



COMPETITION COMMISSION OF INDIA

Case No. 01 of 2014

In Re:

**Shri Ashutosh Bhardwaj
133/1, Inder Vihar
Street No. 11, Rajender Nagar
Dehradun - 248 001
Uttarakhand**

Informant

And

- 1. M/s. DLF Limited
DLF Shopping Mall, Third Floor
Arjun Marg, Phase-I
DLF City
Gurgaon- 122002
Haryana** **Opposite Party No. 1**
- 2. M/s. DLF Home Developers Limited (DHDL)
DLF Centre
Sansad Marg
New Delhi-110001** **Opposite Party No. 2**
- 3. M/s. DLF New Gurgaon Homes Developers Pvt. Limited
1-E, Jhandewalan Extension
New Delhi-110055** **Opposite Party No. 3**



With

Case No. 93 of 2015

In Re:

Shri Lalit Babu & Ors.

3817, Jaydevnagar

Bhubaneswar

District Khurda –751002

Orissa

Informant

And

M/s DLF New Gurgaon Homes Developers Pvt. Ltd.

DLF Centre

Sansad Marg

New Delhi – 110001

Opposite Party

CORAM

**Mr. Devender Kumar Sikri
Chairperson**

**Mr. S. L. Bunker
Member**

**Mr. Augustine Peter
Member**

**Mr. U. C. Nahta
Member**

**Justice G. P. Mittal
Member**



Appearances

For Informant in Case No. 01/2014 Shri K.K. Sharma, Advocate

For Informants in Case No. 93/2015 None

For Opposite Parties

Shri Ramji Srinivasan, Senior Advocate
Ms. Kanika Chaudhary Nayar, Advocate
Ms. Tripti Malhotra, Advocate
Ms. Jahnvi Mitra, Advocate
Shri Rajbeer H. Sachdeva
Ms. Poonam Madan

Order under Section 27 of the Competition Act, 2002

1. This common order shall govern the disposal of the informations filed in Case. No. 01 of 2014 and Case No. 93 of 2015, as the issues involved in these cases are similar and the Commission vide order dated 29.12.2015 clubbed these cases for investigation and for subsequent consideration.

Facts:

Case No. 01 of 2014

2. The information in Case No. 01 of 2014 was filed by Shri Ashutosh Bhardwaj (hereinafter, “**Informant**”) u/s 19(1)(a) of the Competition Act, 2002 (hereinafter, ‘**the Act**’) against M/s DLF Limited (hereinafter, ‘**OP-1**’), M/s DLF Home Developers Limited (hereinafter, ‘**OP-2**’) and M/s DLF New Gurgaon Homes Developers Pvt. Ltd (hereinafter, ‘**OP-3**’) (hereinafter collectively ‘**OPs/ OP Group**’) alleging abuse of dominant position by OPs by imposing unfair/discriminatory conditions/prices on the Informant in contravention of the provisions of section 4 of the Act.



3. The Informant in this case is an individual working as General Manager in Oil and Natural Gas Corporation Ltd. The OP-1 is a public limited company and its primary objective is development and sale of residential, commercial and retail properties. As per Annual Report (FY-2012-13) of the OP-1, OP-2 is a 100% subsidiary of the OP- 1. The OP-3 was a private limited company in which OP-1 held 94.02% shareholding before it was merged with the OP-2 on July 30, 2013.
4. As per the information, the Informant booked an apartment, “GAJ001”, located on ground floor in Tower J in the housing project of OPs named ‘New Town Heights’ located in sector-86, Gurgaon having super area of 1535 sq. ft. at a total price of Rs. 42,91,000/- which included preferential location charges of Rs. 4,60,500/- and Rs. 3,00,000/- for parking space. Pursuant to this, an Apartment Buyers’ Agreement (hereinafter the “Agreement”) was entered into between the Informant, the OP-2 and OP-3 on 22.12.2009, on the terms and conditions set in the Agreement by the OP-2 and OP-3. Subsequent to the execution of the Agreement, the said apartment was allotted to the Informant.
5. The Informant alleged that the OP Group has abused its dominant position by imposing highly arbitrary, unfair and unreasonable conditions on the apartment buyers through the Agreement. By citing various clauses of the agreement, the Informant further alleged that the terms of the Agreement were heavily loaded in favour of the OPs and were made non-negotiable. The Informant has thereby alleged violation of Section 4(2)(a)(i) and 4(2)(d)of the Act..



6. Based upon the various averments and allegations in the information, the Informant *inter alia* prayed for issuing direction to the OPs; to modify the clauses of the Agreement and; to give appropriate compensation to the allottees for delay in delivery of possession of the apartment beyond 36 months.

Case No. 93 of 2015

7. The information in Case No. 93 of 2015 was filed by Shri Lalit Babu along with Smt. Madhu Jindal W/o Shri Lalit Babu; Shri Gaurav Kumar S/o Shri Lalit Babu; Shri Saurab Kumar S/o Shri Lalit Babu; and Shri Varun Bansal S/o Shri S.L. Bansal ('Informants'), under section 19(1)(a) of the Competition Act, 2002 ('Act') against M/s DLF New Gurgaon Homes Developers Pvt. Ltd. ('OP-3') alleging violation of Section 4 of the Act.
8. As per the information, in the year 2008, the Informants booked five flats at Rs. 5 lakhs each (total Rs. 25 lakhs) in the OP-3's residential apartments development scheme, 'New Town Heights', being developed at Phase-2 Sector-86 Gurgaon, Haryana. Thereafter, the Informants were given provisional allotment letters dated 11.06.2008 for the residential flats in the aforesaid property having a covered area of 2125 sq. ft. at a total cost of Rs. 47,81,250/- each. It is averred that the OP-3 assured that the project would be completed within two years and the flats would be transferred in the name of the Informants after receiving the payments. However, despite reminders, the OP-3 did not inform the informants regarding the progress of construction of the project.
9. It is stated that on 17.11.2008, the OP-3 issued a letter to the Informants asking to deposit further payment of Rs. 12,60,000/- without any



construction on the proposed site. Another letter was also sent on 17.12.2008 informing that the project was being delayed and the OP-3 had decided to hand over the aforesaid flats after three years instead of two years. As there was no progress for 6 months and since the Informants had urgent requirement of flats, they wrote letters to the OP-3 on 25.12.2008 asking for refund of advance money along with 18% interest and compensation of 10 lakhs for each flat to purchase alternate accommodation as, in the meantime, there had been an increase in market price of the properties. The Informants even wrote to the Managing Director of the OP-3 for the refund of amount paid with interest but OP-3 did not respond and remained silent.

10. The Informants alleged that the OP-3 first executed an Agreement which was prejudicial to the Informants and then *vide* letter dated 17.12.2008 intimated Informants about delay in the construction. Thereafter, the OP-3 threatened the Informants to make payments even though the construction had not yet started. Further, it is alleged that the OP-3 sent a letter demanding the payment of outstanding amount failing which the allotment would be cancelled and the amount already deposited would be forfeited.
11. As per the allegations made in the information the entire Agreement was loaded in favour of the OP-3 and it lacked the clauses for protection of the interest of consumers like the Informants. Based on the above allegations, the Informants alleged that the actions of the OP-3 amounted to abuse of dominant position under Section 4 of the Act.

Order for DG investigation

12. After considering the facts of Case No. 01 of 2014, the Commission, in its order under Section 26(1) of the Act dated 27.02.2014, found a



prima facie case of violation of Section 4 of the Act against the OPs and, therefore, directed the DG to cause an investigation to be made into the matter and submit a report. Accordingly, the DG investigated the matter and submitted its investigation report dated 26.11.2015 to the Commission.

13. The Commission also considered the information in Case No. 93 of 2015 and observed that the issues involved and the allegations levelled in this information were substantially similar to the allegations investigated in Case No. 01 of 2014. Therefore, the Commission *vide* order dated 29.12.2015 decided to club this case with Case No. 01 of 2014 in terms of Section 26 (1) of the Act read with Regulation 27 (1) of the Competition Commission of India (General) Regulations, 2009.

Findings of the DG's Investigation

14. In consonance with the decisions of the Commission in the previous cases against the OPs the DG found that the OPs fall within the definition of group as defined under Section 5 of the Act.
15. For the purpose of investigation, the DG first deligated the relevant market and examined the dominance of the OP Group in the same. Thereafter, the DG assessed whether the OP Group contravened the provisions of Section 4 of the Act.
16. The DG examined several aspects of the real estate sector to delineate the relevant product market. Firstly, the DG discussed parameters that make residential property such as apartments, flats, units, *etc.* a separate relevant product market from commercial or industrial property. Secondly, the DG noted that once the consumer decides to buy a



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residential unit, the relevant factors that he would normally consider are the budget, value for money, developer's brand value, its historical background, number of completed projects, delivery schedule, *etc.* The DG has further noted that the consumer would also consider the amenities provided by the developer, general plan of development, location of the project, provision of facilities such as sewerage, developed roads, proximity to railway station/ metro station/ bus-stand/ main roads, *etc.* According to the DG report, these factors together determine the aspect of substitutability and interchangeability of services provided by the developers in respect of residential units apartments.

17. Apart from the aforesaid, DG also highlighted that Director General, Town & Country Planning, Haryana (DGTCP) grants different types of licenses for the purpose of development of residential apartments/ units/ villas/ independent floors *etc.* under the categories such as Residential Plotted Colony (RPL), Residential Group Housing (RGH), Low Cost Housing, Residential Group Housing with minority Plotted area and Affordable Housing Project (AHP).
18. Further, DG was of the view that the dynamics of AHP category license were entirely different from RGH and RPL category of licenses and was out of the purview of the relevant product market. While arriving at this conclusion, DG looked at the distinct requirements prescribed for various licences granted by DGTCP and other factors such as physical characteristics, end-use, price, consumer preferences and location.
19. Based on the above and considering that the project of the OP Group under reference *i.e.*, New Town Heights, which has a product mix of residential apartments, town houses, and independent floors, DG concluded that the relevant product market in this case to be the market for "*the provision of services for development/ sale of residential units*



(apartments/ flats/ independent floors/ villas) under the licensed category of RGH and RPL”.

20. With regard to the relevant geographic market, DG noted that the Informant had submitted that the relevant geographic market may be considered as "Gurgaon". However, during investigation, OP Group contended that the relevant geographic market would be "National Capital region (NCR)". The DG found that the investigation did not indicate that the entire NCR could be considered as relevant geographic market in this case. The DG stated that considering the factors such as different regulatory authorities/ rules/regulations/ master plans *etc.* for Gurgaon, Delhi and Noida/Greater Noida, differential cost of land and development, availability of resources, prices, geographical distances, connectivity with airport and capital, presence of multi-nationals potential of growth and expansion opportunities in Gurgaon, local conditions and preferences of the consumers, Gurgaon may be considered as a separate geographic market. The conditions prevailing in Gurgaon in terms of these attributes were different and distinguishable from that of Delhi and Noida or other areas of NCR and hence in terms of the provisions of Section 19(6)(b) "local specification requirements" , Gurgaon was found to be different from other areas of NCR . Accordingly, the DG delineated "Gurgaon" as the relevant geographic market.
21. Thus, the relevant market u/s 2 (r) of the Act was defined as the market for "the provision of services for development/sale of residential units (apartments/flats/ independent floors/villas) under the licensed category of RGH and RPL in Gurgaon".



22. To examine the dominance of the OP Group, the DG obtained data from real estate developers/competitors of the OP Group in the relevant market, DGTCP and P.E. Analytics Private Limited (PropEquity). Also, data available on the official website of Town and Country Planning, Haryana with respect to various developers in Gurgaon was examined.
23. For the analysis of relevant period, DG noted that the project under reference *i.e.* 'New Town Heights - DLF New Gurgaon' was launched on 31.03.2008 (*i.e.*, in FY 2007-08). The Informant in Case No. 1 of 2014, had booked the residential apartment on 03.09.2009 (*i.e.*, in FY 2009-10) and executed the agreement on 22.12.2009 (*i.e.*, in FY 2009-10). The OP Group had executed more than 80% agreements of the total residential units in the project by 2009-10. Hence, the relevant period/scope of investigation in this case was considered as three (3) years from 2007-08 to 2009-10 (3 years).
24. For the purpose of ascertaining dominance, factors provided under Section 19(4) of the Act were considered. The DG first analysed the market share of the OP Group in the relevant market during the relevant period on five parameters *i.e.*, land licensed for residential purposes, residential units launched, number of residential units sold, value of residential units sold and inventory. With respect to dominance of the OP Group in terms of market shares, DG found that the market consisted of a number of developers where the position of the OP Group was No. 1 in terms of sales value with a vast gap between the OP Group and its competitors. Also, the OP Group was found to be at second position in terms of number of units sold during the relevant period.
25. The DG also looked at the size and resources of the OP Group and its competitors. On overall comparison of information from 15 developers in



terms of financial parameters such as total assets, return on assets, profit after tax, reserve and surplus, sales income and net working capital, the DG found that the OP Group was far ahead of its competitors on all parameters during the period 2007-2008 to 2009-2010. The DG noted that the total assets of the OP Group in 2009-10 was almost three times that of Unitech and its reserve and surplus was more than two times that of Unitech which was found to be at 2nd position on both parameters.

26. Apart from the aforesaid, DG also noted that the one important factor in favour of the OP Group was that it developed its business in Gurgaon over huge piece of land early on. The OP Group was incorporated in 1946 and has since been active in the field of real estate. This gave the OP Group an advantage over its competitors as the real estate sector is capital intensive and involves long gestation period. Huge funds are required to meet the cost of land in the real estate market, which becomes a barrier to entry for new entrants. The DG observed that owing to its significant size, the OP Group benefited from economies of scale and due to its strong position, it could operate independently of the other players in the relevant market. Thus, it was concluded that the OP Group enjoyed advantage over other players in terms of size, resources, economic power, economies of scale, goodwill and long experience which gave it a distinct advantage over the other competitors in the market.
27. The DG further assessed the dependence of consumers on the OP Group and noted that although choices were available to the Informant in projects prior to/during the booking of the said residential apartment in Gurgaon during 2008-09 and 2009-10, other developers/ projects could not match the brand name of the OP Group.



28. Considering the above, the DG found that the OP Group enjoyed a dominant position in the relevant market in terms of Section 4 read with Section 19(4) of the Act.
29. The DG examined various allegations regarding imposition of unfair and unilateral terms and conditions by the OPs in the Agreement. On investigation, DG found some allegations to be misconceived such as mandatory payment of charges for club facility, mandatory electricity supply from the OPs, *etc.* However, with respect to allegations of abuse arising from other clauses of the Agreement, findings of the DG were as follows:
- i. *Clause 1.20:* The allottee is mandated to compulsorily purchase the parking space.
DG's findings: The Government's Memo No. 7/16/2006-2 TCP dated 19.12.2006 instructs that 1.5 equivalent car space for each dwelling unit should be provided in a group housing colony building. It was noted that this stipulation did not make it mandatory upon each apartment buyer to buy at least one parking space and that by bundling the sale of minimum one parking space with the flat, OPs had put unnecessary financial burden on the allottee forcing him to pay Rs. 3 lakh for stilt parking even when he did not need the parking space. This clause, thus, foreclosed the option with the buyer and, hence, was found to be one -sided.
 - ii. *Clause 8:* The OPs are not required to send any notice or reminder for any compliance under the Agreement though for complying with all obligations under the Agreement. Time is of the essence for the allottee.



DG's findings: This clause was found to be one-sided with no responsibility upon the OPs and complete responsibility upon the allottee. When read with other clauses of the Agreement, it could be said that allottee had to bear the brunt of non-compliance without corresponding obligation on the OPs.

iii. *Clause 11:* Schedule for possession of the Apartment

DG's findings: This clause only mentioned that the OPs would endeavour to complete the construction of the building within a period of 36 months from the date of execution of the Agreement and gave ample scope to the OPs to modify the time schedule as per its discretion. Also, merit was found in the allegation of the Informant, as in the present case there was a delay in delivery of possession by more than two years and the OPs could not submit any cogent reasons/ evidence for delay or any force majeure conditions which prevailed during the period. The DG found this clause to be another instance of an asymmetric agreement heavily tilted in favour of the OPs.

iv. *Clause 12:* Procedure for taking possession.

DG's findings: It was observed that this clause was constructed in such a way that any default on part of the OPs would have minimum adverse impact on the OPs, whereas in case of any default on part of the buyer, they would be subjected to heavy penalty. Also payment of maintenance charges with effect from the date of occupation certificate was found to be meaningless because until and unless the effective possession of the apartment was handed over to the buyer, he could not make use of the apartment and its associated benefits and amenities. Moreover, in this case, there was considerable time gap between the date of occupation certificate and



the actual date of handing over the possession of the apartment. Therefore, this clause was found to be one sided and in favour of the OPs and heavily biased against the buyers.

v. *Clause 17: Failure to deliver timely possession (Remedy to the OPs)*

DG's findings: The DG noted that as per clause 17, liability of the OPs was limited to payment of compensation @ Rs. 10/- per sq ft. of the super area for the period of delay beyond 3 years whereas the allottee was subject to payment of interest @ 15% per annum for the first 90 days and additional penal interest @ 3% per annum for a period exceeding 90 days as per clause 46 of the agreement. The interest chargeable to the allottee in case of delay in making payments was much more than interest payable by the OPs for delay on account of construction and handing over of possession to allottee. Further, since the OPs had covered itself on many accounts to save itself from the liability in case of delay in delivery, there was a possibility of delaying and/ or not paying anything to the consumer, while in case of delay in making payment by the consumer, there was no escape from making payment at 18% interest per annum. Moreover, in case project was abandoned by the OPs, the liability of OPs was limited to interest @ 6% only.

vi. *Clause 16: Failure to deliver possession by the OPs (Remedy to allottee)*

DG's findings: It was found that the allottee was deprived of the right to claim any refund/interest when apartment was sold by the OPs. Rather, the OPs reserved all the rights and refunded the excess amount only after the property was sold, which was also at the discretion of the OPs. In effect, by virtue of this clause, the allottee's



exit option was curtailed as the allottee had no right to terminate the agreement in case of Force Majeure and was bound to the OP Group without any means of recovery. There was no provision for payment of penalty by the OPs even when default was committed by it. This made the Agreement heavily loaded in favour of the OPs.

- vii. *Clause 1.15 and 1.16 and Clause 10:* No determination of Super Area, Carpet Area, etc.

DG's findings: As per clause 1.15 and 1.16 of the Agreement, final carpet area of the apartment and the final price which allottee were expected to pay, were not known to the allottee. Further, clause 10 of the Agreement gave absolute right to the OPs to make any addition or alteration to an extent of $\pm 10\%$ and it was the sole discretion of the OPs to entertain the objections of the allottees or to cancel the Agreement without any further notice. This clause enabled the OPs to modify the plan without any obligation upon it but to the disadvantage of the allottee both in terms of the uncertainty about the final amount payable by it and no say of the allottee in the matter. Moreover, in case of reduction of the area of the apartment, the OPs provided to adjust the excess amount in the last installment and for the intervening period, no interest was payable. In addition there was the provision of cancellation of the Agreement without further notice under clause 10 of the Agreement. All these terms were found to be one-sided and unfair.

- viii. *Clause 1.8:* Change in preferential location of the Apartment due to change in lay-out plan.

DG's findings: This clause of Agreement was found to be unfair and highly asymmetric to the allottee for the reason that preferential location charges were required to be paid upfront, but when the



allottee did not get the preferential location, the refund was to be adjusted at the time of last installment, that too without any interest.

ix. *Clause 1.11(a): External Development Charge or Infrastructure Development Charge (EDC/ IDC)*

DG's findings: Under this clause, the allottee was required to pay EDC/ IDC in proportion to the super area of their respective premises to the total super area of all the premises in the said building, whether levied now or leviable in future with retrospective effect, as the case may be. Any increase in EDC/ IDC by the Government of Haryana or as a result of increase/ adjustment in super area had to be paid by allottee on a pro- rata basis. Thus, the allottee was unaware of the amount payable by him even till the last stage and in the absence of adequate disclosure in advance, he was at the mercy of the OPs.

x. *Clause 4: Earnest Money Deposit (EMD).*

DG's findings: Clause 4 of the Agreement provided that 10% of the total amount shall be the EMD and in case of failure to perform the obligations or breach of the contract by the allottee the same shall be forfeited without any notice to the allottee. The DG observed that the right to forfeit EMD without any notice to the allottee was one-sided and unfair.

30. Apart from the aforesaid, DG also analysed and found the following clauses of the Agreement to be one-sided, unfair and in favour of the OPs: (i) clause 34 - allowed the OPs to raise loan/ finance on the apartment/ building, etc. through third party without the consent of the allottee; (ii) clause 41 - the allottee had no rights to assign, transfer, nominate or convey the apartment in any manner without prior written



consent of the OPs; (iii) clause 42 - provided that the Agreement would prevail over the Application in so far as the terms were in variance with the Agreement and obliterated all the probable omissions in the Application by the OPs; (iv) clause 43 - reserved all the rights to correct, modify, amend or change all the annexures attached to the Agreement at the sole discretion of the OPs; (v) clause 60 - in event of default by the allottee gave discretion to the OPs to send notice to the allottee to rectify the default in 30 days or otherwise Agreement shall stand cancelled without any further notice; and (vi) clause 62 - provided that the arbitration proceedings were to be held within DLF City Gurgaon, Haryana by a sole arbitrator who would be appointed by the Managing Director of the OPs and whose decision shall be final and binding upon the parties.

31. On the basis of above analysis the DG found that the OP Group violated Section 4(2)(a)(i) of the Act.
32. The DG also noted that in the statements made during investigation, OP Group claimed that they had initiated some rectification measures but such measures were applicable only for next or future projects. The DG stated that such an action would not absolve them of the past conduct.
33. The Commission notes that the OPs filed their objections/ suggestions to the investigation report of the DG on 15.03.2016. However, the Informants did not submit any written submissions to the Commission. . The Informant in Case No. 01 of 2014 and the OPs were heard by the Commission on 22.03.2016. The Informants in Case no. 93 of 2015 did not appear for the hearing despite notice.



OPs' submissions:

34. The OPs have submitted that though the instant submissions are being made with regard to allegations raised in the present information, the facts pleaded and all the submissions/ objections made in replies and submissions filed with the Commission in relation to Case No. 13 and 21 of 2010 and Case No. 55 of 2012 (which were also related to New Town Heights project) may be considered for these cases too.
35. The OPs have made certain preliminary submissions namely (i) the issues raised in the present matter are already pending before the Hon'ble Supreme Court of India; (ii) the Act is prospective in nature and does not apply retrospectively; (iii) the findings in the investigation report of the DG in relation to the alleged abusive terms and conditions in the Agreements executed between the OPs and the allottees in the project, do not constitute issues of competition law. Instead, they essentially relate to issues of contractual claims and consumer disputes; (iv) provisions of the Act are not applicable as there is no purchase or sale of goods or services and (v) there is no abuse of dominant position as the terms of the Agreement were already known to the allottees in the project; *etc.*
36. In their preliminary objections, OPs have submitted that (i) there is an erroneous delineation of relevant product market as it fails to take into account Affordable Housing Project (AHP); DG has attempted to create unnecessary, undue and irrelevant segmentations/ divisions within the relevant product market even though the same do not affect the substitutability and interchangeability from a demand perspective; (ii) the relevant geographic market as taken by the DG is also not correct as DG has overlooked the fact that the apartment units across the entire NCR regions are substitutable from the demand perspective; (iii) the DG has placed reliance on data which clearly demonstrates that OP Group is not



dominant; (iv) there is failure to appropriately assess issues relating to abuse of dominance; (v) OPs have offered numerous benefits to its allottees in the New Town Heights project, some of which have been considered incorrectly. For example, DG has erroneously concluded that the OPs' practice of offering discounts/ rebates/ benefits to allottees in the project caused appreciable adverse effect in the market; and (vi) DG has failed to take into consideration relevant factors and has instead relied on irrelevant factors to return the findings of contravention.

37. The OPs have contended that the scope of investigation adopted by the DG is flawed as DG did not have the locus standi to examine and assess the conduct of the OPs for the period 2007-08 and 2008-09 since it predates the enforcement of the Act. Further, as regards the relevant market, it has been submitted that the DG has deviated from the relevant product market as defined by the Commission in various orders relating to real estate sector and arrived at an inconsistent definition. The OPs have averred that units of AHP ought to be included and "all residential units" ought to be considered as the 'relevant product market'.
38. With respect to relevant geographic market, the OPs have contended that DG has erroneously considered Gurgaon as a separate relevant geographic market instead of NCR. To support this argument, it has been pointed out that for the purposes of preparing the 'Residex' which tracks movement of prices in residential housing segment, National Housing Bank considers Delhi-NCR as a single geographical area. It has been argued that the relevant geographic market should be area of NCR which would include Gurgaon, Dwarka, Noida, Greater Noida *et al.* Thus, the relevant market ought to be the sale of residential units in the NCR.
39. With regard to dominance, OPs submitted that unless the parameters and extent of the relevant market are clearly determined, strength of enterprise



cannot be determined. Further, the position of strength enjoyed by an enterprise and not the group ought to have been considered and in this case since the Agreement is between OP-2 and allottee, dominance of OP-2 only ought to have been considered.

40. The OPs further pointed out that, DG has not taken into consideration the fact that majority of the apartment buyers purchase the apartments for investment purposes and that several apartments are available in the secondary market. It also challenged the finding of dominance arrived at by the DG when the market shares do not support the same. It has been stated that the DG has proceeded with a pre-determined mind in so far as the OPs are concerned as it has arrived at conclusions that are not in sync with the data which has been analysed. It has been contended that merely size and resources cannot be determinant of dominance in the market. Further, while making financial assessment, details of only OP-2, which launched the project, and that too of real estate business segment, ought to have been considered instead of the OP Group as a whole. Moreover, the years considered by DG for making financial assessment are beyond the scope of investigation. Further, the financial assessment is flawed as DG has looked at factors such as total assets, return on assets, profit after tax, reserves and surplus, net working capital *etc.* without considering the liabilities and indebtedness of the OP Group as well as its debt-equity ratio. It has been averred that OP Group's long business development journey and its goodwill cannot be held against it. The data in DG report shows that consumers are not dependent on the OPs' projects and that customers have ample choice to book/ purchase apartments. It has been stated that the OPs are in agreement with the finding of the DG that there was no entry barrier as many new developers had entered the market during the relevant period. Thus, OP Group cannot be said to occupy a position of dominance.



41. The OPs submitted that in the absence of dominance, question of abuse of dominance does not arise. It has been contended that DG has erroneously concluded that 'imposition' of unfair conditions in contravention of Section 4(2)(a) of the Act is established merely on the basis of the existence of an Agreement. The DG has incorrectly considered only the contents of the clauses of the Agreement, rather than considering the OPs' conduct in the project. It has been, thus, submitted that the DG's assessment of OPs' conduct is entirely incorrect and is liable to be dismissed, *in limine*. The OPs also submitted that its objections/submissions for Case No. 01 of 2014 may be considered as its response to Case No. 93 of 2015 also.

Findings of the Commission

42. The Commission has perused the material available on record and heard the counsels of the OPs and the Informant. The issue before the Commission for consideration and determination is whether the OP Group has contravened the provisions of Section 4 of the Act or not.

43. It may first be noted that these cases relate to 'New Town Heights' project in Gurgaon which was also the subject matter under consideration in Case No. 13 and 21 of 2010 and Case No.55 of 2012. In those cases, an order under Section 27 of the Act was passed by the Commission on 12.05.2015. The only fact which is distinct in the present cases from the decided cases is that the present cases pertain to 'New Town Heights' project in Sector 86 whereas Case No. 13 and 21 of 2010 and Case No. 55 of 2012 pertained to 'New Town Heights' project in Sector 90 and 91 in Gurgaon. In almost all other respects *i.e.*, market involved, time period, abuses alleged, Agreement, *etc.* the present cases are similar to the cases decided by the Commission *vide* order dated 12.05.2015.



44. Drawing reference from the previous order in Case Nos. 13 and 21 of 2010 and Case No. 55 of 2012, the Commission may now proceed to analyse the matter in the instant cases.
45. With regard to the delineation of relevant product market, DG examined three categories i.e. RGH, RPL and AHP under which licenses are granted by DGTCP. The DG considered factors such as characteristics, intended use, price, consumer preference and location and came to the view that the relevant product market would be the provision of services for development/ sale of residential units (apartments/ flats/ independent floors/ villas) under the licensed category of RGH and RPL. On relevant geographic market, DG considered the factors such as different regulatory authorities, cost of land, proximity to airport, separate master, choice of consumers, local conditions and requirement to arrive at a conclusion that Gurgaon be considered as the relevant geographic market.
46. The OPs have contended that the product market should be residential units including the AHP category. It has been submitted that in terms of demand side substitutability, all residential units are interchangeable from a consumer perspective. Further, it is contended that DG has deviated from the product market defined by the Commission in various orders relating to real estate sector and has arrived at an inconsistent definition. Further, OPs submitted that majority of the apartment buyers purchase apartments for investment purposes and that several apartments are available in the secondary market. It has also argued that the entire NCR should have been the relevant geographic market as any prospective buyer would consider NCR and not only Gurgaon for the purpose of buying property for residing or investment.



47. Reference may be made to Case Nos. 13 and 21 of 2010 and Case No. 55 of 2012 wherein the Commission has categorically opined that the technicality on the relevant product market need not be dwelled into if the dominance of the enterprise remains the same even in alternative relevant market definitions. The relevant Para is extracted herein below for reference :

‘6.20 The Commission notes that determination of relevant market is important for assessing dominance of the Opposite Party. But defining relevant market is not an end in itself. If the primary reason for defining relevant market is assessment of dominance of a particular enterprise/ market player with regard to that relevant market, the Commission is of the opinion that such exercise can be dispensed with when such assessment remains unchanged in different alternative relevant market definitions. Therefore, when under possible alternative relevant market definitions, the conclusion on dominance remains the same; the Commission finds no reason to get into the technicalities of precisely defining relevant market.’

48. In the above case, the Commission has further opined that even secondary market will be not considered while defining relevant product market by referring to *Belaire’s case*. The relevant extract in *Belaire’s case* is provided herein below:

‘12.35While “secondary market” may have some bearing on the demand and supply variables, it certainly cannot form a part of the relevant market for the simple reason that the primary market is a market for “service” while the secondary market is a market for immovable property. Moreover, while building an apartment, a builder performs numerous development activities like landscaping, providing common facilities, apart from



obtaining statutory licenses while a sale in secondary market merely transfers the ownership rights. An individual who is selling an apartment he or she has purchased cannot be considered as a competitor of DLF Ltd. or any other builder/ developer. Nor is he or she providing the service of building/ developing. The dynamics of such sale or purchase are completely different from those existing in the relevant market under consideration. The value added or the value reduced due to usage or otherwise does not even leave the apartment as the same one as had been built or developed by the builder/ developer...'

49. Drawing inference from the above, the Commission hereby reiterates that when the dominance of an enterprise remains unchanged in a market even with an alternative market definition, technicality of the product market need not be dwelled further. Therefore, the argument put forth by the OPs that DG has given inconsistent market definition, has no force. At the same time, the Commission sees no reason to deviate from the product market definition taken in earlier cases dealing with similar the issues and project *i.e.*, Case no. 13 and 21 of 2010 and 55 of 2012 where the relevant product market was defined as the market for the '*provision of services for development/ sale of residential apartments*'.

50. With regard to the relevant geographic market, the Commission agrees with the DG's view that Gurgaon would be the geographic region for the purpose of the present cases. Reference is made to the observation made by the Commission in Case Nos. 13 and 21 of 2010 and Case No. 55 of 2012 where *Belair's case* was yet again referred to define the relevant geographic market. The relevant extract is provided herein below:



‘6.23....The ‘geographic region of Gurgaon’ has gained relevance owing to its unique circumstances and proximity to Delhi, Airports, golf courses, world class malls. During the years it has evolved as a distinct brand image as a destination for upwardly mobile families. As it has been reasoned out in the order passed by this Commission in the Belaire case, a person working in NOIDA is unlikely to purchase an apartment in Gurgaon, as he would never intend to settle there. Thereafter, the Commission in that order distinguished between buyers looking for residential property out of their hard earned money or even by taking housing loans and those buyers who merely buy such residential apartments for investment purposes; stating clearly that the Commission was not looking at the concerns of speculators, but of genuine buyers. It was therefore, observed that a small 5% increase in the price of an apartment in Gurgaon, would not make a person shift his preference to Ghaziabad, Bahadurgarh or Faridabad or the peripheries of Delhi or even Delhi in a vast majority of cases. The COMPAT’s order, dated 19.05.2014 passed while disposing of the appeals filed against the Commission’s order in the Belaire case, upheld the Commission’s finding on the relevant geographic market to be ‘geographic region of Gurgaon’.....’

51. Based on the above, the Commission is of the view that geographic region of ‘Gurgaon’ is the appropriate relevant geographic market and not the entire NCR as contended by the OPs.
52. In view of the foregoing, the Commission delineates the relevant market as the market for ‘provision of services for development/ sale of residential apartments in Gurgaon’.



53. On the dominance of OP Group, there is no doubt that the strength which the OP Group possesses in residential real estate segment in the geographic region of Gurgaon is incomparable. In the order dated 12.05.2015 in Case Nos. 13 and 21 of 2010 and Case No. 55 of 2012, the Commission has dwelled into details on the aspect of dominance of the OP Group and has thoroughly assessed the DG's findings. Thereafter, it was finally concluded that the OP Group held a dominant position in the relevant market. The assessment done by the Commission in the previous orders will also apply in the present matters since the issues, the relevant period and the OPs involved are the same. Therefore, it is opined that the OP Group holds a dominant position in the market for the '*provision of services for development/sale of residential apartments in Gurgaon*'.

54. With regard to the issue of abuse of dominance, the Commission notes that the same has already been dealt with by the Commission in its previous orders. It was held that those terms and conditions imposed through the Agreement were abusive being unfair within the meaning of Section 4(2)(a)(i) of the Act. For the sake of brevity, the analysis on the alleged abusive terms is not provided herein. Considering the assessment done in the previous cases including *Belaire's case*, the Commission is of the view that the terms and conditions imposed on the allottees in the instant matters as analyzed by the DG in detail are abusive in nature and the OP Group has contravened Section 4(2)(a)(i) of the Act.

ORDER

55. In view of the above, and in exercise of powers under Section 27(a) of the Act, the Commission directs the OP Group to cease and desist from indulging in the conduct which is found to be unfair and abusive in terms of the provisions of Section 4 of the Act.



56. With regard to penalty the Commission is of the view that since a penalty of Rs. 630 crores has already been imposed on the OP Group in the Belaire's case for the same time period to which the present cases belong, no financial penalty under Section 27 of the Act is required to be imposed. In view of the totality and peculiarity of the facts and circumstances, the Commission does not deem it necessary to impose any penalty on the OP Group in these cases.

57. The Secretary is directed to inform the parties accordingly.

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

**Sd/-
(S. L. Bunker)
Member**

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

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

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

New Delhi

Dated: 04.01.2017