduced business/payment overdue with Asian Paints. To investigate the issue of disproportionate credit reductions as alleged by certain dealers, the DG ought to have focused on the instances of total credit block (i.e., reduction of credit limit to Re. 1). The DG should have checked the number/percentage of credit block cases out of the 7,600 instances cited by Asian Paints and the reasons behind such exceptional credit blocks. Such an investigation would have demonstrated that credit blocks were used by Asian Paints to discipline/punish dealers who dealt with JSW Paints against Asian Paints' will. However, the DG wrongly relied on instances of routine credit limits reduction/variations to dismiss the allegations of dealers who suffered disproportionate credit reductions/credit blocks due to their association with JSW Paints. The DG confirmed that the quantum of reduction in credit limit by Asian Paints with respect to atleast four dealers, namely, Siva Sankara, Nayak Traders, Naga Sai and Sagar Paints and Hardware, was disproportionate. However, the DG failed to investigate the actual reasons for such credit blocks. The multiple instances of Asian Paints' coercive actions and imposition of restrictions highlighted also amounts to the contravention of Section 3(4)(b) and Section 3(4)(d) of the Act. As per JSW Paints, the restrictions imposed by Asian Paints have caused appreciable adverse effect on competition in the relevant market under Section 19(3) of the Act as the business practices of Asian Paints have created barriers for a new entrant. Asian Paints' actions are also aimed at driving the competitors out of the market.

67. The Commission, in the facts and circumstances of the case and based on evidence on record, notes that the investigation has returned a finding that the reduction in credit limit in almost all cases of dealers would have been necessitated on account of business considerations, either due to reduction in off-take by the dealer concerned or on account of unpaid accumulated overdues over a period, which is stated to be as per a laid down policy of Asian Paints. The DG found that the actions are stated to be based on objective criteria and uniformly applicable practice of Asian Paints to protect its business interest. In the absence of concrete evidence on record, the Commission observes that the act of reduction in credit limit or stoppage of service of orders placed could not be on account



गोप्यमेव जयते



of the alleged business association of dealers with competitor. The Informant has not been able to substantiate otherwise. Thus, the Commission, based on material available on record, notes that there is no concrete evidence of alleged restraints imposed by Asian Paints over the dealers to find contravention of provisions of Section 3(4) of the Act. Accordingly, no case of contravention of provisions of Section 3(4) read with Section 3(1) is made out in the facts and circumstances of the present case.

68. With regard to Case No. 17 of 2021, the Commission notes that the DG found that the downgrade of the dealer Sri Balaji Traders from Critical Retailer to Colour World by Asian Paints is fully justified and this downgrade had no relationship with starting a business with the competing brand. The inference has been drawn on the basis that the change in retailing tier was affected on 28.04.2021 as against the alleged claim of February 2021 by the dealer. Further, the dealer was consistently reducing offtake from Asian Paints, which reduced to less than half over a 10-month period, from October 2020 to July 2021. The retailing tier of the said dealer was restored in June 2021 along with seven other dealers after a review exercise undertaken by Asian Paints on the basis of sales, expected sales, customer outreach and other relevant factors.
69. The Commission observes that, as per the DG, the retailing tier of the said dealer was restored in June 2021 along with seven other dealers after a review exercise undertaken by Asian Paints on the basis of factors such as sales, expected sales, customer outreach and other relevant factors. It has also been brought out by the DG that the restoration of dealers' status was done prior to the filing of information in Case No.17 of 2021. The Commission notes that, as per the DG, the retailing status of the said dealer was changed from Ezy Critical Retailer (Ezy CR) to Critical Retailer in 2018–19, when the said dealer had not even started business with any other competing brand. In view of the findings of the DG, the Commission notes that the allegation raised by Balaji Traders that the sudden revocation of the CR status without prior intimation was to punish him for dealing with JSW Paints is misplaced. Accordingly, in the facts of this case, the Commission tends to agree with the findings of the DG that no case of contravention of provisions of Section 4 or Section 3(4) read with Section 3(1) of the Act.
70. The Commission observes that any conduct of a firm with significant/substantial market power which has the effect of vertical foreclosure may be liable to be examined within



the realm of Section 3(4), Section 4 or of both the provisions, as may be applicable. Such prohibited conduct may result in appreciable adverse effect on competition or a likelihood thereof. There has to be evidence which, on balance of probabilities, would point towards a strong entrenched player using tactics to oust a smaller player or even a new entrant to the market (regardless of its size or inherent advantages) by either incentivising or coercing downstream players to boycott or not deal with the new players. In the present case, upon weighing the evidence on record, the Commission is of the view that the balance is not tilted towards JSW Paints. Asian Paints has been able to demonstrate that some of its conduct or practices adopted *qua* the dealers was in furtherance of its terms of doing business with such dealers and not to keep JSW Paints away from the market. The DG in any case found that the alleged deterrence of dealers with JSW Paints has not fructified in the presence of large number of dealers onboarding to the network of JSW Paints and even dealing simultaneously in products of both Asian Paints and JSW Paints.

71. Before parting with the order, the Commission notes that JSW Paints had filed an application dated 28.03.2022, *inter alia*, seeking a direction to the DG to grant an opportunity of depositions to the aggrieved dealers, who requested to submit additional evidence to the DG and consider such evidence without a preconceived notion; to determine the investigation period during which the key abuse was alleged by JSW Paints; to ensure fair procedure in the supplementary investigation and complete the DG Record with all the evidence submitted by JSW Paints and the aggrieved dealers; to grant JSW Paints/dealers an opportunity to cross-examine the officials of Asian Paints who were deposed by the DG; to direct the DG to revise the report based on the material from the cross-examination; and to pass any other order as the Commission may deem fit in the facts and circumstances of this case. In this regard, the Commission notes that the evidence adduced by the dealers has been duly considered by the DG in its Investigation Report. The Commission has not adverted to oral statements, if any, given by any parties or at their behest before the DG for the purposes of passing the present order. In any event, the Commission is of the view that the Informants and even third parties had been given ample opportunity during the course of investigation by the DG. JSW Paints has not been able to demonstrate to the satisfaction of the Commission that it is necessary and expedient to grant a right of cross-examination to it. Accordingly, the Commission finds no merit in the said application and the same stands disposed of.



72. With respect to the confidentiality claimed by the parties, in respect of certain portions of their objections/suggestions/applications filed with the Commission, the same shall be dealt with *vide* separate orders. It is, however, made clear that no such confidentiality claim shall be available in respect of the information that might have been referred to in this order, in terms of Section 57 of the Act alongwith Regulation 35 of the General Regulations (as amended).
73. The Secretary is directed to communicate the said order to the concerned parties accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

New Delhi

Sd/-
(Bhagwant Singh Bishnoi)
Member

Dated: 08/09/2022