



COMPETITION COMMISSION OF INDIA

Case Nos. 21, 29, 36, 47, 48 & 49 of 2013

Case No. 21 of 2013

In Re:

India Glycols Limited

Informant

And

- | | |
|--|-----------------------------|
| 1. Indian Sugar Mills Association | Opposite Party No. 1 |
| 2. National Federation of Cooperative
Sugar Factories Limited | Opposite Party No. 2 |
| 3. Ethanol Manufacturers Association of India | Opposite Party No. 3 |
| 4. Bharat Petroleum Corporation Limited | Opposite Party No. 4 |
| 5. Hindustan Petroleum Corporation Limited | Opposite Party No. 5 |
| 6. Indian Oil Corporation Limited | Opposite Party No. 6 |

WITH

Case No. 29 of 2013

In Re:

Ester India Chemicals Limited

Informant



And

- | | |
|--|-----------------------|
| 1. Bajaj Hindusthan Limited | Opposite Party No. 1 |
| 2. Upper Ganges Sugar & Industries Limited
(now, Avadh Sugar & Energy Ltd.) | Opposite Party No. 2 |
| 3. Triveni Engineering Industries Limited | Opposite Party No. 3 |
| 4. Simbhaoli Sugars Limited | Opposite Party No. 4 |
| 5. Oudh Sugar Mills Limited
(now, Avadh Sugar & Energy Ltd.) | Opposite Party No. 5 |
| 6. Dhampur Sugar Mills Limited | Opposite Party No. 6 |
| 7. Balrampur Chini Mills Ltd. | Opposite Party No. 7 |
| 8. Mawana Sugars Ltd. | Opposite Party No. 8 |
| 9. K. M. Sugar Mills Limited | Opposite Party No. 9 |
| 10. Kisan Sahkari Chini Mills Ltd. | Opposite Party No. 10 |
| 11. Uttam Sugar Mills Limited | Opposite Party No. 11 |
| 12. Dalmia Bharat Sugar & Industries Ltd. | Opposite Party No. 12 |
| 13. Seksaria Biswan Sugar Factory Limited | Opposite Party No. 13 |
| 14. Sir Shadi Lal Enterprises Limited | Opposite Party No. 14 |
| 15. Indian Oil Corporation limited | Opposite Party No. 15 |
| 16. Hindustan Petroleum Corporation Limited | Opposite Party No. 16 |
| 17. Bharat Petroleum Corporation Limited | Opposite Party No. 17 |

WITH

Case No. 36 of 2013

In Re:

Jubilant Life Sciences Limited

Informant



And

- | | |
|--|-----------------------------|
| 1. Bharat Petroleum Corporation Limited | Opposite Party No. 1 |
| 2. Hindustan Petroleum Corporation Limited | Opposite Party No. 2 |
| 3. Indian Oil Corporation Limited | Opposite Party No. 3 |
| 4. Indian Sugar Mills Association | Opposite Party No. 4 |
| 5. National Federation of Cooperative
Sugar Factories Limited | Opposite Party No. 5 |
| 6. Ethanol Manufacturers Association of India | Opposite Party No. 6 |

WITH

Case No. 47 of 2013

In Re:

A B Sugars Limited

Informant

And

- | | |
|--|-----------------------------|
| 1. Indian Sugar Mills Association | Opposite Party No. 1 |
| 2. National Federation of Cooperative
Sugar Factories Limited | Opposite Party No. 2 |
| 3. Ethanol Manufacturers Association of India | Opposite Party No. 3 |
| 4. Bharat Petroleum Corporation Limited | Opposite Party No. 4 |
| 5. Hindustan Petroleum Corporation Limited | Opposite Party No. 5 |
| 6. Indian Oil Corporation Limited | Opposite Party No. 6 |



WITH

Case No. 48 of 2013

In Re:

Wave Distilleries and Breweries Limited

Informant

And

- | | |
|--|-----------------------------|
| 1. Indian Sugar Mills Association | Opposite Party No. 1 |
| 2. National Federation of Cooperative
Sugar Factories Limited | Opposite Party No. 2 |
| 3. Ethanol Manufacturers Association of India | Opposite Party No. 3 |
| 4. Bharat Petroleum Corporation Limited | Opposite Party No. 4 |
| 5. Indian Oil Corporation Limited | Opposite Party No. 5 |
| 6. Hindustan Petroleum Corporation Limited | Opposite Party No. 6 |

WITH

Case No. 49 of 2013

In Re:

Lords Distillery Limited

Informant

And

- | | |
|--|-----------------------------|
| 1. Indian Sugar Mills Association | Opposite Party No. 1 |
| 2. National Federation of Cooperative
Sugar Factories Limited | Opposite Party No. 2 |



- | | |
|--|-----------------------------|
| 3. Ethanol Manufacturers Association of India | Opposite Party No. 3 |
| 4. Indian Oil Corporation Limited | Opposite Party No. 4 |
| 5. Bharat Petroleum Corporation Limited | Opposite Party No. 5 |
| 6. Hindustan Petroleum Corporation Limited | Opposite Party No. 6 |

CORAM

Mr. Sudhir Mital
Chairperson

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Present: Shri Manas K. Chaudhuri, Shri Sagardeep Rathi and Shri Pranjal Prateek, Advocates alongwith Shri Rakesh Bhartia, C.E.O. and Shri Ankur Jain, GM (Legal) & CS for India Glycols Limited.

Shri Kapil Dua, Advocate for Jubilant Life Sciences Limited.

Shri Vikas Singh, Senior Advocate with Shri Amitabh Kumar, Shri Samir Agrawal and Ms. Vibha Dhawan, Advocates alongwith Ms. Bharti Bajaj, Director (Legal) and Ms. Ritika Chatterjee, Legal Executive for Indian Sugar Mills Association.

Shri Amitabh Kumar, Ms. Vibha Dhawan, Shri Samir Agrawal and Ms. Srishti Banerjee, Advocates for National Federation of Cooperative Sugar Factories Limited.



Shri Bhushan V. Mahadik, Advocate alongwith Shri R. G. Mane, Secretary for Ethanol Manufacturers Association of India.

Shri M. L. Lahoti, Senior Advocate with Ms. Reeta Mishra, Shri Nikhil Anand, Shri Anchit Sripat and Ms. Mandakini Bajaj, Advocates alongwith Shri A. P. Verma, DGM of BPCL; Shri R. Gaitonde, DGM (Biofuel) and Shri Rajendra Lade, Sr. Legal Advisor; Ms. Anshika Shrivastava, Law Officer of HPCL; and Shri Shantanu Gupta, G. M. (Operations) of IOCL for BPCL, HPCL and IOCL.

Shri Bhushan V. Mahadik, Advocate for Sahakari Khand Udyog Mandal Ltd., Shree Ganesh Khand Udyog Sahakari Mandli Ltd., Shri Kamrej Vibhag Sahakari Khand Udyog Mandli Ltd. and for Shree Mahuva Pradesh Sahakari Khand Udhyyog Mandli Ltd.

Shri M. A. Chinnasamy and Shri V. Senthil Kumar, Advocates for The Andhra Sugars Ltd.

Shri Sudipto Sircar and Shri M. Balanaga Srinivas, Advocates for Sri Sarvaraya Sugars Ltd.

Shri Pawan Sharma, Ms. Nripi Jolly and Shri Anuj Shah, Advocates for Bajaj Hindusthan Ltd.

Shri Sudhanshu Batra, Senior Advocate with Shri Pankaj Bhagat, Advocate alongwith Shri Mahesh Agarwal, Finance Controller and Shri Shishir Aggrawal, Manager (Sales & Marketing) for Avadh Sugar & Energy Ltd.



Shri Rishi Agrawala, Advocate alongwith Shri Jiwan Pal Singh, DGM (Legal) and Shri Lalit Sachdeva, VP (Legal) for Triveni Engineering Industries Ltd.

Shri Sushil Shukla, Advocate for Simbhaoli Sugars Limited.

Shri Abdullah Hussain, Shri Divye Sharma and Shri Samarth Shergil, Advocates with Shri S. K. Bhatnagar, President (Corporate) for Dhampur Sugar Mills Limited.

Shri A. S. Chandhiok, Senior Advocate with Shri Amitabh Kumar, Shri Abdullah Hussain, Shri Ritesh kumar, Shri Dipender Chauhan and Shri Sameer Agrawal, Advocates alongwith Shri Rohit Bothra, President for Balrampur Chini Mills Ltd.

Shri P. K. Bhalla, Advocate with Shri Rajesh Dhingra, Advisor, Shri Vani Chandrashekhar, Senior V. P. (Legal) and Shri Sandeep Kumar, Additional Manager (Legal) for Mawana Sugars Ltd.

Shri Pankaj Bhagat and Shri Sadre Alam, Advocates for K M Sugar Mills Ltd.

Shri Pankaj Bhagat and Ms. Shipra Bhuttan, Advocates for Kisan Sahkari Chini Mills Ltd.

Shri Karan Singh Chandhiok, Ms. Mahima Singh, Shri Avdhesh Bairwa and Ms. Kalyani Singh, Advocates for Uttam Sugar Mills Ltd.



Shri Ravisekhar Nair, Shri Sahil Khanna and Shri Abhay Joshi,
Advocates for Dalmia Bharat Sugar & Industries Ltd.

Shri M. M. Sharma and Ms. Deepika Rajpal, Advocates for Seksaria
Biswan Sugar Factory Ltd.

Shri Anil Kumar Mishra, Advocate with Shri Manoj Kumar Goel,
Additional G.M. for Sir Shadi Lal Enterprises Ltd.

Order under Section 27 of the Competition Act, 2002

This common order shall dispose of six Informations filed in C. Nos. 21, 29, 36, 47, 48 and 49 of 2013 as substantially similar issues are involved in these cases.

Facts

1. Two separate Informations, one by India Glycols Limited (in C. No. 21 of 2013) and the other by Ester India Chemicals Limited (in C. No. 29 of 2013), were filed before the Commission under Section 19(1)(a) of the Competition Act, 2002 ('the Act') impugning the joint tender floated by Public Sector Oil Marketing Companies (PSU OMCs/ OMCs) on 02.01.2013 for procurement of anhydrous alcohol ('ethanol', hereafter) being in contravention of the provisions of Section 3 of the Act. Besides, it was also alleged that suppliers of ethanol - which mainly comprise sugar mills - have contravened the provisions of Section 3 of the Act by rigging bids submitted pursuant to the said tender, by quoting an exorbitant price for supply of ethanol to OMCs.



2. As the issues involved in both the Informations were similar and related, the Commission through a common order dated 27.05.2013 passed under Section 26(1) of the Act directed the Director General (DG) to investigate the matter. In the said order, it was noted by the Commission that the Informations revealed that pursuant to the notification dated 02.01.2013 issued by Ministry of Petroleum & Natural Gas, Government of India (MoP&NG) regarding mandatory 5% blending of ethanol with motor spirit/ gasoline, the Government owned public sector Oil Marketing Companies (OMCs) viz. Indian Oil Corporation Limited (IOCL)/ Hindustan Petroleum Corporation Limited (HPCL)/ Bharat Petroleum Corporation Limited (BPCL) invited quotations from alcohol manufacturers for supply of ethanol through a joint tender dated 02.01.2013 which was issued by BPCL on behalf of all the three OMCs - as the coordinator of the tender process. Through the joint tender, OMCs invited sealed tenders under two bid system *i.e.* technical bid and price bid from ethanol suppliers and the said supply was to be made available to various depots/ terminals of OMCs across the country for a period of one year w.e.f. 01.03.2013. The Informant (India Glycols Limited), however, alleged that OP-1 to OP-3 in Case No. 21 of 2013 *i.e.* Indian Sugar Mills Association (ISMA), National Federation of Cooperative Sugar Factories Limited (NFCSF) and Ethanol Manufacturers Association of India (EMAI) persuaded OMCs to come out with a joint tender for the purpose of procuring ethanol. The said joint tendering by OMCs was alleged to be an agreement amongst horizontal players to procure ethanol from various suppliers in contravention of the provisions of Section 3 of the Act which was likely to cause appreciable adverse effect on competition within India with respect to supply and distribution of ethanol. It was also submitted that the sugar manufacturers, who participated in the joint tender of 2013, manipulated the bids by quoting similar rates and in some cases identical rates, through an understanding amongst themselves and collective action in violation of the provisions of Section 3 of the Act.



3. From the material placed on record, the Commission in its said order dated 27.05.2013 opined that *prima facie* there existed collective decision making to fix the price of ethanol for supply to OMCs by sugar mills and the said price fixation was *prima facie* found to have violated the provisions of Section 3(3)(a) read with Section 3(1) of the Act. It was also noted that since the sugar mills had been shown to have participated in the bidding while colluding with each other, as such, Section 3(3)(d) read with Section 3(1) of the Act also appeared to have been violated. Accordingly, the Commission directed the DG to investigate the matter and submit the investigation report. Subsequently, the Commission *vide* orders dated 01.07.2013 and 23.07.2013 clubbed Case Nos. 36 of 2013, 47 of 2013, 48 of 2013 and 49 of 2013 with Case Nos. 21 of 2013 and 29 of 2013 as the said cases involved similar issues/ allegations.

Directions to the DG

4. As detailed above, the Commission, after considering the entire material available on record, *vide* its separate orders passed under Section 26(1) of the Act, directed the Director General (DG) to cause an investigation to be made into the matter and submit a report.

Investigations by the DG

5. The DG, after completing the investigation, filed a common Investigation Report dated 20.07.2015. It was concluded by the DG that ISMA had violated the provisions of Section 3(3)(a), 3(3)(b) read with Section 3(1) of the Act. The conduct of EMAI was also found to be in violation of Section 3(3)(a) of the Act. However, allegations against NFCSF were not found to be substantiated. Similarly, the allegations levelled against OMCs were also not found to be substantiated. So far as the allegations against the bidders who participated in the



tender in respect of the depots located in UP, Gujarat and Andhra Pradesh were concerned, the DG concluded that the following identified parties (bidders) had violated the provisions of Section 3(3)(d) of the Act:

Uttar Pradesh

- (i) Bajaj Hindusthan Ltd.
- (ii) Upper Ganges Sugar & Industries Ltd.
- (iii) Triveni Engineering Industries Ltd.
- (iv) Simbhaoli Sugars Ltd.
- (v) Oudh Sugar Mills Ltd.
- (vi) Dhampur Sugar Mills Ltd.
- (vii) Balrampur Chini Mills Ltd.
- (viii) Mawana Sugars Ltd.
- (ix) K M Sugar Mills Ltd.
- (x) Uttam Sugar Mills Ltd.
- (xi) Dalmia Bharat Sugar & Industries Ltd.
- (xii) Seksaria Biswan Sugar Factory Ltd.
- (xiii) Sir Shadi Lal Enterprises Ltd.

No finding of contravention, however, was recorded against Kisan Sahkari Chini Mills Ltd. which was arrayed as one of the Opposite Parties in Case No. 21 of 2013.

Gujarat

- (i) Sahakari Khand Udyog Mandal Ltd.
- (ii) Shree Ganesh Khand Udyog Sahakari Mandli Ltd.
- (iii) Shri Kamrej Vibhag Sahakari Khand Udyog Mandli Ltd.
- (iv) Shree Mahuva Pradesh Sahakari Khand Udyog Mandli Ltd.



Andhra Pradesh

- (i) The Andhra Sugars Ltd.
- (ii) Sri Sarvaraya Sugars Ltd.

6. Further, when the DG report was pending consideration before the Commission, some of the Parties moved application(s) seeking cross-examination of certain witnesses. The Commission *vide* separate orders directed the DG to allow cross-examination as stated therein. Accordingly, a report on cross-examination was submitted by the DG on 21.09.2016.
7. Subsequently, after hearing the concerned parties, the Commission passed an order dated 30.10.2017 wherein the Commission observed that notwithstanding the thrust of the Informants who mainly made allegations against the 14 parties who participated in the bids for supply of ethanol to depots in UP/ Haryana/ Punjab, the DG did not confine the investigations to the depots in UP and nearby States alone. Accordingly, the data in respect of bids for all the depots was collected, collated and examined by the DG to ascertain as to whether there was any pan-India pattern in bidding. However, the DG confined its analysis and findings primarily to UP producers, only. Accordingly, the Commission *vide* its aforesaid order was of the opinion that having collected the necessary data and investigated into the matter, it was incumbent upon the DG to have analysed the same and to have made its recommendations/ findings in respect of the depots in the State of Maharashtra as well. Accordingly, the Commission directed the DG to make further investigation/ analysis and submit a Supplementary Investigation Report on the specific issues identified in the said order.
8. The DG has since submitted the Supplementary Investigation Report to the Commission after addressing the issues highlighted by the Commission and has concluded that no contravention of the provisions of the Act is made out against



any of the bidders who participated in the bidding, in respect of the various depots located in State of Maharashtra.

Consideration of the DG Reports by the Commission

9. The Commission, on consideration of the main Investigation Report, cross-examination report and other material available on record, decided *vide* its order dated 28.03.2017 to proceed against the following 20 sugar mills which, apart from including the 14 originally arrayed bidders who had participated in the bids for supply of ethanol to depots in UP/ Haryana/ Punjab, also included the bidders [who, though not made OPs, mentioned in Case No. 21 of 2013 but against whom the DG recorded finding of contravention namely (a) Sahakari Khand Udyog Mandal Ltd., (b) Shree Ganesh Khand Udyog Sahakari Mandli Ltd., (c) Shri Kamrej Vibhag Sahakari Khand Udyog Mandli Ltd., (d) Shree Mahuva Pradesh Sahakari Khand Udyog Mandli Ltd., (e) The Andhra Sugars Ltd. and (f) Sri Sarvaraya Sugars Ltd.] who participated in the bids for supply of ethanol to depots in Andhra Pradesh and Gujarat:

- (i) Sahakari Khand Udyog Mandal Ltd. (Sahakari Khand)
- (ii) Shree Ganesh Khand Udyog Sahakari Mandli Ltd. (Ganesh)
- (iii) Shri Kamrej Vibhag Sahakari Khand Udyog Mandli Ltd. (Kamrej)
- (iv) Shree Mahuva Pradesh Sahakari Khand Udyog Mandli Ltd. (Mahuva)
- (v) The Andhra Sugars Ltd. (Andhra Sugars)
- (vi) Sri Sarvaraya Sugars Ltd. (Sri Sarvaraya)
- (vii) Bajaj Hindusthan Ltd. (Bajaj)
- (viii) Upper Ganges Sugar & Industries Ltd. (Upper Ganges)
- (ix) Triveni Engineering Industries Ltd. (Triveni)



- (x) Simbhaoli Sugars Ltd.(Simbhaoli)
- (xi) Oudh Sugar Mills Ltd.(Oudh)
- (xii) Dhampur Sugar Mills Ltd.(Dhampur)
- (xiii) Balrampur Chini Mills Ltd.(Balrampur)
- (xiv) Mawana Sugars Ltd.(Mawana)
- (xv) K M Sugar Mills Ltd.(K M Sugar)
- (xvi) Kisan Sahkari Chini Mills Ltd.(KSCM)
- (xvii) Uttam Sugar Mills Ltd.(Uttam Sugar)
- (xviii) Dalmia Bharat Sugar & Industries Ltd.(Dalmia)
- (xix) Seksaria Biswan Sugar Factory Ltd.(Seksaria)
- (xx) Sir Shadi Lal Enterprises Ltd.(Shadi Lal/ Shamli Distillery)

10. Apart from the aforesaid 20 sugar companies, the Commission also decided to proceed against the following parties, which included two associations *viz.* ISMA and EMAI and one federation *viz.* NFCSF besides three public sector oil marketing companies *i.e.* BPCL, HPCL and IOCL:

- (i) Indian Sugar Mills Association
- (ii) National Federation of Cooperative Sugar Factories Ltd.
- (iii) Ethanol Manufacturers Association of India
- (iv) Bharat Petroleum Corporation Ltd.
- (v) Hindustan Petroleum Corporation Ltd.
- (vi) Indian Oil Corporation Ltd.

11. Thus, the aforesaid 26 parties (20 sugar mills, 3 public sector OMCs and 3 trade associations of sugar mills/ factories/ ethanol manufacturers) constitute the array of Opposite Parties in the present batch of cases.



12. In this regard, it is also pertinent to mention that the Commission *vide* its order dated 19.07.2017 took on record submissions made on behalf of Avadh Sugar & Energy Limited to the effect that the erstwhile ‘The Upper Ganges Sugar & Industries Limited’ and the erstwhile ‘The Oudh Sugar Mills Limited’ have merged with ‘Avadh Sugar & Energy Limited’ pursuant to an order dated 02.03.2017 of the National Company Law Tribunal. Thus, effectively, there are 19 sugar mills in the array of Opposite Parties (13 sugar mills of UP, 4 sugar mills of Gujarat and 2 sugar mills of Andhra Pradesh) apart from 3 trade associations and 3 PSU OMCs.

Replies/ Objections/ Submissions of the Parties

13. The parties filed their respective replies/ objections/ post-hearing written submissions to the Report of the DG besides making oral submissions.

Replies/ objections/ submissions of the Informants

14. Out of the 6 Informants in the present batch of cases, only two Informants appeared and out of them, only one (*India Glycols Limited/ IGL*) filed its objections/ suggestions to the DG report and the same are noted in the succeeding paras.
15. Supporting the conclusions of the DG that the conduct of the OPs was in violation of the provisions of Section 3(3)(d) of the Act, it was submitted that the conclusion of the DG in exonerating PSU OMCs and NFCSF, was not correct. The deliberate act of PSU OMCs in not initiating any action against bidders showed that they aided and abetted the conduct of bid-rigging and cartelization by the bidders beyond the common platform which existed all along at ISMA and NFCSF levels.



16. It was pointed out that OMCs had failed to provide any economic or logical justification as to why “separate” tenders were issued in 2006-07 and why “joint” tender was considered in 2012. Furthermore, it was submitted that PSU OMCs were not a single economic entity since they maintain separate balance sheets and were individually audited by the Comptroller and Auditor General.
17. It was further submitted that mere ownership of majority shares by Government of India in PSU OMCs or appointment of directors on the Boards of PSU OMCs would not qualify them to be regarded as single economic entity. The OMCs were required to place reliable evidence to the effect that MoP&NG exercised *de facto* control over the business decisions of OMCs. In view of this, it was averred that PSU OMCs could not be regarded as “single economic entity” for the purposes of the Act. It was alleged that issuance of joint tender by OMCs was done with a view to aid and abet cartelization and bid rigging by sugar mills.
18. It was pointed out that PSU OMCs together comprised over 90% market share whereas the other two buyers of ethanol *i.e.* industrial chemical segment and potable alcohol segment were weaker buyers in comparison to PSU OMCs, requiring objective competition assessment.
19. It was stated that no reasons were specified in the DG Report as to the exoneration of the members of EMAI who attended the meetings and quoted exorbitant prices in excess of Rs. 40/litre.
20. It was also pointed out that Shri Abinash Verma, Director General, ISMA and Shri G.K. Thakur, Director-Policy, ISMA submitted on oath before the DG that there were no meetings held at ISMA on 06.12.2012, 19.12.2012 and 27.12.2012. However, a number of members of ISMA in their oral testimonies on oath before the DG admitted that meetings were held in the ISMA Office



during December 2012 and more specifically on 06.12.2012 and 27.12.2012 which demolished the statements of Shri Verma and Shri Thakur completely. These false and misleading oral testimonies on oath proved the allegations made by the Informant and accordingly made the defence of ISMA unworthy of being relied upon and given any credence in the eyes of law.

Replies/ objections/ submissions of the Opposite Parties

Replies/ objections/ submissions of Indian Sugar Mills Association (ISMA)

21. It was submitted that Cabinet Committee on Economic Affairs (CCEA) *vide* its Press Release dated 22.11.2012 made public its approval for pricing of bio-ethanol procurement by PSU OMCs for Ethanol Blended Petrol (EBP) Programme. However, as no gazette notification was issued by MoP&NG for implementation of the mandatory ethanol blending with petrol, the meeting convened for 06.12.2012 by ISMA did not take place. The next meetings scheduled for 19.12.2012 and 27.12.2012 also could not take place as very few members came to attend the said meetings.

22. It was submitted that the DG not only disregarded the evidences provided by ISMA but also misinterpreted the statements made by other witnesses that supported ISMA's stand. It was further submitted that mere holding of meetings by an association is not anti-competitive in itself unless it is proved that the purpose for holding such meetings was anti-competitive. Calling of meetings by ISMA for discussion over policy and other industry related issue is a legitimate mandate and such an activity by no means can be construed as anti-competitive. Attention was also invited to the statements of representatives of ISMA that established the purpose of meetings was to discuss mandatory 5% ethanol blending across the country under the EBP Programme.



23. It was pointed out that the joint tender was floated by OMCs on 02.01.2013 and as such there was no occasion for ISMA to discuss the price and quantity of ethanol to be supplied, prior pursuant to the issue of the said tender in the month of December by convening any meeting. There was no evidence to suggest that ISMA provided a platform to facilitate cartelization by the bidders. The meetings of ISMA were held informally and that too among 5 or 6 individuals in the month of December 2012 prior to invitation of the tender.
24. Referring to the DG's finding about frequent telephonic conversation of Shri Thakur of ISMA with the bidders just before the closing date of tender, it was stated that the DG itself acknowledged that sugar manufacturers regularly interacted with officials of ISMA to discuss the various policy issues having greater implication on the sugar industry. Further, it was alleged that the DG singled out the period of 2012 (before notification of the tender) and January 2013 (period post-notification of the tender) for the purposes of call detail record analysis.
25. It was also pointed out that the e-mails of Shri Thakur or other communications relied upon by the DG, did not contain any discussion relating to prices or quantities to be offered by the bidders in response to the subject tender.

Replies/ objections/ submissions of National Federation of Cooperative Sugar Factories Ltd.(NFCSF)

26. It was pointed out that the DG has not found any evidence *qua* NFCSF to conclude that it has violated the provisions of Section 3 of the Act. Hence, it was prayed that name of NFCSF be deleted from the array of Opposite Parties.



Replies/ objections/ submissions of Ethanol Manufacturers Association of India (EMAI)

27. EMAI in its reply pointed out that out of 120 members, only 25% to 30% members attend the meetings of the associations. It was further stated that the attendance of members from States outside Maharashtra had always been negligible. Even though EMAI was an all-India association, in practice, it had really functioned as an association of ethanol manufacturers based in Maharashtra. It was stated that barring few exceptional cases, none of the members of the association had been paying any fees to the association. Whenever a meeting was held, a copy of notice of the meeting together with the agenda were sent by e-mail/ fax to the members. In such meetings, no decisions were taken with regard to commercial matters such as production targets or price bids/ quantities to be quoted by the members in response to the tenders floated by OMCs. Such matters were to be decided by individual members and the association had no role to play in such decisions.
28. Further, EMAI did not have any association/ affiliation with ISMA and NFCSF. It was pointed out that the association members who were from the private sector (and not the cooperative sector) might be members of ISMA. EMAI, however, did not have any information with regard to such memberships. The President of the association was also a Director of NFCSF by virtue of holding a position as the President of Maharashtra State Cooperative Sugar Factories Federation Ltd. There was no correspondence between the association, ISMA and NFCSF.
29. With regard to the grievance of the Informants that ethanol manufacturers in concert with each other quoted prices at the basic price of Rs. 40/- or more, it was submitted that IGL's own subsidiary viz. Shakumbari Sugar & Allied Industries also quoted a basic price of Rs. 41/- per litre in respect of the subject



tender. Thus, it was alleged that IGL was guilty of applying double standards.

30. It was further reiterated that EMAI had no role to play in the business/commercial decisions of its members including those related to the price and quantity for supply of ethanol to OMCs or other consumers of ethanol in the market.

31. Adverting to the news items which appeared in the “Business Standard”, it was submitted that the Informant had distorted the said news item. It was explained that the President of the association only stated that the ethanol production cost at that time had surged from Rs. 36.50 to Rs. 37/- per litre and therefore, there was a need for OMCs to pay Rs. 40/- per litre. It was submitted that this statement was made in the context of a situation where the price of ethanol was fixed by the Government and that it would be incorrect to suggest that the said statement amounted to determining or fixing the price of ethanol at Rs. 40/- per litre. When the Government was fixing the price, EMAI had every right to bring to the notice of the Government that the interim price of Rs. 27/- was totally unreasonable and unfair. According to EMAI, the fair price at that time would have been Rs. 40/- per litre (basic price). In fact, when Government was fixing the price, the views of all concerned parties including the manufacturers and EMAI ought to have been taken into consideration even though the said views were not binding upon the Government.

32. It was further submitted that ethanol manufacturers had quoted different basic prices varying between Rs. 35.00 per litre to Rs. 48.01 per litre and had also quoted varying net delivered price of ethanol in response to the subject tender. There was no correlation between the said statement made by the President of EMAI and the rates quoted by the ethanol manufacturers in response to the said tender. It was pointed out that even though most of the manufacturers quoted basic prices above Rs. 40/- per litre, they had offered quantities amounting to



only 15% of the requirements of OMCs in Maharashtra. If the prices quoted by the manufacturers were in fact inflated prices or prices fixed by cartelization, they would have offered to supply much higher quantities to OMCs.

33. It was also submitted that a cartel is formed to sell a product at higher/ inflated price not consistent with the market price. The sales invoices, produced by EMAI, of its members before the DG showed that the members of the association had in fact supplied higher quantity of ethanol to private parties (chemical industry) as compared to the quantity and price submitted in the tender floated by OMCs.
34. It was stated that the DG without any reason arrived at a conclusion that none of the members of EMAI had quoted price below Rs. 40,000/- per KL whereas the data showed to the contrary that the members of the association had quoted prices varying from Rs. 38/- to Rs. 48/- per litre. Hence, the statement of the President of the association had no correlation with the newspaper report and the tenders filled by the members of EMAI. Merely because OMCs had negotiated with ethanol suppliers which qualified in the tender (L1) and had reduced the price to Rs. 36/ Rs. 37 per litre, did not imply that the price quoted by them were excessive.
35. With regard to meetings convened by EMAI, it was submitted that the meetings held on 09.01.2013 and 21.01.2013 were called by EMAI to explain and train its members to submit online tender of OMCs as it was the first online tender floated by OMCs.
36. In view of the above, it was prayed that no further action was warranted in the present matter and the instant proceeding be terminated without any further order.



Replies/ objections/ submissions of Bharat Petroleum Corporation Ltd., Hindustan Petroleum Corporation Ltd. and Indian Oil Corporation Ltd.(OMCs)

37. In a joint reply, OMCs pointed out that the DG had concluded in its Investigation Report that no evidence of violation of the provisions of the Act by OMCs was found in issuing a joint tender for procurement of ethanol.
38. It was submitted that the sole allegation levied against the OMCs, pertained to issuance of a joint tender and this issue has already been dealt with by the decision of the Commission in Case No. 14 of 2012 decided on 26.07.2012, where reasoning behind such exercise was examined.
39. Further, it was submitted that the Government of India introduced EBP Programme keeping in mind the benefits that such a programme will have on the agricultural sector as well as towards the country's environment footprint. It was stated that requirements of IGL and other purchasers of ethanol were for a different product of lower purity than the product which was required by OMCs for the purposes of blending with motor spirit for the implementation of EBP Programme.
40. It was submitted that OMCs were directly controlled by MoP&NG and, being Government Agencies, they were obliged to act according to the direction(s) of MoP&NG as they were under the *de jure* and *de facto* control of the Government of India through MoP&NG. Hence, if certain directions were issued by MoP&NG, OMCs could not deviate from such directions. It was, therefore, submitted that the ethanol procurement process followed by OMCs was a result of the directions received by OMCs from MoP&NG whereupon OMCs floated joint tenders for procurement of ethanol through a public tender route while was considered as a fair and transparent way for procurement of any commodity or service by all the Public Sector Undertakings and Government Departments.



Replies/ objections/ submissions of Sahakari Khand Udyog Mandal Ltd., Shree Ganesh Khand Udyog Sahakari Mandli Ltd., Shri Kamrej Vibhag Sahakari Khand Udyog Mandli Ltd. and Shree Mahuva Pradesh Sahakari Khand Udyog Mandli Ltd.(Sahakari/ Ganesh / Kamrej/ Mahuva)

41. Replies by these OPs were filed through common counsel and are essentially similar in nature except the figures which are specific to each sugar company. Hence, the same are summarized together.
42. These OPs are cooperative societies registered under the Gujarat Co-operative Societies Act, 1961. The member farmers of such societies are the ultimate owners through their shareholdings in sugar mills. Such mills work on the principle of “no profit no loss” and the surplus of income over expenditure is passed on to the member farmers who have supplied sugarcane during the year to the mills.
43. Adverting to the bids submitted by these companies in response to the subject tender, it was pointed out that during the Financial Year 2012-13, the cost of raw material incurred by these companies for producing ethanol was Rs.33.829, 32.25, 33.68 and 33.06 per litre respectively.
44. It was further stated that the demand for rectified spirit and ethanol in Gujarat is high because of the presence of chemical industries. As per the policy of the State Government, a sugar factory could produce ethanol upto a maximum quantity of 50% of its rectified spirit production, and the main reason for lesser quantity of production of ethanol by these OPs was attributable to non-lifting of ethanol by OMCs.
45. It was submitted that price, depot and the quantity supplied were finalized by the respective Managing Director(s) based on the inputs received from the



concerned Distillery Department and the same were submitted by them through online process under their respective digital signature(s). Further, as OMCs did not lift ethanol as per the schedule submitted by them, it became difficult to store ethanol as it is a perishable commodity.

46. Furthermore, it was submitted that lesser quantity was quoted by these OPs as there was high demand of ethanol in private chemical industries. Thus, in commercial interest, these parties quoted a small quantity for supply of ethanol to OMCs. In view of the aforesaid, it was highly improbable that the parties had indulged and/or formed a cartel for supply of ethanol to OMCs. In spite thereof, the DG in his investigation report has erroneously arrived at a conclusion that these OPs had indulged in bid rigging and contravened the provisions of Section 3(3)(d) of the Act, even though the Informant *i.e.* IGL had not even referred to these OPs or any other sugar mill in Gujarat. The DG had wrongly held that the parties were not able to justify the reason for similarities in basic price as well as the net delivered cost of ethanol and without any iota of evidence drew an adverse inference that these OPs quoted exactly identical prices.
47. With regard to cost of production, it was submitted that the co-operative sugar industry is subject to a lot of controls and restrictions right from the Statutory Minimum Price to be paid to the farmers/ members to the quantity of sugar to be sold in the open market. Therefore, it was impossible, rather very difficult, for the co-operative sugar industry to predict the sales realization price compared to its actual production cost which included cost of raw material for ethanol, processing cost of production of ethanol, administrative and other expenses involved, which contributed in arriving at the production cost of ethanol.
48. It was further pointed out that there was no secret or clandestine meeting held between the answering OPs and other sugar factories. In the absence of evidence of any meeting and/ or exchange of verbal and/ or written communication



amongst the parties, the DG ought to have closed the investigation. It was further submitted that the close similarities of the tender prices quoted by the OPs in Gujarat was a mere coincidence and such coincidences did not contravene any of the provisions of the Act.

49. It was further submitted that the OPs had supplied huge quantities of ethanol to private chemical industries at much higher prices than those quoted in the tender for supply of ethanol to OMCs. It was also pointed out that the sugar industry in the country is not a freely competitive industry. The production of ethanol by a sugar factory depends upon the following factors:

- (a) Ethanol quota depends upon the production of rectified spirit as per the policy of the Government.
- (b) Only 50% ethanol can be produced of the total quantity of rectified spirit produced by the sugar factory.
- (c) Non-lifting of ethanol in time by OMCs also deterred the sugar factories from filling high quota for supply of ethanol to OMCs.
- (d) The policy and procedure adopted by OMCs while finalization of tender by pursuing negotiations with L1 along with L2 also discouraged the sugar factories from submitting the tenders to OMCs.
- (e) The demand for supply of ethanol and price realization in chemical industry was higher than the price finalized by OMCs after submission of tenders. Hence, mainly due to this reason, answering OPs had quoted less supply of ethanol for tender floated by OMCs.
- (f) The EBP Programme of the Government also had a severe impact on the nature of competition within the country. There were Government



restrictions on the quantities of blending of ethanol in petrol which also affected the supply of ethanol to OMCs.

(g) Molasses produced from sugarcane, was the main raw material for production of ethanol and constituted the bulk of the manufacturing costs and played an important role in deciding the production cost of ethanol.

50. It was further submitted that assuming without admitting that if at all in any meeting, during the course of discussions, views were expressed to the effect that it was not desirable to supply ethanol at a price below the manufacturing cost *i.e.* it was not desirable to sell at a loss, nobody could be faulted for the expression of such a view. It was submitted that the wrongful intention of the parties to arrive at the same price should be on the basis of large quantity of supply of ethanol in order to make huge profits by forming a cartel. It was highly improbable and not viable for the parties to supply ethanol at a price less than the manufacturing cost.

51. It was stated that the DG nowhere in the investigation report pointed out that the price quoted by these OPs were exorbitant or bubble price and not in consonance with the then market prices for ethanol. On the contrary, the DG accepted the cost of production of ethanol quoted by the OPs and the realization price for supply of ethanol for the tender. Hence, no cartel and/or bid rigging could be attributed between these OPs in Gujarat.

52. It was also submitted that none of the sugar mills in Gujarat had been allotted any quota of supply of ethanol. Hence, no inference could be drawn that these OPs had formed a cartel and/or indulged in bid rigging as wrongly held by the DG which could be said to contravene the provisions of Section 3(3) (d) of the Act.



53. It was submitted that the sales invoices produced by the OPs before the DG showed that they had in fact supplied higher quantity at higher price of ethanol to private parties (chemical industries) as compared to the quantity and price quoted by them in the tender floated by OMCs.
54. With regard to appreciable adverse effect on competition, it was submitted that even if there was a cartel and/ or agreement to supply ethanol at an agreed price, it could not be below the then prevailing market prices and such a consensus could not be said to be an agreement which was likely to cause appreciable adverse effect on competition within India. The definition of “agreement” includes any arrangement, understanding or action whether it is formal or in writing. The expression of such views did not amount to any arrangement, understanding or action. It was also placed on record that the production cost of ethanol during the Financial Year 2012-13 was Rs. 42.11, 39.65, 41.55. 41.80 per litre respectively for the answering OPs whereas the prevailing market rate was Rs. 40 to 45 per litre. It was stated that these OPs quoted the rate of Rs. 42,100 each per KL each. All those who participated in the tender process had taken their own decisions with regard to the respective sugar factories with which they were associated.
55. It was submitted that there was no meeting attended by these OPs during December 2012 and January 2013. It was further submitted that no tender was allotted to any of the sugar factories in Gujarat State and as such no prejudice was caused to anybody.
56. Based on the above, it was submitted that no further action is warranted and the present proceedings may be terminated without any further orders.



Replies/ objections/ submissions of The Andhra Sugars Ltd.(Andhra Sugars)

57. In the reply, the OP pointed out that it was supplying its entire production of ethanol to pharmaceuticals companies since its inception in 2003-2004. It was submitted that the company supplied ethanol to pharma companies at a price ranging between Rs. 38/- per litre to Rs. 46/- per litre. The details of supplies made to such companies from October 2012 to March 2013 alongwith the prices were also provided. It was further submitted that the answering OP participated in the tender called by OMCs and, after considering the market potential and prevailing market conditions, quoted the basic price at Rs 38.60 per litre for both Vijayawada and Rajahmundry terminals for supply of 1800 KL of ethanol for each terminal which was subsequently finalised at Rs 38.20 per litre.
58. In response to the allegation of bid rigging, it was submitted that the OP was for the first time supplying fuel grade ethanol at market price, since previously it was procured at a fixed provisional price and as such there was no discovered price. The price quoted was based on price being realized from supplies made to alternate customers for similar products. Further, the OP was already supplying to pharma companies between Rs 37 to Rs 39 per litre during the years 2011-12 and 2012-13 and thus based on existing average sale price of about Rs 38 per litre to existing customers, the company quoted a price of Rs 38600 per KL randomly to OMCs in order to have a better chance of winning the bid.
59. It was further submitted that the OP did not quote full production quantity to any of the depot only to apportion some quantum to pharma companies who were supporting the OP for the last 10 years. However, the quoted quantity was significant volume of the total sales of the OP. Further, by supplying some quantity to OMCs, the OP expected to earn better margin from pharma sector by about Rs 2 per litre.



60. It was stated that there was no price approval process for the ethanol tender and only oral approval of the management was taken after considering the prevailing prospective market conditions. Also, there were no pre-bid meetings with other competitors or associations and it did not attend any of the ISMA meetings inspite of being its member.
61. It was further clarified that, total production of ethanol by OP was about 7500 KL per annum, out of which about 4000 KL was supplied to regular pharma companies and the balance 3600 KL was decided to be supplied to OMCs. Thus, 1800 KL each was offered to Rajmudhry and Vijayawada terminals.
62. In view of the above, it was prayed that the DG Report be rejected and an order be passed as the Commission deems fit and proper in the interest of justice.

Replies/ objections/ submissions of Sri Sarvaraya Sugars Ltd. (Sri Savaraya)

63. In its reply, the answering OP raised a preliminary objection stating that the DG had unilaterally impleaded the company without any direction of the Commission and issued probe letters seeking reply and appearance before him. It was submitted that only the Commission could pass orders for impleadment or discharge of a party from the case and the DG possessed no such power or authority. As there was no order passed by the Commission to implead the answering OP, the findings of the DG *qua* it must be set aside. Reference was also made to a decision of the Hon'ble High Court of Madras in the case of *Hyundai Motors India & Ors. v. Competition Commission of India*, (2015) 2 MLJ 560.
64. On merits, it was submitted that mere offer of an identical price or mere price parallelism cannot be the sole factor in determining or proving an allegation of bid rigging or cartelization. It was pointed out that the DG had primarily



concentrated his investigation to State of UP and had failed to conduct a detailed investigation of the bids in respect of the depots located in the State of Andhra Pradesh. It was pointed out that the OP had submitted its bid only for Rajamundry depot in Andhra Pradesh and nowhere else. It was further submitted that the conclusion of the DG that bid rigging had taken place in case of OP and Andhra Sugars was not based on material evidence.

65. It was averred that the DG erred in failing to consider the relevant reasons for identical quotes placed by the OP and Andhra Sugars. It was submitted that these bidders were located in the same State and in fact were practically neighbours carrying out their business in the same area. It was also highlighted that factories of both the parties were only 60 kms apart from each other and the distance of both the factories from Rajamundry terminal was also the same.
66. With regard to prices, it was submitted that the initial price quoted by the OP was arrived at based on sound business decisions and after deliberations within the company. To elaborate, it was submitted that the price quoted in the bid was based on average realization price of ethanol during the preceding nine months. As a matter of fact, a comparison of the net realization value of both the companies would have also led to similarity in basic prices. In fact, OP was receiving higher rate from its alternate customers at an average price of Rs. 41.50/KL in the chemical industry during the period under consideration but despite this, OP opted to supply OMCs keeping in mind higher volume of sales over a consistent period and in the interest of nation with intent to diversify its total market.
67. Also, the OP did not submit a bid for other terminals in Andhra Pradesh or outside due to lack of quantity of ethanol and distance of other terminals from the factory of OP. Further, it was submitted that though both the parties quoted same basic price of Rs. 38600/- per KL but the quantities for which these prices



were quoted differed. The DG erred in taking into consideration basic prices quoted by both the parties which were for different volumes of ethanol. If the ratio of basic rate was to be divided with quantity the parties were willing to supply, then the present OP would in fact be offering a higher rate as compared to the rate offered by Andhra Sugars.

68. It was denied that the answering OP attended or participated in any meeting of bidders or any meeting convened by ISMA in relation to the impugned tender. It was submitted that only one meeting held on 24.01.2013 was organized by ISMA after the release of the tender and no representative of the OP attended the said meeting. In fact, the schedule of the meeting was already circulated on 17.12. 2012 *i.e.* before the announcement of tender.
69. It was further submitted that the minimum benchmark price fixed by the oil marketing companies in the region of the OP was Rs 38,200/- per KL, which was less than the quoted price of OP *i.e.* Rs. 38,600/-. Further, it was ultimately Andhra Sugars which was rated as L1 bidder by OMCs and awarded the Letter of Intent for supply of ethanol at the benchmark rate. It was only subsequently that the OP, who ranked as L2, was given an opportunity to supply the balance quantity requirement which L1 bidder was unable to supply and the same had to be supplied at the rate already accepted by L1 bidder. Thus, OMCs approached the OP for supply of ethanol at the rate fixed by them and the OP had only an option to either reject or accept the said rate.
70. Resultantly, the answering OP prayed that the findings of contravention *qua* it be set aside.



Replies/ objections/ submissions of Bajaj Hindusthan Ltd. (Bajaj)

71. At the outset, the answering OP raised some preliminary submissions and objections by pointing out that the Informant - India Glycols Limited is wearing two hats. On the one hand, it is consumer of special denatured spirit while on the other hand through its 98.99% owned subsidiary *viz.* Shakumbari Sugar & Allied Industries Limited, it is also a manufacturer of alcohol. It was also pointed out that IGL has suppressed this fact from the Commission as also the fact that the Informant through its said subsidiary participated in the bid process for supply of alcohol at a basic rate of Rs. 41 per litre but lost out in the bidding process. Moreover, the product supplied to the Informant was special denatured spirit while the product supplied to OMCs was ethanol, which were not comparable and were commercially distinct in nature.
72. It was further pointed out that there was no direct evidence to support the allegation of cartelization by ISMA and in this connection, it was highlighted that the Informant's subsidiary *viz.* Shakumbari was a member of ISMA and would have been privy to any alleged discussion or agreement by ISMA for rigging the subject tender.
73. Justifying the quoted prices, it was submitted that prior to the year 2009, OMCs were buying ethanol through tender system and all the alcohol producers, including Bajaj, were supplying according to the tender route. However, OMCs, pursuant to a recommendation by MoP&NG, from the year 2010 to 2012 started purchasing ethanol at a fixed basic price of Rs. 27 per litre. The basic price of Rs. 27 per litre was kept as interim in nature which later on became final.
74. It was also stated that in the State of UP itself, the bid basic prices ranged from Rs. 34 to Rs. 37.50 per litre. In fact, the basic prices of ethanol globally were in the range of Rs. 70 to Rs. 90 per litre which was almost double the domestic



rates.

75. With regard to Net Delivered Cost, it was submitted that as per the tender process, the bidders were required to quote basic price of ethanol and Net Delivered Cost which included basic price, taxes and freight charges. The L1 was to be determined by net delivered cost and not on the basis of basic price.
76. Adverting to identical or similar pricing, it was submitted that identical prices by themselves do not prove cartelization. The OMCs had invited bids for 110 depots. However, bids were made only for 71 depots. Of these, identical bids were found only in 5 depots and this can be sheer coincidence resulting from the fact that the sugar industry is highly regulated and the pricing of the most important cost component in the industry *i.e.* sugarcane, is also regulated.
77. With regard to allegations of identical prices in respect of depots located in UP, it was submitted that Bajaj decided the basic price in each State considering various factors like ease of doing business in each State and after deciding the basic price, it quoted the said basic price everywhere in that State. Accordingly, it was submitted that the basic price quoted by Bajaj in UP was the same for all the depots located therein. Similarly, the basic price quoted for different depots in Delhi was also the same. After deciding the basic price for each States, the company decided the NDC on the basis of other factors like distance, taxes, freight, *etc.*
78. Further, it was submitted that the DG wrongly concluded in relation to the price that it had been confirmed by the company that no working sheet was prepared at the time of tender. In this regard, it was submitted that this finding of the DG was completely false as Bajaj never confirmed that no working sheets were prepared in relation to price. Explaining the basis of quoting a figure of Rs. 35,600/- per KL, it was submitted that Bajaj had considered a margin over and



above a figure of Rs. 34,228/- per KL which was an estimated figure for supply of ethanol.

79. Further, adverting to the DG's conclusion that Bajaj had not been able to explain the reason for making a quotation at a price which was not aggressive, it was submitted that the DG never asked this question from Bajaj during investigation and therefore, the DG's said conclusion could not be relied upon by the Commission. It was submitted that the term 'aggressive' was a subjective term which may differ from person to person and what it meant for the DG may not be the same within the business community. In any event, the difference between the price quoted by Bajaj and allegedly benchmarked by the DG to Rs. 34,000/- was negligible.
80. With regard to identical NDC with that of Dhampur Sugar Mills, it was submitted that Bajaj quoted in 10 depots where there were around 50 bids in all and only in one case, the NDC was same, which was partly due to lower estimation of freight for the sake of competition and partly due to mere coincidence.
81. It was further pointed out that a detailed analysis of the bidding pattern brings out that out of total 201 bids, the Informant selectively picked up just 12 bids which coincidentally had been the same and conveniently left out the remaining 189 bids in which the parties had bid differently. Further, out of 64 parties which bid for the tender, only 9 had cases of common bids. It was averred that it was next to impossible to rig the bids in the absence of collusion with other parties. Hence, the only logical explanation for similar bids would be a mere coincidence.
82. With regard to the allegation of the DG that Bajaj quoted identical bids, it was submitted that Bajaj bid in 10 depots and matching NDC was present only in one



of the depots and that too with only one of the bidders and, as such, the same could be attributed to mere coincidence.

83. It was also submitted that for the purpose of finalization of tender, NDC is relevant and not the basic price an aspect which was ignored by the DG with result the Investigation Report continued to harp on the basic price and not NDC. It was pointed out that in case of Bajaj, it was only one place *i.e.* depot of Mathura where NDC of Bajaj was tallying with only one bidder. It was also highlighted that there was no similarity in NDC quoted by bidders in UP for various depots and since L1 was to be awarded on the basis of NDC, there could not be an allegation of cartelization by quoting similar prices. Moreover, in the absence of any knowledge of benchmark prices which was decided by OMCs after the bidding process was over, no cartelization could have taken place.
84. It was also submitted that in the State of UP, the prices quoted by Bajaj were lower than in other States *i.e.* Delhi and Punjab. Quotes in other States like Maharashtra were comparatively much higher *i.e.* above Rs. 40000 per KL.
85. It was also pointed out that EMAI had declared that the price of Rs. 40 per litre was a viable price and the same was also mentioned in an article published in Business Standard on 07.12.2012. It was submitted that this information was public in nature and as such Bajaj was cognizant of the fact that the industry was targeting minimum price of Rs. 40 per litre. Despite this, Bajaj quoted a much lower price *i.e.* Rs. 35.6 per litre in depots of UP. It was also stated that all the bidders in Maharashtra quoted a minimum basic price of Rs. 40 per litre and above. However, all these bidders were not charged of cartelization by the DG. It was not clear as to why the DG had targeted manufacturers of UP who had quoted much lower prices than Maharashtra manufacturers. It was submitted that the DG's finding holding Bajaj guilty of the cartel was wrong also on the ground that it had not held Maharashtra manufacturers guilty even when they quoted



higher price than Bajaj.

86. With regard to meeting of minds, it was submitted that Bajaj was present in ISMA office on 06.12.2012 and 27.12.2012 for discussion on policy matters on ethanol, which could not materialize as the required notification was not issued and the overall presence was very poor. The discussions held on 06.12.2012 and 27.12.2012 were much before the date of issuance of tender. Nowhere in the DG Report or in any of the statements of Bajaj or others, it was satisfactorily conveyed/ proved that price was discussed on these dates. It was further submitted that Bajaj had not attended any further discussion after issuance of the tender. The DG Report *qua* discussion of price on these dates was merely speculative and not corroborated with any evidence. Further, it was pointed out that Bajaj had been attending discussions from time to time with ISMA, strictly on policy matters related to sugar, ethanol, cane, *etc.*
87. With reference to ISMA's e-mail pertaining to the meeting which was to be held on 06.12.2012, it was submitted that it proved that the meeting was held to discuss policy matters. The said e-mail in no way proved that any discussion regarding the ethanol tender was to take place. It was submitted that the finding of the DG in this regard were merely speculative as no recorded minutes of the meetings of ISMA for the whole period of investigation had been cited in the Investigation Report.
88. With regard to call records between Bajaj employees and ISMA office bearers, it was submitted that except for the details of calls made, no incriminating evidence as to the details of conversation made during such calls by way of tape recorded voices had been cited as specific evidence in the Investigation Report. Mere making of phone calls between office bearers of trade association and the executives of the members of the association during period of investigation could



not be construed to hold that these calls were made with ulterior motive of fixing prices unless there was substantial evidence to the contrary.

89. In view of the above, it was prayed that Bajaj has not contravened any provisions of the Act and the proceedings against Bajaj be dropped in interest of justice.

Replies/ objections/ submissions of Avadh Sugar & Energy Ltd. (Upper Ganges Sugar & Industries Ltd. and The Oudh Sugar Mills Limited stood merged with Avadh Sugar & Energy Ltd.) (Avadh Sugar)

90. In its reply, Avadh Sugar pointed out that the DG took the price of Rs. 34 per litre quoted by Kisan Sahkari Chinni Mills (KSCM) – a State run cooperative sugar mill - which was further reduced to Rs. 33.70 per litre, as a benchmark competitive price. Accordingly, the price of Rs. 35 per litre or more quoted by private bidders was found to be above the aforesaid competitive benchmark price. In this regard, it was submitted that no documentary evidence or calculations *etc.* whatsoever were submitted or otherwise brought on record by the DG to show as to how it arrived at the alleged finding that the benchmark price of ethanol was Rs. 33 per litre.
91. It was submitted that the DG noted in the Investigation Report that the prices quoted by the bidders were stated to be based on the prevailing prices of similar products *i.e.* RS (Rectified Spirit), SDS (Special Denatured Spirit) and ENA (Extra Neutral Alcohol) *etc.* It was, however, pointed out that these were entirely different products having a different alcoholic strength and different usages. None of them could be replaced with each other even *qua* their usages and/ or applicability.
92. It was further submitted that the DG noted in the Investigation Report that prices of RS/ SDS during the relevant period were between Rs. 26 to Rs. 28 per litre



whereas the price of ENA was about Rs. 33 per litre and after adjusting the Cenvat credit the net realization from ENA during the tender period was noted as Rs. 31 per litre. It was argued that RS and SDS are two different products and so also their prices. It was pointed out that the prices of RS/ SDS during the relevant period submitted by the concerned bidders were in the range of Rs. 32 to 35 per litre. Further, assuming that price of ENA as noted by DG to be Rs. 31 per litre as correct, even then the benchmark price arrived at by the DG for ethanol at Rs. 33 per litre was beyond any stretch of imagination and incorrect. It was highlighted that the alcohol volume contained in RS/SDS is 94.68% whereas in ENA, it is 95.5% and in ethanol, it is 99.9%. By assuming ENA rate of Rs. 31 per litre to be the base, the additional cost only on account of alcohol shall be a minimum of Rs. 1.5 per litre. Besides, it was pointed out that there are other costs also which go on to determine the price of ethanol.

93. The suggestion of the DG that since a large quantity of ethanol was required there was incentive for bidders in UP to cartelize, was denied. It was submitted that though the total requirement of these depots was approximately 40 crore litres, the offered quantity was only about 33 crore litres, however the contracts were awarded for about 26 crore litres only.
94. Faulting the DG Report for taking KSCM's quote in arriving at a competitive benchmark price, it was submitted that the general rule for taking a sample across globe is to take average of few players/ bidders in the normal market conditions and not solitary examples. If the lowest finalized price is the only criterion to arrive at a benchmark price, it is not understood as to why the basic price of Rs. 31.50 per litre finalized by Shakumbari was not considered as a benchmark price. It was also alleged that price quoted and finalized by KSCM for negligible quantity could not be equated with the bidders quoting a much bigger quantity.



95. Further it was submitted that since the private players were never aware of the benchmark price, the reduction or non-reduction of the prices in comparison to it, was vague and imaginary. Without knowledge of the benchmark prices, the bidders should not be made liable for not reducing the price to bring the same within the benchmark prices. Not even a single litre of ethanol was procured by OMCs over and above the benchmark prices. In all such cases where the final negotiated price offered by L1 bidder was more than the benchmark price, not even a single litre was allotted at such depots.
96. With regard to the prices submitted by bidders outside UP, it was submitted that even though such bidders quoted basic price in the range of Rs. 40 and above and as such much higher than the competitive benchmark price arrived at by the DG at Rs. 33 per litre, none of the them was found to be guilty. Thus, it was alleged that the Report of the DG was biased and was an outcome of discrimination. Further, it was pointed out that the DG though concluded that the behaviour of the bidders in the State of Maharashtra was impacted by the decision of EMAI, yet only the association was found violating the provisions of the Act, bailing out all the members of the said association based in Maharashtra.
97. With regard to the meetings held by ISMA, it was submitted that the representative of Avadh Sugar had visited for a meeting on 06.12.2012 by ISMA to discuss the decision taken by CCEA in its meeting held on 22.11.2012 on ethanol. It had not attended any other meeting as alleged in the DG Report. It was emphasized that all the meetings mentioned by the DG were for the period prior to publication of e-tender, which was published on 02.01.2013. The above mentioned e-tender was admittedly issued for the first time by OMCs and the details of which were neither available nor known to the answering OP. Considering the difficulty likely to be faced by the bidders, various pre-bid meetings at various locations throughout India were conducted.



98. It was denied that ISMA provided a platform for meeting of the bidders of UP. The allegation that all the bidders were guilty of similar bidding was denied as imaginary and wrong. It was pointed out that ISMA is the apex body of about 256 mostly private sugar mills of the country actively involved towards representing the industry before various fora. It was admitted that the answering OP is one of the members of ISMA. It was also stated that the allegation that ISMA was actively participating in discussions with the Government for increase in then ongoing price of Rs. 27 per litre, was based on misleading facts. It was stated that the price of ethanol at Rs. 27/- was interim price fixed by the Government (CCEA) with a promise to provide final price. However, since the final price was not declared, the price at which ethanol was supplied during the entire four year period *i.e.*, from 2008-09 to 2011-12 was Rs. 27/- per litre which could not be considered as actual market price.
99. Lastly, it was submitted that the quantities for different locations were bifurcated as per the past experience and practice besides various other factors such as: (i) to prevent the risk of not getting any order, (ii) to reduce the risk of non-supply, (iii) to ensure regular and an uninterrupted supply and (iv) to get better opportunity to get maximum bid quantity.
100. It was also pointed out that though the DG stated in the Investigation Report that it called for IP addresses of all the bidders, yet the DG has not given any finding about the said IP addresses. Thus, it seems that the DG must have arrived at a finding that the IP addresses of all the bidders tendering the bids were different and as such, it is obvious that no common platform was provided to or used by the answering OP.
101. Finally, it was submitted by the answering OP that the DG Report is a nullity being against material on record besides contrary to the evidences. Hence, it was



prayed that the answering OP be exonerated from all the allegations levelled against it and the Information be dismissed.

Replies/ objections/ submissions of Triveni Engineering & Industries Ltd. (Triveni)

102. The answering OP submitted that no “benchmark price” was fixed before the bidding process. The entire allegation that the bidders sat together and decided to bid in a certain manner to maintain their prices just above the so-called benchmark price was completely perverse and outside the factual matrix. Since, the conclusion of the DG was based upon a non-existent “benchmark price”, the edifice of the entire case fell deserving outright rejection of entire case by the Commission.

103. With regard to prices quoted, it was stated that Triveni had internally discovered a basic price of Rs. 35/- per liter of ethanol to be the lowest at which it had thought of supplying ethanol to OMCs and the same constituted proof of the fact that when Triveni was invited to match a price below Rs. 35/- per litre in respect of Tundla Depot, it refused. This fact alone takes away any allegation of cartelization between any manufacturer of ethanol and Triveni.

104. Further, it was pointed out that the lowest tenderer was to be chosen not in accordance with the basic price but in accordance with the final price after adding the transportation cost and the other costs. Therefore, the approach adopted by the DG to consider only the basic price quoted by Triveni as being of some identity with other manufacturers, was clearly a wrong exercise of power. The DG Report ought to have considered that it was not the basic price which was of any concern but the final landed price which would have been considered by OMCs.



105. It was pointed out that as per Clause 3 of the subject tender, OMCs had an unhindered right either to accept or reject the tender. It was also pointed out that as there was no assurance of the contractual quantity granted even after being held successful in the tender, the entire basis of the allegation of cartelization disappeared. Thus, it was submitted that if OMCs considered the rates discovered under the tender process were prejudicial to them or to the general public, OMCs could have cancelled the tender and called for a re-tender.
106. Moreover, it was submitted that it was upto OMCs to place an indent for supply of quantities as even after allocation of quantities, such quantities were not confirmed, as stated above. To buttress the submission, it was stated that even though Triveni was successful in respect of three Depots of Meerut (Partapur), Mathura and Agra (Tundla) for the quantities of 6000 KL, 2500 KL, 1000 KL respectively, the indents placed for these three depots were only for 4719 KL, 2461 KL and NIL respectively. Thus, the allegation that Triveni could have predicted the quantities in the future while making its bid was baseless.
107. It was further submitted by the OP that the DG was wrong in taking the price of Rs 33.70 per litre quoted by KSCM as the basic price, as KSCM's bid was only for small quantity and normally the quality of a government body was treated as lower to private bodies. This was because private companies had to compete with other efficient private bodies.
108. With regard to meeting of minds, it was submitted that when OMCs did not feel that the prices obtained by them in States other than the State of UP while being above Rs. 40/- were prejudicial to public interest, it was extremely incongruent for the DG to suggest that within the State of UP, a price above Rs. 40/- indicated cartelization.



109. On call data records, it was submitted that the association only provided information about upcoming tenders and also allowed the members to learn the aspects regarding participation in the tender process. The association was not used for the purposes either of any anti-competitive activity or fixing of price since manufacturers were in fierce competition with each other.
110. Lastly, it was submitted that the total tender was for more than 100 crore litres against a production of approximately 74 crore litres. Hence, there could not have been any cartelization. Moreover, the Informant- India Glycols Limited itself quoted a basic price of Rs.41/- per litre through its subsidiary *i.e.* Shakumbari.
111. Based on the above, it was prayed that the present proceedings be dropped in respect of the answering OP

Replies/ objections/ submissions of Simbhaoli Sugars Ltd. (Simbhaoli)

112. In its reply, Simbhaoli submitted that the alleged benchmark price was never a part of tender conditions. The alleged price, if any, was fixed by OMCs being their internal matter and was never disclosed to Simbhaoli prior to or after submitting tender bid. It was further submitted that if the alleged benchmark price was within the knowledge of the bidders, then they could have easily quoted bid price close to the benchmark or lower than the same to become L1.
113. Further, the concept of L1 bidder itself was based on competition by offering lowest price, leaving no scope for further reduction in price during negotiations. If prices were to be further reduced, there was no purpose of becoming 'L1 bidder'. Therefore, the DG's observation that L1 bidder/ Simbhaoli did not reduce price at certain depots was totally misconceived and wrong. Moreover, Simbhaoli being L1 bidder was under no obligation to reduce price as per tender



terms and conditions.

114. On comparison of prices with KSCM, it was submitted that the observation of the DG that KSCM reduced its price while private players did not reduce, was totally wrong and could not be sustained both in given facts and as per the law.

115. Further, as KSCM offered to supply very less quantity in tender bid as per its small production capacity, balance quantity was to be supplied by other L2, L3 *etc.* bidders. Hence, OMCs entered into negotiations with the answering OP and only one unit of Simbhaoli *i.e.* Chilwaria Distillery in UP matched the price offered by KSCM for supplying the balance quantity of ethanol to Kanpur and Lucknow Depots as these depots having huge requirement were near to the Unit of the OP and supply/ transportation cost was less in comparison to other depots. Had Simbhaoli not supplied the balance quantity at these two depots, stock lying with Chilwaria Unit would have been left unsold. Therefore, the DG's observation that there was violation of the Act by Simbhaoli was totally incorrect.

116. It was further submitted that the DG's observation that L1 bidders did not reduce price because of coordinated conduct was incorrect and baseless as bid price was submitted only after proper calculation taking into consideration all the factors. Therefore, question of reducing price did not arise at all. It was stated that depots where OMCs called bidders for negotiation, it was well within the right of L1 bidder to not reduce price. Therefore, the observation of the DG that answering OP did not reduce price was unfounded.

117. The DG's conclusion of coordinated bidding based upon the call records between Shri R.K Singh of Simbhaoli and Shri Arvind Jain of Dhampur Sugar was denied. While admitting such interactions, it was submitted that such conversations took place in normal course of long term relationship as Shri R.K



Singh of Simbhaoli was earlier employed with Dhampur Sugar as a Manager. After joining Simbhaoli, Shri R.K Singh never discussed and/ or disclosed any alleged fact of tender bid in question. The alleged calls, if any, were routine calls between them as they were well known to each other having been associated in same organization since past 20 years.

118.It was stated that interaction of the answering OP with Shri G.K. Thakur of ISMA was with respect to various policy matters, suggestions *etc.* However, the tender in question or bid price were never discussed or disclosed to Shri G. K. Thakur. Therefore, the alleged analysis of the DG on CDRs was incorrect as there was no coordination of Simbhaoli with other bidders or with Shri G.K. Thakur of ISMA.

119.In view of the above, it was prayed that the DG report be rejected with respect to the allegation alleged against the answering OP.

Replies/ objections/ submissions of Dhampur Sugar Mills Ltd.(Dhampur)

120.At the outset, it was submitted that denial of opportunity to Dhampur to cross-examine the witnesses whose statements were relied upon by the DG, was a gross violation of principles of natural justice. It was submitted that the Commission being a regulatory body, is bound to observe the principles of natural justice.

121.Adverting to the price quoted, it was submitted that the DG failed to note that Dhampur quoted a universal basic price of Rs. 35600 per KL across all the depots within UP. Similarly, a number of producers including KSCM, had quoted a uniform price at all the depots in which they participated. Explaining as to how it arrived at the quote of Rs. 35.60 per litre, it was submitted that the



same was based on actual average realization from sale of RS which was Rs. 32.84 per litre at the relevant time. It was also submitted that Dhampur had only two successful bids out of the 6 depots it bid for within the State of UP. The total turnover generated by Dhampur through the 2013 tender amounted to Rs. 65.43 crore. Dhampur could have generated a potential revenue of Rs. 125.60 crore through supply to UP depots had it matched OMCs' benchmark price in all 6 depots at which it participated. At the allegedly cartelized margin of Rs. 1.5 per litre, this worked out to a mere Rs. 2.34 crore as against a total revenue of Rs. 1488.61 crore of the company in the FY 2012-2013. However, while attributing motive and profit maximization, the DG had failed to take this into consideration. The DG had also ignored the fact that the same parties alleged to have cartelized for depots in UP, had quoted different prices for depots located outside State of UP.

122. Challenging the observation of the DG that a quote of Rs. 35 per litre would have been the basic competitive price, it was submitted that OMCs themselves had worked out a benchmark price for each depot which averaged to Rs. 34.22 per litre. Furthermore, an analysis of OMCs' benchmark net price and the final contracted price for the two depots in UP for which Dhampur was awarded contracts (Najibabad and Mathura) showed that the difference per litre between the two was less than one Rupee.

123. Dhampur also challenged the findings of the DG that freight charge quoted by the parties were not found to be based on past payment or the actual freight paid subsequent to award of the tender, to show understanding between the bidders to reach close to pre-determined NDC. It was submitted by Dhampur that it did not contact any freight carrier to obtain actual charges, rather it worked on estimates and a close perusal of the freight rates quoted and the ones actually incurred showed that they were closely related. It was also pointed out that similarity in



prices were observed for those manufacturers situated in a similar range to the depots, as can be expected.

124. The answering OP also challenged the analysis of the DG to establish an agreement between the bidders by correlation between quantities offered by different bidders, the capacity and the previous years' quantity bidding pattern. It was submitted that in terms of quantity offered in the impugned tender to total capacity, Dhampur's percentage of capacity offered was the highest of all the bidders at 70.49%. The answering OP also challenged the DG Report in ignoring Dhampur's explanation for not quoting a full quantity at particular depot. It was pointed out that OMCs in their response to the DG themselves stated that the probable reasons for not quoting full quantity at some of the depots by the bidders might be due to award criteria which was location wise L1. The vendors might have been apprehensive of the fact that if they were not L1 at a particular location and if their entire quantity was offered for that location, then they might not have got any order. Also, there might be instances when due to some constraints, OMCs might not procure ethanol for a particular location.

125. Further, challenging the DG's comparison with KSCM in order to establish that the remaining 13 UP participants had cartelized, it was averred that KSCM and Dhampur both quoted uniform basic price but Dhampur's net price was higher due to the difference in the cost of production of ethanol, freight charges *etc.* which were less for KSCM. However, this aspect was not considered by the DG.

126. With regard to meetings at ISMA's office on 06.12.2012 and 27.12.2012, it had been acknowledged by Shri Arvind Jain of Dhampur that he visited ISMA office on 06.12.2012 and 27.12.2012. However, it was stated that no official meeting took place as the notification had not been issued and only a few members came to ISMA office and that too at different times.



127. Further, reliance by the DG upon call data records of Shri G.K. Thakur of ISMA with bidders just before closing of the tender to base finding of cartelization, was also challenged. It was submitted that apart from the number of events affecting the industry, it was the first time that OMCs had floated an e-tender and this was the first occasion on which bidding was to take place electronically. Hence, it was submitted that it was normal in such circumstances, where an entirely new method of tender participation had been introduced, for industry participants to talk to one another regarding the various queries/ clarifications/ issues they may face. Further, it was also pointed out that the DG called for and examined CDRs for the period December 2012 and January 2013, hence the observation of the DG that there were no calls after the tender closed on 28.01.2013 was meaningless.

128. Concluding the submissions, it was submitted that in light of the decision of the Hon'ble Supreme Court of India in the case of *Excel Crop Care Limited v. Competition Commission of India & Anr.*, Civil Appeal No. 2480 of 2014 decided on 08.05.2017, the turnover accrued to Dhampur through sale of ethanol ought to be considered as the relevant turnover in case of a penalty being levied on it.

Replies/ objections/ submissions of Balrampur Chini Mills Ltd. (Balrampur)

129. In its reply, Balrampur stated that the DG had made cardinal error in not considering the fact that the tender notice was issued on 02.01.2013 whereas the alleged meetings of ISMA were held in December 2012. It was impossible to discuss the requirements of the tender and arrive at a concerted price or allocation of quantity even when the terms of the tender were not known to the bidders/ stakeholders in the month of December 2012. Moreover, the tender was different compared to past tenders and necessitated clarifications in terms of the



new procedure.

130. With regard to ISMA meetings, it was pointed out that the DG relied on the statement of Shri B. P. Agarwal of Seksaria to conclude that representative from Balrampur was present in one or both the meetings whereas no witness testified the presence of representatives of Balrampur in such meetings. As far as Balrampur was concerned, only pre-bid meetings organized by OMCs were attended by Shri Dilip Seksaria in January, 2013 and no other meeting was attended by any other representative of Balrampur prior to the pre-bid meeting. Hence, no corroborative evidence in the form of attending the alleged meeting under the banner of ISMA could be alleged against Balrampur.

131. With regard to e-mail dated 22.01.2013 sent by Shri Rajkumar Rawal of Balrampur to Shri Dilip Seksaria of Balrampur and Shri G.K. Thakur of ISMA, it was stated that the said e-mail contained the distance between distilleries of Balrampur and the depots. This data was already in public domain and such e-mail cannot be said to be shared in pursuance of a cartel. The e-mail was for Shri Seksaria and not for Shri Thakur and this aspect has also been deposed by Shri Thakur before the DG in this testimony. Hence, the DG has wrongly relied upon e-mail in support of his conclusion of communication regarding price and quantity amongst the bidders.

132. With regard to call details, it was submitted that the DG had brought on record details of 13 calls made by Shri G.K. Thakur, ISMA to Shri Dilip Seksaria, Balrampur. From the analysis of the said call details, it could be deciphered that out of the 13 calls made by Shri G.K. Thakur, ISMA to Shri Dilip Seksaria, Balrampur, 8 calls were made either prior to the issuance of the tender or after the date of submission of bids by Balrampur in the tender on 27.01.2013. For the remaining calls, it was pointed out that Balrampur regularly interacted with



ISMA in relation to industry issues that ISMA takes up with the Central and State Governments from time to time.

133. On similarity in bids, it was submitted that basic price quoted by Balrampur was independently determined and was the highest amongst all the bidders in UP. Further, not only did Balrampur refrain from quoting an identical price, but its quote was only in the outer range of all the bids made in the tender. Accordingly, it could not be said that the price quoted by Balrampur was in concert with its competitors.
134. With regard to quantity allocation, the DG erroneously concluded that the quantities offered by Balrampur were a result of a concerted action with its competitors, which allegedly included sharing of quantities at the depots that it bid. Balrampur had bid for four depots in UP *i.e.* at Gonda, Baitalpur, Kanpur and Mugalsarai and offered varying quantities independently, on the basis of certain commercial factors and reasons. The selection of the depots was based on the proximity to Balrampur's distilleries and historical trends. Further, with regard to quantities quoted, it was submitted that no ethanol production for about 3 months during rainy season led to lack of storage capacity limiting Balrampur's bid quantity, the potential and existing commitments for supply to non-OMCs further limited the total quantity by Balrampur. In order to maintain continuous flow of order, Balrampur had to divide its available quantity among various depots.
135. With respect to the DG's conclusion that the prices were high and were on account of collusion, it was stated that the DG failed to consider the major input cost for production of ethanol at the relevant time, which went on to make the price high.



136. Further, it was pointed out that the DG in its Report had stressed upon the fact that none of the private players had quoted price below the benchmark price and had also not reduced the price during negotiations. In this respect, it was submitted that in all the depots that Balrampur quoted in UP, it was not the L1 bidder. Therefore, there was no question of negotiation or reduction of price with Balrampur. Further, the final price awarded to Balrampur was always lower than the benchmark price/ revised benchmark price. Out of the four depots where Balrampur bid in UP, it supplied at a price less than the benchmark price set by OMCs in two depots. In the balance two depots, Balrampur supplied at a price marginally higher than the benchmark price (0.68% & 2.15%), but substantially lower from the revised benchmark set by OMCs. Hence, in spite of quoting a higher price in the tender, Balrampur actually had to reduce the prices substantially thereby reducing its margins. Hence, the prices were not high as in case of a cartel and therefore there could not have been any loss to public at large or OMCs in particular with respect to supplies made by Balrampur under the tender.

137. It was also pointed out that the tender was awarded only post-negotiation by OMCs whereas there was no provision in the tender documents for negotiation with L1 bidder. However, negotiation was a practice followed by OMCs and admitted by the DG. There was no possibility and therefore no incentive for cartelization since the quoted price was not the final awarded price.

138. From a comparative analysis of base price of UP, Tamil Nadu and Maharashtra, it was submitted that both Maharashtra and Tamil Nadu had higher base price in comparison to UP. Analysis of the final price of Maharashtra and Tamil Nadu, decided post-negotiation, highlighted the fact that the same was either low or higher than the benchmark price plus 10% as decided by OMCs.



139. With regard to benchmark price, it was submitted that where the prices of L1 bidders were above the benchmark price, the final price was negotiated with the bidders after enhancing the benchmark price by 10%. However, the DG has not considered the revised benchmark price in its analysis.
140. Lastly, it was submitted that in the absence of any evidence to establish “agreement” amongst the bidders, the allegation against Balrampur deserves to be dismissed. Moreover, in view of there being no “plus factors” the DG erred in relying upon price parallelism alone to conclude cartelization amongst the bidders.
141. On penalty, it was submitted that in the event of the Commission holding Balrampur guilty of contravention of the provisions of Section 3 of the Act, only the “relevant turnover” ought to be considered while imposing the penalty *i.e.* the turnover generated from the product under investigation, rather than the overall turnover of the enterprise.

Replies/ objections/ submissions of Mawana Sugars Ltd.(Mawana)

142. It was submitted that the information was an attempt to misuse the forum of the Commission in blatant abuse of process of law to settle individual business grievances of the Informants against the OPs. Further, it was submitted that only one of the Informants *i.e.* Ester India Chemicals Limited named the answering OP as a party and none of the other Informants made any specific allegation against the present OP.
143. It was further submitted that Mawana’s bid for supply of ethanol was completely independent based on its own evaluation and judgment relating to availability of ethanol and supply thereof against the subject tender of OMCs.



144. It was pointed out that the cross-examination report provided by the DG reaffirmed the position of the answering OP that none of its representatives attended any of the meetings of ISMA or any other association where any matter relating to pricing or quantities of ethanol to be quoted against the subject tender was discussed. It was submitted that the mere presence of Shri Rajesh Dhingra, Retainer, Mawana at the meeting of ISMA held on 27.12.2012 where some discussion relating to forthcoming tender for supply of ethanol to OMCs was alleged to have taken place, was not sufficient to establish charge of cartelization against the answering OP.
145. With respect to CDRs collected by the DG, it was submitted that the sporadic conversations of Shri Arvind Jain of Dhampur with various other persons in the sugar industry did not mean that the answering OP was involved in bid-rigging. It was submitted that the CDRs had been wrongfully used to draw a convenient conclusion to establish that there were discussions amongst the parties in relation to the proposed tender.
146. It was further submitted that the call data record of Shri Arvind Jain did not reveal that even a single call was either made to or received from any person connected with or employed by the answering OP. This therefore established beyond doubt that neither the answering OP nor any of its representatives had ever been in touch with any person whatsoever of the competitors in relation to any discussion relating to subject tender.
147. From the cross-examination of Shri Uday M. Gore, the Chief Operations Manager of BPCL and the industry coordinator on behalf of OMCs, it is seen that as per the CCEA guidelines issued on 22.11.2012, the procurement of ethanol was to be decided by market determined forces. Accordingly, the finalization of the tender was to take place on the basis of L1 procurement price.



In this regard, it was submitted that in any tendering procedure, the tender has to be finalized on the basis of net delivered cost and the basic price was of no consequence in the bidding process.

148. It was also pointed out that the statement of Shri Gore in cross-examination established beyond doubt that the prices and terms on which OMCs bought ethanol was a negotiated price. It is a well-recognized principle that negotiated price is anathema to bid-rigging as understood in the sense of competition law. Therefore, the price or quantity quoted by any vendor was of no consequence as it was the decision of OMCs regarding the price and quantity which was to be considered final. It was submitted that in the case of negotiated purchase of goods or services, no presumption of appreciable adverse effect on competition which is *sine qua non* for invoking the jurisdiction of the Commission under Section 3(3)(d) of the Act could be made.

149. It was also submitted that the benchmark price was internally fixed by OMCs for each depot for internal working/ decision. This benchmark price was not disclosed to the bidders and, in fact, the same was decided after the closure of bids. It was stated that wherever the L1 price was above the benchmark price, OMCs entered into negotiation with the L1 bidders and other bidders for making supply at a lower price *i.e.* at the benchmark price. Also, wherever the quantity quoted by L1 bidder was less than the total quantity quoted at a depot, the L2 bidder was called upon to supply the remaining quantity at the rate finalized with L1 bidder, but the L1 bidder did not have the option to raise the offered quantity. It was stated that the private players who were L1 at a specific depot did not reduce their prices during negotiations with OMCs. It was submitted that this act of the private players could hardly be a ground to infer a coordinated conduct amongst the competitors.

150. A close examination of the case reveals that none of the factors mentioned in



Section 19(3) of the Act having bearing upon appreciable adverse effect on competition is present. Further, the DG has neither alleged nor proved that there existed any “agreement” which had such effect.

151. In sum, it was submitted that the DG appeared to have built the entire case around the fact that the OPs did not agree to reduce the quoted prices to match the benchmark price determined by OMCs whereas a vendor operating in cooperative sector was willing and able to do the same. It was submitted that each vendor operated in its own environment and cost structure, and merely because many others were not able to reduce their respective quotes, it could not lead to the inference that those who did not reduce price were involved in bid-rigging.

Replies/ objections/ submissions of K M Sugar Mills Ltd. (K M Sugar)

152. Challenging the finding of the DG that the bidders cartelized as the private players did not agree to reduce L1 prices upto benchmark prices fixed by OMCs, it was submitted that the said finding was flawed and incorrect.

153. It was further stated that the finding of the DG that prices of RS/ SDS during the relevant period were between Rs. 26 to 28 per litre, was incorrect as RS and SDS were two different products altogether and the prices were also different. The price of RS during the relevant period was Rs. 32 (approx.) as per the statements made by the bidders before the DG. It was also pointed out that no CENVAT Credit was allowed on RS and the finding of the DG in this regard was incorrect and against the statutory provisions. Both ENA and RS were treated exactly in the same way as CENVAT Credit.

154. Adverting to the finding of the DG that the net realized sales price of ENA at the time of tender was @ Rs. 31 per litre, it was stated that even if the price of ENA



was considered to be as stated by the DG, the benchmark price arrived at by the DG for ethanol @ Rs. 33 per litre was beyond any stretch of imagination and was incorrect. It was submitted that the total cost of conversion of ENA to ethanol was Rs. 3 per litre due to reduction in volume, fuel & labour cost and cost of denaturant. This was the bare minimum incremental cost as the industry did not run only on these basic conversion costs. Further, costs such as time, interest charged by bank, administrative cost, risk involved in tender, compulsory supply even during non-production, storage, penalty *etc.* were also involved. Thus, the amount of Rs. 33/- per litre arrived at by the DG was not only imaginary but was also impractical. The DG also recorded a wrong finding that KSCM had reduced its prices to the level of Rs. 33.70 per litre during the course of negotiation. It was pointed out that KSCM itself had stated that the final negotiated price was Rs. 33.80 per litre.

155. With regard to benchmark prices, it was stated that the DG did not mention as to how he arrived at the figure of Rs. 33 per litre to come to a conclusion that the same is the benchmark price. However, it was mentioned that OMCs fixed the benchmark prices on the basis of net delivered cost and the entire tender and its concept to decide L1 for a given location centered around NDC only.

156. Further, it was submitted that since the private players were never aware of the benchmark prices, the reduction or non-reduction of the prices in comparison to benchmark prices was vague and imaginary. In absence of any knowledge about the benchmark prices, the bidders could not be held guilty for not reducing the price to bring the same within the benchmark prices. This was, however, stated to be without prejudice to the averment that not even a single litre of ethanol was procured by OMCs over and above the benchmark prices.

157. Further, even after the finalization of the prices post-negotiations, the answering



OP was not aware of the benchmark price. Thus, the allegation that it purposefully quoted a price more than the benchmark price, was without any substance and was incorrect. It was only through the Report of the DG that the OP for the first time came to know about the benchmark price.

158. The finding of the DG that though the L1 was more than the benchmark prices, the OMCs could not make the private players agree for further reduction and the OMCs were forced to accept L1 prices, was without any substance and incorrect. In all such cases where the final negotiated price offered by the L1 bidder was more than the benchmark price, not even a single unit was allotted and the entire depot was left by OMCs. Thus, the very act of OMCs not accepting even a single bid which was more than the benchmark price clearly showed that the OMCs were under no compulsion and were not pressurized, as alleged by the DG.

159. It was stated that the answering OP was regularly making supply of SDS to the Informants/ chemical manufacturers and the rates were different for different buyers depending on the quantity purchased, period of purchase, production, prevailing market price, duration of supply, location of plant, freight *etc.*

160. It was also stated that the OP was not a member of EMAI and did not attend any of its meetings. It was also pointed out that the only allegation in this regard was with respect to a meeting convened by ISMA which was stated to be attended by the representative of the answering OP on 06.12.2012. In this regard, it was submitted that the said meeting was convened much before the floating of the tender and as such it was incomprehensible as to how a person who was unaware of the details of a future event could be held guilty based on this count. The finding of the DG that the three meetings were convened by ISMA on 06.12.2012, 19.12.2012 and 27.12.2012, was denied being incorrect, misconceived and without any evidence. It was highlighted that the tender was



floated by OMCs on 02.01.2013, whereas the alleged meetings were held on 06.12.2012 and 27.12.2012.

161. With regard to IP addresses of the bidders, it was submitted that though the DG stated in the Report that it called for IP addresses of all the bidders, the DG had not given its findings about the said IP addresses. The fact that all the IP addresses were different showed that no common platform was provided to or was used by the answering OP.
162. In respect of call data records collected and collated by the DG, it was submitted that the same revealed a call between G. K. Thakur of ISMA and the representative of the answering OP of 2 seconds duration. By no stretch of imagination, a person can enter into a cartel within 2 seconds and prepare a technical tender.
163. Further, the answering OP explained its working about the ethanol price which involved various factors such as price of RS, conversion cost from RS to ethanol, cost of denaturant, administrative cost, fuel cost, labour cost, interest levied by banks and financial institutions, risk involved because of penalty provisions in tender, storage conditions and compulsory supply during season and off season, *etc.*
164. It was further highlighted that even though the OP had a capacity to manufacture 7500 KL of ethanol, due to various hindrances and difficulties, it decided to fill a minimum quantity *i.e.* 2500 KL with a view to ensure its existence in the market, where OMCs procure ethanol. If the answering OP had any advantage or profit as alleged, it would have opted for the entire quantity.
165. With regard to the DG's finding that the freight charges quoted by the parties



were not based on actual prices but were simply stated to reach closer to the NDC of other players, it was stated that the finding of the DG was incorrect and against the evidence placed on record. It was pointed out that the answering OP categorically stated before the DG that the freight charges finally paid by it were more than those quoted in the tender. In this regard the invoices raised by the transporters were placed on record. Thus, the finding of the DG that freight charges were quoted not based on actual prices but only to reach closer to the NDC of other private players, was incorrect.

166. In view of the above, it was submitted that the report of the DG is a nullity being against the material on record, contrary to evidences and the answering OP be exonerated of the allegations levelled against it.

Replies/ objections/ submissions of Kisan Sahkari Chini Mills Ltd. (KSCM)

167. The learned counsel appearing on behalf of KSCM supported the findings of the DG report as no finding of contravention *qua* it was recorded.

Replies/ objections/ submissions of Uttam Sugar Mills Limited (Uttam Sugar)

168. At the outset, it was submitted that the DG's findings against Uttam Sugar were bereft of any supporting evidence and did not meet the test of "preponderance of probabilities". The circumstantial evidence relied on by the DG did not establish any infringement by Uttam Sugar. At best, the DG findings only showed parallel conduct by Uttam Sugar, which on its own and in the absence of 'plus factors', was insufficient to establish culpability.

169. Further, it was submitted that the DG's findings were silent on delineation of the 'relevant market'. Failure to clearly delineate the relevant market with respect to



which a coherent competitive analysis can be undertaken has made the investigation utterly arbitrary and has led to erroneous conclusions. In fact, a closer scrutiny of the economic evidence sufficiently demonstrates that Uttam Sugar was not a party to any explicit/ implicit arrangement contravening the provisions of the Act.

170. With regard to ISMA meetings, it was stated that Uttam Sugar's representatives were not present in any of these meetings. Further, Uttam Sugar did not have a distillery in operation till 2012 and therefore it could not manufacture and bid for ethanol tenders of 2006-07 and 2009.

171. With regard to CDRs, it was stated that CDRs did not establish any communication by or to Uttam Sugar.

172. On the quoted prices, it was submitted that Uttam Sugar did not quote identical NDCs in either of the 2 depots it bid for. Further, prices quoted by it were based on its cost of production of ethanol, which was Rs. 37,430/ KL. The DG's findings erroneously recorded Uttam Sugar's cost of production as Rs. 26,540/KL. It was reiterated that narrow price range (*i.e.* parallel conduct) on its own could not be considered as an infringement. The prices quoted by it were based on its cost of production and estimated freight charges. It was submitted that there was definite rationale to the freight charges quoted by Uttam Sugar, which was based on various factors such as distance between Uttam Sugar's distillery and the depots for which it submitted bids, cost of the tanker, halting charges and transit insurance *etc.*

173. Further, the DG's finding that bidders quoted in a narrow range was fallacious as the range varied from Rs. 120 KL to 4,440 KL. It was submitted that Uttam Sugar being a first time bidder, its bid was on a trial basis and the quantity



quoted was dependent on the legitimate apprehension of penalty likely to be imposed. It was also stated that Uttam Sugar could not operate at full capacity as the distillery was commissioned from F.Y. 2012-13. It was also pointed out that the DG Report exonerates bidders in other States for the sole reason that bids in those States were not identical. However, even though the bids of Uttam Sugar were not identical, it was held to have contravened the provisions of the Act by the DG.

174.It was also highlighted that Uttam Sugar was an insignificant player besides being a new entrant. Its distillery was facing serious teething problems and could not operate at full capacity initially and was conducting operational trials till February 2013. Uttam Sugar was never an L1 bidder for the ethanol tender. On the contrary, it incurred penalties with respect to the said tender.

175.In sum, it was submitted that the DG's findings failed to establish any contravention of the Act by Uttam Sugar. Accordingly, it was prayed that Uttam Sugar ought to be exonerated from the present proceedings.

Replies/ objections/ submissions of Dalmia Bharat Sugar & Industries Ltd.
(Dalmia)

176.The DG Report failed to identify or substantiate the existence of any agreement, arrangement and understanding of Dalmia with the other OPs. It also failed to point to any advantage accrued to Dalmia out of such alleged agreement amongst the bidders of the tender. It further failed to consider that the participation of Dalmia in the tender was guided by its own business and commercial considerations such as forfeiture of earnest money amount in the previous financial years, first time production of ethanol and proximity to the depots to which Dalmia tendered its bids, amongst other cost related factors. Further, it



was submitted that Dalmia's bids were similar and not identical to the prices quoted by other parties. In any event, a catena of cases have held that price parallelism is not sufficient to establish violation of Section 3 of the Act.

177. With regard to the findings of the DG that Shri Gopendra Singh, an employee of Dalmia, was a part of the meetings convened by ISMA prior to the release of the subject tender and its reliance on calls made by Shri Gopendra Singh to Shri G. K. Thakur, it was submitted that it was a matter of record that Shri Singh never attended any such meeting. Moreover, Dalmia, in its replies filed before the DG adduced verifiable evidence to show that Shri Singh was not even present in Delhi-NCR on the date of the alleged meetings due to his prior official commitments.

178. Further, it was stated that the DG's report placed unguided reliance on call records of Shri Thakur that contained two calls on two different dates of 164 seconds in total between Shri Singh and Shri Thakur. Due to the passage of time, Shri Singh could not recall exact contents of the calls but he did indicate to the DG that the calls were made to seek clarity on the proposed terms of the tender and to inform Shri Thakur of his inability to attend ISMA meetings. The call dated 27.12.2012 took place prior to the issuance of the tender, and as such, no *malafide* intent could possibly be imputed in the said call. The other call dated 04.01.2013 took place two days after the release of the tender document, which was released on 02.01.2013. Thereafter, no communication took place between Shri Singh and Shri Thakur or between Shri Singh and other bidders till the closure of tender. In any event, no allegation of concerted practice or meeting of minds in relation to the tender could possibly be imputed through this call as it was immediately after the release of the tender and prior to Dalmia having even read and completely understood the contents of the subject tender. Also, it was impossible to collude over calls of such short duration, especially, when in fact



no meetings were attended by the representatives of Dalmia.

179. With regard to quantities quoted, it was submitted that the DG report had erroneously ignored the business and commercial factors that guided not only Dalmia's decision to participate in the tender, but also the quantities that were quoted by Dalmia. The DG Report, for reasons or logic that were not apparent on a plain reading of the text thereof, had erroneously concluded that there was no basis for the quantities quoted by Dalmia in the tender. The quantity of 4,500 KL constituted only 18.75% of Dalmia's total installed capacity and the same was quoted due to past failure to deliver as per the tendered quantity contained in those tender documents as a result of shut down of its sole distillery by the UP Excise Authorities. It was pointed out that under the previous tender, Dalmia had to supply only 5,500 KL, which it failed to supply. Further, as a result of this previous failure, Dalmia had to also forego its earnest money deposited in support of its bid under the previous tender. Dalmia's commitment to its existing customer base was another important factor and it would have been a risky and loss making proposition to quote higher quantities for the tender. The DG report had also clearly ignored the fact that Dalmia was the only bidder which ultimately supplied its entire bid quantity, and at the same price (at the price lower than benchmark price) as that of the selected L1 bidder *i.e.* KSCM, despite not being L1 bidder in any of the three depots. Further, Dalmia's projection for immediate future production was also kept at modest levels after closure of its distillery which had impacted Dalmia's confidence to produce higher quantities for supply under EBP Programme.

180. It was stated that the DG report also erred in concluding that Dalmia's decision not to submit bids for supply of ethanol to other depots indicated division/geographical allocation of depots, amongst all the private bidders from UP participating in the tender. Dalmia had only submitted bids for depots located at



Banthra, Kanpur and Lucknow. This was solely on the basis of the proximity of its distillery at Jawaharpur to these three depots. Dalmia took a commercial and business decision not to place its bids for the depots at Allahabad, Jhansi, or at any depot in UP as they were all farther than these three depots as well as had lower quantity requirements (except Jhansi Depot, whose requirement was marginally higher than the Banthra Depot, but was considerably farther in terms of motorable distance). Under such circumstances, Dalmia would have been unable to place competitive bids had it ventured into bidding for these additional depots since, under the tender, contract for supply was fixed to be awarded on the basis of the net delivered cost. In any event, commercial decision of business entities based on sound economic approach and principles, and without the presence of any of the 'plus factors' was not to be viewed as events leading to/ responsible for formation of cartel.

181. With regard to findings on price fixing, it was submitted that the DG had completely ignored the market dynamics of the sugar industry. The meeting of minds for fixation of price *qua* Dalmia was without any basis because neither Dalmia nor any of its representatives participated in any meetings or discussions which allegedly provided a platform for the alleged cartelization. The DG had failed to take into account the fact that the Indian sugar industry had an oligopolistic market structure, while assessing price quotation from Dalmia. Further, since the quality of ethanol required under the tender was specifically used for the purposes of producing motor-grade fuel, it was difficult to ascertain a market price for the same. ENA is the closest form of ethanol in terms of purity and was already selling at Rs. 33/- per litre. Accordingly, Dalmia factored in the additional cost of distillation of ENA, overhead expenses and after adding a reasonable profit margin, quoted Rs. 35.3 per litre as the basic price for the purpose of placing its bid under the terms and conditions of the tender.



182. Furthermore, the DG ignored the fact that the *ex*-factory cost of production of ethanol, as deemed to be appropriate by the DG, was without inclusion of costs for procurement of molasses, cost of packaging, overhead expenses, cost of electricity, *etc.* It was submitted that while determining the basic price of ethanol to be quoted for the tender, Dalmia had factored in the market price of molasses and the market price of electricity consumed in production of ethanol for the tender to determine the final basic price of Rs. 35.3 per litre.
183. With regard to the freight charges and taxes used to fix quoted prices, it was submitted that the DG's findings are contrary to materials and evidences on record. Dalmia had included freight charges, in its bid, purely on the basis of quotation received from its transport. The local taxes, excise and other such levies were determined by the Central and State Governments and therefore the ethanol manufacturers had no control in determination of the same. As a matter of fact, Dalmia ended up paying more than what it factored in bid price.
184. Further, the DG arbitrarily decided to exclude KSCM from the purview of investigation, at the same time placing heavy reliance upon KSCM's pricing pattern to arrive at conclusions against private bidders, including Dalmia. The DG conveniently decided to exclude the price quoted by KSCM for the purposes of examination of agreement on the price band on the pretext of KSCM being a state aided cooperative mill and others being private players.
185. It was submitted that the loopholes in the DG's theory were evident from ignorance of important aspects that made the alleged cartel theory hinge upon too many unsubstantiated variables. For example, the DG Report failed to acknowledge the fact that there was absolutely no visibility on the exact terms of the tender prior to its issuance on 02.01.2013. The Report erred in assuming that participants in the alleged cartel (including Dalmia) could have successfully



fixed prices, allocated quantities or depots without knowledge of KSCM's (who as per the DG was not a part of the alleged cartel) price, quantity and allocation of bids.

186. In view of the foregoing, it was submitted that the conclusions set out in the DG Report *qua* Dalmia and its participation in an alleged cartel were wholly without any merit whatsoever, unsubstantiated and unsupported by any evidence, direct or circumstantial. It was, therefore, prayed that the Report and the findings of the DG *qua* Dalmia contained therein ought to be set aside in its entirety and Dalmia be dropped from the array of parties in the present matter.

Replies/ objections/ submissions of Seksaria Biswan Sugar Factory Ltd. (Seksaria)

187. It was submitted on behalf of the answering OP that the DG failed to understand the concept of demand-supply gap playing a major role in market-driven pricing mechanism. While analyzing the conduct of ISMA, EMAI, along with the ethanol manufacturers, the DG Report failed to analyze the gap between demand and the available supply of ethanol in the country. The impact of demand and supply could be seen from the statement in the DG Report that '*in UP, where the capacity was in excess- the basic prices quoted were generally below Rs. 37/-. In other parts particularly in Maharashtra and Gujarat where the demand of other products of alcohol are very good, the producers charge higher prices in the tender issued by OMCs*'. Thus, despite acknowledging the existence of the forces of demand and supply, the DG Report continued on its pre-decided disposition to return a finding of collusion against the ethanol manufacturer(s) and their association(s).

188. Further, the DG based its findings on identical prices quoted by some of the



bidders (Bajaj, Dhampur, Upper Ganges/ Oudh Sugars, Mawana, Sir Shadilal-Shamli) for some of the depots. In fact, post the analysis of the conduct of ISMA/EMAI/NFCSF, the entire section up to the final analysis was devoted to the conduct of the above mentioned five bidders in relation to identical pricing in the said tender. Despite analyzing the conduct of only 5 bidders in detail, the DG Report found all the private manufacturers violating the Act solely on the basis of the conduct of ISMA. It was submitted that in the absence of definitive circumstantial evidence, particularly, against the answering OP, such finding was unsustainable. Further, the circumstantial evidence stated in the DG Report fell considerably short of standard of proof for cartelization.

189. It was submitted that as per DG Report, the price band of bids for depots in UP was Rs. 3,500/- (37500-34000), which the DG considered as too small. However, an analysis of the DG's findings with respect to the other States showed that the price band in UP was clearly larger than 6 of the analyzed States.

190. With regard to conduct of Seksaria, it was submitted that it bid for only two depots viz. Kanpur and Lucknow. For both the depots, the answering OP quoted a bid of Rs. 35500/- per KL. The price of main raw material *i.e.* molasses was common for all ethanol producers within the State of UP. The cost of production as submitted by Seksaria was Rs. 28280/KL (2012-13).

191. With regard to KSCM, it was submitted that the DG exonerated KSCM solely because it was a State co-operative.

192. It was further submitted that the DG Report failed to understand the concept of benchmark prices as set by OMCs and the DG's case rests on the sole fact that the parties to the bidding process quoted prices lower than the benchmark price in several cases.



193. The DG also ignored the fact that the lowest prices quoted by the bidders were lower than the benchmark prices set by OMCs. It was incomprehensible as to how an allegation of cartelization can be made when the prices at which goods were being offered by the sellers (bid prices) were lower than the benchmark prices. However, to further support his own assumption, the DG even went on to the extent of ignoring the benchmark prices set by the buyers themselves and set his own benchmark price for analysis of bids.

194. It was submitted that the DG Report has not given any credence to the fact that none of the cases being investigated has been filed by OMCs themselves. Even if it were to be accepted for the sake of assumption that there was an agreement amongst the OPs, the fact that none of the tender issuers filed a case in the Commission was evidence of the fact that no appreciable adverse effect on competition has been caused. The present case has only been filed by certain industry players who were unable to accept the fact that the prices of ethanol increased due to the increased demand arising out of the tender issued by OMCs. In fact, even an existence of an 'agreement' or conclusive proof of meeting of minds has not been proved by the DG.

195. It was further submitted that while analyzing the conduct of ISMA as well as EMAI, the DG Report completely ignored the legitimate objectives of trade associations *i.e.* to voice the concern of the industry against the Government and other stakeholders. The DG Report failed to consider that the pressure being applied by industry association(s) was part of their legitimate role as industry association of ethanol manufacturers as well as a representative of the interests of ethanol manufacturers especially in light of the fact that losses were being incurred to the tune of Rs. 5 per litre by the ethanol manufacturers.

196. In view of the above, it was prayed that the observations in the DG Report



against Seksaria be rejected.

Replies/ objections/ submissions of Sir Shadi Lal Enterprises Ltd. (Shamli Distillery & Chemical Works) (Sir Shadilal/ Shamli)

197. Denying the findings made by the DG, it was stated that the answering OP submitted its bids for two depots viz. Partapur (Merrut) and Aonla. It was highlighted that though the OP quoted a basic price of Rs. 35600/- KL for both the depots, the NDC was different for such depots. In none of the depots, the answering OP was L1. However, it matched the negotiated price of L1 in both the depots.

198. Reference was also made to the conduct of KSCM and it was pointed out that though the capacity of KSCM was 9000 KL, it only quoted for 2500 KL and that too for five different depots quoting a quantity of 500 KL for each depot. Thus, it was argued that splitting of the total quoted figure amongst the nearing depots was a normal phenomenon to minimize the chance of loss and maximize the probability of getting the orders.

199. It was also explained that for Partapur depot, there were 7 bidders out of which the NDC price of only 3 bidders was common and that too because of the basic price and the distance being similar. Similarly, it was pointed out that for Aonla depot, there were 5 bidders out of which NDC price of only 2 bidders was common and that too because of the basic price and the distance being similar.

200. It was also argued that there was no agreement amongst the OPs and that there was no adverse effect or manipulation of bidding process. A comparison was also made with the sugar mills of Maharashtra to argue that the DG had accepted the explanations of such sugar mills whereas in case of sugar mills of UP, their



explanations and reasons for arriving at the basic price despite being supported by the documentary evidence, were not accepted by the DG.

201. Further, it was pointed out that on 21.01.2013, which was considered as a crucial date by the DG when apparently ethanol manufacturers were in touch with ISMA through Shri Thakur, nobody on behalf of the answering OP was in touch with them. This clearly showed that the answering OP was not involved in any bid rigging or collusive bidding. In fact, it was pointed out that interaction of Shri Arvind Jain of Dhampur with Shri Manoj Goel of the answering OP on 27.01.2013, did not disclose any agreement regarding bid rigging/ collusive bidding.

202. Hence, it was claimed that the answering OP has not violated the provisions of Section 3(3)(d) of the Act.

ANALYSIS

203. The Informations in the present cases essentially reveal two issues which need to be examined by the Commission. The first issue is whether PSU OMCs have infringed the provisions of Section 3 of the Act by floating a joint tender dated 02.01.2013 for procurement of ethanol under the EBP Programme. The second issue is whether the sugar mills which participated in the said tender rigged the bids in contravention of the provisions of Section 3 of the Act.

204. Accordingly, the following two issues require determination in the present cases:

- i. Whether the joint tender floated by OMCs is in violation of provisions of Section 3(1) read with Section 3(3) of the Act?



- ii. Whether the tender floated on 02.01.2013 by PSU OMCs was rigged by sugar mills/ ISMA/ EMAI/ NFSCF in contravention of the provisions of Section 3 of the Act?

Issue No. I

Whether the joint tender floated by OMCs is in violation of provisions of Section 3(1) read with Section 3(3) of the Act?

205. Before examining the issue, it would be appropriate to note the background of the Ethanol Blended Petrol Programme (“EBP Programme”). This programme was introduced by Government of India (GoI) keeping in mind the beneficial effects it would have for the agriculture sector as well as towards the country’s environmental footprint. At this stage, it may be noted that ethanol is produced in India from sugar molasses. From molasses, Rectified Spirit (RS) is produced having a strength of 95%. RS is then further distilled to produce ethanol having strength of 99.80% alcohol which can be blended with petrol.

206. Accordingly, EBP Pilot Programme was launched in 2002-03 for 5% ethanol blending with petrol. Pilot project was started at Miraj & Manmad in Maharashtra and Bareilly in Uttar Pradesh. Subsequently, GoI extended EBP Programme to 9 States and 4 UTs w.e.f. 01.01.2003. The programme could only be partially implemented during 2003-04 and 2004-05 due to low availability of ethanol owing to lower sugarcane production.

207. In September 2006, resurgence in sugarcane production led GoI mandate 5 percent blending of ethanol in petrol across 20 States and 8 Union Territories subject to commercial viability. Subsequently, implementation of EBP Programme was deferred by GoI due to short supply of sugarcane in 2007-08. In September 2008, the Union Cabinet approved the National Bio-fuel Policy and five percent ethanol blending was made mandatory across all States in the



country. OMCs contracted for 1.4 billion liters of ethanol for EBP Programme at Rs. 21.50/ liter from November 2006 to November 2009. However, only 540 million liters of ethanol could be procured till April 2009.

208. For the Sugar Years 2010-11 and 2011-12, OMCs floated tenders on 'Expression of Interest' (EoI) basis for supply of ethanol. Under the EoI arrangement, the base price at which ethanol was to be procured, was determined by the Cabinet Committee on Economic Affairs (CCEA) at Rs. 27 per litre as an *ad hoc* interim price. In the meanwhile, a Committee was formed to examine the various issues pertaining to pricing of ethanol for EBP Programme. After due consideration of the report of the Committee (headed by Shri Soumitra Chowdhary) by the CCEA, a Press Release was issued on 22.11.2012 in which it was mentioned *inter alia* that "*the procurement price of ethanol will be decided henceforth between OMCs and suppliers of ethanol*". Subsequently, the Government of India, approved the issue of pricing for procurement of ethanol by OMCs at a price determined by the market forces and OMCs issued the Notice Inviting Tender (NIT) dated 02.01.2013 ('the subject tender').

209. Thus, pursuant to a notification dated 02.01.2013 issued by the Ministry of Petroleum & Natural Gas, Government of India, regarding mandatory 5% blending of ethanol with motor spirit/ gasoline, the government owned public sector oil marketing companies (OMCs) *viz.* IOCL/ HPCL/ BPCL invited quotations from alcohol manufacturers for supply of ethanol through a joint tender dated 02.01.2013 which was issued by BPCL on behalf of OMCs - as the coordinator of the tender process. Through the joint tender, OMCs invited sealed tenders under the two bid system *i.e.* technical bid and price bid from ethanol suppliers. The supply was to be made available to various depots/ terminals of OMCs across the country for a period of one year w.e.f. 01.03.2013. The Informant - India Glycols Limited-, has alleged that OP- 1 to OP-3 in Case No.



21 of 2013 *i.e.* Indian Sugar Mills Association (ISMA), National Federation of Cooperative Sugar Factories Limited (NFCSF) and Ethanol Manufacturers Association of India (EMAI) persuaded the OMCs to come out with a joint tender for the purpose of procuring ethanol. The said joint tendering by OMCs was alleged to be an agreement amongst horizontal players to procure ethanol from various suppliers in contravention of the provisions of Section 3 of the Act which was likely to cause appreciable adverse effect on competition within India in supply and distribution of ethanol. It was also alleged that the sugar manufacturers who had participated in the joint tender of 2013 manipulated the bids by quoting similar rates and in some cases identical rates through an understanding and collective action in violation of the provisions of Section 3 of the Act.

210. In the aforesaid backdrop, before examining the issue of alleged bid-rigging by sugar mills in respect of the joint tender floated by OMCs, it is appropriate to note that the DG did not find any contravention of the provisions of the Section 3 of the Act by the PSU OMCs in floating a joint tender, as such arrangement was found to enhance efficiency in respect of procurement of ethanol by saving wastage of time, money and resources of all the stakeholders including the bidders.

211. The Commission while examining this issue has also perused the submissions made by the parties.

212. The Commission notes that GoI holds a majority of shares in each of the OMCs and as such OMCs work under the concerned line Ministry *i.e.* Ministry of Petroleum and Natural Gas. As pointed out by the OMCs, to ensure that the money of the taxpayers is not wasted, a system has been developed by the Ministry whereby the resources of OMCs are pooled together and distributed equally in the entire country. Accordingly, each of the three OMCs, namely,



IOCL, BPCL and HPCL has to work in close co-ordination and provide *inter se* facilities/ services. Furthermore, apart from the aforementioned functional considerations, the efficiencies and commercial benefits of all the stakeholders are also to be kept in mind while examining the issue of joint tendering.

213.The Commission notes that if separate tenders are issued, it would undeniably amount to multiplying the very same tendering exercise leading to wastage of time, money and resources of the stakeholders. This would have resulted in huge cost to the national exchequer. As EBP Programme was intended to be a continuous process, issuance of independent tenders would have led to inefficiencies in the market.

214.As pointed out earlier, there is a limited quantity of ethanol available in the market and as such for OMCs to comply with the Government's directive of blending ethanol with petroleum, it becomes desirable for them to float a joint tender and distribute equitably the ethanol procured amongst themselves. The Commission notes that issuance of separate tenders may lead to a situation where the OMC issuing the tender first, would be able to procure all or most of the available quantity of ethanol, whereas the remaining OMCs issuing tenders thereafter may only be able to procure the left over quantity, if any. Thus, such a mechanism would have led to more market imperfections due to the rational expectation on the part of the suppliers where the producers and suppliers use past events to predict future business operations. Hence, the remaining quantity may demand higher price in accordance with basic economic theory of demand and supply. In such a scenario, the other OMCs might not be able to procure even the available ethanol in the market. In fact, they might be actually priced out of the market. Moreover, the entire existing system of equitable distribution and functional coordination would also be seriously hampered in case separate tendering is conducted.



215. Moreover, the Commission also noted that since the terms of the tender are same for all the OMCs, floating a joint tender is not only a more efficient option, but is also more cost-effective, since it eliminates cost, time and effort in floating multiple tenders with the same terms and conditions.
216. By floating a joint tender and thereafter, distributing the procured ethanol amongst themselves, the OMCs are also giving themselves an opportunity of equitable blending of ethanol such that, no particular OMC is able to provide the ethanol-blended petrol, to the exclusion of others. By acting in such a manner, all the OMCs are able to fulfil the mandate provided by the Government, without the exclusion of any OMC.
217. In view of the above noted operational and commercial considerations, the Commission holds that floating of joint tender by OMCs for procurement of ethanol *per se* cannot be construed as anti-competitive particularly when such process has evident efficiency benefits, as detailed above. Resultantly, the Commission finds no merit in the allegations levelled by the Informants in laying challenge to the joint tendering resorted to by the OMCs. In this connection, the Commission notes that even the presumption of appreciable adverse effect on competition is not applicable in respect of agreements entered into by way of joint ventures if such agreements increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services by virtue of the proviso engrafted to Section 3(3) of the Act. In the factual matrix of the present case, OMCs have demonstrated efficiencies resulting from the joint tendering process and in the absence of any rebuttal thereto or any other material available on record, the Commission has no hesitation in holding that no case whatsoever has been made out against OMCs of contravention of the provisions of Section 3 of the Act due to the impugned act of floating a joint tender. Such a system is beneficial to suppliers and all other stakeholders as it has demonstrable efficiency in improving the production and distribution of ethanol in an equitable



manner.

218. Before concluding on this count, the Commission is constrained to note the brazen conduct of India Glycols Limited in laying repeated challenges to the joint tendering process which was evidently adopted by PSU OMCs in order to avoid multiplicity of tendering exercise and to attain equitable distribution of procured ethanol amongst OMCs, to carry out the mandate of the Government. Such a procedure has also saved wastage of time, money and resources of the stakeholders besides minimizing the attendant costs to the national exchequer.

219. It may be observed that previously also, the same issue of joint tendering by OMCs was agitated by India Glycols Limited by filing Case No. 14 of 2012 before the Commission. The Commission *vide* its order dated 26.07.2012 closed the case finding no violation of any of the provisions of the Act.

Issue No. II

Whether the tender floated on 02.01.2013 by PSU OMCs was rigged by sugar mills/ ISMA/ EMAI/ NFSCF in contravention of the provisions of Section 3 of the Act?

220. Before analyzing the bidding pattern in respect of the impugned tender of 2013 floated by OMCs for procurement of ethanol, it is observed that earlier the Government of India fixed price of Rs. 27 per litre for procurement of ethanol from the sugar mills which remained unchanged between 2009-10 to the date of the present tender in 2013. As per the terms and conditions of the tender, the L1 for each depot was to be decided on the basis of Net Delivered Cost (NDC) quoted by the bidders. The NDC included taxes and freight charges over the basic price which was mainly ex-factory price of ethanol. It is also observed that the OMCs had decided a benchmark price for all the locations after closing date



of the tender which is linked to the landed cost of Motor Spirit (MS) including excise duty and cost of ethanol blending at each procurement location. At the time of finalization of the price, the price quoted by L1 bidder was compared with the benchmark price of that location and accordingly decisions were taken.

221. The subject tender was floated for procurement of ethanol at 110 depots of the OMCs spread across the country. A total of 75 bidders logged in the system and 69 players submitted bids. On 12.02.2013, the bids were evaluated for technical qualification and 64 bidders were found qualified as per the bid qualification criteria. The details of the minutes of meeting of the Tender Committee held on 12.02.2013 showed the following position:

Total quantity required	: 1404146 KL
Total quantity offered	: 550784 KL
Quantity Offered by L1 bidders whose prices were below benchmark price	: 44000KL
Quantity offered by L1 bidders whose prices were above benchmark prices	: 165803KL

222. On perusal of the bids submitted and finalized for all 110 depots across India, it is revealed that after conducting two rounds of negotiations with the bidders on 27.02.2013 and 15.05.2013, a final decision was taken by OMCs whereby a total quantity of 399603 KL was finalized by OMCs as against the total offered quantity of 550784 KL. It is also noted that at the conclusion of the tender process, many depots out of 110 depots remained without any supply.

223. Before proceeding any further, it is also relevant to note from the records that the manufacturers of ethanol are not spread evenly throughout the country. The depots offered in the tender are spread throughout the country as all OMCs have strategically positioned their depots as per the requirement of supply to petrol



pumps. There is area wise mismatch in the requirements of depots and manufacturing capacities of ethanol available nearby. In general, the prices quoted by the bidders of one State are not comparable with the prices of bidders of other States without considering the respective differences with regard to cost, demand and supply. There was no participation in the tender process in the States of Madhya Pradesh, Chhattisgarh, Odisha, Bihar and Jharkhand.

224. At this stage, it would be appropriate to deal with a preliminary and jurisdictional issue raised by some of the Opposite Parties that the DG exceeded its remit by examining the conduct of the bidders who were not arrayed as Opposite Parties in the present batch of Informations. It was contended that the DG had unilaterally impleaded such companies without any direction of the Commission and issued probe letters seeking replies and appearance. It was further submitted that only the Commission can pass orders for impleadment or discharge of a party from the case and the DG possesses no such power or authority. As there was no order passed by the Commission to implead such OPs, the findings of the DG *qua* them must be set aside.

225. The Commission has examined this preliminary/ jurisdictional issue in light of the material available on record. In this regard, it is noted that though the bidders of other States, except UP, were not named specifically as Opposite Parties in any of the Informations, their details were mentioned in the information filed in Case No. 21 of 2013. Moreover, the order passed by the Commission under Section 26(1) of the Act did not confine the investigation to State of UP. In this regard, it is also observed that by virtue of Regulation 20(4) of the Competition Commission of India (General) Regulations, 2009, the Report of the DG shall contain his findings on each of the allegations made in the information or reference, as the case may be, together with all evidences or documents or statements or analyses collected during the investigation. In these circumstances, no fault can be found with the investigation conducted by the DG in respect of



such bidders who were not specifically arrayed as parties.

226. Furthermore, as noted earlier, the Commission has forwarded copies of DG Reports to such bidders besides hearing them at length. In these circumstances, the Commission finds no merit in the plea raised by such bidders as sufficient opportunity including oral hearings have been accorded to such parties and no violation of the principles of natural justice much less any prejudice has been caused.
227. Having noted the above, the Commission proceeded to first analyse the behavior of the bidders based in State of UP.
228. To appreciate the impugned conduct, it is appropriate to outline the tendering procedure. The tender procedure required the bidders to quote Basic Price of ethanol and Net Delivered Cost (NDC). The NDC comprises basic price of ethanol, taxes and fees applicable and the freight charges. The L1 was to be determined on the basis of NDC and not on the basis of basic price. The bidders were required to mention the basic price, taxes, freight charges and finally the NDC in the tender pro-forma. It may, however, be pointed out that the basic price or the *ex*-factory price was relevant for the purpose of analysis as in the past, procurements had been made by OMCs on a fixed basic price or *ex*-factory price, and all other charges such as taxes and freight charges were paid by OMCs themselves on actual basis or on a pre-determined basis over and above the basic price.
229. The details of prices (basic as well as NDC) quoted by the bidders in respect of all the depots of UP have been tabulated indicating the basic prices, Net delivered Cost and the final price at which the bids were finalized after negotiations between OMCs and the bidders. The same are noted below:



(In Rs. Per KL)

S. No.	Depot	Company	Basic Price	NDC	Final Price
1.	ALLAHABAD	Bajaj	35600	42250.16	41882.18
		Oudh	35400	42275.44	41882.18
		K M Sugar	35050	41882.18(L1)	41882.18
2.	KARARI/AMBABAI (JHANSI)	Simbhaoli	35200	42730.72	42625.44
		Oudh	35400	42625.44 (L1)	42625.44
3.	BAITALPUR DEPOT	Bajaj	35600	42250.16 (L1)	42250.16
		Balrampur	35999	43048.48	42250.16
4.	GONDA DEPOT	Bajaj	35600	42250.16	41880.72
		Simbhaoli	35200	41880.72 (L1)	41880.72
		Balrampur	35999	42448.48	41880.72
5.	KANPUR DEPOT	Bajaj	35600	41900.16	-
		Simbhaoli	35200	42130.72	-
		Oudh	35400	41975.44	40127.68
		Balrampur	35999	43348.48	40127.68
		Manakpur	35999	43348.48	40127.68
		KSCM	34000	40352.40 (L1)	40127.68
		Dalmia	35300	41963.08	40127.68
Seksaria	35500	42187.80	40127.68		
6.	LUCKNOW DEPOT	Bajaj	35600	41875.16	40227.68
		Simbhaoli	35200	42000.72	-
		Oudh	35400	41775.44	40227.68
		KSCM	34000	40452.40(L1)	40227.68
		Dalmia	35300	41938.08	40227.68
		Seksaria	35500	41937.80	40227.68



S. No.	Depot	Company	Basic Price	NDC	Final Price
7.	MUGHALSARAI DEPOT	Bajaj	35600	42600.16 (LI)	42600.16
		Oudh	36500	44061.40	-
		Dhampur	35600	44600.16	-
		Manakpur	35999	43548.48	42600.16
8.	AONLA DEPOT	Upper Ganges	35600	42200.16	-
		Simbhaoli	35000	42250.00	39977.68
		Dhampur	35600	42050.16	-
		KSCM	34000	40202.40(L1)	39977.68
		Sir Shadilal-Shamli	35600	42050.16	39977.68
9.	BANTHRA DEPOT	Bajaj	35600	42100.16	-
		Oudh	36500	43311.40	-
		KSCM	34000	39932.40(L1)	39707.68
		Dalmia	35300	42013.08	39707.68
10	TUNDLA DEPOT	Triveni	35650	43006.34	-
		Simbhaoli	35200	42200.72	41981.90
		Dhampur	35600	42050.16	-
		Mawana	35250	41981.90 (L1)	41981.90
11.	NAIBABBAD DEPOT	Bajaj	35600	41900.16	41850.16
		Upper Ganges	35600	41850.16	41850.16
		Simbhaoli	35000	42025.00	41850.16
		Dhampur	35600	41850.16(LI)	41850.16



S. No.	Depot	Company	Basic Price	NDC	Final Price
		Uttam Sugar	35700	42087.52	41850.16
12.	PARTAPUR DEPOT	Bajaj	35600	41925.16	41625.44
		Upper Ganges	37500	44135.00	-
		Triveni	35400	41625.44(L1)	41625.44
		Simbhaoli	35000	41980.00	41980
		Dhampur	35600	41850.16	41850.16
		Mawana	35600	41850.16	41625.44
		Sir Shadilal-Shamli	35600	41850.16	41625.44
13.	MATHURA DEPOT	Bajaj	35600	42025.16	42000
		Upper Ganges	37500	44735.00	-
		Triveni	35450	42431.62	42000
		Simbhaoli	35000	42000.00	42000
		Dhampur	35600	42025.16	42000
		Mawana	35600	42100.16	42000
		Uttam Sugar	35077	42012.52	42000
		Simbhaoli (Brijnathpur)	35200	42000.72(L1)	42000

230. Further, the details of quantity quoted and offered in respect of the above depots have also been tabulated and the same are noted below:

(In KL)

S. No.	Depot	Company	Quantity Required	Quantity Offered	Final Quantity
1	ALLAHABAD	Bajaj	8618	5000	5000
		Oudh		1500	1118
		K.M. Sugar		2500	2500
				Total = 9000	Total= 8618



S. No.	Depot	Company	Quantity Required	Quantity Offered	Final Quantity
2	KARARI/AMBABAI (JHANSI)	Simbhaoli	6376	1000	1000
		Oudh		3500	3500
				Total = 4500	Total = 4500
3	BAITALPUR DEPOT	Bajaj	15620	9000	9000
		Balrampur		6500	6500
				Total = 15500	Total = 15500
4	GONDA	Bajaj	10092	3000	3000
		Simbhaoli		2000	2000
		Balrampur		5500	5092
				Total =10500	Total =10092
5	KANPUR DEPOT	Bajaj	28196	8500	0
		Simbhaoli		1500	0
		Oudh		5000	5000
		Balrampur		1500	1196
		Manakpur		7000	7000
		KSCM		500	500
		Dalmia		1500	1500
		Seksaria		3000	3000
				Total =28500	Total =18196
6	LUCKNOW DEPOT	Bajaj	16196	6000	6000
		Simbhaoli		1500	0
		Oudh		3000	3000
		KSCM		500	500
		Dalmia		1500	1500
		Seksaria		3000	3000
				Total =15500	Total = 14000
7	MUGHALSARAI DEPOT	Bajaj	26680	19000	19000
		Oudh		500	0



S. No.	Depot	Company	Quantity Required	Quantity Offered	Final Quantity
		Dhampur		4000	0
		Manakpur		7000	7000
				Total =30500	Total =26000
8	AONLA DEPOT	Upper Ganges	11130	5000	0
		Simbhaoli		1500	1500
		Dhampur		3200	0
		KSCM		500	441
		Sir Shadilal-Shamli		1200	1200
				Total =11400	Total =3141
9	BANTHRA DEPOT	Bajaj	5662	3000	0
		Oudh		500	0
		KSCM		1000	1000
		Dalmia		1500	1500
				Total =6000	Total = 2500
10	TUNDLA DEPOT	Triveni	5884	1000	0
		Simbhaoli		1000	1000
		Dhampur		1000	0
		Mawana		2500	2500
				Total =5500	Total = 3500
11	NAJIBABAD DEPOT	Bajaj	16700	4300	4300
		Upper Ganges		1500	1500
		Simbhaoli		1800	1800
		Dhampur		5800	5800
		Uttam Sugar		1800	1800
				Total =15200	Total = 15200
12	PARTAPUR DEPOT	Bajaj	20860	4300	1699
		Upper Ganges		500	0



S. No.	Depot	Company	Quantity Required	Quantity Offered	Final Quantity
		Triveni		6000	6000
		Simbhaoli		1800	0
		Dhampur		6300	0
		Mawana		4800	3775
		Sir Shadilal-Shamli		1600	1258
				Total =25300	Total = 12732
13	MATHURA DEPOT	Bajaj	29862	5800	5800
		Upper Ganges		1000	0
		Triveni		2500	2462
		Simbhaoli		1000	1000
		Dhampur		9800	9800
		Mawana		3800	3800
		Uttam Sugar		3200	3200
		Simbhaoli (Brijnathpur)		3800	3800
				Total =30900	Total =29862

231.To sum up, the details of benchmark prices, L1 prices and negotiated prices in respect of depots located in UP are noted below:

S. No.	Depot	Benchmark Price	L1	Final	Party
1.	Allahabad	41808.87	41882.18	41882.18	K M Sugar
2.	Jhansi	41808.90	42625.44	42625.44	Oudh
3.	Baitalpur	41961.20	42250.16	42250.16	Bajaj
4.	Gonda	41911.16	41880.72	41880.72	Simbhaoli
5.	Kanpur	41479.76	40352.40	40127.68	KSCM
6.	Lucknow	41553.97	40452.40	40227.68	KSCM
7.	Mughalsarai	41692.31	42600.16	42600.16	Bajaj
8.	Aonla	41711.46	40202.40	39977.68	KSCM



9.	Banthra	41784.57	39932.40	39707.68	KSCM
10.	Tundla	41330.53	41981.90	41981.90	Mawana
11.	Nazibabad	41479.76	41850.16	41850.16	Dhampur
12.	Partapur	41330.53	41652.44	41652.44	Triveni
13.	Mathura	41330.53	42000.00	42000.00	Simbhaoli

232. To address the issue of whether there was a cartel and bid-rigging by the Opposite Parties and other bidders who participated in the tender issued by OMCs in January, 2013 in violation of the provisions of Section 3(3) read with Section 3(1) of the Act, an analysis of the bid data collected by the DG with respect to the said tender has been undertaken. It is observed that bids for supply of ethanol were invited for 13 depots located across Uttar Pradesh viz., Allahabad, Aonla, Baitalpur, Banthra, Gonda, Kanpur, Karari/ Ambabai (Jhansi), Lucknow, Mathura, Mughalsarai, Najibabad, Partapur (Meerut), Tundla and 16 bidders viz., Bajaj, Balrampur, Dalmia, Dhampur, K. M. Sugar, K.S.C.M, Manakpur, Mawana, Oudh, Seksaria, Shamli, Simbhaoli, Simbhaoli (Brijnathpur), Triveni, Upper Ganges, Uttam Sugar participated in the same.

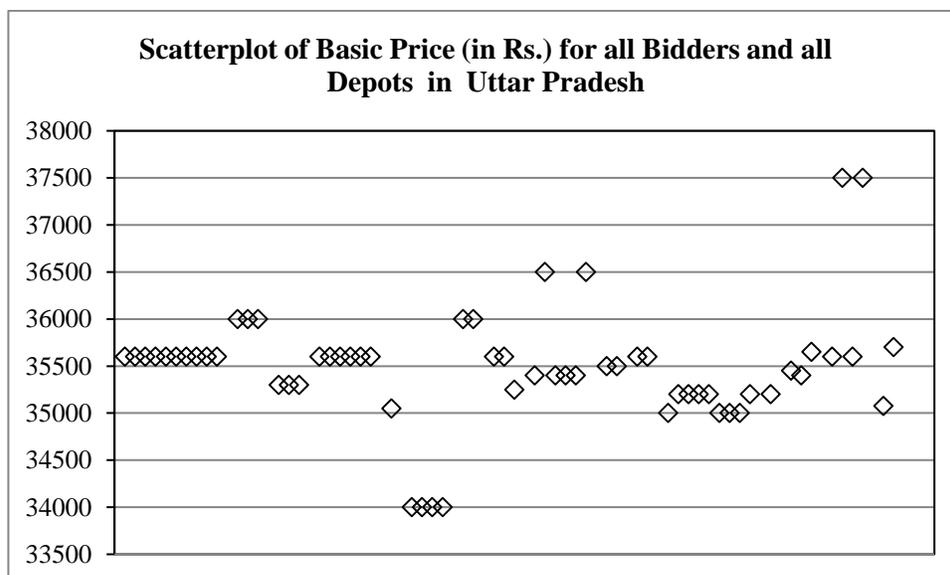
233. From the data relating to basic price and NDC as summarized above, it is observed that KSCM bid for 4 depots and it emerged as L1 at all these four locations. Similarly K M Sugar bid for one depot and had emerged as L1 at that location. Balrampur, Dalmia, Manakpur, Seksaria, Shamli, Upper Ganges, Uttam Sugar did not emerge as L1 at any location. It is observed identical Basic Price of Rs.35600/- KL was quoted by Bajaj for 10 depots, by Dhampur for 6 depots, by Mawana for 2 depots, by Shamli for 2 depots and by Upper Ganges for 2 depots. Similarly, identical Net Delivered Cost of Rs. 41850.16/- per KL were quoted at 2 locations by 5 bidders as follows:



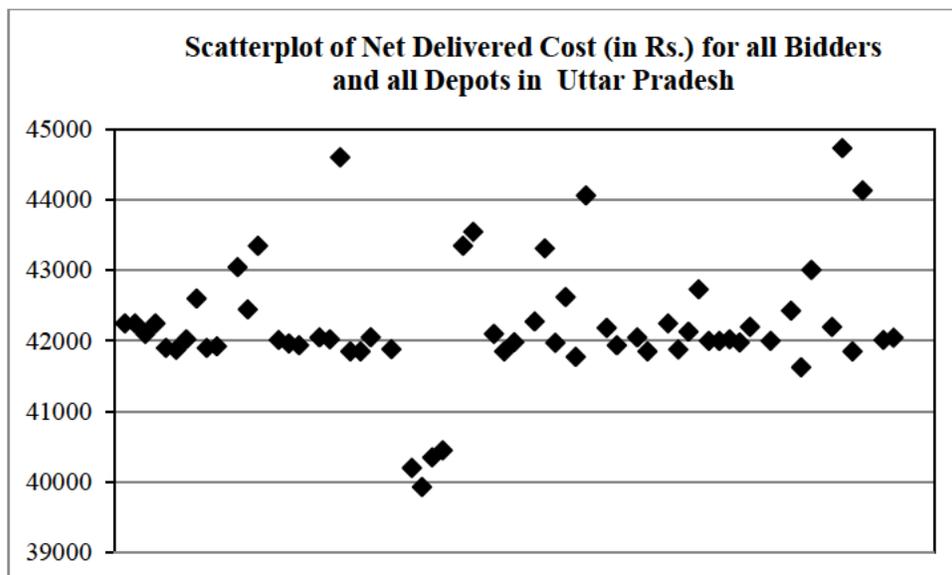
Depot	Bidder
Najibabad	Dhampur* and Upper Ganges
Partaput (Meerut)	Dhampur, Mawana amd Shamli

Note: Dhampur was L1 at Najibabad

234. The distribution of basic price quoted and Net Delivered Cost by the bidders have been depicted by way of a scatterplot to capture the clustering of basic prices quoted as well as to illustrate the variation in the Net Delivered Cost.



235. It can be observed from the above graph that basic price quoted by the sugar mills/ ethanol suppliers is clustered around Rs. 35,600/- similarly the Net Delivered cost was clustered very closely between Rs. 41,700/- and Rs. 42,700/-.



236. The bidders could not offer a satisfactory explanation as to how they arrived at the same basic price and the Net Delivered cost. Lack of satisfactory explanation offered by the parties along with identical basic price and close variation in the Net Delivered Cost indicate that the bid prices have been quoted in a collusive manner.

237. On a careful perusal of the aforementioned details, it emerges that the private players, who were L1, did not reduce their prices any further during negotiations with OMCs. Even though the L1 prices were more than the benchmark prices, the OMCs could not make the private players agree for further reduction. On the other hand, KSCM (a state cooperative) which already had quoted prices below the benchmark price agreed to further reduce the prices whereas the private players did not reduce their prices during negotiation process with OMCs.

238. Further, from the analysis of above data, the DG also deduced the following points:

- (i) The basic price quoted by UP bidders in respect of depots of UP are



found to be mostly in the small price band of Rs. 35/- to 36/- per litre. In this price band, the price quoted by KSCM at Rs. 34/-per litre is excluded as KSCM is a state run cooperative mill.

(ii) Similarly, the Net delivered Cost (NDC) of all the private bidders of UP are very close to each other and the same is found to be mostly in the range of Rs.41700 to Rs. 42,500 per KL.

(iii) There appears to be a visible synergy and correlation amongst the private bidders as far as Basic prices and Net delivered cost quoted by them are concerned particularly in respect of depots of UP.

(iv) At many depots the basic prices of bidders are found to be identical.

(v) At some of the depots the Net delivered cost are also found to be exactly identical.

(vi) The quantities quoted by the bidders in UP almost matched with the quantity required at almost every depot.

(vii) There were 13 private players who participated in 13 depots of UP, yet the total quantity offered by the players was close to the total required quantity.

(viii) At some of the depots like Kanpur, Mathura where there were 8 bidders, still the offered quantity clinically matched with the required quantity.

239. On a closer examination of the behavioral conduct of the bidders in respect of procurement for depots located at UP, it emerges unmistakably that bids were



quoted in a very narrow price range in respect of basic price and NDC, by all the private players. It also emerges that two or more bidders in respect of 5 depots viz. Partapur, Aonla, Najibabad, Mathura and Mughalsarai quoted exactly identical basic prices. Further, it is also observed that bids quoting identical NDCs were submitted in respect of 4 depots (Aonla, Najibabad, Partapur, Mathura) of Western UP by 5 bidders (Dhampur, Bajaj, Upper Ganges, Sir Shadilal-Shamli and Mawana).

240. At this stage, the Commission also notes that the plea of the bidders that out of 110 depots across India, the instances of identical bidding are only few, is misconceived. It is observed that the bidders were not competing in respect of all 110 depots. In fact, most of the bidders have concentrated only in 4-5 depots located near to their respective distillery. Hence, their conduct has to be judged and analysed on the basis of the depots where they submitted their bids, and not on pan-India basis. There is economic rationale for the bidders to bid for the depots which are in the vicinity of their distilleries as freight charges are factored in the final bid price *i.e.* NDC and the low freight charges would obviously result in low NDC leading to success in the bidding process.

241. It is also evident that total quantity offered by bidders matched total required quantity in most of the depots. On a bare perusal of the quantities required by OMCs and quantities offered by the bidders in respect of the depots located in UP, it is evident that the total quantity quoted by the bidders were quite close to total quantity required by OMCs in respect of different depots of UP. This is quite clearly indicative of an understanding, coordination and concerted approach adopted by the bidders who participated in respect of the depots located in UP in order to share the quantities amongst themselves through such anti-competitive behavior. No plausible explanation could be offered by the bidders for such pattern. The DG examined at length the representatives of such



bidders during investigation and it was categorically found that none of the bidders had been able to provide the basis for specific quantity quoted in respect of the specified depots in respect whereof they submitted their bids. In fact, it was recorded by the DG that the bidders accepted that the figures mentioned in quantity column were random. Such explanation defies any rationale as it would be too much of coincidence that the required and offered quantities matched so clinically. In fact, the DG went on to examine the plea taken by some of the suppliers that the decision *qua* selection of depots and quantities offered was based on their past experience. On a detailed comparison of the quantities offered by the bidders in the previous years *vis-à-vis* the tender year of 2013 by the DG, it emerged that no co-relation existed between the quantities quoted in the current tender and the supplies made by the respective parties in previous years. This only strengthens the collusive arrangement entered into by the bidders in respect of the supplies to be made at the depots located in UP.

242. The afore-detailed pattern of bidding is indicative of concerted understanding amongst the bidders. In this regard, the Commission further examined as to whether there was any agreement amongst the bidders on a particular price band. From the data analysed in the earlier part of the order in respect of the depots located at UP, the Commission notes that the lowest basic price quoted was by KSCM of Rs. 34000 per KL. In this regard, it is observed that KSCM is a state run cooperative mill, whereas all the other bidders are private players. Hence, if the bids of KSCM are excluded, the price band of private bidders ranges between Rs. 35000 per KL to Rs. 37500 per KL. However, as noted by the DG, if the basic price of Rs. 37500 per KL quoted by Upper Ganges at Mathura depot is excluded which was accepted to be non-serious by the company itself, the price band essentially ranges between Rs. 35000 per KL to Rs. 35999 per KL. Similarly, the price range of NDC is between Rs. 41775 per KL to Rs. 44735 per KL. Hence, there was a difference of about Rs. 3000 per KL in the NDC quoted



by the private players.

243. On an analysis of the pricing pattern, the DG observed the following points to have emerged therefrom:

- (i) None of the private players of UP has quoted a basic price below Rs.35000 per KL.
- (ii) There is a price band of Rs.1000 (between Rs.35000 to 36000 per KL) in which all the parties have quoted. The quote of Rs.37500 by Upper Ganges was accepted as a non-serious in the statement of Shri Mahesh Agarwal of Upper Ganges. Thus, the price range was essentially limited between Rs. 35000 to 35999 per KL in respect of all the depots of UP.
- (iii) On analysis of NDC, it is seen that at Jhansi (karari) depot, there was a gap of about Rs.105/- per KL only in the NDC prices of two bidders viz. Oudh Sugars and Simbhaoli Sugars. Similarly, the difference in other depots was very narrow.
- (iv) It may be mentioned that as a market practice the prices are not reported in KL but in litre and if we take the said market practice the gap was very narrow among the bidders.
- (v) The basic price of Rs. 35.50 per litre becomes the average price of all the bidders. Price difference amongst most players is found to be in the range of 50 paise.
- (vi) Prior to this tender, ethanol was being supplied at a fixed basic price of Rs.27/- per litre. The parties could not explain as to how all the private players of UP discovered prices between Rs.35 to 36 per litre in the tender.



- (vii) Further, in addition to the narrow price band the issue of not quoting the price below Rs.35000/- per KL is an important fact to show some kind of understanding among the private players.
- (viii) Even though KSCM being a very small player quoted a basic price of Rs.34000/- per KL, the private players who were having advantage of economies of scale and integrated units could match or quote below Rs.34000/- per KL.
- (ix) The prices quoted by the bidders have been stated to be based on the prevailing prices of similar products *i.e.* RS/SDS/ENA. The prices of RS/SDS during the relevant period were between Rs.26 to 28 per litre. Prices of ENA were about Rs.33 per litre. However, on sale of ENA the Cenvat credit is not allowed to manufacturers, whereas RS and Ethanol sales get Cenvat credit which means the net realisation from ENA was about Rs.2 per litre lower than the sales price. This makes the net realised sales price of ENA at the time of tender to be Rs.31 per litre.
- (x) Considering the price of Rs. 34/ per litre quoted by KSCM, the calculation of Rs. 33/- per litre as a benchmark price was further justified for analysing the competitive price for the purpose of tender. It is also noted that KSCM further agreed to reduce the prices during negotiation upto Rs.33.70 per litre.
- (xi) It is also noted that the other bidders in the depots where KSCM had participated agreed to reduce their prices to the level of Rs. 33.70 during the course of negotiation.
- (xii) Thus, the benchmark price for supply of ethanol in tender of January 2013 was found to be a price around Rs.33 per litre.



244. Further, the bidders who participated in the tender could not explain satisfactorily the basis of the prices quoted by them. In this regard, the Commission also notes from the comparison chart of cost of production *vis-à-vis* the prices quoted by the bidders, as tabulated by the DG, wherefrom it is noticed that the prices quoted by the bidders had no relation with the cost of production. For ready reference, the comparison chart of cost of production is noted below:

Comparison Chart of Cost of Production

Company	COP (2012-13)	Minimum BP quoted	Margin
BAJAJ**	26390.00	35600.00	9210.00
UPPER GANGES**	17790.00	35600.00	17810.00
OUDH**	20056.00	35400.00	15344.00
TRIVENI	28310.00	35400.00	7090.00
SIMBHAOLI	29200.00	35000.00	5800.00
BALRAMPUR	21980.00	35999.00	14019.00
MAWANA	29160.00	35250.00	6090.00
K M SUGAR **	25490.00	35050.00	9560.00
KSCM**	21210.00	34000.00	12790.00
UTTAM SUGAR##	26540.00	35077.00	8537.00
DALMIA##	19180.00	35300.00	16120.00
SEKSARIA	28280.00	35500.00	7220.00
** For 2011-12 as information for 2012-13 not available.			
## does not include selling and administrative <i>etc.</i> charges which vary between Rs. 2 to 4/ per litre.			
Source- Replies of parties to Notices dated 19.06.2013			

245. Furthermore, it remains unexplained as to why none of the bidders quoted a price below Rs. 35 per litre. This pricing pattern, when juxtaposed with the



quantitative pattern of the bids, further reinforces the inevitable conclusion that the bidders ensured *inter se* that there should be no cross-cutting in terms of pricing and quantity. Such arrangement was facilitated by the platform provided by ISMA and signals provided by EMAI, which will be dealt with in the later part of this order.

246. At this stage, the Commission deems it appropriate to address a common refrain of the bidders that mere offer of an identical price or mere price parallelism cannot be the sole factor in determining or proving an allegation of bid rigging or cartelization. There can be no dispute with the proposition that the law is well settled that price parallelism *per se* is not sufficient to establish collusion. However, unexplained parallel conduct coupled with plus factors would go a long way in establishing the collusive and concerted arrangement amongst the participants. These other aspects have also been examined by the DG and are discussed in the succeeding paras of this order.

247. The Commission has examined quoting of identical freight charges as an additional factor to establish the collusive conduct of the bidders. In this regard, the analysis done by the DG in respect of some of the depots located in UP may be noted:

Mathura Depot

At Mathura depot the Net delivered Cost quoted by Bajaj and DSM was Rs. 42025.16 per KL. This included Basic price of Rs.35,600/ quoted by both and freight charges of Rs.925/ per KL . It was found that the freight charges quoted by them was not based on any actual quotations but was only based on estimates. The factories of these two companies are situated at a distance of 200 -250 KM from Mathura. Another bidder Simbhaoli Sugars who is located



only about 100 Km. from Mathura quoted a figure of Rs.1574/- per KL on account of freight charges. Further, when asked about the actual freight charges paid by them, Bajaj has stated that they paid freight of Rs. 1380/- per KL against the quoted freight of 925/- per KL. Similarly DSM has actually made freight payment of Rs.1129/- onwards as against the quoted freight of Rs.925/- Thus, there was no real basis or correlation between the freight quoted and the actual freight while submitting the figures of freight charges in their respective bids by the bidders. The fact that two main components of NDC being basic price and freight charges were not based on any real working or calculations and yet they were exactly identical in the case of a number of bidders cannot be accepted as a mere coincidence.

Similarly the analysis of other depots where identical NDC has been quoted by the bidders has revealed the same result.

Aonla Depot

At Aonla depot DSM and Shamli have quoted NDC of Rs. 42,050.16/ per KL. The freight charges have been quoted at Rs.925/- per KL by both the parties. DSM has its factory at about 150 Km and Shamli at about 270 Km from Aonla depot. Another bidder, Simbhaoli which has its factory at a distance of about 175 km, quoted Rs.1824/ as freight charge. The reason for quoting exactly identical freight charges of Rs. 925/- when there is a difference of more than 100 km in distance has not been explained by the companies.



Najibabad Depot

At Najibabad Depot, DSM and Upper Ganges have quoted Rs.725/- on account of freight charges and their NDC at Rs. 41,850.16 was exactly identical. Other bidders like Uttam Sugars which has its factory at lesser distance than DSM and Upper Ganges quoted Rs.875/- as freight charges. Further, it is submitted by DSM that they have paid actual freight charges of Rs.659 to Rs.689. There is no explanation as to how the freight charges and basic charges of two competitors matched exactly.

Partapur Depot

At Partapur Depot, Meerut the NDC of three bidders viz. DSM, Mawana and Shamli matched at Rs. 41850.16 per KL. The figure of freight charges mentioned by all the three bidders matched at Rs.750/- per KL. The distances are different for these companies yet the freight charges matched. Mawana is closest located at a distance of about 25 Km, Dhampur is at 120 Km and Shamli at about 100 KM while DSM is at about 120 Km, still the identical freight charges of Rs.750/- per KL were quoted by the above three parties. It is further noticed that Simbhaoli Sugars situated at a distance of 60 KM from Partapur Depot quoted a figure of Rs.1554/- as freight charges. The above mentioned parties could not explain the reason for quoting identical freight charges.

248. From the above, it is obvious that no plausible explanation could be offered by the bidders as to how the freight charges could match exactly despite substantial variance in distance between the distilleries of the bidders and the depots for which they participated in the bidding process. It is also found that the freight charges quoted by the bidders were neither based on the actual figures of past



supplies nor the same were found to have any connection with the actual charges paid by them to the transporters after award of tender. On the contrary, as noted above, despite difference in the distance between the depot and factory, identical freight charges have been quoted by the bidders. Such conduct can only be an outcome of collusive behavior and not the result of free market forces.

249. The Commission also finds no merit in the plea that the DG has only picked few depots and players for the purpose of investigation to arrive at a finding of contravention against few bidders leaving the rest. The Commission notes that bidding was depot-wise and therefore the DG was justified in focussing investigation on the depots where the bidding pattern appeared to be collusive. The DG has conducted a detailed investigation after examining the bidding patterns of various depots. In these circumstances, the plea of some of the parties that the DG cherry picked only few depots and bidders, is not only untenable but has no basis in law or in facts. The infringing bidders can derive no sustenance from the fact that no collusive conduct was found or was otherwise present in respect of the remainder of the depots or the bidders.

250. It has also been argued by some of the parties that there is no direct evidence of collusion and the entire finding of the DG is just based on circumstantial evidence. The Commission notes that since prohibition on participating in anti-competitive agreements and bid-rigging and the penalties which infringers may incur are well known, it is normal for such practices and agreements to take place in a clandestine fashion, for meetings to be held in secret, and for associated documentation to be reduced to a minimum. The Commission in this regard notes that in respect of cases concerning cartels which are hidden or secret, there is little or no documentary evidence and the available evidence may be quite fragmentary. The evidence may also be wholly circumstantial. It is therefore often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be



inferred from a number of coincidences and indicia, which, taken together, in the absence of any other plausible explanation, may constitute evidence of infringement of the competition law. In the present case, the material on record clearly establishes that the bidders have acted in a collusive and concerted manner while quoting prices and quantities. In the absence of any logical or plausible explanation offered by the parties, the impugned conduct of the bidders when viewed collectively, shows that there was no other plausible explanation other than that the OPs have engaged in bid-rigging.

251. In view of the foregoing discussion, the Commission is of the considered opinion that the bidders who participated in respect of the depots located in UP, in response to the joint tender floated by OMCs, have acted in a concerted and collusive manner in submitting their bids. This is evidenced from the prices quoted, quantities offered and the explanations given by the parties. Moreover, such collusion is also strengthened from bidders utilizing the platform of ISMA as also from the signals emitted by EMAI which influenced the bidding behavior of the parties, as detailed in the succeeding paras.

252. Having first examined/ analysed the behavior of the bidders based in the State of UP, the Commission proceeded to analyse the conduct of the bidders in respect of depots located in Gujarat and Andhra Pradesh.

Gujarat Depots

S. No.	Name of parties Depot	Total Qty. Required (KL)	Qty. offered (KL)	No. of bidders	Parties with identical prices (Rs. Per KL)	NDC (Rs. Per KL)
1.	Hazira	13765	3100	6	42100- Ganesh	48064.06
					42100- Mahuva	48063.56



					42100 – Sahakari Khand	48064.06
					42100 – Kamrej	48064.06

Andhra Pradesh Depot

S. No.	Name of Depot	Total Qty. Required (KL)	Qty. offered (KL)	No. of bidders	Parties with identical prices (Rs. Per KL)	NDC (Rs. Per KL)
1.	Rajamundri	5366	5300	3	38600-Andhra Sugars	44945.96
					38600- Sarvariya	44945.96

253.To ascertain the cause for such identical prices upto the last decimal point, the DG examined the representatives of the concerned bidders and the testimony of such representatives was also recorded.

254.It is observed from the above that identical bids were submitted in Gujarat by four bidders viz. Shree Kamrej Vibhag Sahakari Khand Udyog Mandli Limited, Sahakari Khand Udyog Mandai Limited, Mahuva Pradesh Sahkari Khand Udyog Mandai Ltd and Shri Ganesh Sahkari Khand in respect of Hazira depot. It is also noted that The Andhra Sugars and Sri Sarvaya Sugars have quoted exactly identical figure for basic price as well as NDC for Rajamunduri depot.

255.The representatives of the aforesaid sugar mills were confronted by the DG. In the depositions recorded by the DG, the parties have not been able to give any plausible justification for similarities in basic price as well as the NDC. The freight charges quoted by them were also noted by the DG to be without any basis. There was no earlier discovered price which could have resulted in similarity in the rates of all the bidders. No plausible explanation was furnished by the bidders in respect of identical pricing.



256. In view of the above, the Commission is of the considered opinion that similarities upto decimal figures cannot be an outcome of a price discovered through a competitive bidding process but is the result of collusive and concerted behavior of the parties.

257. At this stage, the Commission reiterates that though the aforesaid bidders of Gujarat and Andhra Pradesh were not specifically named as Opposite Parties in the Information, their details were mentioned in the Information filed in the Case No. 21 of 2013. Furthermore, the direction issued by the Commission *vide* its order passed under Section 26(1) of the Act did not restrict the scope of the investigation to any particular State. In this view of the matter, no fault can be found with the DG's findings *qua* such bidders in respect of States of Gujarat and Andhra Pradesh, and the objection taken by the parties that the DG acted beyond the mandate given by the Commission, is without any basis and the same is rejected. Needless to add, such parties were forwarded copies of investigation reports and were also accorded opportunity of hearing and in these circumstances, the Commission is of the opinion that no jurisdictional error has been committed by the DG, nor any breach of principles of natural justice is observed.

258. Some of the Opposite Parties during the course of arguments on the DG Reports made specific criticism on the ground that the DG examined producers of UP leaving out the producers located in Maharashtra. No strength can be derived by the bidders of UP merely on the ground that the bidders of other States have not been examined by the DG if the impugned conduct of UP bidders is found to have contravened the provisions of the Act. However, in light of the mandate vested in the Commission to remove distortions in the market, the Commission, while remanding the matter back to the DG for further investigation, was of the opinion that having collected the necessary data and investigated into the matter,



it was incumbent upon the DG to have analysed the same and to have made its recommendations/ findings in respect of the depots in the State of Maharashtra as well. Accordingly, the Commission *vide* its order dated 30.10.2017 directed the DG to make further investigation/ analysis and submit a supplementary report on the specific issue identified in the said order. The DG has since submitted the supplementary investigation report to the Commission after addressing the issues highlighted by the Commission.

259. It is observed from the Supplementary Investigation Report that the DG made an analysis in respect of the 20 bidders who submitted their respective bids for 11 depots in State of Maharashtra *viz.* Akola, Akolner, Khapri, Loni, Manmad, Miraj, Solapur, Shirud, Chandrapur, Vashi and Wadala. It is noticed that no bid was submitted for Chandrapur depot. A brief account of the bids submitted in respect of the depots in State of Maharashtra is noted below:

(i) No. of bidders	20
(ii) Quantity requirement met	15.10% (Qty. reqd. 315252 KL; Qty. offered 47600 KL)
(iii) Basic price range	Rs.40,000/- to Rs.48,012/-
(iv) Delivered price range	Rs.45,544/- to Rs.55,662.09
(v) All bids were in excess of Rs. 40000/- and above	
(vi) At none of the locations, the requirement was met.	

260. At this stage, it would be appropriate to note the details of the bids in respect of different depots of State of Maharashtra and the same are tabulated below:

**Depot- Akola****Total Quantity required- 18506 KL**

Nameof the bidder	Basic Cost (in Rs.)	Net Delivered Cost (in Rs.) (after VAT set off)	Quantity Offered (in KL)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. before VAT setoff) (in Rs.)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. afterVAT setoff) (in Rs.)	Quantity Finalized (in KL)
Bhaurao Chavan SSK Ltd.	40800	47545.24	1500	45999.00	43908.55	1500
Purna Sahakari Sakhar Karkhana Limited	40000	47044.00	500	45999.00	43908.55	500
Gangakhed Sugar & Energy Limited	42000	49836.20	1000	45999.00	43908.55	1000

Depot- Akolner**Total quantity required -9092 KL**

Nameof the bidder	Basic Cost (in Rs.)	Net Delivered Cost (in Rs.) (after VAT set off)	Quantity Offered (in KL)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. before VAT setoff) (in Rs.)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. after VAT setoff) (in Rs.)	Quantity Finalized (in KL)
Padamshri Dr. Vitthal Rao Vikhe Patil Sahakari Sakhar Karkhana Limited	42000	48453.70	2500	45000.00	42917.41	2500

**Depot- Khapri****Total Quantity required- 29378 KL**

Nameof the bidder	Basic Cost (in Rs.)	Net Delivered Cost (in Rs.) (after VAT set off)	Quantity Offered (in KL)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. before VAT setoff) (in Rs.)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. after VAT setoff) (in Rs.)	Quantity Finalized (in KL)
Purti Power & Sugar Ltd.	41700	47354.12	3000	47000	44785.72	3000

Depot- Loni**Total Quantity required- 64404 KL**

Nameof the bidder	Basic Cost (in Rs.)	Net Delivered Cost (in Rs.) (after VAT set off)	Quantity Offered (in KL)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. before VAT setoff) (in Rs.)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. after VAT setoff) (in Rs.)	Quantity Finalized (in KL)
Shree Renuka Sugars Limited	48010	55120.04	3000	45006.00	42910.49	3000
Sterling Chemicals & Alcohols Pvt. Ltd.	41250	47528.50	2000	45006.00	42910.49	2000
Ajinkyatara Sahakari Sakhar Karkhana Limited	40000	46944.00	600	45006.00	42910.49	600
Mumbai Fabrics Private Limited	40000	45944.00	1500	45006.00	42910.49	1500
Raosahebada Pawar Ghodganga Sahakari Sakhar Karkhana Ltd.	41000	47602.60	600	49905.98	47602.60	Nil
Daund Sugar Ltd.	41500	47629.40	1500	45006.00	42910.49	1500



Baramati Limited	Agro	43000	49564.80	2500	45006.00	42910.49	2500
Laxmi Industries Ltd.	Organic	40750	47362.25	2000	45006.00	42846.63	2000
The Sahakari Karkhana Ltd.	Malegaon Sakhar	41000	47492.60	1000	45006.00	42910.49	1000

Depot- Manmad**Total Quantity required - 49898 KL**

Nameof the bidder	Basic Cost (in Rs.)	Net Delivered Cost (in Rs.) (after VAT set off)	Quantity Offered (in KL)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. before VAT setoff) (in Rs.)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. after VAT setoff) (in Rs.)	Quantity Finalized (in KL)
Padamshri Dr. Vitthal Rao Vikhe Patil Sahakari Sakhar Karkhana Ltd.	42000	48734.95	2500	51094.51	48734.95	Nil
ARSS Biofuel Pvt. Ltd.	40500	46705.80	900	48981.09	46705.80	Nil

Depot – Miraj**Total Quantity required- 27030 KL**

Nameof the bidder	Basic Cost (in Rs.)	Net Delivered Cost (in Rs.) (after VAT set off)	Quantity Offered (in KL)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. before VAT setoff) (in Rs.)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. after VAT setoff) (in Rs.)	Quantity Finalized (in KL)
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Rajarambapu Patil Sahakari Sakhar Karkhana Ltd.	40400	48294.44	1500	46933.87	44837.06	1500
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Depot- Solapur**Total Quantity required -16818 KL**

Nameof the bidder	Basic Cost (in Rs.)	Net Delivered Cost (in Rs.) (after VAT set off)	Quantity Offered (in KL)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. before VAT setoff) (in Rs.)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. after VAT setoff) (in Rs.)	Quantity Finalized (in KL)
Shree Renuka Sugars Ltd.	48011	55416.84	3000	47004.00	44841.92	3000
Vitthalrao Shinde Shahkari Sakhar Karkhana Ltd.	43000	49404.80	1500	47004.00	44481.92	1500
The Saswad Mali Sugar Factory Ltd.	40360	46948.50	1500	47004.00	44841.92	1500
Majalgaon Shahkari Sakhar Karkhana Ltd.	41000	47495.60	1000	47004.00	44841.92	1000
Manjara Shetkari Shahkari Sakhar Karkhana Ltd.	40700	47596.77	700	47004.00	44841.92	700

Depot- Shirud**Total Quantity required -1850 KL**

Nameof the bidder	Basic Cost (in Rs.)	Net Delivered Cost (in Rs.) (after VAT set off)	Quantity Offered (in KL)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. before VAT setoff) (in Rs.)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. after VAT setoff) (in Rs.)	Quantity Finalized (in KL)
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Shree Renuka Sugars Ltd.	48012	55622.09	1000	50046.79	47743.41	Nil
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Depot- Chandrapur**Total Quantity required- 1856 KL****As per information submitted by OMCs, no bid was submitted for Chandrapur Depot.****Depot- Vashi****Total Quantity required- 37238 KL**

Nameof the bidder	Basic Cost (in Rs.)	Net Delivered Cost (in Rs.) (after VAT set off)	Quantity Offered (in KL)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. before VAT setoff) (in Rs.)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. after VAT setoff) (in Rs.)	Quantity Finalized (in KL)
Shree Renuka Sugars Ltd.	41010	46945.09	2000	44959.00	42846.63	2000
Mumbai Fabrics Private Limited	40000	45544	2000	44959.00	42846.63	2000
Laxmi Organic Industries Ltd.	40750	47362.25	3000	44959.00	42910.49	3000
ARSS Biofuel Pvt. Ltd.	40500	50190.47	900	52465.76	50190.47	Nil

**Depot- Wadala****Total Quantity required – 59182 KL**

Nameof the bidder	Basic Cost (in Rs.)	Net Delivered Cost (in Rs.) (after VAT set off)	Quantity Offered (in KL)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. before VAT setoff) (in Rs.)	Final Negotiated/ Matched Price (Net Delivered Cost Per UOM i.e. after VAT setoff) (in Rs.)	Quantity Finalized (in KL)
Shree Renuka Sugars Ltd.	41011	50425.56	500	52729.56	50425.56	Nil
Mumbai Fabrics Private Limited	40000	48897.04	1500	48854.00	46710.73	Nil
ARSS Biofuel Pvt. Ltd.	40500	50190.47	900	52465.76	50190.47	Nil

261. On a careful perusal of the bidding pattern and submissions/ depositions of bidders in respect of the various depots (10) where bids were submitted in State of Maharashtra, the Commission is of the considered opinion that, unlike the bidding pattern (prices and quantity) in UP and Andhra Pradesh, bids for net delivered cost were not similar in respect of such 10 depots. In so far as Loni depot is concerned, basic price of few bidders matched. It is observed that Ajinkyatara Sahakari Sakhar Karkhana Limited and Mumbai Fabrics Private Limited quoted the same basic price of Rs.40,000/- per KL whereas Raosahebada Pawar Ghodganga Sahakari Sakhar Karkhana Ltd. and The Malegaon Sahakari Sakhar Karkhana Ltd. had quoted the same basic price of Rs.41,000/- per KL. However, bid price for NDC submitted by different parties was found to be different. Further, out of the abovementioned four parties, only Ajinkyatara Sahakari Sakhar Karkhana Limited made supply of ethanol to OMCs. Written responses and depositions of the parties could not lead the



investigation to establish any coordination or agreement amongst the aforesaid four bidders for Loni depot as well. Accordingly, no case of contravention of the provisions of Section 3 of the Act is made out against any of the bidders who submitted their bids in respect of the various depots located in State of Maharashtra.

262. Having examined the conduct of the bidders across States (UP, Gujarat, Andhra Pradesh and Maharashtra) and having found the bidders of UP, Gujarat and Andhra Pradesh to have indulged in bid rigging, the Commission deems it appropriate to examine the role of ISMA/ EMAI and NFCSF in facilitating the bid rigging.

263. To examine the role played by ISMA, it is noted that immediately after the Press Release dated 22.11.2012 in respect of the decision of CCEA regarding change in pricing mechanism, ISMA had convened meetings of ethanol manufacturers on 06.12.2012. Subsequent to this, meetings were convened on 19.12.2012 and 27.12.2012. However, no details of these meeting were provided by ISMA in response to the probe letters issued by the DG during the course of investigation.

264. In this regard, it was submitted by ISMA that though a meeting was convened on 06.12.2012, the said meeting could not take place as the number of members who attended the office on 06.12.2012 was less than expected. The next meeting scheduled on 19.12.2012 was deferred to 27.12.2012. It was submitted that the meeting on 27.12.2012 also could not take place as very few members came to attend the said meeting.

265. In the aforesaid backdrop, the matter was further investigated by the DG in detail to find out the purpose and nature of the said meetings called by ISMA.

266. During the course of investigation, some of the members of ISMA who attended those meetings provided the information about the meetings held by ISMA in



December 2012 in respect of Ethanol supply to OMCs. The representatives of companies who had attended these meetings have categorically stated the details of these meetings in their statement recorded under oath by the DG. The representatives of following companies have confirmed that they attended the meeting convened by ISMA in December 2012 in respect of supply of ethanol:

- i) Bajaj Hindusthan Sugar- Shri Amit Agarwal and Shri J.P. Shah
- ii) Dhampur Sugar Mills - Shri Arvind Jain
- iii) Balrampur Chini Mills - Shri Dilip Seksaria
- iv) Triveni Engineering- Shri Anil Khatri
- v) Upper Ganges & The Oudh Sugar -Shri Mahesh Agarwal & Shri Shishir Agarwal
- vi) Simbhaoli - Shri Rakesh Kumar Singh
- vii)Seksaria- Shri Ramesh Chandra Singhal and Shri B.P. Agarwal
- viii) KM Sugars- Shri B.M. Shrivastava
- ix) Mawana - Shri Rajesh Dhingra
- x) Dalmia Bharat- Shri Gopendra Singh
- xi) Sir Shadilal-Shamli - Shri Manoj Goyal
- xii)Uttam Sugar - Shri Sanjay Govil

267.The DG also obtained e-mails of Shri G. K. Thakur, Director-Policy (Sugar & By-products), ISMA [the then Dy. Head-Policy (Sugar & By-products)] from the service provider. It appears from the e-mails that Shri Thakur sent e-mails to ethanol manufacturers in respect of meetings to be held on 06.12.2012 and on the subsequent dates.

268.The DG also examined on oath Shri Abinash Verma, Director General, ISMA and Shri G. K. Thakur, at length and recorded their statements *in extenso* in the investigation report.



269. On a perusal of their testimonies, it emerged that no specific details of meetings were given by Shri Abinash Verma, D.G., ISMA on the pretext of having no record. It was also claimed that no formal meeting could be conducted as scheduled. When the companies who participated in the tender have confirmed that they attended the meetings convened by ISMA, the statement of Mr. Abinash Verma is found to be evasive and untrue. There can be no reason to hide the facts about the meetings except that the ISMA wanted to hide the details of these meetings of ethanol manufacturers from the Commission. Further, any specific, cogent and convincing reason could not be given by Shri Verma as to why a meeting of ethanol manufacturer members was called by ISMA at the first place, when the member companies were themselves competent enough to deal with the tender process. He has also not been able to give any convincing explanation in respect of necessity and requirement of calling the executives of Bajaj Hindusthan, a non-member to the meeting convened in the office of ISMA.

270. It is noticed that the meetings of the ethanol manufacturer members were called by Shri G.K. Thakur by way of email. As stated by him, the meetings were called with the approval of Shri Abinash Verma, DG, ISMA. As can be noticed on the perusal of statement of Shri Thakur, he has not been able to give any cogent and logical reply in respect of purpose of calling the meeting. His reply has been found to be inconsistent. At one point, he has stated that the purpose of the meeting was to discuss the change from fixed pricing policy to market driven price mechanism. Then, he went on to state that since blending had been made mandatory, the meeting was called to discuss that also. When he was confronted with the fact that EBP Programme was made mandatory even in October, 2007, it was stated by Shri Thakur that the purpose of the meeting was to motivate the ethanol manufacturers to supply ethanol to achieve the blending programme of the Government. When confronted with the fact that the AGM of the Association was already scheduled on 13.12.2012 in which the office bearers could have very



well requested the members to actively participate in the said EBP Programme and what was the further requirement of calling the meeting of senior executives on 06.12.2012 ahead of AGM, Shri Thakur could not give any convincing explanation apart from the averments that it is not necessary that all the members manufacturing ethanol would have been present in any AGM or any other meetings. The said explanation of Shri Thakur has no legs to stand. Shri Thakur was also asked to give the agenda of said meeting, but he could not provide the same. He was also asked whether any presentation was prepared for discussion in respect of EBP Programme to which he replied in negative. The above facts coupled with the conduct of ISMA in hiding the details of meeting leads to the conclusion that the ISMA was taking an active role in providing a platform to all the competing bidders of UP for discussion and coordination amongst themselves in order to obfuscate the whole bid process of OMCs.

271. It is also noted that ISMA has invited Bajaj Hindusthan, a non-member, to the meeting. Neither Shri Verma, DG nor Shri G.K. Thakur, could give any logical explanation in respect of invites to Bajaj. The replies of Shri Verma and Shri Thakur have been found to be evasive and it appeared that they were not forthcoming to disclose the truth and correct facts. Shri Verma could only state that there was no restriction on the Association for meeting any sugar company which is not member of ISMA. It was stated by Shri Thakur in response to Question No.23 of his statement dated 15.04.2015 that since Bajaj Hindusthan Limited was one of the largest manufactures of ethanol in the country, it was thought fit by Shri Verma and Shri Thakur to invite Bajaj in the meeting even though the said company was not a member of the Association. However, Shri Thakur could not answer or recall whether Shri Amit Agarwal or Shri J.P. Shah of Bajaj, who were specially invited, attended the aforesaid meetings of ISMA on 06.12.2012 or 27.12.2012. The extent of non-cooperation of Shri Thakur can be inferred from the fact that in his statement in answer to Question No.29 posed



by the DG, he stated that he did not remember whether any representative from Bajaj or any other sugar mills was present in the said meetings convened by ISMA. He went on to state that – *“I cannot say about any particular person whether he attended ISMA office or meeting on that particular day”*. His answers to question Nos. 29 to 35 are found to be evasive. The investigation found that Shri Amit Agrawal and Shri J. P. Shah of Bajaj not only attended the meetings on said date but also continued to interact telephonically with Shri Thakur during the tender period in January 2013. The call data records of Shri Thakur’s mobile confirmed this fact. Shri Thakur, when confronted with the call data records during the course of recording his statement during his subsequent statement on 07.07.2015, accepted that the mobile numbers of Shri Amit Agrawal and Shri J. P. Shah were saved in his mobile and that he communicated with them. It is obvious that Shri Verma and Shri Thakur have concealed the facts regarding the details of the meeting which were known to them.

272. From the aforesaid, it is clear that ISMA was proactively facilitating coordinated action by ethanol manufacturers. As noted above, ISMA even invited Bajaj in the meetings as it was the largest ethanol manufacturers controlling more than 40% of the market share in UP. Needless to add, no coordination amongst ethanol manufacturers of UP could have been successful without Bajaj being a party to such concerted effort. Such actions coupled with evasive responses of ISMA representatives lead to inescapable conclusion that ISMA acted as fulcrum to the whole arrangement. Furthermore, the DG obtained call data records (CDRs) of Shri Thakur and analysed them in great detail. It emerges from such details that Shri Thakur of ISMA was frequently interacting with the representatives of bidding companies during the relevant period. In fact, the DG noted that on 21.01.2013, Shri Thakur was interacting with a number of representatives of the OPs in the evening. Even on the last date of submission of bids *i.e.* 28.01.2013, Shri Thakur was found to be in communication with such



representatives of ethanol manufacturers. Crucially, the DG noted that the interactions stopped after 28.01.2013.

273. Further, the Commission finds it strange that ISMA does not maintain register of visitors and the records of communications. No register of attendance of members attending the meetings of ISMA were produced.

274. Some of the bidders claimed that they have not attended the meetings convened by ISMA and also submitted that there was no communication of their representatives with their competitors during the relevant period. This plea is of no assistance to the parties. It is not necessary that all the bidders must operate in a symmetric, syncretic and aesthetic way all the time. More often than not, every attempt would be made by the participants to hide their coordinated behavior and it would be only on a few occasions when the authorities may be able to gather evidence of the entire concerted behavior. More often than not, participants in a cartel would try to mislead the Authorities by breaking the patterns of coordinated action from time to time in order to create a façade of competitive scenario when none exists. In such a situation, few instances itself would indicate a smoking gun and which would unfold the entire conspiracy alongwith other factors. This is amply exemplified in the present matter when the entire evidence is examined and assessed in an holistic manner. Same is true for various explanations given by different bidders in respect of the quoted bid price and the quantities.

275. In view of the above and also considering the past history of ISMA in facilitating concerted bidding in respect of the tenders floated by OMCs, as recorded by the DG, the Commission has no hesitation in holding that ISMA was actively involved with the bidding parties during the relevant period of the tender of January 2013. The evidence adumbrated hereinabove establishes that ISMA has



violated the provisions of Section 3(3)(a), 3(3)(b) read with Section 3(1) of the Act.

276. That brings the Commission to examine the role played by EMAI in facilitating rigging of the bids in respect of the tender of 2013.

277. In this regard, the DG found that Shri V. M. Patil, President of EMAI, made a statement with respect to price of ethanol which was reported in a business daily *i.e.* Business Standard, Mumbai Edition of 07.12.2012. Shri Patil had categorically stated in that statement that the ethanol manufacturers wanted OMCs to pay Rs. 40 per litre. EMAI, however, stated that the newspaper item was interpreted incorrectly and that it had no role to play in the decision making activities of its members. However, the DG found that EMAI was also constantly striving for increase in procurement price for ethanol, on account of increase in cost of production. Before the issue of tender, ethanol suppliers/ bidders across the country had created a benchmark of Rs. 37 per litre. In Uttar Pradesh, where the capacity was in excess, price quoted was below Rs. 37 per litre. On the contrary in states like Gujarat and Maharashtra, where the demand was high, suppliers were attempting to increase the prices. Statement of Shri Patil was recorded by the DG. He was confronted by the aforesaid newspaper clipping to which he responded that his views/statement were wrongly construed and that he had also requested the concerned newspaper to publish a corrigendum/ rebuttal.

278. Furthermore, the DG has also highlighted that the members of EMAI are mainly based in Maharashtra. The members of EMAI were found to have followed the lead given by the President, EMAI in his press statement that the price of ethanol should be more than Rs.40/- litre. It also emerged that EMAI conducted two meetings (on 09.01.2013 and 21.01.2013) after the announcement of tender where all the members were called to Mumbai.



279. On a careful perusal of the conduct of EMAI as noted hereinabove, there is no doubt that the behavior of the bidders was influenced by EMAI and such conduct of EMAI is found to have contravened the provisions of Section 3(3)(a) read with Section 3(1) of the Act.
280. So far as the conduct of NFCSF is concerned, the DG did not find any evidence on which a finding of contravention can be recorded against it. Neither the Informants could point out any such material against NFCSF wherefrom any infringing anti-competitive conduct could be attributed to it. Having examined the material on record, the Commission is satisfied that no anti-competitive role can be attributed to NFCSF in manipulating the bidding process.
281. In terms of the provisions contained in Section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void. Further, by virtue of the presumption contained in sub-section (3), any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which- (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; or (d) directly or indirectly



results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

282. Further, as per the explanation appended to sub-section (3) of Section 3 of the Act, “bid rigging” means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

283. In case of agreements as listed in Section 3(3) (a) to (d) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition; the onus to rebut the presumption would lie upon the parties. In the present case, the OPs could not rebut the said presumption. Further, the OPs have not been able to show how their impugned conduct resulted in accrual of benefits to consumers or made improvements in the production or distribution of the goods in question. In fact, far from accrual of any benefits, the impugned conduct of the OPs had virtually sabotaged the Government of India’s flagship programme which was conceived to have beneficial effects on the agricultural sector besides improving the environment footprint.

284. As the bidders are sugar companies engaged in similar business of manufacturing of sugar and its by-products, and are therefore, operating at the same level of the production chain, allegations of anti-competitive agreements, decisions or practices among them squarely stand covered within the ambit of Section 3(1) read with Section 3(3) of the Act.

285. Further, it may be noted that the definition of ‘agreement’ as given in Section 2(b) of the Act requires, *inter alia*, any arrangement or understanding or action in



concert whether or not formal or in writing or intended to be enforceable by legal proceedings. The definition, being inclusive and not exhaustive, is a wide one. An understanding may be tacit and the definition under Section 2(b) of the Act covers even those situations where parties act on the basis of a nod or a wink. The Commission notes that the Act envisages civil liability. Thus, the standard of proof required to prove an understanding or an agreement would be on the basis of ‘preponderance of probabilities’ and not ‘beyond reasonable doubt’. There is rarely any direct evidence of action in concert and in such situations, the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In light of the definition of the term ‘agreement’, the Commission has to assess the evidence on the basis of benchmark of preponderance of probabilities.

286. Applying the aforesaid legal test to the evidence detailed in the present case, the Commission is of the considered view that the bidders through their impugned conduct have contravened the provisions of Section 3(3)(d) read with Section 3(1) of the Act by acting in a collusive and concerted manner which has eliminated and lessened the competition besides manipulating the bidding process in respect of the impugned tender floated by OMCs. Their conduct stands established from series of actions taken by them which are detailed in the preceding paras. To sum up, the bidders who participated in respect of the depots located in UP, Gujarat and Andhra Pradesh in response to the joint tender floated by OMCs, have acted in a concerted and collusive manner in submitting their bids. This is evidenced from the prices quoted, quantities offered and the explanations given by the parties. Such collusion is further strengthened from the fact that the bidders utilized the platform of ISMA and also acted on the signals emitted by EMAI which influenced the bidding behavior of the parties.

287. Accordingly, the Commission holds that the bidders who participated in respect of the depots located in UP/ Gujarat/ Andhra Pradesh in response to the joint



tender floated by OMCs have colluded in submitting the bids by quoting collusive prices and sharing quantities using the platform of ISMA and signals provided by EMAI.

Conclusion

288. In view of the above discussion, the Commission is of the considered view that the sugar mills, as detailed below, who participated in the bidding process in respect of the depots located in UP/ Gujarat/ Andhra Pradesh in response to the joint tender floated by OMCs on 02.01.2013 have colluded in submitting the bids by quoting collusive prices and sharing quantities and thereby contravened the provisions of Section 3(3)(d) read with Section 3(1) of the Act. Further, the impugned conduct of ISMA is found to have violated the provisions of Section 3(3)(a)/ (b) read with Section 3(1) of the Act. Also, the conduct of EMAI is held to be in violation of the provisions of Section 3(3)(a) read with Section 3(1) of the Act by providing their platforms to sugar mills in facilitating rigging of impugned tender.

289. Accordingly, the sugar mills and ISMA/ EMAI are directed to cease and desist from indulging in conduct that has been found to be in contravention of the provisions of the Act, as noted above.

290. So far as imposition of monetary penalty is concerned, the Commission deems it apposite to refer to the recent decision of the Hon'ble Supreme Court of India in *Excel Crop Care Limited v. Competition Commission of India & Anr.*, Civil Appeal No. 2480 of 2014 decided on 08.05.2017. One of the issues which fell for consideration before the Hon'ble Supreme Court in this case was as to whether penalty under Section 27(b) of the Act should be imposed on total/ entire turnover of the offending company or only on "relevant turnover" i.e. relating to the product in question?



291. After referring to the statutory scheme as engrafted in Section 27 of the Act and analysing the case law at length, the Hon'ble Supreme Court opined that adopting the criteria of 'relevant turnover' for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties. While reaching this conclusion, the Hon'ble Supreme Court recorded the following reasons:

When the agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section 3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the 'maximum penalty' imposed in all cases be prescribed on the basis of 'all the products' and the 'total turnover' of the enterprise. It would be more so when total turnover of an enterprise may involve activities besides production and sale of products, like rendering of services etc. It, therefore, leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of 'relevant turnover'.

292. Thus, the starting point of determination of appropriate penalty should be to determine relevant turnover and thereafter, to calculate appropriate percentage of penalty based on facts and circumstances of the case.

293. Coming to the facts of the present case, the Commission notes that the infringing anti-competitive conduct of the parties pertain to bid rigging in respect of the tender floated by PSU OMCs for procurement of ethanol and as such, for the purposes of determining the relevant turnover for this infringement, revenue from sale of ethanol alone has to be taken into account.



294. Having determined the relevant turnover, the Commission now proceeds to calculate appropriate percentage of penalty.
295. It may be noted that the twin objectives behind imposition of penalties are: (a) to reflect the seriousness of the infringement; and (b) to ensure that the threat of penalties will deter the infringing undertakings. Therefore, the quantum of penalties imposed must correspond with the gravity of the offence and the same must be determined after having due regard to the mitigating and aggravating circumstances of the case. The Commission is also guided by the judgment of the Hon'ble Supreme Court of India in *Excel Crop* case (*supra*) which enunciates the principle of proportionality. Proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act on the other.
296. In this regard, the Commission has examined various other pleas urged by the parties on quantum of penalty. Having considered the material available on record, the Commission is of the considered opinion that Government of India introduced EBP Programme keeping in mind the beneficial effects that such a programme will have on the agricultural sector as well as towards the country's environment footprint. However, the collusive conduct of the bidders not only tried to stultify the flagship programme of the Government but also acted to the detriment of larger national interest.
297. On a careful consideration of the nature of the contraventions, the Commission decides to impose penalty on sugar mills at the rate of 7% of their average relevant turnover of the preceding three financial years arising out of sale of ethanol. The total amount of penalty is worked out as follows:



(Rs.) (In Lakh)

S. No.	Name of the Party	Relevant Turnover for 2011-12	Relevant Turnover for 2012 -13	Relevant Turnover for 2013-14	Average Relevant Turnover for Three Years	Penalty amount @ 7% of average Relevant Turnover
1	Sahakari Khand Udyog Mandal Ltd.	1412.19	1021.40	910.66	1114.76	78.03
2	Shree Ganesh Khand Udyog Mandali Ltd.	579.84	368.96	343.40	430.73	30.15
3	Sri Kamrej Vibhag Sahakari Khand Udyog Mandali Ltd.	867.61	266.08	170.50	434.73	30.43
4	Shree Mahuva Pradesh Sahakari Khand Udyog Mandli Limited	803.63	840.16	1256.56	966.79	67.67
5	The Andhra Sugars Ltd.	2219.17	1968.14	2871.03	2352.79	164.69
6	Sri Sarvarya Sugars Limited	522	587.93	1969.72	1026.55	71.86
7	Bajaj Hindusthan Limited	15012.54	20269.460 (Oct 2012 to March 2014)		17641	1234.87
8	Triveni Engineering Industries Limited	1556.01	746.02	5162.07	2488.03	174.16
9	Simbhaoli Sugars Ltd.	3394.98	3190.86	3241.08	3275.64	229.29
10	Avadh Sugar & Energy Limited	4083	2267	9614	5321.33	372.49
11	Dhampur Sugar Mills Limited	140.83	93.08	285.12	173.01	12.11
12	Balrampur Chini Mills Limited	5293	5385.48	7658.16	6112.21	427.85
13	Mawana Sugars Ltd.	3200	2258	5034	3497.33	244.81
14	K M Sugar Mills Ltd.	299.43	NIL	581.83	440.63	30.84
15	Uttam Sugar Mills Ltd.	NIL	NIL	1116.33	1116.33	78.14
16	Dalmia Bharat Sugar & Industries Ltd.	2031	7352	7439	5607.33	392.51
17	Seksaria Biswan Sugar Factory Limited	656.64	896.4	1726.72	1093.26	76.53
18	Sir Shadi Lal Enterprises Limited	668.52	341.55	774.14	594.74	41.63



298. Similarly, the Commission decides to impose penalty on trade associations (ISMA/ EMAI) at the rate of 10% of their average receipts of the preceding three financial years. The total amount of penalty is worked out as follows:

(Rs.) (In Lakh)

S. No.	Name of the Party	Relevant Receipts for 2011-12	Relevant Receipts for 2012 -13	Relevant Receipts for 2013-14	Average Relevant Receipts for Three Years	Penalty amount @ 10% of average Relevant Receipts
1	Indian Sugar Mills Association	502.05	459.79	446.46	469.43	46.94
2	Ethanol Manufacturers Association of India	1.45	0.95	4.25	2.22	0.22

299. Accordingly, the Commission imposes monetary penalties upon the parties as detailed hereinabove for contravention of the provisions of Section 3(1) read with Section 3(3) of the Act, as noted in the order.

300. The Commission directs the parties to deposit the penalty amount within 60 days from the receipt of this order.

301. Before concluding, the Commission notes that some of the Opposite Parties (Dhampur, Bajaj, Dalmia, Balrampur) sought oral hearing when the supplementary investigation report in respect of the bidding pattern for depots located in State of Maharashtra was forwarded inviting their objections/ suggestions. In this regard, the Commission notes that the DG did not record any finding of contravention against any of the bidders who participated in the bidding process for such depots. Moreover, the Commission also did not find any material or evidence against any of the bidders who participated in respect of the depots located in State of Maharashtra wherefrom any finding of



contravention could have been recorded. As there was no adverse finding against such bidders in respect of such depots, it is not understood as to how any prejudice could have been caused to such parties particularly when the parties have been heard at length on many days in these proceedings. As far as their responses to the said DG Report are concerned, the parties have essentially sought parity in treatment for UP bidders *vis-à-vis* bidders of Maharashtra. The detailed analysis made in this order makes it amply evident that the bidding pattern of these two States was not comparable. In any event, the infringing parties can claim no equity based on exoneration of other set of bidders when there is no material on record to base any finding of contravention in respect of the bidders who participated for the depots located in Maharashtra.

302. The Commission also finds no merit in the plea raised by Dhampur that it was denied opportunity to cross-examine the witnesses whose statements were relied upon by the DG. In this regard, the Commission notes that *vide* order dated 06.10.2015, liberty was granted to the parties who were desirous of cross-examining the witnesses to file appropriate applications containing the details of the (i) witness sought to be cross-examined; (ii) relevance of the statements made by such person in the findings/ recommendations of the DG; and (iii) the grounds on which cross-examination of witness(s) was sought for. The Commission also directed that applications, if any, for cross-examination of witness(s) shall be made within a week.

303. It may, however, be noted that the Commission *vide* its order dated 16.02.2016 rejected the application moved by Dhampur seeking cross-examination which was not only filed belatedly but also did not conform to the directions of the Commission. While rejecting the plea of Dhampur seeking cross-examination, the Commission observed as follows:



“..... Besides, except giving a list of 14 witnesses, the Applicant has neither specified the relevance of the statements made by such persons in the findings of the DG nor otherwise made out any ground for seeking cross-examination as directed by the Commission. As such, the application is not in the manner directed by the Commission and the same deserves to be rejected.”

304. Thereafter, Dhampur moved yet another application dated 04.03.2016 seeking modification of the aforesaid order. The Commission after perusing the application and hearing the counsel for Dhampur *vide* its order dated 29.03.2016 observed that the learned counsel appearing for Dhampur could not point out specifically any portion of the depositions on which the request for cross-examination was made. Except making general submissions and seeking parity without complying with the directions of the Commission and satisfying the requirement of the General Regulations for making out a case for cross-examination, the counsel could not substantiate the plea seeking cross-examination. In the result, the Commission found no merit in the said application and the same was rejected. However, liberty was granted to Dhampur to file Affidavits in rebuttal to dispute the conclusions drawn by the DG based upon such depositions or by incorporating such rebuttal in the objections/ suggestions to the DG report, if so required.

305. In view of the aforesaid, it is evident that Dhampur was granted sufficient opportunity which it did not avail and as such the plea that it was denied opportunity of cross-examination is not only fallacious but is reflective of its contumacious conduct in not complying with the directions given by the Commission.

306. Finally, the Commission notes that some of the parties had filed both



confidential as well as non-confidential versions of their replies/ objections/ responses/ submissions. The confidential versions were kept separately during the pendency of the proceedings. It is ordered that confidentiality claim, as prayed for, shall hold for a further period of 3 years from the date of passing of this order in respect of confidential versions which have been filed before the Commission from time to time and on which confidentiality was claimed. It is, however, made clear that no such confidentiality claim shall be available in so far as the data that might have been referred to in this order.

307. The Secretary is directed to communicate to the parties, accordingly.

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

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

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

New Delhi
Date: 18/09/2018