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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 34 of 2015

In Re:

Western Coalfields Limited

Coal Estate, Civil Lines,
Nagpur, Maharashtra.

Informant

And

SSV Coal Carriers Private Limited

Durgapur Rayatwari Colliery No. 4,
Near OB Plant, Chandrapur, Maharashtra

Opposite Party No. 1 / OP-1

Bimal Kumar Khandelwal

117, Khare Town, Dharampeth,
Nagpur, Maharashtra

Opposite Party No. 2 / OP-2

Pravin Transport

1-E, Mayur Building, Mul Road,
Chandrapur, Maharashtra

Opposite Party No. 3 / OP-3

Khandelwal Transport

Bagla Nagar, Babupeth,
Chandrapur, Maharashtra

Opposite Party No. 4 / OP-4

Khandelwal Earth Movers

117, Khare Town, Dharampeth,
Vikhroli West, Nagpur, Maharashtra

Opposite Party No. 5 / OP-5

Khanduja Coal Transport Co.

19, Redcross Road, Sadar,
Nagpur, Maharashtra

Opposite Party No. 6 / OP-6

Punya Coal Road Lines

Plot No. 50-51, Baji Prabhu Nagar,
Near South Indian Temple, Ramnagar,
Nagpur, Maharashtra

Opposite Party No. 7 / OP-7

B. Himmatlal Agrawal

Krishna House, 71/A, S.T. Bus Stand Road,
Ganeshpeth, Nagpur, Maharashtra

Opposite Party No. 8 / OP-8



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Punjab Transport Co.
Plot No. 35, Ward No. 61, Surana Layout,
Raj Nagar, Nagpur, Maharashtra

Opposite Party No. 9 / OP-9

Avaneesh Logistics Private Limited
Mezzanine Floor, Aradhana Building,
Gokulpeth, Nagpur, Maharashtra

Opposite Party No. 10 / OP-10

(Hereinafter collectively called '**the Opposite Parties/ the OPs**')

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. Justice G. P. Mittal
Member

Appearances during final hearing held on 16th March, 2017, 25th April, 2017 and 4th May, 2017:

- (i). Mr. Uddyam Mukherjee and Mr. Ankit Jain, Advocates for Western Coalfields Limited.
- (ii). Mr. Jaspreet Singh Rai, Advocate for OP-1 and Mr. Sunil Singh.
- (iii). Mr. Nakul Mohta and Mr. Johnson Subba, Advocates for OP-2, OP-5, OP-7, Mr. Tapan Mukherjee and Mr. Rajiv Khandelwal.
- (iv). Mr. T. Sundar Ramanathan, Mr. Abir Roy and Mr. Prashanth Shivadass, Advocates for OP-3, OP-4, Mr. Jasbir Singh and Mr. Kanhaiyalal Khandelwal.
- (v). Mr. Randeep S. Khanduja, Partner for OP-6 and Mr. Manjeet Singh Khanduja.
- (vi). Mr. Anubhav Mardikar, Advocate for OP-8 and Mr. Kishore Agrawal.
- (vii). Mr. Arunava Mukherjee, Advocate for OP-9 and Mr. Jagdish Kumar.
- (viii). Mr. Chetan S. Dhore, Advocate for OP-10 and Mr. Anil Sapra.



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Order under Section 27 of the Competition Act, 2002

1. The information in the present case was filed by the Informant under Section 19 (1) (a) of the Competition Act, 2002 (hereinafter '**the Act**') against the OPs alleging contravention of the provisions of Section 3 of the Act.

A. Allegations in the information

2. The Informant is one of the eight subsidiary companies of Coal India Limited and has been conferred '*Miniratna*' status. It has mining operations spread over the States of Maharashtra (Nagpur, Chandrapur and Yeotmal districts) and Madhya Pradesh (Betul and Chhindawara districts). It is a major supplier of coal to industries located in the States of Maharashtra, Madhya Pradesh, Gujarat, Andhra Pradesh, Tamil Nadu, Karnataka and Kerala. A large number of power houses *i.e.* Electricity Boards in Maharashtra, Madhya Pradesh, Gujarat, Karnataka, Punjab and Uttar Pradesh are the major customers of the Informant along with cement, steel, chemical, fertilizers, paper and brick industries.
3. The OPs are engaged in the business of providing ancillary services in colliery areas including of sand and coal transportation in the areas of operation of the Informant.
4. The instant information was filed pursuant to the quoting of identical prices by the OPs in four tenders floated by the Informant for coal and sand transportation. In these tenders, bids were called in two parts: Part I for general eligibility criteria and Part II for price bids which was to be opened only for bidders who qualify and were found eligible after scrutiny of their respective Part I bid documents. Estimated rates of the works to be executed under these tenders were based on the prices of diesel stated in the respective Notice Inviting Tenders (hereinafter '**NITs**'). There was also a provision for upward revision of the estimated value in case of increase in prices of diesel post submission of the bids to retain profitability and viability element in the exercise for the bidders.



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5. Details of the bidders and bids received in these four tenders are as below:
- 5.1 In Tender Notice No. 34/2013-14 dated 16th April, 2014 (hereinafter '**Tender No. 1**') for transportation of sand at Mahakali Colliery of Chandrapur area, OP-1 to OP-4 submitted the Part I bids. Out of them, OP-1, OP-2 and OP-4 qualified for Part II bids but OP-3 was disqualified as it did not meet the eligibility conditions in Part-I. It was noted by the Tender Committee that all the three qualified bidders quoted identical rates for all the three jobs mentioned in the said tender. Further, the rates quoted were 20.3% above the estimated cost, though the trend of awarded rates in the preceding two years were 8.39% above to 9.26% below the updated estimated cost.
- 5.2 In Tender Notice No. 37/2013-14 dated 2nd May, 2014 (hereinafter '**Tender No. 2**') for sand transportation at Hindustan Lalpeth Colliery of Chandrapur Area, OP-1 to OP-4 submitted the bids as all four of them met the eligibility criteria under Part I. It was, however, again noted by the Tender Committee that three bidders *viz.* OP-2, OP-3 and OP-4 quoted identical rates for all the three jobs mentioned in the said tender and the fourth bidder, OP-1 quoted a slightly higher rate than the others. Further, the identical rates quoted by OP-2, OP-3 and OP-4 were 16.21% above the estimated cost.
- 5.3 Similarly, in Tender Notice No. 03/2014-15 dated 3rd June, 2014 (hereinafter '**Tender No. 3**') for coal transportation at Neeljay South OCM of Wan Area, all the five participating bidders *i.e.* OP-5 to OP-10 qualified the eligibility criteria under Part I and yet again, four out of these five bidders *i.e.* OP-5, OP-7, OP-9 and OP-10 were found to have quoted identical rates which was 38.47% above the estimated cost, 32.09% above the justified cost and 2.08% below the ESM (ex-service man) rates though the trend of awarded rates after revision of justified rates (after February 2013) were 27.72% below to 23.35% above the



justified rates, 14.65% below to 41.98% above the updated estimated rates and 3.01% below to 41.76% below the ESM rates.

5.4 Also, in Tender Notice No. 06/2014-15 dated 6th June, 2014 (hereinafter '**Tender No. 4**') for coal transportation from loading point of Umrer CHP to wharf wall siding (Makardhokda Sub Area) of Umrer Area, OP-5 to OP-8 were found to have qualified the eligibility criteria. Out of them, OP-5, OP-6 and OP-7 quoted identical rates which were 41.26% and 64.57% above the justified and estimated rates respectively and 2.66% below the overall ESM rates though the trend of awarded rates was 27.72% below to 23.35% above the justified rates, 14.65% below to 41.98% above the updated estimated rates and 3.01% below to 41.76% below the ESM rates.

6. For ease of reference, the details of the rates quoted by the OPs in the above-mentioned four impugned tenders are produced in a tabular form below:

Table No. 1: Details of price quoted in Tender No. 1				
Bidder	Rates Quoted (Rs. per cum.)			
	Job No. 1	Job No. 2	Job No. 3	Job No. 4
OP-1	173	168	29	25
OP-2	173	168	29	25
OP-3	Disqualified	Disqualified	Disqualified	Disqualified
OP-4	173	168	29	25

Table No. 2: Details of price quoted in Tender NO. 2			
Bidder	Rates Quoted (Rs. per cum.)		
	Job No. 1 (a)	Job No. 1 (b)	Job No. 2
OP-1	175	175	35
OP-2	171	171	31
OP-3	171	171	31
OP-4	171	171	31



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Table No. 3: Details of price quoted in Tender No. 3					
Bidder	Rates Quoted (Rs. per Te.)				
	Job No. 1	Job No. 2	Job No. 3	Job No. 4	Job No. 5
OP-5	26	25.70	39	45	8.35
OP-7	26	25.70	39	45	8.35
OP-8	26.51	26	40.46	46	9
OP-9	26	25.70	39	45	8.35
OP-10	26	25.70	39	45	8.35

Table No. 4: Details of price quoted in Tender No. 4			
Bidder	Rates Quoted (Rs. per Te.)		
	Job No. 1	Job No. 2	Job No. 3
OP-5	20	8.75	8.75
OP-6	20	8.75	8.75
OP-7	20	8.75	8.75
OP-8	21	9	9

7. The Informant hence, alleged that the aforesaid conduct of the OPs in submitting identical bids at higher rates is a blatant act of bid-rigging, which is in clear violation of the provisions of the Act and prayed for initiation of an investigation against the OPs in the matter.

B. Directions to the Director General:

8. Upon considering the information and the materials placed on record by the Informant as well as hearing the parties during the preliminary conference held on 1st July, 2015, the Commission was convinced that a *prima facie* case of contravention of the provisions of Section 3 (3) (d) read with Section 3 (1) of the Act is made out against the OPs and accordingly, the Commission passed an order dated 2nd July, 2015 under Section 26 (1) of the Act directing the Director General (hereinafter '**the DG**') to cause an investigation into the matter. The DG was also directed to investigate the role of the officers/ persons who, at the time of contravention, if any, by the OPs, were in-charge of and responsible for the conduct of business of the OPs.



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C. Investigation by the DG:

9. After making a detailed investigation into the allegations, recording depositions made by the witnesses and considering the replies provided by the parties, the DG submitted its investigation report on 17th January, 2016. The DG framed the following three issues for the purpose of investigation: (a) whether the OPs, while bidding in the impugned tenders, acted in a concerted manner resulting in collusive bidding or bid-rigging?; (b) whether the alleged conduct of the OPs is covered within the ambit of the provisions of Section 3 (3) (d) read with Section 3 (1) of the Act?; and (c) if the OPs are found to have violated the provisions of Section 3 (3) (d) read with Section 3 (1) of the Act, who are the persons responsible under Section 48 of the Act for the conduct of their business? Based on analysis of facts and circumstances and evidence collected and discussed in the investigation report, the DG found that the conduct of the OPs in the four impugned tenders amounted to bid-rigging and was in contravention of the provisions of Section 3 (3) (d) read with Section 3 (1) of the Act. Further, the DG identified eight individuals who were the officers of the OPs who were found to be responsible under Section 48 of the Act for the conduct of business of the OPs. The findings of the DG, in brief, are as follows:

- 9.1 None of the OPs was able to justify its conduct of quoting identical rates or price quotes with narrow difference in the four impugned tenders, which shows that the same could not have happened without any understanding amongst the OPs.
- 9.2 Almost all the OPs admitted that they filled and submitted the price bid on the last date near the closing time, at the office of the Informant.
- 9.3 All the OPs claimed that costing was done by them before the respective tenders. However, it is highly peculiar that while the respective costing provided by the OPs do not match with each other, their final quoted rates were either identical or within a narrow range.



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This showed that matching of rates or quoting of rates in close range by the OPs in their respective tenders was not a result of any cost analysis done by them but a result of their collusion to rig the bids in the impugned tenders.

- 9.4 There were regular talks over mobile phone between the OPs and none of the OPs could substantiate in any way grounds for such communication with each other.
- 9.5 Many of the OPs had business and financial dealings with each other. OP-2 and OP-6 had financial dealings. OP-5 and OP-10 had earlier formed a joint venture for submitting bids in a joint tender floated by the Informant. OP-8 and OP-7 took few tenders of the Informant by forming joint venture.
- 9.6 All the OPs used to meet at social gatherings and meetings organised by the Informant and at each other's offices. Further, partners of OP-2, OP-4 and OP-5 involved persons of a common family.
- 9.7 Infrastructural conditions for tender submission at the Informant's office were highly fertile for exchange of information amongst the bidders.
- 9.8 The bidding pattern of the OPs in several earlier tenders also suggested that the conduct of the OPs of quoting identical rates in the impugned tenders was not a mere coincidence but a result of their prior understanding. Besides failure to justify identical rates in the impugned tenders, OP-5, OP-6, OP-7 and OP-8 could not justify their identical rates in earlier tenders also.
- 9.9 Mr. Kishore Agrawal of OP-8 and Mr. Y. P. Mehta of OP-7 admitted their conduct of bid-rigging in some of the previous tenders floated by the Informant.



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- 9.10 The OPs were members of one trade association *namely*, Central India Mining and Transport Association (hereinafter ‘CIMTA’), which gave few representations to the Informant for hike in transportation rates. The fact of existence of such association was withheld by most of the OPs. CIMTA gave another platform to the OPs to exchange information.
- 9.11 A few OPs even kept on exchanging important information regarding the instant case and its investigation. The information exchanged between them showed that even after order of investigation by the Commission, the OPs kept on exchanging important information with each other, which happens only in a typical case of cartelisation/ bid-rigging.
- 9.12 On careful examination of the circumstantial evidence gathered during investigation, taking note of the conduct of the OPs, telephone calls exchanged between them, formation of joint venture between some of the OPs in the past, exchange of information amongst the OPs, filling of price bid at the office of the Informant near tender closing time and related facts and circumstances, the DG concluded that there was an agreement/ understanding between the OPs who were engaged in identical services of transportation of sand/ coal, which had the effect of eliminating, reducing and manipulating the process of bidding for the four impugned tenders, which ultimately resulted into bid-rigging and collusive bidding, which is in violation of Section 3 (3) (d) read with Section 3 (1) of the Act.
- 9.13 Further, based on the depositions of witnesses and other material available on record, the following individuals were found by the DG to be liable under Section 48 of the Act: (i) Mr. Sunil Singh, Director of OP-1; (ii) Mr. Tapan Mukherjee, Attorney/ Manager of OP-2; (iii) Mr. Kanhaiyalal Khandelwal, Partner of OP-4; (iv) Mr. Rajiv Khandelwal,



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Partner of OP-5; (v) Mr. Manjeet Singh Khanduja, Partner of OP-6; (vi) Mr. Kishore Agrawal, Partner of OP-8; (vii) Mr. Jagdish Kumar, Director of OP-9; and (viii) Mr. Anil Sapra, Director of OP-10.

D. Consideration of the investigation reports:

10. The Commission, in its meeting held on 8th March, 2016, considered the investigation report filed by the DG and decided to forward copies of the same to all the parties for filing their written objections/ suggestions thereto. Further, the parties were directed to appear for oral hearing on the investigation report before the Commission on 4th May, 2016. The OPs and their officials found liable by the DG under Section 48 were also asked to file copies of their audited balance sheets and profit and loss accounts/ Income Tax Returns for the financial years 2011-12, 2012-13 and 2013-14, latest by 16th February, 2016.
11. Subsequently, the Commission received applications from OP-1, OP-3, OP-4, OP-7, OP-8 and OP-10 seeking cross-examination of some of the witnesses and the DG. Upon hearing these Applicants on 9th June, 2016, the Commission *vide* order dated 6th September, 2016 allowed the cross-examination of Mr. Jagdish Kumar of OP-9 by OP-2, OP-4 and OP-5. Accordingly, the said witness was cross-examined by the said OPs on 13th October, 2016 and 23rd January, 2017.
12. Thereafter, upon considering the record of the cross-examination, the Commission decided to forward copies of the same to the OPs and hear them on merits of the investigation report. Accordingly, the Commission heard OP-1, OP-2, OP-5 and OP-7 on 16th March, 2017; OP-3, OP-4, OP-8 and OP-9 on 25th April, 2017; and OP-9 and OP-10 on 4th May, 2017. Upon completion of hearing on 4th May, 2017, the OPs were also allowed to file Affidavits detailing out the compliance programmes initiated by them, if any, alongwith supporting documentary evidence in that regard, latest by 15th May, 2017. In response, OP-3 and OP-4 filed Affidavits *inter alia* undertaking to put in place



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mechanism to comply with the requirements of the Competition Act, 2002. OP-7, OP-8 and OP-10 filed their respective Affidavits detailing the competition advocacy programmes organised by them for the benefit of their employees.

13. In their written replies and during oral arguments, the OPs and their respective officers raised the following preliminary contentions:

13.1 Mis-joinder of causes of action – Tenders No. 1 and 2 were for transportation of sand whereas Tenders No. 3 and 4 were for transportation of coal. Jobs under each tender of both categories were materially different. Thus, coal transportation and sand transportation fall in different markets. Parties who have bid in coal transportation tenders cannot be made jointly and severally liable for actions of parties who have bid in sand transportation tenders and *vice versa*.

13.2 Violation of Principles of Natural Justice – Statements given by Mr. Sunil Singh and Mr. Paras Nath Yadav OP-1 and Mr. Jasbir Singh of OP-3 to the DG were in Hindi; however, the DG has recorded the same in English. Such procedure is in violation of the principles of natural justice. The statements could have been recorded in Hindi itself as per Regulations 6 and 7 of the Competition Commission of India (General) Regulations, 2009 (hereinafter '**General Regulations**'). Any individual would as it is be nervous in a strange environment in deposition surroundings and would be a wreck as it is, let alone the act of signing something, which he does not even fully comprehend. In support of such contention, reliance has been placed upon *V. K. Sasikala v. State, Crl. Pet. No. 7070 of 2011 decided by Kant. HC on 03.02.2012* and *Sardar Mohd. Wali v. P.S. Namboodri, Intelligence Officer, 2004 Cri. L.J. 5091 (Bom)*.

13.3 Non-admissibility of electronic evidence – CDRs relied upon by the DG to suggest telephonic conversations between the OPs cannot be



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admitted as evidence in absence of a Certificate under Section 65B of the Indian Evidence Act, 1872 (Hereinafter “**Evidence Act**”). In support of such contention, reliance has been placed upon *Anvar P.V. v. P.K. Basheer*, (2014) 10 SCC 473; *R.V.E. Venkatachala Grounder v. A Viswesaraswami*, (2003) 8 SCC 752; *Vinayak S. Shetty v. The State of Karnataka*, 2015 (3) Kant. L.J. 628; *The Board of Control for Cricket in India v. Competition Commission India and Others*, 2015 Comp. L.R. 548 (CompAT); *Amar Nath Pandey v. State of Uttar Pradesh*, 2014 (87) ALL CC 156; and *Jagdeo Singh and Others v. The State*, 2015 III AD (Delhi) 268.

13.4 Previous Tenders – The DG has erroneously relied upon the earlier conduct of some of the OPs as the DG cannot go beyond the scope of the order passed by the Commission under Section 26 (1) of the Act. Further, one of the relied upon *i.e.* Tender No. HLC-1/ SAND/ 42/ 2008-09 dated 3rd March, 2009, was issued prior to the enforcement of Section 3 of the Act. In support of such contention, reliance has been placed upon *Automotive Tyre Manufacturers Association of India v. Competition Commission of India*, W.P. (C) No. 10862 of 2015 decided by Del. HC on 03.12.2015; *In Re: Alleged cartelization by steel producers*, 2014 Comp. L.R. 145 (CCI); *Jyoti Swaroop Arora v. Tulip Infratech Ltd. and Others*, 2015 Comp. L.R. 109 (CCI); *Ram Lakhan Singh v. State of Uttar Pradesh*, (1977) 3 SCC 268; *Narendra Explosives Limited v. Competition Commission of India*, Appeals No. 88, 89, 90, 91, 102 and 103 of 2015 decided by CompAT on 10.05.2016; and *Grasim Industries Limited v. Competition Commission of India*, 206 (2014) DLT 42.

13.5 Appropriate Standard to Evaluate Bid-Rigging– The DG has utterly failed to demonstrate existence of an agreement to rig the bids through evidence. Mere identical prices cannot be taken as sufficient proof of bid-rigging. In cases of circumstantial evidence, the DG has to satisfy that on the basis of evidence, there is possibility of only one conclusion



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and no other plausible explanation other than collusion amongst the OPs. Since the proceedings under the Act have penal consequences, the relevant standard of proof to establish a cartel/ bid-rigging should be ‘*beyond reasonable doubt*’ and not ‘*preponderance of probabilities*’. The DG has failed to establish cartel amongst the OPs through clear and cogent evidence. Concept of ‘preponderance of probability’, which is a legacy in departmental proceedings cannot be adopted as standard of proof in cartel cases. In support of such contention, reliance has been placed upon *Union of India and Others v. Hindustan Development Corporation and Others*, (1993) 3 SCC 499; *Deputy Chief Materials Manager, Rail Coach Factory v. Faiveley Transport India*, Appeal No. 10 of 2016 decided by CompAT on 17.02.2016; *Neeraj Malhotra v. Deutsche Post Bank and Others*, (2011) 102 CLA 181 (CCI); *In re: Sugar Mills, Suo Moto Case No. 01 of 2013* decided by CCI on 04.05.2017; *MDD Medical Systems India Private Limited v. Foundation for Common Cause and People Awareness and Others*, 2013 Comp. L.R. 327 (CompAT); *Sterlite Industries (India) Limited v. SEBI*, Appeal No. 20 of 2001 decided by SAT on 22.10.2001; *Dilip Pendse v. SEBI*, Appeals No. 78 to 80 and 89 to 91 of 2009 decided by SEBI on 19.11.2009; *Mousam Singha Roy v. State of West Bengal*, (2003) 12 SCC 377; *Narendra Explosives (supra)*; *DG (Investigation & Registration) v. India Auto Industries Private Limited and Others*, RTPE 13 of 2006 decided by CompAT on 02.02.2015; *Director General (Investigation and Registration) v. Pioneer Friction Limited*, 2013 Comp. L.R. 743 (CompAT); and *Director General (Investigation and Registration) v. Escorts Limited and Others*, [2014] 126 SCL 262 (CAT).

14. Apart from the above, the OPs and their respective officials also raised the following common contentions before the Commission:

14.1 Market Conditions – In a limited market where the Informant used to divide the work between bidders quoting identical prices, there was an



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incentive for suppliers to quote higher prices instead of competitive prices. The market being oligopolistic in nature, identical price is not anti-competitive. There are many competitors other than the OPs in the market for sand/ coal transportation. No entry barriers are there. Skill set and technology required for carrying out task at hand is extremely basic and does not involve expertise. Demand depends solely on the Informant and tenders are awarded at negotiated rates and not bid rate. In support of such contention, reliance has been placed upon *Faiveley Transport India Limited (supra)*.

- 14.2 Estimated Rates – With regard to the DG’s observation that the rates quoted by the OPs were higher in comparison to the estimated rates of the Informant, it was submitted that even though the impugned tenders stipulated price revision/ escalation in case of increase in diesel price, the formula was faulty. The base price or estimated value of works was incorrectly determined by the Tender Evaluation Committee of the Informant. Adjustments over 2006 price were made only for lead and diesel prices. Inflation had not been accounted for. Also, post negotiations, prices were usually further reduced. Vehicle economy considered by the Informant was as per highway conditions and market rate of diesel was not taken into consideration by the Informant. Further, escalation in cost of tyres, lubricants, spare parts, wages *etc.* were not recoverable under the tender conditions. When the Informant calculated the estimated rate in 2012, the rates were low, but when the impugned tenders were applied for, wages and diesel costs were high. Further, negotiations would have taken place thereby reducing the contract price further. If a party quoted low rates and was then unable to complete the work, the Informant imposed heavy penalty and blacklisted the operator. Recently, a few tenders awarded by the Informant at estimated rates had to be cancelled as the operator was unable to complete the work at given rates. At the time when the impugned tenders were floated and bids were invited, diesel price was at peak. Diesel is the major component of cost incurred by the OPs.



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Hence, rates were quoted keeping all this in mind and were not substantially higher. In support of such contention, reliance has again been placed upon *Faiveley Transport India Limited (supra)*. Object of competition law does not envisage that a business enterprise has to serve the cause of competition at the cost of one's own survival. In support of such contention, reliance has been placed upon *All Indian Motor Transport Congress v. Indian Foundation of Transport Research and Training and Others, 2016 Comp. L.R. 646 (CompAT)*.

14.3 Infrastructural conditions at Informant's office – The conclusion of the DG that infrastructural conditions at the office of the Informant were conducive to bid-rigging cannot be used against the OPs. Infrastructural conditions at the office of the Informant cannot be taken as a relevant factor. The Tender box was placed in a corridor in the office of the Informant and there was no possibility for the OPs to stand in this corridor and discuss prices. Also, the OPs live close by. They had no reason to stand in the office of the Informant to cartelise. Though no CCTV camera was installed, however, a guard was usually deployed near the tender box. Hence, the OPs had no reason to and could not have discussed prices at the office of the Informant. Further, the DG is unclear as to whether collusion took place on phone calls or at the office of the Informant. Existence of an agreement amongst the OPs needs to be established unequivocally. In support of such contention, reliance has been placed upon *Neeraj Malhotra (supra)*.

14.4 Financial/ business dealings – Financial/ business dealings between the OPs have been wrongly considered by the DG as a plus factor in establishing cartel amongst the OPs. Merely because there were business dealings between the OPs, it cannot make activities of the OPs illegal. Such business dealings were disclosed voluntarily by the OPs to the DG. Tender conditions of the Informant required that trucks used at one site cannot be utilised at any other site. A large number of trucks were required to operate at each site and truck being a depreciating



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asset, it was not possible for any single bidder to fulfil the entire requirement of trucks by purchasing so many vehicles. Thus, there were dealings amongst the OPs for trucks. The OPs took trucks on hire from each other. The tender conditions themselves allowed formation of joint ventures at times considering that one bidder may not be able to undertake the entire work single-handedly. Since the OPs at times worked by forming joint ventures, business dealings between them was natural.

14.5 CIMTA – The fact that there was a trade association of the OPs was voluntarily disclosed by OP-10 to the DG. The association was not a registered one and was discontinued very shortly after its formation. Only one meeting of the association took place. The association was not in existence when the bids in the impugned tenders were submitted. The association had no address, contact number, bye-laws, bank account, staff *etc.* Freedom of association is anyhow protected under Article 19 (1) (c). The DG has found no evidence to suggest that the association was used as a platform to discuss bid prices. In support of such contention, reliance has been placed upon *Film and Television Producers Guild v. Multiplex Association, 2013 Comp. L.R. 19 (CCI)*.

14.6 Long-standing relationship – Long standing relationship amongst the OPs has been wrongly taken by the DG as a plus factor. Due to small demographics, it was inevitable that the OPs, despite being in similar business, had some unavoidable encounters. Regarding the meetings of the OPs in social gatherings, since Nagpur and Chandrapur are small places and the OPs are in the same business for many years and have business dealings with each other, such meetings are natural. The DG has not found any evidence that interaction between the OPs during such social gatherings was not for social reasons but for collusion and bid-rigging purpose.



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14.7 Family Relationship – Reliance placed by the DG on family relationship between partners of OP-2, OP-4 and OP-5 is not sustainable due to long history of family disputes amongst them. First of all, such evidence cannot be relied upon against any other OPs than OP-2, OP-4 and OP-5. Further, OP-2 and OP-5 on one hand and OP-4 on the other have different control and management. Even though their partners are related, but due to long history of family disputes, their firms are fierce rivals. Their partners have even filed cases against each other in courts. Similarly though partners of OP-4 and OP-5 are brothers, but they are not on good terms. The DG has not even found any evidence of interaction between the family members who are partners in OP-2, OP-4 and OP-5. The sole point of interaction between the said OPs was Mr. Tapan Mukherjee, who was earlier employed with OP-4 but shifted to OP-2 after family disputes arose. Moreover, such interaction taking place through Mr. Tapan Mukherjee was only with regard to hire and lease of trucks. Ms. Shashikala Khandelwal, wife of partner in OP-5 *namely* Mr. Bimal Kumar Khandelwal did not surrender her shares in OP-4 because Mr. Kanhaiyalal Khandelwal, partner in OP-4, did not surrender his share in certain properties of Mr. Bimal Kumar Khandelwal. Between OP-2 and OP-4, there are no common partners. Hence, there was no collusion between OP-2, OP-4 and OP-5. OP-4 and OP-5 have not even been participating in the same tenders. In support of such contention, reliance has been placed upon *Narendra Explosives (supra)*.

14.8 Appreciable Adverse Effect – Unlike other clauses of Section 3 (3), in cases of bid-rigging, appreciable adverse effect on competition has to be established. It has to be established not only that the parties quoted inflated identical prices, but also that the effect of such an act was to manipulate the bidding process. In support of such contention, reliance has again been placed upon *Narendra Explosives (supra)*.



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14.9 Liability of Individuals – As regards liability of individuals under Section 48 of the Act, it was submitted that a person cannot be found responsible under Section 48 of the Act unless there is first an affirmative finding against the concerned company that it has contravened the provisions of the Act. In support of such contention, reliance has been placed upon *Shib Sankar Nag Sarkar and Another v. Competition Commission of India and Others, Appeal No. 34 of 2014 decided by CompAT on 10.05.2016*.

14.10 Penalty – OPs are first time offenders, have co-operated in the investigation and no harm has been caused to consumers as the impugned tenders were cancelled by the Tender Committee. OPs being small operators are not well versed with competition jurisprudence. There was lack of infrastructural facilities at the office of the Informant. The Informant had a practice to divide work in case two or more bidders quoted identical prices and tender conditions allowed formation of joint tenders. Penalty can be imposed only when there is a deliberate violation. Hence, no penalty be imposed. In support of such contention, reliance has been placed upon *Pratibha Processor v. Union of India, (1996) 11 SCC 101; Karnataka Rare Earth v. Department of Mines and Geology, (2004) 2 SCC 783; Anti Theft Elastic Rail Clip Case; Hindustan Steel Limited v. State of Orissa, AIR 1970 SC 253; Rashtriya Swasthya Bima Yojna v. National Insurance Company Limited and Another, 2017 Comp. L.R. 1 (CompAT); In Re: Sheth and Company, Mumbai and Others, 2015 Comp. L.R. 715 (CCI), MDD Medical Systems (supra); and Excel Crop Care Limited (supra)*. Further, only relevant turnover generated from WCL's tenders not total turnover should be considered if the Commission finds violation by the OPs and imposes penalty on them. In support of such contention, reliance has been placed upon the EU penalty guidelines; *Excel Crop Care Limited (supra)*; and *L.H. Hiranandani Hospital v. Competition Commission of India and Others, 2016 Comp. L.R. 129 (CompAT)*.



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15. Further, OP-1 and its Director Mr. Sunil Singh also raised the following contentions:

15.1 The prices quoted by OP-1 in Tender No. 2 were different as compared to the prices quoted by others.

15.2 The DG has come to a wrong conclusion that the prices quoted by OP-1 had no relation with its cost. Such conclusion has been arrived at on the basis that OP-1 considered a cost of Rs. 163.43/- in Tender No. 1 for a lead of 13-14 kms. and a cost of cost as Rs. 173.98/- in Tender No. 2 for a lead of 12-13 kms. However, the DG has failed to appreciate that the price quoted in Tender No. 1 was for a quantity of 1,10,000 cum. of sand whereas the price quoted in Tender No. 2 was for a quantity of 1,30,000 cum. of sand. Such pick and choose approach of the DG has led to fatal errors resulting in inconsistencies in the investigation report.

15.3 Despite observing contradictions in the statements of Mr. Sunil Singh and Mr. Paras Nath Yadav of OP-1, the DG has erroneously accepted the statement of Mr. Sunil Singh regarding filling of price bid as correct. Mr. Sunil Singh had time and again stated that he alongwith Mr. Paras Nath Yadav had filled the entire tender previously except the price bid form, which was filled at the premises of the Informant 15-20 minutes before the closing time on the last date of Tenders No. 1 and 2. This was to ensure bid sanctity and avoid chances of leakage of information. Such behaviour of OP-1 suggested that it was aggressively competing with others and there was no reason to believe anti-competitive agreement being entered into amongst the OPs.

15.4 Statements of Mr. Kishore Agarwal of OP-8 and Mr. Y. P. Mehta of OP-7 regarding price discussion with each other or with other OPs do not indicate involvement of OP-1 in any anti-competitive behaviour. Similarly, statement of Mr. Anil Sapra of OP-10 does not relate to OP-1



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in any manner and thus, the same should not be used to arrive at any adverse inference against OP-1.

16. OP-2 and its Attorney/ Manager raised the following additional contentions:
 - 16.1 Tenders for sand and coal transportation are substitutable. Nature of activity in both is the same. The Informant also considers them same. Even the OPs gave statements to the DG to that extent. There are no entry barriers in sand transportation market. In recent past, new entrants have entered and even secured orders from the Informant.
 - 16.2 Order dated 02nd July, 2015 passed under Section 26 (1) of the Act by the Commission was never served upon it.
 - 16.3 The DG erred in concluding that submission of bids by all OPs near closing time is a reason to believe that there was collusion amongst them. Since a lot of manual/ electronic tenders are received from the Informant and other parties for big and small requirements, OP-2 requires secretarial assistance in the same. Hence, it is logical that bids would be submitted on the last date. Moreover, submission of price bids is only an administrative action and not indicative of any collusion. It has also been deposed by several OPs that price bid is filled at the end to maintain secrecy and ensure competitiveness.
 - 16.4 The DG has erred in raising suspicion about the technical bid and price bid being filled in different inks. Price bid is filled at later date as it requires mental calculation whereas remaining part of the tender is filled beforehand being mechanical in nature. Formal portions can be filled by any employee, but bid price is usually filled in by partner only.
 - 16.5 The conclusion of DG based on identical rates in earlier tenders cannot be relied upon against OP-2 as it has not been found to quote identical price in any of the earlier tenders.



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- 16.6 Purported admissions of OP-7 and OP-8 regarding price discussion and quoting identical prices cannot be relied upon to arrive at any adverse finding against OP-2 as those depositions do not implicate OP-2 in any manner.
- 16.7 The DG has wrongly concluded that the OPs coordinated with each other even after ordering of investigation. No information was exchanged by OP-2 with any other bidder. Emails were exchanged with OP-7 by Mr. Tapan Mukherjee as employee of OP-5 and that has nothing to do with OP-2. OP-2 did not even participate in the tenders where OP-5 or OP-7 participated. OP-2 is in sand transport business while OP-5 and OP-7 are in coal transport business.
17. OP-3 raised the following additional contentions:
- 17.1 The Informant has instituted the present case with *mala fide* intentions and for extraneous consideration. It has been antagonised with the OPs raising their common grievances through letters sent by CIMTA, their association. It is in response to the same that the Informant has filed the instant information. Such behaviour of the Informant amounts to abuse of dominant position and exerting pressure on the OPs for vexatious reasons. In support of such contention, reliance has been placed upon *Dalip Singh v. State of Uttar Pradesh, (2010) 2 SCC 114*.
- 17.2 OP-1 has quoted an altogether different rate in Tender No. 2. Thus, no cartel can be said to have been established amongst the OPs in Tender No. 2. If an agreement in respect of Tender No. 2 would have been there, there was no reason why OP-1 would not be a part of it and quote a separate rate.
- 17.3 The analysis of the DG that cost of OP-3 had no co-relation with the rates quoted by it is wrong. Rates were quoted on the basis of per cubic



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meter cost and included fixed cost as well. Costing by OP-3 was done tentatively and a specific costing format was not prepared before every price bid. Unlike MNCs, high level of sophistication is not found in sand transportation companies as resources and personnel are limited. Mr. Jasbir Singh of OP-3 had stated to the DG that prices were quoted on the basis of costs incurred, which are tentative in nature. Also, since the industry itself is small scale, price was quoted not on the basis of one's own cost but also keeping in mind the tentative costs incurred by other competitors. Since every party was aware about the vehicles and equipments of other parties, which were already deployed, this assessment becomes easier. Further, prices quoted were not necessarily determined on the basis of costing of that particular tender only, rather on the basis of overall work the party had. In certain tenders, prices lower than costs were bid so in other tenders, they may be offset in the quotes made by a party. OP-3 bids keeping a margin of 10% on the cost. 10% +/- is the industry norm also with respect to the tenders floated by the Informant and the same has even been accepted by Mr. J.B. Baba, Official of the Informant as stated at Page 401, Volume II of DG Report.

- 17.4 Overall costs of none of the OPs has been examined by the DG. Market analysis has not been done by the DG.
- 17.5 Higher prices may be quoted rather than competitive prices to maximise profits as award price is usually reduced by the Informant through negotiations. In support of such contention, reliance has been placed upon *Faiveley Transport India Limited (supra)*.
- 17.6 The DG failed to take note that in various other tenders, prices quoted by the OPs were different as can be seen at Pages 740 and 742, Volume III of DG Report. Many tenders were awarded to OP-3 as being the L1 bidder. Infact, OP-3 won tenders by quoting even lower rates than estimated value of works at times. Hence, apart from this one tender



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wherein OP-3 has been found quoting identical prices, there were no other instances of OP-3 quoting identical prices.

17.7 Filling of price bid at the last minute at the office of the Informant cannot be faulted. Apart from danger of leakage, even dynamics may change at the last minute due to non-participation by some party. Quotes are decided hand to hand seeing the number of competitors filling up the tender. There is statement of Mr. Kanhaiyalal Khandelwal of OP-4 that there is a risk of leakage of bids if they are filled in beforehand. Same was also stated by Mr. Sunil Singh of OP-1 and Mr. Jasbir Singh of OP-3 before the DG.

17.8 The DG has not found any business dealing of OP-3 with any other OP. Similarly, the DG has not found OP-3 coordinating with other OPs post the ordering of investigation.

17.9 The statement of Mr. Kishore Agrawal of OP-8 that he used to discuss rates to be quoted with Mr. Y. P Mehta of OP-7 at his office cannot be relied upon to arrive at any adverse finding against OP-3 as the same does not relate to it.

17.10 Basic elements of bid-rigging have not been established by the DG. New players have recently entered into the market. No extraordinary profits have been made by OP-3. In support of such contention, reliance has been placed upon *Foundation for Common Cause and People Awareness, New Delhi v. PES Installations Private Limited and Others, 2012 Comp. L.R. 588 (CCI)*.

18. OP-4 and its Partner Mr. Kanhaiyalal Khandelwal raised the following additional contention:

18.1 Mr. Kanhaiyalal Khandelwal had specifically stated before the DG that he was present inside the chamber of one of the officers of the Informant when he filled the bid price and hence, merely filling of price



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bid at the office of the Informant by him does not evidence that OP-4 was a part of the cartel.

19. OP-5 and its partner Mr. Rajiv Khandelwal raised the following additional contentions:

19.1 When in the first tender identical rates were quoted, the Tender Committee itself recommended both bidders to conduct negotiations and divide the work equally between them. When Tender Committee has found the price quoted by OP-5 and OP-8 reasonable and justified, the question of appreciable adverse effect on competition being caused by the same does not arise.

19.2 The statement of Mr. Kishore Agarwal of OP-8 that it quoted the same rate in Umrer mine tender in 2013-14 with OP-5 after discussing with Mr. Balli Babu of OP-5 cannot be relied upon by the Commission against OP-5 without confronting the same with OP-5. No meeting of OP-5 and OP-8 took place in OP-5's office as deposed by OP-8.

20. Additional contentions of OP-6 and its Partner Mr. Manjeet Singh Khanduja are as follows:

20.1 Copy of the information filed by the Informant was not shared with OP-6. This has caused serious handicap and is in violation of principles of natural justice.

20.2 There was frequent short tendering, limited number of suppliers *etc.*, which often lead to quoting of common price. Price analysis also shows that justified price and bid prices are in a very nominal range. Further, each case requires economic analysis of price and market structure, which may also sometimes give an indication of competitive pressure due to stringent buyer requirements giving a false impression of coordination amongst market players.



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- 20.3 Calculation of 'justified rates' and 'ESM rates' given by the Informant and mentioned in the order passed under Section 26 (1) of the Act are wrong. Also, these expressions have nowhere been defined. Justified rates seem to have been stated on the basis of failed contracts. Hence, comparison of bid prices quoted by the OPs and estimated rates was wrong. Also, manner of arriving at estimated rates has not been disclosed by the Informant. In support of such contention, reliance has been placed upon the order dated 15.01.2015 of Hon'ble Delhi High Court in W.P. (C) No. 1792 of 2013 titled *Khushi Coal Transport v. Union of India* wherein ESM rates fixed by the CIL have been quashed and writ appeal filed against the same has been dismissed. In fact, the Informant ought to have disclosed the details of these proceedings and outcomes to the DG and the Commission.
- 20.4 No phone call involving OP-6 is found by the DG. OP-6 has not been found to be a member of CIMTA. No mail was found to be exchanged between OP-6 and any other OP. OP-6 was not found to have any financial dealings with other OPs except with one Aveenesh Petroleum for purchase of fuel, which is not a party in this proceedings.
21. OP-7 raised the following additional contentions:
- 21.1 The statement of Mr. Kishore Agarwal of OP-8 that he used to discuss rates to be quoted with Mr. Y. P Mehta of OP-7 at his office cannot be relied upon to arrive at any adverse finding against OP-7 without giving opportunity of cross-examination. First of all, the said statement was given under stress as if in an interrogation. Secondly, OP-8 and OP-7 have pending disputes due to which OP-8 had a motive to implicate OP-7. OP-7 never used to discuss price bids with any other OP. It was only in cases where OP-8 and OP-7 bid in joint venture that they discussed the prices. The DG has failed to examine OP-8 on whether its



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discussion with OP-7 was only in respect of joint venture bids or even otherwise.

21.2 In various previous tenders referred to by the DG, either the tender was cancelled or the rates quoted by OP-7 and OP-8 were found to be reasonable and further reduced upon negotiations.

21.3 The DG was already biased. He asked Mr. Jasbir Singh of OP-3 to become a government approver or accept that there was a cartel. There was violation of principles of natural justice, Section 36 of the Act and Article 14 of the Constitution.

22. Additional contentions of OP-8 and its Partner Mr. Kishore Agrawal are as follows:

22.1 In Tenders No. 3 and 4, the rates quoted by OP-8 were different and higher than the rates quoted by other OPs.

22.2 Regarding statement of Mr. Kishore Agrawal of OP-8 about price discussion with Mr. Y. P. Mehta of OP-7, it is submitted that joint participation of two or more bidders by forming a joint venture was not prohibited by the Informant. OP-7 and OP-8 have successfully completed many tenders for the Informant as a joint venture. Sometimes for financial reasons and in order to give better performance, bidders have to enter into joint venture partnership. Further, though the present information was filed in April 2015, yet thereafter, tenders were allotted by the Informant jointly in certain cases where similar rates had been quoted. One of such tender was of Umrer, Ballarpur, Wani area.

22.3 If the rates quoted by bidders were unviable, the Informant could allot the work to ESM (Ex-Service Man) Agency rather than advertise the same again. The rates at which tenders were allotted to ESM Agency



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were much above the estimated price. Thus, allegation that unreasonable prices were quoted by the OPs is not tenable.

- 22.4 The DG has wrongly drawn adverse inference against OP-8 for not providing details of the cost considered by it for the purpose of the impugned tenders. Since the Informant did not ever make it mandatory to submit costing sheets along with tender, non-submission of costing sheets by OP-8 cannot be taken adversely by the Commission. During his deposition before the DG, Mr. Kishore Agrawal has clearly told that costing was done mentally and no costing sheet was prepared. He further stated that OP-8 usually sent two price bids – one filled in and other to be filled depending upon participation of others. This clearly shows that there was no collusion by OP-8. There is no proof in the form of entry register of the Informant or CCTV footage to prove the conduct of OP-8 prior to filling of tender.
- 22.5 OP-8 had good friendly relations with other OPs, which has been fairly admitted by Mr. Kishore Agarwal. Merely having contact numbers of other OPs is not sufficient to establish collusion.
- 22.6 OP-8 is not a part any previous tenders.
- 22.7 The statement of Mr. Kishore Agarwal was not recorded in its entirety by the DG and only certain portion of the same was recorded. This statement cannot be read singularly but has to be interpreted jointly taking into consideration the factual reality and the spirit of Competition law.
23. Additional contentions of OP-9 and its Director Mr. Jagdish Kumar are as under:



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- 23.1 OP-9 has been taking transportation contracts of the Informant since 1983. Till 2016, it has successfully executed more than 200 contracts without there being any dispute.
- 23.2 OP-9 had only participated in Tender No. 3 and other tenders are not related to OP-9. The DG has not found any evidence to establish that OP-9 is part of collusion, if any, with other bidders in this tender but conclusions have been drawn by the DG against OP-9.
- 23.3 OP-9 stands on a different footing than other OPs. It had not filled its bid in the office of the Informant or near the closing time. It had filled its bid a day before the bid submission and submitted the same at office of the Informant one to two hours prior to the closing time. All other OPs have admittedly met at the office of the Informant on the last day of bid submission but OP-9 did not meet them.
- 23.4 The DG has not found any CDR or email that indicates participation of OP-9 in any collusion. The DG has simply painted all the OPs with the same brush.
- 23.5 The only business dealing which OP-9 had with other OPs was renting out of its idle trucks/ tippers once in a while to those who required the same. Such dealings were discussed only at the level of fleet supervisors and the management was not involved, except for approval of rates of rentals.
- 23.6 Admissions of Mr. Kishore Agarwal of OP-8 and Mr. Y.P. Mehta of OP-7 regarding price discussion amongst them and with other OPs do not relate to OP-9.
- 23.7 Other OPs had knowingly matched their bid prices as a matter of business management in order to become joint L1 bidders since the Informant had the practice of equally dividing the work amongst



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multiple L1 bidders who quoted identical prices. This suited the OPs fine since they lacked the capacity to undertake the entire tendered work single-handedly. But such is not the case of OP-9. It has never secured L1 position jointly with any other OP. It did not even need to since it owned a large captive fleet of around 40 trucks at the time of bid submission and currently has 70 trucks. Thus, OP-9 enjoys economies of scale.

23.8 OP-9 has given coherent statement to justify its costing and explained with distinct calculations how its bid price was determined. It's costing sheet is consistent with the bid price quoted by it. Its identical prices with other OPs in one tender have been accepted by the DG to be mere co-incidence. Prices of OP-9 were most likely leaked/ compromised.

23.9 The DG itself has observed that infrastructural conditions at the office of the Informant were highly fertile for spot exchange of information. Bids were not sealed as well. In these circumstances, corporate espionage cannot be ruled out.

23.10 Before the DG, Mr. Jagdish Kumar had stated that he discussed with one Mr. Khandelwalji regarding the process before the office of DG during investigation. In this regard, it is submitted that Mr. Khandelwalji referred to by Mr. Jagdish Kumar is not any Khandelwal from the OPs. Rather, it is some Khandelwalji who met Mr. Jagdish Kumar in a marriage reception and who was told about to Mr. Jagdish Kumar by one of his well-wishers who was aware of Mr. Jagdish Kumar being summoned by the DG. He thought that this Mr. Khandelwal might be able to guide him about the papers required to be submitted and the process of investigation before the DG since he worked at a cement company, which was also known to be involved in a big investigation with the DG. Naturally, Mr. Jagdish Kumar, being a law abiding citizen, who was clueless about the papers/ documents he ought to submit as his legal obligation during the course of



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investigation, wished to discuss that aspect with a person who was reportedly aware of the papers/ documents to be submitted before the DG.

23.11 The DG has ignored the statement of Mr. J. B. Baba, Senior Manager (Mining) of the Informant wherein he stated nothing against OP-9. Similarly statement of Mr. Sudhir Kumar, Senior Manager (Civil) of the Informant was ignored by the DG wherein he has stated that OP-9 had quoted higher rates in various other tenders.

24. Lastly, additional contentions of OP-10 and its Director Mr. Anil Sapra are as under:

24.1 OP-10 is a bidder only in Tender No. 3.

24.2 Mr. Anil Sapra had clearly stated that the rates quoted by OP-10 in Tender No. 3 were as per its own calculation and costing. OP-10 cannot state as to why the other OPs quoted identical rates. They may also have similar costing.

24.3 Mr. Anil Sapra had also clearly stated that one Mr. Rakesh Kashyap filled bid price of OP-10 at its Nagpur office and the signatures on the cover page and technical bid were filled by Mr. Anil Sapra, which led to use of different inks. Bid in a sealed cover was thereafter dropped at the office of the Informant.

24.4 With regard to CDRs evidencing calls between Mr. Anil Sapra and other OPs, Mr. Anil Sapra stated that he might have talked with other OPs regarding plying of trucks. The statements of Mr. Rajiv Khandelwal of OP-5 and Mr. Y. P. Mehta of OP-7 corroborate the same.



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24.5 With regard to evidence of identical rates in prior tenders, OP-10 submitted that it did not form part of the same.

25. In reply to the above-mentioned contentions taken by the various OPs, the Informant stated as below:

25.1 To streamline/ ease the process of tendering and as a measure to foster greater transparency and competition in awarding tenders, the Informant has changed its tendering process to e-mode/ online with reverse auction process. Bidders are no longer required to visit the office of the Informant for bid submission.

25.2 On the issues of dividing work between bidders, it has been submitted that such division is resorted to only in case where the work involved was urgent. The Informant had never divided the job when three or more bidders quoted identical price. Two parties quoting identical rates might be a co-incidence but more than two parties quoting identical rates cannot be considered as a co-incidence.

E. Analysis and findings of the Commission

26. The Commission has perused the investigation report, suggestions/ objections filed by the parties and other material available on record and heard the learned counsel for the parties. On consideration of the aforesaid, the following issues arise for determination in the present matter:

Issue 1: *Whether OP-1, OP-2, OP-3 and OP-4 were in agreement to fix prices in the tenders floated by the Informant for sand transportation resulting in bid-rigging in Tenders No. 1 and 2, in contravention of the provisions contained in Section 3 (3) (d) read with Section 3 (1) of the Act?*



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Issue 2: *Whether OP-5, OP-6, OP-7, OP-8, OP-9 and OP-10 were in agreement to fix prices in the tenders floated by the Informant for coal transportation resulting in bid-rigging in Tender No. 3 by OP-5, OP-7, OP-8, OP-9 and OP-10, and in Tender No. 4, by OP-5, OP-6, OP-7 and OP-8, in contravention of the provisions contained in Section 3 (3) (d) read with Section 3(1) of the Act?*

Issue 3: *In the event the conduct of the OPs is found to be in contravention of the provisions of the Act, whether the individuals/ officials of the OPs mentioned in the investigation report, are liable under Section 48 of the Act for the anti-competitive conduct of the respective OPs?*

27. Before determining the above issues on merits, the Commission finds it appropriate to deal with the preliminary objections and certain issues commonly raised by most of the OPs.

(i) Mis-joinder of causes of action

28. The learned counsel for OP-2, OP-5, OP-7 and their respective office bearers argued that there is mis-joinder of causes of action as Tenders No. 1 and 2 were for sand transportation and Tenders No. 3 and 4 were for coal transportation. Sand and coal transportation are different from each other and fall under different markets. Parties who have bid in coal transportation tenders cannot be made jointly and severally liable for actions of parties who have bid in sand transportation tenders and *vice versa*.
29. The Commission observes that Section 19 (1) of the Act provides that any person can file an information or government or statutory authority can file a reference or *suo moto* case can be initiated alleging contravention of the provisions of Sections 3 or 4 of the Act. The Commission does not adjudicate a dispute between the Informant and the OP against whom the case if filed, rather it addresses the competition issues brought to its notice and restores fair competition in the market. Such proceedings before the Commission are not



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adversarial but inquisitorial. This is why Section 19 does not use the words ‘complaint’, ‘plaint’ or ‘suit’ but instead, uses the terms ‘information’ and ‘reference’. Further, Section 36 (1) of the Act empowers the Commission to regulate its own procedure. Though Section 36 (2) confers upon the Commission certain powers of a Civil Court, the procedure typically applicable to civil suits has not been made applicable to the proceedings under the Act, which are inquisitorial in nature.

30. The present information has been filed on the basis of identical prices or near identical prices being quoted by the ten OPs in the four impugned tenders floated by the Informant. The allegations are that the respective OPs colluded with each other resulting in quoting of such identical or near identical prices, which is in contravention of Section 3 (3) (d) read with Section 3 (1) of the Act. Upon hearing the parties during the preliminary conference, the Commission was *prima facie* satisfied that the conduct of the OPs suggest some kind of arrangement amongst them to collude by aligning the prices for sand and coal transportation. Consequently, the DG was directed to cause an investigation into the matter. None of the OP was alleged to be responsible for the actions of any other OP. In simple terms, OP-1 to OP-4 were alleged to have colluded in the impugned sand transportation tenders while OP- 5 to OP-10 were alleged to have colluded in the impugned coal transportation tenders. Hence, each OP is proceeded against on account of its own conduct. Neither have the OPs pointed out any procedural lapse under the Regulations framed by the Commission nor has any prejudice been demonstrated as a result of such grouping of all the OPs and subjecting them to a common investigation.

31. As a result, the Commission does not find any merit in the contention raised by the OPs regarding mis-joinder of causes of action.

(ii) Violation of principles of natural justice

32. The learned counsel for OP-1, OP-2, OP-3, OP-4, OP-5, OP-7 and their respective office bearers contended that the representatives of the OPs gave



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their statements in Hindi but the same were recorded by the DG in English. Such procedure adopted by the DG is in violation of the principles of natural justice and the DG could have recorded the statements in Hindi itself as per Regulation 6 and 7 of the General Regulations. It was also contended that the deponents would have been nervous in the deposition environment and hence, making them sign something which they do not fully comprehend was not correct on the part of the DG. The investigation was hence, not fair and proper.

33. The Commission first of all notes that Regulations 6 and 7 of the General Regulations do not help the case of the OPs. Regulation 6 simply states that parties may file documents drawn up in Hindi if they so desire, but information, reference or other papers shall always be filed with translated English copies. Further, Regulation 7 provides that where any document is not filed in English, the same may be made to be translated into English by the Commission by a translator approved the Commission, or where the translated copy is provided by the party only, same may be accepted if all the parties agree that the same is true translation of the document.
34. Secondly, it is not the case that the representatives of the OPs, who had given their statements to the DG in Hindi, did not understand English. The e-mails exchanged amongst the OPs (Annexures 37 to 40 of the investigation report), letters and submissions written by the OPs to the DG (Annexures 8 to 15 of the investigation report) and the representation given by their association CIMTA to the Informant, were all in English (Annexure 36 of the investigation report). The judgments relied upon by the OPs in support of such contention are also distinguishable. In *V. K. Sasikala (supra)*, the issue was relating to the role of interpreter in translation, in a circumstance where the learned Judge and the Deponent did not know the language of each other. That is not the case in hand since the DG knew Hindi and each of the statements recorded were read and explained to the respective deponents both in Hindi and English. The observations in *Sardar Mohd. Wali (supra)* are also not applicable to the present facts as investigation by the DG cannot be equated with criminal



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interrogation nor were the Deponents in this case unable to comprehend English.

35. Also, the Commission notes that in each such statement recorded, it has been categorically mentioned that “*The above statement has been explained to me both in Hindi and English. Also above statement has been given by me to the best of my knowledge without duress, coercion and undue pressure. I have gone through the statement and have signed it after finding it correctly recorded*”. Hence, it is clear that it was not the case that the deponents did not understand what they were signing. Signing of depositions with such statement cannot be undermined by saying that these are formal or usual phrases used in depositions and do not have any meaning.
36. Further, none of such persons, at the time of recording of their statements, requested the DG to record the statements in Hindi. No objection was raised before the DG when the statements were being recorded in English on this count nor was any application or objection moved later on before the DG or the Commission stating that there are any discrepancies in the recording of the statements. Even now, the contents of the depositions have not been disputed. Hence, the objections as to recording of statements in English seem to be an afterthought and *sans* merit.

(iii) Non-admissibility of electronic evidence

37. Almost all the OPs have contended that CDRs cannot be admitted as evidence as per the decision of the Hon’ble Supreme Court in *Anvar P. V (supra)* as the same are not supported by a Certificate under Section 65B of the Evidence Act. In support of such contention, various other case-laws have also been relied upon.
38. In this regard, the Commission notes that CDRs are only corroborative evidence used by the DG to support its finding of bid-rigging by the OPs and the major evidence against the OPs in this regard is quoting of identical prices



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upto the last decimal in all the jobs in all the four impugned tenders which is hard to be believed as a co-incidence. CDRs are only a plus factor which strengthens the finding arrived at by the DG. They are not the sole but one of the several such plus factors relied upon by the DG to find contravention by the OPs.

39. Further, though the admissibility of the CDRs as evidence has been challenged by the OPs on a legal ground, none of the OPs, when confronted with the CDRs, denied having made such calls; rather they only stated that such calls were made for social purposes and nothing regarding the impugned tenders of the Informant were discussed on such calls.
40. Hence, even if the Commission does not take the CDRs into evidence, the DG otherwise seems to have placed before the Commission sufficient evidence in support of its findings.

(iv) Previous Tenders

41. The learned counsel for OP-2, OP-5, OP-7 and their respective office bearers contended that the DG ought not to have investigated and relied upon the conduct of the OPs in earlier tenders of the Informant as those were not the subject-matter of the order dated 2nd July, 2015 passed by the Commission under Section 26 (1) of the Act. The learned counsel for OP-1 contended that the DG has *suo-moto* increased the ambit of the investigation by going into details of various other tenders of the Informant between 2009 and 2015, apart from the impugned tenders. The DG cannot go beyond the scope of directions issued by the Commission under Section 26 (1) of the Act. Further, the DG has relied upon Tender No. HLC-1/ SAND/ 42/ 2008-09 dated 3rd March, 2009, which was issued even prior to the enforcement of Section 3 of the Act.
42. The Commission notes that the instant information was filed on the basis of identical rates being quoted by the OPs in the four impugned tenders. Conduct of the OPs in the impugned tenders formed the basis for ordering investigation.



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However, that does not mean that the scope of investigation of the DG is limited to the four impugned tenders. The same is evident from the order of the Commission dated 2nd July, 2015 passed under Section 26 (1) of the Act, relevant portion of which is reproduced below:

“19. Prima facie examination of the price bids submitted by various Opposite Parties in the 4 aforesaid tenders floated by the Informant indicates some arrangement amongst the Opposite Parties. It is quite apparent that while in some tender notices, all the Opposite Parties, qualified for Part II bidding, have quoted identical rates and in others with marginal difference. In Tender Notice I, for sand transportation at Mahakali Colliery, all the eligible bidders OP 1, OP 2 and OP 4 had quoted identical rates and similarly for Tender Notice II, for Hindustan Lalpeth Colliery, three out of four eligible bidders (OP 2, OP 3 and OP 4) had quoted identical rates while OP 1 quoted a rate which was marginally above the identical rate as quoted by the other three Opposite Parties. Similarly, in Tender Notice III for coal transportation at Neeljay South OCM of Wan Area, four out of five bidders (OP 5, OP 7, OP 9, and OP 10) had quoted identical rates and for Tender Notice IV, three out of four bidders OP 5, OP 6 and OP 7 quoted identical rates for the said tender while OP 8 had quoted a price slightly above the identical price as quoted by the other three Opposite Parties.

20. The Commission also observes that all the identical quotes were above the updated estimated and justified cost and mostly below ESM rates. These similarities prima facie indicate that there was some kind of an arrangement amongst the Opposite Parties to collude by aligning the prices for the sand and coal transportation tenders. Further, the fact that such identical rates in the four tenders were much above the average estimated costs portray that the same could not have been the result of independent decision making.

21. From the facts on record, it appears that the Opposite Parties were coordinating and fixing the prices of their services with the object of distorting the fair bidding process. The identical price quotations submitted by the Opposite Parties appear to have actuated by mutual understanding/arrangement or in other words agreement amongst them. Although some of the Opposite Parties had quoted different rates, their rates were too close to the identical rates as quoted by others, which could not be a mere coincidence.

22. In view of the foregoing, the Commission is of the view that the Opposite Parties have contravened the provisions of Section 3



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(1) read with Section 3 (3) (d) of the Act. Though the Commission has considered the submissions made by the Opposite Parties whereby they have denied collusion, the evidence on record suggest that prima facie they had colluded for aligning the prices for the sand and coal transport tenders.

23. Accordingly, the Commission, under section 26(1) of the Act, directs the Director General (DG) to cause an investigation into the matter and to complete the same within a period of 60 days from receipt of this order...” [emphasis supplied]

43. There was no restriction, express or implied, to limit the investigation to the four impugned tenders. Instead, the order directing investigation concluded that identical prices quoted by the OPs in the four impugned tenders *prima facie* indicate that there was some kind of an arrangement amongst the OPs to collude by aligning the prices for sand and coal transportation tenders.
44. It is observed that for the purpose of inquiry into bid-rigging, it is inherently relevant to undertake a holistic assessment of the facts and circumstances, including the behaviour of the parties in other relevant tenders, to determine the existence or absence of collusion. Isolated analysis of the conduct of the parties in one or two tenders alone may not result in such assessment. Thus, any effort to limit the scope of investigation to the impugned tenders alone is not only contrary to the scope and spirit of the above discussed order but also renders the purpose of the Act otiose.
45. The Hon'ble Supreme Court of India has dealt with similar arguments in the case of *Excel Crop Care Limited (supra)* which related to bid-rigging in the tenders floated by Food Corporation of India (hereinafter, 'FCI') for procurement of Aluminium Phosphide Tablets between 2007 and 2009. There also, the Appellants argued that the DG had gone beyond the directions issued by the Commission under Section 26 (1) of the Act by investigating the conduct of parties in 2011 tender, which was neither mentioned in the reference made by FCI nor included in the order passed by the Commission under Section 26 (1). The Hon'ble Supreme Court, while rejecting such contention held as under:



“44. The CCI had entrusted the task to DG after it received representation/ complaint from the FCI vide its communication dated February 04, 2011. Argument of the appellants is that since this communication did not mention about the 2011 tender of the FCI, which was in fact even floated after the aforesaid communication, there could not be any investigation in respect of this tender. It is more so when there was no specific direction in the CCI’s order dated February 24, 2011 passed under Section 26 (1) of the Act and, therefore, the 2011 tender could not be the subject matter of inquiry when it was not referred to in the communication of the FCI or order of the CCI....

45. If the contention of the appellants is accepted, it would render the entire purpose of investigation nugatory. The entire purpose of such an investigation is to cover all necessary facts and evidence in order to see as to whether there are any anti-competitive practices adopted by the persons complained against. For this purpose, no doubt, the starting point of inquiry would be the allegations contained in the complaint. However, while carrying out this investigation, if other facts also get revealed and are brought to light, revealing that the ‘persons’ or ‘enterprises’ had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report. Even when the CCI forms prima facie opinion on receipt of a complaint which is recorded in the order passed under Section 26(1) of the Act and directs the DG to conduct the investigation, at the said initial stage, it cannot foresee and predict whether any violation of the Act would be found upon investigation and what would be the nature of the violation revealed through investigation. If the investigation process is to be restricted in the manner projected by the appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition. We, therefore, reject this argument of the appellants as well touching upon the jurisdiction of the DG...” (emphasis supplied)

47. Hence, the Hon’ble Supreme Court has held that it is well within the powers of the DG to investigate and report all the relevant facts and violations that the Commission could not foresee at the time of ordering investigation. In view of such decision of the Hon’ble Supreme Court, the Commission need not refer to the other case-laws on which reliance has been placed by the OPs. In light of such observations, the contention of the OPs that the DG could not have investigated and relied upon the conduct of the OPs in the previous tenders that



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were not mentioned in the information or the order passed under Section 26 (1) of the Act by the Commission is erroneous, and accordingly, rejected.

48. The Commission also does not find merit in the contention of OP-1 that the DG cannot examine tenders that were issued prior to the enforcement of Section 3 the Act *i.e.* prior to 20th May, 2009. Bid-rigging by the OPs prior to the said date may not be a contravention of Section 3 of the Act as the said provision was not in force then but such previous conduct of the OPs can definitely be taken into account to comprehensively determine whether quoting of identical prices in the impugned tenders was merely a co-incidence or repetitive conduct of the OPs. It is again pertinent to refer here to the decision of Hon'ble Supreme Court in *Excel Crop Care Limited (supra)* wherein the Hon'ble Court, in this regard, held as under:

“46. ... Pertinently, the investigation of DG revealed that the appellants had been quoting such identical rates much prior to and even after May 20, 2009. No doubt, in relation to tenders prior to 2009, it cannot be said that there was any violation of law by the appellants. However, prior practice definitely throws light on the formation of cartelisation by the appellants, thereby making it easier to understand the events of 2009 tender. Therefore, to take a holistic view of the matter, it would be essential to point out that the DG in his report had tabulated this tendency of quoting identical rates by these parties in respect of various tenders issued by even other Government bodies before and after 2009...” (emphasis supplied)

(v) Appropriate standard to evaluate bid-rigging:

49. The learned counsel for OP-10 argued that proceedings before the Commission involve penal consequences and therefore, the relevant standard of proof to establish a cartel/ bid-rigging should be 'beyond reasonable doubt'. OP-6 contended that the concept of 'preponderance of probability', which is a legacy in departmental proceedings cannot be adopted as the standard of proof in cartel cases. Almost all the OPs also contended that the DG has erred in giving a finding of bid-rigging based only on identical pricing. It has been further contended that mere price parallelism is not sufficient to establish a cartel



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amongst the OPs. Additionally, the learned counsel for OP-2, OP-3, OP-4, OP-5, OP-7 and their respective office bearers further suggested the purported oligopolistic nature of the markets for sand and coal transportation in Nagpur and Chandrapur area as a defence for their price quotes being identical in the impugned tenders.

50. All these contentions take the Commission to determine the appropriate standard of proof for evaluating bid-rigging, before dealing with the evidence on record. The Commission notes that proceedings under the Act in context of anti-competitive agreements, including bid-rigging, do not involve criminal punishments but only monetary penalties. Thus, the standard of proof of ‘beyond reasonable doubt’ typically relevant in criminal proceedings cannot be made applicable to the proceedings before the Commission. In cases of alleged anti-competitive agreements, the endeavour of the Commission is to evaluate the existence of such agreement for the proscribed subject-matter. The term ‘*agreement*’ has been defined under Section 2 (b) of the Act as “... *any arrangement or understanding or action in concert, - (i) whether or not, such arrangement, understanding or action is formal or in writing; or(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;*”. The language of this section itself is indicative of the nature of arrangements pursued to achieve anti-competitive objectives. They may not be formal or in writing or intended to be enforceable. Way back in 1969, Lord Denning in the case of *Registrar of Restrictive Trading Agreements v. W. H. Smith and Son Limited and Others*, (1969) 3 All ER 1065, in the context of evidence available in cartel cases, observed that “*People who combine together to keep up prices do not shout it from the housetops. They keep it quiet. They make their own arrangements in the cellar where no one can see. They will not put anything into writing, nor even into words. A nod or wink will do. Parliament is well aware of this ...*” Although in general, it is desirable that violation of any law is established with direct evidence pointing the same; however, in cases of cartelisation, such evidence is hardly available. It is also relevant to note here the following observation of the Hon’ble



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COMPAT in *International Cylinder (P) Ltd. and Others v. Competition Commission of India and Others*, 2014 Comp. L.R. 184 (CompAT):

“30. The burden in this behalf cannot be equated with the burden in the criminal cases where the prosecution has to prove the allegation beyond the reasonable doubt. A strong probability would be enough to come to the conclusion about the breach of the provisions of the Competition Act. Some of the learned counsel argued that their participation or the preconcerted agreement would have to be proved beyond doubt. We do not think so. It is obvious that an agreement cannot be easily proved because it may be a wink or a nod or even a telephone call. What is required to be proved is a strong probability in favour of a pre-concerted agreement and the factors which we have highlighted go a long way in that direction and as plus factors...”

51. It is also instructive to take guidance from the recent judgment of the Hon’ble Supreme Court in *Excel Crop Care Limited (supra)* wherein the Hon’ble Supreme Court has endorsed the test laid down by the European Court of Justice in *Imperial Chemical Industries Ltd. v. Commission of the European Communities, Case 48-69 [(1972) ECR 619]* for appraising concerted practices. The relevant portion of the said judgment is reproduced hereunder:

*“53. We are here concerned with parallel behaviour. We are conscious of the argument put forth by Mr. Venugopal that in an oligopoly situation parallel behaviour may not, by itself, amount to a concerted practice. It would be apposite to take note of the following observations made by U.K. Court of Justice in *Dyestuffs*:*

“By its very nature, then, the concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants. Although parallel behaviour may not itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not respond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. Such is the case especially where the parallel behaviour is such as to permit the parties to seek price equilibrium at a different level from that which would have resulted from competition, and to crystallise the status quo to the detriment of effective freedom of movement of the products



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in the [internal] market and free choice by consumers of their suppliers (emphasis added).

54. *At the same time, the Court also added that the existence of a concerted practice could be appraised correctly by keeping in mind the following test:*

“If the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the products in question.”

(emphasis supplied)

52. In the above-mentioned case also, the Hon’ble Supreme Court rejected the justifications advanced by the Appellants on the pretext of the concerned market being oligopolistic in nature. The Court, in the following words, categorically held that the defence of price parallelism being a general feature of oligopolistic market does not hold good in bid-rigging cases:

“48. We may record here the submission of Mr. Krishnan Venugopal, learned senior counsel appearing for M/s. Excel Crop Care Limited, that the APT pesticide is needed only by the FCI and the Central Warehousing Corporation or the Central and State Warehousing Corporations and it creates a monopoly situation where buyer is in a dominant position. There are only four suppliers who are given ‘MFN’ status, but since the supply is only to the aforesaid Government agencies, the supplier is entirely dependent upon these parties for supplies. It creates oligopoly market. It was argued that since dominant position is enjoyed by the buyer, it leads to parallel pricing and this conscious parallelism takes place leading to quoting the same price by the suppliers. The explanation, thus, given for quoting identical price was the aforesaid economic forces and not because of any agreement or arrangement between the parties. It was submitted that merely because same price was quoted by the appellants in respect of the 2009 FCI tender, one could not jump to the conclusion that there was some ‘agreement’ as well between these parties, in the absence of any other evidence corroborating the said factum of quoting identical price. In respect of this submission, Mr. Venugopal had also referred few judgments.

49. The aforesaid argument is highly misconceived. A neat and pellucid reply of Mr. Kaul, which commands acceptance, is that argument of parallelism is not applicable in bid cases and it fits in the realm of market economy. It is for this reason the entire history of quoting identical price before coming into operation of Section 3 and which continued much after Section 3 of the Act was enforced has



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been highlighted. There cannot be coincidence to such an extent that almost on all occasions price quoted by the three appellants is identical, not even few paise more or less from each other. That too, when the cost structure, i.e. cost of production of this product, of the three appellants sharply varies with each other. ...”

(emphasis supplied)

53. The Commission hence, observes that, in a case of alleged bid-rigging, if a holistic, not isolated, assessment of the evidence on record points to the fact that identical prices quoted by the bidders are not a result of any market force but a consequence of consensus amongst them, the same is conclusive of contravention of Section 3 (3) (d) read with Section 3 (1) of the Act. Further, as noted by the Hon'ble Supreme Court in *Excel Crop Care Limited (supra)*, quoting of identical prices in tenders is a strong evidence of bid-rigging and the same cannot be taken as a mere coincidence unless a plausible explanation is given in a clear and cogent manner.
54. In view of the above, the reliance placed by the OPs on various case-laws is misplaced. The case of *Hindustan Development Corporation (supra)* relied upon by the OPs was not even a case of identical pricing at all, but rather related to dual pricing.
55. Keeping the above discussed standard of proof in mind, the Commission shall now proceed to evaluate the evidences gathered by the DG during the investigation, in light of the arguments put forward by the OPs and determine the issues framed above.

Issue No. 1: *Whether OP-1, OP-2, OP-3 and OP-4 were in agreement to fix prices in the tenders floated by the Informant for sand transportation resulting in bid-rigging in Tenders No. 1 and 2, in contravention of the provisions contained in Section 3 (3) (d) read with Section 3 (1) of the Act?*

56. To begin with, the Commission first looks at the prices quoted in Tenders No. 1 and 2 for sand transportation:



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Table No. 5: Details of price quoted in Tender No. 1				
Bidder	Rates Quoted (Rs. per cum.)			
	Job No. 1	Job No. 2	Job No. 3	Job No. 4
OP-1	173	168	29	25
OP-2	173	168	29	25
OP-3	Disqualified	Disqualified	Disqualified	Disqualified
OP-4	173	168	29	25

Note: This table is same as Table No. 1

Table No. 6: Details of price quoted in Tender No. 2			
Bidder	Rates Quoted (Rs. per cum.)		
	Job No. 1 (a)	Job No. 1 (b)	Job No. 2
OP-1	175	175	35
OP-2	171	171	31
OP-3	171	171	31
OP-4	171	171	31

Note: This table is same as Table No. 2

57. As may be seen, in Tender No. 1, OP-1, OP-2 and OP-4 quoted identical prices, not for just one job but for all the four different jobs. Similarly, in Tender No. 2, OP-2, OP-3 and OP-4 quoted identical prices for each of the three different jobs. It is highly unlikely that in normal market conditions, prices quoted by different bidders in two tenders for several jobs would be identical to this extent. The Commission considers the identical price quotes in both the said tenders, not for one job, but for four different jobs in Tender No. 1 and three different jobs in Tender No. 2 as a strong evidence to show that the same are not a co-incidence but more an outcome of understanding amongst OP-1, OP-2, OP-3 and OP-4. Although OP-1 quoted different rates in Tender No. 2, difference between the price quoted by OP-1 and others is exactly the same in respect of each of the three different jobs. The identical price difference in respect of each of the three different jobs in Tender No.2 does not appear to be an outcome in normal market conditions. This when seen in conjunction with the identical price quote of OP-1 in Tender No. 1 and other factors/ findings outlined in the subsequent paras suggest that its bid in Tender No. 2 to be a cover bid.



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58. The Commission notes that the matter in hand is not a case of mere price parallelism as argued by the OPs. The investigation has revealed several other plus factors evidencing a cartel, which are dealt with in detail in the later part of this order. OP-1 to OP-4 suggested the purported oligopolistic nature of the market as the reason for such identical prices. However, as noted earlier, such argument is misconceived in view of the Hon'ble Supreme Court decision in *Excel Crop Care Limited (supra)*.
59. Besides this argument, the OPs have taken two sets of defence for the price quotes being identical: *firstly*, that their price quotes were on the basis of independent costing; and *secondly*, that the price quotes were benchmarked against earlier rates. The Commission does not find either of these explanations acceptable. In the first place, the OPs have not been able to demonstrate with any evidence whatsoever that the prices quoted in the impugned tenders were benchmarked against the earlier award prices. Even if the said argument is assumed to be true, it does not explain as to how the price quotes were identical to the extent where same price was quoted for each of the four/ three different jobs. Secondly, the Commission notes that though the cost data provided by each OP is different from others, yet all the four OPs have ended up giving identical prices quotes as can be seen from the table below:

Table No. 7: Comparison of cost and price in Tender No. 1 (in Rs. per cum.)								
Bidder	Job 1		Job 2		Job 3		Job 4	
	Cost	Price	Cost	Price	Cost	Price	Cost	Price
OP-1	179.11	173	163.43	168	23.16	29	23.16	25
OP-2	156.27	173	152.71	168	26.92	29	24.07	25
OP-3	NA	NA	NA	NA	NA	NA	NA	NA
OP-4	NP	173	NP	168	NP	29	NP	25

Note: NP – Not provided; and NA – Not applicable.

Table No. 8: Comparison of cost and price in Tender No. 2 (in Rs. per cum.)						
Bidder	Job 1(a)		Job 1(b)		Job 2	
	Cost	Price	Cost	Price	Cost	Price
OP-1	173.98	175	173.98	175	24.16	35
OP-2	159.50	171	152.81	171	33.14	31
OP-3	171	171	171	171	31	31
OP-4	NP	171	NP	171	NP	31

Note: NP – Not provided; and NA – Not applicable.



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It is relevant to note that quoting of identical price when cost of each bidder is different from others was taken as one of the circumstances indicating bid-rigging in *Excel Crop Care Limited (supra)*.

60. OP-2, OP-3 and OP-4 have also raised issues concerning the correctness of the estimated rates prescribed by the Informant. OP-2 has submitted that a few tenders had to be cancelled by the Informant as the bidders could not finish the work awarded at the given price. Further, the estimated rates do not take into account cost escalations over time due to tyres, lubricants, spare parts, wages, etc. OP-2 has also submitted that after the impugned tenders, the Informant has awarded work to OP-2 in subsequent tenders at higher rates. OP-3 and OP-4 have also contended that inflation has not been taken into account in the estimated rates and the same is abusive. Arguments have also been advanced to suggest that the prices quoted by the OPs are justified.
61. The Commission, is of the view that the instant proceedings are not concerned with the estimated rates being wrongly or rightly computed by the Informant at all or the purported independent price quotes of the OPs being reasonable or on a higher side. The Act requires that the prices quoted in tenders are decided by the bidders on the basis of their own cost and evaluation of market conditions. It prohibits price quotes that are an outcome of consensus amongst the bidders. The issue before the Commission in the instant proceedings is whether or not the identical prices of the OPs in the impugned tenders is a result of any understanding amongst them and not the correctness of the estimated rates prescribed by the Informant.
62. OP-2 has also argued that the instant information was filed in response to the representation given by the association of the OPs viz. CIMTA to the Informant seeking upward revision of the price for transportation contracts. It has been further contended that such a conduct amounts to abuse of dominant position by the Informant. However, the Commission does not see any substance in such argument. The Informant, being the procurer/ consumer of



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transportation services offered by the OPs can very well report the suspicion of cartel/ bid-rigging amongst the OPs to the Commission. In a case where the price quotes for different jobs in the same tender are identical to such extent, the Commission does not see anything wrong in the Informant filing an information suspecting/ alleging bid-rigging. Rather, such a reporting by a PSU is found to be responsible and commendable effort to foster and promote the spirit of competition and prevent efforts for cartelisation in the future. No misrepresentation by the Informant is demonstrated by the OPs nor is the same discernible from the facts of the instant matter.

63. OP-2 and OP-4 have further submitted that there are family/ property disputes between their partners and therefore, their concerned families do not see eye to eye. Such disputes and associated litigations between them have been cited to suggest that they are fierce rivals and there is no possibility of cooperation or collusion between them. The Commission notes that the argument of family dispute cannot be a valid defence as the fact remains that prices are identical despite their difference in cost. This has to be seen along with the fact that admittedly there was business relationship between OP-2 and OP-4 for hiring and leasing of trucks and that interactions between them take place through Mr. Tapan Mukherjee.

64. Thus, the Commission rejects the arguments put forward by the OPs to explain their conduct in the impugned two tenders for sand transportation. In addition to identical price quotes, there are also several additional factors/ circumstances, which corroborate that there was an agreement amongst OP-1 to OP-4. These are:
 - 64.1 Mr. Tapan Mukherjee of OP-2 had deposed that it had regular business dealings with OP-1 and OP-4. Interestingly, Mr. Sunil Singh of OP-1 deposed that it has never had financial dealings with its competitors but as per the ledger account of OP-1, it had business dealings with OP-2. The OPs have claimed that mere business dealings is not conclusive of bid-rigging. According to them, the DG has wrongly relied upon the



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financial dealings amongst the OPs as a factor indicating cartel/ bid-rigging. The Commission notes that financial dealings is one of relevant factors as parties who have financial dealings are not strangers but work together for their respective commercial interests. It is also relevant to note that the partners/ proprietors of the OPs have social relationships and frequently meet/ interact with each other. Mr. Sunil Singh of OP-1 admitted his closeness to Mr. Jasbir Singh of OP-3 and his generally speaking with Mr. Tapan Mukherjee of OP-2 and Mr. Kanhaiyalal Khandelwal of OP-4. Similarly, Mr. Tapan Mukherjee of OP-2 confirmed his general meetings with Mr. Sunil Singh of OP-1 in social gatherings. Mr. Jasbir Singh of OP-3 also confirmed that he meets Mr. Sunil Singh of OP-1, Mr. Kanhaiyalal Khandelwal of OP-4 and Khandelwalji of OP-2 in social gatherings and all of their residences are within 1-3 km. radius in Chandrapur. Mr. Kanhaiyalal Khandelwal of OP-4 also admitted his occasional meetings with Mr. Tapan Mukherjee of OP-2. Though social relationship/ get-together by themselves cannot be objected to, but when seen in the context of identical prices and other factors/ circumstances discussed herein, regular meetings amongst OPs provide them opportunities to collude, which is absent in case of competitors who do not have such relationship. Thus, being in continuous contact with each other for business purposes and having financial dealings alongwith the long standing social relationship amongst the OPs is taken as a plus factor;

- 64.2 Though the CDRs are not being taken into evidence as such, in their objections to the investigation report, some of the OPs have sought to justify their telephonic conversations with other OPs. For instance, OP-2 has contended that the telephonic conversation amongst OPs were for account settlement, payment for trucks taken on hire, diesel charges, *etc.* OP-3 and OP-4 have contended that the OPs have regular telephonic conversations as they know each other on a social and professional basis. The OPs obviously, cannot be expected to confess that their speaking included discussions about the price to be quoted in



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the tenders floated by the Informant. However, the admitted frequent telephonic conversations confirm their closeness as noted in the earlier paragraph;

64.3 OP-1 and OP-4 had even quoted identical prices in two earlier tenders also, namely, Tender No. CH3 150-Min-0018/2013-14 and Tender No. HLC-1/SAND/42/2008-09. History of quoting identical prices has been held as one of the relevant circumstances indicating bid-rigging in the case of *Excel Crop Care Limited (supra)*;

64.4 The Commission notes that barring Mr. Tapan Mukherjee of OP-2 and Mr. Paras Nath Yadav of OP-1, all the representatives of OP-1, OP-3 and OP-4 examined by the DG viz. Mr. Sunil Singh of OP-1, Mr. Jasbir Singh of OP-3 and Mr. Kanhaiyalal Khandelwal of OP-4 deposed that their price bids were filled at the office of the Informant just before the closing time of Tenders No. 1 and 2. They also stated that this is the general practice. Although Mr. Tapan Mukherjee of OP-2 stated that its entire tender was filled beforehand in one go, explanation provided by him for using different inks to fill the cover page and the price schedule in Tender No. 2 is not satisfactory. Strangely, both Mr. Tapan Mukherjee of OP-2 and Mr. Paras Nath Yadav of OP-1 have stated that their blue ink pen being used to fill up the cover page of the tender got exhausted when they were filling the price schedule. Hence, they used black pens to fill the price schedule of their bids. Such a co-incidence casts doubt upon the depositions of both the said witnesses. The DG has concluded that infrastructural conditions at the office of the Informant were conducive for last minute exchange of price information and the Informant did not take any safeguard to prevent the possibility of collusion amongst bidders. Seen in this background, it cannot be ruled out that the office of the Informant acted as a fertile ground for the OPs to carry forward their price discussion and quote identical prices. All the four participating OPs in Tenders No. 1 and 2 have suggested bid sanctity, chances of leakage of information, assessment of last minute



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dynamics including non-participation of certain competitors as reasons to fill the price bid at the last minute. However, such explanations do not seem true in a case where competitors ended up quoting identical prices for each of the different jobs in both the impugned tenders. The outcomes seen in Tenders No. 1 and 2 do not correspond to the purported competitive pricing strategy claimed by OP-1 to OP-4. The Commission hence, concludes that the apparent last minute filling of price schedule in the office of the Informant, which provided the infrastructure conducive for collusion is a plus factor which shows that the OPs have indulged in bid-rigging. OP-3 has contended that the DG has given contradictory reasoning for inferring collusion amongst the OPs by relying upon telephonic conversations on one hand to suggest collusion through these and the infrastructural conditions at the office of the Informant on the other to suggest possibility of last minute exchange of price information. The Commission does not find any merit in this. Modus of a cartel is not a one-time affair; rather, people who cartelise, pursue their anti-competitive agenda through various means simultaneously or one followed by the other. They may meet to decide their agenda for co-operation followed by interactions, telephonic or otherwise, regarding terms and modus of co-operation and, later, monitor each other to ensure compliance of their decision. Thus, there is merit in the DG relying upon the telephonic interactions between the OPs, frequent prior discussions in social gatherings as well as the possibility of last minute exchange of price information in the office of the Informant; and

- 64.5 Prior to ordering of investigation but post the submission of the impugned tenders, the trade association of the OPs *i.e.* CIMTA met in August, 2014 where possibilities to demand higher price in the tenders floated by the Informant was discussed. Following such meeting, CIMTA sent a letter dated 28th August, 2014 to the Chairman and Managing Director of the Informant highlighting the problems in the rates offered by the Informant and seeking revision of pricing



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mechanism under the tenders floated by the Informant. In their depositions before the DG, Mr. Sunil Singh of OP-1, Mr. Tapan Mukherjee of OP-2, Mr. Jasbir Singh of OP-3 and Mr. Kanhaiyalal Khandelwal of OP-4 denied them being part of any such association. The Commission has taken note of such concealment of facts pertaining to CIMTA by OP-1 to OP-4 as their names and signatures of their representatives were found in the attendance register dated 23rd August, 2014 of CIMTA, enclosed as Annexure-36 to the investigation report. In their objections to the investigation report, the OPs have claimed that CIMTA was discontinued due to difference of opinion amongst its members and thus, the same cannot be relied upon to infer bid-rigging. However, the Commission notes that identical price bids by the OPs followed by their association CIMTA demanding higher prices in the tenders floated by the Informant makes such demand of CIMTA a relevant factor in the inquiry of bid-rigging.

65. Amongst the other defences taken, OP-1 and OP-2 have suggested that the tenders of the Informant allowed bidders to form a joint venture and participate in the tenders. Further, if two or more bidders quoted identical prices, the Informant would select both of them as L-1 and divide work amongst them. This coupled with the capacity constraints faced by the bidders to undertake tender work single-handedly, incentivised them to work together to undertake and execute the work of the Informant. According to the OPs, the DG has not taken these market realities into consideration. The Commission again does not find merit in this contention as this at most reflects vulnerability of the circumstances to anti-competitive cooperation amongst the bidders. The Act does not prohibit formation of efficiency enhancing joint ventures but it is pernicious for the bidders to collude to fix prices in cases where they bid independently. No doubt that it would be better if the tender process itself is reviewed to avoid stipulations that incentivise cartelisation. However, flawed or anti-competitive tender conditions cannot be a defence for the parties to indulge into any of the practices prohibited under the Act.



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66. Apart from such contentions, OP-2, OP-4 and their office bearers also raised the objection that the order dated 2nd July, 2015 passed by the Commission under Section 26 (1) of the Act was not shared with the OPs and the same resulted in hardship to them and violation of the principles of natural justice. The Commission notes that a preliminary conference was held with the parties on 1st July, 2015 before the Commission formed its *prima facie* opinion. Before such conference, all the OPs were served with electronic copies of the information to facilitate them to present their views during the preliminary conference. It was only after holding such conference that the order dated 2nd July, 2015 was passed by the Commission. Thus, no hardship can be said to have been caused by the Commission not sharing its order with the OPs. Also, as per the judgment of the Hon'ble Supreme Court in *Competition Commission of India v. Steel Authority of India Limited and Another*, (2010) 10 SCC 744, issuance of a direction under Section 26 (1) is only an administrative action and the *prima facie* opinion expressed therein is not a final determination. The parties need not even be heard before passing a direction under Section 26 (1) and thus, no impediment can be said to have been caused to the OPs on account of non-serving of the order dated 2nd July, 2015 passed under Section 26 (1) of the Act by the Commission, upon them. It is also pertinent to note that the records of the case including the said order was open for inspection by the parties any time and a party of vigil could have taken certified copy of the same by making an application in terms of the provisions contained in the General Regulations. In view of this, the Commission does not find merit in the argument that the OPs faced hardship due to the non-sharing of the order dated 2nd July, 2015 of the Commission.
67. On a holistic consideration of all these factors along with identical pricing despite different cost structures, apparently last minute filling of price bids; existence of earlier financial dealings amongst the OPs as well as identical price quotes even in previous tenders floated by the Informant, the Commission has no hesitation whatsoever but to conclude that quoting of identical prices by OP-1, OP-2 and OP-4 for each of the four different jobs in Tender No. 1 and by OP-2, OP-3 and OP-4 for each of the three different jobs



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in Tender No. 2 alongwith OP-1 quoting higher prices with uniform and exact price difference of Rs. 4/- for each of the three different jobs, are not a mere co-incident but the result of clear understanding amongst OP-1, OP-2, OP-3 and OP-4 to fix prices in the tenders floated by the Informant, resulting in rigging the bids in the impugned tenders for sand transportation.

68. Having established an agreement amongst OP-1, OP-2, OP-3 and OP-4 to rig the bids in tenders floated by the Informant, the next point to be determined is whether the said agreement is in contravention of Section 3 (3) (d) read with Section 3 (1) of the Act.
69. As per Section 3 (1) of the Act, no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3 (2) of the Act declares that any such agreement entered into in contravention of the provisions contained in sub-section (1) of Section 3 shall be void. Further, by virtue of the presumption contained in sub-section (3) of Section 3, any such agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which (a) directly or indirectly determines purchase or sale prices; or (b) limits or controls production, supply, markets, technical development, investment or provision of services; or (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; or (d) directly or indirectly results in bid-rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.



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70. The facts of the instant case relate to bid-rigging in the tenders floated by the Informant. Since the agreement amongst OP-1 to OP-4 stands established, the statutory presumption of appreciable adverse effect on competition automatically follows. The Commission notes that the Hon'ble Supreme Court in *Excel Crop (supra)* has held that agreements mentioned in Section 3(3) of the Act, including bid-rigging, *would be treated as ipso facto causing appreciable adverse effect on competition*. The Court further held that once an agreement amongst the bidders is established, heavy onus is on the bidders to justify the conduct. Thus, it is erroneous on the part of OP-2, OP-3 and OP-4 to argue that the DG has not taken any effort to establish appreciable adverse effect on competition resulting from the alleged agreement. The Commission notes that cartelisation including bid-rigging is a pernicious form of competition law contravention and the same generally has no justification. Any party willing to advance justification has to give proper reasoning with clear and cogent evidence for the same. Vague assertions would not help such parties to evade the responsibility cast upon them under the provisions of Section 3 of the Act. Once existence of an agreement for anti-competitive object is established, the burden is on the alleged contravener to prove that the said agreement does not have any appreciable adverse effect on competition.
71. OP-2, OP-3 and OP-4 have submitted that no adverse effect on competition was caused as the impugned tenders were scrapped. Absence of entry barriers, prices quoted in the impugned tenders being reasonable, sand transportation market being a miniscule of the overall transportation market and the coal supply having not been affected were suggested as the factors indicating absence of appreciable adverse effect on competition. The Commission notes that the OPs have put forward such contentions as if the scope of the proceedings was limited to the impugned tenders and their effect on competition. As stated above, the scope of the present proceedings is not limited to the four impugned tenders but concerned with the conduct of the OPs in general to rig the bids in the tenders floated by the Informant. Accordingly, the burden on the OPs was to establish that their agreement to fix prices and rig bids in the tenders floated by the Informant does not or is not



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likely to cause appreciable adverse effect on competition at any time and this burden on the OPs cannot be limited to the effect of their agreement in the impugned tenders alone. A perusal of the participants in the impugned tenders as well as other previous tenders looked into and discussed by the DG on pages 90 and 95 of its investigation report suggests that only a handful of bidders *i.e.* 3 to 4 bidders participated in the tenders floated by the Informant. The Informant being a mining PSU has continuous requirement of transportation services, which it procures through tendering process only. Under these circumstances, collusion to fix prices by rigging the bids in the tenders floated by the Informant most definitely has an adverse impact on the price paid by the Informant for procuring such transportation services. Such conduct in public procurements besides defeating the tendering process also has an adverse impact on the process of competition resulting in deprivation of efficient outcomes that would have followed otherwise. Thus, bid-rigging in tenders floated by the Informant is a brazen defiance of the responsibility cast under the Act. In view of the above, the Commission finds the contentions of OP-1 to OP-4 concerning absence of appreciable adverse effect on competition misconceived and the same are thus, rejected.

72. In result, the Commission finds the agreement amongst OP-1 to OP-4 to rig the bids in the tenders floated by the Informant for sand transportation to be in contravention of the provisions of Section 3 (3) (d) read with Section 3 (1) of the Act.

Issue No. 2: *Whether OP-5, OP-6, OP-7, OP-8, OP-9 and OP-10 were in agreement to fix prices in the tenders floated by the Informant for coal transportation resulting in bid-rigging in Tender No. 3 by OP-5, OP-7, OP-8, OP-9 and OP-10, and in Tender No. 4, by OP-5, OP-6, OP-7 and OP-8, in contravention of the provisions contained in Section 3 (3) (d) read with Section 3(1) of the Act?*

73. To begin with, the Commission first looks at the prices quoted in Tenders No. 3 and 4 for coal transportation:



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Table No. 9: Details of price quoted in Tender No. 3					
Bidder	Rates Quoted (Rs. per Te.)				
	Job No. 1	Job No. 2	Job No. 3	Job No. 4	Job No. 5
OP-5	26	25.70	39	45	8.35
OP-7	26	25.70	39	45	8.35
OP-8	26.51	26	40.46	46	9
OP-9	26	25.70	39	45	8.35
OP-10	26	25.70	39	45	8.35

Note: Table same as Table No. 3

Table No. 10: Details of price quoted in Tender No. 4			
Bidder	Rates Quoted (Rs. per Te.)		
	Job No. 1	Job No. 2	Job No. 3
OP-5	20	8.75	8.75
OP-6	20	8.75	8.75
OP-7	20	8.75	8.75
OP-8	21	9	9

Note: Table same as Table No. 4

74. As may be seen, in Tender No. 3, OP-5, OP-7, OP-9 and OP-10 quoted identical prices, not only for one job but for all five different jobs. That too upto the last decimal point. Similarly, in Tender No. 4, OP-5, OP-6 and OP-7 quoted identical prices for each of the three different jobs, again upto last decimal point. It is highly unlikely that in normal market conditions, prices quoted by 4 different bidders in two tenders for several jobs would be identical to this extent. Further, OP-8, though quoted different rates in both the impugned tenders, its rates were only marginally higher than those of other OPs. The Commission considers the identical price quotes in both the said tenders, not for one job, but for five different jobs in Tender No. 1 and three different jobs in Tender No. 2; and the marginally higher prices quoted by OP-8 in both the tenders, a strong evidence to show that the same are not a coincidence but more an outcome of understanding amongst OP-5, OP-6, OP-7, OP-8, OP-9 and OP-10.

75. The Commission notes that the matter in hand is not a case of mere price parallelism as contended by the OPs. The investigation has revealed several other plus factors (including against OP-8) which evidences cartel, which are dealt with in detail in the later part of this order.



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76. Similar to OP-1 to OP-4 in Tenders No. 1 and 2, the bidders in Tenders No. 3 and 4 have also claimed that their respective price quotes are based on independent costing and the identical prices are mere co-incidences. For reasons already discussed earlier based on the same argument, the Commission does not find any merit in the explanation offered by the OPs since it is highly unlikely that OP-5, OP-7, OP-9 and OP-10 will quote identical prices upto the second decimal for each of the five different jobs in Tender No. 3 and OP-5, OP-6 and OP-7 ended up quoting identical prices upto second decimal for each of the three different jobs in Tender No. 4, though their cost structures are so different as can be seen from the table below:

Table No. 11: Comparison of cost and price in Tender No. 3 Rates Quoted (Rs. Per Te.)										
Bidder	Job No. 1		Job No. 2		Job No. 3		Job No. 4		Job No. 5	
	Cost	Price	Cost	Price	Cost	Price	Cost	Price	Cost	Price
OP-5	24.16	26	23.36	25.70	35.29	39	41.34	45	7.89	8.35
OP-7	26.50	26	25.61	25.70	38.92	39	45	45	8.45	8.35
OP-8	NP	26.51	NP	26	NP	40.46	NP	46	NP	9
OP-9	25.14	26	25.39	25.70	38.49	39	44.03	45	8.09	8.35
OP-10	26.01	26	25.71	25.70	39.03	39	45.06	45	8.36	8.35

Note: NP – Not provided

Table No. 12: Comparison of cost and price in Tender No. 4 Rates Quoted (Rs. Per Te.)							
Bidder	Job No. 1		Job No. 2		Job No. 3		
	Cost	Price	Cost	Price	Cost	Price	
OP-5	17.95	20	8.07	8.75	7.97	8.75	
OP-6	NP	20	NP	8.75	NP	8.75	
OP-7	20.23	20	8.76	8.75	8.74	8.75	
OP-8	NP	21	NP	9	NP	9	

Note: NP – Not provided

77. OP-9 has contended that unlike other bidders, it had submitted its price bid a day before the tender closing day. Possibility of corporate espionage and leakage of price details by the office of the Informant could have been a reason for such identical priced. OP-9 has also contended that it has a large fleet of trucks and is not dependent upon any other OP to undertake the work of the Informant. The Commission observes that the plea of OP-9 regarding corporate espionage cannot be believed as if that would have been the case, the other OPs would not have quoted prices identical to those of OP-9, but rather at least one paisa less than OP-9’s prices to become L-1. Bidders doing corporate



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espionage to win tenders would quote lesser price to win the tender and would not choose to quote the same price as quoted by other bidders. Thus, the Commission does not find any merit in the corporate espionage argument. Similarly, large fleet size and self-sufficiency are no defence to cartelisation and identical pricing.

78. Further, though the Commission notes that OP-8 has quoted marginally different rates in both the impugned tenders *i.e.* Tenders No. 3 and 4; however, in his deposition before the DG, the representative of OP-8 Mr. Kishore Agrawal categorically submitted that OP-8 and OP-7 used to consult and quote same price in tenders floated by the Informant as each of them independently were not having capacity to undertake the work of the Informant. For such purpose, he used to visit Mr. Y. P Mehta of OP-7 personally at his office at Ramnagar, Nagpur. The rates quoted by OP-7 and OP-8 in Mongoli Mine Tender in 2012-13, Kamptee Dumri Tender in 2012-13 and Ballarshaha Tender in 2013-14 were identical and all these tenders were awarded to both of them equally. He also admitted the instance of quoting of identical rate by OP-8 and OP-5 in the Umrer Mine Tender in 2013-14, which was pursuant to his discussion with Mr. Balli Babu of OP-5 and the tender was equally awarded to both. He further stated that it is the general business practice adopted by all bidders to consult and quote same prices, and in case all bidders do not agree to share the tender, agreed bidders quote the same prices and others quote different prices. In his statement to the DG, Mr. Y. P. Mehta of OP-7 also admitted that Mr. Kishore Agrawal of OP-8 used to come to his office to discuss rates to be quoted in Informant's tenders and also confirmed the details of the three tenders where both OP-7 and OP-8 quoted same prices. In their objections to the investigation report, both OP-7 and OP-8 sought to qualify the depositions of their representatives by stating that price discussions were held only in cases where joint venture was formed. However, no effort was made by them to explain or any evidence produced to show that OP-7 and OP-8 had participated in the said tenders together by formalising joint ventures. There cannot be any verbal/ oral joint venture. In his deposition, Mr. Y.P. Mehta of OP-7 also submitted that "*since the last five years, so many tenders*



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were awarded by WCL to respective bidders where they had quoted same rates.” OP-7 contended that the deposition of Mr. Kishore of OP-8 Agrawal cannot be used against it without cross-examination. The Commission notes that the cross-examination request of OP-7 of Mr. Kishore Agrawal of OP-8 has already been disposed of by the Commission by a detailed order dated 6th September, 2016 and no defence relying upon such contention can be taken now. All the other OPs have claimed that the depositions of Mr. Y.P. Mehta of OP-7 and Mr. Kishore Agrawal of OP-8 cannot be used against them; however, the fact of identical pricing in the impugned tenders and other previous tenders of the Informant discussed on pages 90 and 95 of the investigation report supports the statements of Mr. Y.P. Mehta of OP-7 and Mr. Kishore Agarwal of OP-8 regarding the general practice amongst the OPs to collude bids.

79. In its reply dated 20th October, 2015 to the DG, OP-2 also stated that in the past, if two-three parties quoted identical rates, the Informant used to award the contract by dividing to all of them. The Commission notes that though such practice of the Informant appears to have incentivised the bidders to consult and quote identical prices if they are willing to share the tender, however, the same cannot be taken as a defence for indulging into anti-competitive agreement.
80. In addition to identical price quotes and depositions as discussed above, there are various additional factors/ circumstances, which have been stated by the DG to be plus factors to arrive at a finding of consensus amongst OP-5 to OP-10. These are:
 - 80.1 It is evident that OP-7 had business relationship/ financial dealings with OP-5, OP-6, OP-8, OP-9 and OP-10. Mr. Rajiv Khandelwal of OP-5 admitted that it had formed a joint venture with OP-10 to participate in the tenders of the Informant. Similarly OP-7 and OP-8 were joint venture partners for the purpose of participating in the tenders floated by the Informant. In his deposition before the DG, though Mr. Randeep Singh Khanduja of OP-6 denied any financial dealings with other OPs,



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but the ledger of OP-6 evidences financial dealings of OP-6 with sister concern of OP-10. The OPs have claimed that mere business dealings is not conclusive of bid-rigging. According to them, the DG has wrongly relied upon financial dealings amongst the OPs as a plus factor indicating cartel/ bid-rigging. The Commission reiterates that financial dealings amongst OPs is one of the important factors in appreciating the relationship amongst the OPs as parties who have financial dealings with each other are not strangers but work together for their respective commercial interests. Further, the OPs admittedly have long standing social relationship. Mr. Rajiv Khandelwal of OP-5 admitted that he meets his competitors in the meetings of the Informant. Mr. Randeep Singh Khanduja of OP-6 also admitted his social relationship with the partners/ proprietors of OP-5, OP-7 and OP-9. Mr. Y. P. Mehta of OP-7 also admitted his personal relationship and meetings with all other OPs. Mr. Kishore Agrawal of OP-8, Mr. Jagdish Kumar of OP-9 and Mr. Anil Sapra of OP-10 also confirmed their social relationship and meetings with officers of other OPs. Though social relationships/ get-together by themselves cannot be objected to, but when seen in the context of identical pricing, social relationships and frequent gatherings provide more opportunities to collude, which is absent in case of competitors without such relationship/ interaction. The Commission notes that cartelisation is not improbable amongst parties who have continuous contact for business purposes, previous financial dealings and long standing social relationship;

- 80.2 Though the CDRs are not being taken into evidence as such, in their objections to the investigation report, some of the OPs have sought to justify their telephonic conversations with other OPs. For instance, OP-5 and OP-7 have contended that the telephonic conversation amongst OPs were for account settlement, payment for trucks taken on hire, diesel charges, *etc.* OP-10 has stated that Mr. Anil Sapra might have had talked with Mr. Kishore Agrawal of OP-8, Mr. Rajiv Khandelwal of OP-5, Mr. Tapan Mukherjee of OP-2 and Mr. Balli Babu of OP-2



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regarding their trucks being plied with OP-10. Further, Mr. Anil Sapra might have talked to Mr. Y. P. Mehta of OP-7 as he is his neighbour. The OPs obviously, cannot be expected to confess that their speaking included discussions about the price to be quoted in the tenders floated by the Informant. However, the admitted frequent telephonic conversations confirms the closeness amongst the OPs noted in the earlier paragraph;

80.3 From the details provided by the Informant, it is evident that: (i) OP-7 and OP-5 had quoted identical prices in two earlier tenders also, namely, Tender No. 10/(2011-12) dated 6th August, 2011 and Tender No. 18/2011-12; (ii) OP-6 and OP-5 had quoted identical prices in one tender earlier, namely, Tender No. 61/(2014-15); and (iii) OP-7 and OP-6 had quoted identical prices in 6 earlier tenders, namely, Tender No. 22/(2011-12) dated 3rd September 2011, Tender No. 26/(2011-12)/27-05/2011, Tender No. 01/(2013-14), Tender No. 08/(2013-14) dated 23rd July 2013, Tender No. 01/2012-13 and Tender No. 45/(2011-12). Such history of quoting identical prices has been held to be one of the relevant circumstances indicating bid-rigging in the case of *Excel Crop Care Limited (supra)*. Besides identical rates/ prices being quoted, it is also relevant to note that work was awarded to both OP-6 and OP-7 in four earlier tenders, namely, Tender No. 22/(2011-12), Tender No. 26/(2011-12), Tender No. 01/(2012-13) and Tender No. 45/(2011-12);

80.4 Barring Mr. Jagdish Kumar of OP-9 and Mr. Kishore Agrawal of OP-8, the depositions of all other witnesses from OP-5 to OP-10 suggest that price schedule in the bid form was filled separately. Further, in the case of OP-5, OP-6, OP-7 and OP-10, it has been admitted that price bids were filled at the office of the Informant just before the closing of the tender. The DG has concluded that infrastructural conditions at the office of the Informant were vulnerable to last minute exchange of price information and the Informant did not take any safeguard to prevent the possibility of collusion amongst the bidders. Thus, it cannot be ruled



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out that the office of the Informant acted as a fertile ground to carry forward the price discussion amongst the OPs for quoting identical prices. The Commission concludes that the last minute filling of price schedule in the Office of the Informant as an important plus factor in the circumstances where identical price bids are noticed not for just one job in one tender but for all jobs in both the impugned tenders and upto the second decimal; and

80.5 Prior to ordering of investigation but post the submission of the impugned tenders, the trade association of the OPs *i.e.* CIMTA met in August, 2014 where possibilities to demand higher price in the tenders floated by the Informant was discussed. Following such meeting, CIMTA sent a letter dated 28th August, 2014 to the Chairman and Managing Director of the Informant highlighting the problems in the rates offered by the Informant and seeking revision of pricing mechanism under the tenders floated by the Informant. In their depositions before the DG, Mr. Kishore Agrawal of OP-8, Mr. Rajiv Khandelwal of OP-5 and Mr. Jagdish Kumar of OP-9 denied them being part of any such association. The Commission has taken note of such concealment of facts pertaining to CIMTA by OP-5 to OP-10 as the names and signatures of their representatives were found in the attendance register dated 23rd August, 2014 of CIMTA, enclosed as Annexure-36 to the investigation report. The Commission notes that identical price bids by the OPs followed by their association CIMTA demanding higher prices in the tenders floated by the Informant makes such demand of CIMTA a relevant factor in the inquiry of bid-rigging.

81. In relation to the above-discussed factors, OP-5 to OP-10 also advanced arguments/ defences similar to those of OP-1 to OP-4, which have already been dealt with in the earlier section of this order. Therefore, they are not repeated once again with specific reference to the arguments / contentions of OP-5 to OP-10.



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82. On a holistic consideration of the these factors along with the quoting identical prices ; having different cost structures; last minute filling of price schedule in the office of the Informant; existence of financial dealings amongst the OPs; identity of price quotes even in previous tenders floated by the Informant; and the efforts of CIMTA for upward revision of rates offered by the Informant, the Commission concludes that quoting of identical prices by OP-5, OP-7, OP-9 and OP-10 in Tender No. 3, not only for one job but for all five different jobs and by OP-5, OP-6 and OP-7 in Tender No. 4, for each of the three different jobs, upto the last decimal points is a result of clear consensus/ understanding amongst OP-5 to OP-10. Although the prices quoted by OP-8 in both Tenders No. 3 and 4 were different from others, the deposition of its proprietor Mr. Kishore Agrawal is sufficient to suggest that OP-8 is also a part of the collusion amongst the bidders in Tenders No. 3 and 4. Several telephonic conversations between Mr. Kishore Agrawal of OP-8 and Mr. Anil Sapra of OP-10 even on the tender submission date of Tender No. 4 and the earlier instances of quoting identical prices by OP-8 corroborates the fact that OP-8 was also in collusion with the other OPs to rig the bids in the tenders floated by the Informant. This is conclusive of an agreement amongst OP-5, OP-6, OP-7, OP-8, OP-9 and OP-10 to fix prices in the tenders floated by the Informant, resulting in rigging the bids in the impugned tenders for coal transportation.
83. Having established an agreement amongst OP-5, OP-6, OP-7, OP-8, OP-9 and OP-10 to rig the bids in tenders floated by the Informant, for reasons stated in the earlier part of this order, the Commission finds such agreement amongst OP-5 to OP-10 to rig the bids in the tenders floated by the Informant for coal transportation to be in contravention of the provisions of Section 3 (3) (d) read with Section 3 (1) of the Act.

Issue No. 3: In the event the conduct of the OPs is found to be in contravention of the provisions of the Act, whether the individuals/ officials of the OPs mentioned in the investigation report, are liable under Section 48 of the Act for the anti-competitive conduct of the respective OPs?



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84. Having found the OPs to be in contravention of Section 3 (3) (d) read with Section 3 (1) of the Act, the Commission proceeds to next determine whether the officers of the OPs, identified by the DG, are liable under Section 48 of the Act for the conduct of business of the respective OPs?
85. The DG has identified the following individuals liable under Section 48 of the Act: (i) Mr. Sunil Singh, Director of OP-1; (ii) Mr. Tapan Mukherjee, Attorney/ Manager of OP-2; (iii) Mr. Kanhaiyalal Khandelwal, Partner of OP-4; (iv) Mr. Rajiv Khandelwal, Partner of OP-5; (v) Mr. Manjeet Singh Khanduja, Partner of OP-6; (vi) Mr. Kishore Agrawal, Partner of OP-8; (vii) Mr. Jagdish Kumar, Director of OP-9; and (viii) Mr. Anil Sapra, Director of OP-10.
86. The OPs have contended that the Commission cannot make a person liable under Section 48 of the Act without first finding the concerned company liable for contravention of the provisions of the Act. In this regard, it is observed that the OPs have been held guilty of contravention of Section 3 (3) (d) read with Section 3 (1) of the Act above in this order. Therefore, the Commission can now proceed to determine the liability of the individuals, if any, under Section 48 of the Act.
87. It is noted that Mr. Sunil Singh of OP-1 is responsible for all its business decisions. This is admitted by him in his statement made before the DG. He has further admitted that the bids of OP-1 were signed and filed by him. As noted earlier, Mr. Sunil Singh was also found to be in regular touch with the other OPs, which is one of the plus factors to infer bid-rigging in the facts and circumstances of the present case.
88. In case of OP-2, Mr. Tapan Mukherjee has been found to take the business decisions of OP-2. Admittedly, he takes care of the day-to-day functioning of OP-2 and was the person to fill and file the bids in the impugned tenders.



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89. The DG has further found Mr. Kanhaiyalal Khandelwal of OP-4 to be responsible for the conduct of OP-4. In his reply dated 12th October, 2015 before the DG, he has submitted that he takes all the decisions regarding price bids submitted by OP-4. He has been found to be in regular touch with other OPs also.
90. In case of OP-5, the DG has found Mr. Rajiv Khandelwal responsible for its conduct. Admittedly, he is the main partner in the firm who looks after all the work of the firm including bidding in the tenders of the Informant and other parties.
91. In case of OP-6, its partner Mr. Randeep Singh Khanduja has stated that prior to August 2014, his father Mr. Manjeet Singh Khanduja used to take all decisions regarding OP-6's business and thereafter, he is now responsible for taking all the important business decisions of OP-6. OP-6 participated in Tender No. 4 in June 2014 at which time Mr. Manjeet Singh Khanduja was responsible for running the business of OP-6. Further, as per the deposition of Mr. Randeep Singh Khanduja, he filled the price bid on the instructions of his father. Thus, it is evident that Mr. Manjeet Singh Khanduja was the person to decide the price quote identical to other bidders in Tender No. 4.
92. In case of OP-8, in his deposition before the DG, Mr. Kishore Agrawal admitted his earlier conduct of discussing bid prices with other competitors. He has also not denied having several telephonic conversations with Mr. Anil Sapra of OP-10, even on the tender submission date of Tender No. 4.
93. The Commission has found OP-9 guilty of bid-rigging as it quoted identical price up to the second decimal in Tender No. 3. Admittedly, the price bid of OP-9 was filled in and dropped by Mr. Jagdish Kumar. He has also been found to be in touch with other competitors through common friends in social functions, which is considered as one of the plus factors along with identical pricing up to the second decimal for five different jobs under Tender No. 3 to find contravention by OP-9.



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94. Lastly, Mr. Anil Sapra of OP-10 has been identified by the DG to be responsible for the conduct of OP-10. He was the person to sign and drop the price bid in Tender No. 3, where OP-10 has been found to have quoted identical prices up to the second decimal for five different jobs.
95. Noting the above, the Commission is of the considered view that the DG has presented sufficient evidence to hold (i) Mr. Sunil Singh, Director of OP-1; (ii) Mr. Tapan Mukherjee, Attorney/ Manager of OP-2; (iii) Mr. Manjeet Singh Khanduja, Partner of OP-6; (iv) Mr. Kishore Agrawal, Partner of OP-8; (v) Mr. Jagdish Kumar, Director of OP-9; and (vi) Mr. Anil Sapra, Director of OP-10, responsible under Section 48 (2) of the Act, and (i) Mr. Kanhaiyalal, Partner of OP-4; and (ii) Mr. Rajiv Khandelwal, Partner of OP-5, responsible under Section 48 (1) of the Act, for the impugned conduct of the respective OPs, which is found herein above to be in contravention of the provisions of Section 3 (3) (d) read with Section 3 (1) of the Act.
96. In view of the above, the Commission passes the following:

ORDER

97. The OPs and their respective office bearers are directed to cease and desist from indulging into practices, which are found to be in contravention of the provisions of Section 3 (3) (d) read with Section 3 (1) of the Act.
98. The Commission, for the reasons recorded below, finds the present case fit for imposition of penalty. Under the provisions contained in Section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreement or abuse. Further, in cases of cartelization, the Commission may impose upon each such cartel participant, a penalty of upto three times of its profit for each year of



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continuance of the anti-competitive agreement or ten per cent of its turnover for each year of continuance of such agreement, whichever is higher.

99. The Commission has given its thoughtful consideration to the issue of quantum of penalty. The impugned tenders were for procurement of transportation services by a public utility in connection with its mining operation. The importance of services procured under public procurement needs hardly any emphasis. At the same time, the Commission is also not oblivious of Informant's practice of dividing the tender work amongst bidders who give identical price quote. The OPs have also argued that penalty should be proportionate to the contravention established and should be imposed taking into consideration only the relevant turnover generated from WCL's tenders not the total turnover of the OPs. They further offered the following as mitigating factors in the facts and circumstances of the case: the OPs are small scale business operators, the OPs are first time offenders, the OPs have co-operated in the investigation, no harm has been caused to consumers as impugned tenders were cancelled by the Tender Committee and being small operators, the OPs were not well versed with competition law and its requirements.

100. In this connection, first of all, it would be apposite to refer to the decision of the Hon'ble Supreme Court in *Excel Crop Care Limited (supra)*, where holding that 'turnover' to be taken for imposition of penalty should be relevant turnover from the product in question and not the total turnover of the enterprise, the Hon'ble Court observed as under:

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



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conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of 'relevant turnover'.

101. Thus, the starting point of determination of appropriate penalty should be to determine relevant turnover and thereafter, to calculate the appropriate percentage of penalty based on facts and circumstances of the case.
102. The Commission notes that the infringing anti-competitive conduct of the OPs is bid-rigging in the tenders floated by the Informant for transportation. Since the impugned conduct emanates from transportation services offered by the OPs, the relevant turnover for this infringement would be their revenue from the said services.
103. Having determined the relevant turnover, the Commission now proceeds to calculate the appropriate percentage of penalty. It may be noted that the twin objectives behind imposition of penalty are: (a) to reflect the seriousness of the infringement; and (b) to ensure that the threat of penalties will deter the infringing undertakings. Therefore, the quantum of penalty imposed must correspond with the gravity of the offence and the same must be determined after having due regard to the mitigating and aggravating circumstances of the case.
104. Coming to the facts of the instant case, the Commission notes that bid rigging is one of the pernicious form of anti-competitive conduct prohibited under the Act. Further, Informant is a public sector undertaking supplying input to customers in an important sector such as electricity. The Commission considers the criticality of the services procured under public procurement as an aggravating factor. On the other hand, the OPs having cooperated in the proceedings is taken as a mitigating factor. OP-3, OP-4, OP-7, OP-8 and OP-10 have stated that they have undertaken competition law compliance measures and filed Affidavits in support. These OPs have also filed Affidavits giving the details of compliance measures put in place alongwith photographs of competition law training programmes organised for their employees. The



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Commission appreciates such efforts taken by the OPs. However, the compliance efforts cannot be taken as a mitigating factor as they were undertaken post the initiation of the present proceedings.

105. Having dealt with the nature of contravention as well as the mitigating factors, the Commission proceeds to impose penalty on the OPs at the rate of 4% of its average relevant turnover for the last three financial years. Accordingly, the total amount of penalty works as follows:

PARTY	FY 2011-12 (In Rs.)	FY 2012-13 (In Rs.)	FY 2013-14 (In Rs.)	FY 2014-15 (In Rs.)	AVERAGE (In Rs.)	PENALTY (In Rs.)
OP-1	4,16,30,470	3,64,51,960	2,99,91,820	NP	3,60,24,750	14,40,990
OP-2	4,28,33,287	4,43,87,439	5,83,58,944	NP	4,85,26,557	19,41,062
OP-3	NP	1,22,32,847	81,54,978	1,27,76,393	1,10,54,739	4,42,189
OP-4	NP	2,54,24,807	1,51,08,221	1,44,32,496	1,83,21,841	7,32,873
OP-5	NP	64,385,742	7,34,48,194	18,95,77,600	10,91,37,178	43,65,487
OP-6	6,34,95,094	14,06,41,977	14,12,59,372	NP	11,51,32,148	46,05,285
OP-7	NP	45,35,84,215	63,90,21,674	74,86,98,582	61,37,68,157	2,45,50,726
OP-8	44,92,83,335	1,03,01,82,393	1,22,73,31,924	NP	90,22,65,884	3,60,90,635
OP-9	49,95,72,142	76,44,07,116	39,82,64,533	NP	55,40,81,264	2,21,63,250
OP-10	39,66,54,121	52,57,43,081	71,55,10,035	NP	54,59,69,079	2,18,38,763

Note: NP - Not provided

106. The Commission further deems it appropriate and necessary to impose penalty on the above-mentioned individuals found liable under Section 48 of the Act at the rate of 4 % of their average income of the last three financial years reported to the Commission. Accordingly, the total amount of penalty on the aforesaid individuals found liable under Section 48 works as follows:

PARTY	INDIVIDUAL	FY 2010-11 (In Rs.)	FY 2011-12 (In Rs.)	FY 2012-13 (In Rs.)	FY 2013-14 (In Rs.)	AVERAGE (In Rs.)	PENALTY (In Rs.)
OP-1	Sunil Singh	NP	2,40,000	6,00,000	6,00,000	4,80,000	19200
OP-2	Tapan Mukherjee	4,44,266	5,00,880	4,90,373	NP	4,78,506	19140
OP-4	Kanhaiyalal Khandelwal	NP	283003	1,70,281	1,91,340	2,14,875	8594
OP-5	Rajiv Kumar Khandelwal	1,75,992	48,114	1,20,724	NP	1,14,943	4597
OP-6	Manjeet Singh Khanduja	NP	6,23,139	9,10,377	7,94,981	7,76,166	31046
OP-8	Kishore Agrawal	9,44,510	9,61,128	4,63,348	NP	7,89,662	31586
OP-9	Jagdish Kumar	NP	5,88,122	5,91,034	6,13,961	5,97,706	23908
OP-10	Anil Sapra	NP	52,18,295	67,87,983	66,85,464	62,30,581	249223

Note: NP - Not provided



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107. The Commission directs the concerned parties to deposit the afore-said penalty amounts within 60 days of the receipt of this order.
108. It is ordered accordingly.
109. The Secretary is directed to transmit copies of this order to all concerned forthwith.

**Sd/-
(Devender Kumar Sikri)
Chairperson**

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

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

**Sd/-
(Justice G.P. Mittal)
Member**

**New Delhi
Date: 14/09/2017**