COMPETITION COMMISSION OF INDIA

Case Nos. 72 of 2011; 16, 34 & 53 of 2012; and 45 of 2013

Case No. 72 of 2011

In Re:

Shri Sunil Bansal
Mrs. Manjula Bansal
Shri Anil Bansal
Mrs. Saroj Bansal
Shri Pawan Bansal
Mrs. Meena Bansal

At:

2030/4, Rampura Mohalla
Hisar
Haryana **Informants**

And

1. **M/s Jaiprakash Associates Ltd.**
   Sector 128
   Noida (U.P.) **Opposite Party No. 1**

2. **M/s Deutsche Postbank Home Finance Ltd.**
   201, 2nd Floor, Vipul Agora, M.G. Road
   Gurgaon **Opposite Party No. 2**

WITH

Case No. 16 of 2012

In Re:

Shri Deepak Kapoor
59, Nehru Apartment
Outer Ring Road
Kalkaji
New Delhi-110019 **Informant**

And

1. **M/s Jaiprakash Associates Ltd.**
   Jaypee Greens, Sector-128
   Noida-201304 **Opposite Party No. 1**

2. **M/s Jaypee Infratech Limited**
   Sector-128
   Noida-201304 **Opposite Party No. 2**

3. **New Okhla Industrial Development Authority**
   Admin Building
   Sector 6
   Noida (U.P.) **Opposite Party No. 3**

WITH

Case No. 34 of 2012

In Re:

Shri Tarsem Chand
Smt. Kanta Devi Mittal

At:
D-2, Maharani Bagh
New Delhi-110065 **Informants**

And

M/s Jaiprakash Associates Ltd. **Opposite Party**

WITH

Case No. 53 of 2012

In Re:

Shri Sanjay Bhargava
Smt. Anjali Bhargava

At:
A-106, New Friends Colony
New Delhi-110025 **Informants**

And

1. **M/s Jaiprakash Associates Ltd.**
   Jaypee Greens
   Sector-128
   Noida-201304 (UP) **Opposite Party No. 1**

2. **Jaypee Infratech Limited**
   Jaypee Greens
   Sector-128
   Noida-201304 (U.P.) **Opposite Party No. 2**

WITH

Case No. 45 of 2013

In Re:

Shri Raghuvinder Singh
V-2/4 Jaypee Green
Golf Course,
Greater Noida (U.P.) **Informant**

And

1. **M/s Jaiprakash Associates Ltd.**
   Jaypee Greens
   Sector-128
   Noida (U.P.) **Opposite Party No. 1**

2. **Shri Jay Prakash Gaur**
   Managing Director
   Jai Prakash Associate Ltd.

Sector-128
Noida (U.P.) **Opposite Party No. 2**

3. **Shri Manoj Gaur**
Director
Jai Prakash Associate Ltd.
Sector-128
Noida (U.P.) **Opposite Party No. 3**

4. **Authorized Signatory**
Jai Prakash Associate Ltd.
Sector-128
Noida (U.P.) **Opposite Party No. 4**

CORAM

Mr. Ashok Chawla
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Appearances: Shri Sunil Bansal, Informant-in-Person in Case No. 72 of 2011.

Shri Deepak Kapoor, Informant-in-Person in Case No. 16 of 2012.

Shri A. S. Chandhiok, Senior Advocate with Shri Sudhir Sharma, Shri G.R. Bhatia, Ms. Kanika Chaudhary Nayar, Shri Arjun Nihal Singh, Ms. Deeksha Manchanda, Ms. Shweta, Ms. Monika, Ms. Yamini, Advocates for M/s Jai Prakash Associates Ltd. alongwith Shri R.L. Batta, Jt. President Legal and Shri Traun Sharma, Law Officer.

ORDER

This common order shall dispose of the informations filed in C. Nos. 72 of 2011, 16 of 2012, 34 of 2012, 53 of 2012 and 45 of 2013 as similar issues are involved in these cases.

Facts

1. Facts of the cases may be briefly noted.

Case No. 72 of 2011

1.1. The information in Case No. 72 of 2011 has been filed under section 19(1)(a) of the Competition Act, 2002 ('the Act') by Shri Sunil Bansal, Mrs. Manjula Bansal, Shri Anil Bansal, Mrs. Saroj Bansal, Shri Pawan Bansal and Mrs. Meena Bansal against M/s Jaiprakash Associates Ltd. and M/s Deutsche Postbank Home Finance Ltd. alleging *inter alia* contravention of the provisions of section 4 of the Act.

Case No. 16 of 2012

1.2. The information in Case No. 16 of 2012 has been filed under section 19(1)(a) of Act by Shri Deepak Kapoor against M/s Jaiprakash Associates Ltd., M/s

Jaypee Infratech Ltd. and New Okhla Industrial Development Authority alleging *inter alia* contravention of the provisions of section 4 of the Act.

Case No. 34 of 2012

1.3. The information in Case No. 34 of 2012 has been filed under section 19(1)(a) of the Act by Shri Tarsem Chand and Mrs. Kanta Devi Mittal against M/s Jaiprakash Associates Ltd. alleging *inter alia* contravention of the provisions of section 4 of the Act.

Case No. 53 of 2012

1.4. The information in Case No. 53 of 2012 has been filed under section 19(1)(a) of the Act by Shri Sanjay Bhargava and Mrs. Anjali Bhargava against M/s Jaiprakash Associates Ltd. and M/s Jaypee Infratech Ltd. alleging *inter alia* contravention of the provisions of sections 4 of the Act.

Case No.45 of 2013

1.5. The information in Case No. 45 of 2013 has been filed under section 19(1)(a) of the Act by Shri Raghuvinder Singh against M/s Jaiprakash Associates Ltd. alleging *inter alia* contravention of the provisions of section 4 of the Act.

2. The Informants in all the above cases will be collectively referred to as the 'Informants' and M/s Jaiprakash Associates Ltd. as JAL, M/s Jaypee Infratech Ltd. as JIL and New Okhla Industrial Development Authority as NOIDA. JAL and JIL would be referred to as Jaypee Group hereinafter in this order.

3. In Case Nos. 16 of 2012 and 45 of 2013, the Informants are allottees of residential units in JAL's project named 'Jaypee Aman' at Noida. In Case Nos. 34, 72 and 53 of 2012, the Informants are allottees of residential units in 'Jaypee

Sun Court and Jaypee Sea Court Apartments' at Greater Noida.

4. JAL and JIL are engaged in real estate business. M/s Deutsche Postbank Home Finance Ltd. is a financial services provider to Indian corporate, institutional and individual clients and NOIDA was constituted under the U.P. Industrial Area Development Act, 1976 with a view to develop an integrated industrial township for the industrial growth of the area.

5. The Informants in all the above mentioned cases alleged that JAL along with its group company *i.e*. JIL abused its dominant position by imposing highly arbitrary, unfair and unreasonable conditions in the agreements for allotment of residential apartments which blatantly violated the principles of free and fair competition and thereby contravened sections 4(2)(a) and 4(2)(e) of the Act.

6. The following terms and conditions of the Provisional Allotment of an Apartment were alleged to have violated section 4 of the Act: the application form did not mention the name of the project; columns relating to consideration (basic sale price, car parking, preferential location charges *etc*.) were left blank; the undertaking along with the application form was onerous and one sided; introduction of clauses relating to maintenance deposit/ maintenance charges/ club membership fees were not told at the time of booking; making obligatory for applicant/ allottee to sign a separate maintenance agreement for maintenance of common areas and facilities; clause stating that applicant/ allottee would have no right, title or interest on the premises either during its construction or after its completion till the execution of Indenture of Conveyance; it was stated that the Indenture of Conveyance shall not absolve applicant/ allottee of obligations under the standard terms and conditions; unilateral changes in the original plan and instead of 24 floors, the plan was modified to build 28 floors; delay in

delivery of possession and since the agreement was highly one sided and arbitrary, no compensation was provided for this long delay in delivery; the terms and conditions provided an absolute right to JAL to reject/ not to allot the apartment to the applicant without assigning any reason while the applicant had to give an undertaking that the application for allotment was irrevocable, unless JAL desired so; there was no liability on the opposite party builder in case of delay and breach of contract while there was a stringent condition put on consumers for breach of contracts; it was provided that it was at the discretion of JAL in case of a breach of contract by the applicant, to cancel the allotment and to forfeit the earnest money of the allottee, and this could be, even before final installment was made; JAL had unfettered rights to any variations, deletions, alternations of the plans, super areas, specifications, dimensions, designs *etc*. and the Informants had no right to question or dispute such changes; JAL failed to construct the apartment as per the specifications assured by it in its advertisements and representations and that the Informants were provided with shoddily constructed, poor quality flats which by no means could be considered of a 'premium' category as advertised; it was also stated that the agreement provided a *force majeure* clause giving the right to JAL to indefinitely delay the project without any obligations or for reasons of non-availability of building material, water supply, electricity, strike *etc*. which are not the reasons generally under any law of *force majeure*.

Directions to the DG

7. In Case No. 72 of 2011, the Commission after considering the entire material available on record *vide* its order dated 22.11.2011 directed the Director General (DG) to cause an investigation to be made into the matter.

8. In Case No. 16 of 2012, the Commission *vide* its order dated 27.03.20112 directed the DG to cause an investigation into the matter as well.

9. In Case Nos. 34 of 2012 and 53 of 2012, the Commission *vide* its separate orders dated 07.11.2012 directed the DG to investigate into the matters.

10. In Case No. 45 of 2013, the Commission *vide* its order dated 01.07.2013 directed the DG to investigate into the matter.

11. Further, the Commission *vide* its separate orders clubbed the investigation of Case Nos. 72 of 2011, 16 of 2012, 34 of 2012 and 53 of 2012.The DG, after receiving the directions from the Commission, investigated the matters and filed a common investigation report in all these cases on 18.06.2013.In Case No. 45 of 2013, the DG also submitted its investigation report on 31.12.2013. It was stated that the investigation in Case No. 45 of 2013 was in line with the investigation report dated 18.06.2013 since the nature of allegations was similar to the once in the previous cases.

Investigations by the DG

DG Reports dated 18.06.2013 and 31.12.2013

12. It was first observed by the DG in Case No. 72 of 2011 that none of the paragraphs either in the information or in the order passed under section 26(1) of the Act had allegations related to M/s Deutsche Postbank Home Finance Ltd. The DG further noted that NOIDA was constituted under the U.P. Industrial Area Development Act, 1976 and has no control over JAL and JIL. Therefore, no further examination was done against them.

13. The DG then dealt with the issue of jurisdiction which was raised by JAL. JAL stated that since it was engaged in sale of "immovable property", and not in the provision of services, section 2(i) of the Act would not be applicable in the instant matter. It was also argued that sale of apartment is not a provision of service. In this regard, the DG cited the provisions of section 2(u) of the Act, section 65 (105) of the Finance Act, 1994 and decision of the Commission in Case No. 19 of 2010 to deduce that Jaypee Group entities are providing services to the consumers while they are developing and selling apartments and hence the Commission has jurisdiction over the cases.

14. The DG also referred to the judgment of the Hon'ble High Court of Bombay in *Kingfisher Airline* v. *Competition Commission of India* wherein it was held that although the agreements belonged to the period prior to May 20, 2009 the effects thereof were given in the year 2009-10 and hence the same could be examined. In the instant case also, though the imposition of the terms and conditions in the agreement were prior to May 20, 2009, the effects of the same were given in the year 2009-10. Therefore, it was concluded by the DG that the matters could be examined under the provisions of section 4 of the Act. It was further noted that the apartments were sold and agreements were executed even after May 2009.

15. The DG further examined whether Jaypee Group has dominance in the market or not. The relevant product market was first analysed. It was noted by the DG that development norms for a residential house are altogether different from other kind of properties. Further, once a consumer decides to buy a residential unit/ apartment, the factors of substitutability are restricted to the services that would be provided by the developer in respect of those residential apartments. That buyers will consider whether other players operating in the same market are able to offer similar services or not. It was also noted that the company's brand

value, background, number of projects completed, delivery time, value for money, amenities, design, materials, fixtures, location of the project, proximity to expressway *etc*. are some of the factors usually considered by a consumer before buying an apartment/ unit which would determine the aspect of substitutability. Thus, substitutability/ inter-changeability is possible within the entire market of services provided by the developers/ builders in respect of residential apartments launched in a particular period. After having considered the above factors and drawing reference from *Belaire Owners' Association* v. *DLF Ltd. & Ors* (DLF case), the DG delineated the relevant product market as '*the provision of services for development and sale of residential apartments'.*

16. To determine the relevant geographic market, it was first noted that the instant case refers to the residential units situated at Noida and Greater Noida. It was further noted that a customer who has decided to buy a residential unit at Noida or Greater Noida as per his needs, requirements and willingness or otherwise, would not opt for any other location. Therefore, residential units in Noida and Greater Noida are distinctively homogeneous and the preference given by a customer to Noida and Greater Noida for his own reasons makes them distinguishable from the neighbouring areas. That apartments situated in those areas cannot be interchangeable with other areas. It was also noted that the rules and regulations applicable in Noida and Greater Noida for development of housing complexes are different from other locations such as Ghaziabad, Gurgaon, Delhi, *etc*. In the case of Noida and Greater Noida, most of the housing complexes are built on the land acquired by the builder on leasehold basis unlike the other cities mentioned above. In view of the above analysis, the DG concluded that the relevant geographic market would be that of *Noida and Greater Noida.* Accordingly the relevant market was defined as *the provision of services for development and sale of residential apartments in Noida and*

Greater Noida'. Next, the DG examined the issue of dominance of Jaypee Group in the relevant market. For this purpose, the real estate segment of JAL and JIL as a whole was considered.

17. To assess dominance, the DG examined the number of dwelling units by builders in the relevant geographic market till 31.03.2012. It was noted that that the top 3 groups were Amrapali, Jaypee and Supertech which had 36,211, 33,253 and 21,445 dwelling units respectively. Next to them was 3C Company which had 11,037 dwelling units to offer for sale. Other builders/ developers did not have matching figures to compare with the top 4 as the number of dwelling units of the next 5 ranged between 9043 to 21 only. The top market share on the basis of dwelling units was that of Amrapali Group with 28.30% share and Jaypee Group came second with 25.99%. M/s Supertech Limited came at third position with 16.76% and was still close with Jaypee Group whereas 3C Company and M/s Unitech were there with 8.63% and 7.06% respectively.

18. The DG further considered the market share of Jaypee Group on the basis of sales of the available dwelling units for the period 2009-10 to 2011-12 and it was noted that the market share of Jaypee Group was much less than the rival competitor. After having examined the size and resources of Jaypee Group and its competitors in the relevant market, the DG was of the view that Jaypee Group did not have any commercial advantage over its competitors due to its economic strength or due to its size or resources. The land reserve was also analyzed and it was concluded that though Jaypee Group had the largest land reserves along the Yamuna Expressway, the use of land was of different nature and not comparable with the land allotted to other builders. Other aspects like entry barrier, consumer dependence and countervailing buying power were also taken into consideration. In view of the above, the DG opined that Jaypee Group did not have the position

of strength that could enable it to operate independently of competitive forces prevailing in the relevant market or to affect its competitors or consumers in its favour. Therefore, it was not dominant in the relevant market in terms of section 4 of the Act.

19. The DG also concluded that the though several allegations were found to be unfair, the same did not emanate out of dominant position of Jaypee Group. Therefore, no violation was found against Jaypee Group within the meaning of section 4 of the Act.

Consideration of the DG Reports by the Commission

20. The Commission considered the investigation reports submitted by the DG and was of the view that a further investigation was required in the matters. Therefore, the DG was directed to investigate the matter further *vide* order dated 02.01.2014 under section 26(7) of the Act. In this order, the Commission also noted that since the allegations involved in the cases are of the same nature, it was directed that the DG submit a consolidated supplementary report on the same. Accordingly, the supplementary report was submitted by the DG to the Commission on 11.12.2014.

Supplementary DG Report dated 11.12.2014

21. In its Supplementary Report, the DG delved more into the aspect of relevant market, dominance and then the alleged abuse.

22. The DG assessed the relevant product market by comparing the features of 'Integrated Township' with other standalone residential apartments. The DG

gathered that an integrated township is a cluster of residential units and commercial business within a marked area. It has units of different size and nature with associated infrastructure like wide and exclusive roads, schools, hospitals, shopping facilities, golf courses, parks, entertainment centers, convention centers, *etc*. These facilities/ amenities, add-ons may vary depending on the local needs and choices of customers/ buyers and the way product and package are developed and marketed by the developers. The DG further elaborated that an integrated township's emphasis is on creating sustainable ecosystem with formidable infrastructure backed by water, power, roads, drainage and sewage. That township usually have lower Floor Area Ratio than that in other residential complexes and, therefore, generally have more open spaces. Commuting to office, entertainment centers, hospitals, *etc*. were also factors that were considered by the DG.

23. With regard to the standalone residential towers, the DG stated that such standalone residential towers do not offer the kind of infrastructure and facilities otherwise offered in an integrated township. That residents have to depend on independent markets, hospitals, educational institutions, *etc*. located at a distance and that residents in an integrated township do not have to depend on anybody to avail such services as they are constructed within the township. It was further stated that infrastructure like roads, schools, convenience shopping facilities, drainage & sewage facilities, *etc*. are not normally part of such standalone residential towers.

24. The DG concluded by stating that these two products are distinct from each other and that they are not similar enough to allow customers to switch easily from one to another. That there is sufficient ground for accepting the fact that the product 'integrated township' is a separate product from the point of structure as well as

the conditions of competition. A buyer has wide range of choices within the integrated township. There can be effective competition between the products which form part of the integrated township and this presupposed that there is sufficient degree of interchangeability among all the products within the integrated township. Therefore, the DG deduced that the relevant product market in the instant matter would be '*the integrated township'.*

25. The DG further stated that Noida and Greater Noida would be the relevant geographic market on the same ground as cited in previous reports. Therefore, the relevant market was delineated as *'provision of services for development of integrated township in the territory of Noida and Greater Noida'.*

26. On the issue of dominance of Jaypee Group, the DG noted that the projects developed by it cannot be compared with other developers' projects in terms of size and scale, magnitude, amenities, facilities, usage and other features of integrated township in the relevant geographic market. The information provided in Jaypee Group's website further confirmed that its project was indeed an integrated township. It was also noted that the projects of other players depend upon the infrastructure created by Noida/ Greater Noida authorities whereas in case of Jaypee Group the entire infrastructure pertaining to road, sewage, parks, electricity, water, *etc*. has been created by Jaypee Group within the overall framework stipulated by the concerned authorities.

27. After having examined the information furnished by the authorities and other real estate developers in the market, the DG gathered that Jaypee Group has the largest market share in the relevant market. On analysis of details of land bank reserves, it was noted that, as on 13.03.2012, Jaypee Group is much bigger in comparison to other competitors in the market. Also, it was gathered that even

the combined land bank of the next five competitors is less than half the total land bank of Jaypee Group. The DG took note of the fact that Jaypee Group is using its own cement manufacturing units for the construction of the units which undoubtedly gives commercial advantage to Jaypee Group. Considering the size and resources, total land bank, assets and surplus and also the advantage of having cement manufacturing plants, the DG concluded that these factors make Jaypee Group dominant and, therefore, it has the ability to operate independent of market forces and competition.

28. After having examined the allegations leveled in each of the cases above, it was concluded by the DG that the terms and conditions imposed by Jaypee Group in the Provisional Allotment Agreement were unfair. The DG opined that Jaypee Group has violated section 4(2)(a)(i) of the Act.

29. The Commission considered the Supplementary DG report in its ordinary meeting on 30.12.2014 and decided to forward copies thereof to the parties for filing their replies/ objections to the same. The Commission also directed the parties to appear for oral hearing, if so desired. Subsequently, arguments of the parties were heard on various dates.

Replies/ Objections/ Submissions of the parties

30. The parties filed their respective replies/ objections to the Supplementary Report of the DG besides making oral submissions. The JAL and JIL filed a common reply in all the cases.

Informants

31. With respect to the DG Report dated 18.06.2013, the Informants in Case Nos. 16 of 2012 and 53 of 2012 submitted that the said investigation was flawed and biased. The Informants did not agree with the relevant product market as defined by the DG. The Informants also did not agree with the delineation of the relevant geographic market. Disagreeing with the DG's conclusion that Jaypee Group is not dominant in the relevant market, it was submitted that such finding lacked considerations of various other factors and was, therefore, erroneous. The Informant in Case No. 16 of 2012 further argued that the market share criteria applied by the DG were vague and arbitrary.

32. The Informant in Case No. 16 of 2012 submitted that NOIDA being a development authority let JAL and JIL launch and advertise real estate projects on the land not belonging to them right under its nose. That JAL and JIL collected crores of money for their projects from buyers even before the execution of Lease Deed between JAL, JIL and NOIDA. Therefore, NOIDA should be impleaded for not performing its duties under the U.P. Act.

33. The Informant in Case No. 72 of 2011 filed its written submissions dated 13.11.2013 wherein it was argued that the DG in its investigation report 18.06.2013 has found all the allegations against Jaypee Group to be true. However, it was submitted that the relevant market was wrongly delineated by the DG. It was also alleged that the Opposite Party did not produce relevant records and documents before the DG during the course of the investigation. It was prayed that the Commissions may order re-investigation to explore all the loose ends to arrive at the truth.

34. No written submissions were filed by the Informants in Case No. 34 of 2012 and Case No. 45 of 2013.

M/s Deutsche Postbank Home Finance Ltd.

35. M/s Deutsche Postbank Home Finance Ltd. in its reply prayed that it may not be impleaded in the proceedings since no charges have been found against it.

Jaypee Group (JAL/ JIL)

36. It was submitted that the DG's findings in the supplementary report were on the basis of conjectures, surmises and subjective opinion and the supplementary report is fraught with such instances. It was argued that in the instant case, despite procedural requirements under section 26(7) read with section 26(5) of the Act, no comments or objections were invited from JAL. As such, passing the order under section 26(7) of the Act without complying with the provisions of the section was bad in law and an erroneous exercise of jurisdiction. It was further submitted that an order under section 26 (7) of the Act is in the nature of an order *simpliciter* and should not provide detailed grounds for the DG on which the investigation has to proceed. That an order under section 26(7) of the Act in that respect is similar to the order passed under section 26(1) of the Act as both merely require the DG to conduct an investigation

37. It was further contended that the definition of 'goods' as provided under the Act refers to the Sale of Goods Act, 1930, which expressly excludes immovable property from its ambit. Therefore, the sale of residential unit in the instant case would not amount to sale of goods. That the transaction pertains strictly to sale of the residential unit by JAL and does not in any manner contemplate the

provision of services as between JAL and the prospective allottees. It was also contended that section 65(105) (zzq) of Chapter V of the Finance Act, 1994 was only for the purposes of the Finance Act, 1994 and has no consequence on the Act in question.

38. It was also submitted that the instant case does not raise any competition concerns and is purely contractual in nature and as such the Informants ought to have approached the relevant authorities/ forums agitating the contractual/ commercial disputes.

39. On the issue of retrospective effect of the Act, it was argued that the terms of the agreement, *qua* the sale of residential units between JAL and the Informants in Case 72 of 2011, Case No. 34 of 2012 and Case No. 53 of 2012, were agreed by and between the allottees and JAL at the time of bookings which were made in the years 2007, 2006 and 2007 respectively, *i.e.* much prior to coming into force of section 4 of the Act. Hence, section 4 of the Act, being prospective in nature, could not be applied to such terms and conditions in the aforementioned cases. To substantiate, reference was made to the Hon'ble Competition Appellate Tribunal's order in *M/s DLF* v. *Competition Commission of India & Ors.* wherein it was observed that mere presence of onerous clauses in an agreement, voluntarily entered into, cannot amount to an abuse of section 4(2)(a) of the Act.

40. Disagreeing with the delineation of the relevant product market by the DG in the Supplementary Report, it was contended that the projects of JAL in Noida and Greater Noida were not integrated township and that the term was used only for marketing purposes. It was submitted that what was being offered for sale in the instant case were apartments and/or residential units and/or plots and not the integrated township. It was further submitted that the DG has failed to consider

that there was no statutory definition of Integrated Township in real estate projects being developed in Noida and Greater Noida. Moreover, the same was not covered by any comprehensive or uniform regulatory regime in India.

41. It was argued that even residential complexes and group housing societies will have the same amenities and facilities which will make it substitutable and interchangeable with integrated township and this completely negates the findings of the DG that there exists a separate relevant product market in the nature of integrated township. It was reiterated that there were various builders in the region of Noida and Greater Noida who are marketing their development as integrated township or who are developing their projects with similar features as have been described by DG for Integrated Township, but have not named the projects as Integrated Township.

42. With regard to the relevant geographic market, Jaypee Group contended that a prospective buyer would consider residential units of different locations of the NCR for better returns. It was submitted that the properties in Noida and Greater Noida are comparable with properties in NCR including Gurgaon, Faridabad, Ghaziabad, *etc*. Residential properties in Delhi are also taken into consideration due to locational advantage before making investments. Furthermore, it was stated that distant areas like Manesar or Alwar or Bhiwadi or Kundli *etc.* where residential properties are available at a lower price would be considered by a prospective buyer. Jaypee Group has also cited the convenience of improved connectivity on account of Metro and other infrastructure facilities as reasons for customers to actively consider various locations in NCR for investment or residential purposes.

43. It was submitted that the DG has arbitrarily arrived at a conclusion with respect

to the dominant position of JAL on the basis of merely three factors mentioned in the Supplementary Report *viz*., the market share; land bank and resources and vertical integration *vis-à-vis* the cement manufacturing capabilities of Jaiprakash Group. It was contended that JAL was not offering unique facilities/ amenities like education, healthcare, recreation, shopping malls, golf course *etc*. to any of its customers which cannot be enjoyed by the other residents of residential projects in Noida and Greater Noida. The existence of such facilities/ amenities for other projects also indicates that there cannot be any dependence of customers in respect of facilities/ amenities being provided by JAL and that there exists level playing field amongst the players. It was submitted that the DG has provided no data to show that the project of JAL cannot be compared to other developers. It was also pointed out that the DG failed to take into consideration the nature of development being undertaken by JAL, on account of which the land bank is riddled with obligations and that the entire land bank is not meant for residential purposes.

44. It was argued that availability of cement would not offer any significant advantage as it is easily available to other competitors. It was further submitted that the conclusion on market share was grossly misleading as they failed to take into account the figures pertaining to residential townships as provided by Noida and Greater Noida authorities. That its calculation was only limited to JAL, Omaxe and Unitech. It was stated that JAL could not be dominant in the relevant market in the presence of larger players like Noida Authority and Greater Noida Authority. JAL also stated that it was a new entrant in the real estate market. Therefore, it was submitted that the findings of the DG on the dominance of JAL was erroneous.

45. Jaypee Group has provided a detailed justification for imposing the alleged

abusive terms and conditions in the Agreement. It was denied that those terms and conditions were onerous, one-sided, arbitrary or biased towards the developer as alleged. It was argued that the said terms were as per market practice and are followed by all real estate developers. That the DG has erred in concluding that Jaypee Group's conduct was unfair and discriminatory. Therefore, it was submitted that the conduct of Jaypee Group would not amount to abuse within the meaning of the provisions of section 4 of the Act.

46. The Informant in Case No. 16 of 2012 filed detailed response to the reply filed by the Opposite Parties to the supplementary investigation report of the DG. Submissions were made on the application of doctrine of estoppel, promissory estoppel and the doctrine of approbate and reprobate. It was argued that the contention of the Opposite Parties that the concept of integrated township was only a marketing gimmick to puff up their image was contrary to the aforesaid doctrines. To strengthen the contention, excerpts from the annual reports of JAL were quoted *in extenso*. Submissions were also made on the jurisdictional pleas raised by the Opposite Parties. The Informant also supported the order passed by the Commission under section 26(7) of the Act and rebutting the contention of the Opposite Parties on the point contending *contra*.

Analysis

47. On a careful perusal of the information, the reports of the DG and the replies/ objections/ submissions filed/ made by the parties and other material available on record, the following issues arise for consideration and determination in the matter:

(i) Whether the Commission has jurisdiction in the present matters?

(ii) Whether Jaypee Group has violated the provisions of section 4 of the Act.

Issue No. (i) : Jurisdiction

48. Before adverting to the merits of the case, it would be appropriate to deal with the various preliminary and jurisdictional issues raised by the counsel appearing for JAL/ JIL.

49. It was contended by the counsel appearing for JAL/ JIL that in the instant case after due consideration of the Main Report, the Commission *vide* its orders dated 02.01.2014 and 11.02.2014 directed the DG to conduct a further inquiry into the matter in the terms specified therein. It was submitted that the said orders suffer from various infirmities and as such the issuance of the same is in erroneous exercise of jurisdiction. Accordingly, it was argued that the Supplementary DG Report made as a result of the said order is a nullity and ought to be set aside.

50. It was argued that section 26(7) of the Act empowers the Commission to direct for further investigation only if the circumstances mentioned therein are fulfilled. In the instant case, it was submitted that despite procedural requirements under section 26(7) read with section 26(5), no comments or objections were invited from JAL/ JIL and passing the order under section 26(7) of the Act, without complying with the provisions of the section is bad in law and an erroneous exercise of jurisdiction. In this regard, reference was also made to the decision of the Hon'ble Delhi High Court in *Grasim Industries Limited* v. *Competition Commission of India* case wherein it was held that "when the provisions of a statute requires an act to be done in a particular manner, such an act be done only in the prescribed manner and not otherwise."

51. Furthermore, it was pointed out that in the present case, the Commission while passing orders dated 02.01.2014 and 11.02.2014 had delved into minute details of the matter and entered into an adjudicatory process *vis-à-vis* the relevant market and position of strength of JAL/ JIL, thereby sacrificing the independence of the DG. The orders dated 02.01.2014 and 11.02.2014 have, therefore, gone beyond the scope of a direction *simpliciter* as it has pre-determined the findings of the investigation report to be filed by the DG and effectively determined the rights and obligations of the parties to the *lis*.

52. The Commission has very carefully examined the pleas raised by JAL/ JIL. At the outset, it may be observed that the issue raised is no longer *res integra* in as much as the Hon'ble High Court of Delhi in the case of *South Asia LPG Company Private Limited* v. *Competition Commission of India*, LPA No. 857 of 2013 decided on 03.09.2014 has categorically held that the Commission may give directions for further investigation if on the basis of material collected by the DG and after consideration of the objections it is neither able to close the case nor able to proceed from investigation to the inquiry stage, and is of the opinion that there are lacunae/ deficiencies in the report of the DG. Furthermore, it was observed that no hearing has to be given to the person/ enterprise informed/ referred against. It was also held that a direction, under section 26(7) of the Act of "further investigation" is distinct from "causing further inquiry to be made in the matter or itself proceed with further inquiry....". It was observed by the Hon'ble Court that while at the time of ordering "further investigation", the Commission has not formed an opinion of the statute having been contravened, before "causing further inquiry" to be made, formation of opinion (as distinct from *prima facie* opinion under section 26(1)) by the Commission of the statute having been contravened, is a must.

53. In the present case, the counsel for JAL/ JIL appeared before the Commission on 21.08.2013 and submitted that they are in agreement with the findings of the DG. Even thereafter, the counsel appeared before the Commission on 10.09.2013. On perusal of the orders dated 21.08.2013 and 10.09.2013, it is evident that not only the counsel for JAL/ JIL appeared and made submissions on the findings of the DG report but were even granted opportunities to file their responses to the written submissions filed by the Informants.

54. In the aforesaid backdrop, the Commission notes that the counsel for JAL/ JIL were not only given an opportunity to make their comments or objections on the findings of the DG but were even accorded an opportunity of oral hearing which was not even required as held by the Hon'ble High Court of Delhi.

55. In these circumstances, the plea raised by the counsel for JAL/ JIL is found to be devoid of any merits and it is held that no procedural infirmity can be imputed in the Commission ordering further investigation by the DG in the matters.

56. Furthermore, the Commission finds no merit in the plea taken by JAL/ JIL that the orders dated 02.01.2014 and 11.02.2014 have gone beyond the scope of a direction *simpliciter* by pre-determining the findings of the investigation report to be filed by the DG and effectively adjudged the rights and obligations of the parties to the *lis*.

57. It may be noted that the Commission in the said orders has only directed the DG to submit a self-contained investigation report keeping in mind the points specified therein. Moreover, it was also mentioned that the DG was at liberty to consider any other relevant factor. By no stretch of imagination, such a direction can be construed as pre-determining the findings, much less having adjudicatory effect.

58. It was next contended by the counsel appearing for JAL/ JIL that for the present investigation to fall within the jurisdiction of the Commission, the sale of residential units including apartments should either amount to sale of 'goods' or provision of 'services'. It was argued that the activity of sale of the residential units by JAL/ JIL amounts to sale of immovable property and not 'goods' since the term 'goods' as defined under section 2(i) of the Act makes reference to the Sale of Goods Act, 1930 which expressly excludes immovable property from its ambit. As such, it was sought to be canvassed that the sale of the residential units in the instant case would also not amount to sale of goods.

59. The plea is thoroughly misconceived. It may be noted that in a catena of cases the Supreme Court has held that housing activities undertaken by development authorities are services and are covered within the definition of service. Though, the said ruling was given in the context of the Consumer Protection Act, 1986, the same is fully applicable under the scheme of the Competition Act as well, as has been held by the Commission in previous cases and further repeated below for felicity of reference.

60. In *Lucknow Development Authority* v. *M.K. Gupta*, MANU/SC/0178/1994 the Supreme Court while dealing with the issue whether statutory authorities such as Lucknow Development Authority or Delhi Development Authority or Bangalore Development Authority are amenable to the Consumer Protection Act, 1986 for any act or omission relating to housing activity such as delay in delivery of possession of the houses to the allottees, non-completion of the flats within the stipulated time, or defective or faulty construction *etc*. also elaborately and succinctly construed the meaning of 'service' and 'consumer' as provided in the Consumer Protection Act.

61. The Supreme Court negated the contention raised on behalf of development

authorities that the housing activities undertaken by them are not covered under the ambit of term 'service'. The Supreme Court emphatically held that:

> *Construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of a builder or a contractor. The latter being for consideration is service as defined in the Act. Similarly when a statutory authority develops land or allots a site or constructs a house for the benefit of common man it is as much service as by a builder or a contractor. The one is contractual service and other is statutory service. If the service is defective or it is not what was represented then it would be unfair trade practice as defined in the Act. Any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such disputes or claims are not in respect of Immovable property as argued but deficiency in rendering of service of particular standard, quality or grade.*

62. The Supreme Court further held that a person who applies for allotment of a building site or for a flat constructed by a development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered under the definition of 'service of any description'. Housing activity is a service covered in the definition of term 'service'.

63. The rationale given be the Supreme Court in the above referred cases applies with full force in the present matters, more so when considering the fact that the definitions of 'consumer' given in section 2(f) and 'service' in section 2 (u) of the Competition Act, 2002 are wider than the definition of these terms provided in the Consumer Protection Act, 1986. It is thus seen that dealings in real estate

or housing construction has always been taken as service whether it be MRTP Act or Consumer Protection Act or Finance Act.

64. Even without taking the support of the decisions of Supreme Court in the case referred above, a plain reading of section 2(u) of the Act makes it abundantly clear that the activities of JAL/ JIL in context of the present matter squarely fall within the ambit of term 'service'. The relevant clause (u) reads as under:

> *service means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising.*

65. It is clear that the meaning of 'service' as envisaged under the Act is of very wide magnitude and is not exhaustive in application. It is not in dispute that JAL/ JIL undertakes to construct apartments intended for sale to the potential consumers after developing the land. Therefore, it is explicit that this kind of activity is a provision of service in connection with business of real estate or construction. Hence, the contention raised on behalf of JAL/ JIL that sale of an apartment is not covered under the definition of service is wholly misplaced and is devoid of any substance.

66. Lastly, on the jurisdictional grounds, it was argued by JAL/ JIL that the Commission has no jurisdiction in Case No. 72 of 2011, Case No. 34 of 2012

and Case No. 53 of 2012 as the Provisional Allotment Agreements under challenge were entered into prior to 20.05.2009 *i.e.* the period when the relevant provisions of the Act, were not in force. Hence, it was argued that section 4, being prospective in nature, cannot be applied to agreements entered into in these cases. Reliance was placed on the order of the Competition Appellate Tribunal dated 19.05.2014 wherein it was observed that since the concept of '*imposition', 'abuse' or 'dominance' was not present at the time of signing of the Buyers' Agreements, the Buyers' Agreements were perfectly valid and non-abusive.*

67. There is no dispute with the proposition that the Act is not retrospective but prospective in nature. However, that does not mean that the fact of execution of an agreement prior to 20.05.2009 would immunize the alleged abusive conduct of the dominant undertakings from the scrutiny of the Act. It may be noted that the very order of the Hon'ble Appellate Tribunal relied upon by JAL/JIL categorically upheld the jurisdiction of the Commission by holding as under:

> *We therefore, conclude that the CCI had the jurisdiction, but that is not the be-all and end-all of the matter. Since the buyer/ allottees have alleged breach of section 4 of the Act, not only on account of the various clauses in the ABA, but also on some other counts. In respect of all the three residential apartments namely – Belaire, Park Place and Magnolia, the buyers/ allottees complained of imposition of unfair and discriminatory conditions by the action of the Appellant against themselves and this imposition was stated to be after 20th May, 2009. If that is so, then the CCI certainly has the duty and jurisdiction to take into account such impositions. Therefore, even if we do not find any justification on the part of CCI to look into and consider the ABAs, which were dated way back in 2006/2007, we do feel that the complaints about the breach of section 4 of the Act could be and were*

rightly entertained by the CCI, particularly of those impositions, which were post 20th May, 2009. (Para 76)

68. Thus, the Commission is not at all convinced that the fact that the agreements were entered into prior to 20.05.2009 would *ipso facto* absolve JAL/ JIL of the liabilities which arise because of their conduct post- 20.05.2009. Also, the DG has clearly pointed out that even after 20.05.2009, apartment units were sold and agreements came to be executed. Further, JAL/ JIL has not stopped executing agreements of the same nature and with similar clauses/conditions which were previously entered into with the present Informants post- 2009. Looking at the broader spirit of the Act and the duty that has been cast on the Commission by the legislature, it will be inappropriate to decide every case *qua* the Informants only. The Informant is but one of the mediums through which the Commission becomes aware of the distortion of competition or market irregularities. To say that the investigation and analysis of the Commission should be restricted to the conduct of opposite party towards a particular Informant/ consumer would hamper the very objective and spirit of the Act.

69. Lastly, JAL/ JIL argued that the instant matter would come under the Consumer Protection Act, 1986 and the Informants should have approached the appropriate forum. It was further argued that the instant matter does not raise any competition concern and is purely contractual in nature and as such the Informants ought to have approached the appropriate relevant authorities/ forum. The Commission notes that the argument is misplaced. Suffice to mention that availability of remedies before consumer fora does not oust the jurisdiction of the Commission and it is the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other

participants, in markets. Moreover, by virtue of the provisions contained in section 62 of the Act, the provisions of the Competition Act are in addition to, and not in derogation of, the provisions of any other law for the time being in force.

70. In view of the foregoing, the Commission is of the opinion that none of the contentions urged by JAL/ JIL is found sustainable and it is held that the same being devoid of any merit or force are rejected. Accordingly, the Commission has the necessary jurisdiction to examine the issues on merits.

(ii) Whether Jaypee Group has violated the provision of section 4 of the Act

71. In the present cases, the Informants, who were allotees in the real estate projects developed by Jaypee Group, namely, 'Jaypee Aman' in Noida, 'Jaypee Sun Court' and 'Jaypee Sea Court' in Greater Noida, alleged violations of section 4 of the Act.

72. It may be noted that section 4 of the Act prohibits abusive conduct undertaken by a dominant enterprise. Section 4 only applies to enterprises which are dominant and, for the purposes of determining dominance of an enterprise, identification of the relevant market is a *sine qua non*. Accordingly, the Commission deems it appropriate to delineate the relevant market prior to assessing dominance.

73. To determine the alleged abusive instances of an alleged dominant enterprise, the Commission has to first determine the relevant market in terms of the provisions contained in the Act after considering the various factors prescribed therein. Once the relevant market is defined, the issue of dominance has to be examined by the Commission.

Relevant Market

74. Therefore, the Commission proceeds to determine the 'relevant market' having due regard to the 'relevant geographic market' and 'relevant product market'

75. As per section 2(r) of the Act, 'relevant market' means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. Further, the term 'relevant product market' has been defined in section 2(t) of the Act as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. The term 'relevant geographic market' has been defined in section 2(s) of the Act to mean a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

76. For determining whether a market constitutes a 'relevant market' for the purposes of the Act, the Commission is also required to have due regard to the 'relevant geographic market' and 'relevant product market' by virtue of the provisions contained on section 19(5) of the Act.

77. To determine the 'relevant geographic market', the Commission, in terms of the factors contained in section 19(6) of the Act, is to have due regard to all or any of the following factors *viz*., regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services.

78. Further, to determine the 'relevant product market', the Commission, in terms of the factors contained in section 19(7) of the Act, is to have due regard to all or any of the following factors viz., physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products.

Relevant Product Market

79. The DG in its consolidated report dated 18.06.2013 in C. No. 72 of 2011 and C. Nos. 16, 34 & 53 of 2012 and the investigation report dated 31.12.2013 in C. No. 45 of 2013 stated that the rules and other norms applicable for development of residential property are altogether different from other kinds of properties. It was further stated that after a consumer decides to buy a residential property, the substitutability factor will be restricted to the services to be provided by a developer/ builder in respect of residential buildings/ apartments. A buyer, before investing in a residential property, will primarily consider the company's brand value, background, number of projects completed, delivery time, value for money, amenities, design, materials, fixtures, location of the project, proximity to railways, metro stations, hospitals, *etc.* After having considered these factors, only thereafter a buyer decides to invest in a particular residential unit/ property. Therefore, it was noted by the DG that substitutability and inter-changeability is possible within the entire market of services provided by builders/ developers in respect of residential apartments. After having considered the above factors and drawing reference from *Belaire Owners' Association* v. *DLF Ltd. & Ors.* (*Belaire* case), the DG delineated the relevant product market as *'the provision of services for development and sale of residential apartments'.*

80. The DG's delineation of relevant product market was not disputed by JAL/ JIL.

The Informants, however, argued that the said investigation was flawed and biased. It was further argued that the relevant product market was not correctly defined by the DG.

81. The Commission, after having considered the said DG reports, as noted *supra*, directed the DG to investigate the matter further *vide* order dated 02.01.2014 passed under section 26(7) of the Act. The Commission had also directed the DG to consider the followings while investigating the matter:

a) The entire land bank and resources of JAL.
b) Obtain necessary information from NOIDA and other sources with respect to land banks allotted to other competitors of JAL in Noida region and consider such data in its analysis.
c) The nature and dwelling units and the fact that integrated township should be considered while comparing those with other builders/ developers in the market.
d) Any other issues/ matter which the DG deemed that were essential to effectively analyze the position of strength, if any, of JAL in the relevant market.

82. Thereafter, the DG submitted the Supplementary Investigation Report on 11.12.2014. It may be noted that the DG in its Supplementary Report has compared the features of an integrated township with other standalone residential apartments. The DG was of the view that an integrated township and standalone residential apartments are two distinct products and are not similar enough for consumers to switch from one another. It was stated that an integrated township is a mix of residential and commercial space along with well-developed infrastructure and other recreational amenities and facilities within its marked

areas. That standalone residential apartments do not offer facilities like schools, hospitals, shopping malls, golf courses, parks, entertainment centers, convention centers, gym *etc*. which are generally included in an integrated township. It was further stated that the residents of such apartments would have to depend on independent markets, hospitals, educational institutions, *etc*. located at a distance whereas the residents in an integrated township do not have to depend on anybody to avail such services as they are constructed within the township.

83. The DG also opined that the product 'integrated township' is a separate product from the point of structure as well as the conditions of competition. It was stated that a buyer has wide range of choices within the integrated township. That there can be effective competition between the products which form part of the integrated township and this presupposed that there is a sufficient degree of inter-changeability between all the products within the integrated township. Therefore, the DG delineated relevant product market as *'provision of services for the development of integrated township'* as against its earlier conclusion in the Report dated 18.06.2013 *i.e. 'the provision of services for development and sale of residential apartments'.*

84. Disputing the finding of the DG with respect to the relevant product market in the Supplementary Report dated 11.12.2014, JAL/ JIL, firstly, argued that it is not developing any integrated township and uses the term 'integrated township' for marketing purposes like other players in the market. It was also contended that the DG failed to consider that there was no statutory definition of 'Integrated Township' in real estate projects being developed in Noida and Greater Noida. The next argument put forth was that integrated township does not constitute a separate relevant product market. It was submitted that what was being offered for sale were apartments and/ or residential units and/ or plots and not the

residential units in integrated township. That residential complexes and group housing societies provide largely similar features, amenities and facilities that are offered in an integrated township. Furthermore, the units/ apartments offered on sale are also in the same price range which is indicative of the fact that integrated township and standalone residential apartments would fall in the same category of product market.

85. On perusal of the DG reports, the Commission notes that whereas in the main investigation reports dated 18.06.2013 and 31.12.2013, the DG identified the relevant product market as the market for provision of services for development and sale of residential apartments; in the supplementary investigation report dated 11.12.2014, the DG defined the relevant market as the market for provision of services for the development of integrated township.

86. The Commission acknowledges the significance of determination of the relevant product market and notes that the residential projects constitute a distinct product when compared to commercial/ industrial/ other types of properties. In coming to this conclusion, the Commission considered that all the relevant stakeholders, including, the Government/ statutory authorities, builders/developers, brokers/ sales agents *etc.* distinguished residential properties such as residential apartments, villas and plots from other types of properties such as commercial spaces, commercial plots, farm houses and agricultural lands primarily on the basis of their usages. Further, the development norms for residential properties are entirely different from those relating to other types of properties.

87. It is observed that the residential houses constitute a separate product market and it may also be noted that a buyer before investing in a residential property considers the company's brand value, background, number of projects

completed, delivery timelines, value for money, amenities, design, materials, fixtures, location of the project, proximity to railways, metro stations, hospitals, *etc.* Thus, the Commission considers the provision of services for development and sale of residential apartments as a distinct product.

88. At this stage the Commission would also like to note the relevant product market as determined by the DG in the supplementary investigation report *i.e.* the market for provision of services for the development of integrated township.

89. In this connection, it may be noted that the concept of 'integrated township' is of recent past only and has been employed by builders to market their products particularly in urban areas to convince the prospective buyers about the easy availability of a cluster of various facilities and amenities in and around the residential projects. This makes the project a very attractive proposition for potential buyers who may like to buy such product to avoid the attendant hassles of commutation and transportation *etc.* in availing such services that they may otherwise encounter while residing in standalone projects.

90. Without delving any deeper into this aspect, suffice to note that the term 'integrated township' is a nebulous and evolving concept and at this stage of development of markets, it cannot be said with certitude that all so called 'integrated township' constitute a separate product market from standalone residential projects. The question of integrated township constituting an altogether different relevant market would depend upon a host of factors which may make the same in a given case a unique product in itself depending upon the factual matrix of a particular case, project involved and the amenities associated therewith. Further, the demand-side substitutability of such an integrated township with standalone/ independent residential projects would also need to be

considered while examining whether a particular so called integrated township is altogether a separate product.

91. Further, it may be noted that the issue of integrated township being a separate product market also came up before the Commission in *Shri Sunil Chowdhary* v. *M/s TDI Infrastructure Ltd*., Case No. 27 of 2014 decided on 23.09.2014 where it was noted by the Commission categorically that though the concept of integrated township has become popular where all facilities are provided within one township but even in those cases, ordinarily the market would be of residential units. Accordingly, in that case the market of services of development and sale of residential apartments was taken as the relevant product market. A similar view was also taken by the Commission in *Shri Deepak Kumar Jain & Anr.* v.*M/s TDI Infrastructure Ltd*., Case No. 40 of 2014 decided on 24.09.2014 wherein it was also observed that though integrated township do offer some different characteristics than other forms of plotted residential units, the same cannot be considered as the separate relevant product market.

92. In the instant case, the Informants appear to be the allottees of residential apartments being developed by JAL/ JIL. The question here is whether there is any degree of substitutability or inter-changeability between the projects in question and standalone/ independent residential projects or not. In an integrated township, various amenities and facilities like hospitals, educational centers, shopping malls, *etc*. are available within a short distance unlike independent projects. The DG, in its supplementary report, cites distance and dependence of residents of standalone apartments on other market players to avail other services as reasons to distinguish between integrated township and standalone apartments.

93. On a careful consideration of the matter, the Commission notes that just because an integrated township offers such services it is not necessary that residents of an integrated township will not avail other similar services outside the township or *vice versa*. It is established that the services offered in the projects under consideration can also be availed by residents of other independent apartments and are not restricted to JAL/ JIL residents only. Further, it appears that the residents in the projects under consideration may also avail of such similar services/ amenities which are available outside the said projects. The projects in question are located in Noida and Greater Noida regions and as such it cannot be said that the services or amenities provided therein make the residential apartments within such so called integrated township non-substitutable and non-interchangeable with residential apartments located outside their boundaries. Further, the locational advantage of the projects being in close proximity with the developed urban area coupled with connectivity to other areas offering similar amenities/ facilities also makes the so called integrated township less unique. It may also be added that, most of the real estate developers in order to attract consumers offer along with the apartments, various recreational amenities, gym, parks, *etc*. and these services are not offered only in these so called integrated township. Further, the Commission agrees with the DG's analysis that a consumer will take into consideration the company's brand value, reputation, background, locations, projects, materials used, launch period, its proximity to metro stations, hospitals, educational institutions, expressway *etc*. and several other factors before purchasing a residential property. The Commission also agrees with the contention of JAL that what was being offered for sale in the instant case were apartments/ residential units and not the integrated township. Having considered the above analysis, it appears that there is sufficient degree of inter-changeability of residential apartments in standalone apartment projects with the so called integrated township in the present case.

94. In view of the foregoing, the Commission is of the opinion that the so called integrated township in the present case do not constitute a distinct product market. Therefore, the relevant product market in the present case may be more appropriately considered as the market for '*provision of services for the development and sale of residential apartments'.*

Relevant Geographic Market

95. With regard to the relevant geographic market, the DG, in its reports dated 18.06.2013, 31.12.2013 and 11.12.2014 has delineated Noida and Greater Noida region as the relevant geographic market. It was stated in the reports that the fact that any customer, who has decided to buy a residential unit at Noida or Greater Noida as per his/ her needs, requirements and willingness or otherwise, shall not opt for any other location. That the market conditions in these areas are homogeneous in nature. It was also noted by the DG that that the rules and regulations applicable in Noida and Greater Noida for development of housing complexes are different from other locations such as Ghaziabad, Gurgaon, Delhi, *etc*. In case of Noida and Greater Noida, most of the housing complexes are built on the land acquired by the builder on leasehold basis unlike the other cities mentioned above. In view of the above analysis, the DG concluded that the relevant geographic market would be that of Noida and Greater Noida.

96. Relevant geographic market refers to an area in which conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in neighboring areas. It may be noted that the DG identified Noida and Greater Noida as the relevant geographic market on the basis that the residential projects developed by JAL/ JIL are situated in Noida and Greater Noida. It may also be pointed out that JAL/ JIL has vehemently contended that the entire NCR region

should be considered as the relevant geographic market. JAL/ JIL has further argued that Delhi region could also fall in the same category of relevant geographic area.

97. At the outset, the Commission rejects the definition of relevant geographic market proposed by JAL/ JIL. The Commission observes that conditions for supply of real estate development services in Noida and Greater Noida are clearly distinguishable from the conditions prevalent in other NCR regions such as Faridabad, Bhiwadi, Alwar, Manesar, Kundli, *etc*. which were suggested as substitutable by the opposite parties and also from other neighboring areas such as Delhi on the basis of factors such as applicable rules and regulations, regulatory authorities, *etc*.

98. Further, the Commission notes that from the consumers' perspective, a buyer having a locational preference for Noida/ Greater Noida would not consider distant places like Alwar, Manesar, Bhiwadi or Kundli where property rates are cheaper merely on the basis of improved connectivity. Furthermore, the cost of transportation and the travel time taken from Noida/ Greater Noida to Alwar/ Bhiwadi/ Kundli/ Manesar is too high on account of the long distance. Also, Delhi region cannot be considered in the same category of relevant geographic area as there are considerable price differences in the properties located in Noida/ Greater Noida and Delhi. Various other factors like consumer preference, better infrastructure, transport services, *etc.* may also prevent consumers from switching their purchases to other regions.

99. It may be noted that the Commission in its *DLF* case has held Gurgaon to be a distinct geographic market. It was observed that the geographic region of Gurgaon has gained relevance owing to its unique circumstances and proximity

to Delhi, Airports, golf courses, world class malls. During the years it has evolved as a distinct brand image as a destination for upwardly mobile families. In the *DLF* (*Belaire)* case, the Commission distinguished between buyers looking for residential property out of their hard earned money or even by taking housing loans and those buyers who merely buy such residential apartments for investment purposes; stating clearly that the Commission was not looking at the concerns of speculators, but of genuine buyers. It was, therefore, observed that a small 5% increase in the price of an apartment in Gurgaon would not make a person shift his preference to Ghaziabad, Bahadurgarh or Faridabad or the peripheries of Delhi or even Delhi in a vast majority of cases. The Hon'ble Competition Appellate Tribunal, through its order dated 19.05.2014, also upheld the Commission's finding on the relevant geographic market.

100. In view of the above analysis, the Commission agrees with the DG's finding that the relevant geographic market would be that of Noida and Greater Noida. Like Gurgaon, Noida and Greater Noida regions have a brand image of their own. Its close proximity to Delhi and Metro Stations, preference by MNCs, big commercial and institutional centers, shopping malls, well developed infrastructure, wide roads, *etc*. are many of the reasons Noida and Greater Noida have become the hub for realty sector. It has also benefitted from the fact that Delhi is slowly getting congested and lacking in space. Therefore, Noida and Greater Noida have become a preferred location for many.

Determination of the Relevant Market

101. In view of the above, the Commission holds the relevant market in the present case as the market for '*provision of services for development and sale of residential apartments in Noida and Greater Noida regions'*.

Dominant Position

102. After having delineated the relevant market, the Commission would now proceed to assess JAL's dominance. It may be noted that by virtue of explanation (a) to section 4 of the Act, 'dominant position' means a position of strength enjoyed by an enterprise in the relevant market in India which enables it to operate independently of competitive forces prevailing in the relevant market; or to affect its competitors or consumers or the relevant market in its favour.

103. Further, to analyse dominance, the factors enumerated in section 19 (4) of the Act are to be considered, namely, market share of the enterprise; size and resources of the enterprise; size and importance of the competitors; economic power of the enterprise including commercial advantages over competitors; vertical integration of the enterprises or sale or service network of such enterprises; dependence of consumers on the enterprise; monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; market structure and size of market; social obligations and social costs; relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; and any other factor which the Commission may consider relevant for the inquiry.

104. In this regard, a reference may be had to the main investigation reports. It may be pointed out that the Commission would not consider the DG's analysis of JAL/ JIL's dominance with respect to the projects under consideration as the

Commission has already opined above that the so called integrated township in the instant case do not constitute a distinct product market and that the relevant product market may be considered as the market for '*provision of services for the development and sale of residential apartments'.*

105. An indirect assessment of dominance is through the market share of the enterprise in the relevant market. Though the importance of market share may vary from market-to-market, nevertheless, market share indicates the position of strength of the enterprise to some extent. In the instant case, the Commission observes that Noida and Greater Noida regions, being the new hub of realty sector, have attracted several real estate players in the market. One can find a wide range of residential apartments offering world class amenities suitable for all budgets available for sale. Many established and reputed companies have several ongoing, completed and future projects in the relevant geographic market, thereby, making Noida and Greater Noida an ideal location for purchasing residential properties.

106. A reference may be drawn to the main DG report where the DG has gathered comprehensive information regarding details of various projects launched/ developed by all real estate players active in the relevant geographic market as on 31.03.2012. It is clear from the DG's analysis that Amrapali (with 27.32% market shares) is ahead of JAL/ JIL (with 25.09% market shares). Further, there are other major players, such as, Supertech Ltd. (with 16.18% market shares); 3C Company (with 8.33% market shares); Unitech (with 6.82% market shares), *etc*. This clearly demonstrates that the residential segment of the realty sector is highly fragmented with the presence of a large number of players.

107. Further, it may be pointed out that the DG also calculated market shares of the

major players on the basis of actual sales made by them in the period between 2009 and 2011. It would be appropriate to note the relevant details from the investigation report dated 18.06.2013 and the same are noted below:

S. No.	Group	Sales (Rs. in Crore)				
		2009-10	2010-11	2011-12	Average	Diff. with the largest share
1.	**AMRAPALI**	**2600**	**6010**	**5411**	**4673**	
2.	**JIL**	640	2778	3155	2191	
	JAL (Real Estate Division)	1531	1710	1416	1552	
	JAYPEE	**2171**	**4488**	**4571**	**3743**	**19% less**
3.	**3C**	**484**	**2421**	**4736**	**2547**	**45% less**
4.	**UNITECH**	**2429**	**3022**	**2019**	**2490**	**46% less**
5.	**Supertech**	330	1322	1857	1169	**74% less**

108. Thus, the DG's investigation establishes that Jaypee Group is behind Amrapali; its next rival competitor. This clearly demonstrates that it does not have the biggest market shares in the relevant market.

109. It is also evident from the DG's analysis that even in terms of financial resources (comprising of cash reserves and surplus), Jaypee Group is behind Unitech. For ready reference, the details are excerpted below from the DG report:

(in Crores)

1.	Unitech	10580
2.	Jaypee	7898
3.	3C	2332
4.	Amrapali	483
5.	Supertech	422

In relation to land reserves, the Commission notes that land admeasuring about 452 acres was leased to JAL by Greater Noida Industrial Development Authority in the year 2000-2001. Further, it is also on record that as part of Yamuna Expressway Project, JIL was given approximately 6175 acres of land along the Yamuna Expressway in 5 parcels for residential, commercial, amusement, industrial and institutional purposes out of which one location of about 5 million sq. mtr. (approx. 1223 acres) is in Noida and remaining 4 locations are outside Noida and Greater Noida regions. As such, the Commission holds that the use of the land reserve available with Jaypee Group is of varying nature and as such the same is not comparable with the land allotted/ leased out to other builders/ developers by the statutory authorities so as to give any commercial advantage to Jaypee Group over its competitors.

110. In relation to the dependence of consumers on JAL/ JIL, it has been clearly mentioned above that there are several established real estate players (who have been operational in the relevant geographic market for decades) offering world class amenities. Accordingly, a large number of options are available to the consumers who can actually choose from a wide range of projects launched/ developed by several builders and developers in the geographic region. Further, rapid growth of real estate sector together with the presence of several big, small and medium sized companies in the market is demonstrative of the absence of entry barriers/ foreclosure of competition.

111. In view of the foregoing, the Commission is of the view that JAL/ JIL does not have the ability to influence the conditions of competition in the relevant market as identified above. Therefore, it is opined that JAL/ JIL does not enjoy a position of dominance in the market for provision of services for the

development and sale of residential apartments in Noida and Greater Noida in accordance with the provisions of section 4 of the Act. Since JAL/ JIL is not in a dominant position in the relevant market, the question of examining the alleged abusive conduct does not arise.

Conclusion

112. In view of the above, the Commission is of considered opinion that JAL/ JIL does not enjoy a position of dominance in the market for provision of services for the development and sale of residential apartments in Noida and Greater Noida in accordance with the provisions of section 4 of the Act. Since JAL/ JIL is not in a dominant position in the relevant market, the question of examining the alleged abusive conduct does not arise.

113. Before concluding, it may be observed that notwithstanding the finding of no contravention against the Opposite Parties, the Commission is conscious of the fact that there are common industry practices adopted by the builders and the developers in the real estate market which are otherwise unfair. Many such cases came up before the Commission, however, the same were closed as the respective parties in such cases were not found to be in a dominant position in the relevant market. In these circumstances, the Commission observed in the case of ***Shri Jyoti Swaroop Arora*** v. ***M/s Tulip Infratech Ltd.*****, Case No. 59 of 2011** 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".

114. It was further observed that "…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"…. "…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"… "…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".

115. The Commission again echoes the above sentiments in this batch of informations and hopes and trusts that the needful shall be done at the appropriate levels.

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

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(Sudhir Mital)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi
Date: 26/10/2015

DISSENT NOTE

PER

Mr. S. L. Bunker,

Member

Mr. Augustine Peter,

Member

We are not in concurrence with the rest of the learned Members of the Commission. On a careful analysis of the facts available, we are of the firm view that the majority of the learned Members have erred in their delineation of relevant product/service market. However, we are in agreement with the delineation of the relevant geographic market. We have, in our order, redefined the relevant product/service consistent with the provisions of the Act. We have further examined the status of the OP group in the relevant market and have found it to be clearly dominant in the relevant market. We are also convinced of the abusive conduct of the OP group after due examination. Hence, we are writing a separate order. Since the facts have been elaborately dealt with in the majority order, we shall deal with only those which we deem necessary for the present purpose.

Information

1. The present case is the outcome of five separate Informations filed under section 19(1) (a) of the Competition Act (hereinafter called as 'the Act') against the same Opposite Party, *viz*. M/s Jaiprakash Associates Ltd (hereinafter called as 'OP1), Jaypee Infratech Limited Ltd (hereinafter called as 'OP2') and Deutsche Post Bank Home Finance Ltd (hereinafter called as 'OP3') for infringement of section 4 of the Act.

2. The first information was filed by Shri Sunil Bansal, Mrs Manjula Bansal, Mr Anil Bansal and Mrs Saroj Bansal in case titled as Case No 72/2011. The second information was filed by Shri Deepak Kapoor in case bearing No 16/2012. The third and the fourth case were filed by Shri Tarsem Chand & Smt Kanta Devi Mittal and Shri Sanjay Bhargava & Smt Anjali Bhargava

respectively and were titled as Case No 34/2012 and 53/2012. Another case bearing No 45/2013 was filed by Shri Raghvendra Singh having identical allegations against the OPs, was clubbed with the present case in respect of which a separate Director General's Report was submitted by the Director General (hereinafter called as 'the DG') on 31/12/2013. The informants in all the five cases have been collectively referred to as the informants.

3. Informants in Case No 16/2012 and 45/2013 are allottees of residential units in OP group's project 'Jaypee Aman' at Noida, while the informants in Case No 34, 72 and 53 of 2012 are allottees of the residential units in 'Jaypee Sun Court and Jaypee Sea Court Apartments' at Greater Noida.

4. OP1 and OP2 are part of Jaypee Group engaged in real estate business. OP 1 and OP2 shall hereinafter be referred to as OP group.

5. OP3 is engaged in the provision of financial services to Indian corporates, Institutionals and individual clients.

Allegations

6. The informants in all the above-mentioned cases have alleged that OP1 along with its group company OP2 abused its dominant position by imposing highly unfair and unreasonable conditions in the agreement for allotment of residential apartments which are in blatant violation of the principles of free and fair market and have, thereby, violated section 4(2) (a) and 4(2) (e) of the Act.

Directions to the DG

7. The Commission formed an opinion that there exists a *prima facie* case of abuse of dominance in all the four cases and clubbed all the cases *vide* order dated 07/11/2012 directing the DG to cause an investigation into the matter and to submit a combined DG Report.

DG Report and DG Supplementary Report

8. The first DG Report (hereinafter called as the 'first DG Report') was submitted to the Commission on 18/06/2013 wherein the relevant market was delineated as the market for '*the provision of services for development and sale of residential apartments in Noida and Greater Noida.*' The DG concluded that the OP Group did not have a position of strength in the relevant market that could enable it to operate independently of competitive forces prevailing in the aforesaid relevant market or to affect its competitors or consumers in its favour and accordingly concluded that no case of section 4 is made out.

9. This Report of the DG was considered by the Commission, and the Commission *vide* order dated 02/01/2014 directed the DG to further investigate the matter under section 26(7) and to submit a self-contained investigation report considering the following points:

a) The entire land bank and resources of Jaypee Group should be taken into consideration while analysing the dominant position of OP1 and OP2

b) DG should take adequate steps to procure the necessary information from the NOIDA or from other sources, related to comparable

figures of land bank allocated to the competitors of Jaypee Group in the Noida region and consider them in his analysis.

c) The nature and size of dwelling units and the fact of integrated township should be considered while comparing those with other builders/developers in the relevant market.

d) All other issues/matters which the DG think are essential to effectively analyse the 'position of strength', if any, of the Jaypee Group in the relevant market.

10. In compliance with the directions of the Commission, the DG submitted a consolidated Supplementary Report (hereinafter called as the 'supplementary DG report') on the matters directed to by the Commission.

11. The findings of the first DG report and supplementary DG report are adequately dealt with by the Commission in its Majority Order and are not being specifically reproduced here and shall be referred to in the order as and when required. It is pertinent to mention that the supplementary DG Report concluded that due to unique features there exists a separate relevant product market of integrated township which is not substitutable with the standalone residential projects. Dominance in this relevant product market was analysed on the basis of total land banks and land reserves and it was noted that the OP group holds the largest quantum of land in comparison to its competitors. Considering the total resources available with the OP and comparing it with the competitors, it was concluded that total assets and reserves and surplus available with the OP Group is far ahead of the next competitor Unitech.

Submissions/Objections/Responses of the Parties

12. The submissions/objections/responses of the Informants and the OP have been adequately dealt with in the majority order and will be reiterated as and when required for the purpose of explaining the issues in hand.

Majority Order

13. The majority of the learned Members of the Commission are of the view that the JAL/JIL (OP 1 and 2) as a group does not enjoy a position of dominance in the market for provision of services for the development and sale of residential apartments in Noida and Greater Noida in accordance with section 4 of the Act and that it has no ability to influence the conditions of competition in the relevant market. In arriving at the above said conclusion, the majority has rejected the DG's analysis of OP group's dominance with respect to integrated township and has opined that integrated township does not constitute a distinct product market. Further as per the majority order, only the residential houses/ villas/ apartments constitute a separate product market and that a buyer before investing in a residential property considers the company's brand value, background, number of projects completed, delivery timelines, value for money, amenities, design, materials, fixtures, location of the project, proximity to railway station, metro station, hospitals *etc*. On the basis of these factors the majority order considered the provision of services for development and sale of residential apartments as a distinct product market.

14. The OP has raised several preliminary issues including the issue of jurisdiction of the Commission in deciding the present matter. The majority order adequately deals with these issues including the issue of jurisdiction

and on the latter holds that the contention of the OP that the Commission does not have the jurisdiction to look into the merits of the matter deserves to be rejected outright. We are in consonance with this part of the decision of the majority order; hence we shall straightaway proceed to the examination of other issues.

Dissent

15. We have perused all the material on record including the first and the supplementary reports submitted by the DG and have also considered the submissions/replies/objections of the parties. We do not agree with the definition of relevant market and the analysis that follows thereafter in the majority order written by the learned members for the following reasons as explained below.

Issues for Determination

16. The following issues, according to us, arise for consideration in the present matter:

    a) What is the relevant market in the present case?

    b) Is the OP group dominant in the relevant market?

    c) Being dominant, whether the OP group has violated the provisions of section 4 of the Act.

Issue (a): Relevant Market

17. *DG's Findings:* The DG, in the first report delineated the relevant market as, *'the provision of services for development and sale of residential apartments in NOIDA and Greater NOIDA.'* In the supplementary DG report Integrated Township has been found to be a separate relevant product market. As far as the relevant geographic market is concerned, the DG, in

both the reports noted that the conditions of competition prevailing in NOIDA and Greater NOIDA are different and are distinguishable from those prevailing in Delhi and Gurgaon. In view of the same the DG concluded in the supplementary report that the relevant market is the '*Provision of services for development of Integrated Township in the territory of Noida and Greater Noida.'*

18. *Informant's Submissions:* The informants, in their respective replies to the first report of the DG, did not agree with the relevant product market or to the relevant geographic market as delineated by the DG i.e. *'the provision of services for development and sale of residential apartments in NOIDA and Greater NOIDA.'* Disagreeing with the DG's conclusion that OP group is not dominant in the relevant market, it was submitted that such a finding lacked consideration of various relevant factors and was, therefore, erroneous. In their response to the supplementary DG report where the DG delineated the relevant market as '*Provision of services for development of Integrated Township in the territory of Noida and Greater Noida',* to which the informant was in consonance, it was urged that the OP, on its website, claims its projects in Noida and Greater Noida to be Integrated Townships. The Informants raised the plea of estoppels, promissory estoppels and the doctrine of approbate and reprobate to counter the arguments of the OP that the concept of integrated township was only a marketing gimmick. The Informant also placed reliance on the Judgment of Orissa High Court in the case of ***Smt Geeta Mishra* v. *Utkal University* AIR 1971 Ori, 276** wherein it was held that a fraudulent intention is also not essential to create an estoppel. Similarly reliance was placed on the case ***Harbans Lal* v. *Div. Supdt., Central Railway*, AIR 1960 All 164** wherein it was observed:

> *"It is settled law that the word "intentionally" in Section 115 does not mean that the conduct of the person making the representation should have been fraudulent or that it should not have been made under a mistake or misapprehension. The motive or state of knowledge of the representor is immaterial. It is not necessary in order to create estoppel that the person whose acts or declarations induce another to deal with him must have been under no mistake himself or must have acted with an intention to mislead or deceive."*

OP's Submissions: On the other hand, DG, making no case against the OP group in the first DG Report, the latter submitted that they are in agreement with the same. In response to the supplementary DG report, the OPs submitted that the DG's findings in the same were based on conjectures, surmises and subjective opinion. The OP claimed that the term Integrated Township has been used by them only for the purpose of marketing as it is the practice in the real estate market. It was submitted that what was being offered for sale in the instant case were apartments and/or residential units and/or plots and not Integrated Townships. It was also argued that the DG failed to highlight that there was no statutory definition of Integrated Township in real estate projects being developed in Noida and Greater Noida and that the same is not covered by any comprehensive or uniform regulatory regime in India. It was also stressed that even residential complexes and group housing societies will have the same amenities and facilities which will make it substitutable and interchangeable with integrated township and this completely negates the finding of the DG that there exists a separate relevant product market in the nature of integrated townships. It was also submitted by the OP that the State of UP does not have any law, rule, regulation, notification and/or policy which provides a comprehensive definition of the term 'Integrated Township'. It was argued that

for the OP to be developing an Integrated Township, the primary prerequisite was to obtain a license from the relevant authority which was never obtained as it never fulfilled any criteria to develop an 'Integrated Township'. With respect the relevant geographic market, OP contended that a prospective buyer would consider residential units of different locations of the NCR for better returns and that property in Noida and greater Noida are comparable with properties in NCR including Gurgaon, Faridabad, Ghaziabad etc.

Determination of Issue (a): Relevant Market

19. The majority order notes that to regard integrated township as a distinct product market, there should be sufficient reason to single out what it offers is not interchangeable with or substitutable with standalone residential apartments in the market. We shall, in the following paras, make a distinction between the two.

20. The DG, in the first report, delineated the relevant market as *'the provision of services for development and sale of residential apartments in NOIDA and Greater NOIDA.'* In arriving at the said conclusion the DG considered as to whether substitutability and interchangeability is possible within the entire market of services provided by builders/ developers in respect of residential units. It was opined that the residential unit provided by a builder/developer can be substituted with similar kind of residential units offered by another builder/ developer and that once a consumer decides that he is going to buy a residential unit from a particular builder/ developer, the factor of substitutability becomes restricted within the relevant product market to services provided by that developer with respect to the chosen residential project.

21. After considering the first report and submissions/objections of the parties, the Commission found that various relevant factors like the aspect of land bank and land reserve available with the OP had not been properly analysed. Further the Commission observed that the nature and size of projects and dwelling units and the fact of integrated township have been overlooked while determining the market position in the first report. Therefore the Commission issued directions to the DG under section 26(7), and a supplementary report was submitted. In the supplementary DG report the DG gave a fresh look at the relevant facts/materials before reaching at a conclusion on the issue of relevant market and dominance of OP. The view of the DG was that due to its distinguishable and intrinsic characteristics integrated township constitutes altogether different product and that it is not interchangeable or substitutable with standalone residential towers/projects as the physical characteristics of the two are not similar enough to allow the customers to switch easily from one to another. The DG opined that Integrated Township, as a product, is selected by a buyer for different purposes such as more greenery, pollution free area, orderly and safe environment etc. Hence the DG concluded that integrated township is a separate relevant product market. As far as the relevant geographic market is concerned, the DG observed that the conditions of competition prevailing in NOIDA and Greater NOIDA are different and distinguishable from those in Delhi, Gurgaon etc. in as much as in case of Delhi due to The Delhi Development Act, 1957, the State assumed control of real estate development activities which resulted in restriction on private real estate activities due to which no new township or residential complexes could be built by the private builders whereas in the case of NOIDA and Greater NOIDA most of the housing complexes are built on land acquired by builder on lease hold basis. In view of the same the DG concluded that the relevant

market in the supplementary report as the '*Provision of services for development of Integrated Township in the territory of Noida and Greater Noida'.* The majority has contended that the relevant market is *provision of services for the development and sale of residential apartments in the territory of NOIDA and Greater NOIDA.* We are unable to agree with the majority in this regard. On the other hand, we find the method of delineation of the relevant product market in the supplementary report by the DG to be the correct approach, but with the following modification 'provision of services for the development and sale of residential/dwelling units in Integrated Townships in the relevant geographic area of NOIDA and Greater NOIDA' rather than simply specifying as Integrated Townships as such, as defined by the DG, we would elaborate the rationale for defining the same in the following paras.

Concept of Integrated Township

22. To put the issue of relevant market in correct perspective it is important to have a clear idea of the concept of 'Integrated Townships.' The dictionary meaning of the term 'integrate' is to combine (two or more things) to form or create something. The concept of integrated township in the real estate sector is relatively new. From the material available on record it is understood that integrated townships are self-sustained ones having a number of developments that may include residential, commercial, retail, educational facilities. Integrated townships as generally understood are housing projects offering a combination of row houses, villas, bungalows and group housing - all with essential urban infrastructure and amenities - at relatively more affordable prices to consumers. Integrated Townships have infrastructure developed by the developer, normally in remote or under developed areas and normally include ancillary facilities like commercial

premises, hotels, recreational and retail services, along with other amenities. Such townships are designed to be self-contained having all or most modern civic amenities required by the inhabitants such as power, water, roads, garbage management, hospital, school, parks, swimming pools, recreation centres, gyms, outdoor games venues, restaurants, hotel, shopping mall, cinema hall, auditorium, higher learning institute, transport facilities etc. and there is no dependence on the Government for amenities.

23. Recently, in March 2014, the Housing and Urban Planning Development of the State of UP vide letter No 520/8-3-14-17/Miscellaneous/13 dated 04/03/2014, notified the applicability of 'Revised Integrated Township Policy- 2014' (License based scheme). Prior to this policy no guidelines of the State Government were available with regard to the minimum prescribed area for an integrated township. The present policy defines Integrated Township as:

> '*A planned and developed township in the shape of a self-contained entity. The policy provides that in such a township there is a provision of unified facilities of residence, work and entertainment along with all physical and social establishments.'*

24. Like any other new product idea, the concept of 'Integrated Township', has been evolving and is still not a unified one across the country. Further integrated townships vary to some degree depending on the state, location, size, facilities and coverage. Furthermore, given the diversity of the country and diversities within many states themselves it cannot be expected that a unified concept will ever evolve. However, the basic idea of making available all the facilities in an integrated manner to the residents is common to all integrated townships. The National Urban Housing Policy 2007,

recognizing the fast changing demand patterns of urban population, highlights as follows:

> *'In view of the fact that 50 per cent of India's population is forecasted to be living in urban areas by 2041, it is necessary to develop new integrated townships. Further, it is also important to develop mass rapid transport corridors between existing medium and large towns and new green-field towns so that the relationship between industry and commerce is developed to an optimum level.'*

25. The Government of India *vide* Press Note No. 4 (2001 series) permitted FDI of up to 100 per cent for development of integrated townships, including housing, commercial premises, hotels, resorts, city and regional level urban infrastructure facilities such as roads and bridges, mass rapid transit systems and manufacture of building materials. Development of land and providing allied infrastructure shall form an integrated part of township's development. At the state level in August 2007, the Government of Gujarat announced Gujarat Integrated Township Policy 2007, which aimed at the development of integrated townships through private and market initiatives/ operations. The intention was to achieve public policy objectives of employment generation, inclusiveness, quality of living environment, and financial and environmental sustainability. The objective was 'a private city with public policy objectives'. Obviously the idea of Integrated Townships arose out of the inability of public institutions to cater to the ever increasing need for residential accommodation at affordable prices to urban sections of society with well-developed infrastructure.

26. Compared to residential units in 'standalone' residential complexes/towers 'Integrated Townships' provide a number of advantages to the consumers, making them a distinct choice for the consumers. Consumers who choose the services for the development and sale of residential units in Integrated Townships get residential units at relatively more affordable price, being located in the peripheries of metros, coupled with availability of essential infrastructure and lifestyle amnesties. For investors, 'Integrated Townships' provide better scope for rise in value than standalone properties. Added to this, most of the integrated townships are designed as gated communities, which make them an ideal choice from the security perspective. Maintenance charges for township are collected from the residents in addition to building or society maintenance charges.

27. We have also gathered the information available in public domain (news articles and websites of real estate companies and other material) and the opinions of stake holders (Developers and Buyers) regarding integrated township which brings out its distinct characteristics. Some relevant information is discussed below:

- Integrated townships are self-sustained ones with a number of developments that include residential, commercial, retail, educational, as well as industrial areas in some cases. They should have a balanced mix of residential and commercial spaces along with well-developed infrastructure and recreational amenities besides green and open spaces. They should encompass all aspects of modern day living within the gated community. For an integrated township, the key parameters while mixing residential and commercial space can also have residential properties varying from

1BHK to 5BHK, duplexes, penthouses and even detached, semi-detached villas[1].

- Some of the common social amenities that one should look at within these townships include provision of schools, hospitals or nursing homes, shopping centres that take care of your daily needs and emergency services like fire station etc. Presence of these facilities shall ensure that all one's family needs are taken care of in a compact, secure environment. Also the township should have ample green areas and parking facilities as well[2].

Residential units in Integrated Townships as a product distinct from those in standalone towers and standalone residential complexes

28. In its submission, the OP has claimed that the term 'Integrated Township' has been used by them only for the purpose of marketing as is the practice in the real estate market. However, according to the DG, the information gathered during the course of investigation from different real estate developers and the government agencies show that the project developed by the OP group cannot be compared with projects of other developers in view of its size and scale, facilities, usage and other features of an integrated township. The DG has relied on the full page advertisement in Times Property by the OP claiming that "*Wish Town, Noida is the finest….. Integrated Township."*

[1]Ravi Ahuja, Executive Director, Agency, Cushman & Wakefield, accessed from http://articles.economictimes.indiatimes.com/2009-08-23/news/28407592_1_integrated-townships-low-cost-homes-social-infrastructure,accessed on 09/09/2015

[2]Chintan Patel, Associate Director, real estate practice, E&Y, accessed fromhttp://gurutalk.magicbricks.com/topic/integrated-township-the-investment-advantage.html, accessed on 09/09/2015

29. Moreover, in its conduct the OP has been consistently representing to the outside world and especially to the consumers that what it is developing and providing is residential units in Integrated Townships. The information provided by the OP on its website jaypeegreens.com reads:

> *"Jaypee Group is a well-diversified infrastructure & Industrial conglomerate with an annual turnover of over Rs 20,000/- crore. Jaypee greens is the real estate arm of Jaypee Group and since its inception in the year 2000 has been creating lifestyle experiences from building golf centric premium residences to building mega township to building a self-sustained mega city. Jaypee Greens has been developing some of the finest* ***integrated townships*** *in the country; wherein everything is at one's disposal & at walking distance; whether it is shopping, office, hospital, sports or a game of golf. Jaypee Greens offers Residential Projects at Noida, Greater Noida and Agra.'(emphasis supplied)*

The website further mentions that:

> *"It has been designed as a new and exciting place to live, work and play. It offers residential and commercial properties in Noida complemented by excellent Education System, International Standard Health Care Facilities, Recreational and entertainment centres, multiple shopping complexes, corporate offices, spiritual centres, hotels and public services. A drive through the pleasant streets and neighbourhoods of this pedestrian oriented community will make you aware about the wide array of residential property options available within the township ranging from independent homes to high rise apartments and penthouses. The 18+9 Graham Cooke Golf Facilities in this Noida expressway project has been seamlessly interwoven with*

the residential and commercial community, creating a wonderful place to live in."

30. To substantiate its averments that what the OP offers is a different product, the informant also placed on record the extract from Business Responsibility Report, Page No 345, Volume II of Reply to S.I. Report which provides:

" c) Real Estate.

*Company has been developing some of the finest **integrated townships** in the country; wherein everything is at one's disposal & at walking distance; whether it is shopping, office, hospital, school/colleges, sports or a game of golf. Company offers residential projects at Noida, Greater Noida& Agra".(emphasis supplied)*

"Company believes that harmony between the man and his environment is the prime essence of healthy life and living. The sustenance of our ecological balance is therefore of Paramount Importance. Efforts are made to conserve ecological balance without any harm done to local flora and fauna. The Company has also taken green initiatives, afforestation drives, resources conservation, water conservation, air quality control and noise pollution control and created a 'Green Oasis."

"Some of the major initiatives taken in the field of Real Estates are as follows:

a) ...

b) ...

c) Company's integrated Township, is equipped with renewable source of energy, i.e. solar lighting and solar hot water system,

this will result in significant reduction in electricity consumption over the lifetime of township"

d) ...

e) ....

31. Moreover, the OP on a number of occasions in its submission to the DG defended itself against the allegations of abuse of dominance by stating that the act /conduct of the OP was because of the exigencies arising out of the special characteristic of the Integrated Township: This is reflected in the following:

- Page 57 of the Supplementary DG Report, where the OP has admitted:

"*In view of the **integrated nature of the project**, it is imperative that the maintenance of such construction and facilities be uniform and consistent across the board. For these purposes, it is a necessary prerequisite that the entire project be serviced by one maintenance agency. Further, it would be administratively impossible to provide this discretion to the allottees and for the allottees to agree amongst themselves on one agency. Hence, to avoid any unnecessary variance in services, which may eventually reflect on the property as a whole, JAL and JIL undertake this responsibility of appointing the maintenance agency." **(emphasis supplied)***

- Page 57 of DG Report also contains further Submission of the OP in this regard:

"It is to be borne in mind that Greater NOIDA project and the NOIDA project are in the nature of infrastructure development projects, i.e. involving not only development of real estate, but also development of other activities. For example, the Greater Noida residential complex is only in about 82 acres. In rest of the area, Golf Course, integrated Sports Complex Resort and Spa, Park etc. are being developed. The integrated development is such that there are no exclusive entry-exit gates, roads, water supply, power distribution network and other facilities meant exclusives for anyone of the users that for Golf Resort, Spa and Public Park which have separate entry-exit from the main road. Since the area is being developed in an integrated manner, it is not possible to carve out any of the services exclusives for any specific user."(emphasis supplied)

32. It will not be out of place to mention here the excerpts from the letter dated 24/04/2012 written by OP1 to its customers (placed on record by the informant dated 10/03/2015):

"As you are aware, ***the wish town project is being developed as fully fledged integrated township at Jaypee Greens, Noida,*** *spread over 1100 acres (440 hectares) complete with modern amenities like shopping facilities, hostels, super speciality hospital, engineering college, schools and the like; besides sports facilities including golf courses and other games and sports. We are taking special care to ensure power and water supply systems, a good road network, sewer treatment plants etc., as per superior standard." (emphasis supplied)*

33. Further the excerpts in Management Discussion &Analysis Report; Page 339 Volume II of Reply to S.I. Report placed on record by the Informant provides:

> *Jaypee in Real Estates*
> *.....While the various initiatives taken by the group in education and sports are already in operation, a super speciality Hospital will commence commercial operation during the year 2014-15*
>
> ***The group's primary focus shall remain on the development of the INTEGRATED TOWNSHIPS*** *along the Yamuna Expressway with a wide range of planned product mix to suit all strata of the population.(emphasis supplied)*

34. Thus, it can be seen from the information available on OPs own website, other admissions of the OP and various reports placed on record by the Informant that what the OP has constructed is a full-fledged self-contained 'Integrated Townships' and the plea of the OP that it is a marketing gimmick deserves outright rejection.

35. Coming to the application of law to the facts in hand, any enquiry into the alleged abuse of dominant position starts with the correct delineation of the relevant market. Further delineation of relevant market for competition law enforcement purposes is neither straightforward nor easy. As per sec 2 (t) of the Act "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services,

their prices and intended use. Since our law was enacted much after the competition jurisprudence evolved in many other mature jurisdictions we had the good fortune of learning from the experience of some of those countries. Overtime substantial rigour and sophistication in delineating the relevant product market for addressing abusive conduct of enterprise has evolved, across anti-trust jurisdictions. We had the benefit of abstracting from such experience and including them as factors to be considered by the Commission while defining relevant product/service market. Thus as per section 2(r), 'relevant market' means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both. The term relevant product market has been defined in section 2(t) of the Act geographic market has been defined under section 2(s) of the Act to mean a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas. Sec 19 (7) of the Act provides that: the Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:—(a) physical characteristics or end-use of goods; (b) price of goods or service; (c) consumer preferences; (d) exclusion of in-house production; (e) existence of specialised producers; (f) classification of industrial products. The Commission is bound to give due regard to all or any of these factors. The factors that are of relevance in the instant case are physical characteristics or end-use of goods and services; price of goods or service; and consumer preferences. Basically the manner in which the relevant product market is to be delineated is to consider the substitutability of a product/service vis-à-vis other products. The smallest set of products/services which are substitutable for each other constitute one

relevant product/service for competition analysis. And substitutability is from the point of the consumer.

36. The Supplementary DG Report has found that the relevant product market is '*provision of service for development of Integrated Township in the territory of Noida and Greater Noida'*. OPs have argued that integrated township cannot be considered as a relevant market due to existence of fair degree of substitutability with products in the form of standalone apartments, group housing society and residential townships. However a close look at the concept and reality of 'Integrated Townships' as they exist today (as seen in paras 21-34 above) suggests that residential units located in integrated townships are a distinct relevant product and residential units in other residential projects are not close substitutes from the point of view of the consumer. Integrated townships enjoy certain distinct benefits which are not generally found in other projects. Some benefits are presented below:

- Integrated Townships are located away from the centres of cities, largely in the peripheries, but are like 'a city within city'. Every possible facility needed for a reasonable urban life is available close by. For instance, in the case of projects of OP group it was found that (*paragraph 3.46 Pg no 32 of DG supplementary report*) that following amnesties and infrastructure have been created by OP group in its integrated townships at Wish town Noida and Greater Noida:

  Amenities developed at Wish Town Noida

  - Jaypee Hospital in Sector 128
  - Jaypee Institute of Information Technology in Sector 128
  - Jaypee Public School.

- Wish Point a Commercial Complex in sector 134
- Lakes and Water bodies
- Two Golf Course
- Exclusive 50,000 sq feet club

Amenities developed at Wish Town Greater Noida

- Two Golf Course
- Club Resorts and Town Centres etc.

- On the other hand, due to the lack of infrastructure and access to civic amenities, being largely dependent on government agencies, many upcoming standalone real estate projects lack adequate social infrastructure. This certainly is a negative aspect for consumers who look for residential units in urban areas. Added to this is safety and security of people, children in particular, and property available in Integrated Townships. Being located on the outskirts of cities cost of residential units in 'Integrated Townships' is also relatively much lower, keeping also in view the positive externalities that the residents derive from such townships. The cost towards specific amenities is collected separately which could be paid over the years and does not become a burden on the consumers. Thus the concept of 'Integrated Township' with residential units provides a much better alternative to the consumers and therefore, it is not, in any manner, a substitute for apartments/ residential units in standalone residential towers/complexes.

- Consumers also evaluate that the cost of the facilities and their maintenance overall is relatively much lower because of the scale economies accruing to the residents in the Township.

37. In our opinion, dwelling units in Integrated Township and standalone apartments are two distinct products and are not similar enough for the consumers to switch over from one to another. It is the residential units in the 'Integrated Townships' that are developed and sold by the developers and bought by the consumers and not the township as a whole. In this regard we agree with the submission of the OP on page 54 of the submissions dated 04/02/2015 that what is being sold by it is the residential unit and not the entire integrated township. Further the dwelling /residential unit in an integrated township is differentiated from those elsewhere by way of prime characteristics i.e. itself is self-contained and the buyers have a wide variety of residences in terms of size and specifications to buy at different price ranges. The substitutability, from the point of view of the consumer, has to be seen as between the residential units in an Integrated Townships and those which are outside the Integrated Townships and it is this that determines the relevant product market. In the present case, residential units in an integrated township is not substitutable with residential units in a cooperative society, or a group housing scheme or any other residential unit built in a standalone project as such residential projects do not include all the facilities that an integrated township offers. In such a scenario, a consumer who opts to buy a residential unit in an integrated township will not prefer a residential unit elsewhere. The distinguishing and intrinsic characteristics of Integrated Township discussed above definitely makes the residential units located in such Townships a distinct 'relevant product' which is not substitutable with residential units in other standalone residential projects/towers. As mentioned earlier, the Act provides for three basic factors to look for while arriving at the relevant product market - price, characteristic and intended uses. The above discussion on the concept of

Integrated Townships and how and on what counts they differ from residential units in standalone complexes and other residential units makes it amply clear that characteristics of residential units in township differ from residential units elsewhere significantly. Not only are the characteristics different but the preference of the consumers opting for residential units in Integrated Township differ from residential units elsewhere.

38. Another issue raised by the OPs in their oral submissions was that the projects marketed as Integrated Townships by the OPs were not licenced as Integrated Townships by the Competent Authorities. This may be so. But that is not relevant for competition analysis. Relevant product market is *"a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use".* This aspect has been discussed in para 35 of this order and does not require more elaboration. Besides, the concept of Integrated Townships has been evolving over years as has been explained in paras 22 to 27 of this order. Any new product or service first comes to the market and gets appreciated by the consumers; government regulations may come thereafter. So has been the case with integrated townships. The idea came up in different parts of the country and was also formalized by policies by states like Gujarat and Maharashtra as also through the National Urban Housing Policy 2007. Even the state of Uttar Pradesh, where the relevant geographic market, in the instant case, is located, came up with a revised Policy in March, 2014. As far as effects on competition is concerned it is the characteristics of the products/services, end use and price, and appreciation of interchangeability or substitutability by consumers that matter. Formal license is not relevant as the effects on the market remain the same irrespective of whether the

project is licensed or non-licensed. Falsely representing a project to consumers without necessary license would fall foul of some other relevant legislation that may be in force. However, such a lapse on the part of the OP cannot be converted to their advantage. In an 'effects based system' where substance rather than form matters the OP doesn't deserve any leniency.

39. No straightjacket formula can be applied to delineate the relevant market. Facts in each case have to be evaluated carefully before proceeding to a conclusion. What is relevant market depends on case to case. In this regard, it is imperative to quote the Judgement of the COMPAT in Appeal No 17/2014 order dated 19/01/2015 ***Global Tax Free Traders*** *v* ***William Grant & Sons Limited and Ors*** wherein it was observed that:

> "*In our opinion, it is neither possible nor desirable to evolve any straightjacket formula for interpreting the term 'relevant market' and each case is required to be decided keeping in view the material brought on record, which is germane to the factors specified in Section 19(6)and 19(7) of the Act..*"

40. It is noted that what the OP specifically represents to its customers is development of a full-fledged integrated township which cannot be termed a marketing gimmick only, as claimed by the OP at a later stage. In their representation and conduct, the OPs have time and again maintained that what they are building is an integrated township in Noida, Greater Noida and beyond. Moreover, OP in the Annual Reports which includes Director's Report, Notes on accounts etc. at several places refer to development of integrated township, but the OP, before the DG and the Commission has

contended that it had not developed any project which can be said to be an 'Integrated Township'.

41. It is also relevant to look at various doctrines/ rules of evidence relied upon by the informant. The common law doctrine of approbate and reprobate, a facet of law of estoppel, is well established in our jurisprudence. It is a well-recognized principle that a person may not blow hot and cold at the same time. The principle of approbate and reprobate expresses two propositions, that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct he has pursued and with which his subsequent act is inconsistent. The informant relies on the famous quote of Lord Atkin: "*Where a person has the choice of two rights either of which he is at liberty to adopt, but not both, and if he adopts one, he cannot afterwards assert the other.*"

42. In the recent case of ***Mumbai International Airport* v. *M/s Golden Chariot Airport & Anrs,* Civil Appeal No 8201 of 2010**, delivered on 22/09/2010, the Apex Court observed that:

> "*The doctrine of election was discussed by Lord Blackburn in the decision of the House of Lords in Benjamin Scarf vs. Alfred George Jardine [(1881-82) 7 Appeal Cases 345], wherein the learned Lord formulated "...**a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such***

a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, *if he has done an unequivocal act...the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election." (emphasis supplied)*

43. We are in agreement with what the informant alleges in this regard that the OPs cannot be allowed to approbate and reprobate.

44. From the above discussion, it is clear that it is sufficient to conclude that the relevant product market in the present case is '*Provision of services for development and sale of dwelling/ residential units in integrated townships'*. The relevant geographic market is the area comprising of Noida and Greater Noida as has been concluded in the majority order. Hence, we define the relevant market as '*provision of services for the development and sale of dwelling/residential units in Integrated Townships in Noida and Greater Noida'.*

Issue (b): Dominance

45. *DG's findings*

In the first Report DG defined the relevant market as '*provision of services for the development and sale of residential apartments in NOIDA and Greater NOIDA'*. The existence or otherwise of the dominance of the OP was analysed primarily on the following factors: (a) market share of total dwelling units in Noida and Greater Noida; (b) market share of land available as per the Master Plan; and (c) comparison of assets and liabilities. On this basis it was found in the first DG report that the OP group is not in a dominant position. The DG supported his analysis by the finding that M/s Amrapali with 27.32% share in

the relevant market is marginally ahead of the OP Group which had a market share of 25.09%. The DG also found out that there are other players operating in the market such as Supertech (16.18%), 3C Company (8.33%) and Unitech (6.82%). Hence the DG came to the conclusion that the residential segment of the real estate sector is highly fragmented as evidenced from the presence of a number of players. The DG effectively ignored the factors other than 'market share' in the relevant market as defined by him in the first report, while section 19(4) the Act provides that the Commission shall have due regard to any or all of the factors specified therein.

However, after further investigation based on the section 26(7) order dated 02/01/2014 by the Commission, a fresh and comprehensive analysis was undertaken by the DG on factors such as land bank, financial strength, vertical integration, etc. of the OP group. While proceeding towards enquiry into dominance in the supplementary report, the DG looked into the market share of the OP group in the redefined relevant market viz. '*provision of services for development of Integrated Township in the territory of Noida and Greater Noida'* The DG also looked carefully at the land bank available with the OP group and other competitors, assets and liabilities of the OP group vis-à-vis others players in the relevant market, the fact of vertical integration of OP group as regards supply of cement for construction purposes. The DG called for information from 23 real estate developers of Noida and Greater Noida. According to the data in the DG Report, the number of units/apartments in Jaypee Wish Town, Noida and Jaypee Greens cumulatively comes to 32,435 followed by Unitech with 1,399 and Omaxe with 1,054. The DG also gathered data relating to land reserves of the players operating in the relevant geographic market of Noida and Greater Noida. The DG came to the conclusion that the OP Group holds the largest area of land in comparison to its competitors, and that

in the relevant geographic market of Noida and Greater Noida also, the OP Group has been found to be having the largest land bank in comparison to its competitors.

Informant's submissions

46. On the issue of dominance the Informants argued that in the year 2009, OP2 got lease deed with respect to sector 151 executed in terms of the concession agreement dated 07/02/2003 and the developmental rights available with the OPs put them in a unique position and is a factor in itself under section 19(4)(g) since the developmental rights have been acquired under concession agreement at substantially lower costs without even the need for expenditure for change in land use. It was also argued that the Integrated Township projects of the OP are huge in size and have compelling features such as golf courses which gives the OPs dominance in the relevant market.

OP's submissions

47. It was contended by the OP that the Noida and Greater Noida Authority in addition to performing the regulatory function, as prescribed by statutes, are also involved in development and transfer of residential plots, apartments, group housing plots etc. of various sizes and are competitors of OP. The OP has argued that the DG has failed to take into account the liabilities of the OP while accounting for its assets and resources and also the fact that no projects have been approved/sanctioned for development of an Integrated Township by the New Okhla Industrial Development Authority. The OP, in support of its contentions, also placed reliance on **Case No 27/2014 *Sunil Chowdhary*** v. ***M/s TDI Infrastructure Ltd and Ors*** and **Case No 40/2014**

Deepak Kumar Jain v. ***M/s TDI Infrastructure Ltd and Ors*****.** The OP also took the pleas that it has contributed to the economic development of the country in many ways including the development of 160 kms long Yamuna Expressway.

48. Before proceeding further, let us deal with the OPs reliance on cases earlier decided by the Commission

Relevance of earlier decisions of the Commission in the present context

49. The OP has argued that the Commission in earlier decisions has taken the stand that Integrated Townships cannot be treated as relevant market. Therefore it is useful to have a close look at some of the decisions by the Commission on the relevant product market. In **Case No 55/2011, *Kolkata West International City Buyer's Welfare Association, Howrah*** the Commission held:

> *"We cannot consider a single township project as the only relevant market. All other townships coming up or being developed in the surrounding areas of the Distt. of Howrah or within the Distt. Of Howrah would be part of the relevant market. One cannot say that each planned township has to be considered a market in itself having no substitute." (Page 4).*

> *"We therefore consider that the relevant product and geographic market cannot be defined in such a narrow manner that each and every housing project started by a builder becomes a sole un-substitutable market and every builder to be a dominant player, however small his share may be in the housing market in a state or district" (Page 5: para 2)*

"The Informant has failed to give information of the surrounding townships and other projects and the market share of other market players" (Page 5: last para.)

50. It is clear that the Commission did not rule out that Integrated Townships could not be considered as a relevant product market. What it has ruled is that one standalone township in isolation cannot be considered as a relevant product or geographic market. Again in Case No 27/2014 the Informant did not propose any relevant market in the Information. The Commission noted that:

"The concept of integrated townships has become popular where all facilities are provided within one township but even in those cases, ordinarily the market would be of residential units".

51. The above decision was in the context of the location of TDI Infrastructure where an Integrated Township was being developed in isolation. The Commission's decision in this regard was specific to that project and cannot be generalized as is evident from the decision in another case related to the same project, viz. Case No. 40 of 2014, where the Commission observed that:

"It is true that integrated townships do offer some different characteristics than other forms of plotted residential units but it cannot be considered as separate relevant product market ***in the present case*** *as contended by the Informants" (emphasis supplied) (page 6/10: para 6)*

52. In the case under consideration what we are looking at is an issue where a number of 'Integrated Townships' have been planned by various developers including the OP, and 'residential units wherein have been marketed by them, and spanning the large relevant geographical area of NOIDA and Greater NOIDA. Thus, the previous decisions by the Commission do not in any way constrain delineation of the market as ***'provision of services for the development and sale of dwelling/ residential units is in the integrated townships in NOIDA and Greater NOIDA'*** .While defining the relevant product/service market each Information has to be looked at separately, keeping in view the characteristics, end use, price and consumer preferences. It is precisely through this process that we have arrived at the conclusion about the relevant market as '*provision of services for the development and sale of dwelling/residential units in the integrated townships in NOIDA and Greater NOIDA.*'

Determination of Issue (b): Dominance

53. The Competition Act 2002, as amended, in section 19 (4) provides that while inquiring whether an enterprise enjoys a dominant position or not in the relevant market under section 4, the Commission shall have due regard to all or any of the factors provided therein. The factors are: the market share of the enterprise, size and resources of the enterprise, size and importance of the competitors, economic power of the enterprise, dependence of consumers on the enterprise, monopoly or dominant position acquired by virtue of a statute or by virtue of being a government company or a public sector undertaking, entry barriers, countervailing buyer power, social obligation and social costs; relative advantage, by way of the contribution to the economicdevelopment, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; and

any other factor which the Commission may consider relevant for the inquiry. Thus, the Act provides flexibility to the Commission to also look at factors that are not covered explicitly in section 19(4), but are relevant for determining dominance in the relevant market. The Commission has to assess various relevant factors in an objective fashion and come to a determination regarding position of dominance of the OP in the relevant market. The objective is to identify the ability of the enterprise concerned to operate independently of competitive forces prevailing in the relevant market or to affect its competitors or consumers or the relevant market in its favour. The importance attached to the various factors by the Commission would differ depending on the facts of each case and also depending on the specificity of each information and the sector of economic activity involved.

54. Notwithstanding that a high share of the relevant market does not always mean that dominance exists, a high market share is one of the most important factors for consideration. The Commission, in Case No 19/2010, Belaire Owners Association against DLF Limited, held:

> "*The Commission has considered the issues relating to market share, which is one of the important parameters for determining dominance. However, as is evident from the provisions of Section 19(4), it need not necessarily be the single predominant factor and often a host of other factors have to be considered. Further, if sufficient and undisputed data is not available to determine market share in a credible manner, it becomes even more important to draw on other corroborating data and analyse the other factors in even greater depth to off-set the difficulties in working out sharply specified market shares on account of data constraints, and/ or to complement the market share when margins between competitors are not wide enough in determining the*

strength of the enterprise in terms of affecting market forces as set out in the explanation (a) to Sec 4.

55. On an examination of the data that forms part of DG record, it can be easily concluded that the OP Group is having the largest market share in the relevant market of residential units/dwelling units in the 'Integrated Townships' in NOIDA and Greater NODIA, with 32,435 dwelling units (with total sale value of Rs 20,072 crores) which far exceeds the number and sales value of its competitors Unitech (1,399 units with a total sale value of Rs 2,712.30 crores) and Omaxe (1,054 units with a total sale value of Rs 349.74 crores). Further the DG, in order to assess dominance, has looked at various other relevant factors such as land reserves, assets, size and resources of the enterprise, size and resources of the competitors, vertical integration etc.

56. In the real estate sector land reserves/ land bank represent the size and extent of resources of an enterprise. It reflects the ability of the enterprise to act independently of competitors and consumers. Financial assets, coupled with land resources, add to the muscle of the enterprise and determines its ability to undertake new projects in the real estate sector. The data on land reserves available with the OP group show that OP has a clear competitive edge over its competitors. During investigation, relevant details were called for by the DG from 17 builders/developers on total assets/liabilities, assets and liabilities specific to the real estate business, details of total land reserves and details of land reserves in the relevant geographic market in Noida and Greater Noida. The land reserves of top players in the relevant geographic market of Noida and Greater Noida, as documented by the DG are as follows:

Sl. No	Name of the Builder	Financial year	Land Reserves (Acres)	Land used for residential projects (Acres)	Land used for other projects (Acres)	Vacant land (for sanctioned projects) (Acres)	Vacant land for projects not yet sanctioned (Acres)
1.	JP Associates	2011-12	1684.37	514.91	1009.24	3.00	160.22
2.	Unitech	2011-12	266.21	166.34	-	99.87	-
3.	Omaxe	2011-12	167.85	148.55	19.30	-	-
4.	Parsvnath	2011-12	38.46	37.83	0.63	-	-
5.	Eldeco Infra	2011-12	41.613	41.613	-	-	-
6.	ATS Infrastructure Ltd	2011-12	34	32	-	-	2
7.	Ajnara India Ltd	2011-12	36.50	12.21	-	23.57	0.72
8.	Gaur sons India	2011-12	15.667	15.667	-	-	-

Source: Supplementary DG Report Page 39

57. It is clear from the above Table appended to the Supplementary DG Report (page 39) that the OP had, in the year 2011-12, the largest land reserves, land area used for residential projects, land are used for other projects, as well as vacant land for projects not yet sanctioned, as compared to other players in the relevant market. The OP has raised the point that part of the land was received by it as part of the expressway agreement. The plea raised by the OP group is not relevant in that it does not matter how the land came to be acquired by an enterprise. Once land becomes available at one's disposal and one has the ability for developing residential units in the relevant market, market power stands bestowed on the enterprise concerned.

58. Further, the details of total land reserves of the main competitors of the OP group obtained by the DG during the course of investigation also clearly suggests that the OP group is far ahead of its competitors, reflecting its position of strength in the relevant market.

S. No	Name of the Builder	Financial Year	Total Land Reserve (Acres)	Value in Rupees crores
1.	JP Associates Ltd	2011-12	13725.11	4167.27
2.	Unitech Ltd	2011-12	1477.93	3348.17
3.	Parsvnath Developers	2011-12	2295.54	3235.17
4.	Three C Group	2011-12	107	1794.77
5.	OMAXE Ltd	2011-12	1669.32	786.84
6.	ELDECO Infra	2011-12	150.214	425.44
7.	Ajnara India Ltd	2011-12	46.77	200.17
8.	ATS Infrastructure Ltd	2011-12	57.76	179.49
9.	Gaur Sons India	2011-12	15.667	26.40

Source: Supplementary DG Report Page 40

59. This leaves no one in doubt that the OP not only has large land reserves in Noida and Greater Noida but the total land reserves of the OP are far above those of the next competitor. Certainly the quantum of land available to the OP group in comparison to the next five top builders/developers is much larger giving substantial commercial advantage to the OP group over its competitors. It is further noticed in the supplementary DG report that in respect of land used for residential projects as well, while OP has used 514.91 acres of land, the next competitor M/s Unitech Ltd has used only 166.34 acres, which is about 1/3 of that of the OP. When comparison of entire land bank of competitors is considered, it is evident that even the

combined land bank of the next 5 competitors is less than half of total land bank of OP.

60. The OP, in its response, indicated a list of six projects, viz. *Vedic City, Antriksh Golf City, Logix Blossom Greens, Amrapali O 2 valley, Unitech Uniworld Project* and *Omaxe NRI city* (paragraph 223 of OPs response to the Supplementary Report of the DG) that DG had ignored and failed to conduct investigation upon while assessing dominance though they were situated in the same relevant geographical market. The OP, however, has not provided any data to support their contention. This has left us with no choice other than to look at the information available in the public domain as regards the share of residential/ dwelling units of these projects which are alleged by the OP in the relevant geographic market to be integrated townships but have not been included by the DG in the report. Based on the information available on the website of the real estate companies, we have found that even if these projects are included in the analysis the conclusion of the DG regarding dominance would not change as shown below:

S. No	**Projects**	**No. of Dwelling Units**	**Area (Acres)**
PROJECTS INVESTIGATED BY THE DG			
1	JAYPEE WISH TOWN Noida + Jaypee Greens	32435	1162
2	Omaxe	1054	85
3	UnitechLtd.	1399	NA
PROJECTS SUGGESTED BY THE OP			

4	Vedic City	Only plots	580
5	Antriksh Golf City	540	25
6	Logix Blossom Greens	2000	25
7	Amrapali O 2 valley	720	5
8	Unitech Uniworld Project	5000	100

Source: All of the above accessed on 09/09/2015 from Jaypee Wish Town from website of Jaypee, i.e. www.jaypeewishtownnoida.in/, Unitech uniworld – http:-//www.magicbricks.com/unitech-uniworld-city-sector-mu-greater-noida-pdpid-4d42353031353239,
Antriksh Golf City – http:-//www.magicbricks.com/antriksh-golf-city-sector-150-noida-pdpid4235303233373536, Omaxe NRI city – http:-//www.magicbricks.com/omaxe-construction-nri-city-townships-pari-chock-greater-noida-pdpid-4d42353030303535933,
Logix Blossom – http:-//www.magicbricks.com/logix-blossom-country-sector-137-noida-pdpid-4d4235303030373535, Amrapali O2 valley – http://wwww.magicbricks.com/amrapali-o2-valley-cosmic-corporate-park-tech-zone-greater-noida-pdpid-4d4235303236333036

61. As is evident from the above Table the other five projects (excluding Vedic city as it is selling only plots) collectively has only 10,713 dwelling units/ residential units as compared to 32, 435 units of OP i.e., only about 30% of OPs numbers. This leaves me with no doubt that the OP definitely enjoys a position of strength in the relevant market of '*provision of services for development and sale of residential unit/dwelling units in the territory of Noida and Greater Noida'* with more than 67% of market share.

62. The analysis of land reserve in the relevant geographic market as well as at an all India level clearly points to the advantage enjoyed by the OP *vis-a-vis* its competitors. Even in terms of number of projects in the relevant geographic market the OP enjoys substantial advantage over its competitors, with 69 projects as against only 22 by UNITECH, the next in order.

S. No	Projects	Land Reserve (Acres) in 'Relevant Geographical Market	Land Reserve Across the country (Acres)	No. of Residential Projects in Noida and Greater Noida
1	Jaypee Group	1684.37	13725.11	69
2	Omaxe	266.21	1669.32	18
3	Unitech	167.85	1477.93	22
4	Eldeco	41.613	150.214	18
5	Parsavanath	38.46	2295.54	12
6	Ajnara	36.50	NA	17
7	ATS	34	NA	10

Source:DG supplementary report Pg-42 and www.99acres.com, DG supplementary report Pg-42 (land reserve in Geographical market and across the country); www.99acres.com (No. of Residential Projects in Noida and Greater Noida) accessed on 09/09/2015

63. A close look at the financial resources of the OP *viz*. total assets and reserves and surplus in respect of real estate segment of the OP group as on 31/03/2012 (page 44 of Supplementary DG Report) clearly brings out that on this basis as well OP is far ahead of other major real estate groups, as follows:

S:N	Name of the Builder	Financial	Current	Fixed	Total	Reserves

o		Year	Assets	Assets	Assets	& Surplus
1	Jaypee Group	2011-12	18435.67	15426.18	33861.85	11879.01
2	Amrapali Group	2011-12	5330.61	231.77	5562.38	212.59
3	Unitech Ltd	2011-12	14193.40	88.62	16780.52	9115.72
4	Three C Group	2011-12	3474.97	45.71	3520.68	31.11
5	SuperTech Ltd	2011-12	2284.89	36.08	2789.39	422.73
6	OMAXE Ltd	2011-12	4946.58	56.63	5413.93	1596.88
7	Anjara India Ltd	2011-12	512.86	10.63	580.02	106.67
8	Prateek Buildtech (India) Pvt Ltd	2011-12	662.43	58.33	720.76	69.02
9	ATS Infrastructure Ltd	2011-12	352.04	20.20	372.24	34.07
10	Prasvnath Developers	2011-12	4398.44	537.40	5867.44	2366.68
11	ELDECO Infra	2011-12	573.24	39.58	794.99	359.20
12	Steller Constellation	2011-12	155.80	0.13	155.93	-
13	Gaur Sons India	2011-12	582.30	23.45	642.26	125.37

Source: Supplementary DG Report Page 44

64. The Supplementary Report of the DG also revealed that going by any acceptable financial parameters the OP enjoys far advantageous position compared to its competitors. The OP with total assets at Rs 33,861.85 crores is far ahead of Unitech Group which has Rs 16,780.52 crores of total assets. Even on the basis of Reserves and Surplus, with Rs 11,879.01 crores, OP is ahead of its next competitor Unitech which is having only Rs 9,115.72 crores of reserves and surplus.

65. The OP, in its response, objected to such comparison by the DG and suggested that only the real estate segment of Jaypee group should have been compared with the other developers and not the entire Jaypee Group because it is involved in many other businesses apart from real estate. Further only assets were used in comparison and liabilities were not

considered. However, such objection by the OP may not be tenable in that the financial resource of an enterprise of a conglomerate nature provides strength and market power to each of its subsidiaries. The following facts are therefore relevant;

- Analysis of Net worth of different developers reflect that OP group has the highest net worth;

S.No	Projects	Total Assets (Cr)	Reserves and Surplus (Cr)	Net worth (in Rs crores at end March, 2012
1	Jaypee	33861.85	11879.01	12304.30
2	Unitech	16780.52	9115.72	9638.99
3	Parsavanath	5867.44	2366.68	2584
4	Amrapali	5562.38	212.59	Not Available
5	Omaxe	5413.93	1596.88	1505.48
6	3C	3520.68	31.11	Not Available
7	Supertech	2789.39	422.73	Not Available

Source: DG supplementary report Pg-47 (Total Assets and Reserves and Surplus (ii) www.moneycontrol.com-(Net worth in 2012) (accessed on 09-09-2015)

- Apart from other areas of business OP group is also involved in cement production which is an important input in real estate business. OP in its submission admits that during 2009-2012, nearly the entire (99%) consumption of cement by the OP was from its own units. The OP vide its reply dated 10-06-2014 (Annexure O of

Supplementary DG Report), submitted that it has 12 cement plants in India at various locations. During the year 2011-12 the OP has used 1857.10 metric tonne of cement of other brands and 311025.65 metric tonnes of cement of its own group company. Cement is a major input for real estate development and vertical integration (sourcing 99 per cent of the requirement from own sources) adds substantially to the market power of the OP in the relevant market.

- While assessing an enterprise's strength in a relevant market a number of factors are taken into consideration to gauge the extent to which a firm can act independently of its competitors and customers/consumers. In the real estate sector factors such as the overall size of the enterprise, overall financial strength, control of land and infrastructure, product differentiation, economies of scale, vertical integration etc are relevant and the OPs satisfy all these conditions to be treated as dominant player in the relevant market.

66. This leaves us in no doubt that on the basis of information submitted by the Parties and those available in public domain and the investigation report of the DG it can be concluded that on the basis of number of dwelling units (with about 67% of market share), financial resources and land resources available at its disposal, as well as vertical integration the OP clearly enjoys dominant position in the relevant market.

67. Now that the dominant position enjoyed by the OP in the relevant market has been duly defined, we proceed to look at the behavior of the OP based on the allegations of the informant.

Issue (c): Abuse

68. During the course of hearing, it was argued by the OP that for an infringement of section 4(2)(a) of the Act to be established, 'direct or indirect imposition of unfair or discriminatory conditions' is essential and that unless there is an imposition of unfair and discriminatory condition or price, as the case may be, there will be no breach of section 4(2) (a) (i) or (ii) of the Act. It is to be noted that the dictionary meaning of the word 'impose' is force on someone, or take advantage of someone by demanding their attention or commitment. The meaning of unfair is 'not based on, or behaving according to the principles of equality and justice'. Thus imposing unfair conditions would mean that one of the party who enjoys a higher bargaining power is in a position to dictate terms to the weak party who is not in a position to negotiate.

69. Therefore, what has to be seen in the case in hand is whether in abuse of dominant position, the OP evolved/drafted/finalized the terms and conditions of the buyer's agreement so as to impose unfair conditions on the informant. It is to be noted that the agreement between the OP and the buyers are the so called 'standard' agreements where the prospective buyers merely sign on dotted lines. The informant, in this regard, alleged that this agreement is one sided and onerous and totally favours the OP to the detriment of the consumers and that there is no negotiation that takes place between the OP and the consumers. It was submitted that the OP has so devised the entire steps for sale of flats that initially the prospective buyers are asked to fill a one page form for booking of flats followed by an application for the flat and thereafter the buyers are asked to sign the application on dotted lines. It was also alleged that the OP literally requires the prospective buyers to bind themselves in all respects although the OP does not bind itself to any condition even in relation to the location of the

property, super area, built area ratio, number of floor etc. Let us analyse the allegations of the informant on the touchstone of section 4 (2)(a)(i) which prohibits imposition of unfair and discriminatory conditions by a dominant enterprise. The allegations are dealt with one by one in the following paras.

70. The general allegations of the informants as regards abusive conditions under section 4(2)(a)(i) are:

a) The application form did not mention the name of the project

b) Columns relating to consideration (basic sale price, car parking, preferential location charges etc) were left blank

c) Introduction of clauses relating to maintenance deposits/ maintenance charges/club membership fees (not told at the time of booking)

d) Nature of various undertakings contained in the application form sought from applicant

e) Clause enabling the company to reject any application without assigning any reason thereof

f) Clause stating that applicant/allottees would have no right, title or interest on the premises either during its construction or after its completion till the execution of Indenture of Conveyances

g) Clause enabling the company to construct other buildings or structure in the area of the project to put up additional constructions and to amend/alter the plan unilaterally

h) Clause setting that execution of Indenture of Conveyance shall not absolve applicants/allottees under the standard terms and conditions

i) Introduction of new charges

j) Clause mandating the applicant/allottees to make prompt and due payment of additional sums borne by the company

k) Building is not made as per the specifications. It was not centrally air conditioned as advertised and many similar promises made in the advertisement remained unfulfilled.

l) In Case No 16/2012, the informant has levelled the following allegations against the OP:

I. Clause enabling the company to construct other building or structure in the area of the project, to put up additional construction and to amend/alter the plan unilaterally

II. Clause mandating the applicant/ allottees to make prompt and due payment of additional sums borne by the company

III. Clauses dealing with obligations of the company, default, consequences of default, termination and consequences of termination are also alleged to be unfair.

m) OP unilaterally changed the original plan and instead of 24 floors, modified the plan to 28 floors, without intimation to the allottees.

n) The agreement provided that the apartment would be centrally air conditioned with personal climate control. However, only split air conditioners had been provided. There have been other such changes in the specifications which differ from what was originally agreed between OP and allottees.

o) Specific issue of misrepresentation of facts by the OP leading to informant signing the loan and disbursement letter in Case No 72/2011.

p) In case No 45/2013, in respect of which a separate DG Report was submitted to the Commission on 31/12/2013, the allegations pertain to:

I. One sided conditions in the provisional allotment letter
II. Delay in delivering possession by the OP
III. Demand of dues not confirming to payment plans
IV. Unfair clauses 2.3 and 2.4 of standard terms and conditions
V. Unfair adjustment of interest and penalty against the payment
VI. Applicants have no right over open space/common area etc.
VII. The allottees will be made to sign a separate maintenance agreement in respect of maintenance of common areas and OP had the sole right of appointment of the maintenance agency

VIII. OP had the absolute right to reject/ not to allot the apartment to the applicant without assigning any reason

IX. OP have unfettered rights to any variation, deletions, alterations in the plans, super areas, specifications, dimensions, designs etc.

X. OP had the sole right to introduce new charges and the allottees had no right to challenge such charges

Determination of Issue (c): Abuse

71. The Act prohibits abuse of dominant position under section 4. Section 4 provides:

Abuse of dominant position *- (1) No enterprise or group shall abuse its dominant position. (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group.—-*

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service

(b) limits or restricts—

(i) production of goods or provision of services or market there for or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) .....

(d) .....

(e) .....

72. *Allegation: The application form did not mention the name of the project:* With respect to this allegation, the DG in the Supplementary DG Report

found that the application form is general for all the projects of OP Group at Greater Noida and the applicant is required to fill column 3 as per his choice of the premises applied for. Hence there was enough choice available to the applicant to mention the name of the project as per his will and therefore the practice of providing general application form to the applications cannot be considered as unfair.

Submissions: The OP, in his response, agreed with this conclusion of the DG.

Analysis: It is to be noted that the forms of real estate builders are standard ones which are printed at the time when the project is launched and the requirement of mentioning the name of the project opted by the customer can, in no way, be termed as unfair. At best it requires an extra effort on the part of the consumer to fill in the relevant columns.

73. *Allegation: Columns relating to consideration (basic sale price, car parking, preferential location charges etc.) were left blank.* With respect to the allegations of the columns relating to consideration being blank, the DG was of the view that the amount of consideration of a particular flat in a particular project would depend on features unique to that dwelling unit such as market price prevalent at the time of booking, carpet areas, other incidental charges, Preferential Location Charges, floor on which it is located and other factors and that this column is filled after mutual agreed conditions and other negotiations and that this practice cannot be termed as unfair.

Submissions: The OP agreeing with the DG submitted that as per industry practice, application forms are standard and are printed at the time of launch

of the project and that while the application form remains the same, the value of consideration changes with each launch and hence is entered manually after negotiations.

Analysis: We have no hesitation in accepting the finding of the DG that it is a standard practice having no significant adverse effect and that the forms are printed at the launch of the project and the amount is entered after negotiations manually at a later stage. Hence the clause cannot be treated as unfair under section 4(2)(a)(i) of the Act.

74. *Allegation: Allottees will be made to sign a separate maintenance agreement in respect of maintenance of common areas and OP has sole right of appointment of maintenance agency/ Introduction of clauses relating to maintenance deposits/ maintenance charges/club membership fees (not told at the time of booking).* As per the DG, the OP has admitted: "*In view of the integrated nature of the project, it is imperative that the maintenance of such construction and facilities be uniform and consistent across the board. For these purposes, it is necessary pre requisite that the entire project be serviced by one maintenance agency. Further, it would be administratively impossible to provide this discretion to the allottees and for the allottees to agree amongst themselves one agency. Hence, to avoid any unnecessary variance in services, which may eventually reflect on the property as a whole, JAL and JIL undertake this responsibility of appointing the maintenance agency."* As per the DG, by thrusting a maintenance agreement over the allottees without their consent and involvement in preparation in the same, the conduct of the OPs is violative of section 4 of the Act as it amount to an unfair condition. The DG is of the opinion that this amounts to usurpation of the rights of the allottees by not allowing them

to have their own maintenance agency for the residential apartments they own.

Submissions: The OP maintains that it does not only have to maintain the residential units but the common area as well and that such a condition is perfectly in line with the provisions of the U.P Apartment Act 2010. The OP argues that since Jaypee Green is being executed in a homogeneous manner there are various facilities which are being shared by the apartment owners with various other commercial, institutional and residential developments which are outside the purview of the UP Apartment Act, 2010.

Analysis: It is observed that the OP, on one hand before the DG and the Commission, denies the existence of an integrated township built by it on the pretext of it being a marketing gimmick and on the other, is defending the allegations made by the informant claiming that the integrated nature of the project requires that maintenance of common area and facilities be uniform. The OP cannot blow hot and cold at the same time contending at one place that what it has constructed is not an integrated township and at the other taking the excuse of integrated nature of project and uniform facilities as a reason to usurp the rights of the allottees by not allowing them to have their own maintenance agency for the residential apartments they own. We outright reject the defence taken by the OP. The DG is correct in his finding that by thrusting a maintenance agreement over the allottees without their consent and involvement in the preparation of the same, the conduct of the OPs is violative of the Act under section 4(2)(a)(i)of the Act as it amount to an unfair condition in sale of services.

75. *Allegation: Nature of various undertakings contained in the application form sought from applicant is onerous and one sided:* Regarding the undertaking required along with the application form being onerous and one sided the DG observes: "*Though the undertaking says that the said premise is subject to the terms of the lease deed with GNIDA, no such lease deeds were provided to the buyers and they were unaware of the provisions of the lease deeds. Buyers were also forced to undertake to have understood about the scheme of development, tentative plans, other documents shown by the company, or any other conditions with the company may prescribe in future. Further, that the application form does not give any right of allotment to the buyer and the undertaking to abide by the terms and conditions in regard to forfeiture of the earnest money, all are considered to be one sided against the interest of the buyers. May be that such undertakings are general practice in the relevant market and is part of the application form of all the players, still the fact remains that such undertakings taken from the buyers at the time of application is one sided and can be considered as unfair practices.*"

Submissions: To the above finding of the DG, the OP argues that:

a) If it undertakes to knock at the door of every allottees and negotiate the terms and conditions of the agreements, the same may prejudice the interest of the other allottees and it is in this scenario that there are set of standard terms and conditions common for allottees and the same cannot be termed as onerous and one sided due to the nature of residential projects.

b) It has not been considered that such large projects are developed in phases and the developer requires funds at regular intervals so as to complete constructions of the project. If payment of dues is left at the behest of the allottees, JAL will suffer huge losses in trying to recover money from the allottees so as to complete construction.

c) Further, it is submitted that there is always a corresponding liability on the developer to pay compensation. For, instance, JAL pays compensation @ Rs 5 per sq feet for the delay or in any event which occurs due to the fault of the developers.

d) The DG failed to take note of the fact that the informant was fully aware of the terms and conditions stipulated in the application form/provisional allotment letter and had signed in consideration of acceptance of the same. It needed to be considered that all the terms and conditions were made available to the informant along with the application form itself and there was never any intention on part of JAL to hide such terms or to refrain from providing such terms at the very outset.

e) The standard terms and conditions are part of the application form and that the applicant is in knowledge of the same before applying for the allotment of the flat/plot.

f) 10% of the total consideration forms part of the earnest money and this is prescribed in the Standard Terms and Conditions. The very purpose of providing a clause for forfeiture is to ensure that the allottees make timely payments and does not default in making

payments of the amounts due. The forfeiture of earnest money aids and assists in ensuring timely payment by a consumer, a *sine qua non* for the development of any project, more so, in a project of such magnitude.

g) Forfeiture of earnest money was held to be legal by the Hon'ble Supreme Court in the case of ***Housing Urban Development and Anrs.*** v ***Kewal Krishan Goel and Ors*** (1996) 4 SCC 249, wherein it was held that: "*Earnest..... meant something given for the purpose of binding a contract, something to be used to put pressure on the defaulter if he failed to carry out his part. If the contract went through, the thing given in earnest was returned to the giver, or, if money, was deducted from the price. If the contract went off through the giver's fault the thing in earnest was forfeited."* It was held by the Apex Court that: *"the competent authority would be fully justified in forfeiting the earnest money which had been deposited and not the 10% of the amount deposited as held by the High Court."*

h) Receipt of application along with the booking amount from the applicant makes an applicant entitled to be considered for an allotment of residential unit applied for. The application can be said to be offer of the applicant showing his/her desire to have a residential unit. Unless the offer is accepted by OP, it does not form a contract. Hence, there is nothing unfair in the 'undertaking 3'.

i) With respect to undertaking 4, it was submitted that the land on which real estate is being developed by JAL has been given by the Greater Noida Industrial Development Authority (GNIDA) and

Yamuna Express Industrial Development Authority (YEIDA). It is essential for JAL to disclose that the said premises are subject to the terms of the lease deed with concerned authority and make the allottees understand the rights and obligations that they possess over the apartments/ residential units. The said undertaking can in no way be considered unfair.

j) With respect to 'undertaking 5' , it was submitted that before an allottees pays the booking amount, JAL undertakes to disclose all the tentative plans, scheme of development etc to the allottees during the informal meetings held with the allottees and the said undertaking is, as such, not opposed to as being unfair, in benefit of the allottees.

k) There is nothing unfair in 'undertaking 6' as the schedule of payments and payment plan is provided to the applicant before signing the application form.

l) JAL denies that the terms of the application form along with the undertaking are onerous, one sided and biased towards the developer. The said terms are as per the market practice and are followed by all real estate developers big or small and JAL being a new entrant in the market has followed the industry practice.

Analysis: It is noted that the OP contends that the terms of the undertaking in the application form are as per market practices and are followed by all real estate developers, big or small. On a closer examination of the undertakings, it is evident that they are onerous and are one sided in favour of the OP and biased

against the buyers. We accept the observation of the DG that the conditions in the nature of agreeing to the payment plan; application not constituting any acceptance of the application and the allottees not being entitled to any provisional or final allotment even after money is tendered with the application etc are in the nature of one sided unilateral conditions imposed on the buyers and provide immunity to the OP against all odds. In fact the OP is trying to escape the clutches of the Commission by claiming that what it follows is merely an industry practice. The Commission has already, on earlier occasions, expressed its displeasure over certain practices followed by the real estate players under the garb of industry practice. In Case No 59/2011, ***Jyoti Swaroop Arora against M/s Tulip Infratech Limited and Ors*** the Commission observed:

> "*It may be noticed therefrom 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.*"

In the present case the OP is a dominant player in the relevant market. A dominant enterprise cannot hide behind the argument of 'industry practice' when the practice is of abusive nature resulting in gains to the enterprise and substantial harm to the consumers. A dominant player is expected to set standards of conduct rather than claim to follow conduct/behaviour that harm competitors and consumers and subserve its own interests.

76. *Allegation: Clause enabling the company to reject/ not to allot any application without assigning any reason thereof.* With respect to the allegation of the informant that OP has the absolute right to reject/ not to allot the apartment to the applicant without assigning any reason, the DG observed that when the application form is claimed to be given to the applicant after statutory approval of layout plan, floor plan, clauses for preferential location and other special charges related to the floor at which the unit is located, it is unfair on the part of the developer that there is any other possibility of rejecting or not allotting the particular apartment for which buyer has applied for and if at all there is any reason for the same, it cannot be rejected or not allotted without assigning any reason to the applicant and if such a practise exists, it is unfair, autocratic and abusive.

Submissions: The OP contends that it is a new comer in the real estate sector and has been following the pattern that has been set by leaders in the industry (industry practice) and that if at all it has cancelled allotments the same is due to breach of contractual obligations as set out in the standard terms and conditions.

Analysis: With respect to this allegation it is observed that the OP retaining to itself the right to reject/ not to allot the residential units and that too

without assigning any reason is blatant abuse of dominant power by the OP. The buyers have a right to be allotted the premises which they have booked and paid money for. If this is not the case then it makes the entire concept of Preferential Location Charges (PLC) infructuous. There can be nothing more unfair/abusive than the act of the OP, on one hand, collecting PLC and, on the other, rejecting to allot the floor for which the PLC is collected. Hence, we have no doubt that the clause is unfair under section 4(2)(a)(i) of the Act. The claim of the OP that it is a new entrant and that it is following the industry practice does not deserve any merit as industry practice cannot be a cause for justification by a dominant player as already discussed *supra*.

77. *Allegation: The allottees have no right, title interest subsequent to allotment.* The DG observes that the OP does not deny that the provisional allotment of apartment contains clause stating that applicants/ allottees would have no right, title or interest on the premises either during its construction or after its completion till the execution of Indenture of Conveyances, it being a standard industry practice in all real estate transactions. As per the DG, Clauses 2.3 to 2.4 of the standard terms and conditions are drafted in such a way that for every small fault, the buyer will be made responsible but at the same time seller does not have any responsibility at all. As a result the DG terms the above allegation of the informant as correct.

Submissions: It was submitted by the OP, that right from the stage of obtaining a license for development of land till the grant of the occupation certificate, the builder is required to secure various approvals and sanctions from the concerned regulatory authorities and the builder is obligated to comply with all the relevant laws or rules or even departmental guidelines

which have to be made known to the allottees for which they are included in the agreements and hence there is nothing which is unfair regarding the clause.

Analysis: It is to be noted that once again the OP is defending its conduct under the guise of it being an industry practice. Dominant enterprises in the real estate sector have a duty to ensure that their conduct in dealing with the consumers is fair and does not hamper competition. In fact, they should set standards that are fair for others to emulate. Such clauses in the agreement which penalize the buyers at every fault of theirs but entails no liability for the seller, deserves to be condemned outright. The allegation of the informant is correct and the OP is in violation of section 4 of the Act.

78. *Allegation: OP has unfettered rights to any variations, deletions, alterations in the plan, super areas, specifications, dimensions, designs etc.:* The DG notes that a builder/developer never reduces the component of super built up area and charges less on this account against what has been offered to the buyers at the time of booking. The DG also notes that this is drafted in a way where all the disadvantages are on the part of the buyers, whereas the OP is free from any accountability.

Submissions: It was submitted by the OP that the super area described in the application form and standard terms and conditions are as tentative, and as such the allottees were fully aware that by the time the building is completed, there may be some changes in the super area of the apartment. It was submitted that, usually, during the course of construction owing to certain regulatory, architectural or civil engineering requirements, often developers are constrained to carry out certain changes in the layout or floor

plans of the apartment block which could either lead to an increase or decrease in the actual area of the apartment. The OP further claimed that clause 6.8 of the Standard Terms and Conditions work both ways as at the time of final calculation of super area, it appears to have been increased, the allottee will be liable to pay the amount to it and vice versa.

Analysis: We agree with the conclusion of the DG on this account. There is no doubt that there may be certain situations where minor changes are required to be made for technical reasons. However, the claim of the OP that such clauses in standard terms and conditions work both ways and sometimes in favour of the buyer is not tenable in that the OP took major changes in the super area as analysed in para 81 that follows. It is clear that in the garb of the claim that the change/alteration is limited to regulatory, architectural or engineering requirements, the OP has inducted this clause in the standard terms and conditions confirming that it is engaged in practices which are unfair.

79. *Allegations: OP has sole right to introduce new charges and the allottees have no right to challenge such charges:* With respect to the right of the OP to introduce new charges, the DG is of the opinion that under no circumstances can the OP take away the right from the allottees to challenge such charges. Such a clause limiting the right of the buyer is an unfair practice.

Submission: The OP objected to the said allegation of the informant on the ground that it has not taken away the right from the allottees to challenge and that such a charge is not true. In case the allottees wish to challenge such charge he/she always has the legal right and recourse that are available.

Analysis: There is no doubt that the adversely affected buyers possess remedies under different forums which are concurrently available. The OP cannot attempt to snatch such a right from the buyers. If the OP takes away such a right from the buyers by including a term in the contract that the allottees cannot challenge the changes undertaken by it, such clause is hit by section 4.

80. *Allegation: OP can indefinitely delay the project without any obligation towards the allottees:* All such conditions imposed on the buyers are unfair, the standard terms and conditions are one sided where the company has covered itself on every possible account from liability in the case of delay and there are no possibilities of paying anything except a small compensation of Rs 5 per sq ft to the consumers.

Submission: The OP, in this regard submitted that the delay in construction cannot be considered as a deliberate wilful action on the part of the builder and there is no doubt that the builder would suffer to a greater extent by not handing over possession besides running the risk of the buyers not being inclined to invest in the developer's subsequent projects leading to reputational loss of the developer. Moreover, in such cases time is not of the essence of a contract. The OP placed reliance of the Case of ***Bangalore Development Authority* v. *Syndicate Bank* Appeal (Civil) 5462 of 2002** in which it was observed by the Apex Court that:

> *" .....where time is not the essence of the contract and the buyer does not issue a notice making time the essence by fixing a reasonable time for performance, if the buyer, instead of rescinding the contract on the*

ground of non-performance, accept the belated performance in terms of the contract, there is no question of any breach or payment of damages under the general law governing contracts....." "In a contract involving construction, time is not the essence of the contract unless specified... the Respondent did not also choose to terminate the contract, obviously in view of the manifold increase in the value of the houses.... thus, it cannot be said that the respondent made time the essence of contract, in a manner recognized by law."

The OP also stressed that on account of delay beyond the proposed period, a specific right was given to the allottees to cancel the agreement and to claim refund of the entire amount without deduction of the earnest money and that the company is refunding the amount by the allottees with simple interest @ 12% per annum which is reflected in Clause 9.1.5 of the new application form. Further, the OP contends that subsequently a practice has evolved in the industry to provide for compensation for delay in possession at the rate of Rs 5 per sqft per month.

In this regard, Clause 7.1 of the Standard Terms and Conditions of the application form lays down the obligation of the OP and reads:

"*The Company shall make best effort to deliver possession of the Said Premises to the Applicant within the period more specifically described in the Provisional Allotment Letter with a further grace period of 90(ninety days). If the completion of the said premises is delayed by reason of non availability or scarcity of steel and/or cement and/or other building materials and/or water supply and/ or electric power and/or slow down, strike and/or due to a dispute with the construction agency employed by the company, lock out or civil commotion or any militant action or by*

reason of war; or enemy action, or earthquake or any act of god or if non delivery of possession is result of any law or as a result of any restriction imposed by a government authority or delay in the sanction of building/zoning plans/ grant of completion/ occupation certificate by any government authority or for any other reason beyond the control of the company (hereinafter referred to as 'Force Majeure Events' and each individual event referred to as 'Force Majeure Event') the company shall be entitled to a reasonable extension of time for delivery of possession of the said premises."

81. *Analysis:* It is noted that *force majeure* is a common clause in contracts that essentially frees both parties from liability or obligation when an extra ordinary event or circumstances beyond the control of parties take place. It is generally intended to include risks beyond the reasonable control of a party and does not include acts arising out of negligence or malfeasance of a party. The Commission in Case No 03, 11, 59 of 2012 ***M/s Mahagenco Ltd against Mahanadi Coalfileds and CIL*** observed that:

"The Commission observes that the term force majeure is frequently used in construction of contracts to protect the parties in the event that a segment of the contract cannot be performed due to causes that are outside the control of the parties, such as natural disasters, that could not be evaded through the exercise of due care."

82. In the case in hand, the DG is correct in his observation that it is hard to imagine how the non-availability or scarcity of steel and/or cement and/or other building materials and/or water supply and/or electric power and/or slow down, strike and/or dispute with the construction agency employed by the company can constitute acts covered under *force majeure*. Moreover, in

Clause 7.2 it is ensured by the OP that no compensation for damage or loss shall be paid to the buyers on account of delay in handing over possession for any of the conditions included in *force majeure*. Though this clause further says that the allottees are entitled to compensation for delay thereafter @ Rs 5 per sq ft per month for the super area, the time consumed by the occurrences of *force majeure* event is excluded from computing the time of delay. Moreover, the company reserves its right to be the sole judge for determining whether the act is covered under *force majeure* or not. To add to the miseries of the buyers, the OP has introduced the exclusion clause stating that if there is any default in making timely payment of any instalment by the allottees, no compensation shall be payable by the company. This is nothing short of gross abuse of power by the OP and the contention of the OP that this clause is not that wide as compared to that of other developers is of no avail. Compensation of Rs 5 per sq feet per month has been stated as an industry practice. In a market where prices have been rising steeply adopting a rate of Rs 5 sq per feet which was fixed years ago and giving the sanctity of 'industry practice' falls foul; of the basic principles of financial logic. Any fair compensation has to be linked to the value (*ad valorem*) of the transacted product/service rather than being a fixed sum irrespective of changes in value per unit. Besides it is the responsibility of the OP to get all approvals before launching the scheme and before collecting money.

83. In addition to the above, In Case No 16/2012, the informant has levelled the following allegations against the OP:

a) Clause enabling the company to construct other building or structure in the area of the project to put up additional construction and to amend/alter the plan unilaterally

b) Clause mandating the applicant/ allottees to make prompt and due payment of additional sums borne by the company

c) Clauses dealing with obligations of the company, default, consequences of default, termination and consequences of termination are also alleged to be unfair.

84. *Allegation: Clause enabling the company to construct other building or structure in the area of the project to put up additional construction and to amend/alter the plan unilaterally*: The DG opines that clauses related to enabling the company to construct other buildings or structures in the areas of the project to put up additional constructions mean that the company should be free to construct towers for which approval has been accorded by authorities under a single layout plan and that keeping such a clause in the standard terms and conditions does not seem to be unfair.

Allegation: *Clause mandating the applicant/ allottees to make prompt and due payment of additional sums borne by the company.* The DG observed that there is nothing wrong with clauses requiring the allottees to make prompt and due payments.

Allegation: Clauses dealing with obligations of the company, default, consequences of default, termination and consequences of termination are also alleged to be unfair. This Allegation pertains to Clauses dealing with obligations of the company, default, consequences of default, termination and consequences of termination which are clauses 9.1.1 to 9.2. Clause 9.1.5 provides that in the event the allottees are permitted to cancel the allotment, the entire amount of earnest money shall be forfeited by the company since the termination of the allotment on request of the allottees is allowed only

after the full payment of consideration. Clause 5.7 states that the allottees shall be liable to make payment of interest @ 18% per annum on the amount outstanding of the consideration from the due date upto their payment or cancellation of the allotment. The payments made by the allottees shall be first adjusted against the interest and/or any other penalty, if any, due from the allottees of the company.

Analysis of Clause (a), (b) and (c) above: It is clear from a plain reading of the above clauses that the OP has not left any choice before the buyer to exercise the option of coming out of the project. Clauses relating to charging interest are heavily loaded in favour of the OP and against the interest of the buyers. Hence the contention of the informant is found to be legitimate and reasonable on account of all the unfair clauses dealing with obligations of the company default, consequences of default, termination and consequences of terminations etc. and calls for redressal. With respect to the allegations of the Informant that the OP retained the right to put up additional construction, we agree with the DG that the clause enabling the OP to construct other buildings or structure in the area of the project meant that the OP should be free to construct towers for which approval has been accorded by authorities under a single lay out plan, provided that this fact has been brought to the notice of the customers at the time of inviting applications for the project. If this is not the case and the customers are kept in the dark regarding construction of additional towers undertaken by the OP after the project is sold, the clause becomes unfair and is hit by section 4(2)(a)(i). With respect to the clause requiring the allottees to make prompt and due payment of additional sums borne by the OP, it is observed that the OP has the right to collect whatever is legitimately due to it. Moreover, it is in the interest of the allottees and the project under construction that all

payments are duly made. Hence clause (a) and (b) are not unfair. However clause (c) is in violation of section 4(2)(a)(i) of the Act.

85. *Allegation: OP unilaterally changed the original plan and instead of 24 floors, without intimation to the allottees, modified the plan to 28 floors:* As per the investigation carried out by the DG, the following facts emerge:

I. Layout plan includes one tower B-6 to be of 30 floor. It is not clear from the plan that the so called tower B-6 is Sun Court Apartment

II. Submission dated 20/02/2012 contained two brochure out of which one contains price list. The tower was announced containing ground plus 28 floors. It does not mention that the tower contains any penthouse.

III. No evidence is on record stating that the Sun Court/Sea Court Apartment would have 30 floors.

As per the DG, even if the lay out plan was sanctioned for 30 floors, the same was not provided in the brochure that the building would contain a certain number of floors, which if present in the brochure would have a material bearing on the decision of the allottees. Further as per the DG, construction of 12 additional flats of 3875 sq ft means addition of about 46500 sq ft which can by no means be considered as a minor alteration.

Submissions: The informant claimed that at the time of booking the OP represented that the apartment tower will have 24 floors having 2 apartments on each floor which was unilaterally changed without any intimation to the allottees and the number of floors was changed from 24 to 28.

The claim of the OP is that the Sun Court Apartment Tower was originally conceptualized as – ground plus 29 storeys i.e. 30 storied building. With respect to this, necessary approval was provided by GNIDA *vide* its letter dated 11/09/2006. Further the OP has claimed that the alteration in the number of floors from 28 to 30 was a minor one which cannot be said to reduce the facilities assured to the original allottees.

Analysis: It is to be noted that the brochure or the prospectus is the mirror of the project which should reflect what the entire project has to offer and any misrepresentation/ fraud/ wrong information therein may have a material bearing on the decision of the allottees. Such an alteration, after the brochure is released and after OP has started collecting money from the allottees jeopardizes the interest of the allottees who will be subject to pay more interest on the finances taken and would not be able to enjoy the benefits of the property during the period of delay. It is but natural that at the time when construction started, the OP had a complete idea about the structural strength of the building as to how many floors could be built on the foundation on the basis of the structural strength. Besides, increasing the number of floor would mean that the allottees will have less common area than was originally promised and paid for. The DG has estimated that this additional area comes to about 25% of the total area. Such blatant action of not informing the allottees about the exact specification of the tower to be constructed and effecting major alteration during the period of construction amount to anti-competitive behaviour and is hit by section 4.

86. *Allegation: The agreement provided that the apartment would be centrally air conditioned with personal climate control however, split air conditioner had been provided. There had been other such changes in specifications which differ from which was originally agreed between OP and allottees:* The allegation of the informant is with respect to the OPs deviating from what was agreed in respect of apartments being centrally air conditioned with personal climate control. The DG is of the view that this contention of the Informant in Case No 34/2012 and 72/2011 are correct even though it appears to be a mere breach of contract rather than a competition issue having AAEC.

Submissions: The OP has argued that the air-conditioning system provided in Sun Court Towers conforms to central air conditioning system and practices, in all its aspect, as defined by United States Department of Energy (Residential Central Air Conditioners and Heat Pumps) and conforms to the modern energy conservation standards in vogue. The OP also submits that all modifications to the standard architectural designs lie at its sole discretion, which is exercised keeping in mind the interest of the future owners/allottees. OP also submits that it cannot be held ransom to the whimsical desires of the informant and that there is no element of competition involved in the information.

Analysis: It is observed that the OP has admitted that each residential unit has been provided with a separate air conditioning unit (indoor and outdoor). In no way, individual unit provided in each residential unit can be considered as a substitute for central air condition system. Further, in no way can an exhaust system be said to be a central air condition system, as submitted by the OP. Certainly the OP has not provided to the consumers

what it had contracted for under the agreement. Unlike what the DG has concluded we find a clear case of consumer harm through this act of OP in that while the OP seems to have saved on expenditure by shifting from the original plan of centralized air conditioning, to individual units, the level of comfort to the allottees is much lower and the effect on the environment is also adverse impacting consumer interest adversely. Thus we reject the finding of the DG on this aspect and hold OP liable for violation of section 4(2)(a)(i).

87. *Allegation: Specific issue of misrepresentation of facts by OP leading to informant signing the loan and disbursement letter:* This is a specific issue involved in Case No 72/2011 that there was a misrepresentation of facts by the OP which led to the informant signing the loan and disbursement letter. It was alleged that the OP had not procured NOC from HUDCO by the end of March 2007. Property was mortgaged to HUDCO at the time of creating mortgage in favour of the relevant finance company BHW (earlier known as Birla Home Finances Limited and later as Deutsche Postbank Home Finances Ltd). To this, the OP claimed that a tripartite agreement with the informant was signed on 30/03/2007 after which it was realized that NOC from HUDCO, inadvertently, could not be obtained on 02/04/2007 and was received the very next day, i.e. 03/04/2007 and a copy was given to the informant on the same day. The OP claims that that informant deposited the same with the bank and obtained the cheques of loan amount of Rs 2.02 crores and if the informant had any grouse against the mortgage of land, he would not have deposited the bank cheques with the company and would have sought the refund of booking amount. The DG, investigated the relevant documents in this regard and found out that the NOC issued by HUDCO on 03/04/2007 confirms that it had no objection if the OP made

booking and entered into agreement with the informant although HUDCO shall continue to have charge over the property which can be released only after payment of proportionate loan amount to HUDCO by OP before execution of the Conveyance Deed for residential units. It was found out by the DG that there are few more restrictions imposed by HUDCO for release of all the charges of the residential units. Moreover, the DG report mentions that there is no evidence on record to prove that the NOC was given to the informants who in turn gave it to the bank.

Analysis: As is evident from the investigation there was no NOC with the OP on 31/03/2007 and the lien of HUDCO over the said three residential units was finally discharged on 11/05/2007 (gathered from letter by HUDCO dated 11/05/2007). However no evidence on record was found with respect to the allegations of the informant that it was represented to him that OP3 was the only finance company who has pre-approved loan facility for the projects of OP group. Moreover, the OP group was not found to have any buy back guarantee scheme for its housing projects by the DG. Thus, non compliance, if any, to such scheme is a case of breach of contract and as such cannot be treated as unfair conduct in violation of section 4.

88. In Case No 45/2013, in respect of which a separate DG report was submitted to the Commission on 31/12/2013, the allegations pertain to:

I. One sided conditions in the provisional allotment letter
II. Delay in delivering possession by the OP
III. Demand of dues not confirming to payment plans
IV. Unfair clauses 2.3 and 2.4 of standard terms and conditions
V. Unfair adjustment of interest and penalty against the payment
VI. Applicant have no right over open space/common area etc

VII. The allottees will be made to sign a separate maintenance agreement in respect of maintenance of common areas and OP had sole right of appointment of maintenance agency

VIII. OP had absolute right to reject/ not to allot the apartment to the applicant without assigning any reason

IX. OP have unfettered rights to any variation, deletions, alterations in the plans, super areas, specifications, dimensions, designs etc

X. OP had sole right to introduce new charges and the allottees had no right to challenge such charges

89. *Allegation: One sided conditions in the provisional allotment letter:* one of the allegations pertains to abusive and one sided conditions in the provisional allotment letter. The DG observes that the undertaking forming part of the application form taken from the buyers at the time of application is one sided and can be considered unfair. The DG came to this conclusion on the basis of the fact that though the undertaking provided that the premise is subject to the terms of the lease deed with GNIDA, no such lease deeds were provided to the buyers and they were unaware of its provisions. Moreover, buyers were forced to undertake to have understood the scheme of development, tentative plans, and other documents shown by the Company.

Submissions: The OP submits that: "It *is denied that the terms of the application form along with the undertaking is onerous and one sided. The said terms are as per market practices and are followed by all real estate developers, big or small. However keeping in mind the jurisprudence emanating from the Hon'ble Commission, and despite being not dominant in the relevant market, JAL and JIL have undertaken unilaterally to modify*

the terms and conditions in the application form. Modified application form was submitted dated 24/09/2012....."

Analysis: The application form not giving any right of allotment to the buyer and the undertaking to abide by the terms and conditions in regard to forfeiture of the earnest money, are all abusive and resulting out of the dominant status of the OP. It is noted that the OP, on this account also, defends himself on the ground of following the industry practice. The DG has adequately pointed out that the condition in the agreement that the application form does not constitute any acceptance of the same by the OP and that the allottees are not entitled to any provisional or final allotment even after money is tendered with the application is one sided and provides immunity to the OP against any undue circumstances and places the buyer in a position to suffer.

90. *Allegation: Delay in delivering possession by the OP:* The DG observed that all such conditions imposed on the buyers are unfair and indicated that the standard terms and conditions are one sided where the OP has covered itself on every possible account from liability in the case of delay and there are no possibilities of paying anything except small compensation of Rs 5 per sq ft.

91. *Submissions:* The OP submitted that it never assured to the informant that the possession would be given in 1.5 yrs time and that the informant placed no evidence on record to substantiate his averment. It was submitted that its Provisional Allotment Letter (PAL) clearly states that the period of construction would be 30 months from the date of PAL subject to 90 days grace period. The OP also resorted to Clause 7 of the Standard Terms and

Conditions of the application form which provides that on account non availability or scarcity of steel and/ or cement and/or other building materials and/or water supply and/or electric power and/or slow down, strike and/or due to a dispute with the construction agency employed by the OP, lock out or civil commotion etc the OP will be entitled to a reasonable extension of time for delivery of possession of the said premises.

Analysis: We have already dealt with the concept of *force majeure* in the preceding paras and how the OP group being a dominant player in the relevant market, in this case, has resorted to an extended *force majeure* clause and that this amounts to an unfair term in the agreement. The meagre amount of compensation which the OP is offering by over stretching the *force majeure* clause is clearly abusive, more so when the OP is reserving to itself the right to be the sole judge and arbiter for the existence of a *force majeure* event.

92. *Allegation: Demand of dues not conforming to the payment plan:* In Case No 45/2013, the informant has alleged that the OP sent an illegal notice claiming a sum of Rs 11,15,310/- as final payment, whereas, in fact, the structure/ construction at the time of issuing notice was incomplete. In support of his allegations the informant enclosed photographs (page 44 and 45 of the information) of the incomplete structure. On examination of the payment plan by the DG, it was revealed that the informant was required to pay the amount in 13 stages of payments. 13th stage of payment is at the time of offer of possession. As per the payment plan, the allottes are required to pay the total amount of Rs 29,93, 000/- including IFMD charges, Social Club Charges and one time lease Rent Charges. Excluding these charges, the allotee was required to pay only Rs 27,58,000/- till the payment of

possession. It was admitted by the informant that an amount of Rs 17,08,000/- was already paid by him. The only issue is the time of payment of outstanding dues of Rs 11,15,310/-.

Submission: The OP submitted that the informant defaulted in making timely payments as per the payment plan and is liable to pay interest in accordance with the standard terms and conditions. The standard terms and conditions provide for 18% per annum interest for the period of delay in payment of due instalments. However, the rate of interest has been reduced from 18% to 12% w.e.f. 01/04/2011 for all allottees and demands are made accordingly.

Analysis: It is clear from the photographs of the structure made available by the informant that at the time when the demand for money was made only upto 11th floor roof slab was completed. It is also clear that internal plaster and flooring within the apartment would not be possible in that state of incomplete stage of the building. In such a scenario, the informant is not liable to pay the amount mentioned against the 11th, 12th and 13th stage of payment and any demand by the OP in this regard is unjustified.

93. *Allegation: Unfair Clauses 2.3 and 2.4 of standard terms and conditions:* One of the allegations of the informant pertains to Clause 2.3 and 2.4 of the Standard Terms and Conditions with respect to execution of Indenture of Conveyance where allottee had no right, title, interest subsequent to allotment and to prevent the company from construction of other building, other structure in the area adjoining the premises, putting up additional construction at OP project Aman and amending/altering the plans. As per the DG, the OP group does not deny that the provisional allotment of

apartment contains clauses stating that applicants/allottees would have no right, title or interest on the premises either during its construction or after its completion till the execution of Indenture of Conveyance. Reason given once again for this is standard practices followed in all real estate transactions. Clause 2.3 reads: *The applicant agrees that unless an Indenture of Conveyance is executed in favour of the allottees, the Jaypee Infratech Ltd shall continue to be the owner of the said premises and no payments made pursuant to the Provisional Allotment of the said premised to the allottees, whether pursuant to the Standard Terms and Conditions or otherwise, shall give any person any lien on the Said Premise until they have complied with all the terms and conditions of the Provisional Allotment and the Indenture of Conveyance has been executed in favour of the allottees.* Further Clause 2.4 provides: *Nothing herein shall be construed to provide the applicant/ allottees with any right, whether before or after taking possession of the said premises or at any time thereafter, to prevent the Company/JIL from (i) construction or continuing with the construction of the other building(s) or other structure in the area adjoining the Said Premises; (ii) putting up additional construction at Jaypee Greens Aman; (iii) amending/ altering the plans herewith.*

Submissions: it was specifically submitted that the allotment to an allottee, under the norms of the industry, is a provisional allotment with ownership remaining with it until construction of projects subject to payment of all dues and execution of deed of conveyance. It was averred that this is a standard practice not only in group housing societies but also in all real estate transactions between two individuals.

94. *Analysis:* It is agreed that no right, title and interest in the land can be transferred to an allottee till the entire consideration is paid to the OP as per the terms and conditions agreed upon but the clauses 2.3 to 2.4 of the standard terms and conditions are certainly drafted in such a way that for every small fault of the buyer, he will be made responsible. On the other hand, the seller will have no responsibility. We reject the stand taken by the OP. As mentioned above, unfair practices in real estate by an enterprise cannot be carried out under the garb of standard practice/industry practice, more so by a dominant player. The DG rightly notes that it is agreed that no right, title and interest in the land can be transferred to an allottee till the entire consideration is paid to the OP as per the terms and conditions agreed upon but the clauses 2.3 to 2.4 of the standard terms and conditions are certainly drafted in an unfair way.

95. *Allegation: Unfair adjustment of interest and penalty against the payment:* The informant also raises allegation regarding Clause 5.6 which provides for adjustment of payment first against the interest and/or any penalty and the balance available amount is adjusted against the remaining instalments due from the informant. The DG observes that the allegation of the informant is correct on account of the unfair clauses related to adjustment of payments first against interest and penalty, if the same is read with other clauses dealing with obligations of the company, default, termination and consequences of termination.

Analysis: The words in which clause 5.6 is couched needs to be seen: "*The allottee shall be liable to make payment of interest at the rate of 18% per annum on the outstanding amounts of consideration and other dues from the date upto their payment or cancellation of the provisional allotment. The*

payment made by the allottee shall first be adjusted against the interest and/or any penalty, if any, due from the allottee to the JIL under the terms herein and the balance available, if any, shall be appropriated against the instalments due from the allottee under the Standard Terms and Conditions and the Provisional Allotment." It is noted that a plain reading of clause 5.6 in isolation does not seemingly appears unfair as much as it does when it is read in conjunction with clause 9.1.1 to 9.2 which, as discussed earlier, deals with default, consequences of default, termination and consequences of termination. It is reiterated that clause 9.1.5 provides that in the event the allottees are permitted to cancel the allotment, the entire amount of earnest money shall be forfeited by the company since the termination of the allotment on request of the allottees is allowed only after the full payment of consideration. Thus it can be seen that the OP has not left any option before the buyer to come out of the project. The clauses are heavily loaded in favour of the OP and against the consumer interest. As per clause 9.1.1 allottee was allowed a period of 30 days only to rectify the default failing which the provisional allotment was to be cancelled, earnest money to be forfeited, termination charges to be paid, penal interest to be charged wherein in the garb of *force majeure* event, OP has ensured that under nearly no circumstances, any compensation should be paid to the buyer.

96. *Allegation: Applicant has no right over open space/common area:* As per clause 7.7 of the Standard terms and conditions of PAL the applicant shall have no rights, claim, title or interest of any nature or kind whatsoever except right of ingress/egress over or in respect of land, open space & all or any of the Common areas/facilities *etc*. which shall remain the property of OP. The OP, can as per applicable laws, transfer and assign the common area/facilities to a body or association of owners of units of Jaypee Greens

Aman or their cooperative society… As per the DG this clause does not seem to be unfair as the allottees are eligible for the ownership of only the units that they have purchased. They also have a right over the super built up area for which they have paid.

Analysis: We have no hesitation to accept the conclusion of the DG. The above clause says that the applicant shall have no claim in respect of land, open spaces and all or any of the common areas/facilities except the right of ingress/egress. It further says that as per the applicable laws the OP can transfer and assign the common Areas/facilities to a body or association of owners of units of Jaypee Greens or their cooperative society. It is clear that what the allottees are owners of is only the apartment that they have purchased and they have no right over the super built up area which contains common facilities like lift, corridors etc. Thus, the clause is not unfair in saying that the applicant shall not be entitled to claim any separate exclusive demarcation or partition or right to use any of the areas which is not specifically sold or allotted to the applicant.

97. The following allegations have already been dealt with above and shall not be repeated.

I. The allottees will be made to sign a separate maintenance agreement in respect of maintenance of common areas and OP has sole right of appointment of maintenance agency;

II. OP has the absolute right to reject/not to allot the apartment to the applicant without assigning the reason;

III. OP have unfettered rights to any variation, deletions, alterations in the plans, super area, specifications, dimensions, designs etc;

IV. OP had the sole right to introduce new charges and the allottee had no right to challenge such charges

2.97.1. Now let us go through the provisions of the Act to analyse how the above conduct of OP constitute imposing unfair conditions. The Act prohibits abuse of dominant position under section 4. Section 4 provides:

Abuse of dominant position *- (1) No enterprise or group shall abuse its dominant position. (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group.—-*

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service

(b) limits or restricts—

(i) production of goods or provision of services or market there for or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) .....

(d) .....

(e) .....

98. Section 4(2) (a) (i) clearly prohibits the imposition of unfair or discriminatory conditions by a dominant enterprise. From the above discussion, it is clear that in drafting all the terms and conditions in the standard agreement, the OP did not follow the principles of equity, rather they were couched in such a manner so as to unilaterally favor the OP and to the disadvantage of the consumers. The allotment letter executed by the

OP is quite vague and does not confer any substantive rights on the buyers. It is seen that the standard terms and conditions introduced through the application form are totally one sided and the buyer has virtually no right against the OP. Moreover, time and again, the OP describes the present dispute as a contractual one. The entire *modus operendi* of the OP, such as collecting money from the buyers without delivering the residential/dwelling unit on time, increasing the number of floors without the consent of the buyers, imposition of various charges, unfettered right of addition, deletion *etc*., absolute right to reject the allotment without specifying any reason *etc*., are nothing but imposition of unfair conditions on the buyers by the OP who enjoys a position of dominance in the relevant market. In analysing unfairness in contracts, the Commission in Case No 03, 11, 59 of 2012 observed that:

> *"Rawlsian principles for justice postulate equitable enforcement of contracts, where the rights and obligations of the parties are balanced and do not favour one party to the contract. However,* ***there cannot be a watertight compartment in which fairness of all contracts in the world can be defined or listed.*** *The unequal nature of the contract with CIL exercising its market power in setting the terms and conditions has been outlined in the order.* ***The 'unfairness' emanates from the fact that CIL is in a position to influence the terms and conditions of the contract and has inclined them in its favour, and there has been an attempt to formulate the contract with unequal non-benign effect on the buyer."*** **(emphasis supplied)**

Conclusion

99. In view of the above discussion, we are of the considered opinion that the OP enjoys an undisputed dominant position in the relevant market of

provision of services for development and sale of residential/dwelling units in Integrated Townships in the territory of Noida and Greater Noida. We hold the OP to be in contravention of provisions of Section 4(2) (a) (i) of the Act for imposing unfair/ discriminatory conditions. The unfairness emanate from the fact that the OP is in a position to influence the terms and conditions of the contract and has tilted them in its favour. The OP, abusing its dominant position, not only drafted the standard terms and conditions of the agreement without mutual consultative process but sought to impose them on the buyers. In sum and substance we agree with the findings of the Supplementary DG Report, subject to more clear definition of the relevant product/service market and hold the following terms and conditions/ conduct to be violative of section 4(2)(a)(i) of the Act:

a) Clause relating to separate maintenance agreement in respect of maintenance of common area and the OP having the sole right to appoint the maintenance agency
b) Various undertaking, as mentioned above, and the one sided conditions in the undertaking required to be signed by the buyers along with the application form
c) Absolute right to reject/ not to allot the apartment to the buyers without assigning any reason
d) Clause relating to the allottees having no right, title, interest subsequent to allotment
e) Clause providing unfettered rights to any variation, deletion, alteration in the plans, super areas, specifications, dimensions, designs *etc*.
f) Clause giving sole right to the OP to introduce new charges and the allottee having no right to challenge the same

g) Clause giving the right to the OP to indefinitely delay the project without any obligation towards the allottees

h) Clause dealing with obligation of the OP, default, consequences of default, termination and consequences of termination

i) Unilaterally changing the original plan from 24 floors to 28 floors without any intimation to the allottees

j) Demanding dues not confirming to the payment plans

k) Clause relating to unfair adjustment of interest and penalty against the payment

l) The conduct of the OPs deviating from what was agreed in respect of apartments being centrally air conditioned with personal climate control.

100. Such imposition of unfair and discriminatory condition by the OP who is a dominant player in the relevant market has serious adverse effects on the market and on consumers. While the Act does not envisage analysis of adverse effect on competition arising out of abusive conduct by a dominant player (unlike what is provided under section 19(3) in respect of anti-competitive agreements and under sec 20(4) as regards appreciable adverse effect in respect of combination) before concluding violation in the instant case the adverse effects are clearly evident. Customers have suffered due to the lower common areas than what was envisaged; they were made to pay much more than what was originally agreed to; timely completion of the project was not achieved resulting in substantial consumer harm; the OP perpetrated undesirable industry practices causing substantial harm to the competition and to consumers, ignoring its responsibility as a dominant player to set fair standards of industrial practices for other players in the market to emulate. Therefore, we find it a fit case for imposition of penalty

in terms of provisions contained in section 27 of the Act which shall not only reflect the seriousness of the contravention committed by the OP, but which is also expected to act as a deterrent for the OP and other players in the real estate sector so as to result in a check on the anticompetitive practices perpetrated in the sector under the guise of standard industry practice.

101. There are severe aggravating factors in the case in hand. Not only is the conduct of the OP abusive but despite the stern words of the Commission in ***Belaire Owners Association against DLF*** **Case No 19/2010**, the OP, being the dominant player in the relevant market has chosen to perpetrate practices that were frowned on and penalized by the Commission. To our dismay the OP defends its conduct in the name of 'industry practice', while as a dominant enterprise, it is expected to have set an exemplary trend for players in the industry to emulate. The OP, armed with command over land banks far above its competitors, with substantial financial resources and enjoying vertical integration, possesses tremendous potential to expand its real estate business in the relevant market in the coming years, and it is therefore important to put a break on its practices that while benefitting itself, cause severe harm to competition and consumers in the relevant market. The OP also submits that it is a new entrant in the real estate market and has entered the market only in 2003. The hollowness of such arguments are evident given that real estate sector is nothing new in the country and that the learning curve is not that steep for an industrial house of the strength and resources of the OP to take refuge under the plea of experience falling short of a decade. On the other hand, if such a player, calling itself a 'new entrant' in the market, can thrust one sided and abusive contract terms on the customers, hampering competition in its very initial years, then if left

unchecked it can go ahead and perpetrate undesirable standards that have been infesting the industry so far, as also set newer and even more undesirable standards for other players in the market to follow. On the other hand, being a 'new comer' the OP should have endeavored to set fair standards for the rest of the industry to follow and built a reputation for itself on this basis. The OP has collected several thousands of crores of rupees from the consumers on the pretext of offering them residential / dwelling units in 'Integrated Townships' and cannot now be allowed to turn around and say that it is a 'marketing gimmick' when it is subjected to the scrutiny of this Commission.

102. On the quantum of penalty the OP also submits that after consultation with its allottees, it sought to address the issues raised by its consumers for which it issued a letter to the consumers which was placed before the Commission in the submissions dated 24/09/2012. In the said letter the OP claims to have modified the application form. Besides, the OP has also informed that they have reduced the interest charged from defaulting allottees from 18% to 12% w.e.f 01/04/2011. These two acts of the OP, can, to some extent, be treated as mitigating factors. However, the plea of the OP that it has contributed to the economic development of the country in many ways including the development of 160 kms long Yamuna Expressway does not deserve attention as a mitigating factor since contribution to economic development can in no case be considered as a 'license' for abusive conduct.

Order

103. Considering the totality of facts and circumstances of the present case including the aggravating and mitigating factors, as discussed above, we

decide to impose penalty on the OP group by taking into consideration its consolidated accounts at the rate of 5 % of the annual turnover:

Name of the Enterprise	Turnover for 2011-12 (Rs crores)	Turnover for 2012-13 (Rs crores)	Turnover for 2013-14 (Rs crores)	Average turnover for three years (Rs crores)	@ 5 % of average turnover (Rs. crores)
Jai Prakash Associates	13,117.61	13,512.08	13,327.02	13,318.90	665.94

104. In view of the findings recorded by us, it is ordered as under:

I. The OP group is directed to cease and desist from indulging in the conduct which has been found to be in contravention of the provisions of the Act and determined to be so in this order

II. The OP group is directed to pay a penalty of Rs 665.94 crores.

105. The directions contained in the order must be complied within a period of 30 days from the date of receipt of this order.

106. No case is made out against OP3.

107. We, further, direct the OP to deposit the penalty amount within 60 days of receipt of this order.

108. It is ordered accordingly.

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

Sd/-
(S. L. Bunker)
Member

Sd/-
(Augustine Peter)
Member

New Delhi
Date: 26/10/2015