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**COMPETITION COMMISSION OF INDIA**

**Reference Case No. 07 of 2018**

**In Re:**

**Food Corporation of India  
FCI Headquarters  
16-20, Barakhamba Lane  
New Delhi – 110 001**

**Informant**

**And**

**Shivalik Agro Poly Products Ltd.  
Plot No. 1, Sector – 3  
Industrial Area, Parwanoo District  
Solan – 173 220  
Himachal Pradesh**

**Opposite Party No. 1**

**Climax Synthetics Pvt. Ltd.  
11, Pollock Street, Room No. 8C  
8<sup>th</sup> Floor, Kolkata  
West Bengal**

**Opposite Party No. 2**

**Arun Manufacturing services Pvt. Ltd.  
B-53, FF Complex, Rani Jhansi Road  
New Delhi – 110 085**

**Opposite Party No. 3**

**Bag Poly International Pvt. Ltd.  
95 KM Stone, Village Alipur Khalsa  
P. O. Box No. 30, Kohand  
Distt. Karnal – 132 114  
Haryana**

**Opposite Party No. 4**

**Shalimar Plastic Industries  
Plot No. 1812, Halol GIDC, Halol  
Panch Mahal District – 389 350  
Gujarat**

**Opposite Party No. 5**

**Dhanshree Agro Poly Product  
15-Am Changodar, Sanand – 382 213  
Gujarat**

**Opposite Party No. 6**



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**CORAM**

**Mr. Ashok Kumar Gupta  
Chairperson**

**Ms. Sangeeta Verma  
Member**

**Mr. Bhagwant Singh Bishnoi  
Member**

**Present:**

- For the Informant** : Mr. K. K. Sharma, Advocate
- For Opposite Party No. 1 and its individuals** : Mr. G. R. Bhatia, Mr. Rudresh Singh and Ms. Avantika Arun, Advocates
- For Opposite Party No. 2 and its individuals** : Mr. Rishad Chowdhury and Ms. Madhurika Ray, Advocates
- For Opposite Party No. 3 and its individuals** : Mr. M. M. Sharma and Mr. Anand Sree, Advocates
- For Opposite Party No. 4 and its individuals** : Mr. Amil Sinha and Mr. Rahul Kochar, Advocates
- For Opposite Party No. 5 and its individuals** : Mr. Sanjay Kumar, Advocate
- For Opposite Party No. 6 and its individuals** : Mr. Sanjay Kumar, Advocate



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## **Order under Section 27 of the Competition Act, 2002**

1. The present Reference was filed by Food Corporation of India ('Informant/ FCI') under Section 19(1)(b) of the Competition Act, 2002 ('the Act') against Shivalik Agro Poly Products Ltd. (Opposite Party No. 1/ 'OP-1'/'Shivalik'), Climax Synthetics Pvt. Ltd. (Opposite Party No. 2/ 'OP-2'/'Climax'), Arun Manufacturing Services Pvt. Ltd. (Opposite Party No. 3/ 'OP-3'/'Arun') and Bag Poly International Pvt. Ltd. (Opposite Party No. 4/ 'OP-4'/'Bag Poly') alleging *inter alia* cartelisation in the bidding process for procurement of Low Density Poly Ethylene covers (LDPE) during the period 2005 to 2017 in contravention of the provisions of Section 3 of the Act.
2. The Informant is a statutory authority under the administrative control of Ministry of Consumers Affairs, Food & Public Distribution, Government of India, that implements different objectives of the National Food Policy under which one of its objectives is to maintain a satisfactory level of operational and buffer stocks of food grains. LDPE covers are required by the Informant for safeguarding food grains stored in the open.
3. It has been averred in the Reference that large quantities of LDPE covers are required for safeguarding huge food grain stocks from rain and fumigation. In this regard, it has been stated that FCI purchases LDPE covers through centralised rate running contracts entered into with various manufacturers/suppliers by inviting bids through tenders. During the period from 2005 to 2017, the Informant had floated a total of seven tenders and awarded the impugned tenders to L-1 bidder(s), except for Tender No.1 and Tender No. 5 floated in the years 2005 and 2015 respectively, which were scrapped. Prior to 2012, the bidders quoted identical bids and in post negotiations after opening the tender, reduced the bid amount identically, but in 2012, the tender form was modified, prohibiting the Informant from negotiating with bidders after opening the tender.
4. The Informant alleged that the OPs have been constantly involved in quoting of identical rates or cosmetically differing rates in the impugned tenders. Thus, OPs were alleged to be involved in the anti-competitive conduct of bid-rigging in violation of the provisions of Section 3 of the Act.



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5. The Commission, after examining the material on record, *vide* its dated 07.03.2019 passed under Section 26(1) of the Act *prima facie* opined that there appeared to be a case of contravention of the provisions of Section 3(3)(d) read with Section 3(1) of the Act and accordingly, directed the Director General (DG) to cause an investigation to be made into the matter. Further, *vide* the said order, the DG was enabled to investigate the role of other parties/ entities, that might have also indulged in the said contravention. At this stage itself, it may be pointed out that during the course of investigation, involvement of two more parties was noted by the DG *viz.* Shalimar Plastic Industries, ('Shalimar') and Dhanshree Agro Poly Product ('Dhanshree'). Accordingly, while forwarding the investigation report to the Parties, the Commission arrayed these two parties as the Opposite Party No. 5 and the Opposite Party No. 6 respectively. Hereinafter, all these parties (*i.e.* the originally arrayed four parties and subsequently added these two parties) will be collectively referred to as 'OPs'.

#### **Investigation by the DG**

6. Pursuant to the directions of the Commission issued under Section 26(1) of the Act, the DG conducted investigation by issuing probe letters to the Informant, OPs and third parties, who were also examined on oath based on the evidences gathered during investigation.
7. During pendency of investigation, leniency applications under Section 46 of the Act read with Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 ('LPR') were received from OP-1 to OP-4 and the same were forwarded to the DG.
8. After completing investigation, the DG submitted the investigation report to the Commission on 01.04.2021.

#### **DG's Finding(s):**

9. During investigation, the DG found that, in 2005, OPs entered into an agreement to share the quantities of LDPE in different tenders floated by FCI and other government agencies on an all-India basis. The quantities to be shared by these OPs have also been specifically mentioned in the said agreement. The OPs even agreed to appoint



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arbitrators in case of any differences/issues arising from the said agreement. The DG further noted that, to ensure that the six OPs get the quantities as per the decided percentage in all tenders of LDPE covers on an all-India basis, they used to prepare tables showing the quantities received, actual quantities as per agreement, and difference of quantities on an annual basis. The DG also recovered the calculation sheets from the premises of OP-1, OP-2, and OP-4 during investigation.

10. The DG noted that for the purpose of the execution of the cartel arrangement, a WhatsApp group named 'Super Six' was formed by the OPs, and the contents of the WhatsApp chats were retrieved from the mobile phone data of Shri Ved Prakash Mittal of OP-4, which clearly proved the *modus operandi* of OPs. The DG also noted that OPs also followed the process of compensatory mechanism by which they compensated each other. From the calculation sheets, the DG noted that the OPs agreed to compensate Rs. 7/- per kg to bidder, out of the six OPs who received lesser quantity on an annual basis.
11. The DG also collected evidence in the nature of financial transactions between OPs and certain e-mails exchanged between OPs showing meeting of minds.
12. Accordingly, the DG concluded that OPs (OP-1 to OP-6) were involved in fixing the price of LDPE covers, limiting/restricting the supply of LDPE covers, sharing tender quantities, and thereby rigged the bids in respect of the tenders floated by FCI and other government agencies for procurement of LDPE covers. As such, the DG noted contravention of the provisions of Section 3 (3) (a)/ (b)/ (c)/ (d) of the Act. The DG also identified persons of these OPs who played an active role in the process in terms of the provisions of Section 48 of the Act.

### **Consideration of the DG Report by the Commission**

13. On 15.04.2021, the Commission considered the investigation report submitted by the DG. After considering the investigation report, the Commission directed to forward an electronic copy of the "non-confidential" version of the investigation report to the Informant and "non-confidential version *qua* OPs only" of the investigation report to the Opposite Parties for filing their respective objections/ suggestions.



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14. Further, the Commission also directed to forward an electronic copy of “non-confidential version *qua* OPs only” of the investigation report to the persons identified therein for the purposes of Section 48 of the Act, with directions to file their respective objections/suggestions.

#### **Replies/Objections/Submissions of the Parties**

15. The Parties filed their respective replies/objections/submissions to the Investigation Report of the DG besides making oral submissions on 25.08.2021, when the case was set down for final hearing.

#### **Objections/ Suggestions of Informant**

16. The Informant supported the findings of the DG.

#### **Objections/ Suggestions of OP-1 and its Individuals**

17. OP-1 and its individuals filed their objections/suggestions on 19.08.2021 to the investigation report of DG and also filed written submissions on 01.09.2021 after the final hearing. OP-1 submitted that it is a Micro Small Medium Enterprise (MSME) with modest operations, having its registered office/factory in a notified backward hill area in Parwanoo, in the State of Himachal Pradesh. OP-1 further submitted that it has provided true, full, and vital disclosure and fully cooperated with the DG. It even conducted an internal competition audit of its employees, and ascertained the material available with them in order to assist the investigation. Lastly, OP-1 pointed out that the Informant’s tender process systematically reduced competition in tenders by disqualifying the number of bidders without adequate reason and encouraging bidders to negotiate identical rates, thereby creating unhealthy competition, manipulating the market, keeping prices artificially low, and facilitating discussion among competitors.

#### **Objections/ Suggestions of OP-2 and its Individuals**

18. OP-2 and its individuals have filed their objections/suggestions on 20.08.2021 to the investigation report of DG. OP-2 submitted that it has disclosed all vital information about the working of the cartel arrangement and comprehensively narrated the vital



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facts regarding the business arrangements between the OPs, which assisted the DG gaining a clear picture of the working of the cartel. OP-2 also submitted that the Informant followed unfair and opaque practices which led to anti-competitive behaviour by various OPs, including it, and the Informant retains the discretion to extend the duration of the contract by up to one year without the consent of the bidder, which leads to risk of fluctuations in several respects, including in the price of raw material, manpower, logistics, taxation, and fuel costs.

### **Objections/ Suggestions of OP-3 and its Individuals**

19. OP-3 and its individuals filed its objections/suggestions on 19.08.2021 to the investigation report of DG. OP-3 also submitted that it has made full, true, and vital disclosures, including the detailed description of the arrangement between the parties such as the date of the pre-bid meeting, the venue of the meeting, details of the attendees, the outcome of the meeting, *etc.* OP-3 further submitted that the disclosures provided significant added value to the evidence in possession of the DG and enabled the DG to establish a contravention of Section 3 of the Act. In the absence of the cooperation and disclosures by OP-3, the evidence in the possession of the DG would not have been sufficient to establish a contravention of the provisions of Section 3(3) of the Act.

### **Objections/ Suggestions of OP-4 and its Individuals**

20. OP-4 and its individuals have filed their objections/suggestions on 20.08.2021 to the investigation report of DG. OP-4 submitted that it had cooperated throughout the investigation conducted by the DG and had also, to the best of its ability and knowledge, made full and true disclosures about the tender participants and its arrangement, thereby providing value added information necessary to the Commission. OP-4 further submitted that it is a small/medium enterprise having low profits/margins, and stated that it was a first-time offender and not guilty of any previous offence under the provisions of the Act.
21. OP-4 further submitted that the conduct of the cartel has not created any financial loss to the Informant or state exchequer. Moreover, the Informant has no increase in the



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cost of procurement, since the Informant forces the manufacturer into negotiations and reduces the cost.

### **Objections/ Suggestions of OP-5 and its Individuals**

22. OP-5 filed its objections/suggestions on 13.08.2021 to the investigation report of DG. In its reply, OP-5 stated that it is an MSME partnership firm with an annual turnover in the range of Rs. 8 – 10 crore and employs, on an average, around 10 – 12 employees. It further submitted that it was not named by the Informant in the Information nor was any order passed by this Commission in this regard. OP-5 submitted that the DG report relies heavily on the alleged confessions made by the authorised persons of OPs, and the conclusion drawn by the DG of the similar handwriting on the price bid, is false and misconceived.
23. Lastly, OP-5 submitted that there was no justification for it receiving 10% share mentioned in the calculation sheets and receiving of the same quantities, *i.e.*, 10%, in tenders, is mere coincidence. With respect to exchange of e-mails, OP-5 submitted that there was nothing incriminating against it in the alleged e-mails.

### **Submission of OP-6 and its Individuals**

24. OP-6 filed its objections/suggestions on 13.08.2021 to the investigation report of DG and is stated to be an MSME with an annual turnover in the range of Rs. 9 – 20 crore and employing, on an average, around 11 – 14 employees.
25. OP-6 also submitted that it was not named by the Informant in the Information nor was any order passed by the Commission in this regard. OP-6 submitted that the tenders until 2015 were being determined by the Informant through negotiated prices, and the contract used to be awarded to multiple suppliers who were ready and willing to match the negotiated fixed price by the Informant.
26. Lastly, OP-6 further submitted that the investigation report does not even ascertain the date on which the alleged Super Six WhatsApp group was formed. In none of the statements, did any person state having paid/received any amount to/from it by way of compensation in terms of alleged calculation sheets.



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### Analysis

27. The Commission has perused the Reference filed, the investigation report and evidences in support thereof submitted by the DG, the submissions made by the Opposite Parties and the Informant, and other material available on record, and has also heard in detail the arguments put forth by the Parties during oral hearings.
28. The question which falls for consideration in the present matter is as to whether OPs have contravened the provisions of Section 3(1) of the Act read with Section 3(3) thereof in respect of the tenders floated by FCI and other government agencies for procurement of LDPE covers during 2005 to 2017, as found by the DG.
29. Before examining the aforesaid issue, it would be appropriate to note that OP-1, OP-2, OP-3, and OP-4 have filed their Leniency Petitions and have not disputed any of the findings made by the DG in the investigation report. During the oral hearing also, the above-mentioned OPs reiterated that they had co-operated with the DG and made vital disclosures before the DG. From the investigation report, it can be seen that these OPs had confessed their conduct in the matter.
30. In the aforesaid backdrop, the Commission proceeds to examine as to whether there was an agreement between the OPs to rig the tenders, as found by the DG.
31. Before examine this issue, it is apposite to note that the definition of 'agreement' as given in Section 2(b) of the Act requires, *inter alia*, any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. The definition, being inclusive and not exhaustive, is a wide one. An understanding may be tacit and the definition under Section 2(b) of the Act covers even those situations where parties act on the basis of a nod or a wink. The Commission notes that the Act envisages civil liability. Thus, the standard of proof required to prove an understanding or an agreement would be on the basis of 'preponderance of probabilities' and not 'beyond reasonable doubt'. There is rarely any direct evidence of action in concert and in such situations, the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in



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cooperation with each other. In light of the definition of the term ‘agreement’, the Commission has to assess the evidence on the basis of benchmark of preponderance of probabilities.

32. Further, in terms of the provisions contained in Section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void. Further, by virtue of the presumption contained in sub-section (3), any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-
- (a) directly or indirectly determines purchase or sale prices;
  - (b) limits or controls production, supply, markets, technical development, investment or provision of services;
  - (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; or
  - (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.
33. As per the explanation appended to Sub-Section (3) of Section 3 of the Act, “bid rigging” means any agreement, between enterprises or persons referred to in Sub-Section (3) engaged in identical or similar production or trading of goods or provision of services which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.
34. In case of agreements as listed in Section 3(3)(a) to (d) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition; the onus to rebut the presumption would lie upon the parties.



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35. In this statutory framework, the Commission proceeds to examine the evidence collected by the DG to assess whether there was an “agreement” between the OPs of the nature which is prohibited in terms of the provisions contain in Section 3(1) of the Act read with Section 3(3) thereof.
36. In this regard, it would be useful to refer the evidences collected by the DG during investigation.
37. To begin with, it is pertinent to refer to a document recovered by the DG, from the premises of OP-1, OP-2 and OP-3, whereby OPs agreed to share the quantities of LDPE covers in different tenders floated by various government agencies on an all-India basis was recovered. The said agreement was entered in 2005 by the OPs. The quantities to be shared by the OPs were specifically mentioned in the agreement/calculation sheet. The OPs had even agreed to appoint arbitrators in case of any difference/issues arising from the agreement. As evidenced from the calculation sheets recovered from the premises of OP-1, OP-2, and OP-3. The details of the agreement in respect of the quantities to be shared amongst the OPs, are as follows:

<b>Name of OP</b>	<b>Percentage</b>
Shivalik (OP-1)	29
Dhanshree (OP-6)	11
Shalimar (OP-5)	11
Climax (OP-2)	21
Bag Poly (OP-4)	16
Arun (OP-3)	12

38. Further, the DG noted from the calculation sheets that the OPs agreed to compensate each other @ Rs.7/- per kg in case of receipt of lesser quantities than the pre-decided percentage on annual basis, i.e., the bidder selling quantities over and above the pre-decided percentage had to compensate the bidder selling smaller quantities/receiving lesser share.



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39. In this regard, the Commission noted that OP-1, OP-2, OP-3, and OP-4 have admitted to the existence of such an agreement, and the same was also retrieved from more than one OP.
40. The Commission noted that Shri Pankaj Kumar Mahajan, Managing Director of OP-1, in his statements dated 03.02.2020 and 14.10.2020 before the DG, confessed that he had submitted the bid documents after discussing with competitors, i.e., OP-2, OP-3, and OP-4, and accordingly, bid prices were quoted in FCI's tenders floated for the period 2009 and 2012. Further, Shri Mahajan also stated *vide* statement dated 14.10.2020, that in 2015, 2016, and 2017, the rates in the Informant's tenders were quoted independently; however, he admitted that he had discussed with OP-2, OP-3, and OP-4.
41. Shri GD Tyagi, Director of OP-1, also confessed that Shri Pankaj Mahajan, CMD of OP-1, used to quote in the Informant's tenders in consultation with OP-2, OP-3 and OP-4, and categorically admitted that Shri Pankaj Mahajan quoted the price in the 2005, 2007, 2009, 2012, 2015, 2016, and 2017 tenders of FCI for LDPE covers after discussions and agreement with OP-2, OP-3, and OP-4.
42. The Commission observes that Shri Pankaj Mundhra of OP-2 in his statement recorded by DG on 05.09.2020 had confessed that he had quoted the prices in FCI tenders for 2005, 2007, 2009, and 2012 after discussing with other OPs. In his supplementary deposition recorded on 05.02.2020 before the DG, Shri Mundhra specifically admitted that, after the 2012 FCI tender, the other tenders were not part of the sharing formula, but he had discussed the prices with other bidders.
43. The Commission further observes that Shri Arun Agarwal of OP-3, in his statement recorded on 10.02.2020 before DG, had admitted that, around August 2006, Shri PJ Singh, the then-ED of OP-1, along with Shri Ved Prakash Mittal of OP-4 and Shri Ashok Sethi, local agent for OP-5 and OP-6, met his father Shri HP Agarwal at a hotel in Chandigarh and requested him to join the cartel. Based on the said meeting, OP-3 agreed to join the cartel, and the cartel members were informally called 'Super Six'. He also agreed that OP-3 had quoted the prices in all FCI tenders after discussing with other OPs and disclosed the sharing percentages of OPs in an all-India basis, the



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- WhatsApp group, and compensation. In his supplementary deposition recorded, dated 19.10.2020, Shri Arun stated that his company was part of the cartel with other bidders in case of FCI tenders till 2017 and for other tenders till 2019.
44. Further, the Commission observes that Shri Ved Prakash Mittal of OP-4 admitted that he was involved in discussing the price to be quoted in FCI tenders with other bidders for 2005, 2007, 2009, and 2012. Further, he stated that, in case of the 2015, 2016, and 2017 tenders, it was decided after discussion with the other bidders to quote own rates, and these tenders were not covered under the sharing formula. He also admitted about the WhatsApp group. Shri Mittal admitted that OP-4 was part of the cartel to share tender quantities of LDPE on an all-India basis with other OPs.
45. The Commission observes that the Directors of OP-1, OP-2, OP-3, and OP-4 confessed about their anti-competitive conduct of bid rigging in the tenders floated by the Informant. In view of the above discussion and confessional statements of Shri PK Mahajan of OP-1, Shri GD Tyagi of OP-1, Shri Pankaj Mundhra of OP-2, Shri Arun Agarwal of OP-3, and Shri Ved Prakash Mittal of OP-4, which are corroboratory in nature, it is clear that these OPs were involved in cartel by way of fixing the price of LDPE cover, limiting/restricting the supply of LDPE covers, sharing tender quantities, and bid rigging in the tenders of LDPE covers floated by the Informant from 2009 to 2017.
46. It is also pertinent to highlight here that, for the purpose of the execution of the cartel arrangement, a WhatsApp group named 'Super Six' was also formed by the OPs, Shri Pankajj Mundhra of OP-2, Shri Pankaj Mahajan of OP-1, Shri Amit Mittal and Shri Ved Prakash Mittal of OP-4, Shri Shilpesh Patel and Shri Anil Patel of OP-6, Shri Vishal Vyas and Shri JP Paneri of OP-5, and Shri HP Agarwal of OP-3, were members of the WhatsApp group. The administrator of the group was Shri Arun Agarwal of OP-3. The contents of the WhatsApp chat were retrieved from the mobile phone data of Shri Ved Prakash Mittal of OP-4. The backup of the chats was confronted to the other OPs.
47. The Commission further observes that all these WhatsApp chats are relevant incriminating documents to show coordination amongst the OPs in relation to various



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tenders of LDPE covers floated by various agencies. The Commission notes that WhatsApp chats were also confronted to the officials of OPs, and the officials of OP-1, OP-2, OP-3, and OP-4 had admitted that they discussed the prices to be quoted in various tenders.

48. Apart from the WhatsApp chats, the DG also retrieved certain emails exchanged with respect to various tenders floated by different agencies for procurement of LDPE covers.
49. The DG found that, on 26.07.2014, Shri Lalit Sharma of OP-1 had forwarded an email to Shri Sanjay Bhatia of OP-1 containing the following attachments: (a) letter dated 08.07.2014 issued by FCI to OP-2 regarding confirmation of the balance amount of EMD; (b) letter dated 21.07.2014 written by OP-2 to FCI confirming the EMD; and (iii) confirmation of credit balance by OP-2 dated NIL. When the DG confronted Shri Sanjay Bhatia of OP-1 with the said e-mail, he stated that the letter was exchanged as the EMD of OP-2 and OP-4 were withheld by FCI in the 2012 tender and, OP-1 was trying to get the EMD released.
50. The DG further retrieved the following mails exchanged by OPs regarding the procurement of LDPE covers by non-FCI agencies: (a) e-mail dated 04.01.2019 sent by Shri Pankaj Mahajan of OP-1 to Shri Pankaj Mundhra of OP-2 and other OPs containing agenda for a meeting to be held at OP-1's office in Delhi on 07.01.2019; (b) e-mail dated 25.04.2012 sent by Shri Arun of OP-3 to OP-1 along with letter dated 25.04.2012 from OP-3 to Bihar State Food and Supply Corporation; (c) e-mail dated 15.10.2013 sent by OP-3 to OP-1 containing a letter regarding supply of LDPE films under DGS&D rate contract to Orissa government; (d) cc of e-mail dated 17.09.2013 received by Shri Ved Prakash Mittal of OP-4 from Shri RC Gupta of OP-1, containing an excel sheet mentioning the justification for the rate quoted in DGS&D.
51. During recording of depositions, the DG confronted the above e-mails to Shri Pankaj Kumar Mahajan, Shri Sanjay Kumar Bhatia, Shri RC Gupta of OP-1, Shri Pankaj Mundhra of OP-2, Shri Arun Aggarwal of OP-3, and Shri Ved Prakash Mittal of OP-4. All the aforesaid persons accepted the receipt and exchange of the e-mails in respect of different tenders floated by non-FCI agencies for procurement of LDPE.



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52. Furthermore, the Commission observes that, from the account ledgers seized from the premises of OP-2 and from OP-3, it has been proved that OP-3 had taken 50% of the quantity from OP-2 to be supplied to the Informant's tender. The ledger entries bearing the details of security deposit and other related entries reveal the amount paid by OP-3 to OP-2 for the same. The said entries were reflected in the ledgers seized from both parties. In the deposition before the DG, when Shri Arun of OP-3 was confronted regarding the same, he confirmed these transactions. The Commission observes that the transaction unearthed by DG from the ledger accounts indicate that OP-2 and OP-3 had rigged the 2009 tender of FCI and had also shared the said tender between them.
53. In view of the above statements of the officials of the aforesaid OPs (OP-1 to OP-4), it is clear that the OPs were involved in discussing, deciding, and accordingly, quoting the prices in the tenders of LDPE covers floated by non-FCI agencies even in 2019 as per their existing cartel. From the confessional statements of Shri PK Mahajan of OP-1, Shri GD Tayagi of OP-1, Shri Pankaj Mundhra of OP-2, Shri Arun Agarwal of OP-3, and Shri Ved Prakash Mittal of OP-4, and the electronic evidences collected by the DG, it is clear that these OPs were involved in cartel by way of fixing the price of LDPE cover, limiting/restricting the supply of LDPE covers, sharing the tender quantities, and bid rigging in the tenders of LDPE covers floated by the Informant from 2009 to 2017.
54. As regards the involvement of OP-5 and OP-6 is concerned, the Commission observes that the DG found that in 2005 and 2009, in response to the Informant's tenders, the price bids were filled by hand and the handwriting of the bids submitted by OP-5 and OP-6 were found to be identical. When DG confronted Shri JP Paneri of OP-5, he stated that Shri Vinu Mehta, Partner of OP-5, does not understand English and hence, he used to ask other bidders to fill the price bids.
55. The Commission observes that Shri JP Paneri of OP-5 was a member of the WhatsApp group 'Super Six' and had exchanged messages regarding price bids to be quoted in CSIDC 2019 tender. However, when he was confronted by the DG regarding the same, he refused to divulge anything.



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56. When the DG confronted Shri JP Paneri of OP-5 regarding the 10% share for OP-5 as mentioned in the agreement and the compensation amount of Rs.7/- kg as mentioned in the agreement referred *supra* along with the quantities received by OP-5 in LDPE tenders of Punjab and CSIDC, he stated that it was a mere coincidence and did not offer any justification.
57. The Commission further observes that the DG retrieved eight incriminating emails from the email account of OP-5 and the personal account of Shri JP Paneri of OP-5 pertaining to non-FCI tenders and FCI tender. When Shri JP Paneri of OP-5 was confronted by the DG regarding the same, he did not divulge anything. The Commission observes that the DG came across financial dealings in the form of loan to a tune of Rs. 25 lakh to Shri HP Agarwal of OP-3 and purchase of raw material by OP-5 from OP-2 to a tune of Rs. 1,14,420/-. When confronted, Shri JP Paneri gave evasive answers.
58. From the DG report, the Commission observes that though OP-5 was never awarded tenders floated by the Informant, it nevertheless used to participate in them by placing cover bids to get the benefit of non-FCI tenders. The evidence provided by the DG point to the fact that OP-5 has discussed with other OPs regarding non-FCI tenders.
59. The Commission further notes that Shri Anil Patel of OP-6 in his deposition before the DG admitted that he had filled the price bids of OP-5 in the 2005 FCI tender and they had both quoted an identical price. When confronted by the DG, Shri Anil Patel confirmed that he and his son Shri Shilpesh Patel were part of the 'Super Six' WhatsApp group. Further, he admitted before the DG that OP-6 had discussed with other OPs regarding the price bid to be quoted in the CSIDC 2019 tender. The DG also found, from the messages exchanged in the 'Super Six' group on 28.08.2019, that Shri Anil of OP-6 had informed other OPs that it was not possible to reach Chandigarh before 01:00 pm that day and had requested the OPs to arrange the meeting at 03:00 pm that day.
60. The Commission also notes that Shri Anil did not deny the execution of the said agreement and stated that his firm had never received compensation @ Rs.7/- kg as mentioned in the agreement. He stated that OP-6 used to be awarded tender quantities



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based on its production/financial capacity, but at the same time, he also admitted that the production capacity of OP-6 was substantially more than the quantities awarded. It can be seen that OP-6 always received quantities around 11% as mentioned in the said agreement. Shri Anil was not able to provide any reasonable justification for this.

61. The DG further confronted Shri Anil regarding two emails dated 04.01.2019 regarding meeting at OP-1's premises in Delhi and dated 30.04.2012 regarding meetings at hotels in Delhi. Shri Anil, in response, gave evasive replies. The DG had also confronted Shri Patel regarding other emails also.
62. The DG observed from the bank account statements of OP-6 that it had financial dealings with OP-2 and OP-3. Based on the aforesaid evidences, along with the fact that OP-6 was never awarded FCI tenders but nevertheless used to participate in them by placing cover bids to get the benefit of non-FCI tenders, the evidence provided by DG point to the fact that OP-6 has discussed with other OPs regarding non-FCI tenders.
63. In view of the above, taking into account all the aforesaid evidences collected by the DG, the Commission concludes that OPs had indulged in cartelization and bid rigging in respect of tenders floated by FCI and other government agencies for procurement of LDPE, by means of directly or indirectly determining prices, allocating markets, co-ordinating bid response, and manipulating the bidding process. The exchange of communication is direct evidence displaying the anti-competitive conduct of the OPs and sufficient to hold that OPs have contravened the provisions of Section 3(3)(d) of the Act. The Commission therefore, finds OPs to be in contravention of the provisions of Section 3(3)(d) read with Section 3(1) of the Act.
64. At this stage, it would be appropriate to consider the contention of some of the OPs that there was no Appreciable Adverse Effect on Competition (AAEC) in the market for procurement of LDPE.
65. In this regard, the Commission notes that the pleas are misdirected. Suffice to observe that from a bare reading of the provisions of Section 3 (1) of the Act, it is evident that these provisions not only proscribe the agreements which cause AAEC but the same also forbid the agreements which are *likely* to cause AAEC. Hence, the plea that there



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is no contravention of the provisions of the Act in the present matter because allegedly no AAEC has been caused as a result of the alleged cartel between the parties, is misdirected and untenable in the face of clear legislative intent whereby even the conduct which can potentially cause AAEC, is prohibited. Furthermore, once an agreement of the types specified under Section 3(3) of the Act is established, the same is presumed to have an AAEC within India. Therefore, it follows that once an 'agreement' of the types as specified in Section 3(3) of the Act, is shown to be established, the same falls within the presumptive rule of AAEC as provided thereunder. The parties, however, can rebut such statutory presumption in light of the factors provided under Section 19(3) of the Act.

66. The parties have failed to show as to how their impugned conduct resulted in any accrual of benefits to consumers; improvements in production or distribution of goods or provision of services; or promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services, in terms of Section 19(3) of the Act. On a holistic evaluation of the replies filed by the parties in light of the factors enumerated in Section 19(3) of the Act, the Commission is satisfied that the parties have not been able to dislodge the statutory presumption by adducing cogent evidence, as required.
67. Once contravention by OPs, is established, the Commission proceeds to analyse the conduct of the Opposite Parties' directors, officers, and employees who would be liable for such anti-competitive acts of the Opposite Parties, in terms of Section 48 of the Act.
68. In view of the instances cited by the DG in the investigation report regarding the identified individuals and evidences against them, the Commission agrees with the DG in terms of liability to be fixed under Section 48. Accordingly, the Commission holds the individuals of OPs, as identified by the DG, liable in terms of the provisions of Section 48(1) and 48(2) of the Act. None of the identified individuals has been able to prove that the contravention committed by their respective companies was without their knowledge or that they had exercised all due diligence to prevent the commission of such contravention. The individuals have not been able to rebut or deny before the Commission the specific roles played by them in bid rigging and cartelisation for



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which the DG has gathered cogent and sufficient evidences. Therefore, the Commission finds the identified individuals of OPs also liable in terms of the provisions of Section 48(1) as well as Section 48(2) of the Act.

### **ORDER**

69. In view of the above, the Commission holds OPs to have contravened the provisions of Section 3(3)(d) read with Section 3(1) of the Act, as detailed in this order.
70. The Commission, in terms of Section 27(a) of the Act, directs OPs and their respective officials who have been held liable in terms of the provisions of Section 48 of the Act, to cease and desist in the future from indulging in practices which have been found in the present order to be in contravention of the provisions of Section 3 of the Act, as detailed in the earlier part of the present order.
71. On the issue of imposing monetary penalties upon the OPs and their respective officials, the Commission is of the view that, for the reasons recorded below, the present case is not fit for issuing such remedy.
72. In this regard, the Commission notes that OPs are small/ medium enterprises. The Commission also notes that four out of the six OPs have filed lesser penalty applications and have admitted their conduct. The Commission is also conscious of the fact that the MSME sector in India is already under stress and bearing the impact of the economic situation arising from the outbreak of the pandemic (COVID-19). The Government of India has undertaken various measures to support the liquidity and credit needs of viable MSMEs to help them withstand the impact of economic shock. In such a situation, if any penalty were to be imposed on these firms, it may render these firms economically unviable and may even result in exit from the market, which would further reduce competition in a market. Thus, considering the matter holistically, the Commission decides not to impose any monetary penalty on the OPs and their respective officials. Further, the Commission is of the considered opinion that the objectives of the Act would be met if the parties in the present matter cease such cartel behaviour and desist from indulging in similar behaviour in the future, as directed earlier. The opposite parties and their respective individuals are, however,



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cautioned to ensure that their future conduct is strictly in accord with the provisions of the Act, failing which, any such future behaviour would be viewed seriously as constituting recidivism, with attendant consequences.

73. Before parting with this order, the Commission notes that OP-5 filed a cross-examination application dated 13.08.2021 along with its objections/suggestions to the investigation report of the DG. In the said application, OP-5 sought a cross-examination of the persons whose statements have been relied upon by the DG in the investigation report. Having considered the application and the averments made therein, the Commission is of the considered opinion that the application is not in accord with the provisions of Regulation 41 of the Competition Commission of India (General) Regulations, 2009. Under Regulation 41 of the General Regulations, the Commission or the DG has the discretion to take evidence either by way of affidavit or by directing the parties to lead oral evidence in the matter. However, if the Commission or the DG, as the case may be, directs evidence by a party to be led by way of oral submissions, the Commission or the DG, as the case may be, if considers necessary or expedient, may grant an opportunity to the other party or parties, as the case may be, to cross-examine the person giving the evidence. Thus, it is only when the evidence is directed to be led by way of oral submissions that the Commission or the DG may grant an opportunity to the other party or parties to cross-examine the person giving the evidence, if considered necessary or expedient. Hence, even when the evidence is led by oral submissions, the Commission or the DG retains the discretion to consider the request for the grant of opportunity to the other party or parties to cross-examine the person giving the evidence if the same is considered *necessary* or *expedient*.
74. Having considered the cross-examination request in light of the above statutory framework, the Commission notes that OP-5 has not pointed out any specific statements or adduced cogent reasons for seeking such cross-examination, which cannot be otherwise controverted through affidavits - in - rebuttal. In fact, OP-5 in its application has suggested that as OP-1 to OP-4 have preferred leniency applications, their statements were based on inducements and promise contained in Lesser Penalty Regulations. In this regard, reference was made to the provisions of Section 24 of the



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Indian Evidence Act, 1872 which makes confessions made by accused person irrelevant when the same have been caused by the inducement, threat or promise. Having considered the reasoning adduced by OP-5, the Commission notes that the plea is thoroughly bizarre in attributing inducements to a statutory scheme, to say the least. Making reference to the provisions of Indian Evidence Act in the context of civil and inquisitorial proceedings before the Commission, is equally and thoroughly misconceived. Resultantly, the request made by OP-5 does not satisfy the requirement of necessity or expediency as required under Regulation 41(5) of the General Regulations. Moreover, during the course of oral hearing also, the learned counsel appearing on behalf of OP-5 did not press the said application.

75. It is made clear that nothing contained in this order shall be deemed confidential, as the same has been used in the terms of provisions of Section 57 of the Act.
76. The Secretary is directed to communicate with the Parties accordingly.

**Sd/-**  
**(Ashok Kumar Gupta)**  
**Chairperson**

**Sd/-**  
**(Sangeeta Verma)**  
**Member**

**Sd/-**  
**(Bhagwant Singh Bishnoi)**  
**Member**

**Date: 29/10/2021**

**Place: New Delhi**