COMPETITION COMMISSION OF INDIA

Case No. 21 of 2013

***In Re*:**

India Glycols Ltd.	**Informant**

And

Indian Sugar Mills Association	**Opposite Party No. 1**
National Federation of Co-operative Sugar Factories	**Opposite Party No. 2**
Ethanol Manufacturers Association	**Opposite Party No. 3**
Bharat Petroleum Corporation Ltd.	**Opposite Party No. 4**
Hindustan Petroleum Corporation Ltd.	**Opposite Party No. 5**
Indian Oil Corporation Ltd.	**Opposite Party No. 6**

WITH

Case No. 29 of 2013

***In Re*:**

Ester India Chemicals Ltd.	**Informant**

And

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

WITH

Case No. 36 of 2013

***In Re*:**

Jubilant Life Sciences Ltd.	**Informant**

And

Bharat Petroleum Corporation Ltd.	**Opposite Party No. 1**
Hindustan Petroleum Corporation Ltd.	**Opposite Party No. 2**
Indian Oil Corporation Ltd.	**Opposite Party No. 3**
Indian Sugar Mills Association	**Opposite Party No. 4**
National Federation of Co-operative Sugar Factories	**Opposite Party No. 5**
Ethanol Manufacturers Association	**Opposite Party No. 6**

WITH

Case No. 47 of 2013

***In Re*:**

AB Sugars Ltd.	**Informant**

And

Indian Sugar Mills Association	**Opposite Party No. 1**
National Federation of Co-operative Sugar Factories	**Opposite Party No. 2**
Ethanol Manufacturers Association	**Opposite Party No. 3**
Bharat Petroleum Corporation Ltd.	**Opposite Party No. 4**
Hindustan Petroleum Corporation Ltd.	**Opposite Party No. 5**
Indian Oil Corporation Ltd.	**Opposite Party No. 6**

WITH

Case No. 48 of 2013

***In Re*:**

Wave Distilleries and Breweries Ltd.	**Informant**

And

Indian Sugar Mills Association	**Opposite Party No. 1**
National Federation of Co-operative Sugar Factories	**Opposite Party No. 2**
Ethanol Manufacturers Association	**Opposite Party No. 3**
Bharat Petroleum Corporation Ltd.	**Opposite Party No. 4**
Indian Oil Corporation Ltd.	**Opposite Party No. 5**
Hindustan Petroleum Corporation Ltd.	**Opposite Party No. 6**

WITH

<u>Case No. 49 of 2013</u>

***<u>In Re</u>*:**

Lords Distillery Ltd.	**Informant**

<u>And</u>

Indian Sugar Mills Association	**Opposite Party No. 1**
National Federation of Co-operative Sugar Factories	**Opposite Party No. 2**
Ethanol Manufacturers Association	**Opposite Party No. 3**
Indian Oil Corporation Ltd.	**Opposite Party No. 4**
Bharat Petroleum Corporation Ltd.	**Opposite Party No. 5**
Hindustan Petroleum Corporation Ltd.	**Opposite Party No. 6**

<u>CORAM</u>

Ms. Ravneet Kaur
Chairperson

Mr. Anil Agrawal
Member

Ms. Sweta Kakkad
Member

Mr. Deepak Anurag
Member

<u>PRESENT</u>

For Informant No. 1 – India Glycols Ltd.	:	Mr. Manas Kumar Chaudhari and Mr. Aman Baroka, Advocates with Mr. Peter Paul, Legal Advisor of India Glycols Ltd.
For Informant No. 2 - Ester India Chemicals Ltd.	:	Ms. Shruti Iyer and Ms. Nishita Jagetia, Advocates
For Informant No. 3 – Jubilant Life Sciences Ltd.	:	None
For Informant No. 4 - AB Sugars Ltd.	:	None
For Informant No. 5 – Wave Distilleries and Breweries Ltd.	:	None
For Informant No. 6 – Lords Distillery Ltd.	:	None
For Opposite Party No. 1 – Indian Sugar Mills Association	:	Mr. Sridhar Potaraju, Senior Advocate with Ms. Ankita Sharma, Ms. Shiwani Tushir, Mr. Ayush, Mr. Rajat Srivastava and Mr. Laut Mohan, Advocates and

		Ms. Bharti Balaji of Indian Sugar Mills Association
For Opposite Party No. 2 – National Federation of Co-operative Sugar Factories	:	None
For Opposite Party No. 3 – Ethanol Manufacturers Association	:	Mr. Bhushan V. Mahadik, Mr. Ranjit Raut and Ms. Pallavi Pukale, Advocates
For Opposite Party No. 4 – Bharat Petroleum Corporation Ltd.	:	Mr. Vishal Singh and Mr. Shiv Sapra, Advocates
For Opposite Party No. 5 – Hindustan Petroleum Corporation Ltd.	:	Mr. Vishal Singh and Mr. Shiv Sapra, Advocates
For Opposite Party No. 6 – Indian Oil Corporation Ltd.	:	Mr. Vishal Singh and Mr. Shiv Sapra, Advocates
For Opposite Party No. 7 – Bajaj Hindusthan Sugar Ltd.	:	Mr. A.K. Agarwal, Mr. Sanjeev Kumar Singh, Mr. Bhishm Pratap Singh and Mr. Mayank Bughani, Advocates
For Opposite Party No. 8 – Avadh Sugar & Energy Ltd. (erstwhile Upper Ganges Sugar and Industries Ltd. and Oudh Sugar Mills Ltd.)	:	Mr. Pankaj Bhagat, Advocate with Mr. Shishir Agarwal, Senior Manager, Avadh Sugar & Energy Ltd.
For Opposite Party No. 9 – Triveni Engineering and Industries Ltd.	:	Mr. Pranjit Bhattacharya, Advocate
For Opposite Party No. 10 – Simbhaoli Sugars Ltd.	:	Ms. Suneha Jain and Mr. Aman Kumar Thakur, Advocates
For Opposite Party No. 11 – Dhampur Sugar Mills Ltd.	:	None
For Opposite Party No. 12 – Balrampur Chini Mills Ltd.	:	Mr. Gautam Shahi and Mr. Narinder Kumar Verma, Advocates
For Opposite Party No. 13 – Mawana Sugars Ltd.	:	Mr. P.K. Bhalla, Advocate with Mr. Gagan Deep Panwar, Manager (Legal), Mawana Sugars Ltd.
For Opposite Party No. 14 – KM Sugar Mills Ltd.	:	Mr. Pankaj Bhagat, Advocate with Mr. Bal Mukund Sharma, Senior Manager
For Opposite Party No. 15 – The Kisan Sahkari Chini Mills Ltd.	:	None
For Opposite Party No. 16 – Uttam Sugar Mills Ltd.	:	Mr. A.K. Agarwal, Mr. Sushil Trivedi, Mr. Sanjeev Kumar Singh and Mr. Bhishm Pratap Singh, Advocates

For Opposite Party No. 17 – Dalmia Bharat Sugar and Industries Ltd.	:	Mr. M.M. Sharma and Mr. Ankit Singh Rajput, Advocates with Mr. Abhishek Dua, Manager (Legal), Dalmia Bharat Sugar and Industries Ltd.
For Opposite Party No. 18 – The Seskaria Biswan Sugar Factory Ltd.	:	Mr. Pankaj Bhagat, Advocate
For Opposite Party No. 19 – Sir Shadi Lal Enterprises Ltd.	:	Mr. Anil Kumar Mishra, Advocate with Mr. Vishambhar Dahuja, Deputy General Manager, Sir Shadi Lal Enterprises Ltd.
For Opposite Party No. 20 – Sahakari Khand Udyog Mandali Ltd.	:	Mr. Bhushan V. Mahadik, Mr. Ranjit Raut and Ms. Pallavi Pukale, Advocates
For Opposite Party No. 21 – Shree Ganesh Khand Udyog Sahakari Mandli Ltd.	:	Mr. Bhushan V. Mahadik, Mr. Ranjit Raut and Ms. Pallavi Pukale, Advocates
For Opposite Party No. 22 – Shree Kamrej Vibhag Sahakari Khand Udyog Mandali Ltd.	:	Mr. Bhushan V. Mahadik, Mr. Ranjit Raut and Ms. Pallavi Pukale, Advocates
For Opposite Party No. 23 – Shree Mahuva Pradesh Sahakari Khand Udyog Mandali Ltd.	:	Mr. Bhushan V. Mahadik, Mr. Ranjit Raut and Ms. Pallavi Pukale, Advocates
For Opposite Party No. 24 – The Andhra Sugars Ltd.	:	Mr. M.A. Chinnasamy and Mr. Senthil Kumar, Advocates
For Opposite Party No. 25 – Sri Sarvaraya Sugars Ltd.	:	Mr. Sudipto Sircar, Advocate

ORDER

Facts:

1. In the captioned matters, in 2013, separate Informations under Section 19(1)(a) of the Competition Act, 2002 (the ‘Act’), were filed by India Glycols Ltd., Ester India Chemicals Ltd., Jubilant Life Sciences Ltd., AB Sugars Ltd., Wave Distilleries and Breweries Ltd. and Lords Distillery Ltd., against (i) three sugar mills’ associations *namely* Indian Sugar Mills Association (‘ISMA’), National Federation of Co-operative Sugar Factories (‘NFCSF’) and Ethanol Manufacturers Association (‘EMA’), (ii) three Public Sector Undertakings (‘PSUs’) Oil Marketing Companies (‘OMCs’) *namely* Indian Oil Corporation Ltd. (‘IOCL’), Bharat Petroleum Corporation Ltd. (‘BPCL’) and Hindustan Petroleum Corporation Ltd. (‘HPCL’), and (iii) 14 sugar mills of the State of Uttar Pradesh. Post Central Government notification dated 02.01.2013 mandating all OMCs to sell Ethanol blended Petrol (‘EBP’) to achieve 5% Ethanol blending across

the country, a joint tender dated 02.01.2013 ('Impugned Tender') was issued by the above-mentioned three PSU OMCs for procurement of 'Ethanol', which is a by-product of sugar production. In the captioned matters, allegations pertain to price fixation and bid-rigging by various sugar mills, most of whom are members of the above-mentioned three associations, in the Impugned Tender were made. Other allegations in the nature of, *inter alia*, the sugar mills limiting the production of Ethanol to create artificial scarcity in the market were also levelled and it was also averred that joint tendering by the OMCs itself is anti-competitive.

2. Based on the facts and averments made in the aforesaid Informations and upon analysis of the annexures annexed therewith, as also upon holding a preliminary conference with the Informant in Case No. 21 of 2013, the Commission *vide* three separate orders dated 27.05.2013, 01.07.2013 and 23.07.2013, passed in terms of the provisions contained in Section 26(1) of the Act, formed the opinion that there exists *prima facie* case of contravention of the provisions of Section 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act in the present matters. Accordingly, the Commission directed the Director General ('DG') to cause an investigation to be made into the matters, and submit a consolidated investigation report.

3. The DG submitted its investigation report dated 17.07.2015 finding that:

(i) joint tendering by the three OMCs is not anti-competitive or violative of the provisions of Section 3(3) of the Act;

(ii) ISMA has violated the provisions of Section 3(3) read with Section 3(1) of the Act;

(iii) the conduct of EMA and its President is in violation of Section 3(3)(a) of the Act;

(iv) allegations against NFCSF could not be substantiated;

(v) 13 out of 14 sugar mills of the State of Uttar Pradesh named in the Information filed in Case No. 29 of 2013 (except Kisan Sahkari Chini Mills) along with 06 other sugar mills from other States have contravened the provisions of Section 3(3)(d) of the Act; and

(vi) 42 individuals of the Opposite Parties ('OPs') are liable in terms of the provisions contained in Section 48 of the Act for the anti-competitive conduct of their respective companies/ associations.

4. Upon consideration of the investigation report, the Commission, *vide* order dated 13.08.2015 forwarded electronic copies of the same to the 06 Informants and the 25 OPs [3 OMCs, 3 associations, 14 sugar mills named in the Information filed in Case No. 29 of 2013 (2 of the same later became one entity), and 06 additional sugar mills found guilty of contravention of the provisions of the Act by the DG] (hereinafter called as the 'Parties') in the matter, as well as to their 42 individuals found liable by the DG in terms of the provisions contained in Section 48 of the Act.

5. The Parties and individuals were given an opportunity to file their suggestions/ objections, if any, to the investigation report. Further, the said 25 OPs were directed to furnish copies of their audited Balance Sheets and Profit and Loss Accounts and their 42 individuals were directed to file their income details including Income Tax Returns, for the Financial Years ('FY') 2011-12 to 2013-14.

6. Thereafter, applications were filed by few OPs seeking cross-examination of certain witnesses whose statements had been relied upon by the DG during the course of its investigation. The Commission, after hearing the applicants, *vide* orders dated 16.02.2016 and 29.03.2016, allowed cross-examination of various witnesses by the applicants, and directed the DG to conduct cross-examination proceedings and submit a report.

7. The DG submitted its report on cross-examination on 21.09.2016. Upon consideration of the said report, the Commission, *vide* order dated 28.03.2017, forwarded electronic copies of the same to the Parties, giving them opportunity to file their suggestions/ objections, if any, thereto.

8. Subsequently, on 19.07.2017, 20.07.2017, 25.07.2017, 02.08.2017 and 22.08.2017, the Commission heard the Parties on the investigation report and the report on cross-examination, and decided to pass an appropriate order.

9. *Vide* order dated 30.10.2017, the Commission, in terms of the provisions contained in Regulation 20(6) of the Competition Commission of India (General) Regulations, 2009, directed the DG to cause a further investigation in the matter in respect of, *inter alia*, the depots in the State of Maharashtra, and submit a supplementary investigation report.

10. On 15.03.2018, the DG submitted its supplementary investigation report finding that no contravention of the provisions of Section 3 of the Act could be established in the present matters with respect to bidding by the sugar mills of the State of Maharashtra.

11. Upon consideration of the supplementary investigation report, the Commission *vide* order dated 07.06.2018, forwarded electronic copies of the same to the Parties, giving them an opportunity to file their suggestions/ objections, if any, thereto.

12. In its Ordinary Meeting held on 26.07.2018, the Commission considered the supplementary investigation report and the suggestions/ objections received thereto from the Parties, and decided to pass an appropriate order in due course.

13. On 18.09.2018, the Commission passed a Final Order under Section 27 of the Act disposing of all the 06 matters, finding 20 OPs (ISMA, EMA, 12 sugar mills of Uttar Pradesh, 4 sugar mills of Gujarat and 2 sugar mills of Andhra Pradesh) guilty of contravention of the provisions of the Act and imposing penalty upon them in terms of the provisions contained in Section 27(b) of the Act.

14. Against the aforesaid Final Order passed by the Commission, several OPs filed appeals before the Hon'ble National Company Law Appellate Tribunal ('NCLAT'). *Vide* judgment and order dated 10.10.2023, the Hon'ble NCLAT set aside the Final Order dated 18.09.2018 passed by the Commission and directed the Commission to undertake fresh hearing of the cases keeping all contentions of rival parties open, including contentions of the parties on the supplementary investigation report and the issue of penalty and its quantum.

15. Pursuant to the directions issued by the Hon'ble NCLAT, fresh hearings in the matter were held on 03.04.2024, 18.04.2024 and 19.04.2024 and the Commission decided to pass an appropriate order in the matters. The Parties were also given the liberty to file their written arguments within a period of 2 (two) weeks from date of conclusion of the final hearing in the matters, which were filed and are taken on record.

Analysis:

16. For ease and convenience, in the captioned matters, the parties shall be referred to as the follows:

Sl. No.	Name of Party	Referred to as
1.	India Glycols Ltd.	IP-1
2.	Ester India Chemicals Ltd.	IP-2
3.	Jubilant Life Sciences Ltd.	IP-3
4.	AB Sugars Ltd.	IP-4
5.	Wave Distilleries and Breweries Ltd.	IP-5
6.	Lords Distillery Ltd.	IP-6
7.	ISMA	OP-1
8.	NFCSF	OP-2
9.	EMA	OP-3
10.	BPCL	OP-4
11.	HPCL	OP-5
12.	IOCL	OP-6
13.	Bajaj Hindusthan Sugar Ltd.	OP-7
14.	Avadh Sugar & Energy Ltd. (erstwhile Upper Ganges Sugar and Industries Ltd. and erstwhile Oudh Sugar Mills Ltd.)	OP-8
15.	Triveni Engineering and Industries Ltd.	OP-9
16.	Simbhaoli Sugars Ltd.	OP-10
17.	Dhampur Sugar Mills Ltd.	OP-11
18.	Balrampur Chini Mills Ltd.	OP-12
19.	Mawana Sugars Ltd.	OP-13
20.	KM Sugar Mills Ltd.	OP-14
21.	The Kisan Sahkari Chini Mills Ltd.	OP-15
22.	Uttam Sugar Mills Ltd.	OP-16
23.	Dalmia Bharat Sugar and Industries Ltd.	OP-17
24.	The Seskaria Biswan Sugar Factory Ltd.	OP-18
25.	Sir Shadi Lal Enterprises Ltd.	OP-19
26.	Sahakari Khand Udyog Mandali Ltd.	OP-20
27.	Shree Ganesh Khand Udyog Sahakari Mandli Ltd.	OP-21
28.	Shree Kamrej Vibhag Sahakari Khand Udyog Mandali Ltd.	OP-22
29.	Shree Mahuva Pradesh Sahakari Khand Udyog Mandali Ltd.	OP-23
30.	The Andhra Sugars Ltd.	OP-24
31.	Sri Sarvaraya Sugars Ltd.	OP-25

17. It is noted that EBP was started by the Government of India in 2002-03. The Ministry of Petroleum and Natural Gas (‘MoPNG’) made 5% Ethanol blending in petrol mandatory across 9 States and 5 Union Territories (‘UTs’). However, the same could only be partially implemented because of unavailability of Ethanol.

18. In September 2006, resurgence of sugarcane production in 2005-06 and 2006-07 led Government of India to again mandate 5% blending across 20 States and 8 UTs subject to commercial viability. The OMCs hence, contracted 1.4 billion litres of Ethanol for EBP at ₹21.5/lt from November 2006 to November 2009. However, only 540 million litres could be procured. Subsequently, implementation of EBP was deferred.

19. In September 2008, the Union Cabinet approved the National Bio-fuel policy and 5% Ethanol blending was made mandatory across all States in the country. For 2010-11 and 2011-12, the OMCs floated tenders on Expression of Interest ('EoI') basis for supply of Ethanol. Under this arrangement, the base price at which Ethanol was to be procured was determined by the Cabinet Committee on Economic Affairs ('CCEA') on 23.08.2010 at ₹27/lt as an *ad hoc* interim price. In the meanwhile, Soumitra Chowdhary Committee was constituted to examine the issues pertaining to pricing of Ethanol for EBP which submitted report to CCEA. After due consideration of the report, the CCEA issued a Press Release on 22.11.2012 mentioning, *inter alia*, that "*the procurement price of Ethanol will be decided henceforth between OMCs and suppliers of Ethanol*."

20. Accordingly, the Government of India, *vide* gazette notification dated 02.01.2013 approved the issue of pricing and the OMCs issued a joint Notice Inviting Tender ('NIT') for procurement of around 140 lakh kl of Ethanol for 110 depots across the country (4 in Punjab, 5 in Haryana, 2 in Delhi, 7 in Rajasthan, 13 in Uttar Pradesh, 2 in Uttarakhand, 3 in Bihar, 3 in Jharkhand, 7 in Odisha, 6 in West Bengal, 9 in Gujarat, 1 in Chhattisgarh, 6 in Madhya Pradesh, 1 in Goa, 11 in Maharashtra, 10 in Andhra Pradesh, 9 in Karnataka, 4 in Kerala, and 7 in Tamil Nadu) for a period of 3 years *i.e.* the Impugned Tender. The last date of bid submission for the tender was 28.01.2013. The tender required the bidders to quote Basic Price ('BP') which is ex-factory price and Net Delivered Cost ('NDC') which is BP + Taxes and Fees applicable + Freight, and the L1 bidder was to be determined on the basis of NDC. 68 bidders from all across India participated in the Impugned Tender.

21. According to the tender conditions:

> "*2. EVALUATION/ ORDER AWARD CRITERIA:*
>
> *a.* ...
>
> *b.* ...

c. ...

d. The contract/ order for supply of Anhydrous Ethanol shall be awarded on location wise lowest net delivered cost basis. The reasonability of price shall be determined by the industry committee.

e. Basis of quantity Allocation:

1. The location-wise lowest net delivered cost (NDC) will be determined for all the locations.

2. If the total of the location-wise L1 vendors offered quantity is more than 1.05 million KL, the order allocation will be as under:

i. Among all the location-wise lowest bidders, we will select the bidder who is the lowest NDC among all and allocate his offered quantity for that location.

ii. Among all the remaining location-wise lowest bidders, we will select the bidder who is the lowest NDC (next lowest after (i) above) among all and allocate his offered quantity to that location.

iii. The above process will be repeated till the total quantity requirement of 1.05 million KL plus +/-10% is achieved.

iv. In no case, the location-wise quantity requirements will be exceeded and hence, the bidder should ensure that their offered quantity is less than or equal to the location-wise quantity requirements.

f. If the quantity offered by the L1 bidder is not sufficient to meet the entire demand of a location, then the shortfall quantity shall be offered to the L2 vendor and the L2 vendor has to match the L1 rate. If the rates are not matched, it will then be offered to L3, L4 and so on for matching with L1 rate.

g. If in case there are multiple L1s for any location, the allocation shall be made based on the ratio of their offered quantity.

h. ..."

22. Therefore, as per the terms and conditions of the Impugned Tender, the award of tender was to be made on depot-wise basis as per the lowest NDC quoted. The one who had quoted the lowest NDC amongst all bidders for a particular location was to be declared L1 and was to be called for negotiations by the OMCs. At the negotiated rate, the

quantity offered by the L1 bidder was to be awarded to it. If the quantity offered by L1 was less than the total quantity required at that particular depot, the next highest bidder for that particular location was to be called for negotiations and the quantity offered by it was to be offered to it at L1 negotiated rate. Same process was to be repeated for every depot till the total quantity requirement of 1.05 million KL plus +/-10% was achieved.

23. The allegations made in the present matter are primarily as follows:

(a) That issue of a joint tender *i.e.* the Impugned Tender by the three OMCs itself was anti-competitive in contravention of the provisions of Section 3 of the Act.

(b) That the bidders, specifically those of the State of Uttar Pradesh, indulged in cartelisation and bid-rigging in the Impugned Tender in contravention of the provisions of Section 3 of the Act.

(c) That the industry associations ISMA, NFSCF and EMA facilitated such cartelisation by the bidders in the Impugned Tender.

24. For the purposes of investigation, the DG, *inter alia,* gathered replies from the OMCs, data and documents including bid details for the Impugned Tender, IP addresses from which the bids were quoted in the Impugned Tender, replies from the three industry associations, details of their minutes of meetings, call details records ('CDRs') and e-mails of their key persons, replies from the 14 named OP sugar mills of the State of Uttar Pradesh (who had participated in the Impugned Tender *w.r.t* supply to depots in Uttar Pradesh, Haryana and Punjab), costing details of these sugar mills, details of meetings and travels of their key persons, replies from the 44 other sugar mills who had participated in the Impugned Tender but not named as OPs in Informations filed, as well as recorded the statements on oath of 27 witnesses.

25. From the investigation report dated 17.07.2015, is noted that the primary evidences relied upon by the DG in the present matter are as follows:

A. <u>Against ISMA and sugar mills of Uttar Pradesh</u>

(i) Meetings of Ethanol Manufacturers dated 06.12.2012 and 27.12.2012 (rescheduled from 19.12.2012) convened by ISMA, where representatives of several sugar mills of Uttar Pradesh, including of OP-13 who is a non-member of ISMA but largest player in the market, were present. This is despite the fact that

Annual General Meeting ('AGM') of ISMA was already scheduled on 17.12.2012 (which was attended by promoters or senior officers of member companies).

(ii) CDRs of Shri GK Thakur, Director of ISMA, of December 2012 and January 2013, showing that representatives of the sugar mills of Uttar Pradesh who were bidders in the Impugned Tender (including of OP-13 who is a non-member of ISMA but largest player in the market), communicated with him on a regular basis during the relevant period.

(iii) Mobile conversations between competitors *viz.* Shri Arvind Jain of OP-11 and Shri Dilip Seksaria of OP-12 on 04.01.2013 and 16.01.2013 *i.e.* during the tender period.

(iv) Shri GK Thakur attending pre-bid meeting organised by OMCs for the Impugned Tender without there being any reason for him to do so.

(v) Certain e-mails recovered from the e-mail account of Shri GK Thakur which showed that ISMA used to exchange data relating to production and sale of Ethanol from various manufacturers during its meetings, that too during the tender period.

(vi) Quoting of NDC by all private players in the State of Uttar Pradesh within a narrow range of ₹41.8/lt to ₹44.7/lt (barring one exception), and quoting of identical NDC to the last decimal point by some bidders at some depots.

(vii) Quoting of identical freight charges by some bidders at some depots in the State of Uttar Pradesh and freight rates quoted having no nexus to past charges (₹1.43/km in 2012-13) or actual charges paid post award of tender.

(viii) Quoting of BP by all private players in the State of Uttar Pradesh within a narrow range of ₹35/lt to ₹36/lt (barring one exception), though the BP quoted by OP-15 (a state co-operative) was ₹34/lt, and quoting of identical BP by some bidders at some depots.

(ix) Comparison of minimum BP quoted by the bidders *vis-à-vis* their cost of production ('CoP') submitted by them showing that the BP quoted is not related to the CoP.

(x) Previously fixed BP of Ethanol being ₹27/lt and prevailing prices of similar products *i.e.* of Rectified Spirit ('RS') and Specially Denatured Spirit ('SDS') being ₹26-28/₹lt and of Extra Neutral Alcohol ('ENA') being ₹31/lt.

(xi) Private players who were L1 not reducing their quoted NDCs during negotiations with the OMCs at all locations despite the fact that the OMC benchmark prices were lower than the quoted prices and despite the fact that OP-15 (a state co-operative), which had already quoted prices below benchmark prices at 04 locations, had further agreed to reduce prices.

(xii) Previous conduct of ISMA and bidders hinting at collusion, like quoting of identical rates in previous tenders, pricing discussions *etc.* taking place in ISMA meetings *etc.*

(xiii) Total quantity in the State of Uttar Pradesh being quoted *i.e.* 2.08 lakh kl being almost equal to the required quantity floated through the Impugned Tender *i.e.* 2.01 lakh kl, though the bidders' capacity was almost 3 times the required quantity (includes 25% for RS/ SDS and ENA). Further, depot wise also, in the State of Uttar Pradesh, the difference between the quantity required by the OMCs and the quantity offered by the bidders was very narrow.

(xiv) Many players not bidding for a depot despite being in close proximity to the same as well as far away bidders placing bids for amounts lower than nearer players.

B. <u>Against sugar mills of Gujarat</u>

(i) Quoting of identical BP and NDC to the last decimal point by 04 bidders at 01 depot and representatives of the bidders being unable to provide the basis for quoting the identical prices by their mills. Freight charges quoted by such bidders was also found to be without any basis.

C. <u>Against sugar mills of Andhra Pradesh</u>

(i) Quoting of identical BP and NDC to the last decimal point by 02 bidders at 01 depot and representatives of the bidders being unable to provide the basis for quoting the identical prices by their mills. Freight charges quoted by such bidders was also found to be without any basis. Further, required quantity for such depot was 5,366 kl while the quantity offered by the 03 participating bidders therefor was 5,300 kl.

D. Against EMA

(i) Statement of Shri VM Patil, President of EMA, published on 07.12.2012 in the Mumbai edition of the 'Business Standard' in respect of price of Ethanol, and no publication of any rebuttal in this regard.

(ii) Press Release dated 20.01.2013 issued by Pune online edition of the 'Times of India' where a report in the name of Shri VM Patil mentioning that Ethanol manufacturers will quote prices in the range of ₹38/lt was published.

(iii) All members of EMA in Maharashtra and Gujarat quoting BP of ₹40/lt and above (which was much above prevailing market price) and supplies being eventually made at prices of ₹3000- ₹4000/kl below the quoted prices.

(iv) EMA conducting 2 meetings of its members on 09.01.2013 and 21.01.2013 which were attended by the bidding parties.

26. During the course of arguments, the major pleas raised by the OPs were, *inter alia*, as under:

26.1 The alleged meetings dated 06.12.2012 and 27.12.2012 of ISMA were convened to discuss the mandatory 5% EBP across the country as CCEA, *vide* press release dated 22.11.2012, had communicated its decision that 5% mandatory blending of petrol with Ethanol should be implemented all across the country. The said meetings however, never took place as the Impugned Tender post CCEA press release had not been issued and most members invited did not show up.

26.2 It was impossible to discuss the requirements of the Impugned Tender and arrive at concerted price or quantity allocation in such meetings when even the terms of the Impugned Tender were not known to the bidders at the time of the alleged meetings. The Impugned Tender was the very first tender issued by the OMCs after major policy shift in price mechanism of procurement of Ethanol. Further, it was also the very first time that an e-tender was floated.

26.3 Post issue of tender notification on 02.01.2013, no ISMA meetings took place during the tender period.

26.4 Regarding CDRs of Shri GK Thakur, Director of ISMA from December 2012 to January 2013, it was argued that member sugar manufacturers as well as non-members regularly interacted with officials of OP-1 to discuss various policy issues having greater implications on sugar industry. As such, the DG ought to have analysed the CDRs pre December 2012 or post January 2013 also to analyse if there was any surge of calls during the tender period.

26.5 The present matters are nothing but vexatious litigation by IP-1. IP-1 filed the present matter to secure a business advantage as its strategy was to somehow obstruct supplies of alcohol to the OMCs and thereby cause a surplus availability of alcohol in the market, which would in turn result in sale of cheaper SDS to itself. IP-1 had earlier also filed Case No. 14 of 2012 before the Commission which was closed by the Commission *vide* Order dated 26.07.2012 passed under Section 26(2) of the Act and IP-1 had also challenged the EBP before the Hon'ble Delhi High Court *vide* W.P. (C) No. 247 of 2015. The conduct of IP-1 is *mala fide*. Its own subsidiary Shakumbari Sugar Mills and Allied Industries Ltd. was a member of ISMA and had quoted the BP of ₹41/lt in the Impugned Tender and lost in the bid process.

26.6 There are sparse incidents of quotation of identical NDCs by the bidders of the State of Uttar Pradesh in the Impugned Tender. Hence, not all bidders can be painted with the same brush.

26.7 The tender required the bidders to quote BP as well as NDC (BP + taxes and fee + freight) of Ethanol. L1 was to be determined on the basis of NDC. Hence, comparison of BP by the DG was of no consequence.

26.8 The DG has stated that the prices quoted by the bidders were based on the prevailing price of similar products *i.e.* RS/ SDS/ ENA. However, RS/ SDS/ ENA and Ethanol are entirely different products having different alcoholic strength and altogether different usage. None of them are substitutes to each other *qua* their usage and/ or applicability.

26.9 Benchmark prices did not exist prior to the bidding process and were in fact, fixed only after bidding was completed. Therefore, the idea that the bidders sat together and decided to bid in a certain manner to maintain their prices just above the benchmark prices is perverse and outside the factual matrix.

26.10 Since the OPs were never made aware of the benchmark prices, the reduction or non-reduction of prices by them in comparison to benchmark prices is vague and imaginary.

26.11 The DG has ignored the e-mails, IP addresses, travel plans, copies of ledger accounts, and minutes of ISMA meetings collected by it as evidence, which, if evaluated objectively, would have negated the assumptions made in favour of cartelisation.

26.12 The prices quoted by the bidders in the State of Uttar Pradesh were lower than those quoted by other bidders in other States.

26.13 Sugarcane prices from 2008-09 to 2012-13 went up by 100% (from ₹140/ quintal to ₹280/ quintal) whereas Ethanol price has risen only by 24.15%. Similarly cost of every other input went up substantially during the aforesaid period.

26.14 The price of ₹27/ lt decided by the Committee appointed by Government of India headed by Dr. Soumitra Chaudhury was only the *ad hoc* "Interim Declared Price" and the "Final Declared Price" was yet to be declared. As per the formula suggested in the draft interim report of the Expert Committee, the final price of Ethanol had been calculated at approximately ₹37.54/ lt. and the BPs quoted by the OPs in the Impugned Tender were less than that price.

26.15 The OPs have made no *supra* normal profits in the Impugned Tender.

26.16 The Impugned Tender contained clause 35 for 'Anti-competitive agreements/ abuse of dominance'. Had the OMCs observed cartelisation by the bidders, they would have taken recourse to such clause. However, they did not do so but rather accepted the bid prices quoted.

26.17 As far as supplementary investigation report is concerned, it can be seen that all sugar factories of Maharashtra had submitted the tender at BP higher than ₹40/lt. However, even though all the said bidders quoted price which was much higher than the competitive benchmark price calculated by the DG at ₹33/lt, none of them were found guilty by the DG. This clearly establishes that the investigation reports are biased and based on discrimination. Further, the DG, in its investigation report, had concluded that the behaviour of the bidders in the State of Maharashtra was impacted by the decision of EMA. The bidders of Maharashtra had also admittedly attended two EMA meetings on 09.01.2013 and 21.01.2013. However, no correlation has been found by the DG between the statement made by the President of OP-3 and the prices actually quoted by the Maharashtra mills, which varied between ₹35/lt and ₹48.01/lt. Only the association has been found violating the provisions of Section 3(3)(a) of the Act. This also clearly establishes that discriminative approach has been adopted by the DG.

26.18 The facts of the present matters are squarely covered on both facts and law by the judgment of the Hon'ble Supreme Court in the case of *Rajasthan Cylinders and Containers Ltd. v. Union of India and Another, passed by Hon'ble Supreme Court of India, (2020) 16 SCC 615.*

27. In contrast, IP-1 filed an application seeking deletion of its name from the array of parties submitting that it is no longer interested in pursuing its case before the Commission as the resultant economic harm to it because of alleged cartelisation has eased considerably. Since 2013, the business scenario and market conditions of availability of Ethanol have changed drastically and the company also has, over the years, changed its business priorities. The learned counsel appearing on behalf of IP-2 pleaded discharge from the matter stating that she has no instructions to appear in the matters from the party; and none appeared on behalf of IP-3, IP-4, IP-5 or IP-6 during the course of hearings.

28. Based on the case records and taking into account the submissions made by the Parties, the observations of the Commission with respect to each of the above evidences, and conclusion reached on the basis of the same, are as follows:

Against ISMA (OP-1) and sugar mills of Uttar Pradesh

28.1 ISMA Meetings

28.1.1 It is noted that Shri GK Thakur, Director of ISMA, convened a meeting on 06.12.2012 by sending an e-mail dated 23.11.2012 to around 45 sugar mills, including OP-7, a non-member of ISMA, who was the largest sugar manufacturer in the market.

28.1.2 Thereafter, Shri GK Thakur convened another meeting on 19.12.2012 by sending an e-mail dated 12.12.2012 to around 40 sugar mills.

28.1.3 However, the said meeting dated 19.12.2012 was cancelled and another meeting dated 27.12.2012 was convened by Shri GK Thakur, *vide* e-mail dated 17.12.2012.

28.1.4 These e-mails were addressed not only to the sugar mills of Uttar Pradesh between whom cartelisation has been found by the DG, but also to other sugar mills not found to be a part of the alleged cartel by the DG.

28.1.5 ISMA and the sugar mills of Uttar Pradesh have argued that the said meetings were cancelled and never took place as the meetings were set up in anticipation of a Government of India gazette notification post CCEA Press Release dated 22.12.2012, however, since the notification never came, the said meetings were cancelled.

28.1.6 The Commission, however, notes that there is no record of any e-mail being sent to cancel the meetings dated 06.12.2012 and 27.12.2012, despite the fact that mills which were invited to the said meetings were from outside Delhi. On the other hand, there was a specific e-mail dated 17.12.2012 sent by Shri GK Thakur to cancel the meeting convened on 19.12.2012 and postpone it to 27.12.2012. As such, the Commission does not find merit in the argument put forth by the OPs.

28.1.7 Further, ISMA and the sugar mills of Uttar Pradesh have also argued that the meetings dated 06.12.2012 and 27.12.2012 never took place because of attendance of very limited members.

28.1.8 In this regard, it is noted by the Commission that the e-mail dated 17.12.2012 postponing the meeting dated 19.12.2012 to 27.12.2012 clearly mentions that the meeting dated 06.12.2012 took place. The contents of the said e-mail read as "*As decided in the last meeting held on 06th December 2012, the next meeting …*"

28.1.9 Further, admittedly, the meetings dated 06.12.2012 and/ or 27.12.2012 were attended by at least the following representatives of the sugar mills of Uttar Pradesh, including of OP-7, which was not even a member of ISMA:

(i) Shri Amit Agarwal, General Manager (Sales and Marketing) of OP-7,

(ii) Shri Mahesh Agarwal, Financial Controller of erstwhile Oudh Sugar Mills Ltd. and erstwhile Upper Ganges Sugar and Industries Ltd. (now OP-8),

(iii) Shri Shishir Agarwal, Deputy Manager (Sales) of Upper Ganges Sugar and Industries Ltd.,

(iv) Shri Rakesh Kumar Singh, Chief General Manager of OP-10,

(v) Shri Arvind Jain, Vice-President (Marketing) of OP-11,

(vi) Shri Rajesh Dhingra, former Business Head (Alcohol) of OP-13,

(vii) Shri Balmukund Srivastava, Assistant General Manager (Finance) of OP-14,

(viii) Shri B.P. Agarwal, General Manager (Commercial) of OP-18, and

(ix) Shri Manoj Goel, Deputy General Manager of Shamli Distillery (OP-19).

28.1.10 The investigation report also states that the following representatives of sugar mills also attended such meetings, though the same could not be verified from the record:

(i) Shri J.P. Shah, Deputy General Manager (Sales and Marketing) of OP-7,

(ii) Shri Anil Khatri, General Manager (Marketing) of OP-9,

(iii) Shri Dilip Seksaria, General Manager Marketing (Chemical) of OP-12,

(iv) Shri Sanjay Govil, Manager (Commercial) of OP-16,

(v) Shri Gopendra Singh, Senior General Manager (Sales) of OP-17, and

(vi) Shri Ramesh Chandra Singhal, Chief Executive Officer of OP-18.

28.1.11 As such, the meetings dated 06.12.2012 and 27.12.2012 may have been held informally. However, no agenda or Minutes of such meetings have come on record as ISMA consistently maintained that such meetings were never held.

28.1.12 It is also noted by the Commission that the persons who attended the impugned meetings were the key persons who were involved in or who finalised the prices and quantities quoted on behalf of their respective companies in the Impugned Tender.

28.1.13 Some OPs have also urged during the course of hearing that the members who visited ISMA office on those days (dates of the meetings) just happened to be in Delhi for some other work on those days and hence, they visited ISMA office. However, it has not come on record from any such party as to for what other business were these specific representatives present in Delhi on 06.12.2012 and/ or 27.12.2012.

28.1.14 However, as stated above, of the approximately 40 sugar mills to whom the e-mail invite was sent, only a few attended the meeting. Further, as argued by the parties, the said meetings took place before the Impugned Tender was issued and the tender so issued was a novelty, being a first time e-tender and being a joint tender issued by 3 OMCs for 110 locations across India.

28.1.15 Hence, in the absence of any supporting evidence, it is difficult to assume that specific depot wise prices or quantities to be quoted in the Impugned Tender could have been discussed in the impugned meetings without knowledge of specifics of the tender or that any decisions could have taken place therein or consensus amongst all sugar mills could have been reached therein in light of limited attendance. The OPs have also argued that there is no record to show as to what actually transpired in the said meetings and that there is also no evidence to hint that prices or quantities were discussed in the said meetings.

28.1.16 In the matter of *Rajasthan Cylinders (supra)*, the Hon'ble Supreme Court of India also did not attach much weightage to scarcely attended meetings of competitors as evidence of cartelisation, though in that case the meetings had in fact been held during the relevant period of tender.

28.1.17 As far as inviting of and attendance of OP-7 (a non-member of ISMA) in such meetings is concerned, it has been explained by Shri Amit Agarwal, General Manager (Sales and Marketing) of OP-7 and Shri Abinash Verma, Director General of ISMA, in their statements recorded on oath before the DG, that OP-7 was a member of ISMA till 2004 and has been occasionally interacting with ISMA on policy issues.

28.1.18 As argued by OP-7, since OP-7 was the largest sugar manufacturer in the State of Uttar Pradesh and the expected gazette notification for the purpose of discussion of which the impugned meetings were convened was to have a huge impact on the industry as a whole (including on OP-7), OP-7 being invited for such meetings, is not entirely unreasonable.

28.1.19 The investigation report also expresses concerns about the fact that when AGM of ISMA was already scheduled on 13.12.2012, what was the need for ISMA to call for separate meetings on 06.12.2012 and 27.12.2012 to discuss the expected gazette notification.

28.1.20 When asked about the same, Shri GK Thakur, Director of ISMA, in his statement recorded on oath before the DG, stated that "*As already stated, since there was major* policy *change in EBP, we thought it better to discuss it with the Ethanol manufacturing members. Regarding AGM, it is true that it was scheduled to be held on 13.12.2012, it is not necessary that all the members manufacturing Ethanol are present in any AGM or any other meeting.*"

28.1.21 In light of such explanation given by Shri GK Thakur and given the new policy of CCEA, holding of separate meetings of only Ethanol manufacturers by ISMA, as against an AGM in which all ISMA members (all sugar mills) would be invited, to discuss the specific policy issue which would concern solely those sugar mills who may be engaged in Ethanol production, again does not seem entirely unreasonable.

28.1.22 As such, the meetings dated 06.12.2012 and 27.12.2012 of OP-1 cannot be construed as evidence of there being any cartelisation amongst the sugar mills of Uttar Pradesh through the platform of ISMA, in the Impugned Tender.

28.2 <u>CDRs</u>

28.2.1 The DG has collected the CDRs of Shri GK Thakur, Director of ISMA, from 01.12.2012 to 31.01.2013, which showed multiple telephonic interactions with representatives of 10 sugar mills of the State of Uttar Pradesh. Such persons with whom Shri GK Thakur interacted were mostly, the key persons who were involved in or who finalised the prices and quantities quoted on behalf of their respective companies, in the Impugned Tender.

28.2.2 When such representatives of the parties whose interactions with Shri GK Thakur had come on record were questioned by the DG, they stated that communications with representatives of ISMA were a regular course of action and not much can be read into the representatives of sugar mills having telephonic conversations with the Director of the industry association.

28.2.3 As per the OPs, in order to say that such frequent telephonic calls between the representatives of the OPs and Shri GK Thakur, Director of ISMA, were in furtherance of a cartel, the DG ought to have obtained the CDRs of Shri GK Thakur for preceding or at least subsequent few months to show a sudden surge, if any, in the telephonic calls made during the months of December 2012 and January 2013. However, no such exercise has been done by the DG.

28.2.4 In this regard, however, it is noted by the Commission that Shri GK Thakur, when asked by the DG if the representatives of Ethanol manufacturers communicated with him on telephone and mobile on a regular basis, during his statement on oath, answered "*No*". Hence, in light of the categorical negative answer given by Shri GK Thakur to the DG, the argument put forth by the OPs in this regard, cannot be accepted.

28.2.5 The Commission notes that the calls exchanged with Shri GK Thakur by the representatives of the OPs, as collected by the DG, can be divided into 3 categories, as follows:

(a) Calls exchanged prior to 02.01.2013 *i.e.* calls exchanged prior to issue of Impugned Tender: Such calls may not be of much relevance as the Impugned Tender was a novelty, being a first time e-tender and being a joint tender issued by 3 OMCs for 110 locations across India. Hence, it is difficult to fathom that any specific prices or quantities to be quoted by any OP with respect to any depot in the Impugned Tender could have been discussed in the impugned calls before the tender itself was issued.

(b) Calls exchanged between 02.01.2013 to date of submission of bid by each party (during tender period): The same lasted from a couple of seconds to around 05-07 minutes, as follows:

(i) Calls exchanged with Shri Amit Agarwal, General Manager (Sales and Marketing) of OP-7

Date	Time	Duration (In seconds)
04.01.2013	18:07	101
09.01.2013	10:37	80

(ii) Calls exchanged with Shri J.P. Shah, Deputy General Manager (Sales and Marketing) of OP-7

Date	Time	Duration (In seconds)
19.01.2013	17:10	49
19.01.2013	17:25	36

(iii) Calls exchanged with Shri Shishir Agarwal, Deputy Manager (Sales) of Upper Ganges Sugar & Industries Ltd.

Date	Time	Duration (In seconds)
21.01.2013	19:22	149
22.01.2013	10:25	189

(iv) Calls exchanged with Shri Rakesh Kumar Singh, Chief General Manager of OP-10

Date	Time	Duration (In seconds)
07.01.2013	13:16	59

(v) Calls exchanged with Shri Arvind Jain, Vice-President Marketing of OP-11

Date	Time	Duration (In seconds)
19.01.2013	17:07	163
21.01.2013	18:09	202
21.01.2013	19:17	95

(vi) Calls exchanged with Shri Dilip Seksaria, General Manager Marketing (Chemical) of OP-12

Date	Time	Duration (In seconds)
16.01.2013	16:44	74
19.01.2013	16:13	95
21.01.2013	19:20	77
23.01.2013	07:46	133
23.01.2013	16:59	110

(vii) Calls exchanged with Shri Rajesh Dhingra, former Business Head (Alcohol) of OP-13

Date	Time	Duration (In seconds)
21.01.2013	12:05	35
21.01.2013	19:43	379
22.01.2013	15:43	8

(viii) Calls exchanged with Shri Gopendra Singh, Senior GM (Sales) of OP-17

Date	Time	Duration (In seconds)
04.01.2013	14:47	2
04.01.2013	14:47	119

(ix) Calls exchanged with Shri B.P. Agarwal, General Manager (Commercial) of OP-18

Date	Time	Duration (In seconds)
23.01.2013	13:56	168

(x) Calls exchanged with Shri Manoj Goel, Deputy General Manager of OP-19

Date	Time	Duration (In seconds)
09.01.2013	14:06	2
22.01.2013	11:42	61
23.01.2013	15:56	85
23.01.2013	20:15	6
23.01.2013	20:17	163
27.01.2013	15:15	118
27.01.2013	15:00	424

(c) Calls exchanged after submission of bids by each OP: Again, such calls may not be of much relevance as there is no finding in the investigation report that price negotiations with the OMCs was also pursuant to a cartel.

28.2.6 From the above, it is evident that the representatives of OP-7, Upper Ganges Sugar & Industries Ltd., OP-10, OP-11, OP-12, OP-13, OP-17, OP-18 and OP-19 exchanged several calls of substantial duration with Shri GK Thakur, Director of ISMA, during the relevant period of the Impugned Tender. As stated by Shri GK Thakur, such calls were not routinely exchanged.

28.2.7 Though it has not come on record as to what was discussed in such calls, none of the OPs have been effectively able to explain the discussions which may have taken place during such calls, except stating generally that since the tender was a novelty, issues needed to be discussed. The Commission shall deal with the same in detail in the later part of the present order.

28.2.8 Further, apart from the calls exchanged with Shri GK Thakur, it has also come on record that calls between Shri Arvind Jain, Vice-President Marketing of OP-11 and Shri Dilip Seksaria, General Manager Marketing (Chemical) of OP-12 took place on 04.01.2013 and 16.01.2013 (*i.e.* during the tender period) as follows:

Date	Time	Duration (In minutes and seconds)
04.01.2013	10:40	09:33
04.01.2013	10:50	00:28
16.01.2013	14:53	04:21

28.2.9 In this regard, it has been argued by OP-11 that OP-11 and OP-12 did not participate for the same depots in the Impugned Tender except Mughalsarai, Uttar Pradesh where also, no supply was eventually made by OP-11. Also, OP-11 argued that at Mughalsarai depot, prices offered by OP-11 and OP-12 were not identical. On the other hand, OP-12, in this regard, submitted that it had business relations with OP-11 and has undertaken business transactions with OP-11 (and other sugar companies). Hence, the OPs have averred that no adverse inference can be drawn against OP-12 for having calls with OP-11.

28.2.10 The Commission notes from the investigation report that neither Mr. Arvind Jain nor Mr. Dilip Seksaria seem to have been questioned regarding these calls. Further, the NDCs quoted by OP-11 and OP-12 are not identical for any depot in the Impugned Tender.

28.2.11 As such, given the explanation of OP-12 about OP-11 and OP-12 having business relations and in the absence of any evidence to the contrary on record, benefit of doubt may be given that the calls exchanged between OP-11 and OP-12 during the tender period may not necessarily be related to the Impugned Tender.

28.3 Shri GK Thakur attending pre-bid meeting organised by OMCs

28.3.1 The investigation report finds that Shri GK Thakur, Director of ISMA, had attended the pre-bid meeting dated 08.01.2013 organised at Mumbai by the OMCs.

28.3.2 When asked about the same, Shri GK Thakur, in his statement recorded on oath before the DG, stated that "*Since the e-tender was floated for the first time, I attended the said pre-bid meeting after consulting my Director General just to understand the procedure of e-tender process. There was no request from any member or any directions from the President of the Association to attend the same*."

28.3.3 In view of the Commission, Shri GK Thakur, being the Director of ISMA, the largest association of Ethanol Manufacturers in India, had reasonable ground to attend the pre-bid meeting organised by the OMCs in respect of the Impugned Tender, which admittedly was a novelty, being a first time e-tender and being a joint tender issued by 3 OMCs for 110 locations across India.

28.4 E-mails recovered from the account of Shri GK Thakur

28.4.1 The Commission notes that in the investigation report, 06 e-mails recovered from the e-mail account of Shri GK Thakur, Director of ISMA, have been flagged as evidence of ISMA being involved in anti-competitive activities *w.r.t.* the Impugned Tender.

28.4.2 The views of the Commission upon each such e-mail, are as follows:

(i) E-mail dated 22.01.2013 sent by Shri Raj Kumar Rawal of OP-12 to Shri GK Thakur inviting attention of Shri Dilip Seksaria of OP-12 and containing distance between distilleries of OP-12 and the OMC depots.

With respect to the above e-mail, ISMA, in its objections/ suggestions to the investigation report, has explained that such e-mail was meant for Shri Dilip Seksaria of OP-12, and was sent to Shri GK Thakur as Shri Dilip Seksaria was in the ISMA office at the relevant time.

The investigation report has taken such e-mail as being evidence of the representative of OP-12 being present at ISMA office on 22.01.2013 *i.e.*

during the relevant period of the Impugned Tender and viewed such presence as evidence of anti-competitive conduct.

However, OP-12 sending distance between its distilleries and OMC depots to its own representative, who was in ISMA office at the time, cannot be adjudged anti-competitive. The data exchanged does not seem to be commercially sensitive and no adverse inference on the basis of exchange of such data has been drawn by the DG in the investigation report.

(ii) E-mail dated 06.03.2013 from Ugar Sugar Works Ltd. to Shri GK Thakur enclosing copy of 'price bid of Ethanol dated 23.07.2009' for delivery at various locations in the State of Karnataka.

The above e-mail is of post bid submission date of the Impugned Tender, contains details of historical pricing and not prices for the Impugned Tender, and has been sent by a sugar mill which has not been found guilty of cartelisation by the DG and which does not belong to the State of Uttar Pradesh. No adverse inference *w.r.t.* ISMA being involved in cartelisation in the Impugned Tender, can be drawn from such e-mail.

(iii) E-mail dated 25.01.2014 from South Indian Sugar Mills Association to Shri GK Thakur:

(a) Providing data relating to quantities for the State of Andhra Pradesh in the Impugned Tender; and

(b) Requesting depot wise quantity data for the tender dated 22.07.2013 of OMCs.

The above e-mail is of post bid submission date of the Impugned Tender, contains aggregated data of the industry and not of individual companies, and has been sent by South Indian Sugar Mills Association, sugar mills of which have not been found guilty of cartelisation by the DG. No adverse inference *w.r.t.* ISMA being involved in cartelisation in the Impugned Tender, can be drawn from such e-mail.

(iv) E-mail dated 22.02.2013 from Shree Renuka Sugars Ltd. to Shri GK Thakur in relation to tender price bid for 2009-10.

The above e-mail is of post bid submission date of the Impugned Tender, contains historical bid data, and has been sent by a sugar mill which has not been found guilty of cartelisation by the DG. No adverse inference *w.r.t.* ISMA being involved in cartelisation in the Impugned Tender, can be drawn from such e-mail.

(v) Letter dated 13.03.2013 from South Indian Sugar Mills Association seeking some information on difference in quantity offered as against required quantity by OMCs for depots located in the State of Andhra Pradesh.

The above letter is of post bid submission date of the Impugned Tender, contains aggregated data of the industry and not of individual companies, requests quoted quantity and price information post tender, and has been sent by South Indian Sugar Mills Association to ISMA, sugar mills of which in general have not been found guilty of cartelisation by the DG. No adverse inference *w.r.t.* ISMA being involved in cartelisation in the Impugned Tender, can be drawn from such e-mail.

(vi) Circular dated 23.11.2012 of ISMA to its members enclosing Press Release of CCEA.

Evidently, the above circular simply informs the members of ISMA about the approval of EBP policy by CCEA, which press release was already in the public domain. No adverse inference *w.r.t.* ISMA being involved in cartelisation in the Impugned Tender, can be drawn from such e-mail.

28.4.3 Therefore, as per the Commission's above observations on each specific e-mail, no inference against ISMA being involved in anti-competitive activities *w.r.t.* the Impugned Tender can be drawn from the above-stated e-mails.

28.5 <u>NDCs of bidders of Uttar Pradesh</u>

28.5.1 It has also come on record that there are instances of the OPs, who are sugar mills of Uttar Pradesh, quoting identical NDCs for certain depots in the State of Uttar Pradesh, in the Impugned Tender. These instances are as follows:

(a) For Mathura depot – OP-7 and OP-11 quoted identical NDC of ₹42,025.16.

(b) Najibabad depot – Upper Ganges Sugar & Industries Ltd. and OP-11 quoted identical NDC of ₹41,850.16.

(c) Aonla depot – OP-11 and Shamli Distillery (OP-19) quoted identical NDC of ₹42,050.16.

(d) Partapur depot – OP-11, OP-13 and Shamli Distillery (OP-19) quoted identical NDC of ₹41,850.16.

28.5.2 Thus, it has come on record that 5 OPs *viz.* OP-7, Upper Ganges Sugar & Industries Ltd., OP-11, OP-13 and OP-19 have quoted identical NDCs for certain depots.

28.5.3 Analysis *w.r.t.* each such OP is as follows:

(i) OP-7

- It is noted from the investigation report that OP-7 had quoted bids for 10 depots out of 13 in the State of Uttar Pradesh, for 3 depots in the State of Punjab, and for both depots in Delhi.
- Out of its 15 bids, there is a single instance of quotation of an identical bid, with 1 competitor, at one depot.

(ii) Upper Ganges Sugar & Industries Ltd.

- Upper Ganges had quoted bids for 04 out of 13 depots in the State of Uttar Pradesh, for 2 depots in the State of Punjab, for 3 depots in the State of Haryana, as well as for both depots in Delhi.
- Of its 11 bids, there is a single instance of quotation of an identical bid, with 1 competitor, at one depot.

(iii) OP-11

- OP-11 had quoted bids for 07 depots out of 13 depots in the State of Uttar Pradesh, for 2 depots in the State of Haryana and for 1 depot in Delhi.
- Of its 10 bids, 04 matched with 04 competitors at 04 different depots of the State of Uttar Pradesh.

(iv) OP-13

- OP-13 had quoted bids for 03 depots out of 13 depots in the State of Uttar Pradesh, for 2 depots in the State of Rajasthan and for 1 depot in Delhi.
- Of its 6 bids, there is a single instance of quotation of an identical bid, with 2 competitors, at one depot.

(v) OP-19

- OP-19 had quoted bids for 02 depots out of 13 depots in the State of Uttar Pradesh.
- Both its bids matched with 3 competitors.

28.5.4 From the above, it can be seen that out of the 5 OPs who the investigation report states have quoted identical NDCs, 3 have only one single instance of identical prices out of multiple bid quotations made by them which might as well be a coincidence, while 2 have multiple such identical prices.

28.5.5 Further, of the 3 who have a single instance of quotation of identical bid, it is noted from the investigation report that neither of them ended up being L1 bidder at the depots where they had placed the identical bids. Also, they had eventually reduced their prices during negotiations with the OMCs and ended up being suppliers of Ethanol at these respective depots.

28.5.6 However, of the remaining 2 *i.e.* OP-11 and OP-19 who have been identified to have quoted identical bids at multiple depots, it is noted from the investigation report that OP-11 was the L1 bidder at Najibabad depot while OP-19 was at none. Further, OP-11 had reduced prices during negotiations with OMCs and ended up being supplier of Ethanol at one other depot (Mathura) whereas it refused to reduce its prices for the remaining 2 depots. On the other hand, OP-19 reduced its prices during negotiations with the OMCs and ended up being supplier of Ethanol at both the depots where it had matching prices.

28.5.7 It is also noted from the investigation report that both OP-11 and OP-19 had exchanged substantial calls with Shri GK Thakur, Director of ISMA, during the tender period.

28.5.8 Therefore, the above instances of identical prices and the conduct of OP-11 and OP-19 hint at their anti-competitive conduct *w.r.t.* the Impugned Tender. The Commission shall come back to the same in detail in the later part of the present order.

28.5.9 It has also been observed by the DG in its investigation report that the NDCs quoted by the OPs for the depots in the State of Uttar Pradesh were in a very narrow range of ₹41.8/lt to ₹44.7/lt, (excluding OP-15), which points towards an anti-competitive agreement amongst the bidders. The maximum difference noted is for the depot of Jhansi of ₹105/kl between Oudh Sugar Mills Ltd. and OP-10.

28.5.10 In this regard, it is noted from the record that the quotations received for the 13 depots of Uttar Pradesh were solely from the sugar mills located within the state. Since the cost of ingredients (*i.e.* raw material (sugarcane), conversion cost, labour cost, fuel/ energy cost *etc*.) in a State would be almost similar, the likelihood of the bids of the bidders located within the same State being in a narrow range would be quite high. As such, nothing adverse can be drawn from this, especially in light of the argument made by the OPs that sugarcane industry is highly regulated by the Government in India.

28.5.11 It is further noted from the investigation report that the range of NDCs quoted in certain other States also by certain other sugar mills were also very less *viz.* in the State of Haryana, it was ₹44.23/lt to ₹47.97/lt (5 depots); in the State of Rajasthan, it was ₹48.60/lt to ₹51.60/lt (3 depots); and in the State of Gujarat, it was ₹47.90/lt to ₹50.55/lt (6 depots).

28.5.12 Therefore, not much emphasis can be placed on the narrow price range of the bids quoted by the bidders of the State of Uttar Pradesh.

28.6 <u>Freight charges of bidders of Uttar Pradesh</u>

28.6.1 It has also come on record that there are instances of the OPs *i.e.* the sugar mills of Uttar Pradesh, quoting identical freight rates for certain depots in the State of Uttar Pradesh, in the Impugned Tender. These instances are as follows:

(a) Aonla depot – OP-11 and Shamli Distillery (OP-19) quoted identical freight charges of ₹950.

(b) Najibabad depot – Upper Ganges Sugar & Industries Ltd. and OP-11 quoted identical freight charges of ₹750.

(c) Allahabad depot – Oudh Sugar Mills Ltd. and OP-14 quoted identical freight rates of ₹1,400.

28.6.2 From the above, the Commission notes that:

(i) The quotation of identical freight rates at Aonla depot is despite difference in distance of distillery (150 km of OP-11 and 270 km of Shamli Distillery (OP-19)) from the depot.

(ii) The quotation of identical freight rate at Najibabad depot may not be of much consequence as the distilleries of the bidders were located in close proximity (60 km of Upper Ganges Sugar & Industries Ltd. and 50 km of OP-11) from the depot.

(iii) The quotation of identical freight rates at Allahabad depot is despite difference in distance of distillery (310 km of Oudh Sugar Mills Ltd. and 225 km of OP-14) from the depot.

28.6.3 Apart from the above, it has also been observed in the investigation report that the freight charges quoted by different bidders at different depots were neither based on past payments being made to them (the OMCs were reimbursing transportation charges @₹1.43/ km to the suppliers in the State of Uttar Pradesh during 2012-13), nor are they the actual freight paid subsequent to award of the Impugned Tender. The same are also not based on the distance of the distilleries from the depots. As per the investigation report, such freight charges seem to have been quoted only in order to reach closer to the NDC of other bidders.

28.6.4 In this regard, it is noted by the Commission that the OPs have tried to explain that the freight charges quoted by them were approximate in nature and the same were based on quotations received by them from the transporters. However, the DG has not accepted such explanations given by the OPs. The DG has not investigated the same by collecting the freight quotations received by the OPs from the transporters in order to determine the veracity of the OPs' claim.

28.6.5 In the absence of investigation by the DG on this count, 2 odd instances of quotation of identical freight rates (1 explained by difference in distilleries' distance), cannot lead to an inference of cartelisation amongst the OPs and benefit of doubt will have to be given to the OPs on this count.

28.7 BP of bidders of Uttar Pradesh

28.7.1 It has also come on record that there are instances of the OPs, who are sugar mills of Uttar Pradesh, quoting identical BP of ₹35,600 for certain depots in the State of Uttar Pradesh, in the Impugned Tender. These instances are as follows:

(i) Mathura depot – OP-7, OP-11 and OP-13.

(ii) Najibabad depot – OP-7, Upper Ganges Sugar & Industries Ltd. and OP-11.

(iii) Aonla depot – Upper Ganges Sugar & Industries Ltd., OP-11 and Shamli Distillery (OP-19).

(iv) Partapur depot – OP-7, OP-11, OP-13 and Shamli Distillery (OP-19).

(v) Mughalsarai depot – OP-7 and OP-11.

28.7.2 As stated above, since the quotations received for the 13 depots of Uttar Pradesh were solely from the sugar mills located within the State, and since the cost of ingredients (*i.e.* raw material (sugarcane), conversion cost, labour cost, fuel/ energy cost *etc*.) in a State are likely to be similar, the likelihood of the BP of the bidders located within the same State being similar, would be very high.

28.7.3 In fact, the DG in the investigation report itself, while analysing the bid quotations for the States of Gujarat and Andhra Pradesh, has stated that where identical BPs have been quoted but the NDCs are different, the same has been accepted as a co-incidence and not construed as evidence of a cartel, thereby downplaying the importance of the BP.

28.7.4 Further, the difference between ₹35/lt–₹36/lt quoted as BP in the Impugned Tender by the OPs and ₹27/lt which was the *ad hoc* BP fixed for procurement in 2010 after 2.5 years is not a big difference, especially in light of the OPs bringing on record that the sugarcane prices from 2008-09 to 2012-13 went up by 100% (from ₹140/ quintal to ₹280/ quintal) whereas Ethanol price rose only by 24.15%.

28.7.5 It is noted from the record that the BP is arrived at by a bidder by determining the CoP of Ethanol and adding profit margin thereto. The CoP of Ethanol is stated to be based on the prevailing cost of other products *i.e.* RS (94.68 % v/v min 2), SDS (94.68% v/v mm), and ENA (95-96% v/v mm), and adding conversion cost to the same to reach at Ethanol (99.60% v/v mm).

28.7.6 It has been stated in the investigation report that the prevailing prices of RS/ SDS and ENA during the relevant period were around ₹26-28/₹lt and ₹31/lt, respectively. The OPs have argued that apart from adding conversion cost to the above, several other factors were also applicable to determine the price of Ethanol to be quoted for the Impugned Tender like the cost of denaturant, cost towards additional power and fuel, steam cost, labour cost, cost towards storage loss, transit loss, freight loss, administrative cost, insurance, interest cost from procurement of raw material till realisation of payment from OMCs, risk factor on account of penalty clause in the Impugned Tender, risk towards escalation of input costs, risk towards change in levies by State Governments *etc.*

28.7.7 Taking into account all of the above, in the absence of any evidence to the contrary on record, it seems that the BPs quoted by the OPs for the various depots in the State of Uttar Pradesh in the range of ₹35/lt to ₹36/lt, based on prices of RS/ SDS and ENA at around ₹26-28/₹lt and ₹31/lt respectively, may be justified and not the result of any anti-competitive conduct.

28.7.8 In fact, it has come on record that the BPs quoted by the OPs in the State of Uttar Pradesh were the lowest all across India. Further, it has also been argued by the OPs that the BP of Anhydrous Ethanol globally during the tender period was in the range of around ₹70/lt to ₹90/lt which was almost double the domestic rates.

28.7.9 It was also observed that the BP of OP-15 of ₹34/lt has been taken by the DG to be the benchmark price for private bidders, in contrast with the benchmark prices actually determined by the buyer OMCs. OP-15 is a state co-operative. The OPs have argued that its costs as well as profit earning motive cannot be compared with those of private players. Further, there is hardly a difference of ₹1/lt to ₹1.5/lt in the BP of OP-15 and of the private bidders. It has been submitted on record that Government organisations like OP-15 run entirely in a different environment with regard to costs, public policy, various subsidies, incentives, *etc*. Therefore, expecting the private bidders to make quotation similar as OP-15 may not be the correct approach.

28.7.10 The OPs have also argued that the investigation report incorrectly states that the BP quoted by bidders is not related to their CoP. Further, a few OPs have argued that their CoP taken by the DG in the investigation report for comparison, is in fact incorrect.

28.7.11 In this regard, the Commission notes from the statements on oath given by representatives of certain OPs before the DG that the calculation of BP quoted by such OPs have been explained. Further, it is noted that similar reasoning given by representatives of the bidders of the State of Maharashtra for arriving at their BP has been accepted by the DG in the supplementary investigation report.

28.7.12 Therefore, the Commission is also not inclined to agree with the finding of the investigation that the BPs quoted by the OPs are not justified on the basis of their CoP.

28.8 <u>Reduction in NDC during negotiations</u>

28.8.1 The investigation report has also observed that private players who were L1 in the State of Uttar Pradesh did not, at all locations, reduce their prices during negotiations despite the fact that the OMC benchmark prices were lower than their quoted prices. However, on the other hand, OP-15, which had already quoted prices below benchmark prices at four locations (Kanpur, Lucknow, Aonla and Banthra), further agreed to reduce prices.

28.8.2 In this regard, it is noted from the record that *firstly*, at none of the depots, the OMCs purchased Ethanol at a rate above their internally fixed benchmark prices. Purchases were made by the OMCs only at rates quoted below or at par with their benchmark prices or where the rates quoted were higher, at negotiated prices which were again below or at par with the benchmark prices. From bidders whose negotiated prices could not be brought down than benchmark prices, no purchases were made. Hence, at some depots, no purchases could be made.

28.8.3 *Secondly*, it is noted by the Commission that it has come on record that the OMCs had in fact, revised their internal prices by increasing the benchmark prices by 10%, for negotiations with the OPs.

28.8.4 *Lastly*, with respect to the final negotiated prices arrived at for the depots in the State of Uttar Pradesh, it is noted as under:

Depot	**Status**		
Allahabad	Lowest bidder (OP-14) was selected as L1, implying that its bid amount was lower than benchmark price fixed by OMCs.	Both the other bidders also agreed to supply at L1's rate.	Therefore, it is seen that the private players did reduce their prices during negotiations.
Jhansi	Lowest bidder (Oudh Sugar Mills Ltd.) was selected as L1, implying that its bid amount was lower than benchmark price fixed by OMCs.	The other bidder also agreed to supply at L1's rate.	Therefore, it is seen that the private players did reduce their prices during negotiations.
Baitalpur	Lowest bidder (OP-7) was selected as L1, implying that its bid amount was lower than benchmark price fixed by OMCs.	The other bidder also agreed to supply at L1's rate.	Therefore, it is seen that the private players did reduce their prices during negotiations.
Gonda	Lowest bidder (OP-10) was selected as L1, implying that its bid amount was lower than benchmark price fixed by OMCs.	Both the other bidders also agreed to supply at L1's rate.	Therefore, it is seen that the private players did reduce their prices during negotiations.
Kanpur	Lowest bidder (OP-15) selected as L1 lowered its NDC by ₹224.72/ kl.	05 out of 07 other bidders who were private players also agreed to supply at OP-15's negotiated rate.	Therefore, it is seen that the private players did reduce their prices during negotiations.
Lucknow	Lowest bidder (OP-15) selected as L1 lowered its NDC by ₹224.72/ kl.	04 out of 05 other bidders who were private players also agreed to supply at OP-	Therefore, it is seen that the private players did reduce their prices during

Depot	Status		
		15's negotiated rate.	negotiations.
Mughalsarai	Lowest bidder (OP-7) was selected as L1, implying that its bid amount was lower than benchmark price fixed by OMCs.	01 out of 03 other bidders also agreed to supply at L1's rate.	Therefore, it is seen that the private players did reduce their prices during negotiations.
Aonla	Lowest bidder (OP-15) selected as L1 lowered its NDC by ₹224.72/ kl.	02 out of 04 other bidders who were private players also agreed to supply at OP-15's negotiated rate.	Therefore, it is seen that the private players did reduce their prices during negotiations.
Banthra	Lowest bidder (OP-15) selected as L1 lowered its NDC by ₹224.72/ kl.	01 out of 03 other bidders who were private players also agreed to supply at OP-15's negotiated rate.	Therefore, it is seen that the private players did reduce their prices during negotiations.
Tundla	Lowest bidder (OP-13) was selected as L1, implying that its bid amount was lower than benchmark price fixed by OMCs.	01 out of 03 other bidders also agreed to supply at L1's rate.	Therefore, it is seen that the private players did reduce their prices during negotiations.
Najibabad	Lowest bidder (OP-11) was selected as L1, implying that its bid amount was lower than benchmark price fixed by OMCs.	All 04 other bidders also agreed to supply at L1's rate.	Therefore, it is seen that the private players did reduce their prices during negotiations.
Partapur	Lowest bidder (OP-9) was selected as L1, implying that its bid amount was lower than benchmark price fixed by OMCs.	01 other bidder also agreed to supply at L1's rate, and 04 out of 05 remaining bidders also made supplies at rates slightly higher than L1 rate but at rates lower than benchmark rates.	Therefore, it is seen that certain private players did reduce their prices during negotiations.
Mathura	Lowest bidder (OP-10) was selected as L1 with marginal reduction in price during negotiations.	06 out of 07 other bidders also agreed to supply at L1's rate.	Therefore, it is seen that the private players did reduce their prices during negotiations.

28.8.5 From the above, it is seen that majorly all private players did reduce their NDCs quoted during price negotiations with the OMCs. However, bidders who qualified as L1 and had quoted rates below the revised internal prices, may have refused to lower the prices further, in contrast with OP-15. However, at all locations where OP-15 was the L1 and had reduced its rates further, private players also made supplies at such lower rates. The bidders however, cannot be expected to reduce their prices at all locations to match the L1 negotiated rates or be mandated to reduce their prices further, if they have already qualified as L1.

28.8.6 In this regard, it is also noted that the OPs have argued that their only customer for fuel grade Ethanol *i.e.* Anhydrous Ethanol were the OMCs and they had no other buyer for the product. Further, the OPs have also argued that such Ethanol has limited shelf life and the OPs have limited storage capacities. As such, keeping in mind such arguments made by the OPs, the Commission observes that the OPs had no reason to not reduce their prices during negotiations if they had surplus quantity to supply, even at break-even rates, in order to avoid incurring losses.

28.8.7 Therefore, for the above reasons, the Commission is not inclined to draw adverse inference against the OPs simply because they may have not reduced their prices at all bid locations during negotiations with the OMCs.

28.9 <u>Previous conduct of ISMA and bidders</u>

28.9.1 The investigation report has also highlighted certain previous conduct of ISMA and the bidders of the State of Uttar Pradesh, *i.e.*:

(a) Bidders quoting identical prices of ₹21,500/kl for depots of Rajasthan and ₹22,000/kl for depots of Punjab in 2006-07 tenders of OMCs;

(b) All bidders of the State of Uttar Pradesh quoting the BP of ₹27,000/kl or 27,500/kl in the 2009 tender (subsequently scrapped), with the exception of Shakumbari Sugar (subsidiary of India Glycols Ltd.) which quoted ₹21,500/kl;

(c) Minutes of Meeting of ISMA dated 14.10.2009 which recorded "*The Committee reviewed the position regarding finalization of tenders issued by the Oil Marketing Companies (OMCs) for purchase of ethanol. Shri Narendra Murkumbi informed that he had a conference call with all the members of the Ethanol Promotion Sub Committee before the tenders were submitted in which several members participated. He was glad that the members generally quoted a price of Rs. 25/- per litre of ethanol ex-factory except in the case of two cases, where Rs. 21/50 per litre was quoted as per the earlier contract. He informed that the OMCs have approached the Ministry for revising the purchase price of ethanol upwards and as soon as a decision was taken, the OMCs would finalise the tenders. …*"

(d) Minutes of Meeting of ISMA dated 22.11.2011 wherein the President of ISMA allegedly started discussion on the issue of pricing and quantity to be supplied by its members; and

(e) Circular dated 23.11.2011 of ISMA, whereby the sugar mills allegedly decided to close their mills and stop operations for one day in the third week of December as mark of protest and to register their demands strongly with the Government.

28.9.2 With respect to the above evidences regarding alleged previous anti-competitive conduct of ISMA and bidders, the observations of the Commission are as under:

(a) The alleged conduct from 2006 to 2009 loses its relevance in light of the fact that the Commission had, in *Case No. 14 of 2012* titled *India Glycols Ltd. v. Indian Oil Corporation Ltd. and Others*, decided on *26.07.2012*, passed an order under Section 26(2) of the Act finding no contravention of the provisions of the Competition Act with respect to OMCs Ethanol tender of 2009. Such order of the Commission has also been upheld by the Hon'ble erstwhile Competition Appellate Tribunal *vide* order dated 09.12.2013 passed in Comp. Appeal No. 119 of 2012.

(b) Regarding the 2011 conduct, the Commission is of the view that the minutes of ISMA meeting dated 22.11.2011 do not suggest discussion on pricing or quantity and the circular dated 23.11.2011 of ISMA seems to only propose a strike. There is no evidence of a co-ordinated strike actually taking place in furtherance of such circular. Further, even if such a strike did take place, it may, depending upon facts and circumstances, fall within trade union activities and may not necessarily, be an anti-competitive conduct.

28.9.3 As such, any of the above evidences regarding alleged previous anti-competitive conduct of ISMA and the Uttar Pradesh bidders, do not strengthen the allegations of cartelisation and bid-rigging in the Impugned Tender.

28.10 <u>Allocation of quantities</u>

28.10.1 The investigation report also states that against the total quantity required in the State of Uttar Pradesh through the Impugned Tender *i.e.* 2.01 kl, the total quantity quoted by the bidders was 2.08 kl, *i.e.* almost equal to the total required quantity. This was despite the fact that the bidders' actual capacity was almost 3 times the required quantity (includes 25% for RS/ SDS and ENA).

28.10.2 Further, the report also observes that depot wise also, in the State of Uttar Pradesh, the difference between the quantity required by the OMCs and the quantity offered by the bidders was very narrow.

28.10.3 It has also been observed in the investigation report that many OPs did not bid for a depot despite being in close proximity to the same and far away bidders also placed bids for amounts lower than the OPs located nearer. They were also questioned regarding selection of depots by the DG during recording of their statements on oath.

28.10.4 Such irregularities led the investigation report to conclude that there was quantity allocation amongst the bidders of the State of Uttar Pradesh in the Impugned Tender since the justifications offered by them for selection of depots was not found credible by the DG.

28.10.5 The Commission however, notes from the investigation report that there is no evidence brought on record by the DG pointing towards quantity allocation amongst the OPs. Also, the DG while observing that the quantity offered by the bidders of Uttar Pradesh in the State of Uttar Pradesh was almost one-third of their actual capacity, has failed to take into account that the bidders of Uttar Pradesh also participated for depots outside the State of Uttar Pradesh.

28.10.6 Further, analysis in this regard of other States has not been made by the DG. During the course of arguments, it has been brought to the knowledge of the Commission that in the State of Tamil Nadu, there were altogether 07 depots and 07 bidders and each bidder had applied for only one location and became L1.

28.10.7 As such, the Commission does not find the above irregularities sufficient enough to arrive at a finding of quantity allocation amongst the OPs in contravention of the provisions of Section 3(3)(b) of the Act, without any evidence in this regard being brought on record.

28.11 From the above analysis, it is seen that for the allegations of price cartel amongst ISMA and the sugar mills of the State of Uttar Pradesh in contravention of the provisions of Section 3(3)(a) of the Act, the only credible evidence brought out in the investigation report is a few instances of quotation of identical prices by OP-11 and OP-19 in the Impugned Tender as mentioned in Para 28.5.8 above, and exchange of calls by them as well as by key officials of certain other OPs with Shri GK Thakur, Director of ISMA, during the tender period, as mentioned in Para 28.2.7 above.

28.12 It is no longer *res integra* that price parallelism cannot be the sole criteria to establish a cartel. Evidence of parallel pricing must be supplemented with "*plus factors*" showing that alleged conduct is conscious and not the result of independent business decisions. In the present matters, the plus factors on record to supplement price parallelism by 2 OPs, is exchange of a few calls between the OPs with the representative of the industry association ISMA, which may have been to understand the nuances of the Impugned Tender as it ushered a novel way of tendering process.

28.13 When the aforesaid evidence is viewed holistically, and keeping in mind the practicalities of the industry, it may not be possible for 2 isolated bidders of the State of Uttar Pradesh, out of 14 bidders of the State of Uttar Pradesh and 66 bidders pan India, to indulge into a cartel with respect to the pan India Impugned Tender, specifically in the light of the fact that there was no bar on the bidders to give their quotations pan India.

28.14 Moreover, it is a part of the record that the final prices were to be determined on the basis of negotiations with the buyer (OMCs) and the OPs have also argued that the OMCs have not themselves alleged cartelisation in the Impugned Tender despite their submissions being on record and despite the existence of clause 35 for '*Anti-competitive agreements/ abuse of dominance*' in the Impugned Tender. Thus, when the evidence on record is viewed in this light, the Commission finds it difficult to make a case of cartelisation for contravention of the provisions of Section 3(3)(a) of the Act, against ISMA and the bidders of the State of Uttar Pradesh, in the present matters.

Against sugar mills of Gujarat and Andhra Pradesh

28.15 Now, coming to the sugar mills of the State of Gujarat, the Commission notes from the record that the Impugned Tender had invited quotations for 06 depots (Hazira, Dumad/ Koyali/ Nandesary, Bareja/ Navegaon, Rajkot, Sabarmati/ Kaligam and Palanpur) in the State of Gujarat.

28.16 For those 06 depots, 06 bidders (OP-21, OP-22, OP-23, OP-24, Luna Chemical Industries Pvt. Ltd. and Shree Khedut Sahakari Khand Udyog Mandli Ltd.) submitted bids. OP-21 bid for Hazira, Dumad/ Koyali/ Nandesary, Bareja/ Navegaon and Sabarmati/ Kaligam depot, OP-23 bid for Hazira and Dumad/ Koyali/ Nandesary depot, while OP-22 and OP-24 bid for only Hazira depot.

28.17 Of the above quotations, the investigation report finds that the bids given by OP-21, OP-22, OP-23 and OP-24 matched for Hazira depot *i.e.* all four OPs quoted identical BP of ₹42,100 and identical NDC of ₹48,064.06 (including identical freight rates) at Hazira depot.

28.18 On the basis of the above evidence, the investigation report has found OP-20, OP-21, OP-22 and OP-23 to have indulged in cartelisation in contravention of the provisions of Section 3 of the Act.

28.19 In this regard, the concerned OPs have, *inter alia,* argued that their mills are situated within the same State at a distance of less than 100 km from Hazira depot and the cost of transportation to Hazira depot from within a 100 km range is the same; therefore, these four OPs quoting identical bids for a single Hazira depot cannot be viewed as a cartel. All these four OPs had quoted very small quantities and had no intention to earn any *supra* normal profits.

28.20 Similarly, with respect to the sugar mills of the State of Andhra Pradesh, the Commission notes from the record that the Impugned Tender had invited quotations for 10 depots (Cuddapah, Guntakal, Ghatkesar/ Cherlapalli, Ongole, Rajamundry, Ramagundam, Tada, Vijaywada, Vizag and Suryapeth/ Warangal) in the State of Andhra Pradesh.

28.21 For those 10 depots, 06 bidders (OP-24, OP-25, Shree Renuka Sugars Ltd., Satish Sugars Ltd., Rajlaxmi Petrochem Pvt. Ltd. and Parry Sugar Industries Ltd.) submitted bids. OP-24 bid for Rajamundry and Vijaywada depots while OP-25 bid for only Rajamundry depot.

28.22 Of the above quotations, the investigation report finds that the bids given by OP-24 and OP-25 matched for Rajamundry depot *i.e.* identical BP of ₹38,600 and identical NDC of ₹44,945.96 (including identical freight rates) was quoted. Further, the investigation report finds that the total quantity of Ethanol required at Rajamundry depot was 5,366 kl and the quantity offered by the three bidders who gave quotations at Rajamundry depot *i.e.* OP-24, OP-25 and Shree Renuka Sugars Ltd. was 5,300 kl.

28.23 On the basis of the above evidence, the investigation report has found OP-24 and OP-25 to have indulged in cartelisation in contravention of the provisions of Section 3 of the Act.

28.24 In this regard, the concerned OPs have, *inter alia*, argued that their mills are situated within the same State at a distance of around 60 km from each other, and that their distance from the Rajamundry depot is also the same; therefore, quoting identical bids for this single depot cannot be viewed as an act of cartel.

28.25 As stated *supra*, it is no longer *res integra* that price parallelism cannot be the sole criteria to establish a cartel. Evidence of parallel pricing must be supplemented with "*plus factors*" showing that alleged conduct is conscious and not the result of independent business decisions.

28.26 Further, with respect to matching of quantity in the State of Andhra Pradesh, neither has Shree Renuka Sugars Ltd. been found guilty of being a part of the alleged cartel by the DG for quantity allocation, nor has the investigation report brought on record any actual evidence pointing towards quantity allocation amongst the concerned OPs.

28.27 As such, the Commission does not find the single instance of price parallelism sufficient evidence to prove contravention of the provisions of Section 3(3) of the Act by either OP-20, OP-21, OP-22 and OP-23 or OP-24 and OP-25.

Against EMA

28.28 Business Standard publication 07.12.2012

28.28.1 The Commission notes that the article published on 07.12.2012 in the Mumbai edition of the 'Business Standard', reads as follows:

> *"Ethanol manufacturers have welcomed the Centre's decision on the 5% mandatory ethanol blending will petrol but with riders. They have demanded a payment of Rs. 40 per litre considering current rate of alcohol or Rs. 37 per litre and Rs. 5,500 and Rs 6,000 per tonnes of molasses. Besides, ethanol manufacturers want consistency in the procurement from the oil marketing companies (OMCs).*
>
> *Ethanol manufacturers Association of India, a representative body of ethanol producers across the state, has ready conveyed to OMCs that they would be able to supply 101.66 crore litre by end of October next year.*
>
> *Vijaysinh Mohite Patil, president of the association told Business Standard: "The all India ethanol production capacity is 162 crore litre of which Maharashtra has maximum with 92.80 crore litre. As per the government's decision at the all-India level, total requirement of ethanol up to next October would be 101.66 crore litre. This is a doable. However, we want OMCs to pay Rs. 40 per litre. We have been repeatedly pursuing rise in the ethanol procurement price with OMCs." He informed that during 2011-12, ethanol producers had incurred a per litre loss of Rs. 5 as the production cost had increased to Rs. 32 per litre against the procurement price of Rs. 27 per litre.*

Mohite Patil said there has been a still rise in the prices of alcohol and molasses in Maharashtra in particular especially due to the fall in sugarcane production following drought conditions. "It won't be possible for ethanol producers not only in Maharashtra but other states in such circumstances to supply ethanol at Rs. 27 per litre especially when the ethanol production cost has surged to Rs. 36.50 to Rs. 37 per litre. Therefore, there is a need for OMCs to pay Rs 40 per litre.'' he added.

Mohite Patil recalled about 35 ethanol producers had shown their intention to supply 4.82 crore litre during 2012-13 at Rs. 37 per litre. OMCs had forwarded its letter recommending ethanol producers' demand to the Cabinet Committee on Economic Affairs.

An OMC official, who did not want to be named, admitted that all OMCs would joint review the Centre's 5% ethanol blending programme and decide future course of action. "The government decision is in the right direction. There were hiccups in the past but the programme will be implemented as several issues have been addressed. OMCs will jointly review the Centre's decision and issue the tender if required. The price will be quoted in the tender," the official informed."

28.28.2 In this regard, EMA submitted before the Commission that it is necessary to appreciate exactly what statement was made by the President of OP-3 and the context in which the said statement was made. EMA explained that sometime before 05.12.2012, a reporter of 'Business Standard' by the name of Shri Sanjay Jog made a telephone call to the President of OP-3 and asked for information with regard to the position of supply of Ethanol. The President assured him that a note would be sent to him giving the required information. On 05.12.2012, the Secretary forwarded a written note in Marathi to the said Shri Sanjay Jog by e-mail. The news item in Business Standard dated 07.12.2012 is based on the said written note sent to Shri Sanjay Jog.

28.28.3 As per EMA, the said reporter has made certain errors while publishing the news item which appeared in Business Standard. However, the DG has not even sought any reply from Shri Sanjay Jog when Shri VM Patil disputed the interpretation of his note published by Shri Sanjay Jog in the newspaper.

28.28.4 In this regard, the Commission notes that *firstly*, the above publication is dated prior to the Impugned Tender; *secondly*, in light of the assertions made by EMA disputing the contents of the article published, the accuracy of the same ought to have been established by the DG by verifying the same from the reporter or the publisher; and *lastly*, it has come during the course of investigation (in the supplementary investigation report) that the members of EMA *i.e.* bidders of the State of Maharashtra who actually quoted a price of not less than ₹40 per litre for Ethanol in the Impugned Tender, have not indulged in cartelisation.

28.28.5 In light of the above three factors, the Commission cannot give a finding of contravention of the provisions of Section 3 of the Act by EMA on the basis of the statement of the President of EMA published in the above quoted article in the 'Business Standard'.

28.29 Times of India publication dated 20.01.2013

28.29.1 Similar to the above, another Press Release was issued on 20.01.2013 by the Pune online edition of the 'Times of India' where a report in the name of Shri VM Patil mentioning that Ethanol manufacturers will quote prices in the range of ₹38/lt was published. The relevant portion of the same read as "*January 28 is the last date of filing tender released by oil companies. We have decided to quote our price which would be close to Rs. 38 per litre. Some factories may quote a little lower* rates. *Five years back, the price was fixed at Rs. 27 per litre which is now not practical. The production cost of ethanol has already crossed Rs. 30 per litre and we cannot sell ethanol at Rs. 27 per litre.*"

28.29.2 As per EMA, no separate statement was given by Shri VM Patil, President of EMA, to the 'Times of India' and the above article is also based on the same statement of Shri Patil given to Shri Sanjay Jog, reporter of 'Business Standard' only. Further, as per EMA, the only thing that the 'Times of India' confirmed to the DG was that the said item was indeed published in their online edition.

28.29.3 Again, in light of the fact that the supplementary investigation report concludes that the members of EMA *i.e.* bidders of the State of Maharashtra who quoted a price of not less than ₹40 per litre for Ethanol in the Impugned Tender have not indulged in cartelisation, EMA cannot be held guilty of contravention of the provisions of Section 3 of the Act on the basis of the above evidence.

28.30 EMA meetings

28.30.1 The investigation report also finds that 2 meetings of EMA dated 09.01.2013 and 21.01.2013 were conducted after the Impugned Tender was issued on 02.01.2013 where all EMA members were called to Mumbai. Further, the investigation report finds that all bidding parties of Maharashtra had attended such meetings. As per the DG, "*convening two meetings after the announcement of tender provided a platform to the members to take a decision to submit higher prices in the tender*".

28.30.2 It is noted by the Commission that agenda for such meetings or Minutes of Meeting of the same are not available on record.

28.30.3 Further, in the supplementary investigation report, the DG has found that the NDCs quoted by the Maharashtra bidders of not less than ₹40 per litre, in the Impugned Tender, are justified on the basis of their CoP. The same has not been stated to be a result of the above two meetings of EMA where the members allegedly took a decision to submit higher prices in the Impugned Tender.

28.30.4 As such, without either there being any evidence (in the form of Agenda or Minutes) of price being discussed in the EMA meetings as an attempt to cartelise or without the members of EMA who allegedly cartelised on the platform provided by EMA being found guilty by the DG of contravention of the provisions of the Act, EMA cannot be held guilty of contravention of the provisions of Section 3 of the Act for convening the above-stated two meetings of its members.

28.31 Therefore, no case of contravention of the provisions of Section 3(3) of the Act is made out against EMA in the present matters.

29. As far as OP-4, OP-5 and OP-6 (OMCs) are concerned, the DG has concluded that "*the investigation has, therefore, not found any violation of provisions of Competition Act by OMCs in issuing a joint tender for procurement of Ethanol*". In this regard, the Commission notes from the investigation report that all the three PSU OMCs are

directly controlled by the MoPNG, Government of India and they are obligated to act according to direction(s) of the Ministry. A system has been developed by the Ministry whereby the resources of all the three OMCs are pooled together and distributed throughout the country. The three OMCs have to work in close co-ordination and provide *inter se* facilities/ services. This includes sharing of pipelines, railway sidings, refineries, jetties *etc.* Keeping in mind efficiencies and commercial benefits, joint tendering for Ethanol was resorted to. Since EBP policy was intended to be a continuous process, issuance of independent tenders would have led to inefficiencies. There has been no attempt by the OMCs to determine, directly or indirectly, the price of Ethanol, or to limit or restrict, the supply of Ethanol. Further, total quantity of Ethanol that is required by the OMCs is well known, since it arises from gazette notification and will not change whether a single tender or separate tenders are issued. Conversely, from an administrative and public benefit perspective as well as in light of the mandate of Government of India, there are a lot of factors necessitating joint tendering which outweigh the option of separate tendering. Such joint tendering has also not been found to have resulted in any appreciable adverse effect on competition in the market for supply of Ethanol. Accordingly, issuance of joint tender purely on account of commercial and operational considerations and to meet the Government's directives in a cost effective manner, cannot be construed to be anti-competitive or in violation of the provisions of Section 3(3) of the Act.

30. With respect to OP-2, the DG has found that it is the apex body of about 260 co-operative sugar mills in India. All State Federations are also its members. NFCSF was also found to be actively working with ISMA. However, during the relevant period of investigation, no details of any meeting or involvement of its office-bearers with individual mills who participated in the tender was found by the DG. As such, allegations against NFCSF could not be substantiated. Since the investigation has not brought on record any evidence of anti-competitive conduct against OP-2, it cannot be held guilty of contravention of the provisions of Section 3(3) of the Act.

31. Lastly, the DG has also not found OP-15 to be a part of the alleged cartel between OP-1 (ISMA) and the sugar mills of the State of Uttar Pradesh. Again, since the investigation has not brought on record any evidence of anti-competitive conduct against OP-15, it cannot be held guilty of contravention of the provisions of Section 3(3) of the Act.

Conclusion:

32. The investigation has not brought out sufficient evidence on record for the Commission to arrive at a finding of contravention of the provisions of the Act against any OP in the present matters.

33. It is made clear that all information used in the present order is for the purposes of the Act and as such, in terms of Section 57 of the Act, does not qualify for grant of confidential treatment.

ORDER

34. In light of the above analysis, no case of contravention of the provisions of the Act can be made out in the present matters against any OP and the matters are directed to be closed forthwith.

35. The Secretary is directed to forward certified copy of the present order to the Informants and the OPs, accordingly.

Sd/-
(Ravneet Kaur)
Chairperson

Sd/-
(Anil Agrawal)
Member

Sd/-
(Sweta Kakkad)
Member

Sd/-
(Deepak Anurag)
Member

New Delhi
Date: 22.07.2024