COMPETITION COMMISSION OF INDIA
Case No. 59 of 2011

In Re:

Shri Jyoti Swaroop Arora	**Informant**

And

1. M/s Tulip Infratech Ltd.	**Opposite Party No. 1**
2. Director, Town & Country Planning, Haryana	**Opposite Party No. 2**
3. Haryana Urban Development Authority	**Opposite Party No. 3**
4. Confederation of Real Estate Developers' Association of India (CREDAI)	**Opposite Party No. 4**
5. M/s Amrapali Group	**Opposite Party No. 5**
6. M/s Ansal Properties and Infrastructure Ltd.	**Opposite Party No. 6**
7. M/s Ambuja Neotia Group	**Opposite Party No. 7**
8. M/s Avalon Group	**Opposite Party No. 8**
9. M/s Aparna Constructions & Estates Pvt. Ltd.	**Opposite Party No. 9**
10. M/s Amit Enterprises Housing Ltd.	**Opposite Party No. 10**
11. M/s BPTP Limited	**Opposite Party No. 11**
12. M/s Gaursons India Limited	**Opposite Party No. 12**
13. M/s K. Raheja Corp Pvt. Ltd.	**Opposite Party No. 13**
14. M/s Oberoi Realty Limited	**Opposite Party No. 14**
15. M/s Omaxe Ltd.	**Opposite Party No. 15**
16. M/s Parsvnath Developers Ltd.	**Opposite Party No. 16**
17. M/s Puravankara Project Limited	**Opposite Party No. 17**
18. M/s PS Group	**Opposite Party No. 18**
19. M/s Prestige Estates Projects Ltd.	**Opposite Party No. 19**
20. M/s Purohit construction Ltd.	**Opposite Party No. 20**
21. M/s Supertech Ltd.	**Opposite Party No. 21**
22. M/s Salarpuria Group	**Opposite Party No. 22**
23. M/s Tata Housing Development Company Ltd.	**Opposite Party No. 23**
24. M/s Unitech Ltd.	**Opposite Party No. 24**

CORAM

Mr. Ashok Chawla
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

Appearances: Informant-in-Person.

Shri Avinash Sharma, Advocate for M/s Tulip Infratech Pvt. Ltd.

S/ Shri Anubhav Ray, Vivek Kohli and Lokesh Bhola, Advocates for CREDAI.

S/ Shri Gurukrishna Kumar, Senior Advocate with Rakesh Kumar, Bipin Kumar and Suresh Chandra Sharma, Advocates for M/s Amrapali Group.

S/Shri Amir Pasrich, Vikas Agarwal, Vaisayant Paliwal and Dhruv Malik, Advocates for M/s Ansal Properties and Infrastructure Ltd.

S/ Shri Manas Chaudhuri, Sagardeep Singh, Shounak Mitra, C P Kakarania and Deepak, Advocates for M/s Ambuja Neotia Group.

S/ Shri Anubhav Ray, Vivek Kohli and Lokesh Bhola, Advocates for M/s Avalon.

S/ Shri Sanjiv Sen, Ms. Bharti J. Joshi, M. V. Durga Prasad, Dev Roy and G. Ramakrishna Prasad, Advocates for M/s Aparna Constructions & Estates Pvt. Ltd.

Ms. Neha Sharma, Shri Amit Dhulekar, Advocates for M/s Amit Enterprises Housing Ltd.

S/ Shri Manish Sharma, Ms. Adrika Pandey, Rahul Dahiya, Senior Manager and Yashpal Autil, Advocates for M/s BPTP Limited.

S/ Shri Ranjan Sardana and Pradeep Verma, Advocates for M/s Gaursons India Limited.

S/ Shri A.N. Haksar, Senior Counsel with K.A. Sampat and Aayushe Advocates, for M/s K. Raheja Corp Pvt. Ltd.

S/ Shri Anuj Puri, Satyendra Kumar, Ms. Kalyani Shukla and Ms. Gesu Priyadarshini, Advocates for M/s Oberoi Realty Ltd.

S/ Shri Amit Sibal, Senior Advocate with S/ Shri M.M. Sharma, Vaibhav Choskse and Ms. Deepika Rajpal, Advocates for M/s Omaxe Ltd.

S/ Shri Vijay Nair, Manoranjan Sharma and V. Mohan, Advocates for M/s Parsvnath Developers Ltd.

S/ Shri Krishnan Venugopal, Senior Advocate with Rahul Goel, Anu Monga, Neeraj Lalwani, Aditya Narain, Arnav Narain, Gaurav Ray Advocates with Shri Sunil Raj R, VP Legal and Shri S John Vijay Kumar, Senior GM (Legal) for M/s Puravankara Project Ltd.

S/ Shri Ramji Srinivasan, Senior Advocate with Manas Kumar Chaudhuri, Shounak Mitra, Ms. Pranjal Prateek and Anand Somani, Advocates for M/s PS Group Realty Limited.

S/ Shri Aditya Sondhi, Senior Advocate, Ms. Nisha Kaur Uberoi, Ms. Aishwarya Gopalkrishnan and Neelambera Sandeepin, Advocates for M/s Prestige Estates Projects Ltd.

Ms. Pinaki Misra, Senior Advocate with Shri R. Chandrachud and Shri Rajnish Singh, Advocates for M/s Supertech Ltd.

S/ Shri Devashish Bharuka, P.K. Mishhra and B.V. Karthik, Advocates for M/s Salarpuria Group.

Ms. Radhika Seth, Shri Nihil Sahai and Shri Rajeevan Nair, Advocates for M/s Tata Housing Development Company Ltd.

S/ Shri H.S. Chandhoke, Vardhan Tulsian, Ms. Deeksha Manchanda, Arjun Nihal Singh, Gauran Jain and Vikas Agarwal, Advocates for M/s Unitech Ltd.

ORDER

1. The present information under section 19(1)(a) of the Competition Act, 2002 ('the Act') was filed by Shri Jyoti Swaroop Arora ('the Informant') against M/s Tulip Infratech Ltd. ('the Opposite Party No. 1'/ OP-1), Director, Town &

Country Planning Haryana ('the Opposite Party No. 2'/ OP-2) and Haryana Urban Development Authority ('the Opposite Party No. 3'/ OP-3) alleging *inter alia* contravention of the provisions of section 3 of the Act.

2. In the instant case, the Informant alleged that various enterprises engaged in real estate development business including the Opposite Party No.1 have an arrangement/ understanding amongst themselves to adopt an anti-competitive *modus operandi*/ practices. It was further alleged by the Informant that there is a tacit understanding amongst all the real estate players in the market. In support of this allegation, the Informant has referred to an article in the Economic Times of 14.11.2011 wherein Shri Pradeep Jain, Chairman of Confederation of Real Estate Developers' Association of India (CREDAI) was reported to have stated that all constituent members of CREDAI would be signing a Code of Conduct. As per the statement of Shri Jain, CREDAI Code of Conduct would include mentioning the actual usage area to the buyers, compensation in case of project delays and honouring agreement clauses of buyers' agreements. According to the Informant, the said Code of Conduct indicates collusion amongst all members of CREDAI.

3. It has also been alleged that various enterprises engaged in real estate development business including the Opposite Party No.1 have agreements/ understanding amongst themselves on the marketing front as all these enterprises are marketing/ selling their projects without first obtaining the necessary approvals from the competent authorities. All of them are selling the Floor Area Ratio (FAR) over and above the permitted/ sanctioned limits.

4. The Informant has also alleged that there is an understanding between various real estate developers to make it mandatory for the buyers to purchase the parking space which is a violation of section 3(4)(a) of the Act.

5. The Informant has further alleged that the agreement between builders also exists on matters such as charging of interest rates on the defaulting customers

and on various one sided and arbitrary clauses mentioned in their respective flat buyer's agreements such as exemption from builder's liability for any violations of Haryana Apartment Ownership Act (HOPA), forfeiture of advance deposits on flimsy grounds and builder's freedom to increase floors.

6. The Informant has also filed a copy of the flat/ apartment buyers' agreement of some of the real estate enterprises namely Unitech, DLF and Gupta Promoters Ltd. The Informant has submitted that these agreements though not identical, have certain similarities and common points which are exploitative which again goes to prove that the real estate enterprises were acting in concert and have been exploiting the customers all these years.

7. Based on the above averments and allegations, the Informant has laid the instant information alleging *inter alia* contravention of the various provisions of section 3 of the Act.

Directions to the DG

8. The Commission after considering the entire material available on record *vide* its order dated 15.12.2011 passed under section 26(1) of the Act directed the Director General (DG) to investigate the alleged conduct of residential apartment complex builders including the Opposite Party No. 1 and CREDAI.

Investigation by the DG

9. The DG, on receiving the directions from the Commission, investigated the matter and filed the report on 25.03.2014. The findings and conclusions of the DG are as under:

10. Investigation concluded that certain practices are being commonly carried on by builders/ developers of residential apartments in the country as detailed below:

(i) Non-disclosure of calculation of total common area and its proportionate apportionment on the apartments being sold on Super Area basis and, reserving the right to increase or decrease the flat area.

(ii) Not expressly disclosing the applicable laws, rules and regulation *etc.* with respect to the projects being developed.

(iii) Reserving the right of further construction on any portion of the project land or terrace or building and to take advantage of any increase in FAR/ Floor Space Index (FSI) being available in the future.

(iv) Charging high interest from the apartment owners on delayed payments as against payment of significantly lower interest/ inadequate compensation on account of delay on the part of the builder in implementation of the project.

(v) Restricting the rights, title and interests of apartment allottees to the apartments being sold, and retaining the right to allot, sell or transfer any interests in the common areas and facilities as per their discretion.

(vi) Fastening the liability for defaults, violations or breaches of any laws, bye laws, rules and regulations upon the apartment owners without admitting corresponding liability on the part of builder/ developer.

(vii) Non-disclosure of all the terms and conditions of sale to the prospective buyers at the stage of booking of apartments and taking booking amount from interested buyers without disclosing the terms and conditions of the sale agreement to be executed at a later stage.

11. The DG report states that the aforementioned practices were being carried on by builders/ developers in India by way of a tacit agreement/ understanding/ informal co-operation.

12. Investigation further concluded that carrying on of certain practices by builders/ developers that have cost implications for consumers and resultantly impact/ determine the final prices of apartments in contravention of section 3(3)(a) of the Act.

13. Lastly, it was concluded that making provision of services by builders/ developers contingent upon acceptance by buyers of certain clauses incorporated in the sale agreements, tantamounts to controlling the provision of services in contravention of section 3(3)(b) of the Act.

14. Though, it was concluded by the DG that CREDAI provides its platform to its members to meet and discuss various issues related to the sector, in the absence of any substantive evidence, the DG did not find any contravention of the provisions of the Act by CREDAI.

Consideration of the DG report by the Commission

15. The Commission in its ordinary meetings held on 09.04.2014 and 15.04.2014 considered the investigation report submitted by the DG. *Vide* its order dated 15.04.2014, the Commission ordered impleadment of the following 20 builders, who were selected by the DG as a representative sample for the purposes of investigation, in the matter:

(1) Amrapali Group
(2) Ansal Properties and Infrastructure Ltd.
(3) Ambuja Neotia Group
(4) Avalon Group
(5) Aparna Constructions & Estates Pvt. Ltd.
(6) Amit Enterprises Housing Ltd.
(7) BPTP Limited
(8) Gaursons India Limited
(9) K. Raheja Corp Pvt. Ltd.
(10) Oberoi Realty Limited

(11) Omaxe Ltd.

(12) Parsvnath Developers Ltd.

(13) Puravankara Project Limited

(14) PS Group

(15) Prestige Estates Projects Ltd.

(16) Purohit Construction Limited

(17) Supertech Ltd.

(18) Salarpuria Group

(19)Tata Housing Development Company Ltd.

(20) Unitech Ltd.

16. The report of the DG was ordered to be forwarded to the parties. Subsequently, the Commission *vide* its order dated 26.06.2014 noted that the DG report does not contain any particular information relating to M/s Purohit Construction Limited *i.e.* one of the identified parties by the DG and as such, the Commission decided not to seek any reply from it.

Replies/ Objections/ Submissions of the parties

17. On being noticed, the parties filed their respective replies/ objections to the report of the DG besides making oral submissions.

18. It may be mentioned that some of the parties have taken certain common pleas and therefore while noting the submissions of the opposite parties, the Commission has not reproduced the same for each such party. Besides, most parties have adopted each other's submissions during the oral hearings and as such the Commission has considered all written and oral pleas submitted by all the parties.

Replies/ objections/ submissions of the Opposite Parties (OPs)

Replies/ objections/ submissions of M/s Tulip Infratech Ltd.

19. Shri Avinash Sharma, counsel appearing for the answering Opposite Party has contended before the Commission that the findings of the DG are flawed, misleading and erroneous. It was also contended that there is complete disregard to the well settled principles of competition law and economics, and the findings of the DG are contrary to the jurisprudence evolved by the Commission so far. It has been emphasized by the counsel that the conclusions in the DG Report are based on two premises: *Firstly*, there are 'certain practices', which are uniform across different builders/ developers, therefore, attracting the rigors of section 3(3)(a) of the Act and *secondly*, there are 'uniform'/ 'similar' agreements offered by different builders/ developers and buyers have no choice except to either take it *in toto* or leave it, thereby attracting the rigors of section 3(3)(b) of the Act. It has been explained by the counsel that on both the aforesaid *premises*, the DG report completely fails.

20. It has been further submitted that once the Commission in its own wisdom and overall analysis decided to close the matter (Case No. 07 of 2011) under section 26(2) of the Act, no fresh case (*i.e*. the present case) could have been brought before the Commission, on the same factual matrix, between the same parties, and on the same issue/ cause of action as the same would be squarely hit by the principle of *res judicata*.

21. It has been emphasized by the counsel that in both the previous as well as present case (*i.e.* Case Nos. 07 of 2011 and 59 of 2011) the Informant has alleged that certain conditions included by the answering Opposite Party in its builder buyer agreements are unfair. It has been submitted that similar allegations of unfair practices have been raised by different Informants in a considerable number of cases before the Commission in the past, *albeit* all such informations were in the context of section 4 of the Act. All these cases were

closed by the Commission under section 26(2) of the Act, except those cases in which the builder/ developer/ enterprise in question *prima facie* was a dominant player in the relevant market. The aforesaid point becomes relevant as in the instant case, the Informant, having failed to convince the Commission about the *prima facie* case (in Case No. 07 of 2011), on the same factual matrix and involving the same parties, changed the thrust of the allegations in the present case from section 4 to section 3 of the Act *i.e*. from abuse of dominance to anti-competitive agreement between builders/ developers.

22. It was further submitted that the Informant, despite making allegations relating to anti-competitive agreements amongst builders, has not impleaded any other builder as a party in the information. It has been consistently held and reiterated by the Commission that in order to attract the contravention of section 3(3) of the Act, the first pre-requisite is to have more than one enterprise/ persons engaged in identical or similar business.

23. It has been further pointed out that unlike the erstwhile MRTP Act, under the Competition Act, the DG does not have any *suo motu* power to investigate any matter/ party. In the present case, the Informant has made only three entities *i.e.* OP No. 1; DTCP, Haryana (OP No. 2) and HUDA (OP No. 3) as the parties, hence, it is not clear whether the Commission passed an order authorizing the DG to investigate the 20 builders/ developers only (as has been done by the DG), or to proceed against all the members of CREDAI. From the record, it appears that the DG *suo motu* and randomly shortlisted 20 builders/ developers. It is not clear from the record, whether there any objective criterion was adopted to select and investigate only 20 builders/ developers. It was submitted that if the information and the order under section 26(1) of the Act names only three entities as opposite parties, then the DG has clearly exceeded its brief and jurisdiction by adding another 20 builders/ developers for the purposes of present investigation, in the absence of any such authorization from the Commission.

24. It has been further submitted by the counsel that the DG report has, in the absence of any 'agreement' as referred to in section 3(3) of the Act, unsuccessfully tried to emphasize on 'practice carried on' as referred to in section 3(3) of the Act. It was submitted that the term 'industry practice' should not be confused with the phrase 'practice carried on' as mentioned in section 3(3) of the Act. In section 3(3) of the Act, the phrase 'practice carried on' has to be read and understood in reference/ in relation to 'any association of enterprises or association of persons, including cartels.' Thus, it was sought to be canvassed that existence of any 'association' of enterprises or persons is a pre-condition for any 'practice carried on' for the purposes of examination under section 3 of the Act. Unless and until the enterprises/ persons being examined can be said to be an 'association', it is not possible to examine the same practice followed by them as violative of section 3(3) of the Act. Further, though it is immaterial whether the 'association' is legal, formal, incorporated or otherwise, nevertheless, what is essential is to have an 'association' in order to attract the applicability of the term 'practice carried on'. It means confluence of independent entities that consciously come together with some common objectives or goals. The resultant 'practices' arising from the conscious and combined effort to achieve those common goals would constitute the 'practice carried on' in the context of section 3(3) of the Act. In other words, there has to be some meeting of mind and conscious common practice adopted by that 'association' - however loosely or informally knit. Hence, it was submitted that the similarity of conduct, without any meeting of minds, cannot come within the ambit of the term 'agreement' as defined in section 2(b) of the Act.

25. It is further contended that the Commission has consistently held that if the practices of different enterprises remained the same, the same would not *ipso facto* attract section 3(3) of the Act unless it is established by evidence that such practices are indeed a result of some action in concert or emerge from a collusive decision between/ amongst different enterprises. In the instant case, neither the Informant nor the DG has adduced any evidence whatsoever, which

could even remotely suggest any collusion or action in concert on the part of the opposite parties.

26. It was pointed out that it is the case of the Informant that CREDAI is the said 'association' of builders/ developers for the purposes of section 3(3) of the Act. The aforesaid contention of the Informant is based on two premises: *Firstly*, the statement of the Chairman of CREDAI and *Secondly*, the similarity of unfairness reflected in the clauses of the agreements of various builders/ developers. However, it was submitted that both the premises are liable to be rejected. Neither the Informant nor the DG has been able to establish/ demonstrate, even remotely, that there is any meeting of mind, conscious or congruous act, conspiracy to gather undue market power or intent to fix prices/ limit output/ share market between various unconnected and competing enterprises/ builders/ developers who are members of CREDAI. It is averred that CREDAI, an association of private real estate developers has at its apex level, CREDAI National which through its 20 State Chapters and 128 City Chapters, has over 9000 members. It essentially covers a vast and differentiated array of both *markets* and *relevant markets* conceived under the Act. It would be neither feasible nor conceivable why builders/ developers operating in different and often unconnected markets would enter into anti-competitive agreements when the segregation of markets does not necessitate such alleged collusion.

27. It has been further pointed out that the alleged unfair conduct on the part of the builders/ developers, such as launch of project without proper clearances, violation of FAR, increase of number of floors or lop-sided clauses in the agreements do not result in fixing price, control output or share markets, by themselves do not attract section 3(3) of the Act. It has been submitted that the object and purpose of the Act is not to put each and every similar prevailing business practice(s), which might be detrimental from pure consumer perspective under the provisions of the Act. For example, the industry or

market practice of 'goods once sold will not be returned' cannot be taken as 'practice carried on' if there is no indication of meeting of minds.

28. Lastly, it was submitted that the aforesaid 'practices/ unfair practices' as alleged by the Informant and subscribed to by the DG can be regarded as anti-competitive only if the same are imposed by a dominant enterprise/ builder/ developer. Under the scheme of the Act in general and section 3(3) in particular, as long as the enterprises are competing on prices, freely determining their output in response to the demand and not carving out a market between themselves, section 3(3) of the Act cannot be invoked even if there is similarity in conduct of the enterprises or some 'perceived unfairness' to consumers. Accordingly, the counsel prayed that the Commission may be pleased to close the present matter in terms of the provisions of the Act.

Replies/ objections/ submissions of CREDAI

29. The counsel appearing for CREDAI submitted that the DG has not found any contravention against it and did not advance any detailed submissions before the Commission.

Replies/ objections/ submissions of M/s Amrapali Group

30. It was submitted that parallel terms and conditions in the builder buyer agreement being examined by the DG have been explained by the DG itself. To establish the concerted action, additional tangible evidence should exist besides parallel behaviour. The element of meeting of minds or coordinated action is *sine qua non* for existence of an agreement as defined in section 2(b) of the Act.

31. It was further elaborated that conscious parallel behaviour needs to be substantiated with the additional evidence or the plus factor. Unless it is conscious, deliberate and concerted, it cannot and shall not be categorized as tacit agreement. Under the tacit agreement, there is no direct evidence like agreement in writing or expressed agreement and it is proved by circumstantial

evidence. However, even in case of tacit agreement, the meeting of mind or concerted approach element has to be present. Tacit agreement is proved by circumstantial evidence and the circumstantial evidence should point to higher preponderance of probability. There is nothing in the DG Report to suggest that the agreement has been arrived amongst the stakeholders in concert.

32. It was further submitted that where a builder operates in a particular geographical region, it has no incentive to have price parallelism or behaviour parallelism with a builder which operates in different geographical region. The offering in the markets are different and varied like affordable, luxurious *etc.* and the builders offering affordable have no incentive to either price parity or demand/ supply manipulation. The DG has not given any thought for the same.

33. For any concerted practice, there has to be a platform. The platform could be either be an association or joint meeting where they can strategize their concerted action. The DG has not been able to give any indication of any platform. Further, the DG by exonerating CREDAI has ruled out that CREDAI is a platform for the builders on pan-India basis.

34. In co-ordinated action falling under the mischief of the Act, the nod or wink is given by the market/ geographical leader by increasing or decreasing the price, limiting/ controlling the supply *etc*. and on that signal the other players follow the suit. However, this phenomenon has to be proved by a sufficient number of instances to mitigate the possibility of any different inference. That kind of phenomenon is also absent here as the DG has not identified any market leader in the geographical region and any co-ordinated action taken by the other players. If the unsold inventory data of the real estate and the market is taken into account, the DG's assumption of non-competition in the market is not sustainable as the builders have done nothing to control the production/ supply or stabilization of the price. It was argued that unsold inventory creates pressure on the builders to sell the flat at lower prices and in such a situation they cannot maintain any artificial pricing due to piling up of inventory.

35. Objection was also taken to the findings of the DG by arguing that the DG has no data to support the finding that the supply/ demand in the market is affected. It would be rather correct to say that in the last two years prices of the flats have gone down in a number of pockets and where there is upward trend, the same was attributed to high land and construction costs.

36. It was also alleged that the DG, to substantiate its findings, has tried to give an innovative interpretation of the Act by explaining that the builders generally through concerted practice are earning *supra* competitive profit by charging higher interest on delayed payment and by utilizing the additional FAR (resulting into reduction of super area of the flat), sale of car parking space *etc.* According to the DG, the higher rate of interest and additional FAR/ FSI have cost implications for end consumer and thus impact the ultimate prices at which the apartments are sold. The DG without examining building regulation/ restriction and apartment laws of different states and without appreciating that additional FAR is not a universal character has made a sweeping conclusion of price determination.

37. Further, it was submitted that even a bare perusal of the investigation report would show that there are no barriers, let alone barriers created to new entrants in the real estate market. On the contrary, the DG has found that any person or enterprise, who can muster up the required resources, can enter the real estate sector.

38. Further, it was stated that the discussion under the caption 'Analysis and Findings' in respect of each of the 9 specific issues in the investigation report would show that there is no uniformity amongst the builders in respect of all / any of the issues. Indeed, it is specifically noted *qua* the issue of launching of project that 'as such it may not be correct to generalize that all builders/ developers are carrying on the practice of marketing and selling their apartment projects without having the requisite sanctions/ approvals in hand'.

39. On the issue of selection of 20 builders, it was argued that there is absolutely no reasonable basis or criterion to select 20 builders to make allegation that they are violating any provisions of the Act. It was pointed out that selection of 20 builders from about twenty thousand builders operating in the market on pan-India basis and out of about ten thousand members of CREDAI is apparently on a pick and choose basis. Even the DG report is conclusive of the fact that these twenty arbitrarily selected builders have no commonality in their practices on the issues raised. Rather, it is suggestive of the fact that they are significantly different in their practices on such issues which leads to a conclusion that there is no deliberation or common understanding amongst them. Rather the finding of the DG leads to an inference that each builder is acting independently or other and there is no agreement or tacit agreement between them. Significantly the report is totally silent about the terms and conditions which are supposed to be common to all builders.

40. It was also argued that there is absolutely no material such as any agreement, statement of any person or any other kind of evidence or material brought on record which suggests that there is a tacit understanding between the 20 odd builders which is anti-competitive in nature.

41. The practices of builders as pointed out by the DG in its report are not anti-competitive or violative of the provisions of the Act. The present case in one of violation of the provisions of section 3 of the Act and not that of section 4 of the Act. Therefore, in this case there is no question of determination of fairness or unfairness of the practices by the builder, rather, it is a case of builder having tacit understanding to regulate the price under section 3(3)(a) and (b) of the Act. Therefore, even if the practices of the some individual builders are found to be unfair that is not anti-competitive and for such unfair practices the consumers have remedies available in law such as the consumer protection Act, Arbitration, civil suit *etc*.

42. On the issue of interest rate, it was submitted that there is no unfairness in having different rate of interest in case of default by the builder and in case of default by the flat buyer. It was submitted that the answering Opposite Party signs the application form exhaustively containing all the terms and condition which is replicated in the flat buyer agreement. In so far as the draft of sale deed/ sub- lease deed of the land developed by the answering Opposite Party in Noida/ Greater Noida is concerned, the same is executed on the format approved by the relevant Noida/ Greater Noida Authority.

43. Similarly, it was pointed out that the DG completely failed to appreciate that the additional FAR is a property in itself which belongs to a builder and that property comes into existence after payment of a price by the builder to the municipal/ development authority under the provision of municipal laws/ building bye laws. It was contended that there is nothing unfair or wrong if the builders retain the right to use that FAR, so long as it is permitted under building regulations/ bye laws and the builder does not interfere with the flats sold and common area and facilities committed to the flat owner which are otherwise protected under local laws such as the Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 *etc*.

44. Lastly, on the issue of selling of car parking, it was suggested that having a provision for selling car parking along with the flat and separately is not illegal or wrong and is within the ambit of the laws where its sale is not prohibited. Under the provisions of the Uttar Pradesh Apartment (Promotion of Constructions, Ownership and Maintenance) Act, 2010, liberty is given to the builder to earmark a particular area as common area, limited common area or independent common area. Both limited common and independent area are saleable subject to condition that is it so mentioned in the declaration filed by the builder in terms of provisions of the Uttar Pradesh Apartment (Promotion of Construction, Ownership, and Maintenance) Act, 2010.

Replies/ objections/ submissions of M/s Ansal Properties and Infrastructure Ltd.

45. At the outset, it was argued that the answering Opposite Party was impleaded without cause, without hearing and in violation of natural justice. It was submitted that nothing contained in the DG report actually evidences any agreement as covered in section 3(3)(a) of the Act. No decision of either CREDAI or any other Opposite Party on any specific date has been referenced, and therefore, only the practices of the opposite parties assume relevance/ significance.

46. It was submitted that the practices found by the DG may have gradually filtered through the industry due to the same draftsmen or other professional agencies that advise various builders. The existence of these terms, as far as the answering Opposite Party is concerned, can also be traced back to original agreements of the Ansals going back to the early 1970s as one of the earliest builders in the market and since those agreements would have been commonly available, any common practices only reflect conscious parallelism that is a recognized exception to cartelization in all industries. Such common terms can hardly be described as violative of the provisions of section 3 of the Act.

47. It was further submitted that the information is based on the alleged existence of anti-competitive *modus operandi* (particularly of the Opposite Party No.1) and a tacit understanding amongst all the real estate players in the market is now sought to be implied by the DG, yet no evidence of any meetings, actual communication (correspondence) or interaction of the heads of these real estate players in the market has come to light. Given the vast expanse of players and geographies, a tacit understanding between the parties is not plausible. The impossibility of the alleged anti-competitive agreement(s) (or abuse of dominance) can be shown by the huge availability of real estate and by the fact that big players have huge inventories of unsold built-up commercial and residential space available in a difficult market that often fails to keep pace with inflation, often causing losses consequent to financial arrangements that

unequivocally require payment notwithstanding market forces. Nothing contained in the information or in the DG report actually demonstrates any of the ingredients of an anti-competitive agreement or any of the illustrations of such agreements set-out under section 3(4). It could appear that nothing contained in the report reflects any actual agreement/s, practice/s or decision/s that violates section 3(3). Since none of the provisions of section 3 is attracted, there is/ was clearly no anti-competitive agreement.

48. Further, it was submitted that nothing contained in the DG report reflects either that any particular group of the opposite parties or even all those opposite parties that have been sporadically and randomly selected and/ or all those other 9000+ members of CREDAI have actually colluded to arrive at a single unified decision on any subject let alone in a manner that may actually be considered concerted. Nothing has emerged *firstly* - to suggest the existence of any concerted agreement (no evidence of any agreement has emerged) nor can such a 'tacit agreement' amongst 20 randomly selected companies from over 9000 be assumed: *secondly* - to suggest the existence of any decision or practice that is or was anti-competitive: *thirdly* - to demonstrate that the relevant players or opposite parties are or were in a position of strength: *fourthly* - to reflect that they control the market or operate in a manner that would have an appreciable adverse effect on competition (AAEC) in a particular or defined relevant market (no such relevant market has been or can be identified): *fifthly* - to suggest that they operate independently of competitive forces: and *sixthly* - that the opposite parties can in any way act so as to adversely affect either competitors or consumers in the relevant market, when each and every one of those players has to compete openly and often on a project/ location basis.

49. It was also contended that the DG has in the report unjustifiably arrived at conclusions that the opposite parties have contravened section 3(3)(a) and (b) of the Act. The DG's findings do not justify directions under the Act in a competitive market already reeling under the effects of high inflation and

increased home loan rates. The DG has, however, arrived at certain conclusions concerning two issues *i.e.* (a) marketing and selling of projects without obtaining all necessary approvals and transferring entire risk of non-receipt/ delayed receipts of approvals, delay in construction *etc*. upon the prospective buyers; and (b) making purchase of car parking compulsory alongwith the apartments. These are not assailed though the original assumptions for these alleged practices or any other corollary issues is also disputed and will only be relevant if raised and pursued, pursuant to orders of the Commission.

50. While denying the observations made by the DG in his report, it was submitted that there remains no justification for continued proceedings in the face of the findings that CREDAI is not contravening provisions of the Act since there remains no demonstrated agreement or medium of communication. CREDAI has formulated a Code of Conduct for its members to ensure transparency amongst the members and their customers. The answering Opposite Party is a member of CREDAI and a signatory to this Code of Conduct. This Code primarily demands that its members meet the highest standards of competition law compliance. The Code further provides clear guidelines for its members to serve their customers in an ethical manner. It has been submitted that the answering Opposite Party adheres to CREDAI's Code of Conduct. The report submitted by the DG whilst making reference to the current Code of Conduct of CREDAI has erroneously concluded that such a code can be '*construed as an admission/ acceptance by CREDAI of the prevalence of practices of builders/ developers detrimental to consumer interest and non-transparency as well as lack of accountability prevailing in the residential real estate sector*'…. It has been pointed out that the very next part of the same paragraph admits that such a conclusion '*is not based on any direct or indirect evidences in support of the said imputation*'. This alone demonstrates that the DG's final conclusions about existence of some 'tacit agreement/ understanding/ informal co-operation' are unsustainable.

51. The DG in his report has failed to appreciate that the terms and conditions included in the flat buyers agreement just derived from ordinary industry practice recognized as part of the trade practices under the Indian Contract Act, 1872, such contracts have been executed for decades between thousands of buyers and sellers, the same have been enforced by the courts and can hardly be said to have violated any law, least of all the Act. When a consumer desires to buy an apartment, he has a free choice from various offers and is not limited to the residential properties offered by the answering Opposite Party. Such choice also includes offers from Government and Public Sector Organization like Delhi Development Authority (DDA), Haryana Urban Development Authority (HUDA), NOIDA Development Authority, Ghaziabad Development Authority *etc*. who also impose their terms and conditions, some that are common with ordinary builder agreements. Similarly, buyers are also free to buy from the after-market (already built-up properties) with just an ordinary sale deed. The existence of such a market reflects neither anti-competitive agreements/ nor abuse of dominant position. Since the clauses of the agreement objected to by the Informant or highlighted by the DG are classified as 'common' clauses as per industry practice and adopted by other competitors also in their respective agreements to meet the competition, the same are the product of conscious parallelism in a market where each party strives to protect itself from foreseeable events. Parallel steps by competitors have been held to be insufficient to demonstrate an anti-competitive agreement falling foul of section 3 of the Act.

52. It was submitted that the findings on different clauses of agreements as mentioned in paragraph 8.1 of the conclusions in Chapter 8 of the DG report are erroneous. The answering Opposite Party has also responded to in detail on the specific practices mentioned by the DG in the report.

Replies/ objections/ submissions of M/s Bengal Ambuja Housing Development Ltd. (Ambuja Neotia Group)

53. At the outset, it was submitted that the conduct of the answering Opposite Party did not attract or fall foul of the provisions of section 3(3)(a) and 3(3)(b) of the Act.

54. It was submitted that the allegations by the Informant *i.e.* Jyoti Swaroop Arora against Tulip Infratech Pvt. Ltd. for abuse of dominant position were earlier examined by the Commission and were rejected on merits in Case No. 07 of 2011. In furtherance of the Commission's order in Case No. 07 of 2011, the Informant in this captioned matter, filed an information alleging anti-competitive agreement due to existence of business practices amongst real estate players. The Informant also relied on the Code of Conduct issued by CREDAI to suggest that CREDAI is used as a platform for certain common purposes. On this basis, the Commission passed the *prima facie* order (majority) under section 26(1) of the Act emphasizing that the role of CREDAI should be examined by the DG so as to ascertain as to how the members of CREDAI use the industry association platform to indulge in anti-competitive practices leading to breach of section 3(3) of the Act, if any. Since finally the DG did not actually find any evidence of CREDAI being used as a platform for cartelization, there is no further merit in the case which could help establish contravention of the Act by the builders.

55. The DG in its detailed investigation report has exonerated the role of CREDAI and went on to investigate the allegations of the Informant in respect of only 41 real estate developers across India out of approximately 9000 CREDAI members. The DG *suo moto* exonerated 21 out of 41 short-listed by it when the alleged clauses in the buyers' agreement according to the DG appeared similar or nearly similar in all the 41 real estate developers. Yet the DG finally concluded that only the present 20 developers had breached the provisions of section 3(3) of the Act. The DG could not find any direct or indirect evidence of 'agreements' amongst the 20 real estate developers yet it concluded that

since few of the clauses of the buyers' agreements of these opposite parties appear unfair and indicated similar practices amongst them hence, there was tacit agreement in spite of CREDAI having not provided any platform to these opposite parties.

56. It was pointed out that the DG did not examine any of the clauses of section 19(3)(a) to (c) of the Act to substantiate any AAEC by the opposite parties, yet it said very loosely that there were no accrual of benefits to the consumers nor was there any improvement in provision of services hence, there was AAEC. The DG could not even establish in the investigation report expressly by evidences as to how the consumers of Bengal Ambuja were harmed and how no improvement in provision of services was found.

57. It was further submitted that there was no examination of market shares of the opposite parties before the investigation and during the investigation so as to ensure that the market shares at least amongst the three opposite parties in the State of West Bengal remained static and therefore the opposite parties colluded to keep the market shares stable - an indirect economic evidence of cartelization. However, no such exercise was undertaken by the DG. In fact, considering the fact that all the builders operate in different market conditions, there can be no logical investigation and comparison that may indicate cartelization.

58. It was also alleged that the DG did not examine the *ratios* enunciated by the Commission in earlier cases that '*interdependence amongst competitors cannot establish cartel unless plus factors are found*'. The DG has failed to examine the theory of 'conscious parallelism' in a market which has large number of competitors. The DG has also failed to appreciate the heterogeneity in housing accommodations made available to different cross-section of societies in different States.

59. It was further contended that the market practice prevailing in NCR of India cannot be compared with that of the State of West Bengal and there was no mention of such differences in demand-supply situations in the DG report. The Informant's case relies on the Code of Conduct booklet released by the CREDAI, which again, by the Informant's own admission, relates to the 'business practice as prevalent in the NCR'.

60. It was submitted that the DG has been prohibited to extend/ alter the scope of the investigation by the Hon'ble Supreme Court of India's order in *Competition Commission of India* v. *Steel Authority of India & Anr*. (2010) 10 SCC 744, therefore the DG had no power of adding/ deleting parties to the investigation further, by limiting the record of the DG report to 20 opposite parties while the DG actually collected information from 41 real estate residential developers, the DG has failed to bring all the material placed on record in concluding the investigation report before the Commission. The DG has breached Regulation 20(4) of the Competition Commission of India (General Regulations, 2009 (General Regulations). Thus, it was argued that the DG report is a nullity in law.

61. Further, it was submitted that the Opposite Parties were not granted opportunities of oral hearing. It was alleged that the DG based his conclusions on the basis of the documents submitted by the opposite parties despite the fact that even the basic allegations were denied by the parties in their respective documents.

62. It was contended that the opposite parties have expressly requested for the opportunity to cross-examine the Informant before the DG and later before the Commission but all such prayers were either not considered or were ignored. This omission on the part of the authorities to grant cross-examination has come in conflict with the General Regulations and also fallen foul of *ratio* enunciated by the Hon'ble Competition Appellate Tribunal (COMPAT) in

Schott Glass India Pvt. Ltd. v. *Competition Commission of India & Ors.* (Appeal Nos. 91 of 2012 and 92 of 2012).

63. The funds for construction of the real estate projects are raised by the opposite parties at commercial rates whereas funds raised by buyers are raised at domestic home loan rates. As such, the percentages of penalties in the terms and conditions of the buyers agreements shall vary between parties.

64. It was submitted that the residential part of the real estate business is a uniform standard trade practice across India hence some of the clauses in the buyers agreements will also be similar or nearly similar but that alone cannot attribute breach of section 3(3) of the Act much less collusion or cartelization. The DG also admitted this fact at several points in the investigation report. The DG in the investigation report has noted that the percentage of interest on delayed payment varied from 3% to 25% that precisely proves that the opposite parties are not in collusion. It was also highlighted that the DG in his analysis to all the seven points and also in the conclusion has itself used the terms like 'few OPs are carrying this practice' or 'most of them are carrying this practice but few are different' and therefore the findings are inconclusive based on conjectures and surmises.

65. Adverting to the arguments specific to the answering Opposite Party, it was submitted that all the residential accommodations of Bengal Ambuja are in the outskirts of Kolkata or sub-urban areas of the State. It was submitted that all the residential projects including the one that is under investigation are with the West Bengal Housing Board under a Joint Venture (JV) agreement since 1995 and for each project a separate development agreement is executed between the Housing Board and the JV company and the project under the investigation *i.e.* UPHOHAR is the only project which has LIG and MIG flats, prices of which were settled by the WBH Board and HIG category was to be determined as per the prevailing market price in the area of development which

is lower than that of the residential flats constructed around same period of time in urban and or proper Kolkata.

66. It was submitted that projects developed by Bengal Ambuja are different even from the other opposite parties operating in the State of West Bengal and bear no similarity whatsoever in comparison to the projects of the opposite parties present in other States. Hence, it was contended that there could be no similarity in provision of services nor in relation to prices could exist.

67. It was also submitted that the market share of Bengal Ambuja remained around 2% in the State of West Bengal and as such its all-India market share is negligible for competition law purposes.

68. Lastly, it was submitted that since there was no proof of agreement between Bengal Ambuja and other two the opposite parties of the State of West Bengal and the projects of Bengal Ambuja had all along been with the WB Housing Board as JV- it was submitted that the projects of the answering Opposite Party have all along generated consumer welfare and overall economic efficiencies in the residential real estate market of the State of West Bengal. The arguments advanced by the Informant were also rebutted by the answering Opposite Party.

Replies/ objections/ submissions of M/s Avalon Group

69. It was submitted that the present report submitted by the DG merits outright dismissal as the same is outside the scope of investigation as directed by the Commission *vide* its order dated 15.12.2011.

70. It was pointed out that the DG in his report has not specified as to how the selection of the builders who would fall within the ambit of the present report were actually selected. It has been done on a random basis without any scientific basis and if a penalty is to be imposed on the builders so identified, other builders will go unexamined. Thus, the DG without giving any coherent

reasons of selecting only a few builders and leaving the others out of the ambit of the present report amounts to singling out of the opposite parties herein and as such, the present report of the DG, merits dismissal.

71. It was argued that the DG in his finding on each and every point under investigation has given vague answers *i.e.* has not affirmatively stated that all of the opposite parties are indeed involved in any practice which is anti-competitive in nature. Therefore, the inferences which can be drawn from this is that no 'one follows the other phenomena' is being followed in the area of business of the opposite parties and as such, the present report of the DG merits outright dismissal.

72. On merits, it was argued that the right to further increase or decrease the flat area has been reserved by the builders/ developer only to accommodate the actual on ground increase or decrease in the super area which may arise at the time of the actual construction of the apartment of an allottee.

73. Furthermore, it was stated that the DG in his report, after going through the agreements submitted to it by the answering Opposite Party, has stated that there is no explicit disclosure to each of the applicable laws, rule and regulations with respect to their respective projects. It was submitted that the DG has failed to appreciate the specific clauses in the apartment buyer's agreement of the answering Opposite Party on this point. A perusal of aforesaid agreements, more specifically, clause 5. H and clause 8. G clearly show that the answering Opposite Party has disclosed all the applicable laws which are applicable on any of its projects.

74. On the issue of compulsorily buying car parking, it was argued that as a matter of practice the answering Opposite Party does not make buying of the parking space compulsory. It was, however, pointed out that non-provision of car parking space may result in action against the developer by the civic authorities besides exposing the allottees to safety and security risks. Thus, it was argued

that as a matter of practice, the answering Opposite Party provides every apartment owner with a car parking space for which no additional payment needs to be made by the allottee and the same is included in the basic price of the apartment.

75. So far as the issue of marketing and selling of projects without obtaining all necessary approval *etc*. it was submitted that the answering Opposite Party only starts marketing its projects only after acquiring all the necessary approvals from the appropriate authorities. This process includes the steps of acquiring the land on which the project is purported to be constructed, having the land converted by the State for appropriate usage of the same, taking the same on lease from the State and lastly, acquiring the sanction of the building plan for the project. It is only upon the completion of the aforementioned four stages does the answering Opposite Party start its marketing process. Thus, in view of this, it was argued that the DG has rightly held that the answering Opposite Party starts the process of marketing their respective projects only upon acquiring all the necessary approvals including a sanction of the building plan.

76. On the issue of charging high interest from the apartment owners in case of delay in payment as against payment of significantly lower interest/ inadequate compensation on account of failure to deliver possession/ delay on the part of the builder in implementation of the project, it was submitted that the said clause is a feature of all the apartment buyer agreements not only that of the answering Opposite Party but also of all the other developers carrying on business in the said sector. The consequence of delayed receipt of the payment from any of the flat buyers is that the developer has to look for other means of payment to ensure that the project goes on in a timely manner and without delay. The delayed payment from the flat buyer does not only effect the time frame of the project, but in turn affects the other flat buyers who have been making timely payments as due to the default of one flat buyer, the time frame for the entire project gets pushed back.

77. It was further submitted that on the other hand, in case of delay on the part of the developer, the consequences on the developer are much higher than that in case of delay on the part of a flat buyer. The delay occasioned on account of reasons beyond the reasonable control of the answering Opposite Party is also being compensated to the buyer at a reasonable rate. It was highlighted that in case of delay on the part of the answering Opposite Party, the said compensation is being paid to each and every one of the allottees and not to a single person which in itself is a huge financial burden on the developer/ answering Opposite Party. Moreover, the answering Opposite Party has also agreed to refund the amount to the buyer in case of cancellation, alongwith interest calculated at the rate of 10% p.a. to the allottee.

78. Further, it was submitted that the answering Opposite Party does not retain any right to allot, sale or transfer any interest in the common area. The answering Opposite Party retains the possession of the said common areas for maintenance and upkeep which is done by appointing a maintenance agency. The cost of such maintenance is borne by the allottees as the said maintenance is done for their own benefit and use. The reason behind appointing a maintenance agency is to ensure that the upkeep and maintenance of the project is always up to mark. It also enables the allottees to understand how to properly maintain the common areas of the project as it as a matter of practice of the answering Opposite Party that the maintenance of the common areas is done by a maintenance agency only upto a point of time after which the same is to be done by the Residents Welfare Association. Nowhere has the answering Opposite Party retained the right to transfer such portions of the common area and as a matter of practice, it is usually handed over to the control and supervision of Residents Welfare Association who are free to administer the same as per their own requirements. Thus, although the answering Opposite Party charges the allottees for the maintenance of the common areas which is initially and upto a point of time done by a maintenance agency, they do not retain any right to transfer the same and usually hand over the said common

areas to be administered by Residents Welfare Association of the respective projects.

79. It was contended that the DG has failed to appreciate that the answering Opposite Party has already given an undertaking under apartment buyer's agreement that they have complied with all the applicable laws which in itself is an indemnification to the allottees in case any action is brought against them. This goes to show that the DG has failed to appreciate the clauses of apartment buyer's agreement of the answering Opposite Party in its true sense and interpretation.

80. The answering Opposite Party has incorporated all the necessary provisions for ensuring that in case there arises any disputes between the answering Opposite Party and the allottees, the same can be adjudicated upon in a fast and efficient manner by referring the parties to arbitration which in itself is a speedy and efficient recourse than that of approaching the courts. In case any of the allottees in the projects of the answering Opposite Party finds apartment buyer's agreement to lack mutuality and is willing to challenge the same, he/ she can do so by way of the dispute resolution mechanism which has been incorporated under the said agreement. The answering Opposite Party has not reserved any right under the agreement which disallows the allottee to assail the agreement for want of mutuality. If any such claim of any allottee has been made, the same will have to be proved in the Arbitration proceedings before which any liability can be fastened on the answering Opposite Party.

81. On the issue of non-disclosure of interest and title of builder/ developer in the project land, it was submitted that the finding of the DG on the point under response is wrong and denied. It was submitted that the DG has failed to appreciate that answering Opposite Party makes an express disclosure of the right and title of the builder in the project land at the very beginning of apartment buyer's agreement. Furthermore, the agreement also states that the allottees has verified the records pertaining to the project land and it is only

after satisfying this title of the answering Opposite Party, does the intended allottee sign the agreement wherein he/ she clarifies that he/ she has satisfied themselves about the title and interest of the developer in the land/ complex.

82. Lastly, it was submitted that the practice of signing a draft agreement which is not the final agreement is not being carried out by the answering Opposite Party. It has only one agreement which is executed with the potential flat buyer *i.e.* at the time of making the payment of the booking amount for the unit. Thus, the present point of investigation is not applicable on the answering Opposite Party.

Replies/ objections/ submissions of M/s Aparna Constructions & Estates Pvt. Ltd.

83. On the issue of non-disclosure of calculation of total common area and its proportionate apportionment on each of the apartment with further right to increase or decrease the flat area, it was submitted that the issue basically consists of the following three parts: (a) the disclosure of the calculation of total common area in the project; (b) the non-disclosure of the calculation of the proportionate appointment of the total common area on each of the apartment; and (c) the developer having further right to increase or decrease the flat area.

84. With respect to the first part of the issue, it was submitted that the DG report specifically observed that as far as the projects of the answering Opposite Party are concerned, the apartments are being offered on built-up area. The DG report further analyses and concludes in general that few builders are selling apartments on the basis of carpet area and disclosing its breakup, that most builders are selling apartments on the basis of super built up area and that it is incorrect to state that builders across the board are following the same practice of non-disclosure of calculation of common areas since there are few builders selling flats on carpet area basis. The report also states that there exists the common practice of selling flats on super built up area basis without disclosing

calculation. It was submitted that a perusal of the brochure issued by the answering Opposite Party to its prospective buyers preceding the agreement of sale and the registered sale deed clearly shows the floor plans of the various types of flats and these plans categorically show the measurements of each flat offered for sale.

85. On the allegations pertaining to non-disclosure of the calculation of the proportionate apportionment of the total common area for each apartment, it was submitted that once the plinth area of the flat as well as the total area of the flats is disclosed, it tantamounts to the disclosure of the calculation of the total common area and the same, in turn, amounts to the disclosure of the remaining area, which is the proportionate undivided share in the common areas and amenities.

86. Further, it was submitted that as far as the case of the answering company is concerned, it can undoubtedly be seen from the floor plans provided in the brochure as well as those annexed with the sale deeds that there is no variation at all in the area of the flat. This only goes to show that this part of the issue can be inferred in favour of the answering company. It was further submitted that even if the builder/ developer reserves the right to further increase or decrease the size of the flat, it is attributed to the factum that the architects of the projects cannot as such conceive all the problems that would crop up during the construction process. In view of this, even the local laws prevalent in some of the States allow the changes in the flat area under the head of 'Flat Area Ratio'.

87. On the findings of the DG on non-disclosure of applicable laws, rules and regulations to the project, the right of further construction on any portion of the project land or terrace or building and reserving the right to take advantage of any future increase in FAR becoming permissible, it was submitted that as far as the answering company in concerned, it gives a detailed description of the laws, rules and regulations applicable to its projects. It was submitted that

the answering company gives a detailed description of the building sanction afforded by the Greater Hyderabad Municipal Corporation (GHMC) for all its projects. In this specific case, in the agreements submitted before the Commission with respect the apartment project and Villa Project, a detailed description of the sanction given by GHMC has been included in the terms of contract. It is further submitted that the answering company further declared the local and central Acts applicable to the projects. The answering company submitted that at the time of booking of the flats/ villas, the company affords an oral and written legal opinion to all its flat buyers and such an opinion not only covers the flow of title of the land to the developer but also a description of the compliance of the laws applicable to the project.

88. It was submitted that the answering Opposite Party nowhere in its agreements reserves the right to further construct on any portion of the project land or terrace or building. Moreover, in compliance with the judgement passed by the Hon'ble High Court of Andhra Pradesh in the case of *CSR Estates Flat Owners Welfare Association* v. *Hyderabad Urban Development Authority*, AIR 1999 AP 61, the builders/ developers, including the answering company, are not making any further construction on the project land or structure without the prior consent of the buyers.

89. It was also submitted that as per the GOMs No.86 of 2008 dated 04.03.2008 issued by the Government of Andhra Pradesh, the system of FAR has been removed from the State of Andhra Pradesh and therefore, after 2008 the answering company does not reserve the right to take advantage of any future increase in FAR.

90. On making buying of car parking compulsory along with the apartment, it was submitted that as far as the answering company is concerned, the inference that the parking rights are being sold to the prospective buyers is incorrect and untenable. As far as the agreement submitted by the answering company with respect to independent bungalows is concerned, it may not be looked into

because the buyers obviously have exclusive parking rights in their bungalows. With respect to the agreement submitted by the answering company with respect to the apartment, it is submitted that car parking has been included under the head of 'Amenities' in the application form and no charges have been collected for this or any other amenities.

91. On marketing and selling of projects without obtaining all necessary approvals and transferring entire risks of non-receipt/ delayed receipts of approvals *etc*. upon the prospective buyers, it was submitted that this issue in general has been concluded in the DG Report in favour of the builders/ developers.

92. So far as the issue of transferring of the entire risks of non-receipt/ delayed receipts of approvals *etc*. upon the prospective buyers, it was submitted that the DG report is silent on this issue *vis-a-vis* the answering company in its individual capacity as well as the builders/ developers in general.

93. On the finding of the DG on charging high interest from the apartment owners in case of delay in payment as against payment of significantly lower interest/ inadequate compensation on account of failure to deliver possession/ delay on the part of the builder in implementation of the project, it was submitted that as far as the answering company is concerted, the condition stipulated in the agreement of sale pertaining to the interest to be charged by the builder in case of delayed payments on behalf of the buyer is for the reimbursement of the similar interest that the answering company has to pay on the amounts loaned from its banks and financial institutions for that project.

94. It was further submitted that as most of the financial institutions are giving loans at a rate between 16% p.a. to 24% p.a. most of the builders are charging interest from their buyers for delayed payment within this range, and therefore, the obvious similarity in the agreements of most of the builders in this respect. Moreover, it was submitted that though it is stipulated in the agreements, the

answering company never charged the interest from the buyers for the delay in payments.

95. In case of any delay in handing over possession of the flat on the part of the company, the company is offering a compensation to the flat buyer at the rate of the prevailing market trends in the area on which the project stands and which would have been earned by the buyer had the project being finished.

96. On fastening of liability for defaults, violations or breaches of any laws, bye laws, rules and regulations of any Government/ local authorities and provisions of the Apartment Ownership Act, if any, upon the apartment owners without admitting corresponding liability on the part of the builders/ developer, it was submitted that the observations made in the report *vis-a-vis* the answering company are clearly in favour of the company as no clause is incorporated in any of its agreements fastening of liability for any defaults, violations, breaches of any laws, *etc*. on the flat owners without correspondingly admitting liability on the developer. In view of the above, no further explanation or submission is required to be made by the answering company in this regard.

97. On the finding of restraining the buyers from assailing the agreement on the grounds of want of mutuality even if any stipulations are held to be lacking mutuality, it was submitted that a perusal of the observation made in the DG report with regard to this issue *vis-a-vis* the answering company categorically shows that this issue is in favour of the answering company as there is no such specific clause in the agreements.

98. So far as the issue of non-disclosure of interest and title of builder/ developer in the project land, it was submitted that this issue is squarely in favour of the answering company as the disclosure regarding the title of the builder in the project land has been made in the agreement itself entered into by it with the buyers. A perusal of the recitals of the agreements of sale submitted before the Commission clearly shows the entire flow of title of the project land from the original owner to the answering company.

99. In view of the finding of the DG with regard to the similarities in the agreement entered into by the various construction companies with their flat buyers, it was submitted that nowhere in the said report has it been stated that all or a substantial portion of the clauses in these agreements are similar. Even if it is taken that certain terms are in fact common in these agreements, it does not mean that there is any form of consensus between the construction companies/ builders to incorporate similar terms in their respective agreements. None of the evidence put forth by the Informant before the Commission can conclusively show that the various construction companies/ builders have agreed to incorporate similar terms in their respective agreements and thereby flouted the law as envisaged under section 3 of the Act. Moreover, even if at all there is some similarity between the terms in the agreements entered into by the builders, the mere similarity cannot *ipso facto* be categorized as a concerted effort by the builders/ developers to kill the competition in the real estate business and thereby be in contravention of the provisions of the Act. It was further submitted in this respect that a perusal of the DG report categorically shows that the false allegations levied against CREDAI or its affiliates have not been proved in any manner whatsoever. A natural corollary to the above is that when the various builders/ developers are not engaging in anti-competitive practices under the sanctuary of CREDAI, then it is highly unrealistic and far-fetched to allege that they would do so independently amongst themselves.

100. It was submitted that even if it is assumed that there is commonness among the terms of contracts, some latitude and leverage ought to be given to the construction companies/ builders so as to afford them the opportunity and flexibility to build better homes.

101. With regard to the commonness in the terms of agreements, it was submitted that this may be a natural corollary to the various problems, both general and legal, that the builders have faced at the hands of the buyers through time. Therefore, out of sheer prudence to protect their rights, they have

independently developed and consequently incorporated certain self-protecting clauses in their agreements with buyers. The similarity in the terms of agreements can, in the above point of view, be termed as self-protecting clauses.

102. With regard to the contravention of the provisions of section 3(3)(a) of the Act, the DG Report has held that the carrying on of certain practices by builders/ developers are in contravention thereof as the same have resulted in the determination of prices of the apartments. In this regard, it was submitted that section 3 of the Act has clearly defined anti-competitive agreements. The agreements to be anti-competitive shall cause or likely to cause an AAEC within India. The word 'competition' as such has not been defined in the Act. But, agreement is defined in section 2(b) of the Act. In view of section 2(b), there must be an arrangement or understanding or action in concert, whether formal or not, enforceable or not, There are no observations in the DG report as to any such arrangement or understanding or action in concert, though the order under section 26(1) of the Act dated 15-12-2011 directing investigation *prima facie* felt that the involvement of CREDAI and the conduct of its members may indicate one follows another phenomenon. It was argued that there is no material to show that the 20 companies selected by way of samples in different parts of the country are representatives of the industry even in the areas they are operating in. Therefore, the first requirement that there is an agreement is not satisfied. Furthermore, it was argued that the above practices have no impact on competition, but if true, they would give an advantage to the seller over the buyer. Such practices, if true, may be unfair and may fall within the meaning of unfair trade practices. But, such practices are outside the scope of the Act and the consumer fora are given jurisdiction in respect thereof under the Consumer Protection Act, 1986.

103. In view of the above, it was submitted that there is absolutely no adverse observations in the DG report against the answering company which warrants any further examination. In fact, it was submitted that there is a clear cut

finding in favour of the answering company in respect of issue Nos. 4, 6, 7 and 8 and even with regard to the other issues the finding are mere inferences. It was further submitted that the answering company has never charged any interest whatsoever from any of the buyers in spite of the stipulation and completed the construction within the time stipulated in its agreement and has not charged anything more than what is mentioned in the application and the agreement and the same is evident from the registered sale deeds conveying the title to the buyer.

Replies/ objections/ submissions of M/s Amit Enterprises Housing Ltd.

104. In the beginning, a preliminary objection has been raised by contending that the present inquiry is initiated on the basis of an information and not *suo moto* by the Commission and, as such, jurisdiction of the Commission and purview of the inquiry can be limited only to the information and cannot be enlarged.

105. On merits, it has been argued that the provisions of the Act are not applicable to the business of the answering party or in respect of the transaction between it and the flat purchasers. It is argued that section 3 is relatable to agreements with respect to goods or services. The term 'goods' has been defined in section 2(i) of the Act by assigning it the meaning as given in the Sale of Goods Act, 1930. As per the provisions of section 2(7) of the Sale of Goods Act, 1930, the word 'goods' means every kind of 'movable property'. It has been submitted that the agreements executed by the answering party with the flat purchasers are for sale of flats *i.e.* sale of immovable property.

106. It has been further argued that the basis for initiation of present inquiry was the nucleus provided by CREDAI and as the DG has found no contravention by CREDAI, the entire basis of the inquiry falls flat on its face and there can be no cause of action to continue any inquiry against the members of CREDAI. It has been argued that the answering party runs its business separately without any interaction with the business houses named in the report/ order.

107. It was also argued that the answering party is governed by the provisions of Maharashtra Ownership Flats Act, 1963 and the various terms of the agreements are stated to be as per the provisions of this law. It was further submitted that the model draft of the agreement between promoter and flat purchaser is stipulated in the Maharashtra Ownership Flat Rules which is binding on all the promoters. The allegations relating to commonality in the agreements have been denied and in any case the same have been ascribed to similarity of business, and not due to any agreement or collusion amongst the builders.

108. Lastly, after giving response on issues of commonality, the answering party has denied the findings of the DG and has also denied any agreement - oral, tacit or written - with the other builders.

Replies/ objections/ submissions of M/s BPTP Ltd.

109. It was submitted that the allegations made by the Informant against 'all the real estate players in the market' are baseless, erroneous, without substance and are in the nature of fishing and roving inquiry without there being any evidence. It was argued that the sheer vastness of the investigated relevant market with its distinct demographics, obliterates the slightest possibility of any tacit understanding, as alleged.

110. It was further contended that the answering Opposite Party has not and does not infringe section 3 and 4 of the Act. It was submitted that the various documents placed on record which relate to the various projects of the Opposite Party fail to show any abuse of a dominant position or fail to show a dominant position at all.

111. Replying to the contraventions found by the DG, it was argued that generally no changes/ alteration/ deviations from the original construction plans are carried out. However, if any change/ alterations/ deviations are carried out, it is in accordance with the applicable law and after due statutory permission

from competent authorities. The reason for prevalence of the practice of selling apartments on super area basis is that during construction change in area are very plausible and their exact degree is unforeseeable before the commencement of construction. Thus, the developers exercise self-preservation from unnecessary litigation by providing exit options if purchasers are not willing to accept the altered area. The prospective buyer is at all times aware about this eventuality. This practice is not prohibited by law and is a general practice amongst builders even followed by the Government agencies such as HUDA, DDA, *etc*. as on date.

112. It was further submitted that the usual practice wherein the purchasers are made aware of all the applicable rules and regulations, licenses, building plans *etc*. is at the stage of due diligence and it is at the purchasers' disposal to apprise themselves with all the details. This implied knowledge is reflected in the principle of law of contract referred to as the rule of *caveat emptor*, meaning, 'let the buyer beware'.

113. It was pointed out that supplying each purchaser with every piece of law, bye-law, regulation, departmental guideline *etc*. is an impractical expectation as this could run into hundreds of pages, thus the due-diligence stage is where the builders expect and also help the purchasers understand all the relevant rules and regulations.

114. On the issue of reserving the right of further construction on any portion of the project land or terrace or building and to take advantage of any increase in FAR/ FSI being available in the future, it was argued that this right has been recognized by the Hon'ble Punjab & Haryana High Court in the matter of *Celebrity Homes Resident Welfare Association* v. *State of Haryana* while dealing with the Apartment Act whereby it was held that while construction is underway, the builder retains the right to utilize any increase in FAR. This aspect has been ignored by the DG. Moreover, it was pointed out that there is no instance in the past where BPTP has claimed right over increased FAR in

respect of project which has been constructed and possession has been handed over to the customers. It was submitted that in projects under construction, BPTP can only take advantage of increased FAR after complying with the condition imposed by the concerned authorities for increase in FAR.

115. On the allegation of charging high interest from the apartment owners on delayed payment as against payment of significantly lower interest/ inadequate compensation on account of delay on the part of the builder in implementation of the project, it was submitted that most payment plans by the purchasers are in the category of construction linked payment plans. This means that the builder raises a demand for payment of installment only after a particular stage of construction has reached. In order to ensure that purchasers do not default in regular payments which could potentially stop in the construction of the building itself and to safeguard the builders from the same, interest is levied as a deterrent measure. Further, the delay possession penalty being offered to the customers and the delay payment penalty levied on the customers are arrived at by way of entirely different set of calculations and hence cannot be compared by taking into account only one component.

116. On the issue of restricting the rights title and interests of apartment allottees to the apartment being sold, and retaining the right to allot, sale or transfer any interests in the common areas and facilities as per their discretion, it was pointed out that the apartment owners have only a 'right of user', so far as the facilities provided under section 3(3)(a)(iv) of the Haryana Development and Regulation of Urban Area Act are concerned. The ownership right over the land earmarked for school, hospital, community centres and other community buildings referred to in section 3(3)(a)(iv) of the Development Act vests on the builder. Such ownership can be divested by the builder through a declaration under sections 11 to 13 read with section 3(f) of the Haryana Apartment Ownership Act. The builder has to provide those facilities in discharge of its legal obligations under the Development Act which recognizes the builders'

legal ownership over the area set apart for those facilities under section 3(3)(a)(iv) of the said Act.

117. So far as the issue of fastening the liability for defaults, violations or breaches of any Laws, Bye-laws, Rules and Regulations upon the apartment's owners without admitting corresponding liability on the part of builder/ developer, it was contended that the builders are subject to a host of various approvals & sanctions from the concerned regulatory authorities. Therefore, the builder is subject to scrutiny and observance of all the relevant laws or rules or even the departmental guidelines issued from time to time. Thus, even though it is not in practice to stipulate a corresponding clause of liability upon themselves, there exists a robust system of checks and balances in the construction process to safeguard interests of the state and consumers. Further, it was pointed out that there exist various obligations as imposed on the developer under the local land laws.

118. Lastly, on the finding of the DG on non-disclosure of all the terms and conditions of sale to the prospective buyers at the stage of booking of apartments and taking booking amount from interested buyers without disclosing the terms and conditions of the sale agreement to be executed at a later stage, it was pointed out that the said conclusion on the part of the DG is not based on any substantive issue and is not one of the 9 issues which were made the subject matter of the investigation as disclosed in para 6.9 at page 56 of the DG Report. The DG therefore never called for any information in this regard and neither did it put the Opposite Party to notice with regard to its investigation in this aspect so as to give an opportunity to the Opposite Party to state its stand in response. The conclusion reached by the DG is unfounded and unfair and is not based on any tangible finding or evidence. This aspect is therefore beyond the scope of investigation and cannot be relied upon or highlighted without the Opposite Party being given an opportunity to rebut it. Without prejudice to this and while reserving its right to file a substantive reply in opposition to such a finding, the Opposite Party submitted that basic terms and conditions are always mentioned in the application for booking/

application and notice of the prospective purchaser is always drawn to them and signatures in this regard are taken. No such documents to allege to the contrary has been placed on record by the DG.

Replies/ objections/ submissions of M/s Gaursons India Ltd.

119. It was submitted that in the State of Uttar Pradesh the construction of project is being regulated by the U.P Apartment (Promotion of Construction, Ownership & Maintenance) Act of 2010 which has been implemented for the State of U.P and commenced from 18.03.2010 and the rules also have been framed commencing from 16.11.2011.

120. It was argued that any industry practice which is not a result of an agreement cannot fall under section 3 since it is only an agreement under section 3(1) which causes or is likely to cause an AAEC that is *void* under section 3(2) of the Act.

121. Further, it was pointed out that the DG in his report has concluded that the practices across the industry vary from builder to builder and in certain cases from project to project. The mere existence of common practice amongst the players of same industry does not make it a result of a tacit agreement/ understanding/ informal co-operation. The common practice and procedure of any industry is bound to prevail in any industry.

122. It was alleged that the DG has grossly misinterpreted the provisions of the Act and has tried to fit in section 3(3)(a) and 3(3)(b) and the Preamble of the Act in the present case. The allegation of working under a tacit agreement/ as a part of cartel cannot be sustained in light of the fact that the findings/ conclusion of the DG are not at all backed by any evidence in support of the conclusions so arrived at.

123. Elaborating further, it was submitted that real estate industry is an unorganized industry and there is a cut throat competition in the market amongst the players.

124. It was also pointed out that the industry requires a heavy investment and piling up of inventory or stalling of any project will have serious ramifications on the overall financial health of the company as well as that of its customers.

125. The answering opposite party questioned the sampling process and submitted that the sample size chosen by the DG does not represent true picture of the universe and is grossly inadequate.

126. It was also mentioned that while the DG has concluded that there is no common practice followed by all the 20 builders, he has still concluded that these practices are the result of tacit agreement without any supporting evidence in this regard.

127. Specifically, it was pointed out that the company follows the practice of booking apartments by taking application money/ booking amount from prospective purchasers after presenting them with all the terms and conditions clearly.

128. Lastly, it was submitted that where there exists any association of manufactures or service providers *etc*. which provides a platform for discussion - a cartel flourishes under the garb of such an association. However, in the instant case there is no such finding recorded by the DG against CREDAI.

129. In view of the above, it was prayed that the matter may be closed as against the answering Opposite Party.

Replies/ objections/ submissions of M/s K. Raheja Corp Pvt. Ltd.

130. It was submitted that the Commission has no jurisdiction to implead the answering Opposite Party in the present case, or initiate or conduct any investigation or proceedings, or pass any orders or directions against it.

131. It was pointed out that the investigation has concluded that the association *i.e.* CREDAI is not contravening the provisions of the Act and there is no allegation of any other 'association of enterprises'/ 'association of persons' formed by developers. It was also submitted that there is no incentive or logic for builders in different corners of India, to agree to determine prices control provisions of services.

132. It was stated that apartments in India vary from project to project, geographical areas/ regions, amenities/ features/ specifications of the apartment, common areas/ facilities, goodwill/ credentials of the developer, progress of implementation, provisions of applicable local laws *etc.* Reference was made to the finding of the DG itself in the report to the effect that '…*sale prices vary from builder to builder, from project to project, within the same geographical areas as well as across different regions*…

133. It was also pointed out that there are no limits or controls on the production, supply, markets, technical developments, investments or provision of services in respect of apartments. In fact, it is suggested that there is a huge inventory of unsold apartments and overhang for months/ years, and fierce competition between developers to sell their apartments by offering various incentives like discounts, freebies and innovative schemes to attract buyers.

134. It was mentioned that 'unfair' practice is a condition for invoking section 4 of the Act, which, in the circumstances of the case, is not attracted as the present proceedings are in respect of the alleged contravention of the provisions of section 3, and not under section 4 of the Act which applies only if there is an allegation of 'abuse of dominant position'. The Act does not apply and cannot be taken recourse to, as an alternative to remedies under the Consumer Protection Act/ local applicable laws/ general law of immovable property. The various findings of the investigation report in respect of the individual practices are in favour of the answering Opposite Party, as set out in sub-paras (9) of paras 6.11 to 6.18 of the report. The documentation and practices by the

answering Opposite Party in Maharashtra are factored on the basis of what is permissible under applicable local statutory laws/ rules *i.e.* the Maharashtra Ownership Flats Act, 1963; the Maharashtra Ownership Flats Rules; the Maharashtra Apartment Ownership Act, 1970; and the Maharashtra Apartment Ownership Rules, 1972. Generic conclusions in the report against builders/ developers in India, is completely contrary to the several findings in favour of the answering Opposite Party.

135. It was further stated that the answering Opposite Party predominantly carries on development of commercial property (including IT/ SEZ, Malls, Hotels). Its residential development forms less than 1/3rd of the area of its total development. In any event, the findings in respect of the practices by the answering Opposite Party, as compared with practices by other 19 Opposite Party developers, are that they differ and vary from developer to developer and from project to project of the same developer.

136. The report of the DG deduces generic inferences without specific conclusions in respect of each Opposite Party. There is no direct or indirect allegations or evidence whatsoever of the answering Opposite Party having entered into any tacit agreement/ understanding/ informal cooperation, with any of the other opposite parties in this case, or with any other builder/ developer in India. There is also no direct or indirect allegation or evidence whatsoever against the answering Opposite Party having followed any practices by the other 19 opposite parties in the present case, or by other builders/ developers.

137. Further, it was contended that the answering Opposite Party was issued notice regarding residential apartments in the Western Region of the country. The conditions and provisions of apartment buyers agreement in Maharashtra are governed by the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (MOFA) and the Maharashtra Apartment Ownership Act, 1970 (MAOA) both of which contain detailed provisions and safeguards relating to development and sale of residential apartments, including relating to the contents of the apartment

buyers agreements. The conditions in the apartment buyers agreements in Maharashtra must be analysed/ considered on the basis of applicable local regulations, which do not apply and are not relevant for apartment buyers agreements in the rest of India. It was submitted that this crucial aspect has not been considered at all in the investigation report and, therefore, the case of Maharashtra buyers is special and ought not to have been clubbed with other builders.

138. It was submitted that if a particular practice is provided for and is permissible under the applicable laws (*e.g.* MOFA/ MAOA *etc*.), it cannot be presumed or inferred to be in contravention of the Act. Where a developer follows MOFA and makes the relevant disclosure and provisions, it could hardly be said to be in contravention of the Act. Following mandatory provisions of one law, does not amount to carrying on practice in tacit understanding/ arrangement with others, and cannot amount to contravention of the Act. It was argued that something which is permitted by one law cannot be held to be a practice carried on under 'tacit arrangement/ understanding/ informal cooperation' with others, in contravention of the Act.

139. It was also argued that as accepted and conceded in the investigation report, replication of document by various players with few modifications is facilitated by ready availability of duly drafted agreement to sell, lease agreements, hire purchase agreements, rent agreements in the public domain as well as in the published books of conveyance.

140. Grievance was also made of the shortlisting process adopted by the DG to identify the 20 parties. Thus, it was alleged that the investigation is arbitrary, discriminatory and, therefore, violative of Article 14 of the Constitution. A sample size of 0.02% is unrealistic and not conclusive for a finding in respect of a population of 10000+ CREDAI members/ builders/ developers in India; more so in view of the selection of commercial & residential developers, for a study only in respect of residential apartments.

141. Concluding the submissions, it was argued that prices of apartments are determined and depend to a great extent on the demand and supply. The tacit arrangements/ understanding/ informal cooperation to control production, supply, markets *etc*. is disproved by the huge inventory overhang in the residential real estate market, created due to the difference between demand and supply of flats. The alleged practice providing clauses by tacit agreement or otherwise can never directly or indirectly determine purchaser or sale price or limit or control the provision of services. It was argued that there is fierce competition between builders/ developers across India. Not only that no anti-competitive agreements exists, there are competitive actions to attract customers. It was submitted that in the recent bearish realty market which is reeling under a price correction, several builders/ developers are competing with other builders/ developers by unleashing various schemes. Thus, the price of apartments is directly or indirectly being determined by bullishness or sluggishness in the Indian property market commensurate with respective geographical locations.

Replies/ objections/ submissions of M/s Oberoi Realty Ltd.

142. At the outset, it was pointed out that the present case began with information filed regarding a particular residential apartment project namely 'Tulip White' in Gurgaon. Subsequently, the scope of investigation was extended to NCR region in particular and pan-India in general, with special focus on role of CREDAI. It was submitted that there exists absolutely no credible basis or intelligible rationale on the basis of which the answering Opposite Party or for that matter the remaining opposite parties have been shortlisted by the DG for the purposes of present pan-India investigation. It was submitted that anti-competitive agreement can only exist between competitors. The present Opposite Party has its base of operations only in Mumbai not even in the entire state of Maharashtra; hence it is preposterous to suggest that the present Opposite Party has entered into or stands to benefit from entering into any anti-competitive agreement with the builders who are operating in various parts of the country. The DG *firstly* submits that CREDAI itself has 9000 members and

as such investigating each member would not be 'manageable'; thereafter the DG has gone on to exempt CREDAI from any liability and instead chosen to hold the present Opposite Party liable which is not even a member of CREDAI. The alleged basis for proceeding against the present Opposite Party is 'information available in the public domain'. The present Opposite Party strenuously submitted that at no juncture the DG has even thought it fit to share the alleged 'information available in the public domain' on the basis of which it has decided to proceed against the present Opposite Party. The said information is not even mentioned in the investigation report. This unintelligible targeting of the present Opposite Party along with denial of information is not only violative of principles of natural justice but also strikes at the very heart of the investigation. The entire investigation report deserves to be set aside on this ground alone.

143. It was further contended that the DG in its investigation report further incredulously states that during the course of the investigation few developers from NCR region were excluded in order to include developers from other regions. This clearly demonstrates that the inclusion and exclusion of real estate developers in the present investigation is completely arbitrary. It is shocking, to say the least, that the DG has in a completely random manner shortlisted the present Opposite Party and charged it with the most serious of violation without a single consumer complaint against it. The mandate of the Act is to act against anti-competitive agreements that cause an AAEC. The DG's lynching list neither satisfied 'the agreement' criteria nor the 'anti-competitive' one and there most certainly is no AAEC.

144. It was argued that it stands to reason that for any anti-competitive agreement to flourish the same has to be driven and dictated by market leaders. The Commission has in Case No. 19 of 2010 punished DLF for abusing its dominant position and even had gone to the extent of directing modification of its agreement with the consumers. However, strangely enough while prosecuting NCR real estate developers amongst others, the DG has chosen to

keep DLF outside the purview of the present enquiry by stating that 'agreement of one such builder had already been examined in detail by the Commission in the past in Case No. 19 of 2010'. It is preposterous to suggest that any alleged anti-competitive agreement between the real estate developers can flourish without the active participation of the market leaders. The present Opposite Party whose base of operations is limited merely to the city of Mumbai is neither the market leader nor is indulging in any anti-competitive agreement. Nevertheless, the DG has chosen to target the present Opposite Party without any justification whatsoever. By the DG's own admission, the present Opposite Party was not even part of the list of members furnished by CREDAI. As such, there exists no basis for proceeding against the present Opposite Party. The DG's arbitrary targeting of real estate developers is *sans* any intelligible differentia and is violative of the Opposite Party's right to equality.

145. It was submitted that the Act does not define the term 'concerted practice'. Under section 2(b) of the Act, agreement includes 'action in concert', thereby bringing in the requirement of consensus or collusion even in an allegation of concerted practice. Reliance was placed upon a decision of the Hon'ble Supreme Court in the case of *Bhavnagar University* v. *Palitana Sugar Mill (P) Ltd*. wherein it was held: '*When a statutory authority is required to do a thing in particular manner, the same must be done in that manner or not at all. The State and other authorities while acting under the stature are only creature of statute. They must act within the four corners thereof*.' It was submitted that the DG is a creation of the Act and cannot exceed the bounds of the legislation. It was submitted that the DG has borrowed the definition of 'concerted practice' from certain European Commission's cases without even citing the same. It was further submitted that this material flaw becomes further critical in light of the fact that under the European law every competition law inquiry begins with by defining the relevant market. The DG cannot pick and choose foreign practices while disregarding the statutory mandate of the Act.

146. It was submitted that the European Commission has, in a catena of cases, laid down the various facets of 'concerted practice'. It was submitted that amongst the foremost requirements of establishing a concerted practice under European law are: (i) direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market; (ii) the number, frequency, and form of meetings between competitors needed to concert their market conduct.

147. It is submitted that neither of the aforesaid requirements is met in the present case. There is no direct or indirect contact between the Opposite Party and its competitors. Further, the requirement that economic operators should be free to act independently does not deprive them of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. The present Opposite Party has never attended any meeting with any of its competitors for facilitating any anti-competitive practices. The analysis of concerted practice under European Law requires at the very least a modicum of communication between the competitors, which is sorely missing in the present case. It was submitted that the nature of anti-competitive practice alleged by the DG would require co-ordination and meeting on multiple fronts. The DG has himself exempted CREDAI as the platform facilitating any anti-competitive practice. In any event, the present Opposite Party is not even a member of CREDAI. It was further clarified that the present Opposite Party has never been an office bearer of CREDAI nor has attended any meeting of CREDAI. It was submitted that in the absence of a co-ordinating mechanism or any meetings facilitating the alleged anti-competitive practice, the assertion of DG as regards the presence of a concerted practice falls flat.

148. It was submitted that the term practice has been defined under section 2(m) of the Act to include any practice relating to the carrying on of any trade by a person or an enterprise. The term practice use in section 3(3) of the Act has to

be interpreted *ejusdem generis* and in consonance with the scheme of the rest of the section. It was submitted that section 3 prohibits anti-competitive agreements. The foremost requirement for a violation under this provision of law is collusion/ consensus between the players. It was submitted that the legislature in its wisdom has not drawn any distinction between 'agreement' and 'practice' from the point of view of the requirement of consensus and there most certainly does not exist even a whisper regarding any 'informal co-operation' within the Act. The DG has merely coined new terms and come up with non-justifiable definitions to suit pre-conceived conclusions. The DG's definition of concerted practice finds no mention under the Act. The DG has not been bothered to quote the authority, case law or any precedent from which the said definition is borrowed. It was submitted that the DG is a creation of the statute and its powers are governed by the parameters laid down under the Act. It is not open to the DG to create new definitions and heads of liabilities in order to prosecute the opposite parties.

149. It is a settled legal position that proof of violation of section 3(3) of the Act requires existence of direct or indirect evidence establishing the presence of agreement or collusive behaviour. In the present case, no such evidence exists and the DG has not even made an attempt to collect the same. The investigation report deserves to be rejected for this material defect. It was submitted that the presence of an alleged 'concerted practice' would require a well-defined leadership structure enforcing the same. The DG's report is woefully silent on this crucial aspect. It was again reiterated that it is impossible for a concerted practice to exist in a market as diverse and as competitive as the real estate market in India.

150. It was submitted that the DG's investigation report renders no assistance to the Commission on the foremost factors prescribed under section 19(3) of the Act. The negative effects of any anti-competitive agreement as prescribed under section 19(3) are: (i) creation of barriers to new entrants in the market; (ii) driving existing competitors out of the market; and (iii) foreclosure of

competition by hindering entry into the market. It was submitted that the DG has not even made a perfunctory attempt to analyze the presence or absence of any of the aforesaid negative effects and without such analysis concluded the violation of section 3(3) of the Act. *Au contraire,* the DG has erroneously concluded that since the positive effects mentioned under section 19(3) of the Act *viz*. accrual of benefits to consumers and improvement in provision of service, are missing; hence, it amounts to a violation of the Act. It was submitted that this approach is contrary to all canons of statutory interpretation and merits no indulgence from the Commission.

151. Next, it was submitted that whilst in some of its previous cases concerning violation of section 3(3) of the Act as a result of anti-competitive agreements the Commission has been of the opinion that the Act does not mandate a 'relevant market' analysis; the present case concerning allegations of 'concerted practice' and 'informal co-operation' necessarily requires the defining of relevant market as the first step of analysis. It was submitted that any concerted practice can exist only between competitors. It is ludicrous to suggest that the present Opposite Party, which has a limited base of operations only in the city of Mumbai, would enter into a concerted practice with a real estate developer having operations in other parts of the country. It was submitted that this wild allegation has been taken to an ill-conceived conclusion by the DG as it has chosen to conduct an investigation devoid of any context. It was submitted that an investigating authority alleging collusive conduct or concerted practice is at the very least required to ascertain the motives behind the existence of the alleged practice. It was submitted that a real estate developer having an operational base limited to one particular city has absolutely no incentive to enter into any anti-competitive arrangement with any other builder spread across the country. This fundamental fact has been overlooked by the DG while coming to its baseless conclusions.

152. It was also pointed out that the Commission and the Hon'ble COMPAT have both in the DLF case specifically disregarded the presence of a pan-India real estate market.

153. It was argued that real estate market is extremely competitive and is not concentrated. It was pointed out that the DG has in its own report stated that just CREDAI has around 9000 real estate developers as its members and many more builders operate across the country. The presence of such a large number of players is a clear indicator of the robust and competitive nature of the real estate industry. This further establishes that the market is not concentrated. This incontrovertible factual position raises a shadow of doubt over the entire investigation report, which proceeds on the presupposition that the real estate market is fraught with anti-competitive activities based on coordinated conduct. It was submitted that is factually impossible for a concerted practice to exist between thousands of real estate developers spread across the country.

154. The possibility of any alleged coordinated conduct or information co-operation or concerted practice further weakens in the absence of a platform facilitating the same. The genesis of the present allegation was that CREDAI was serving as a national platform for facilitation of anti-competitive activity between the various real estate builders. The DG after a nearly two and a half year long investigation has failed to come up with any direct or indirect evidence in this regard. Accordingly, the DG has come to a finding that CREDAI is not acting as the platform for facilitating anti-competitive practices. It was submitted that firstly, the present the Opposite Party is not even a member of CREDAI. *Secondly*, in the absence of a platform facilitating anti- competitive practices, such practices cannot exist. The DG's contradictory findings about the lack of a facilitation mechanism but presence of anti-competitive practice strikes at the heart of the investigation. The report deserves to be rejected on this ground alone.

155. It was further submitted that the DG's investigation is limited merely to a comparative analysis of the agreements of the various real estate developers. The DG has not carried out any field investigation to arrive at its conclusions. The DG has itself as part of the investigation report admitted that the alleged common clauses would cause an AAEC only if they are pressed into operation. In view of such a finding, it is but natural that the DG ought to have inquired either from the present Opposite Party or its consumers whether the said common clauses had ever been invoked. The DG did not even make a rudimentary attempt at establishing this most germane fact. In the absence of this quintessential linkage, the entire report ought to be rejected by the Commission. The present Opposite Party made a categorical statement that as on date with regards to the three projects, details of which were sought by the DG, not a single consumer complaint has been filed before any judicial forum in the country. The party submitted that this is a testament to its pro-consumer business practice and behaviour.

156. The answering Opposite Party submitted that its agreement with its consumers was a product of its regulatory and financial environment. The said agreement has its genesis in MOFA and the rules framed thereunder. The Opposite Party's agreement further draws on the model agreement prescribed under MOFA to arrive at a just contractual arrangement with its consumer.

157. It was also submitted that there is little or no public finance available for purchase of the most significant raw material of real estate industry *i.e.* land. In fact, RBI guidelines dated 01.07.2013 specifically bar banks from lending money to private builders for purchase of land. Further, RBI Master Circular dated 01.07.2009, bars extension of finance to private builders for acquisition of land even as part of housing project. In such a scenario, in order to ensure steady stream of finance, it is but incumbent on the developer to ensure timely compliance of buyer's payment obligations through appropriate clauses in the contract. The Commission in *Neeraj Malhotra's case* No. 05 of 2009 while dealing with the issue of alleged cartelization resulting in imposition of

prepayment penalty in housing loans has favourably taken note of similar industrial realities relating to asset-liability management. The Commission in fact taking cognizance of the genuine commercial realities and macro-economic factors absolved the parties of the charge of anti-competitive agreement since there was a valid independent justification for the existence of the industry practice and the same was not based on collusion. The DG has while compiling the present investigation report overlooked all such business justifications.

158. Furthermore, it was submitted that in about 6 out of 9 charges considered by the DG, the DG himself came to a favourable finding for the present Opposite Party. As regards, the remaining 3 charges, the Opposite Party offered detailed business justifications. It was submitted that after itself coming to a favourable conclusion in majority of the charges, the DG ought to have exonerated the present Opposite Party from the alleged violation of concerted practice. It was submitted that it would be contrary to all tenets of logic to allege that the present Opposite Party whilst not entering into nearly six of the anti-competitive practices is either determining prices or controlling services by the remaining three.

159. It was submitted that the Hon'ble COMPAT has recently in Appeal No. 20 of 2011 amongst others involving DLF's abuse of dominance held that, 'The Competition Act nowhere provides for amending the agreement and re-writing the contracts, particularly when those agreements are prior and existing to the promulgation of section 3 and 4 of the Act.' It was submitted that the present Opposite Party's agreement with its consumers falls neither under section 3(3) nor section 3(4) of the Act. As such, any attempt by the Commission to modify the same would be contrary to the judgment of COMPAT in DLF's case as well as the mandate of the Act.

160. It was submitted that having filed information on the same set of facts before the Commission in form of Case No. 07 of 2011, the Informant is barred from

raising another dispute by way of present case. Any allegation that the Informant wishes to raise ought to have been raised at the very first instance and the case having once been dismissed cannot be re-agitated as it is barred by principles of constructive *res judicata.*

161. It was submitted that while the present Opposite Party has been included in the present investigation without any justification in the garb of a representative sample; the DG has not even made a perfunctory attempt to include any of the government authorities who are in the business of developing residential apartments like DDA, HUDA and Maharashtra Housing and Area Development Authority in order to analyze their conduct and participation in the alleged concerted practice. It was submitted that this discriminatory approach of the DG strikes at the very root of the present investigation and the report deserves to be rejected on this ground alone.

162. It was submitted that while investigating any information under the Act, the DG has to confine itself to the information supplied and the investigation conducted. However, under para 6.21.3 in particular and the report in general the DG's approach seems to be that since no case has been made out previously against many of the real estate developers under section 4, they ought to be made liable under section 3(3) of the Act. It is submitted that the investigation report, which suffers from obvious bias and preconceived notions, ought to be summarily rejected.

163. It was argued that the DG's assertion that the present Opposite Party alongwith other opposite parties directly or indirectly determined purchase or sale price is completely baseless and erroneous. It was submitted that the DG's allegation that a prospective apartment buyer cannot pick-and-choose between 'terms and conditions' of the agreement is ludicrous. The agreement between the present aforesaid parties and its consumers is absolutely fair and is in no manner 'anti-consumer'. It was submitted that sale of a resident apartment envisages a cluster of amenities and rights which have to be balanced between the various

buyers which would be subsequently residing in that apartment complex. If the present Opposite Party would be forced to enter into a customised and individualised agreement with each of the hundreds of prospective buyers, the resultant chaos would play havoc with the right of access to common areas and shared utilities. It was submitted that sale of individual portion of a large-scale project can only be done through standard form contracts which protect the *inter se* rights of the consumers both *vis-a-vis* a builder and the other consumer. In view of the above, it was completely preposterous to even suggest that the present Opposite Party has made the provision of its services contingent upon acceptance of certain clauses by the buyers which amounts to violation of section 3(3)(b) of the Act.

164. It was submitted that the DG has while formulating the investigation charges proceeded on the mistaken premise that the agreement between the developer and the consumer is an agreement between unequals. Accordingly, as per the DG's flawed conclusion, the consumer is neither aware of his legal rights nor has any power to verify the title or approvals of the developers. It was submitted that the DG has while arriving at the aforesaid erroneous conclusion overlooked the presence of sophisticated financial institutions in form of the various reputed public and private sector banks like SBI, HDFC, ICICI *etc.* who approve the present Opposite Party's project only after a thorough due diligence of title documents of the Opposite Party, approvals and most importantly the draft flat purchaser agreement. It was submitted that at least half of Opposite Party's consumer today fund their purchase of flats thorough banks, as this apart from availability of finance also duly placates consumer concerns regarding verification of title and approval. It is a well-known fact that the purchase of residential apartment in India today is largely financed by credit made available by the banks. It was submitted that it is counterintuitive to suggest that prestigious banks would approve and invest in a project, which, as per the DG's flawed conclusion, is designed not be to delivered on time and would have significant cost overruns on account of concerted practice.

165. In sum, it was prayed that the DG's investigation report is devoid of any merits and is entirely based on conjectures and surmises and the same deserves to be rejected by the Commission in its entirety and the present case ought to be dismissed as not proved against the answering Opposite Party.

Replies/ objections/ submissions of M/s Omaxe Ltd.

166. At the outset, it was submitted that the findings of the DG as against the answering Opposite Party deserve to be dismissed outright as the DG has distorted the evidence and erred in law in the impugned investigation report. All the averments as well as all the written replies/ submissions made by Informant were denied and disputed, being ungrounded and gratuitous.

167. It was further denied that the answering Opposite Party has or is engaged in any anti-competitive behaviour, in violation of provisions of the Act or at all. It was specifically denied that the answering Opposite Party has entered into any agreement or concerted practice, anti-competitive or otherwise, with any other real estate developers in relation to adoption of common practices in the market in violation to section 3(3) of the Act.

168. It was alleged that no personal hearing or examination of authorized representative of any real estate builder including the answering Opposite Party was conducted during the entire investigation. Findings have been reached and conclusions drawn against the 21 real estate builders, including the answering Opposite Party merely on basis of the documents furnished by them in response to standard questionnaire sent by the DG, without verifying the attendant circumstances. The findings on facts, thus arrived at and the conclusions drawn based on such findings of fact are, therefore, incorrect, incomplete and need to be reviewed. The conclusions could have been different if personal hearing was given to Omaxe for explaining the various so called alleged common practices, some of which are not followed by Omaxe.

169. On the role of CREDAI, it was pointed out that the DG concluded that there is no evidence of use of CREDAI platform amongst the builders for adopting the alleged common practices. However, the DG has not produced any evidence to show any alternate platform, other than CREDAI, used by the builders for arriving al consensus on alleged common practices or to evolve common clauses in the agreements.

170. It was argued that it needs to be noticed that the term 'practice carried on' used in section 3(3) of the Act, is not the same is 'industry practice' in the absence of an active 'association' as per the offence of anti-competitive agreement defined in section 3(3) of the Act. Since the DG during investigation found no evidence of use of CREDAI as a platform by the real estate builders, including Omaxe, for adopting the alleged 'common practices', the practices even if carried out by the builders (though denied) do not attract the violation of section 3(3) of the Act. Thus, the DG has erred in not examining the possibility that the alleged 'common practices' or the common clauses in the agreement could have been a result of independent decision of each builder due to market structure itself and not the result of the 'one follows the other' trend indicated in the order of the Commission dated 15.10.2011 under section 26(1) of the Act, particularly when the DG has himself stated that draft agreements to sell, lease agreement, hire purchase agreement, and rent agreements are easily available in public domain which facilitates replication.

171. Grievance was also made of the fact that no economic analysis was carried out by the DG on the market structure and it was argued that the real estate industry is competitive and has witnessed and continues to witness significant growth. There is a tough competition on prices of same sized flats with similar amenities amongst builders in the same geographic area. In such highly competitive environment, the existence of a cartel or concerted practice does not arise. Further, by no stretch of imagination, no cartel can exist between more than 10000 independent enterprises where maximum enterprises may only have engaged in similar or identical product/ service but are not actually

competing with each other since they are operating in different geographical region with different market conditions.

172. It was also argued that the manner in which the DG has proceeded with the investigation is a telling tale of the lackadaisical approach adopted by the DG, without any direct, precise or coherent evidence which is essential to prove an agreement to come to a conclusive finding of infringement under section 3(1) read with section 3(3) of the Act, the findings in the DG's report are simply without any basis and as such not sustainable. The conclusions of some kind of tacit agreement reached at by the DG during the investigation is not sufficient to prove the existence of an anti-competitive agreement in terms of section 3(3) of the Act. Attention was invited to decision of the Commission in the case of *Neeraj Malhotra* v. *Deutsche Post Bank*, wherein it was held that in order to establish a finding of infringement under section 3(1) read with 3(3) of the Act, the existence of an 'agreement' must be established unequivocally. Further, it was argued that it is an established principle of competition law that, evidence of parallel conduct without the plus factors is insufficient as a matter of law to meet the civil burden of proof for finding an infringement.

173. On the issue of selection of builders for the purposes of investigation, it was alleged that the DG has cherry picked some private builders from Northern, Eastern, Southern, and Western regions of India, including Omaxe to suggest a pan-India investigation into the alleged common practices or similar clauses in the agreements. Also, apart from absence of any economic rationale, there is no legal basis on which the DG has not included other builders in the investigation. Such an arbitrary exclusion has no tenable basis in law. Assuming without admitting that the DG has the authority under the Act to expand the scope or the period of investigation, the converse (where the DG unilaterally decides to restrict the scope of investigation) cannot be held to be valid.

174. It was argued that the DG's conclusion on the similarity of clauses is completely devoid of any merit. The DG has failed to show that the clause of Omaxe is similar to any other builder. For instance, it was pointed out that Omaxe follows a flexible approach and in case some buyer insists on negotiating the rate of the compensation payable to him or her in the event of delay in completion of the project, Omaxe has agreed to increase the rate of compensation payable by it. It was also highlighted that there are actual instances where, Omaxe has had amended the relevant clauses in the agreements executed with its buyers.

175. It was also submitted that DG has not considered the ground realities of the demand situations in the real estate market in India in as much as the purchase of residential property for self-use, which is a life time investment made by a common man based on only two factors, namely the geographical location of the plot and the reputation of the builder constructing the flats thereon and certainly not on the clauses of the agreements, which are the last thing to come to the minds of a prospective buyer of property.

176. Further, it was submitted that the alleged common practices are not capable of determining the final prices of the flats in terms of the provisions of section 3(3)(a) of the Act or limiting/ controlling the market in terms of the provisions of section 3(3)(b) of the Act.

Replies/ objections/ submissions of M/s Parsvnath Developers Limited

177. It was contended that there are inherent and material flaws in the methodology adopted in investigating the case and inconsistencies in the analysis carried out therein.

178. It was also argued that the purposes, of ascertaining a case under section 3(3)(a) and (b) of the Act, the DG appears to have based the entire investigation on an underlying theme of collective dominance. The Act does not recognize the concept of collective dominance. It was submitted that the report is biased as

it appears that the DG commenced, continued and concluded the entire investigation on the basis of a pre-conceived, unsubstantiated and illogical assumption of the existence of a cartel amongst the various reputed players in the market without any evidence whatsoever**.**

179. It was submitted before the Commission that to invoke the provisions of section 3 of the Act, the existence of an 'agreement' is *sine qua non*. In the light of the definition of the term 'agreement', it is imperative to have sufficient evidence on the basis of benchmark of 'preponderance of probabilities'.

180. It was also suggested that since the DG has not also conducted investigation for any specified period, it can be seen that many of the agreements referred to in the report have either been entered into prior to 20.05.2009 or had already been fully performed prior to the said date. Therefore, in view of the judgment of the Hon'ble COMPAT dated 19.05.2014 passed in Appeal No. 20 of 2011, while considering violation of section 3 of the Act, the Commission is precluded from taking into account or considering the clauses in any agreement entered into prior to 20.05.2009, unless the same is being acted upon. There is neither any allegation nor information from any Informant that any such alleged anti-competitive clauses are being acted upon by the answering Opposite Party. Moreover, the DG has failed to prepare a comparative chart by discussing the uniform clauses of agreements.

181. It was further submitted that the DG has, in para 6.5.4 of Chapter - 6 of the report categorically admitted that the scope of investigation has largely been limited to examination of the various clauses of the said agreements of various builders/ developers of residential apartment projects. Therefore, it would suffice to say that the findings are not with respect to practice but with respect to written clauses only and further, there being no other criterion applied for evaluation of 'common practices', the report is completely superficial and the investigation skeletal, inappropriate and non-mandated.

182. Lastly, the answering Opposite Party gave a detailed response to the various issues framed by the DG and submitted that there is neither any concerted practice or any informal co-operation amongst the answering Opposite Party and other builders as alleged. The commonality of clauses, even if they exist, could only be for the reason that they are necessary, given the business circumstances. Such common clauses as pointed out by the DG also exist in other industries, given the dynamics of the industry. It was denied that the builders/ developers execute the same standardized agreement with different prospective apartment owners in any given project. The terms and conditions are specific to a project and their negotiability is also in-built in the agreement. Therefore, in view of the aforesaid submissions as set out above by the answering Opposite Party, it was prayed that the report of the DG may be rejected and the case may be closed *qua* the answering Opposite Party.

Replies/ objections/ submissions of M/s Purvankara Project Ltd.

183. It was submitted that section 3 of the Act covers only anti-competitive agreements or anti-competitive practices or decisions by an association and does not cover 'anti-competitive' actions such as inserting clauses in their agreement with consumers by individual enterprises. It was argued that section 3(3)(a) and 3(3)(b) of the Act simply do not cover vertical agreements between service providers and consumers. Although section 3(4) does cover vertical agreements, it does so only within a production and/ or distribution chain and stops short of the consumer.

184. It was further contended that the *sine qua non* for a violation of section 3(3)(a) of the Act is a horizontal agreement among producer or service providers or a practice or decision by an association of producers or service providers to determine prices directly or indirectly. Both the order dated 15.12.2011 of the Commission under section 26(1) of the Act and the report are without jurisdiction to the extent that an allegation of 'anti-consumer practices' by developers to the detriment or consumers including by inserting alleged similar or common (though not identical) clauses individually in vertical agreement

with consumers does not satisfy the requirement of a horizontal agreement among service providers. The further allegation that such practices have a bearing on, or implications for, the price paid by the consumer to the developer does not satisfy the requirement under section 3(3)(a) of the Act of a horizontal agreement among producers or service providers that directly determines prices.

185. The DG's conclusion that alleged 'commonality' (not even uniformity or identical provisions) in the clauses of the apartment buyers agreements amounts to price fixation as they have 'cost implication' for consumers is based on a complete misunderstanding of its jurisdiction under the Act. It was contended that it is impossible to conclude a price fixation arrangement between Purvankara and the other 19 builders/ developers based on a common or even uniform (though not identical) agreement between a service provider such as Purvankara, and a consumer.

186. It was also alleged that the DG does not have the jurisdiction to select Purvankara and the other 19 builders on the basis of random sampling and on the basis of information not before the Commission.

187. It was submitted that there is no authority of law either under the Act or the regulations for investigation or inquiry based on a representative sample. When the legislature so intends, the sampling methodology is expressly incorporated as in the case of anti-dumping investigations. Thus, under Rule 17(3) of the Customer Tariff (Identification, Assessment and collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 promulgated under the Customs Tariff Act, 1975, the Designated Authority for Anti-Dumping (which is the body responsible for investigation cases of anti-dumping), while investigation the individual, margins of dumping for each known exporter or producer of the article under investigation, may, in case where there are a large number of exporters, producers, importers or types of articles, limit its finding to a reasonable number by 'using statistically valid

samples based on information available'. Therefore, in the absence of any authorization in the Act or the statutory regulations, the DG has clearly exceeded its jurisdiction by utilizing 'representative sampling' as a methodology for selecting the builders developers who would be investigated and ultimately indicted.

188. It was further submitted that the sampling methodology employed would also lead to absurd consequences in the context of the alleged violation of section 3(3) of the Act. It was contended that any attempt to extrapolate the findings to all the 9000 members of CREDAI would be without jurisdiction and in violation of the Act as builders other than the parties herein did not get any opportunity either before the DG or the Commission. The alternative course of penalizing the representative sample of builders/ developers would equally be without jurisdiction because section 3(3) of the Act only prohibits practices by an association as a whole and not by some members. Assuming that other members of the association did not follow the same practice, there would be no violation of section 3 at all and no member should be penalized. On the other hand, if they too did follow the same practice, the effect of sampling in such a case would be to impose huge penalties only on some cherry-picked members (out of the larger membership of the association) who are alleged to have followed a particular price-fixing or production limiting practice, which would actually impede their ability to compete with the other members of the association or the larger industry in question. This would clearly be a violation of Article 14 of the Constitution as well.

189. Next, it was contended that the DG exceeded its jurisdiction by investigating and indicting Purvankara simply conjecturing/ presuming the existence of a practice in the present case. It was argued that Purvankara was not a party before the DG during the investigation and cannot be impleaded after the entire investigation process is complete.

190. Further, it was contended that assuming that sampling is permissible under the Act, the methodology in the present case is completely flawed and also violates principles of natural justice. The manner in which the random sampling has been carried out in the present case is arbitrary, irrational and violates Article 14 of the Constitution. It was pointed out that in the present case, the DG has not explained the basis on which the sample of builders/ developers was constructed in order to be representative of the industry on a pan-India basis. The DG has not even made an attempt to explain how the sample is representative of the market structure of the industry as a whole on a pan-India basis or otherwise.

191. It was strenuously canvassed that the three practices which have been found to be common to all the 20 builders/ developers could never amount to a violation of section 3(3)(a) and 3(3)(b) of the Act. In this regard, it was argued that a right to increase or decrease the flat area contingent on a change of law is a standard commercial term followed by builders/ developers. It has no impact either directly or indirectly on sale prices nor would in ever amount to limiting or controlling production, supply, markets, technical development, investment or provision of service and would not fall foul of either section 3(3)(a) or section 3(3)(b) of the Act. On the issue of inequality in quantum of delay interest charged by builders/ developers as opposed to compensation paid by builders for delay in delivery, it was pointed out that this practice is not uniformly followed - each builder/ developer charges a different delay interest and each developer pays a different compensation for delay in delivery. Clearly therefore, there is no concerted practice even insofar as this particular practice is concerned. In any event, where the actual interest charged is different from builder to builder, this could never amount to determination, directly or indirectly of the price. Similarly, on the finding of booking apartments and taking application money without presenting all the terms and conditions of the sale agreement, it was pointed out the Report does not disclose any facts that have led the DG to this conclusion. There is no analysis at all on this issue - there is only a finding that the parties are guilty of following this practice.

This findings deserve to be set aside on account of the fact that there is absolutely no evidence to support it.

192. It was urged before the Commission that the legal requirement of an understanding '*inter se'* the parties to be indulging in conduct (*i.e.* practice carried on) prohibited under section 3 of the Act cannot be deduced/ inferred on the basis of an eliminative wishful exercise but must be based on clear objective evidence. This analysis is completely lacking in the present case as the DG has chosen to analyse only the clauses of the apartment buyer agreements without going into any other aspect of the matter, including to analyse whether there was actual deliberate concerted practice being carried on by the builders/ developers.

193. Moreover, based on the findings in the report, it was sought to be pointed out that there is no homogeneity in the products being offered and that the prices vary from 'builder to builder, project to project'. In such cases, it was explained that there is no incentive whatsoever for the builders/ developers to engage in concerted practices. More importantly, CREDAI has been absolved completely of all wrongdoing as there was no evidence whatsoever to support such a finding. There is no evidence to establish that CREDAI ever held any meeting on a national basis where all of its 9000 members attended or where every member of the 'representative sample' of 20 builders/ developers had attended. In fact, CREDAI has regional organizations that hold their own meetings independent of national organizations. There is no evidence therefore, of a single platform that could support a concerted practice. Further, there is therefore no platform for the builders to take concerted action or to decide on the concerted practices they will engage on. According to the DG, the 20 builders/ developers out of the 9000 members of CREDAI are only a representative sample of the wrongdoers - this implies that the remaining members are also engaging in the same practices. It is impossible for such a large number of players to co-ordinate their actions with any likelihood of success unless there is a platform for exchange of information. As the only

such possible platform *i.e.* CREDAI has been exonerated, there can be no concerted practice.

194. Grievance was also made of the fact that the DG has not analysed the regulatory and commercial environment surrounding the market for apartment builders/ developers and rather solely relied on parallel conduct. The various Apartment Ownership Acts enacted by the States contain disclosure norms which are complied with. The Municipal Township or Town Planning Act enacted by each State provides for an opportunity of further construction beyond approved FAR/ FSI in certain situations.

195. The DG has relied on vague and tenuous inferences to make a presumed agreement fit within the contours of section 3(3) of the Act when there is no evidence to support such a conclusion. Nonetheless, it was submitted that the alleged 'practice carried on', even though none exists, cannot be said to be directly or indirectly determining purchase/ sale prices or limiting or controlling production, supply, markets, technical development, investment or provision of services, in the present case.

196. It was also submitted that the Code of Conduct is not binding and does not exclude any possibility of independent action on part of the signatories. Factually, the Code of Conduct, as is evident from the documents put forth by CREDAI before the DG, is intended to be recommendatory in nature thus, leaving ample scope for independent conduct by the builders/ developers. The Informant cannot reason backward from the Code of Conduct, which discourages certain anti-consumer practices, to conclude that CREDAI either provided a platform for builders/ developers to agree on such practices or that its membership followed such practices or that it had ever encouraged such practices. It is equally consistent with the CREDAI's functioning that such practice were being discouraged in its Code of Conduct as such practices gave CREDAI and its members a bad reputation.

197. Furthermore, it was pointed out that the practices are not unfair but necessary in terms of the regulatory and commercial aspects of the real estate industry, which the DG has failed to examine. Further, unfairness, in absence of a dominant position, is not a competition law concern, submitted the answering Opposite Party.

198. The mere fact that certain allegedly unfair clauses are brought to the Commission's notice by an Informant does not *ipso facto* imply that the Commission must act on it in the absence of a competition law concern being attached thereto. In the present case, since the Informant has sought to contend violation of section 3(3) of the Act by the builders/ developers, the alleged unfairness, in and of itself, does not give rise to a competition law concern.

199. The Informant's contention regarding CREDAI's Code of Conduct and communication and meetings related to it constituting meeting of minds between the builders/ developers is misguided and untenable because it fails to reveal any evidence of a link/ causality between the practices alleged by the Informant and investigated by the DG and the terms of the Code of Conduct.

200. It was argued that the terms of the Code of Conduct have nothing whatsoever to do with the impugned practices. On the other hand, the same is intended to enhance transparency by builders and to provide 'confidence and comfort to the purchasers'. It requires mandatory true disclosure of title documents, sanctions. More importantly, it is guided by the best practices sought to be incorporated by the Parliament through the Real Estate (Regulations & Development) Bill, 2013 and the norms forming part of the various State Apartment Ownership legislations.

201. Submissions were also made on the penalty by arguing that the Commission must be mindful of the fact that Purvankara is a company operating in several distinct markets (including different categories of flats, *i.e.* commercial and residential, for different segment of buyers) having distinct agreements for

each market. Also, Purvankara leases out flats to various consumers and its turnover includes income from rent, leasing, sale of flats *etc*. Therefore, in any event, for the purposes of section 27(b) of the Act, the turnover of Purvankara should only be limited to the turnover generated from the sale of residential flats.

Replies/ objections/ submissions of M/s PS Group Realty Limited

202. At the outset, it was stated that the findings by the DG in the investigation report are based on incorrect investigation procedure and legally untenable findings and observations to conclude that builders/ developers of residential apartment complexes in the country in general, including 21 examined opposite parties in the DG report are carrying practices that contravene the provisions of section 3(3)(a) and section 3(3)(b) of the Act.

203. It was also contended that the DG did not examine any of the clauses of section 19(3)(a) to (c) of the Act . Further, no investigation was done to find out if the consumers of the answering Opposite Party are actually aggrieved or satisfied with its services.

204. It was contended that the DG has failed to examine the theory of 'conscious parallelism' in a market which has large competitors. That the market practice prevailing in NCR of India cannot be compared with that of the State of West Bengal and there was no mention of such differences in demand supply situations in the DG report. It was pointed out that the Informant's case relies on the Code of Conduct booklet released by CREDAI, which again, by the Informant's own admission, relates to the 'business practice as prevalent in the NCR'.

205. It was further submitted that the residential part of the real estate business is a uniform standard trade practice across India, hence some of the clauses in the buyers agreements will also be similar or nearly similar but that alone cannot attribute breach of section 3(3) of the Act much less collusion or cartelization.

In this connection, it was highlighted that the DG has also admitted this fact at several points in the report.

206. Adverting to the specific arguments with respect to the answering Opposite Party, it was submitted that the projects disclosed under the investigation are standalone and mostly constructed by demolishing old constructions in urban Kolkata and raising low-rise ground plus three or four storey apartments. In most of the projects, PS Group does not own real estate and merely develops the existing property by entering into agreements with the original owner of the land and consideration for the development is paid in terms of providing certain flats to it. It is stated that this model is absolutely different from those other opposite parties in the State and outside, hence there cannot be any similarity of final product even if the basic business of all opposite parties continue to be residential real estate projects.

207. Moreover, it was submitted that since parties are fragmented and scattered all over the State of West Bengal, where 157 members in CREDAI West Bengal Chapter exist, a cherry-picking of builders/ developers by the DG is arbitrary and devoid of any intelligible application of mind and liable to be rejected.

208. Without prejudice to their rights and contentions, it was submitted that unfair conditions, if any, for arguments' sake that exist between real estate developers and flat buyers, cannot be part of investigation under section 3(3) of the Act since 'unfair or discriminatory conditions' do not fall within the statutory mandate of section 3(3) of the Act, *sans* an agreement whatsoever.

209. The answering Opposite Party also rebutted the arguments made by the Informant.

Replies/ objections/ submissions of M/s Prestige Estates Projects Ltd.

210. To begin with, it was submitted that anything not specifically admitted to in the response, should be deemed to be denied as if the same has been stated therein and categorically traversed.

211. It was emphatically denied that the answering Opposite Party has engaged in any anti-competitive conduct, in violation of the provisions of section 3 of the Act. All the allegations made by the DG were stated to be flawed, baseless and devoid of any merit. It was further pointed out that the DG's report clearly evidences 'cherry picking' of real estate developers which lacks legal basis and demonstrates complete non-application of mind.

212. It should be noted that the DG initially shortlisted few builders/developers of residential complexes from the list of members provided by CREDAI, National Capital Region (NCR) for examination. However, with a view to have a so-called pan-India representative sample, the DG included few builders/ developers from other regions of the country. While shortlisting the builders/ developers from NCR, the DG included such builders/developers whose projects were spread across the NCR and its adjoining areas so as to be 'reasonably representative' of the Northern region of the country. In this regard, the DG considered the turnover derived by such builders/ developers in the NCR. However, builders/ developers from the Eastern, Western and Southern regions of India were included in the representative sample based on information available in the public domain. It is submitted that the DG's Report is silent on the factors considered while selecting the builders/ developers from the other 3 regions in India *i.e*. Eastern, Western and Southern.

213. It was further pointed out that during the course of the investigation, the DG identified ten common clauses/ practices that are allegedly indicative of a tacit agreement/ understanding among builders/ developers and amount to cartelization in contravention of section 3(3)(a) and 3(3)(b) of the Act. However, after analyzing the ten common clauses/ practices, the DG arrived at

the conclusion that four of the ten clauses were not in contravention of the provisions of the Act.

214. Any involvement in colluding with any of the other 19 real estate builders/ developers to standardize the clauses of the agreements was denied by the answering Opposite Party.

215. Criticizing the DG for arbitrarily expanding the scope of the investigation, it was submitted that *firstly*, it is important to note that the Informant filed the information only against the three parties *viz.* Tulip, Director, Town and Country Planning, Haryana and HUDA and did not raise any allegations against Prestige. Moreover, even the Commission in its *prima facie* order did not direct the DG to initiate any investigation against Prestige. However, the DG, in order to gain a so-called 'pan-India understanding' of the practices carried on by real estate builders/ developers, undertook a random 'sampling' exercise and shortlisted 20 real estate builders/ developers, including Prestige without providing any rationale for such selection.

216. It was submitted that the Hon'ble Delhi High Court in *Grasim Industries Limited* v. *Competition Commission of India*, WP (C) No. 4159 of 2013 decided 17.12.2013 emphasized that when an investigation is initiated against an enterprise, the same ought to be carried out pursuant to the information filed. As such, it is emphasized that the frame of reference (for the investigation) ought to be the information filed - both in terms of the issues and parties. In the present case, the information was filed against Tulip and not Prestige. It was reiterated that Prestige was not a party to the information filed by the Informant and accordingly any investigation by the DG against Prestige is beyond the scope of the information.

217. Further, it was submitted that since Tulip operates only in the NCR and Prestige operates exclusively in the Southern region of the country, Prestige and Tulip do not operate in the same relevant geographic market for residential

apartments. Therefore, it can be concluded that the DG arbitrarily expanded the scope of the investigation by including real estate builders/ developers operating in other regions.

218. Alleging violation of the principles of natural justice, it was submitted that the DG in the course of the investigation has violated the principles of natural justice by not providing Prestige an adequate opportunity of being heard.

219. On the sampling issue, it was submitted that the DG cherry-picked the real estate builders/ developers across India and provided no justification for the same. The DG did not is provide any legal/ economic/ logical justification for 'how' and 'why' the 20 builders/ developers were shortlisted for the purposes of the investigation.

220. Adverting to the existence of an agreement, it was argued that the DG has claimed Prestige's practices amounted to a breach of section 3(1) read with section 3(3)(a) and 3(3)(b) of the Act. It was pointed out that the DG has failed to make out a sustainable case under section 3 of the Act and, therefore, the Commission must set aside the findings of the DG and consequently the DG's report.

221. Elaborating further, it was contended that the DG's report has failed to satisfy that there exists an unequivocal agreement between Prestige and any other real estate builder/ developer in relation to section 3(1) read with section 3(3)(a) and section 3(3)(b) of the Act. Further, this fundamental failure to establish and satisfy the primary and most important criteria under section 3 of the Act conveys a lack of understanding of evidentiary standards and legal principles underlying the operation of the Act.

222. It was submitted that, for a finding of an infringement of section 3(1) read with 3(3) of the Act to be reached, there must be evidence of an agreement being reached between competitors, which is clearly missing in the present case. The

presence of similar practices being undertaken by different players in the industry by itself does not lead to a violation of section 3 of the Act, in the absence of an agreement.

223. Moreover, it was pointed out that the Commission's decision in the *Sugar Mills* case further clarified that the standard of proof that must be met by the DG when seeking to establish an infringement of section 3 of the Act. It was submitted that the Commission in the said order *inter alia* observed that: (a) some of the sugar mills met on 22.07.2010 and discussed the issue of minimum floor price; (b) there is no evidence on record that Karnataka and Maharashtra sugar mills had met and decided to take concerted actions to maintain certain minimum floor price and implemented the same; (c) there was no conclusive evidence to establish that there was meeting of minds for agreeing on sale price of sugar; and (d) the alleged decision to have minimum floor price was never implemented. In light of this, the answering Opposite Party sought to draw the following conclusions: (a) there must be evidence of the fact that the alleged cartel participants met and decided to take concerted action; (b) such concerted action must have been implemented; and (c) there must be conclusive evidence of meeting of minds.

224. Based on above, it was submitted that the Commission should set aside the DG's Report given that the DG has failed to establish the existence of an agreement between the selected real estate developers. It was further argued that there must be conclusive proof of meeting of minds to act in a concerted manner and such conduct must have been implemented for establishing an infringement under section 3 of the Act. In the present case, there is no proof, much less conclusive proof of meeting of minds which may be construed as violation of the Act. Mere identification by the DG of certain similar (not identical) clauses in the agreements of the shortlisted real estate builders/ developers, cannot lead to an inference that such clauses are being incorporated in a concerted manner under a tacit agreement/ understanding to achieve a common purpose. Contrary to the DG's findings, the incorporation of the

impugned clauses stems from independent commercial decisions of each real estate builder/ developer and there are commercial justifications/ explanations for incorporation of the same. As observed by the Commission in the *Neeraj Malhotra* case, the presence of similar practices being undertaken by different players in the industry by itself does not lead to a violation of section 3 of the Act, in the absence of an agreement.

225. It was also submitted that the Commission in *In re*: *All India Tyre Dealers' Association* v. *Tyre Manufacturers* analyzed plus factors, such as price cost trend analysis, capacity utilization, cost of sales, sales realization and margin, analysis of net dealer price and margin, higher operating profits and return on capital employed, market share and the conduct of All India Tyre Manufacturers' Association (ATMA) to determine whether the tyre manufacturers were engaged in an alleged cartel.

226. In this case, it was pointed out that the Commission after analyzing each of these factors concluded that, 'taking into consideration the act and conduct of the tyre companies ATMA, it is safe to conclude that on a superficial basis the industry displays some characteristics of a cartel. However, there has been no substantive evidence of the existence of a cartel.' Therefore, the Commission held that the available evidence was not proof enough to establish that the tyre companies were in fact engaged in an alleged cartel which limited and controlled the production and price of tyres in the market in India.

227. Specifically, it was submitted that out of the seven common impugned clauses identified by the DG, only four clauses were found to be present in the agreements of Prestige.

228. Furthermore, it was submitted that none of the impugned clauses in the agreements of the 20 real estate builders/ developers are identically worded. Moreover, the four clauses in Prestige's agreements are also different and distinguishable from the clauses contained in the agreements of the other 19

real estate developers, thereby demonstrating lack of parallel behaviour or concerted action.

229. The impugned clauses identified by the DG are not uniformly incorporated by real estate developers, either in wording or in substance, thereby illustrating the absence of a cartel. For instance, it was pointed out that the amount deducted by real estate developers in case of cancellation of allotment due to delay in payment ranges from 3% to 25% of the sale price. Further, in case of non-cancellation, the real estate developers stipulate payment of interest in the range of 18% per annum to 24% per annum.

230. In relation to disclosure of calculation of total common area and its proportionate apportionment on each of the apartments with the further right to increase or decrease flat area, it was submitted that the agreements of each of the builders/ developers stipulate different percentages of permissible variation.

231. The fact that the clauses in the agreements of each of the builders/ developers are differently worded and have different specifications is proof enough to establish the absence of the existence of a cartel.

232. In relation to the right to increase/ decrease the flat area, it was pointed out that the DG has observed that there are differences with respect to the extent of deviation permissible, availability or otherwise and the type of exit option in the event of deviation exceeding prescribed limits and liability of payment of interest in cases involving refund, *etc*.

233. Without admitting the presence of parallel conduct prevailing in the real estate market, it was submitted that parallel behaviour, on its own, is not proof of a breach of the competition laws. Parallel behaviour is a recognized phenomenon in the world of competition jurisprudence.

234. In this regard, reliance was placed upon a paper published by Organization for Economic Cooperation and Development (OECD) on cartels to the following effect:

> *Over the years, courts, competition authorities and competition experts have come to accept that conscious parallelism, which involves nothing more than identical pricing or other parallel behaviour deriving from independent observation and reaction by rivals in the marketplace, is not unlawful... Economic theory and case law have made it clear that something more than conscious parallelism is required.*

235. In relation to parallelism, it was pointed out that the Commission in the *Tyre* case, observed that, 'parallelism *per se* may not fall foul of the provisions of the Act. However, if the same is the result of a concerted and co-ordinated action under the aegis of trade association, then the same stands covered within the purview of the Act.'

236. It was pointed out that in relation to the role of CREDAI which is the only platform available to real estate builders/ developers, the DG has observed as follows:

> *'While drafting of a self-regulatory Code of Conduct is in the nature of a decision taken by CREDAI, however, in the absence of any direct or indirect evidences suggesting that its platform is being utilized to perpetuate anti-competitive practices, any presumption to this effect may not be correct.*

237. It was submitted that there is no other platform (besides CREDAI) by way of which Prestige can interact with other real estate builder/ developers. Moreover, it was pointed out that Prestige does not operate in the same relevant geographic market as 16 of the 20 builders/ developers identified by the DG. Therefore, given the complete absence of Prestige in other parts of India (except the South), it makes no business sense for Prestige to engage in a cartel with companies, most of which are not even its competitors in the South.

238. In the absence of any specific proof of Prestige being a part of the alleged cartel, even on the balance of probabilities, the DG's report must be dismissed in its entirety. The DG has failed to produce: (a) any direct evidence; or (b) even circumstantial evidence which is sufficiently precise and coherent that an agreement within the terms of the Act can be inferred; especially between Prestige and other real estate builders/ developers.

239. It was also contended that for a cartel to survive, there must be mechanisms in place for: (a) co-ordinating the cartel agreement and to ensure successful functioning of the cartel; (b) monitoring the behaviour and conduct of the members of the cartel; and (c) punishing members of the cartel who do not fall in line with the decisions of the cartel. However, the DG has failed to produce an iota of evidence to even remotely suggest the presence of any of the abovementioned elements. The DG has erroneously drawn a conclusion about tacit collusion that is wholly unsustainable and without any basis. Moreover, given that the DG could not establish the presence of any mechanism/ platform used by the real estate developers to collude with each other, the allegation in relation to cartelization is unfounded and baseless.

240. It was submitted that Prestige has a business justification for each of the clauses included in its agreements.

241. Moreover, the DG himself is not clear as to the nature of the violation committed by the builders/ developers by stating that ‘certain uniform

practices are prevalent in the real estate sector'. This evidences complete non-application of mind by the DG.

242. Further, the DG has himself clearly recognized in several instances that not all builders/ developers necessarily incorporate the same clauses or follow the same practices. Regardless, the DG has concluded that all the builders/ developers share a common understanding and have colluded to incorporate discriminatory and exploitative terms in each of their respective sale agreements. It is submitted that such erroneous observations made in the DG's report are devoid of any merit and shows complete non-application of mind by the DG. Accordingly, it was argued that it would be wrong to state that these practices are common' let alone the fact that these practices are being carried out under a tacit agreement or understanding as alleged in the DG's report.

Replies/ objections/ submissions of M/s Supertech Ltd.

243. It was pointed out that the DG identified 9 issues to ascertain the commonality in the agreement of the 20 builders chosen as a sample. In respect of four of these nine issues the DG has itself recorded that no common practice exists. Even in the other 5 issues, it is found that there is a general practice. Out of the 5 issues in 2 issues the practice followed by the answering Opposite Party was found to be different from the rest. It was argued that this itself is sufficient to establish that there is no tacit agreement among the builders all over the country in indulging any kind of anti-competitive practice.

244. It was also pointed out that in para 7.10 of its report the DG has admitted that ready availability of duly drafted agreement in the public domain facilitates replication by various players with few modifications. Thus, commonality in clauses only reinforces the ‘one follows the other’ phenomena. There is, thus, absolutely no basis or any material to even suggest that the commonality, if any, is owing to any tacit agreement among the builders across the country. The similarity in practice is due to the peculiar nature of the business and

applicable laws to be uniformly applied. Hence, it was argued that section 3 of the Act is not attracted in the present case.

245. The finding recorded by the DG on tacit agreement among the builders is further falsified by the fact that CREDAI has been exonerated of having acted as a common platform for the builders to meet and take a collective decision. CREDAI, which as per the Informant was supposed to be the principal umbrella organization/ association under which the builders collusively conspired to act in an anti-competitive manner, has been completely absolved of any anti-competitive practices by the DG. In view of this, the finding of the DG tacit agreement among the builders across the Country is wholly unsustainable. There is no material whatsoever shown by the DG to even, suggest any concerned tacit agreement even among the builders who were part of sample. In the absence of such material or evidence, the findings and conclusions of the DG are mere inferences drawn on assumptions.

246. It was also submitted that the method and manner in which the DG has conducted the investigation is highly flawed and that there is no basis in which the builders were chosen to be part of the sample.

247. In respect of the issues that were examined by the DG, it was submitted that the answering Opposite Party acts independently and in accordance with law. There is no question of any tacit agreement with any other builder in this regard.

248. Referring to the specific contraventions found by the DG, it was submitted that the answering Opposite Party, whose majority of the projects are in UP, is governed by the provisions of the U.P Apartment Act, 2010 and hence is obliged to disclose information as per the said Act and the Rules framed thereunder. Further, with regard to the right reserved by the builder to make further constructions, it was submitted that the same is also governed as per the provisions of the said Act and the building bye-laws. It was submitted that the builders are entitled to purchase additional FAR which entitles them to

carry our further construction. Thus, the issue is governed by law and there is no question of the same falling foul of the competition laws.

249. It was further submitted that the various practices/ issues which are referred to in para 7.7 of the DG report are all matters covered by local legislation like Apartment Regulations/ Laws, Municipal laws, Building bye laws etc. and the same cannot be subject matter of investigation under the Act. It also needs to be noted that section 21A of the Act specifically provides that where an issue on which a decision is taken or proposed to be taken by the Commission which pertains to a legislation, the implementation of which is entrusted to a particular statutory authority, then the Commission would make a reference in respect of the said issues to such statutory authority, which has not been done in the present case.

250. Next, it was contended that the DG erred in concluding that the practices followed by the builders have a direct or indirect effect on the price. The DG has not examined the market and the prices of the flats over a period or in a given geographical area and in the absence of such analysis it was not possible to conclude that the practices followed by the builders have an effect on the price of the flats. The conclusions of the DG as regards the price of flats and violation of section 3(3)(a) is thus merely based on assumptions and inferences.

251. It was submitted that the DG has erred in concluding that the builders by having uniform terms and conditions in the said agreement indirectly control the supply of the flats and hence violate section 3(3)(b) of the Act. The DG has completely failed to comprehend and take note of the peculiar features of the real estate industry. It escaped the notice of the DG that the builders are generally engaged in the sale of flats in housing complex/ society. All buyers in a given housing complex are sold common facilities along with the flat and hence the agreements are bound to be identical/ similar. This is a requirement of the peculiar nature of the business. It does not in any manner have an adverse

effect on the supply of the commodity (flats) in the market and neither does the builder control the provisions of the services as alleged. Thus, the conclusion of the DG in this regard is untenable in law and on facts. The contents of the written objections to the DG report were reiterated. In sum, it was argued that the findings and conclusions of the DG to the effect that the answering Opposite Party and all other builders all over the country are in tacit agreement in following certain anti-competitive practice in contravention of section 3(3)(a) & (b) of the Act are without any basis, erroneous, perverse, arbitrary and illegal. It was therefore prayed that the DG report *qua* the answering Opposite Party, be set aside and the complaint be dismissed.

Replies/ objections/ submissions of M/s Salarpuria Group.

252. At the outset, it was pointed out that the finding of the DG against the answering Opposite Party is positive on almost all the issues.

253. Further, it was stated that the pick and choose approach is a fatal error leading to inconsistencies in the report as a result of which the findings are unsustainable. It was submitted that the report is based on assumptions, presumptions and inferences which cannot be relied upon to support the findings and should not form the basis for any order. The answering Opposite Party contended that there are inconsistencies in the report which accepts that it is incorrect that builders across the board are following practice of selling apartments on super area basis. The answering Opposite Party is a case in point where there is disclosure regarding common area. The report has sweeping generalizations which go to the root of the matter.

254. It was contended that the requirements of section 3(3) of the Act are not fulfilled. It was argued that section 3(3) of the Act clearly postulates existence of an agreement between the hand-picked developers. In fact, it was pointed out that the present case involves unconnected and competing enterprises operating in a vast and differentiated market with different products and limited market share with no meeting of minds (they operate independently).

In view of this, it was suggested that the conditions/ ingredients envisaged under section 3(3) of the Act are not present as there is no adverse effect on competition.

255. Further, a vital ingredient to trigger section 19(3) of the Act is a conspiracy to gather undue market power or fix prices or control the market share so that the agreement will have an adverse effect on competition under section 3 of the Act. This has to be determined with due regard to the factors set out in sub-clauses (a) to (f) of section 19(3) of the Act. No such case is made out, contends the answering party.

256. The report paints all developers with the same brush. The report proceeds on the basis that every business practice be put under the 'scanner' and the logical *sequitur* thereof would be that 'the market does not work'/ there is complete market failure. This is contrary to the scheme of the Act and not borne out by the facts. It was further submitted that it is a well-settled proposition that unequals cannot be treated as equals. There is no attempt by the DG to categorize the builders on a rational basis, for instance, on geographical location, nature of product being offered, type of consumers seeking such product, mandatory requirement of local laws, *etc*. Failure of the DG to make such categorizations in its report has led to a situation where all the parties have been treated in the same manner while investigating the matter leading to a fundamental error in the very approach of the DG to the entire matter.

257. It was further canvassed that the report of the DG *de facto* seeks to put in place a regulatory regime. In this context, it was mentioned that Real Estate Regulator is proposed by way of the Real Estate (Regulation & Development) Bill, 2013 which sets out rights and duties of allotees and obligations of developers. This shows the shift towards a regulated sector.

258. It was argued that there is sufficient competition in the market and flat buyers have exercised their choice, this is reflected in executed agreements. The case

is essentially a matter between a buyer and a seller which can be decided by an appropriate consumer forum.

259. Coming to the specific contraventions, it was contended that the requirement of car parking is mandatory as per the local building bye-laws in Karnataka. Therefore, the answering Opposite Party is required to provide for car parking along with apartments it is constructing. It was, however, pointed out that the answering Opposite Party gives an option to the purchaser to opt for the car parking along with the apartment. A bare look at one of the sale deeds shows that the apartment and car parking are separately dealt with. Further, it was highlighted that the nature of products being offered by the answering Opposite Party (high end residential apartment) to the class of consumers (high net worth individuals) necessarily requires offering of car parking without which the answering Opposite Party would be unable to compete in the market. Such high-end consumers are highly unlikely to not require car parking space. Therefore, providing of a car parking space cannot be treated as an anti-competitive clause.

260. It was also submitted that reserving right to further construction based on additional FAR is subject to local municipal laws. Furthermore, it is part of the answering Opposite Party's fundamental right to carry on business which is to carry on construction within the permissible limits of law. A builder cannot be expected to abandon its right to do business (which naturally is further construction). It was further, submitted that, there is no finding by the DG based which proves prejudice to the purchasers of the immovable property offered by the answering Opposite Party owing to the exercise of its right to further construct as per available FAR.

261. On the issue of interest rates, it was argued that the interest rate being high is primarily to prevent speculative buyers from applying for the apartment and to ensure that only genuine buyers are applying. It is further important that there is no default by a purchaser as the same will impact the entire project and

would be prejudicial to the interests of other consumers who have been regularly and promptly paying. It needs appreciation that such projects work on collective responsibility where both the builder and each of the consumers perform their respective parts of the contract in a timely manner so that the project can be completed to the benefit of all. It cannot be said that a clause like this one would amount to violation of section 3(3)(a) of the Act.

262. It was submitted that the real estate market is not an oligopolistic market. Further, even if the structural analysis is to be carried out, it is highly unlikely that the random set of real estate developers would find incentive in colluding as their geographic territories and product variety clearly vary from one another.

263. It was further submitted that the DG has held the opposite parties are colluding in the relevant market on account of similar clauses in their buyer's agreement. Such an assessment is inconsistent with the basic structure of the Act. To conclude anti-competitiveness due to commonality of certain clauses, which fall within the garb of industry practice, is a clear deviation from the inquisitorial powers granted to the DG, the DG was not supposed to understand the impact of a clause on the consumer but rather determine whether there is any commonality of intent to harm the market at a pan-India level. Reliance was placed upon the jurisprudence evolved by mature jurisdiction such as European Union, to which the substantive provisions of the [Indian] Competition Act, 2002 are *pari materia*. It was argued that both the EU Courts and the Commission appreciate that parallel behaviour does not, by itself, amount to a concerted practice under Article 101(1) of European Union (TFEU). Certain decisions were cited by the answering Opposite Party in support of the proposition that there must be a consensus *ad idem* whereby practical cooperation is knowingly substituted for competition; however the consensus need not be achieved and can come about by directly or indirect contact between the parties.

264. In light of the above, it was prayed that the DG report, being completely devoid of settled principles, must be quashed as it has been prepared without proper and due application of mind.

Replies/ objections/ submissions of M/s Tata Housing Development Company Ltd.

265. At the outset, it was submitted that neither the Informant nor the Commission in its *prima facie* order has made any allegation against the answering Opposite Party or arrayed it as an Opposite Party in the case.

266. The report of the DG alleges, broadly and in a sweeping manner, that the builders/ developers in the country as a whole follow certain practices that contravene the provisions of the Act. That there is no basis either in fact or in law to array the answering Opposite Party as an Opposite Party in the matter since the observations of the DG are of a very general nature and is not directed against it in any specific manner.

267. It was contended that the words 'agreement', 'practices carried on' or 'decisions taken' do not constitute separate compartment, as they embrace a single concept of 'agreement' under the Act. The usage of the conjunction 'or' before the words 'practices carried on' or 'decision taken' in addition to the word 'agreement' in section 3(3) does not imply that they constitute separate compartments or are mutually exclusive categories. It was argued that the above phrases/ terms have been kept to bring all such conducts within the sweep of the Act, which while not amounting to express/ overt agreement are still found to be anti-competitive. In the absence of the words 'practices carried on' or 'decision taken' it would have been obligatory, and would have cast a much higher burden, on the part of the DG to establish *a priori* the factum of express/ overt agreements before alleging contravention based on the 'practices carried on' or 'decision taken' in cases that fell within the proscribed conduct defined under clauses (a) to (d) of section 3(3) of the Act. The words 'practices carried on' or 'decision taken', in addition to the words 'agreement'

provide flexibility in identifying and prohibiting anti-competitive activities 'by any association of enterprises or association of persons in identical or similar trade of goods or provisions of services'.

268. It was further submitted that the existence of critical mass of direct or circumstantial evidence must sufficiently establish that the 'practice carried on' or 'decision taken' was a product of concerted action – a conscious commitment to a common scheme, designed to achieve an unlawful objective that potentially violates the Act.

269. It was alleged that the conclusions drawn by the DG are premeditated and based entirely on unfounded presumptions/ inferences. The DG has furnished no evidence that the builders/ developers had (i) successfully colluded to reach a consensus on the terms of the agreement (ii) designed allocation mechanisms to divide the collusive gain; and (iii) monitored compliance and had devised mechanism to punish deviant behaviour, so as to solve the multi-dimensional problem of coordinated/ concerted behaviour.

270. It was pointed out that even in its list of 20 sample builders/ developers, selected out of 9000+ members of CREDAI, there are significant differences in their so called common trade practices. Further, it was argued that there is no causal nexus between the observed parallel terms of the builders (the observed conduct) and the alleged infringing misconduct, in terms of section 3(3)(a) and (b) of the Act.

271. Furthermore, it was contended that notwithstanding the fact the DG has neither established any anti-competitive agreement amongst the builders/ developers nor demonstrated any causal nexus between the observed conduct and the alleged infringing misconduct, in terms of section 3(3)(a) and (b) of the Act, the answering Opposite Party submitted its business justifications for the impugned clauses of its 'agreements'.

272. It was argued that real estate market is characterized by many sellers, differentiated products and easy entry of firms. The builders/ developers are of varying capabilities and capacities that cater to a very wide segment of buyers. They compete with each other on multiple dimensions of sale of their apartments – location, quality, facilities, amenities, branding/ advertising *etc*. The nature and structure of real estate market is thus that the developers/ builders do not need to take into account rivals' pricing and output decisions, as they are not interdependent and each firm is indifferent to the decisions of other sellers of apartments. In fragmented markets where product, output, quality, characteristics, *etc*. differ, it is impossible to have collusion. Real estate developers cannot present a 'united front' to the customers unless they are catering to similar end users, in a similar location, having identical amenities, construction quality, reputation, *etc*.

273. Lastly, it was submitted that any order requiring the parties to 'cease and desist' from practising the impugned clauses would be unworkable and contrary to the interests of the consumers and the builders. Such an order would cause substantial conundrum because the Commission cannot meaningfully instruct the firms to adopt unworkable remedies or to regulate the sector as a sector regulator, while remaining within the scope of the Act.

274. Based on the above submissions, it was prayed that since there is no case of infraction of the Act by the answering Opposite Party in the present matter, the Commissions may order deletion of its name from the array of opposite parties.

Replies/ objections/ submissions of M/s Unitech Ltd.

275. The answering party raised some jurisdictional objections and also alleged that the Informant is approbating and reprobating and is indulging in forum shopping.

276. On procedural side, objections were raised relating to the manner in which the investigation was conducted. It was contended that the investigation was

premised on the existence of CREDAI as the forum for collusive activities. Once the DG holds CREDAI not in contravention, the entire basis of the investigation falls. The manner of picking a representative sample by the DG was also challenged. It was pointed out that the answering party has not signed the Code of Conduct of CREDAI. It was argued that the DG failed to provide an opportunity to the answering party to defend itself. Placing reliance upon the order of the Hon'ble High Court of Delhi in *Grasim* case (*supra*) it was argued that the answering party had the right to defend itself first, before the DG and thereafter before the Commission.

277. On merits, it was argued that the term concerted practice has not been defined under the Act and the DG has merely imported the concept from European Union where Article 101 of the Treaty of Functioning of European Union includes concerted practice. The DG, being a statutory authority, cannot go beyond the scope of the statute to adopt and apply a concept from foreign jurisdiction. It was also stated there is no commonality between the clauses of the various builders and the same was stated to be evident from the DG report itself.

278. It was argued that the DG has assumed tacit collusion on the basis of standard agreements. He has failed to appreciate the fact that standard agreements are not necessarily in contravention of competition law. In fact, standard agreements help the buyers to compare the conditions and increase transparency, presence of which would imply that there is no tacit collusion in the market. They are also imperative as they all by using the same language help consumer compare apples to apples. The DG has failed to prove the existence of any 'plus factors' in furtherance of tacit collusion. The DG has failed to trace the existence of the cartel and to identify when the cartel came into existence and the duration for which it has continued.

279. Lastly, it was pointed out that the clauses identified by the DG are in fact not present in the agreement of all the builders and are bereft of the requirement of

commonality for establishing tacit collusion. A point wise response was also given on the findings of the DG.

Replies/ objections/ submissions of the Informant

280. The Informant filed its detailed submissions on the DG report. Besides, the Informant specifically filed its replies to the responses submitted by some of the opposite parties and the same are noted herein below:

Replies/ objections/ submissions of the Informant (in response to submissions of M/s Tulip Infratech Ltd.)

281. The Informant filed its written submissions in response to the reply filed by the Opposite Party No. 1. Challenging the objections raised by the Opposite Party No. 1, it was argued that the same are erroneous, flawed and misleading as the instant case is not in respect of violation of section 4 but for violation of section 3 of the Act. It was stated that Case No.07 of 2011 was closed by the Commission on the findings that OP-1 is not in a dominant position in the relevant market and therefore, *prima facie*, no case of violation of section 4 was made out but the anti-competitive agreements between OP-1 and other enterprises engaged in similar or identical business were not considered by the Commission for want of allegations of violations of section 3 of the Act. In this connection, it was argued that doctrine of *res judicata* as a rule provides that a final judgement on the merits of a case by the jurisdictional court is conclusive between the parties to a suit as also to all the matters that were litigated or that could have been litigated in the suit.

282. Accordingly, it was argued that the Commission has not passed any orders leave alone any final orders on the merits/ demerits of anti-competitive agreements of OP-1 with other enterprises engaged in the same/ similar trade/ business and as such the objections raised by the opposite parties on this count may be dismissed.

283. On the issue of non-impleadment of other builders/ developers in the information by the Informant, it was argued that this objection of the OP-1 is also frivolous and misleading. It was pointed out that the Commission while passing orders under section 26(1) of the Act has observed at number of places that alleged practices are carried on by the builders across the board, thereby impleading all the builders in India. At the same time, it was stated that the Act has cast a duty on the Commission under section 18 of the Act to eliminate practices having AAEC, promote and sustain competition, protect the interests of the consumers and ensure freedom of trade carried on by other participants, in markets in India and has accordingly empowered the Commission under section 19(1) of the Act to even *suo moto* take cognizance of suspected violations of provisions of the Act. In fact, it was argued that the Commission in the past has taken *suo moto* cognizance of suspected violations in appropriate cases.

284. Joining the issues with the opposite parties on the issue of closure of cases by the Commission in the past on similar allegations, it was highlighted that this objection of the OP-1 is also erroneous, frivolous and misleading as the said cases were closed because the Commission did not find any enterprises against which respective cases were filed, to be dominant in the relevant market. None of those cases alleged anti-competitive agreements amongst builders/ developers in violation of the provisions of section 3 of the Act.

285. To establish meeting of mind amongst builders/ developers/ CREDAI members, it was pointed out that the General Body of CREDAI National, in its Special General Meeting held on 21st December 2011 at Hotel Sahara Star, Mumbai *vide* Item No. 5 (at page 1650, Volume 6 of the DG Report), approved the Code of Conduct for adoption by all individual members of CREDAI. It was further unanimously resolved that all CREDAI member developers from all States and city level associations should sign the new Code of Conduct that has been adopted by the General Body in this day *i.e.* 21st of December 2011. It was argued that the ill effects of the three clauses 'Booking', Agreement to

sell' and 'Forfeiture' contained in Code of Conduct leading to all the concluded practices have already been explained by the Informant in its written submissions filed in response to DG report and therefore not reiterated.

286. It was further argued that all the members of CREDAI (9,000 builders/ developers) have been carrying on the concluded practices since long and it is only recently (in 2011) that CREDAI has written these practices in black and white in its Code of Conduct and has made adoption of Code of Conduct mandatory for all its members. This fact has since been admitted by CREDAI NCR in its minutes of the General Body Meeting held on 14th July 2011 (available at p. 5353 Volume 16 of the DG report). In this General Body meeting, Shri Rohit Raj Modi, Secretary of CREDAI NCR, explained the Code of Conduct in detail and said that the Code has been finalized keeping in the NCR's *business practices into consideration*. Thereafter, the General Body of CREDAI NCR approved the Code of Conduct *vide* Item No. 2 of the minutes of the same General Body meeting and 15 members immediately signed the Code of Conduct and handed over the same to Shri Sushant Gupta.

287. It was argued that the above extract '*explained the Code of Conduct in detail and said that the Code has been finalized keeping the NCR's business practices into consideration*' from minutes of the General Body meeting of CREDAI NCR held at 6.30 pm on 14th July 2011 at Hotel Claridges, Aurangzeb Road, New Delhi (minutes available at p. 5353 Volume 16 of the DG Report) where members of CREDAI NCR, CREDAI Western UP, Raj Nagar Extension Developers Association and Bhiwadi Real Esate Developers Association were present. From this, it was argued that it is established beyond doubt that the existing practices of builders/ developers of NCR region were first discussed in the above said general body meeting and explained by Secretary of CREDAI NCR Shri Rohit Raj Modi that the Code has been finalized keeping NCR's business practices into consideration thereby pacifying the builders/ developers that the existing practices shall continue. It was stated that continuance of existing practices was the reason that Code of Conduct was

approved in the same general body meeting without any existence from any builder/ developers and it was signed by 15 members immediately. This is stated to be a direct evidence of meeting of minds of the builders/ developers of NCR including members of CREDAI, NCR, CREDAI Western UP, Raj Nagar Extension Developers Association and Bhiwadi Real Estate Developers Association regarding continuing the prevalent practices which have since been concluded by the DG. This also establishes the fact that builders/ developers have been carrying on these practices since long and it is only recently that CREDAI has formally adopted these practices in black and white through its Code of Conduct.

288. Further, it was argued that similarly, while addressing the General Meeting of CREDAI UPREDCO held on 26th December 2011 at Conference Hall of Eldeco Housing & Industries limited, 4th Floor, Eldeco Corporate Chamber – 1, Vibhuti Khand, Gomti Nagar, Lucknow, Shri Jaspal Oberoi, Vice-President, CREDAI National has said 'that Code of Conduct is CREDAI bench mark and CREDAI is known for it' (at p. 3931 Volume 12 of the DG Report). In the said General Meeting, Shri Jaspal Oberoi, Vice-President, CREDAI National has assertively owned the Code of Conduct of behalf of CREDAI National by saying that this Code of Conduct is CREDAI bench mark and CREDAI is known for it. In this background, it was argued that no further evidence to establish meeting of mind of builders/ developers on continuing these concluded practices is required.

289. It was also pointed out that M/s BPTP Limited, one of the 20 shortlisted builders/ developers that is also a member of CREDAI NCR has admitted (at point 10, p. 6111 Volume 18 of the DG Report) that 'CREDAI is an association of real estate developers and through this common forum, all member developers discuss their problems, difficulties and issues relating to real estate sector as well as the regulations and notifications from the various government authorities'. It was further pointed out that BPTP, one of the prominent builders/ developers of Delhi NCR market, in its submissions dated 21.05.2012

to the DG has admitted that CREDAI members have been meeting very often at CREDAI platform and have been discussing their problems and finding common solutions. In view of this admission by BPTP, it was argued that the Commission does not require any other evidence to establish 'meeting of minds' between various builders/ developers facilitated by CREDAI.

290. It was also pointed out that OP-1 itself was a member of CREDAI NCR at the time of above said general body meeting of CREDAI NCR held on 14th July 2011 at Hotel Claridges, Aurangzeb Road, New Delhi where Shri Rohit Raj Modi, Secretary of CREDAI NCR explained the Code of Conduct in detail and said that the Code has been finalized taking NCR's business practices into consideration. However, it is alleged that sensing that signing of Code of Conduct may tantamount to 'meeting of minds' and may go against it, OP-1 refused to sign the Code of Conduct, as a result thereof its membership was terminated by CREDAI NCR on 25th February 2012 (at p. 2144, Volume 8 of the DG report). However, it was pointed out that OP-1 was a member of CREDAI NCR at the time when it launched its project Tulip White as confirmed by CREDAI NCR in its reply to DG [at point (G) p. 2144, Volume 8 of the DG report] and has since been continuing with the same concluded practices in all its projects including Tulip White, Tulip Orange, Tulip Ivory, Tulip Purple, and Tulip Violet *etc*. It was argued that non-signing of Code of Conduct by OP-1 is an attempt to dissociate itself from CREDAI NCR so as to ward off any allegations of anti-competitive agreements, even though it is only an eyewash as it is actively continuing with the same concluded practices unabatedly.

291. Adverting to the submissions of OP-1 to the effect that impugned practices can be regarded as anti-competitive only if the same have been imposed by a developer/ builder is dominant, it was submitted by the Informant that the same is also erroneous, flawed and misleading.

292. Lastly, it was pointed out that the OP-1 itself has admitted at point Nos. 17 and 23 *etc*. of its written submission that the practices are industry practices. It has even impliedly admitted at point No. 35 of its submissions that these practices are detrimental to the consumers' interests while making flawed attempt to say that each and every similar prevailing business practices(s) cannot be put under the provisions of the Act as section 3(3) of the Act also covers industry practices.

Replies/ objections/ submissions of the Informant (in response to submissions of M/s Omaxe Ltd.)

293. It was reiterated by the Informant that CREDAI has been providing a platform to real estate enterprises to meet and discuss issues of common interest and find common solutions to their problem so as to further the commercial interest of its members who all are builders/ developers.

294. It was also pointed out that CREDAI National in its reply to the DG at point (k) page 1672 (Volume 6 of the DG report) has stated that CREDAI National has framed a Code of Conduct as a self-regulation which is equally applicable to all the members of CREDAI including Omaxe. It was further stated that CREDAI is actively promoting all the common practices concluded by the DG as may be revealed from the following points of Code of Conduct (pages 1675 to 1685, Volume 6 of the DG report) uniformly adopted by all the 9,000 builder/ developer members of CREDAI:

a) **Booking:** The CREDAI Code of Conduct under clause 4 titled as 'booking' states that 'Normally the booking of units shall be commenced only after obtaining sanction of plans from the competent authorities. If booking is made before obtaining sanction of plans, the purchaser shall be made aware of this fact at the time of the booking and in addition a true disclosure of the same shall be incorporated in the agreement'. The CREDAI has adopted the practice of booking without approvals of sanction plans, *etc*. in its Code of Conduct despite the fact that the practice of booking without

obtaining all the approvals/ clearances including sanction plans, *etc*. has been held to be an unfair trade practice by MRTPC *vide* its orders dated 02.05.2006 in UTPE No. 258/98 and UTPE No.190/1999 in the matter of *Grahak Sahayak Gurgaon & Ors.* v. *DLF Limited* and by NCDRC in Appeal No. 557 of 2003 *vide* its orders dated 20.04.2007 in the matter of *Brig. (Retd.) Kamal Sood* v. *DLF*.

b) **Agreement to Sell:** The Code of Conduct under the clause 5 titled as 'agreement to Sell' states that 'Agreement to Sell will be entered into immediately on receipt of full booking amount/ earnest money.'

c) **Forfeiture:** The Code of Conduct under clause 14 titled as 'Forfeiter' states that 'The agreement will also contain a clause with regard to cancellation/ forfeiture covering issues such as amount of forfeiture, interest charges, liquidated charges, period for payment for repayment *etc*. applicable in the event of non-payment of installment or other components of agreed consideration'. This clause is killing the competition by making exit impossible for the flat buyers.

295. It was submitted that the above three clauses inserted in the Code of Conduct and uniformily followed by all the members of CREDAI/ CREDAI NCR including Omaxe are the mother of all the ills prevailing in the residential real estate market in India. Clause 4 of the Code of Conduct titled as 'booking' encourages builders/ developers to receive booking amount from the consumers even before obtaining sanction plans despite this practice of booking without obtaining all the approvals/ clearances including sanctions plans, *etc*. having been held to be unfair trade practice. Further, it was argued that clause 5 of the titled as 'agreement to sell' encourages builders/ developers to sign the agreement only after receipt of full booking amount/ earnest money, *i.e*. after capturing the customers when he is left with no choice or right to negotiate as the threat of forfeiture of earnest money promoted by clause 14 of Code of Conduct under head 'Forfeiture' is looking large on his head. These

three clauses of Code of Conduct read together are promoting the *modus operandi* alleged by the Informant and are a direct evidence of CREDAI promoting all the seven common practices concluded by the DG to be in contravention of the provisions of section 3(3)(a) and 3(3)(b) of the Act.

296. Furthermore, it was sought to be suggested that the above three clauses read together have the effect of (captured) flat buyers signing (under threat of forfeiture of earnest money) one-side agreement much before start of the construction and much before receipt of all the approvals thereby undertaking (forced to undertake under the threat of forfeiture of earnest money) all the risks by signing the one sided agreement containing amongst other a clause stating that the allottee/ buyer has entered into the agreement with full knowledge of all the laws, notifications and applicable rules thereby pushing all the flat buyers within the ambit of the judgment of the Hon'ble Supreme Court in Civil Appeal No.7934 of 2012 in the matter of *Esha Ekta Apartments Cooperative Housing Society Limited and others* v. *Mumbai Corporation of Mumbai and Others* ('Campa Cola' case in Mumbai) wherein the Supreme Court refused to grant any relief to the flat buyers on account of illegalities committed by the builder / developers on the ground that buyers had entered into the agreements with the developers / builders much before commencement of the construction and were aware of the fact that the plans have not been approved by the appropriate authority. It was argued that this is exactly what the three clauses of the Code of Conduct are promoting *i.e.* to get the one sided agreement (forcibly) signed from the (trapped) consumer (under the threat of forfeiture 20% earnest money) much before starting the constructions and much before seeking all the approvals thereby transferring the entire risk to the consumer by incorporated a clause in the one sided agreement stating that the allotee/ buyer has entered into the agreement with full knowledge of all the laws, notifications and applicable rules thereby pushing all the flat buyers within the ambit of above decided Supreme Court judgment.

297. The Informant has also cited some observations made by the Hon'ble Supreme Court in the case of *Campa Cola* to reflect the consumers' dilemma as a result of tacit agreement/ understanding/ informal cooperation amongst developers / builders in violation of section 3(3)(a) and 3(3)(b) of the Act, the same are noted therefrom as under:

> *.....Builders violate with impunity the sanctioned building plans and indulge in deviation much to the prejudice of the planned development of the city and at the peril of the occupants of the premises constructed or of the inhabitants of the city at large. ....Unwary purchasers in search of roof over their heads and purchasing flats/ apartments from builders, find themselves having fallen prey and become victims to the designs of unscrupulous builders. The builders conveniently walk away having pocketed the money leaving behind the unfortunate occupants to face the music in the event of unauthorised constructions being detected or exposed and threatened with demolitions.*
>
> ---
>
> *The conduct of the builders in the present case deserves to be noticed. He knew it fully well what was the permissible construction as per the sanctioned building plans and yet he not only constructed additional built-up area on each floor but also added an additional fifth floor on the building and such a floor was totally unauthorised. In spite of the disputes and litigation pending, he parted with his interest in the property and inducted occupants on all the floors, including the additional*

one. Probably, he was under the impression that he would be able to entire escape the clutches of the law or twist the arm of the law by some manipulation. This impression must prove to be wrong.

A professional builder is supported to understand the laws better and deviations by such builders can safely be assumed to be deliberated and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent future.

It is matter of common knowledge that illegal and unauthorized constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/ colonizers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimately desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multi-storeyed buildings. To some extent, both parties can be said to be equally responsible for this. Still the greater

loss would be of those flat owners whose flats are to be demolished as compared to the builder.

298. It was submitted that the Hon'ble Supreme Court, while holding the buyer equally responsible, appears to have understood that buyers have voluntarily signed the agreements much before start of the construction and much before receipt of all the approvals but, avers the Informant, the fact is that the buyers have no choice as has been rightly held by the DG in its report.

299. It was further submitted that the common practice amongst the builders/ developers due to the tacit agreement/ understanding/ informal cooperation is to first trap the buyer and then force him to sign on the dotted lines of the one sided agreement under the threat of forfeiting 20% earnest money which is the life time saving of an individual consumer.

300. It was highlighted that in the *Campa Cola* case, the Trial Court, the Hon'ble Bombay High Court and the Hon'ble Supreme Court refused to give any relief to the flat buyers on the ground that buyers had entered into the agreements with the developers/ builders much before commencement of the construction and they themselves have assumed all the risk of non-approval/ illegal construction.

301. It was fervently urged that the Commission may visualize the right of consumers having been forced to sign the one–sided agreements after having been captured by the builders/ developers much before start of construction and much before receipt of all the approvals, with the clause that the allottee/ buyer has entered into the agreement with full knowledge of all the laws, notifications and applicable rules, as a result of concluded practices being carried on by the builders/ developers in India under tacit agreement/ understanding/ informal cooperation in the light of above judgment where the Supreme Court refused to grant relief to the flat buyers on account of illegalities committed by the builders/ developers on the ground that buyer had

entered into the agreement with the builders/ developers much before the commencement of the construction and they were aware of the fact that plans have not been approved by the Appropriate Authority. The Informant wondered as to how many 'Campa Cola' like situations India is sitting on.

302. The Informant reiterated the events leading to the Code of Conduct and it is not necessary to reproduce the same herein again.

303. Further, it was pointed out by the Informant that in the meeting of Executive Committee and Governing Committee members of CREDAI NCR held on 15th September 2011, some queries were raised on the Code of Conduct by Shri Gaurav Mittal, Managing Director of CHD Developers and the same were replied by EC, GC members and Shri Mittal, on being satisfied with the replies of EC, GC members, submitted that he will sign the Code of Conduct within one day. These minutes of the meetings are stated to be available at p. 2190 Volume 8 of the DG Report. The Informant posed the query as to what questions were raised by Shri Mittal in the said meeting and what were the replies to these questions by EC, GC members of CREDAI NCR that satisfied him agreeing to sign the Code of Conduct in one day. The answers to these questions are stated to be available in the minutes of the EC, GC meeting of CREDAI NCR held on 28th January 2012 (at p. 2171 Volume 8 of the DG Report). In this meeting, EC, GC members of CREDAI NCR assigned the job of collecting the signed Code of Conduct from defaulter members to Shri Gaurav Mittal and for this purpose, approved the e-mail template prepared by Shri Gaurav Mittal for sending it to defaulter members of CREDAI. Shri Gaurav Mittal sent this e-mail to Shri Praveen Jain, CMD of Tulip Infratech / OP-1 on 31.01.2012 and a copy of this email is available at p. 2234 Volume 8 of the DG Report. This e-mail reads as under:

Dear Mr. Praveen Jain

With immense pleasure, I apprise you that 55 CREDAI NCR members out of 81 have signed the Code of Conduct.

The Code of Conduct (COC) is yet another attempt by CREDAI to bring the Real Estate fraternity in NCR together, bringing collective efforts of the industry – treating it as one for the first time in the history.

***COC is for you so it has taken into consideration the NCR practices. Since it has been created by the developer community, it doesn't at any point try to put the developers into compromising position. It safeguards the interest of the developers**. The idea is to change the image of the Realtors……*

Signing of COC will not impact our business practices.

……

……un due advantage.

I have attached 3 slides which will explain why we should be together and sign the COC.

I would request you to sign the Code of Conduct before 15th February 2012.

Should you……

Best Regards

Gaurav Mittal – Managing Director
CHD Developers Limited
SF 16-17, Ist Floor, Madam Bhikaji Cama Bhawan
11, Bhikaji Cama Place
New Delhi – 110066

304. It was vehemently submitted that the above e-mail clearly spills the beans and reveals the questions raised by Shri Mittal and the answers given by EC, GC members of CREDAI NCR in its meeting held on 28th January 2012 which obviously would satisfy every member of CREDAI NCR as their existing practices would continue. It was argued that the above discussion of Shri Gaurav Mittal in EC, GC meeting of CREDAI NCR and e-mail sent by Shri Gaurav Mittal to Shri Praveen Jain/ OP-1 provides direct and concluding evidences that there are agreements amongst CREDAI members/ 9,000 builders on the concluded practices and the same are quoted from the submissions filed by the Informant for felicity of reference:

a) Approval of e-mail template by CREDAI/ 9,000 builders saying that:

i. COC is for us so it has taken into consideration the NCR practices;
ii. Since it has been created by the developers community, it doesn't at any point try to put the Developers into compromising position;
iii. It safeguard the interest of the developers; and
iv. Signing of COC will not impact OUR business practices

clearly and conclusively establishes meeting of mind of CREDAI members/ 9000 builders on not only existence of practices concluded by the DG but also on their continuance in future too.

b) *That all the CREDAI/ 9000 builders have agreements/ understanding to carry on the alleged modus operandi of capturing the consumers first and then forcing him to sign on the one sided agreement containing all the practices concluded by the DG in its investigation report, as CREDAI members/ 9000 builders have approved that 'COC is for them and it has taken into consideration the NCR practices'.*

c) *That the above said agreements/ understanding amongst the CREDAI members/ 9000 builders have been in existence since long as CREDAI members/ 9000 builders have confessed that 'COC has taken into consideration the (existing) NCR practices'.*

d) *That all the members of CREDAI/ 9000 builders have confided that they will continue to carry on the same practices as COC has been created by developer community and it doesn't at any point try to put the developer into compromising position and COC safeguard the interests of the developer and signing of COC will not impact our business practices.*

e) *That all the CREDAI members/ 9000 builders have confided that signing of COC will not impact Our/ 9000 builders' business practices. The word 'OUR' has been used by CREDAI members/ 9000 builders while approving the e-mail template which means CREDAI members/ 9000*

builders agree in one voice that signing of COC will not impact their business practices.

f) The Commission may appreciate that the above template of e-mail has been approved by CREDAI/ 9000 builders and CREDAI/ 9000 builders has/ have admitted that signing of COC will not impact 'OUR' business practices. The approval of above e-mail and saying that COC will not impact 'OUR' business practices directly and conclusively reveals the meeting of minds of 9000 members of CREDAI who have collectively confident that signing of COC will not impact their current/ existing business practices which further leads to inference that COC is merely an eye-wash and has been created to pay lip service to the consumers as COC is neither going to impact their business practices nor it is putting developer in any compromising position rather, COC safeguarded the interest of the developers.

305. Further, it was reiterated that while addressing the General Meeting of CREDAI UPREDCO held on 26th December 2011 at Conference Hall of Eldeco Housing & Industries Limited, 4th Floor, Eldeco Corporate Chamber-1, Vibhuti Khand, Gomti Nagar, Lucknow, Shri Jaspal Oberoi, vice-president, CREDAI National has said 'that Code of Conduct is CREDAI bench mark and CREDAI is known for it' (at p. 3931 Volume 12 of the DG Report).

306. It was also pointed out that M/s BPTP Limited, one of the 20 shortlisted builders/ developers who is also a member of CREDAI NCR has admitted (at point 10 p. 6111 Volume 18 of the DG Report) that 'CREDAI is an association of real estate developers and through this common forum, all member developers discuss their problems, difficulties and issues relating to real estate sector as well as the regulations and notifications from various government authorities'. Further, it was argued that BPTP, one of the prominent builders/ developers of Delhi NCR market, in its above submission dated 21.05.2012 to

the DG has admitted that CREDAI members have been meeting very often at CREDAI platform and have been discussing their problems and finding common solutions. In view of this admission by BPTP, no further evidence is required to establish 'meeting of mind' between various builders/ developers facilitated by CREDAI.

307. It was summed up that the deliberations in the above said meetings of CREDAI held on 14.07.2011 and 15.09.2011, email template approved by CREDAI in its meeting held on 28.01.2012 and email sent by Shri Gaurav Mittal on 31.01.2012 conclusively establishes meeting of minds of all the CREDAI members/ 9000 members to carry on the concluded practices.

308. It was contended that from the points discussed above it may be seen that CREDAI members, in their meetings held on 14.07.2011, 15.09.2011, 26.12.2011 and 28.01.2012, have not only met, discussed and agreed but have also vowed to continue their current/ existing practices which conclusively establish the meeting of minds of CREDAI/ 9000 builders on the practices concluded by the DG in its report.

309. Specifically, it was pointed out that Shri Rohtas Goel, Managing Director of Omaxe has been a member of Governing Committee of CREDAI NCR, as may be seen from the minutes of meeting held on 15.09.2011 (p. 2187, Volume 8 of DG the Report) where queries of Shri Gaurav Mittal were replied to by EC, GC members and 28.01.2012 (p. 2170 Volume 8 of the DG Report) where e-mail templates of Mr. Gaurav Mittal was approved by the EC, GC members of CREDAI NCR. Since every decision, direction or recommendation of an association is arrived at by consensus amongst its members, as such consensus of CREDAI members in above two meetings shall be constructed as an 'agreement' attracting provisions of section 3 of the Act.

310. It was also argued that though Shri Rohtas Goel, CMD of Omaxe Limited did not attend these two meetings, there is nothing to suggest that he opposed the

discussion/ decision in above said two meetings or disapproved the above referred e-mail template. Therefore, his silence amounts to rectification of the discussion/ decision on above referred points in these two meetings. Besides, signing of Code of Conduct and continuing with the same practices by Omaxe conclusively establishes that it is in agreement with CREDAI NCR members for continuing the concluded practices.

311. Reference was also made to the order of the Commission in its order in Case No.29 of 2010 in *Builders Association of India* v. *Cement Manufactures Associations & Ors.* wherein it has already held at point No.6.5.44 that there is no requirement under the provisions of section 3(1) and section 3(3) of the Act as also under section 19(3) to determine and construct a relevant market, although it remains *sine qua non* for the determination of contravention under section 4 of the Act. Sections 3(1) and 3(3) are concerned with the effect of anti-competitive agreements on markets in India. There is a distinction between 'market' as in section 3 and 'relevant market' as defined in section 4 of the Act. There is no need of determination of relevant product market or relevant geographic market for the purposes of establishing any anti-competitive agreement since the determination of relevant market is required while enquiring into allegations of contraventions under section 4 concerning abuse of dominance to assess an area or a range of products within which a dominant player can exercise its market power profitability at the expense of the consumers or the market or the competitors.

312. It was also argued that Omaxe's objection that reserving the right of further construction on any portion of the project land or terrace or building and to take advantage of any increase in FAR/ FSI available in future, is not detrimental to the interest of consumers as further development by the builder shall in no case alter the unit area of the buyer and is also of no help to Omaxe as this practice has already been held illegal by the Commission *vide* its orders dated 12.08.2011 and 03.01.2013 in Case No.19 of 2010 in the matter of *Belaire Owners Association* v. *DLF Ltd.*

313. Further, Omaxe's objection that builder is justified in making buyer liable for violation of FEMA residential status, RBI guidelines for NRI/ PIO/ Foreigners *etc.* is wholly irrelevant for the purpose in hand and is an attempt to divert the attention from the main topic. The concluded practice is in relation to non-disclosure of applicable relevant urban development laws, rules and civil/ local regulations *etc*. enforced by the State Development Authorities with request to the project under Development and not compliance of FEMA/ RBI guidelines.

314. It was argued that Omaxe's objection at point (c) page 79 is in contrast to its stand taken at point 13.16 pages 100 of its objections. At page 79, Omaxe has insisted that market forces of demand and supply are in play and if this economic theory is supposed to have completely ceased to exist, it would be complete market failure requiring non-marketing intervention such as government control in the form of sector regulation. Whereas at point 13.16 page 100, Omaxe has referred to the recommendations of the Commission in *Belaire Owners Association* case where the Commission has recommended the Government to regulate the real estate sector and has tried to persuade the Commission not to intervene in the working of the sector and let the Government pass the Real Estate (Regulation & Development) Bill and Regulator then, in turn, will deal with all issues related to the real estate sector.

315. It was also alleged that Omaxe's above statement at point 13.16 page 100 is indirectly an admission of existence of agreements/ understanding of Omaxe with other builders/ developers.

316. Lastly, it was argued that the Commission has the exclusive jurisdiction to deal with all the competition issues involved in any industry/ sector including anti-competitive agreements and abuse of dominance, *etc*. It is the duty of the Commission to break cartelization in any industry in the larger interest of free market economy and to protect the interests of the consumers; whether or not there is any sector regulator.

317. In view of the above, it was prayed by the Informant that the Commission may reject all the objections of Omaxe and pass appropriate orders as prayed for in the information for contravention of section 3(3)(a) & 3(3)(b) of the Act.

318. The Informant also brought to the attention of the Commission that more than 100 industries, like cement, steel, furniture, bathroom fitting, draperies, paint *etc*. are linked to real estate industry and cartelization in the real estate industry has cascading effect on these industries as well and has deprived these industries also the benefits of free market economy.

Issues and Analysis

319. On a careful perusal of the information, the report of the DG and the replies/ objections/ submissions filed by the parties and other materials available on record, the issue as to whether the provisions of section 3 of the Act have been contravened in the present case, arises for consideration and determination in the matter.

Whether the provisions of section 3 of the Act have been contravened in the present case?

320. At the outset, it may be mentioned that the Informant had earlier filed an information being case No. 07 of 2011 against the opposite parties Nos. 1-3 on similar facts alleging abuse of dominant position. The Commission *vide* order dated 29.04.2011 closed the case observing that there was no *prima facie* indication of dominance of the Opposite Party No.1 in the relevant market. It had further observed that there was no allegation of any agreement between the Opposite Party No.1 and other enterprises engaged in similar or identical business. Therefore, none of the clauses of section 3(1) read with section 3(3) or 3(4) of the Act was found to be applicable in that case. The present information, however, alleges anti-competitive agreements/ arrangements/

understanding amongst various real estate enterprises including the Opposite Party No.1.

321. It was further alleged by the Informant that there is a tacit understanding amongst all the real estate players in the market. According to the Informant, the Code of Conduct adopted by CREDAI indicates collusion amongst its members.

322. The Commission *vide* its order passed under section 26(1) of the Act directed the DG to conduct an investigation into the matter after opining that the conduct of residential apartment complex builders including that of the Opposite Party No. 1 and CREDAI is indicative of the existence of a *prima facie* contravention of the provisions of the Act.

323. Before adverting to the issue of alleged concerted practices by real estate players, the Commission deems it appropriate to dispose of the allegations directed specifically against the Opposite Party No. 1. It may be noted that in so far as the alleged anti-competitive conduct arising out of the agreement between the Informant and the Opposite Party No. 1 is concerned, suffice to note that the same does not fall within the discipline of section 3(3) read with section 3(1) of the Act as the Informant and the Opposite Party No. 1 are not operating at the same level. Further, the agreement does not come within the purview of section 3(4) of the Act as an end-consumer is not part of any production chain in the market as envisaged thereunder. With regard to the alleged conduct of the Opposite Party No. 1 in terms of the provisions contained in section 4 of the Act is concerned, it may be observed that the Commission, in the previous case filed by the Informant ruled out applicability of section 4 as dominance of the Opposite Party No. 1 was not established. The Informant has neither filed any fresh material to establish *contra* nor did the DG come across any material which can be reflective of any change in the market dynamics.

324. Further, the Commission is also in agreement with the conclusion of the DG that in the absence of any specific allegations of anti-competitive conduct in terms of the provisions of section 3 and section 4 of the Act against the Opposite Party Nos. 2 and 3, the prayer of the Informant seeking examination of their functioning does not merit consideration.

325. Having noted the above, it may be observed that the Commission *vide* its order passed under section 26(1) of the Act directed the DG to investigate the alleged conduct of residential apartment complex builders including that of the Opposite Party No. 1 and CREDAI.

326. In this regard, it may be noted that though the information named only one builder *viz.* M/s Tulip Infratech Pvt. Ltd. as an opposite party, the Commission on consideration of the information and material available on record observed as under:

> ...
>
> *As detailed earlier, the Informant has alleged that the members of CREDAI have a tacit understanding amongst themselves not to disclose carpet area in their brochures and sale agreement. It also alleged that there exists a practice amongst the members of CREDAI including OP-1 to follow certain practices. In addition to agreements, section 3(3) of the Act explicitly covers a 'practice carried on' and the practices listed above prima facie appear to be anti-competitive in nature.*
>
> *On consideration of the material on record, the Commission is of the opinion that the conduct of residential apartment/ complex builders including that of OP-1 and CREDAI is indicative of the existence of a prima facie contravention of provisions of section 3(3) of the Act and hence, it is a fit case to*

direct the DG to cause an investigation to be made into the matter.

…

327. To examine the issues highlighted by the Commission in its *prima facie* direction, the DG conducted a detailed analysis of the market construct and the various agreements executed by the builders/ developers with the buyers. Considering the market structure of the sector with the presence of thousands of players operating across the country, the DG for the purposes of investigation shortlisted the following builders/ developers to capture a representative sample:

(1) Amrapali Group
(2) Ansal Properties and Infrastructure Ltd.
(3) Ambuja Neotia Group
(4) Avalon Group
(5) Aparna Constructions & Estates Pvt. Ltd.
(6) Amit Enterprises Housing Ltd.
(7) BPTP Limited
(8) Gaursons India Limited
(9) K. Raheja Corp Pvt. Ltd.
(10) Oberoi Realty Limited
(11) Omaxe Ltd.
(12) Parsvnath Developers Ltd.
(13) Purvankara Project Limited
(14) PS Group
(15) Prestige Estates Projects Ltd.
(16) Purohit construction Ltd.
(17) Supertech Ltd.
(18) Salarpuria Group
(19)Tata Housing Development Company Ltd.
(20) Unitech Ltd.

328. It was vehemently argued by the parties that the DG exceeded the mandate by expanding the scope of investigation by launching and undertaking an exercise to examine the conduct of the aforesaid builders. It was contended that the investigation ought to have been confined to the three parties named in the information.

329. The Commission has bestowed its thoughtful consideration on this plea. It may be noted that while passing the directions under section 26(1) of the Act, the Commission, as highlighted above, specifically recorded its opinion that the conduct of residential apartment/ complex builders including that of Opposite Party No. 1 and CREDAI was indicative of existence of a *prima facie* contravention of provisions of section 3(3) of the Act and directed the DG to cause an investigation to be made into the matter. In such a scenario, the Commission finds no force in the submissions of the parties and the same are hereby rejected.

330. Accordingly, *vide* its order dated 15.04.2014, the Commission ordered impleadment of these other builders to the proceedings and sought their replies/ objections on the findings of the DG. The parties filed their replies/ objections and also made oral submissions before the Commission on various dates.

331. Before examining the rival submissions, it is appropriate to note the common practices carried on by the builders/ developers emanating out of a tacit agreement, as found by the DG:

(i) Non-disclosure of calculation of total common area and its proportionate apportionment on the apartments being sold on Super Area basis and, reserving the right to increase or decrease the flat area.

(ii) Not expressly disclosing the applicable laws, rules and regulation *etc.* with respect to the projects being developed.

(iii) Reserving the right of further construction on any portion of the project land or terrace or building and to take advantage of any increase in FAR/ FSI being available in the future.

(iv) Charging high interest from the apartment owners on delayed payments as against payment of significantly lower interest/ inadequate compensation on account of delay on the part of the builder in implementation of the project.

(v) Restricting the rights, title and interests of apartment allottees to the apartments being sold, and retaining the right to allot, sale or transfer any interests in the common areas and facilities as per their discretion.

(vi) Fastening the liability for defaults, violations or breaches of any laws, bye laws, rules and regulations upon the apartment owners without admitting corresponding liability on the part of builder/ developer.

(vii) Non-disclosure of all the terms and conditions of sale to the prospective buyers at the stage of booking of apartments and taking booking amount from interested buyers without disclosing the terms and conditions of the Sale Agreement to be executed at a later stage.

332. It was observed by the DG that some of these practices, which have cost implications for consumers, impact the final prices of apartments resulting into indirect determination of prices in contravention of the provisions of section 3(3)(a) of the Act. It was also noted by the DG that making provision of services contingent upon acceptance of conditions in the sale agreements pursuant to a tacit understanding tantamounts to controlling the provision of services in contravention of the provisions of section 3(3)(b) of the Act.

333. The DG further noted that CREDAI does provide a platform to its members to meet and discuss various issues related to the real estate sector. However, in the absence of any substantive evidence regarding an agreement, decisions

taken by, or practices carried on by CREDAI, no contravention of the provisions of the Act was found by the DG against CREDAI.

334. The Commission has perused the report of the DG, replies/ objections filed by the parties besides hearing the Informant and the counsel for the appearing parties.

335. It may be noted that as per the provisions contained in section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an AAEC within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be *void*. Further, by virtue of the presumption contained in sub-section (3), any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

336. Thus, section 3(1) of the Act forbids agreements which cause or are likely to cause an AAEC within India. It may be observed that the definition of 'agreement' as given in section 2(b) of the Act requires *inter alia* any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings.

337. Though section 3(1) employs the term 'agreement', the provisions of section 3(3) use different phraseology *viz*. 'agreement' entered into/ 'practice' carried on/ 'decision' taken. Hence, it is evident that the Legislature provided a very wide definition of the term 'agreement' in the Act in contradistinction to the agreements as understood under civil law and the same is also reflected by the usage of the aforesaid phraseology *viz.* practice/ decision *etc*. in section 3(3) of the Act.

338. It is no doubt true that since the prohibition on participating in anti-competitive agreements and the penalties the offenders may incur being well known, it is normal for the activities, which such practices and agreements entail, to take place in a clandestine fashion, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. Even if the competition agency discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it is normally only fragmentary and sparse, so it is often necessary to reconstruct certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an agreement.

339. In the present case, the DG, in order to investigate the issues highlighted by the Commission in the *prima facie* directions, drew a representative sample of the players situated and located across the country. The DG appears to have conducted a comparative study of the flat buyer agreements executed by such builders with their respective buyers. Based on the commonalities listed by the DG, it was concluded that the same reinforce the presumption of 'one follows the other' phenomenon. It was noted by the DG that even though the various clauses of the agreements conveying same or similar intent were differently worded, the same could not have been reached through independent actions of the various builders. Further, as noted *supra*, the DG concluded that the same

amounted to contravention of the provisions of section 3(3)(a) and 3(3)(b) of the Act.

340. It may be observed that for establishing contravention of section 3(3) read with section 3(1) of the Act, some evidence of practice carried on or decision taken by CREDAI which further results into price fixing, limiting and controlling provision of services *etc*. has to be shown. In the present case, the DG did not find any evidence which is suggestive or indicative of any role played by CREDAI in providing its platform to the members for anti-competitive practices. In such a scenario, it was incumbent upon the DG to have gathered sufficient evidence in light of the thresholds laid down in the Act. The DG, *de hors* the platform of CREDAI for conducting the impugned practices, did not find any material other than the agreements executed between the builders and the buyers containing the common clauses to a varying degree. Such commonality, in the absence of any evidence to establish role of CREDAI or understanding, arrangement or action in concert between the individual enterprises which are arrayed as opposite parties, cannot be held to be in contravention of the provisions of section 3(3) read with section 3(1) of the Act in the present case.

341. The Commission too has looked into the matter in great depth and found no evidence to corroborate that CREDAI has provided any platform, directly or indirectly to its members for indulging in any anti-competitive practice. The Commission, however, hastens to add that in certain market structures, commonality of clauses may be taken as a plus factor to corroborate the parallel conduct for the purposes of reaching a finding of contravention of the provisions of section 3 of the Act. In the present case, there are over 9000 members of CREDAI who are operating in the sector. Besides, it is also seen that there are other players in this market who are not associated with CREDAI. As the DG has not produced sufficient material on record wherefrom any concert amongst the players can be gleaned, it is futile to examine the common practices to ascertain the contravention of the relevant provisions of the law.

342. Though the Informant has very strenuously highlighted the role played by CREDAI in providing a platform to its members, nothing has been shown which can reflect a conduct falling foul of the relevant provisions. As argued by the Informant, the Commission notes that CREDAI does provide a platform to real estate enterprises to meet and discuss issues of common interest and find common solutions to their problems to further the commercial interest of its members who are all builders/ developers.

343. However, as noted above, the DG did not find any evidence which is suggestive or indicative of any role played by CREDAI in providing its platform to the members for anti-competitive practices.

344. In the present case, the Informant harped upon the Code of Conduct framed by CREDAI National as a self-regulation which is applicable to all the members of CREDAI. It was alleged that the same is mandatory for its members association.

345. The attention of the Commission was invited by the Informant to the various clauses of the Code of Conduct including the clauses relating to booking, agreement to sell & forfeiture, which have been described by the Informant as '*the mother of all the ills prevailing in the residential real estate market in India*'.

346. On a careful consideration of the matter, it is difficult to accede to the contention of the Informant that the same contravenes the provisions of the Act. Resultantly, with the aforesaid observations, the Commission differs with the findings of the DG on issue of contravention of the provisions of section 3(3)(a) & (b) of the Act and holds that not sufficient evidence obtains on record which warrants a finding of contravention in this case.

347. Having held so, the Commission deems it appropriate to highlight that the consumers in the real estate market face various hardships. Though the Commission did not find any collusion between the parties due to the absence

of evidence in the present case, the same is in no way suggestive of any intrinsic fairness of the impugned clauses. The Commission notes that non-disclosure of calculation of total common area and its proportionate apportionment on the apartments being sold on super area basis only accentuates the already existing asymmetrical relationship between the builder and the buyer. Further, by not expressly disclosing the applicable laws, rules and regulation *etc.* with respect to the projects being developed, the consumers are often left to fend for themselves. Similarly, fastening the liability for defaults, violations or breaches of any laws, bye laws, rules and regulations upon the apartment owners without admitting corresponding liability on the part of builder/ developer, is far from fair. Besides, the conduct of builders in non-disclosure of all the terms and conditions of sale to the prospective buyers at the stage of booking of apartments and taking the booking amount from interested buyers without disclosing the final terms and conditions of the sale agreement to be executed at a later stage, is plain exploitative.

348. The parties tried to ratiocinate their parallel conduct by passing the same of as common industry practices and to further enable the consumers to compare *apples with apples* through the standardization of agreements. In fact, it was canvassed by some of the parties the common industry practices are to be found across the industries and the same cannot be held to be violative of any law. Examples of common industry practices such as 'goods once sold, cannot be returned' were advanced to fortify such submissions.

349. The Commission notes that the plea is thoroughly misconceived and misplaced. Every industry seeks to evolve common standards and terms for efficient functioning of the markets and for the benefit of all the stakeholders. Such practices, including the examples cited by the counsel for the appearing parties are usually not intrinsically frowned upon unless the same are demonstrably against the interest of one set of stakeholders and against the letter and spirit of a statutory framework.

350. It is no doubt true that the industries over a period of time may develop common practices to bring standardization in their products and services, but the arguments cannot be stretched to a level where the practices which are plainly exploitative and in contravention of the extant laws can be sustained and upheld. In fact, in a competitive market, the incumbent players would naturally strive to deviate from such standards in order to acquire the market share.

351. In the present case, some of the practices found by the DG as anti-competitive can in no case be said to fall in the category of industry practices which are innocuous in nature. It appears that the parties though taking such pleas have not adduced a single example where such common industry practices have helped the consumers by ameliorating their asymmetric position. The Commission notes that instead of providing an informed and fair comparison, in the garb of 'industry practices' the players have created a situation where the consumers are left to fend for themselves. If the argument of the parties is taken to its logical conclusion, it would appear that all players are competing to provide consumers the option to compare 'one rotten apple with another rotten apple'. The race seems to reach to the bottom of the recess which cannot be countenanced and approved of, notwithstanding the lack of finding of contravention of the Act in the instant case. In view of the above, the Commission has no hesitation, in light of the material on record, to hold that the plea is only a ruse and is completely devoid of any substance.

352. The Commission while passing its directions for investigation was cognizant of such anomalies in the functioning of the real estate market.

353. It may be noticed thereform that on a preliminary consideration, it appeared difficult that such practices could be present across the broad and be carried on commonly by the real estate developers in a competitive market. The DG investigation has only strengthened the anxiety of the Commission. Though the DG investigated the representative sample to examine the impugned

conduct of the players in the real estate sector, the Commission is conscious of the prevalence of such practices across the sector. The Commission has received many informations against several real estate players alleging exploitative conduct and unfair terms being imposed by the builders. However, most of these cases could not be carried further as they related to abuse of dominance by parties which were *prima facie* not found to be in a dominant position. Thus, it could not be gainsaid that the sector suffers from inertia generated due to lack of competitive pressure which would force the players to offer better services and fair terms.

354. In terms of the scheme of the Act and the mandate enshrined thereunder, it is enjoined upon the Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets. Thus, when the markets are not functioning or distortions are created through collusive or exclusionary/ exploitative conduct or practices, it is incumbent upon the Commission to take appropriate measures in exercise of its enforcement, regulatory and advocacy remit. In the present case, due to the nature of the market structure, sufficient evidence was not found to establish an agreement spanning across the regions and players. Notwithstanding the findings of the Commission on this issue, it is nobody's case that the sector does not suffer from lack of competitiveness and consequent unfair conduct resorted to by the players. In the normal competitive markets, market participants would continuously strive to beat each other through a bouquet of better product offerings in terms of quality, pricing as well as terms. However, it has been observed by the Commission that there appears to be no market pressure which can prod the participants to improve their services.

355. The Commission also notices that in recent times the self-regulatory standards in the sector have shown a decline. The need for external regulation to supplement self-regulation is constantly felt. The role of CREDAI in this

regard as the apex body for private real estate developers in India, representing over 9,000 developers through 22 states and 150 city level member associations across the country, also needs to be harnessed. It is hoped that CREDAI shall follow its stated objectives to maintain integrity and transparency in the profession of real estate development.

356. Notwithstanding the findings recorded in this order, the Commission is of the firm opinion that the issues raised by the Informant are not only pertinent but need to be addressed by the policy makers and regulators through appropriate legislative tools in tandem with the self-regulatory role played by CREDAI.

357. The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has remained largely unregulated, with absence of lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. With these concerns in the backdrop, the legislature has acknowledged the regulatory vacuum in the real estate sector and consequent need for its regulation through the Real Estate (Regulation and Development) Bill. The proposed Bill *inter alia* provides for the establishment of the Real Estate Regulatory Authority for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector.

358. The Commission hopes and trusts that the Parliament shall take immediate and urgent steps to enact such a law which will supplement the existing regulatory architecture in addressing the grievances of the purchasers through a mix of structural and behavioral remedies.

359. In view of the totality of the facts and circumstances of the present case, the Commission in exercise and discharge of its mandate, deems it appropriate to strongly recommend that not only the parties investigated but all the players in the sector take appropriate voluntary measures to address the concerns projected in the present case.

360. Lastly, it may be noted that one of the opposite parties *viz.* Bengal Ambuja Housing Development Limited, Ambuja Neotia Group moved a request dated 11.08.2014 seeking *inter alia* cross-examination of the Informant. The Commission *vide* its order dated 28.08.2014 decided to consider the issue of cross-examination at the time of final hearing of the case. It may be observed that in the said application no reasons have been detailed justifying grant of such opportunity.

361. The procedure for taking evidence including cross-examination of the persons giving evidence, as provided in Regulation 41 of the General Regulations may be noted:

> *Taking of Evidence*
>
> *Regulation 41(1)...*
>
> *(2)...*
>
> *(3)...*
>
> *(4) The Commission or the Director General, as the case may be, may call for the parties to lead evidence by way of affidavit or lead oral evidence in the matter.*
>
> *(5) If the Commission or the Director General, as the case may be, directs evidence by party to be led by way of oral submission, the Commission or the Director General, as the case may be, if considered necessary or expedient grant an opportunity to the other party or parties as the case may be, to cross-examine the person giving the evidence.*
>
> *(6)...*
>
> *(7)...*

362. In view of the above provisions, it is evident that the Commission or the DG has the discretion to take evidence either by way of affidavit or by directing the parties to lead oral evidence in the matter. However, if the Commission or the DG, as the case may be, directs evidence by a party to be led by way of oral submission, the Commission or the DG, as the case may be, if considered necessary or expedient, grant an opportunity to the other party or parties, as the case may be, to cross-examine the person giving the evidence.

363. Thus, it is only when the evidence is directed to be led by way of oral submission that the Commission or the DG grant an opportunity to the other parties to cross-examine the person giving the evidence, if considered necessary or expedient. Hence, even when evidence is led by oral submission, the Commission or the DG retains the discretion to consider the request for grant of opportunity to other parties to cross-examine the person giving the evidence if the same is considered necessary or expedient. The issue of necessity or expediency depends upon the factual matrix of each case. As a general rule, when the, information supplied by a party is based on personal knowledge, the other party should be granted the right to cross-examine the party giving evidence. When the information provided by a party is documentary or based on documents, the other party need not be granted the right to cross-examine the party giving the evidence. Thus, whether an opportunity of cross-examination is to be given or not depends upon the circumstances of each case.

364. In the present case, it is not the case of the applicant that information supplied by the Informant is based on personal knowledge which cannot be rebutted on affidavit. Resultantly, the request of the applicant is misconceived in as much as the Opposite Party has got sufficient opportunity to meet the allegations and findings of the DG. The request is accordingly declined.

365. Before concluding, it is clarified that the final findings recorded in the present order are essentially based on insufficiency of evidence. The diverse legal pleas advanced by the parties in support of their submissions on various issues

ranging from the remit of the DG to investigate the matter to the interpretation of the various provisions of the Act, though not dealt with in detail, should not be understood as having found acceptance of the Commission.

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

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi

Date: 03/02/2015