

COMPETITION COMMISSION OF INDIA

Case No. 15 / 2010

Dated: 12th May, 2011

ORDER UNDER SECTION 27 OF THE COMPETITION ACT

INFORMANT :- M/s Jupiter Gaming Solutions Private Limited

604, 6th Floor, Reena Complex, Nathani Road, Vidya Vihar West, Mumbai-400086

RESPONDENTS:- 1. Secretary, Finance, Government of Goa

2. M/s Martin Lottery Agency Limited (Future Gaming)

Daisy Plaza-355-359, Ghandhi Puram, Coimbtore-641012

As per R. Prasad (Dissenting)

1. **Facts of the Case:-**

The present information has been filed by the Informant M/s Jupiter Gaming Solutions Private Limited against Finance Secretary, Government of Goa and M/s Martin Lottery Agency Limited (now Future Gaming Pvt. Ltd.) alleging contravention of the various provisions of the Competition Act, 2002. The Government of Goa had floated a tender on 11.03.2010 described as 'Proposal for Goa State Lotteries, Finance Department, Government of Goa', whereby expressions of interest were invited seeking bids for Goa Brand Lottery Schemes (Online and Paper Lotteries). The last date for purchase of proposal form was 25.03.2010 and last date for submission of proposal was 05.04.2010 and the evaluation was fixed on 08.04.2010. It is found that the proposal of Martin lottery Agency (Now Future Gaming Pvt. Ltd) was rejected by the Govt of Goa and the tender was finally awarded to Sugal and Damani Pvt. Ltd.

2. **The Allegations made in the Information:-**

- (i) That the tender bid of Goa lottery contained certain conditions which restricted the size of bidders such as
- a. The minimum of the gross turnover of the participating entity should have been Rs. 4000 Crores per annum during the last three financial years;
 - b. The participating entity should have experience of at least three years working directly with minimum two State Governments during the last five years;

- c. The participating entity should not have any dues pending towards any State Government in which it operates or had worked in the preceding five years.
 - d. That the participating entity should have a minimum net worth of Rs. 40 crores as on 31.03.2009.
 - e. The failure to meet one or more of the pre-qualification terms and conditions would have rendered the proposal of the participating entity liable to rejection.
- (ii) That the above mentioned tender conditions had been clearly formulated in order to favour only one entity, namely, M/s Martin Lottery Agency Ltd, which **was** evident from the fact that among all the lottery service providers in the country, only M/s Martin Lottery Agency Ltd. had minimum gross turnover of Rs. 4000 crores during the last three financial years;
 - (iii) That the Finance Department, Government of Goa, by floating the tender had abused its dominant position by imposing unfair and discriminatory conditions which had limited/denied market access to all other entities, involved in providing services;
 - (iv) That the impugned conditions which had been imposed by Finance Department, Government of Goa had the effect of creation of barriers to new entrants and also foreclosure of competition by hindering entry into the market;
 - (v) That the entry barrier in terms of the high capital cost of entry had been designed to benefit M/s Martin Lottery Agency Ltd. to the detriment and prejudice of smaller entities which otherwise fulfilled all other requirements of the tender and had been successfully providing the marketing and support services to the various State Governments for the past several years.
3. The Commission heard the matter and on being satisfied that there exists a prima facie case, it directed the DG to cause an investigation into the allegations stated as above.

4. **DG'S FINDINGS**

The DG examined all the allegations right from floating of tender to the award of contract and the subsequent conduct of the parties in the whole process of tender bidding and submitted a detailed Investigation Report containing documentary evidences collected at the time of investigation. The investigation made by the DG essentially concentrated on following issues:

- i) Whether it is a fact that that the Govt. of Goa had floated a tender for lottery containing certain terms and conditions which were in violation to provisions of Section 4(2) of the Act?
 - ii) Whether the terms and conditions stipulated in the expression of interest in the tender imposed unfair and discriminatory conditions which served as barriers to new entrants in the market, driving existing competitors out of the market, hindering entry into the market, in contravention to Section 4(2) of the Act?
 - iii) Whether the Govt. of Goa through its action & conduct in the whole process of bidding imposed the conditions which have the effect of creation of barriers to new entrants and foreclosure of competition by hindering entry into the market?
 - iv) Whether the process of handling, documentation and evaluation of the technical and financial bid was carried out as per the laid down procedure in the bidding process which would have resulted in selection of qualifying bidders?
 - v) Was there a case of any collusive bidding by different enterprises who were party to the whole bidding process, based on circumstantial evidences, in violation to Section 3(3) of the Act?
5. M/s Martin lottery Agency (Now Future Gaming Pvt. Ltd) challenged the jurisdiction of the Commission over the case on account of three main reasons; i) that lottery is neither a good nor a service, and hence not covered under the Competition Act ii) that lottery is a pernicious activity, and it cannot be said that there is any service involved in operations of lottery; and iii) that the Govt. of Goa has the discretion to set out different conditions in a tender process such as turnover , net worth etc. which is not within the purview of the Courts. It also cited several decisions of various Courts in support of its claim.
6. The DG, on the other hand has rebutted the above arguments in detail and found no merits in the claim of the respondent on the ground that the cited case examined the interpretation of lottery as goods or service for the purpose of applicability of Sales Tax or Service Tax on such lottery operations and, therefore, such findings would not be applicable to the definition of

product/services defined in the Competition Act. The provisions of the Competition Act, 2002 takes into account under its ambit all activities which has adverse effect on competition which is clearly enshrined in the Preamble of the Act. Further, the term "Service" has been defined in the Act, which reads as under:

Section 2 (u): "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;

7. The reading of the aforesaid definition shows that it uses the term "service of any description which is available to potential users" which would clearly mean that it has a wider meaning to cover any kind of service under its ambit since it is an inclusive definition. Therefore, the appointment of lottery vendors through the tender bid is a service which is hit by the provisions of the Competition Act.
8. Further, the term "Trade" defined in Section 2(x) reads as under:

"trade" means any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services;

9. The aforesaid definitions, according to the DG, clearly cover the business of marketing, distribution and sale of lottery under Competition Act. It does not fit into the legal maxim "*Expressio unius est exclusio alterius*" which means that the express mention of one thing implies exclusion of another. The Competition Act seeks to prohibit all practices which restrict freedom of trade and definition of trade includes provision of any kind of service which would clearly include business of lottery.
10. In the context of averments based upon the judgments of Courts in the context of Sales Tax and Service Tax, relied by the opposite party, it is important to note that "Service tax" is now applicable on the service of promotion, marketing or

organizing of games of chance, including lottery by the amendment brought out in the *Finance Act, 2010* by creating a separate category of taxable service, w.e.f. 16.5.2008. In the light of aforesaid amendment, the judgement of the Apex Court in the case of *Sunrise Associates, B. R. Associates & Martin Lottery Agencies Ltd.* relied upon by the opposite party is not applicable in the present case. Further, Section 65(105) (ZZZN) of the Finance Act, 1994, CBEC Circular No.334/1/2010-TRU dated 26.02.2010 has clearly included the promotion, marketing or organizing of Game of Chance including lotteries under the definition of "Services". Lastly, the Rule 21 of the Goa Lottery Regulation Rules, 2003 also envisages the operation of ticketing agents/vendors as services. In view of the above discussion, there is no iota of doubt that business of lottery is a service covered under the definition of Competition Act and other Acts governing "Service Tax". In the light of the aforesaid finding, the DG in the report, has concluded that the argument of the opposite party in questioning the jurisdiction of the Commission has no merits and hence, not maintainable.

11. The argument of Martin lottery Agency (Now Future Gaming Pvt. Ltd) that the activities of lottery are gambling and pernicious in nature and therefore bearing in mind the nature of the activity, it cannot be said that the State Government is providing any service to the public at large by conducting such business of lottery has also been considered and examined in the report of the DG. The DG has stated that in the case of *BR Enterprises Versus State of UP* relied upon by the opposite party, the question before the Apex Court was whether Section 4 and 5 of Lotteries Regulation Act, 1998 which gives right to State Govts. either to organize or prohibit lotteries are valid piece of legislations and the Apex Court has justified the validity of these two sections of Lotteries Regulation Act, 1998. Interestingly, in this case, the Hon'ble Court has distinguished the meaning of *trade and commerce* as defined in Article 301 of the Constitution with Article 298 of the constitution which includes *trade or business*. The Apex Court in the cited case (Supra) has held that the word 'business' in Article 298 has a wider meaning than 'trade' in Article 301 and any transaction or activity other than 'trade' would be 'business' of that State, which apart from 'trade' would also include activity to run State lotteries. Thus, sale of lotteries by State Governments even if not 'trade' as understood in common parlance, still it would be covered within the executive power of the State under Article 298 being

activity in the nature of 'business' and in any case would also be covered by the words 'contract for any purpose'.

12. Therefore, based on the above interpretation by the Apex Court, the business of organizing lotteries by State Governments is liable to be covered within the ambit of Competition Act since "trade" in Section 2 (x) of Competition Act, 2002 is not restrictive and has been given a wider meaning stating that trade means any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services. Further, Section 2(u) while defining service also includes the term "business".
13. The report has also examined the business of lottery dealt by international jurisdictions. It is observed that lottery had come under scanner of anti-trust laws as in the case of Deutscher Lotto in Germany wherein the monopoly of such enterprise was held to be anti-competitive by the German Federal Cartel office. Therefore, the contention of opposite party that activity of lottery as organized by State Governments cannot be made subject matter of inquiry under Competition Act, 2002, has no merit.
14. The DG's report has also scrutinized the authority of the Government of Goa in deciding terms & conditions of the tender documents for its lottery scheme. The arguments of the opposite party that State Govt. had prerogative to fix minimum turnover and net worth in tender conditions was also examined along with the case laws relied upon by the said party. It has relied upon several case laws in support of its arguments namely: Tata Cellular Vs. Union of India [(1994)6 SCC 651], Raunaq International Ltd. Vs. I.V.R. Construction Ltd. and Ors [(1999) 1 SCC 492], Air India Limited Vs Cochin International Airport Limited [(2000) 1 SCR 505], Directorate of Education and Ors Vs. Educomp Datamatics Ltd. and Ors (AIR 2004 SC 1962) and Association of Registration Plates Vs. Union of India (UOI) and Ors [AIR 2005 SC 469] to state that the Commission cannot question the criteria fixed for participation in the tender in the instant case.
15. The aforesaid case laws (Supra) were examined and it is noted that Courts in

these cases had not given blanket or absolute exemption from judicial scrutiny to such state authority. The courts have held that the conditions in tender documents or decision to award tender should not be arbitrary, discriminatory or actuated by malice. The Courts, thus, had not imposed any bar on examination of tender conditions, if they are discriminatory in nature. The provisions of Section 4 of the Competition Act, 2002 mandate the Commission to inquire into the cases where dominant players may restrict competition in the market by way of denial of market access and by imposing unfair and discriminatory conditions. In light of express provisions in the Competition Act mandating the Commission to inquire into such cases, the argument of the opposite party does not hold good.

16. The DG has further examined and analysed the charges of abuse of dominance on the basis of the documents and statements of Jupiter Lotteries, Future Gaming Solutions, Sugal and Damani Enterprise and the Government of Goa and found that two bids were received in response to expression of interest issued by Govt. of Goa. Namely: Future Gaming Solutions India Private Limited (earlier Martin Lottery Agency Limited) and the other from Sugal and Damani Enterprises Private Limited. Both were meeting the turnover and net worth criteria. The bid of Future Gaming Solutions was not accepted at the time of evaluation, considering it non-responsive. Finally, it was Sugal and Damani who was awarded the contract. Thus, the allegation that the tender was floated only to favour Martin Lottery Agency Limited was not found to be true.

17. The DG has also examined all factors of dominance stated in Section 19(4) applicable to the facts of the present case. It has been adequately established that the Government of Goa enjoyed the position of dominance, since they are solely engaged in the work of awarding the tender to successful bidder for running Goa Lotteries, which no other enterprise can do so in the territory of Goa. The Government of Goa hold position of dominance in terms of explanation (a) to Section 4 of the Competition Act, 2002 read with Section 19(4) of the act which has been elaborately discussed in the report. It is undoubted that Govt. of Goa has the ability to behave /act independently of the competitive forces prevailing in the relevant market since they have been given exclusive authority to run lotteries under the Lotteries Regulation Act, 1998. In terms of provisions of explanation (a)

to Section 4 (2) of the Competition Act, 2002 read with Section 19(4) of the act, Government of Goa, certainly enjoys the position of dominance (in fact the only player) in the relevant market of lotteries in Goa under the Goa Brand Lottery Scheme (online and paper lotteries) under the Lotteries (Regulation) Act, 1998 and the Rules made there under. The analysis of the factors, establishes dominance of Government of Goa in its areas of operations in the relevant market of running and conducting Goa Lotteries. Hence after proving dominant position of the enterprise, the report examined all the acts of abuse listed in Section 4(2) of the Act.

18. It is pertinent to mention here that dominance per se is not bad, but its abuse is treated bad in Competition Law in India. Abuse is said to occur when an enterprise uses its dominant position in the relevant market in an exclusionary or /and an exploitative manner. Section 4 of the Act gives an exhaustive list of practices that shall constitute abuse of dominant position and, therefore, are prohibited. Abuse of dominance is judged in terms of specified acts committed by a dominant enterprise. Such acts are prohibited under the law. There is no need for any reference by the Commission to the adverse effect on competition in Indian Markets. These practices are just prohibited, as an abuse of its dominant position and therefore, the Act does not envisage to explicitly prove such abuse of dominance only when it causes or likely to cause an appreciable adverse effect on competition in the relevant market within India. Rather, any abuse of the type specified in the Act by a dominant firm shall stand prohibited. Once the dominance is established then the Commission shall look into the practices listed in Section 4(2) and if the enterprises are found to be engaged in such practices the abuse of dominant position shall be established since such acts are prohibited under Law.
19. The DG has examined in detail the terms & conditions of the tender documents with the purpose of ascertaining as to whether these imposed unfair and discriminatory conditions limiting /denying market access to all other entities; and has the effect of creation of barriers to new entrants and foreclosure of competition by hindering entry into the market. It is noted from the tender documents that only those entities/persons were eligible to participate that fulfilled among others the following conditions: i) Bidder should have a minimum

gross turnover of Rs. 4000crore during the last three financial years. ii) Bidder should have net worth of more than Rs.40crore.

20. The aforesaid conditions placed in the tender documents clearly shows that Government of Goa had set very high eligibility criteria to qualify and participate in the bidding process which is evident from the fact that only two bidders participated in the tender. There has been consternation among other players in the market and therefore while one of the player- Jupiter Gaming filed petition in the Competition Commission of India, while another party - Puja Enterprises filed a writ petition in the High Court of Bombay. These high parameters also have the effect of creating barriers to entry to the smaller players who may be having a turnover of less than Rs. 4000crore. In case the conditions of minimum turnover of Rs.4000crore would not have been there, more number of participants could have participated in the tender process. The entry of more players could have been facilitated by doing away with the high turnover criteria.
21. It is the observation of the DG that the condition of minimum turnover of Rs.4000crore and net worth of Rs.40crore stipulated in the tender documents also does not stand justified keeping in consideration the dynamics of the lottery business which involved nothing more than selling of tickets, collection of money and remitting the minimum commitment to the Government of Goa. Thus, such high criteria of turnover and net worth of the bidder could be justified in large civil/construction/infrastructure projects, but certainly not in such low risk business of running lotteries. The Government of Goa also not able to explain and justify the reasons for such criteria in the tender documents. Mr. Anand Sherkhane, Joint Secretary, Govt. of Goa could not give any explanation on this minimum cap of Rs.4000crore of turnover as evident from his statement dated 12.07.2010. The DG, therefore, concluded that the allegations that Govt. of Goa has abused its dominant position by denying market access to all lottery players stand substantiated.
22. Further, it was stated in the DG's report that in the '*expression of interest*' floated for the purpose, that the State Govt. of Goa was expecting a minimum guaranteed amount of Rs.12crore from the operators on a turnover of Rs.1000crore and 0.25% over and above the turnover of Rs.1000crore. The

selected bidders were required to pay to the Govt. of Goa the guaranteed amount, only after collecting money from the people buying lottery tickets. Moreover, the EMD of Rs.5crore deposited by the participating and successful bidder was also supposed to be adjusted towards remission of revenues. Thus, even if the turnover criterion of Rs.4000 crore in the tender documents was to be removed, than it would not have impacted the prospect and revenue of the Government of Goa. But for higher turnover criteria in this case, there would have been enhanced participation, leading to easing out of the entry barriers, facilitating entry of more number of players in the relevant market.

23. In the light of above discussions it has been held by the DG that the information on the action of Govt. of Goa in keeping high turnover criteria of Rs. 4000crore and net worth of Rs.40crore has resulted in denial/restriction of market access to the other parties in the relevant market. This action is found to be in contravention to provisions of Section 4(2) (c) of the Competition Act, 2002.
24. The DG, during the course of investigation, found certain intriguing and surprising sequence of events and facts which raises serious concerns on the possibilities of bid manipulations. These are as under:
 - (i) The enquiries had revealed that a total of nine bid documents were purchased between 11.3.2010 to 25.3.2010 as per records of Govt. of Goa and the details of which are given in Chart on page 40 of the report. It was noticed that the proposal form of bid in the name of Kwik win gaming solutions, Tashi delek gaming solutions were purchased by one Mr.Harish as evident from the signature on the Register. These two entities therefore, appear to be front companies of Jupiter Gaming Pvt. Ltd. which in turn is inter-related to Zee Essel Group as apparent from Exhibit-7 of the DG's report. Similarly, the three forms in the case of Sugul & Damani Enterprise, Swagat Business Pvt. Ltd. and Skill Lotto Solutions have been purchased by the same person and therefore, these enterprises appear to be closely related. Lastly, the forms of Krishna Agencies and MJ Associates have been purchased by the same person. Thus, the purchase of forms appears to have been made in the name of front companies belonging to the main players in the business of lottery.

- (ii) The proposal both for the technical and financial bids were supplied on a printed forms containing a unique number and stamp of Joint Secretary, Govt. of Goa after payment of a deposit of Rs.25,000 for each form. This has been confirmed by the Joint Secretary (Budget), Govt. of Goa in his statement dated 12.7.2010.
- (iii) The bid documents of Sugal & Damani were submitted in the pre-printed bid forms containing proposal form No.FIN-BUD/Lot/2010/0004 on both technical as well as financial proposal. However, the bid document of Future Gaming Pvt. Ltd. was submitted on a separate stationary which did not contain the stamp of the Joint Secretary and the unique number (not pre-printed bid form). The said typed bid document contained form No. FIN-BUG/2010/0001 dated 3.4.2010 for the technical proposal and No. FIN-BUG/2010/0007 dated 3.4.2010 for the financial proposal. Further, the said financial proposal form also had an insertion of additional condition written in hand with ink stating: "The 0.25% mentioned on their additional turnover exceeding Rs.1000crores is subject to negotiation." (As per affidavit dated 5.7.2010 given in confidential cover). The bid proposal of Future Gaming was rejected primarily on this ground of inserting additional condition in the bid document.
- iv) However, it was noticed that the copies of the bid document submitted by Future Gaming Pvt. Ltd. earlier to this office vide affidavit dated 20.5.2010 (confidential) were on the pre-printed stationary containing the unique number - FIN-BUG/2010/0001 dated 3.4.2010 both on the technical and financial proposal. The said bid document also did not have any additional condition or alteration made in ink.
- v) Thus, two sets of bid documents were submitted to this office on two different dates as mentioned above. The Future Gaming had explained the discrepancy by stating that they had inserted the additional clause with ink in the bid document at the time of submission the same before the Govt. of Goa.
- vi) Further, bid documents of all the parties was also submitted by the Govt. of Goa vide letter dated 15.7.2010 (Exhibit-9). The examination of the bid document pertaining to Future Gaming Pvt. Ltd. as submitted by the concerned party and the Govt. of Goa showed several differences in the bid documents which have

been highlighted in the Table given on page 44 of the report.

- vii) The original bid document of Future Gaming Pvt. Ltd. submitted by the Govt. of Goa revealed some startling and unusual facts which deserves attention of the Commission. The examination of the said original bid document showed that it **was** on a separate stationary which did not bear the stamp of the Joint Secretary and the date was written as "3rd April, 2010" after using whitener. The back of the page shows the date as 15.3.2010. In other words, the original date of 15.3.2010 was changed to 3rd April, 2010 by using the whitener. Further, the typed technical proposal contained No. FIN-BUG/2010/0001 and the financial proposal contained the No. FIN-BUG/2010/0007 dated 3.4.2010. Thus, the form number of the technical bid did not match with the financial bid in this case.
 - viii) It was also noticed that as per the laid down procedure, all the bids in sealed cover had to be dropped in a sealed box in the office of Govt. of Goa. However, in the case of Future Gaming Solutions Pvt. Ltd. it was noticed that the Govt. of Goa obtained signature of two persons indicating the date and time of receipt of the bid proposal as exception to the normal procedure. This appears to have done to create an evidence for the existence and receipt of non-printed typed bid form containing additional condition put in ink.
 - ix) The aforesaid anomalies/discrepancies were confronted to both the Govt. of Goa and Future Gaming Solution Pvt. Ltd. but no satisfactory explanation could be furnished by them. As a matter of fact the Joint Secretary in his statement dated 12.7.2010 has stated that the anomalies/errors in the bid document of Future Gaming Solution Pvt. Ltd. were omitted to have been noticed by the Tender Evaluation Committee.
25. The aforesaid sequence of events, discrepancies in the set of tender documents of Future Gaming Pvt. Ltd., insertion of additional condition by hand in ink in the financial bid document, change in date of the bid proposal by using whitener, and non-satisfactory explanation by the Govt. of Goa and the target party, raises valid suspicion to the whole -bidding process in this case. The most pertinent question that arises is as to why Future Gaming Solutions Pvt. Ltd. had inserted additional condition by hand in ink in the financial proposal document just before

submitting the bid, despite realising that such "conditional bid" are liable for rejection. Similarly, why didn't the Tender Evaluation Committee of Govt. of Goa did not raise objection to the non-printed typed tender form of Future Gaming Solutions Pvt. Ltd. at the time of opening the bid on 8.4.2010. Further, why no specific representation by way of letter or statement was made by Future Gaming Solutions Pvt. Ltd. at the time of opening of the bid. The minutes of the Tender Evaluation Committee dated 8.4.2010 and 16.4.2010 does not find any mention of such notice of discrepancies (Exhibit-10). It is relevant to mention here that a so called representation to the Govt. of Goa was made on 18.5.2010, only after receipt of notice from this office seeking explanation on their rejection of proposal. It is also not explained satisfactorily as to why Future Gaming Solutions Pvt. Ltd. did not fill up the bids in the pre-printed proposal form containing unique number and stamp of Joint Secretary. Similarly, why and how typed forms without stamp were accepted by the Govt. of Goa with total disregard to the security and validity of such printed forms. At the same time why and how the Tender Evaluation Committee failed to take note on the discrepancies with respect to the two different numbers on technical and financial proposals as also the change made in the date of the form as 3rd April, 2010 by using whitener, whereas the proposal form contained the date as 15.3.2010.

26. All the facts and circumstances, emanating from the sequence of events and suspicious conduct of Future Gaming Solutions Pvt. Ltd. point towards the possibilities of some kind of tacit understanding with the other bidder - Sugal & Damani who was finally awarded the bid contract. The investigation has also tried to examine the possible financial motive of such act of Future Gaming Solutions Pvt. Ltd in the whole bidding process. The perusal of the terms and conditions of the bid design of the Goa lotteries shows that it could have appointed more number of parties instead of one as successful bidder, since there was no requirement of appointing only one distributor. This issue was also deliberated in the meeting of the Tender Evaluation Committee dated 16.4.2010. The bid design of the Govt. of Goa stated that the successful bidder had to pay Rs. 12 crores as minimum guarantee for turnover exceeding Rs. 1000 crores and 0.25% on additional amount over and above Rs.1000 crores. Therefore, considering the fact that both the parties : (i) Sugal & Damani (ii) Future Gaming

Solutions Pvt. Ltd. met all the requirements of the expression of interest including the minimum gross turnover of Rs.4000crores per annum and net worth of Rs.40crores, were eligible to be appointed as distributors. Therefore, if the appointment of two bidders were to be made, it would have resulted in earning of income of Rs.24crores to the Govt. of Goa. Therefore, by putting additional condition in the financial bid in ink by Future Gaming Solutions Pvt. Ltd. and thereby making it liable for rejection so that only one party is awarded the contract has clearly financial motive hidden to it. Thus, by rejection of bid of Future Gaming Solutions Pvt. Ltd. on technical reasons and thereby appointment of one party, namely, Sugal & Damani, the Govt. of Goa was eligible to an income of Rs.14.5 crores as against Rs.24 crores if two parties were to be awarded the contract. Comparative analysis of such equation has been given on page 49 of the report. In other words, it was more beneficial for bidders if they decided to sit together, formulate a strategy and try to ensure that only one party gets contract, instead of two. It appears that Future Gaming initially filled up the printed form as procured from Govt. of Goa. However, on re-consideration, possibly after holding discussions with Sugal and Damani Group, it submitted another bid and inserted additional conditions which made its bid liable for rejection. Thus resorting to such modus operandi, the guarantee money liable to be paid by the second party was avoided and to be shared beneficially by the two concerns. This equation appears to be the real motive, since the lottery business of Future Gaming is not likely to be hampered because as per the terms of the agreement with Government of Goa, M/s. Sugal and Damani could engage sub-agents/retailers. Thus, it appeared to be a case of collusive transaction of bid manipulation by the parties wherein the Government of Goa was made to lose substantial revenue which in turn was shared by the two parties.

27. In the light of several discrepancies in the set of tender documents of Future Gaming Pvt. Ltd; insertion of additional condition in the financial bid document by hand in ink; change in date of the bid proposal by using whitener; financial motive and loss to revenue to Government of Goa, and non-satisfactory explanation by the *Govt. of Goa and the target party; the investigation report has concluded that Bid Rigging* in the form of *Complementary Bidding or Cover Bidding* had taken place in this case. It is a form of price fixing and market

allocation, often practiced, where contracts are determined by a call for bids. Bid-rigging almost always results in economic harm to the agency which is seeking the bids, and to the public, who ultimately bear the costs as taxpayers or consumers.

28. Complementary bidding, or cover bidding, is a form of bid rigging where some of the bidders bid an amount knowing that it is too high or contains conditions that they know would be unacceptable to the agency calling for the bids. In the instant case, the agreement dated 06.05.2010, between Govt. of Goa and Sugal and Damani permits the latter to engage agents. Thus, a possibility of some kind of understanding between Sugal and Damani and Future Gaming group by which Future Gaming or its allied concerns may get share of business of Goa Lotteries from Sugal and Damani cannot be ruled out. The statement of Mr. Naresh Mangal, Director of Sugal and Damani Enterprises Private Limited (Annexure-E) suggest that there is no problem between the three major players in the business of lottery and they independently continue to sell tickets of all State Government including Government of Goa. This said statement therefore, shows that there is some sort of cooperation between all three - Sugal and Damani, Future Gaming and Essel group, with respect to business of lottery operations of the State Govt. of Goa. Further, from the statement of Jagesh Dhamija of Future Gaming Solutions Private Limited and statement of Naresh Mangal, Director of Sugal and Damani Enterprises Private Limited, it is clear that the three main players are working together or have their respective territories. Thus, there could be incentive for them to allocate market for themselves.
29. Bid Rigging has been defined in Explanation to Section 3, Sub-Section (3) of the Competition Act, 2002 which reads as follows:
*"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."*
30. The agreement in Competition Act need not be in writing only; it can be oral as well. Further, any understanding or action is also covered as an agreement for the purposes of Competition Act. Thus, the objective of securing the most

favourable prices and conditions may be negated if the prospective bidders collude or act in concert. Such bid rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive.

31. It may be relevant to mention here that Bid rigging is difficult to detect since it is executed in secrecy with only the participants privy to the scheme of conspiracy. Therefore, its detection can be made only by way of assessing the suspicious conduct, patterns of abnormal activities in the bidding process, exception to the normal procedures and loss to the Government Department. There are number of situations of suspicious behaviour of Future Gaming and other parties which clearly point out towards bid rigging in this case. In this case, it prima-facie appears that additional conditions in ink had been inserted by Future Gaming to make its bid liable for rejection and thereby resorting to mechanism of cover bidding. This finding in the investigation report draws support from the fact that M/S Future Gaming did not raise any objection to the technical rejection of its bid before the Govt of Goa, until such time a notice was issued by this office. Further it appears that Future Gaming had accepted the rejection of its bid without any serious challenge since it has not contested for any review of the decision of Government of Goa or filed a case in Court of Law.

32. The existence of bid rigging in the aforesaid case also finds support from OECD guidelines which suggest certain factors which facilitate efforts of bid rigging namely: i) Bid rigging is more likely to occur when a small number of companies supply the good or service. The number of players in lottery business is very limited and thus it was easier for these parties to reach a collusive agreement. ii) When few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support collusive actions. The bid design of Govt. of Goa calling for higher threshold of turnover and net worth has facilitated this transaction. iii) When the products or services that individuals or companies sell are identical or very similar, it is easier for firms to reach an agreement on a common strategy. The two companies which have submitted tender bids for lottery are definitely engaged in identical products or services. Therefore, all the factors enumerated by the OECD are applicable to the fact of the case to suggest bid rigging by the

concerned parties. Thus, after considering all circumstantial evidence, manipulations in the bid documents, behaviour of the parties, the DG concluded that bid rigging in the form of cover bidding had taken place in this case in violation to section 3(3) (d) of the Competition Act.

33. The finding in the investigation report also draws strength from the case of *Deutscher Lotto -und Totoblock's* of the German lottery, wherein the Higher Regional Court in Dusseldorf held that the agreement between the lottery operators to restrict the operations in their given territories was a cartel and hence anti-competitive in violation to the German and European Laws. This shows that lottery business has come under scanner for their cartel like behaviour in other international jurisdictions and therefore makes a strong argument of bid rigging which is anti-competitive in nature in contravention to provision of section 3(3) (d) of the Act.
34. In the light of discussions in the preceding paras, the investigation report submitted by the DG has essentially brought out two major findings in this case, namely:
- (i) The investigation found that the allegation of abuse of dominant position by the Govt. of Goa stands substantiated by designing bid documents that contained several terms and conditions leading to deprivation of smaller parties to participate in the tender process. Further, it also denied market access through design of bid documents in a particular manner, which is in contravention to provisions of Section 4(2)(c) of the Act.
 - (ii) The investigation has also unearthed on the basis of available record and other circumstantial evidences, the existence of bid rigging in the awarding of the distributor contract of Goa lotteries. The evidences in the form of discrepancies in the tender documents of Future Gaming Pvt. Ltd; insertion of additional condition in the financial bid document by hand in ink; change in date of the bid proposal by using whitener; financial motive and loss to revenue to Government of Goa, and statements of the concerned parties clearly suggest of some sort of tacit understanding/agreement wherein Future Gaming Solutions was made to file a defective bid so that contract could be awarded to Sugal & Damani and thereby the evasion of commitment money to the govt. of Goa could be shared between

them. Further, the poor manner in which Jupiter Gaming Pvt. Ltd. has pursued its information before this office and subsequent withdrawal of such information also suggests that this party associated with Zee Essel Group may also have entered in to some kind of understanding in the whole bidding process in this case.

35. In view of the aforesaid findings in the report, the DG has suggested that the design of the tender process may be modified that would maximise the potential participation of genuinely competing bidders in order to enhance effective competition. The bid design should essentially contain basic elements which reduces the cost of bidding, enlarges the number of potential bidders, proper guidelines for evaluation of bids and finally it should promote the purpose of the Govt. to maximise revenue. Thus, unwarranted restrictions may be avoided while designing tender documents so that the number of bidders is not reduced, without sacrificing suitable performance criteria of the bidders in the tender documents. It is important to ensure that qualitative selection and awarding criteria are chosen in such a way that credible bidders, including small and medium enterprises, are not deterred unnecessarily in the bidding process. It is, therefore, suggested that the Commission may direct the Govt. of Goa to redesign its tender documents which shall remove entry barriers and denial of market access to the potential bidders in order to promote competition in the market of Goa lotteries in India.
36. Lastly, the bid rigging detected on the basis of circumstantial evidences in the investigation report deserves special attention of the Commission. The conduct of the parties, discrepancies in the bid documents, the handling and evaluation of such documents clearly suggest that everything was not proper and fair in the whole process of bidding. The Commission may kindly take note that there has been debate in the assembly of Goa over the validity of the tender processing of Goa lotteries (Exhibit-11 of the DG's report) and therefore, lends credence to the possibility of bid rigging in this case. It is, therefore, suggested that the Commission may take up the matter with the Govt. of Goa for instituting an enquiry into the whole process of designing and awarding the tender in this case so that all shortfalls and defects in the procedure are rectified.

FINDINGS ON MERITS:

37. I have carefully considered the allegations made in the Information and the Investigation Report submitted by the DG. The submission made by the informants and the respondents during the proceedings before the Commission was also considered. After due considerations of the facts of the case and the evidences gathered by the DG, I find that basically there are two issues involved in this case:-

1. Whether Government of Goa has abused its dominant position by unilaterally imposing certain unfair and discriminatory conditions in floating a tender for lottery operations in Goa which resulted in:
 - a. creation of barriers to new entrants in that market
 - b. denial of market access to all other entities; and
 - c. the foreclosure of competition by hindering entry into the lottery market.
2. Were there any collusive bidding/ bid rigging on the part of M/s Martin Lottery Agency Limited (now Future Gaming Pvt. Ltd.), Jupitar Gaming, M/s Sugal and Damani Pvt. Ltd and other enterprises in terms of provisions to Section 3(3) (d) of the Act?

38. On the first issue let us examine what are the allegations that have been leveled against the Govt. of Goa. It has been alleged by the Informant that the Govt of Goa had put certain conditions such as the participating entity should have the minimum of the gross turnover of Rs. 4000Crores per annum during the last three financial years; the participating entity should have a minimum net worth of Rs. 40crores as on 31.03.2009; the minimum guarantee revenue to be offered stipulated as Rs.12Crore; the participating entity should have experience of at least three years working directly with minimum two State Governments during the last five years; and the participating entity should not have any dues pending towards any State Government in which it operates or had worked in the preceding five years and the failure to meet one or more of the pre-qualification terms and conditions would have rendered the bid of the participating entity liable to be rejected. These conditions, according to the Informant, had been clearly formulated in order to favour only one entity, namely, M/s Martin Lottery Agency Ltd, which was evident from the fact that among all the lottery service providers in the country, only M/s Martin Lottery Agency Ltd. had minimum gross turnover of Rs. 4000Crores during the last three financial years and thus, the

impugned conditions which had been imposed by Government of Goa had the effect of creation of barriers to new entrants and also foreclosure of competition by hindering entry into the market thereby it had abused its dominant position by imposing unfair and discriminatory conditions.

39. The Govt. of Goa, on the other hand has denied these allegations and given following reasons for putting these conditions:
- That the clause of minimum gross turnover of Rs.4,000 crores per annum was to ensure that only bonafide firms participate in the tender.
 - That the stipulation of minimum 3 years experience with two State Govts. was due to requirement of an experienced operator.
 - That the criteria of net worth of Rs.40 crores as on 31.3.2009 was again to ensure bonafide and genuineness of the firms.
 - That minimum guarantee revenue stipulated as Rs. 12 crores was on the basis of previous experience as well as experience of other States.
 - That the allegation that tender conditions were designed to favour only the one entity is not sustainable since Sugal & Damani also qualified for the bid and eventually got the tender.
40. M/s Martin Lottery Agency Limited (whose name was subsequently changed to Future Gaming Solutions India Pvt. Ltd.) while defending its case stated that the allegation that GoG had designed the tender to favour Future Gaming was baseless because the proposal by Future Gaming was rejected and proposal submitted by another competitor namely Sugal and Damani has been accepted. According to the respondent, the informant has tried to mislead the Commission by moving an application to withdraw the information once M/s Sugal & Damani got the tender. It is thus, proved that Future Gaming was not the only entity with a turnover of about Rs.4,000 crores as was alleged.
41. M/s Future Gaming has further argued that the floating of tender for the lottery operation in the State of Goa can not be considered as “purchase or sale of goods or service” within the meaning of Section 4(2) (a) of the Act. In support of its argument M/s Future Gaming has quoted several decisions of the Supreme Court wherein it has been held that lottery is a gambling and it is neither a

service nor a good but mere an actionable claim. So, it has been argued by M/s Future Gaming that since no service is rendered to general public and since it is not a good or service, the GoG can not be held to have indulged into any activities as defined in Section 2(h) and 2(u) of the Competition Act.

42. It further, states that CCI does not have jurisdiction over this case as dominant position can only be examined in respect of goods or services. The information does not define “relevant market” where Govt. Of Goa has alledgely abused its dominant position. Relying on Supreme Court decision in Tata Cellular vs UOI and Air India vs Cochin International Airport Ltd the State of Goa had full discretion to fix its own turn over while floating a tender. The informant’s prayer for the deletion of the turn over criteria is, therefore, not sustainable.

43. The argument that lottery is neither a good nor service but only an "Actionable Claim" was examined by the DG in detail and its findings have already been described in preceding paragraphs and are not being repeated for the sake of brevity. I fully agree with the findings of DG who held that there is no merit in the argument of the respondents as the case laws cited by them have been interpreted in a different context and, therefore, such findings would not be applicable to the present case. The Services have been defined in the Competition Act which reads as under:

Section 2 (u): "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;"

44. I agree with the interpretation of the aforesaid definition by the DG that it uses the term "service of any description which is available to potential users" which would clearly mean that it has a wider meaning to cover any kind of service under its ambit since it is an inclusive definition. Therefore, the appointment of lottery vendors through the tendering process is a service and provisions of the Competition Act are undoubtedly attracted in this case.

45. The context and the applicability also changes from time to time according to the economic needs and that is why the extent of the "Service tax" has been enlarged and it is now applicable to the service of promotion, marketing or organizing of games of chance, including lottery by the amendment brought out in the *Finance Act, 2010* by creating a separate category of taxable service, w.e.f. 16.5.2008 and the CBEC Circular No.334/1/2010-TRU dated 26.02.2010. Thus, the DG is right that in the light of aforesaid amendment, the ratios of the decisions of the Apex Court in the case of *Sunrise Associates, B. R.Associates & Martin Lottery Agencies Ltd.* relied upon by the respondents cannot be applied to the present case. Lastly, the Rule 21 of the Goa Lottery Regulation Rules, 2003 also envisages the operation of ticketing agents/vendors as services. The DG therefore, is right in concluding that the business of lottery is a "Service" and clearly covered under the definition of Competition Act.
46. Another argument that the lottery activities and gambling are pernicious in nature and bearing this in mind, it cannot be said that the State Government is providing any service to the public at large by conducting such business of lottery. This issue has been considered by the DG in the light of the decisions relied upon by the respondents and it is found that that in the case of *BR Enterprises Vs State of UP* the question before the Apex Court was whether Section 4 and 5 of Lotteries Regulation Act, 1998 which gives right to the State Govts either to organize or prohibit lotteries are valid piece of legislations and the Apex Court has justified the validity of these two sections of Lotteries Regulation Act, 1998. Interestingly, in this case, the Hon'ble Court has distinguished the meaning of *trade and commerce* as defined in Article 301 of the Constitution with Article 298 of the constitution which includes *trade or business*. The Apex Court in the cited case (Supra) has held that the word 'business' in Article 298 has a wider meaning than 'trade' in Article 301 and any transaction or activity other than 'trade' would be 'business' of that State, which apart from 'trade' would also include activity to run State lotteries. Thus, sale of lotteries by State Governments even if not 'trade' as understood in common parlance, still it would be covered within the executive power of the State under Article 298 being activity in the nature of 'business' and in any case would also be covered by the words 'contract for any purpose'. Therefore, based on the above interpretation by the Apex Court, the business of organizing lotteries by State Governments is liable to be covered within the ambit

of Competition Act since "trade" in Section 2 (x) of Competition Act, 2002 is not restrictive and has been given a wider meaning stating that trade means any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services. Further, Section 2(u) of the Competition Act while defining service also includes the term "business".

47. The report has also examined the business of lottery dealt by international jurisdictions. It is observed that lottery had come under scanner of anti-trust laws as in the case of Deutscher Lotto in Germany wherein the monopoly of such enterprise was held to be anti-competitive by the German Federal Cartel office. Therefore, the contention of opposite party that activity of lottery as organized by State Governments cannot be made subject matter of inquiry under Competition Act, 2002, has no merit.
48. Coming to the authority of the Government of Goa in deciding terms & conditions of the tender documents for its lottery scheme, the arguments of the opposite parties are that it is the prerogative of the State Govt to fix minimum turnover and net worth in tender conditions and the Commission cannot question the criteria fixed for participation in the tender were also examined by the DG along with the case laws relied upon by the said party e.g. Tata Cellular Vs. Union of India [(1994)6 SCC 651], Raunaq International Ltd. Vs. I.V.R. Construction Ltd. and Ors [(1999) 1 SCC 492], Air India Limited Vs Cochin International Airport Limited [(2000) 1 SCR 505], Directorate of Education and Ors Vs. Educomp Datamatics Ltd. and Ors (AIR 2004 SC 1962) and Association of Registration Plates Vs. Union of India (UOI) and Ors [AIR 2005 SC 469]
49. The aforesaid case laws (Supra) were examined and it is noted that Courts in these cases had not given blanket or absolute exemption from judicial scrutiny to such state authorities. The courts have held that the conditions in tender documents or decision to award tender should not be arbitrary, discriminatory or actuated by malice. The Courts, thus, had not imposed any bar on examination of tender conditions, if they are discriminatory in nature. The provisions of Section 4 of the Competition Act, 2002 mandate the Commission to inquire into the cases where dominant players may restrict competition in the market by way of denial of market access and by imposing unfair and discriminatory conditions.

50. The allegation that the tender was floated to favour Martin Lottery Agency Limited, the DG has concluded on the basis of the documents and statements given by Jupiter Lotteries, Future Gaming Solutions, Sugal and Damani Enterprise and the Government of Goa that this allegation was not found to be true as the investigation found that two bids were received in response to expression of interest issued by Govt. of Goa. Namely: Future Gaming Solutions India Private Limited (earlier Martin Lottery Agency Limited) and the Sugal and Damani Enterprises Private Limited. Both were meeting the turnover and net worth criteria. The bid of Future Gaming Solutions was not accepted at the time of evaluation, considering it non-responsive. Finally, it was Sugal and Damani who was awarded the contract.

51. Now coming to the question of abuse of dominance by the government of Goa, the DG has examined all factors of dominance stated in Section 19(4) applicable to the facts of the present case. It has been adequately established that the Government of Goa enjoyed the position of dominance, since they are solely engaged in the work of awarding the tender to successful bidder for running Goa Lotteries, which no other enterprise can do so in the territory of Goa. The Government of Goa hold position of dominance in terms of explanation (a) to Section 4 of the Competition Act, 2002 read with Section 19(4) of the act which has been elaborately discussed in the report. It is undoubted that Govt. of Goa has the ability to behave /act independently of the competitive forces prevailing in the relevant market since they have been given exclusive authority to run lotteries under the Lotteries Regulation Act, 1998. In terms of provisions of explanation (a) to Section 4 (2) of the Competition Act, 2002 read with Section 19(4) of the act, Government of Goa, certainly enjoys the position of dominance (in fact the only player) in the relevant market of lotteries in Goa under the Goa Brand Lottery Scheme (online and paper lotteries) under the Lotteries (Regulation) Act, 1998 and the Rules made there under. The analysis of the factors, establishes dominance of Government of Goa in its areas of operations in the relevant market of running and conducting Goa Lotteries. Hence after proving dominant position of the enterprise, the report examined all the acts of abuse listed in Section 4(2) of the Act.

52. However, dominance per se is not bad, but its abuse is bad in Competition Law in India. Abuse is said to occur when an enterprise uses its dominant position in the relevant market in an exclusionary or /and an exploitative manner. Section 4 of the Act gives an exhaustive list of practices that shall constitute abuse of dominant position and, therefore, are prohibited. Abuse of dominance is judged in terms of specified acts committed by a dominant enterprise. Such acts are prohibited under the law. These practices are just prohibited, as an abuse of its dominant position and therefore, the Act does not envisage to explicitly prove such abuse of dominance only when it causes or likely to cause an appreciable adverse effect on competition in the relevant market within India. Rather, any abuse of the type specified in the Act by a dominant firm shall stand prohibited. Once the dominance is established then the Commission shall look into the practices listed in Section 4(2) and if the enterprises are found to be engaged in such practices the abuse of dominant position shall be established since such acts are prohibited under Law.
53. Further, the DG examined in detail the terms & conditions of the tender documents with the purpose of ascertain as to whether these imposed unfair and discriminatory conditions limiting /denying market access to all other entities; and has the effect of creation of barriers to new entrants and foreclosure of competition by hindering entry into the market. It is noted from the tender documents that only those entities/persons were eligible to participate that fulfilled among others the following conditions: i) Bidder should have a minimum gross turnover of Rs. 4000 crore during the last three financial years. ii) Bidder should have net worth of more than Rs. 40 crore.
54. The aforesaid conditions placed in the tender documents clearly shows that Government of Goa had set very high eligibility criteria to qualify and participate in the bidding process which is evident from the fact that only two bidders participated in the tender. There has been consternation among other players in the market and therefore while one of the player- Jupiter Gaming filed petition in the Competition Commission of India, while another party - Puja Enterprises filed a writ petition in the High Court of Bombay. These high parameters also have the effect of creating barriers to entry to the smaller players who may be having a turnover of less than Rs. 4000 crore. In case the conditions of minimum turnover

of Rs.4000 crore would not have been there, more number of participants could have participated in the tender process. The entry of more players could have been facilitated by doing away with the high turnover criteria. It is observed that the condition of minimum turnover of Rs.4000 crore and net worth of Rs.40 crore stipulated in the tender documents also does not stand justified keeping in consideration the dynamics of the lottery business which involved nothing more than selling of tickets, collection of money and remitting the minimum commitment to the Government of Goa. Thus, such high criteria of turnover and net worth of the bidder could be justified in large civil/construction/infrastructure projects, but certainly not in such low risk business of running lotteries. The Government of Goa also not able to explain and justify the reasons for such criteria in the tender documents. Mr. Anand Sherkhane, Joint Secretary, Govt. of Goa could not give any explanation on this minimum cap of Rs.4000 crore of turnover as evident from his statement dated 12.07.2010.

55. Further, it was noticed in the '*expression of interest*' floated for the purpose, that the State Govt. of Goa was expecting a minimum guaranteed amount of Rs.12 crore from the operators on a turnover of Rs.1000 crore and 0.25% over and above the turnover of Rs.1000 crore. The selected bidders were required to pay to the Govt. of Goa the guaranteed amount, only after collecting money from the people buying lottery tickets. Moreover, the EMD of Rs.5 crore deposited by the participating and successful bidder was also supposed to be adjusted towards remission of revenues. Thus, even if the turnover criteria of Rs.4000 crore in the tender documents was to be removed, than it would not have impacted the prospect and revenue of the Government of Goa. But for higher turnover criteria in this case, there would have been enhanced participation, leading to easing out of the entry barriers, facilitating entry of more number of players in the relevant market.

56. The DG thus concluded that the allegations that Govt. of Goa has abused its dominant position by denying market access to all lottery players stand substantiated as the action of Govt. of Goa in keeping high turnover criteria of Rs. 4000 crore and net worth of Rs.40 crore has resulted in denial/restriction of market access to the other parties in the relevant market. This action is found to be in contravention to provisions of Section 4(2) (c) of the Competition Act, 2002.

57. While fully agreeing with the findings of the DG stated as above, I would like to add here that the abuse of a dominant position is another way of interfering with competition in the market place. In simple terms it refers to the conduct of an enterprise that enjoys a 'dominant position', as defined by the Act. In substance, 'dominant position' means the position of strength enjoyed by an enterprise that enables it to act independently of competitive forces prevailing in the relevant market. Such an enterprise will be in a position to disregard market forces and unilaterally impose trading conditions, fix prices, etc. The abuse may result in the restriction of competition, or the elimination of effective competition.
58. Sometimes, the statutory power or exclusive right conferred by the State to the enterprises also result in abuse of dominant position. In the case of *General Motors Continental NV v. Commission of the European Communities* it has been held that the holder of an exclusive right conferred by the State can abuse its dominant position. In this case the charge was a violation of Article 82 by *General Motors Continental NV*. The infringement was charging an excessive amount as inspection charges, relating to five motor vehicles manufactured in another member state and imported into Belgium, towards checking, for conformity with the specifications contained in the approval certificate prescribed by the Belgian authorities, that *General Motors Continental NV* had to carry out as the sole authorized did not provide any measures to fix or limit the charge imposed for the service rendered. Dealing with the first issue of whether the activity involved in issue of certificates of conformity would constitute a dominant position, the Court held that the legal monopoly granted to the manufacturer or his agent put them in a dominant position as the service of inspection in Belgium for conformity to specifications could be availed of only on the terms stipulated unilaterally by them. The Court observed that the holder of such an exclusive right could abuse it. 'Such an abuse might lie, inter alia, in the imposition of a price and which has the effect of curbing parallel import by neutralizing the possibly more favorable level of prices applying in other sales area in the community, or by leading to unfair trade in the sense of article 86(2)(a).' In the present case, the Ministry of Finance was conferred exclusive right to award contract for the lottery operations in the State of Goa and by virtue of that Govt. of Goa had a dominant position and by putting discriminatory conditions the

Govt. of Goa has abused its dominant position.

59. The Govt. of Goa also cannot take the pretext of discharging sovereign functions. There is a clear distinction between the sovereign functions and commercial functions. In the case of Govt. of Goa the lottery operation is a commercial function as the State Govt. has entered into a business of commercial matters and thus well covered under section 2(x) read with section 2(u) of the Act.

60. The Anti-trust Laws all over the world focus both on multilateral activity and unilateral activity i.e. abuse of dominant position in the market. Any form of monopolization or attempts to monopolize is prohibited under the Anti-trust Laws. In US the offence of abuse of dominant position is included within the phrase 'monopolization or attempt to monopolize' as mentioned in section 2 of the Sherman Act. Monopolization has two elements i) the possession of monopoly power and ii) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. It has been held in the case **Aspen Skiing Co. Aspen Highlands Skiing Corpn. 472 US 585 (1985)** that the intent of the person is relevant to the analysis as to whether the conduct is exclusionary or predatory. Article 82 of the treaty of the EC enumerates following as being abuse of dominant position; unfair prices or conditions, limiting production, markets or technical development, applying dissimilar conditions to equivalent transactions and making contracts subject to supplementary obligations having no connection with the subject of the contracts. That the conduct would be found exclusionary on the examination of the action of the undertaking concern in the light of the consumer interest i.e. as to whether it has impaired competition in an unnecessary restrictive way. Thus, the analysis should reveal if the result of the conduct indicted as abusive is the restriction or elimination of competition in the relevant market, for the goods or services in question. Competition Laws prohibit all those behavior which damage true competition between firms and exploit consumers. In the present case the action of Govt. of Goa in keeping high turnover and net worth has resulted in restriction and elimination of competition in the relevant market for the goods or services in question and thus its action is found to be in contravention to the provisions of Section 4(2) (a) (b) & (c) of the Competition Act, 2002.

61. The next issue in question was were there any collusive bidding/ bid rigging on the part of M/s Martin Lottery Agency Limited (now Future Gaming Pvt. Ltd.), Jupitar Gaming, M/s Sugal and Damani Pvt. Ltd and other enterprises in terms of provisions to Section 3(3) (d) of the Act? The DG during the course of investigation found certain intriguing and surprising sequence of events and facts which points to the possibilities of bid manipulations. DG has highlighted these events as under:

- i) The enquiries had revealed that a total of nine bid documents were purchased between 11.3.2010 to 25.3.2010 as per records of Govt. of Goa and the details of which are given in Chart on page 40 of the report. It was noticed that the proposal form of bid in the name of Kwik win gaming solutions, Tashi Delek gaming solutions were purchased by one Mr.Harish as evident from the signature of the Register. These two entities therefore, appear to be front companies of Jupiter Gaming Pvt. Ltd. which in turn is inter-related to Zee Essel Group as apparent from Exhibit-7 of the report. Similarly, the three forms of in the case of Sugal & Damani Enterprise, Swagat Business Pvt. Ltd. and Skill Lotto Solutions have been purchased by the same person and therefore, these enterprises appear to be closely related. Lastly, the forms of Krishna Agencies and MJ Associates have been purchased by the same person. Thus, the purchase of forms appears to have been made in the name of front companies belonging to the main players in the business of lottery.
- ii) The proposal both for the technical and financial bids were supplied on a printed forms containing a unique number and stamp of Joint Secretary, Govt. of Goa after payment of a deposit of Rs.25,000 for each form. This has been confirmed by the Joint Secretary (Budget), Govt. of Goa in his statement dated 12.7.2010.
- iii) The bid documents of Sugal & Damani were submitted in the pre-printed bid forms containing proposal form No.FIN-BUD/Lot/2010/0004 on both technical as well as financial proposal. However, the bid document of Future Gaming Pvt. Ltd. was submitted on a separate stationery which did not contain the stamp of the Joint Secretary and the unique number (not pre-printed bid form). The said typed bid document contained form No. FIN-BUG/2010/0001 dated 3.4.2010 for the

technical proposal and No. FIN-BUG/2010/0007 dated 3.4.2010 for the financial proposal. Further, the said financial proposal form also had an insertion of additional condition written in hand with ink stating: "The 0.25% mentioned on their additional turnover exceeding Rs.1000 crores is subject to negotiation." (As per affidavit dated 5.7.2010 given in confidential cover). The bid proposal of Future Gaming was rejected primarily on this ground of inserting additional condition in the bid document.

- vii) However, it was noticed that the copies of the bid document submitted by Future Gaming Pvt. Ltd. earlier to this office vide affidavit dated 20.5.2010 (confidential) were on the pre-printed stationary containing the unique number - FIN-BUG/2010/0001 dated 3.4.2010 both on the technical and financial proposal. The said bid document also did not have any additional condition or alteration made in ink.
- viii) Thus, two sets of bid documents were submitted to this office on two different dates as mentioned above. The Future Gaming had explained the discrepancy by stating that they had inserted the additional clause with ink in the bid document at the time of submission the same before the Govt. of Goa.
- ix) Further, bid documents of all the parties was also submitted by the Govt. of Goa vide letter dated 15.7.2010 (Exhibit-9). The examination of the bid document pertaining to Future Gaming Pvt. Ltd. as submitted by the concerned party and the Govt. of Goa showed several differences in the bid documents which have been highlighted in the Table given on page 44 of the report.
- x) The original bid document of Future Gaming Pvt. Ltd. submitted by the Govt. of Goa revealed some startling and unusual facts which deserves attention of the Commission. The examination of the said original bid document showed that it **was** on a separate stationary which did not bear the stamp of the Joint Secretary and the date was written as "3rd April, 2010" after using whitener. The back of the page shows the date as 15.3.2010. In other words, the original date of 15.3.2010 was changed to 3rd April, 2010 by using the whitener. Further, the typed technical proposal contained No. FIN-BUG/2010/0001 and the financial proposal contained the No. FIN-BUG/2010/0007 dated 3.4.2010. Thus, the form

number of the technical bid did not match with the financial bid in this case.

- xi) It was also noticed that as per the laid down procedure, all the bids in sealed cover had to be dropped in a sealed box in the office of Govt. of Goa. However, in the case of Future Gaming Solutions Pvt. Ltd. it was noticed that the Govt. of Goa obtained signature of two persons indicating the date and time of receipt of the bid proposal as exception to the normal procedure. This appears to have done to create an evidence for the existence and receipt of non-printed typed bid form containing additional condition put in ink.
 - xii) The aforesaid anomalies/discrepancies were confronted to both the Govt. of Goa and Future Gaming Solution Pvt. Ltd. but no satisfactory explanation could be furnished by them. As a matter of fact the Joint Secretary in his statement dated 12.7.2010 has stated that the anomalies/errors in the bid document of Future Gaming Solution Pvt. Ltd. were omitted to have been noticed by the Tender Evaluation Committee.
62. The aforesaid sequence of events, discrepancies in the set of tender documents of Future Gaming Pvt. Ltd., insertion of additional condition by hand in ink in the financial bid document, change in date of the bid proposal by using whitener, and non-satisfactory explanation by the Govt. of Goa and the target party, raises valid suspicion to the whole -bidding process in this case. The most pertinent question that arises is as to why Future Gaming Solutions Pvt. Ltd. had inserted additional condition by hand in ink in the financial proposal document just before submitting the bid, despite realizing that such "conditional bid" are liable for rejection. Similarly, why didn't the Tender Evaluation Committee of Govt. of Goa did not raise objection to the non-printed typed tender form of Future Gaming Solutions Pvt. Ltd. at the time of opening the bid on 8.4.2010. Further, why no specific representation by way of letter or statement was made by Future Gaming Solutions Pvt. Ltd. at the time of opening of the bid. The minutes of the Tender Evaluation Committee dated 8.4.2010 and 16.4.2010 does not find any mention of such notice of discrepancies (Exhibit-10). It is relevant to mention here that a so called representation to the Govt. of Goa was made on 18.5.2010, only after receipt of notice from this office seeking explanation on their rejection of proposal. It is also not explained satisfactorily as to why Future Gaming Solutions

Pvt. Ltd. did not fill up the bids in the pre-printed proposal form containing unique number and stamp of Joint Secretary. Similarly, why and how typed forms without stamp were accepted by the Govt. of Goa with total disregard to the security and validity of such printed forms. At the same time why and how the Tender Evaluation Committee failed to take note on the discrepancies with respect to the two different numbers on technical and financial proposals as also the change made in the date of the form as 3rd April, 2010 by using whitener, whereas the proposal form contained the date as 15.3.2010.

63. All the facts and circumstances, emanating from the sequence of events and suspicious conduct of Future Gaming Solutions Pvt. Ltd. point towards the possibilities of some kind of tacit understanding with the other bidder - Sugal & Damani who were finally awarded the bid contract. The investigation has also tried to examine the possible financial motive of such act of Future Gaming Solutions Pvt. Ltd in the whole bidding process. The perusal of the terms and conditions of the bid design of the Goa lotteries shows that it could have appointed more number of parties instead of one as successful bidder, since there was no requirement of appointing only one distributor. This issue was also deliberated in the meeting of the Tender Evaluation Committee dated 16.4.2010. The bid design of the Govt. of Goa stated that the *successful bidder had to pay Rs. 12 crores as minimum guarantee for turnover exceeding Rs. 1000 crores and 0.25% on additional amount over and above Rs.1000 crores*. Therefore, considering the fact that both the parties : (i) Sugal & Damani (ii) Future Gaming Solutions Pvt. Ltd. met all the requirements of the expression of interest including the minimum gross turnover of Rs.4000 crores per annum and net worth of Rs.40 crores, were eligible to be appointed as distributors. Therefore, if the appointment of two bidders were to be made, it would have resulted in earning income of Rs.24 crores to the Govt. of Goa. Therefore, by putting additional condition in the financial bid in ink by Future Gaming Solutions Pvt. Ltd. and thereby making it liable for rejection so that only one party is awarded the contract has clearly financial motive hidden to it. Thus, by rejection of bid of Future Gaming Solutions Pvt. Ltd. on technical reasons and thereby appointment of one party, namely, Sugal & Damani, the Govt. of Goa was eligible to an income of Rs.14.5 crores as against Rs.24 crores if two parties were to be awarded the contract. Comparative analysis of such equation has been given on

page 49 of the DG's report. In other words, it was more beneficial for bidders if they decided to sit together, formulate a strategy and try to ensure that only one party gets contract, instead of two. It appears that Future Gaming initially filled up the printed form as procured from Govt. of Goa. However, on re-consideration, possibly after holding discussions with Sugal and Damani Group, it submitted another bid and inserted additional conditions which made its bid liable for rejection. Thus resorting to such modus operandi, the guarantee money liable to be paid by the second party was avoided and to be shared beneficially by the two concerns. This equation appears to be the real motive, since the lottery business of Future Gaming is not likely to be hampered because as per the terms of the agreement with Government of Goa, M/s. Sugal and Damani could engage sub-agents/retailers. Thus, it appeared to be a case of collusive transaction of bid manipulation by the parties wherein the Government of Goa was made to lose substantial revenue which in turn was shared by the two parties.

64. In the light of several discrepancies in the set of tender documents of Future Gaming Pvt. Ltd; insertion of additional condition in the financial bid document by hand in ink; change in date of the bid proposal by using whitener; financial motive and loss to revenue to Government of Goa, and non-satisfactory explanation by the *Govt. of Goa and the target party; the investigation report has concluded that Bid Rigging* in the form of *Complementary Bidding or Cover Bidding* had taken place in this case. It is a form of price fixing and market allocation, often practised, where contracts are determined by a call for bids. Bid-rigging almost always results in economic harm to the agency which is seeking the bids, and to the public, who ultimately bear the costs as taxpayers or consumers.
65. Complementary bidding, or cover bidding, is a form of bid rigging where some of the bidders bid an amount knowing that it is too high or contains conditions that they know would be unacceptable to the agency calling for the bids. In the instant case, the agreement dated 06.05.2010, between Govt. of Goa and Sugal and Damani permits the latter to engage agents. Thus, a possibility of some kind of understanding between Sugal and Damani and Future Gaming group by which Future Gaming or its allied concerns may get share of business of Goa

Lotteries from Sugal and Damani cannot be ruled out. The statement of Mr. Naresh Mangal, Director of Sugal and Damani Enterprises Private Limited (Annexure-E) suggest that there is no problem between the three major players in the business of lottery and they independently continue to sell tickets of all State Government including Government of Goa. This said statement therefore, shows that there is some sort of cooperation between all three - Sugal and Damani, Future Gaming and Essel group, with respect to business of lottery operations of the State Govt. of Goa. Further, from the statement of Jagesh Dhamija of Future Gaming Solutions Private Limited and statement of Naresh Mangal, Director of Sugal and Damani Enterprises Private Limited, it is clear that the three main players are working together or have their respective territories. Thus, there could be incentive for them to allocate market for themselves.

66. Bid Rigging has been defined in Explanation to Section 3, Sub-Section (3) of the Competition Act, 2002 which reads as follows:

*"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."*

67. The agreement in Competition Act need not be in writing only; it can be oral as well. Further, any understanding or action is also covered as an agreement for the purposes of Competition Act. Thus, the objective of securing the most favourable prices and conditions may be negated if the prospective bidders collude or act in concert. Such bid rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive.

68. It may be relevant to mention here that Bid rigging is difficult to detect since it is executed in secrecy with only the participants privy to the scheme of conspiracy. Therefore, its detection can be made only by way of assessing the suspicious conduct, patterns of abnormal activities in the bidding process, exception to the normal procedures and loss to the Government Department. There are number of situations of suspicious behavior of Future Gaming and other parties which clearly point out towards bid rigging in this case. In this case, it prima-facie appears that additional conditions in ink had been inserted by Future Gaming to

make its bid liable for rejection and thereby resorting to mechanism of cover bidding. This finding in the investigation report draws support from the fact that M/S Future Gaming did not raise any objection to the technical rejection of its bid before the Govt of Goa, until such time a notice was issued by this office. Further it appears that Future Gaming had accepted the rejection of its bid without any serious challenge since it has not contested for any review of the decision of Government of Goa or filed a case in Court of Law.

69. The existence of bid rigging in the aforesaid case also finds support from OECD guidelines which suggest certain factors which facilitate efforts of bid rigging namely: i) Bid rigging is more likely to occur when a small number of companies supply the good or service. The number of players in lottery business is very limited and thus it **was** easier for these parties to reach a collusive agreement. ii) When few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support collusive actions. The bid design of Govt. of Goa calling for higher threshold of turnover and net worth has facilitated this transaction. iii) When the products or services that individuals or companies sell are identical or very similar, it is easier for firms to reach an agreement on a common strategy. The two companies which have submitted tender bids for lottery are definitely engaged in identical products or services. Therefore, all the factors enumerated by the OECD are applicable to the fact of the case to suggest bid rigging by the concerned parties. Thus, after considering all circumstantial evidence, manipulations in the bid documents, behavior of the parties, it is concluded that bid rigging in the form of cover bidding had taken place in this case in violation to section 3(3) (d) of the Competition Act.

70. The finding in the investigation report also draws strength from the case of *Deutscher Lotto -und Totoblock's* of the German lottery, wherein the Higher Regional Court in Dusseldorf held that the agreement between the lottery operators to restrict the operations in their given territories was a cartel and hence anti-competitive in violation to the German and European Laws. This shows that lottery business has come under scanner for their cartel like behaviour in other international jurisdictions and therefore makes a strong

argument of bid rigging which is anti-competitive in nature in contravention to provision of section 3(3) (d) of the Act.

1. Finally, the DG concluded that on the basis of the investigation, available record and other circumstantial evidences, the existence of bid rigging in the awarding of the distributor contract of Goa lotteries cannot be denied. The evidences in the form of discrepancies in the tender documents of Future Gaming Pvt. Ltd; insertion of additional condition in the financial bid document by hand in ink; change in date of the bid proposal by using whitener; financial motive and loss to revenue to Government of Goa, and statements of the concerned parties clearly suggest of some sort of tacit understanding/agreement wherein Future Gaming Solutions was made to file a defective bid so that contract could be awarded to Sugal & Damani and thereby the evasion of commitment money to the govt. of Goa could be shared between them. Further, the poor manner in which Jupiter Gaming Pvt. Ltd. has pursued its information before this office and subsequent withdrawal of such information also suggests that this party associated with Zee Essel Group may also have entered in to some kind of understanding in the whole bidding process in this case. The possible justification for this Act could be possibly of combined financial gain. Technically, there was no requirement of having a single distributor. However, in case a single party was given the contract, it would have to pay GoG only Rs. 4.5 Crores whereas if two parties were given the contract then the combined payment would have been Rs. 24 Crores. Thus, there was ample justification for one party to withdraw deliberately one the understanding that the money saved would result in some benefit to the other party at some later stage.

71. Before reaching any conclusion I would like to focus here on the harmful effect of bid- rigging/collusive bidding. Public procurement is a key economic activity of governments, accounting for a large proportion of Gross Domestic Product worldwide. Effective public procurement avoids mismanagement and waste of public funds. Reducing collusion in public procurement requires strict enforcement of competition laws. It is a known fact that corruption is rampant in Public Procurement. According to the OECD corruption arises in procurement when the agent of the procurer in charge of the procurement is influenced to

design the procurement process of alter the outcome of the process in order to favour a particular firm in exchange for bribes or other rewards. Public procurement policy therefore has to be particularly careful to avoid instances where corruption may occur. Corruption of public officials is not just a regrettable thing as such, but it has an impact on the efficient allocation of procurement. By definition, corruption in procurement involves an allocation of contracts which is not the same as that that would have been obtained through the competitive process. Corruption either leads to the allocation of the contract to a firm which was not the bidder with the lowest price but rather to the firm who has offered the bribe. In this sense, corruption in public procurement implies a distortion of competition. Thus the fights against corruption and anti-competitive practices are highly complementary policies. In practice, therefore, there are trade-offs between enhancing competition and the desire to minimize collusion.

72. Governments devote a large share of taxpayers' money to public procurement – purchasing goods and services from road building to school textbooks. But how can they be sure that they are getting good value for money and those companies seeking public contracts are not conspiring to undermine the principle of competitive bidding. The primary objective of an effective procurement policy is to promote efficiency – in other words, to ensure that the supplier offering the lowest price or, more generally, the best “value for money” is awarded the contract. Effective public procurement avoids mismanagement and waste of public funds. It is therefore important that the procurement process is not affected by practices such as collusion, bid-rigging, fraud and corruption.
73. Anticompetitive conduct affecting the outcome of the procurement process is a particularly pernicious violation of competition law. Through bid-rigging practices, the price paid by public administration for goods or services is artificially raised, forcing the public sector to pay above market rates. These practices have a direct and immediate impact on public expenditure and therefore on taxpayers' resources.
74. In the light of above discussions and the findings of DG based on sufficient

material, there is no doubt that there was collusion among the prospective bidders. Even the involvement of the Informant cannot be ruled out. The purpose and the motive on the part of the bidders are obvious. So far the involvement of the Govt. of Goa in the entire tendering process is concerned, the ultimate loser in this entire process is the Government of Goa which was made to lose substantial revenue by unscrupulous bidders such as M/s Martin Lottery Agency Limited (now Future Gaming Pvt. Ltd.), Jupiter Gaming, M/s Sugal and Damani Pvt. Ltd and other enterprises as mentioned in the DG's report. As a consequence the State of Goa did not get the actual value for money.

75. Thus, I fully agree with the conclusion arrived at by the DG that the action of Govt. of Goa in keeping high turnover and net worth has resulted in restriction and elimination of competition in the relevant market for the goods or services in question. I, therefore, hold that the action of the Government of Goa is found to be in contravention to the provisions of Section 4(2) (a) (b) & (c) of the Competition Act, 2002.
76. I further hold, on the basis of the facts and circumstances of the case, that there was collusion on the part of the bidders in rigging the bid within the meaning of Section 3(3) (d) of the Competition Act as their action in concert has created an appreciable effect on competition.
77. Having clearly concluded that the action of the Government of Goa is in contravention to the provisions of Section 4(2) (a) (b) & (c) of the Competition Act, 2002 and there was collusion on the part of the bidders in rigging the bid within the meaning of Section 3(3) (d) of the Competition Act, and also keeping in view the overall object of the Act and its legislative intent i.e. to protect the interest of the consumers, to promote and sustain competition in the market and to ensure freedom of trade carried on by other participants in the relevant market, I am of the considered opinion that this is a fit case where following directions under Section 27 of the Act need to be issued:
 1. The present agreement with M/s Sugal & Damani be annulled forthwith and fresh tendering process be initiated by the Government of Goa in a

fair and transparent manner to avoid any bid-rigging/ collusive bidding as the entire process of handling, documentation and evaluation of the technical and financial bid, in the present case, was carried out by the Government of Goa in such a manner which resulted in collusive bidding/bid-rigging by different enterprises and as a result the Govt of Goa did not get its value for money.

2. The Government of Goa is also directed to refrain from putting unfair and discriminatory conditions in floating a tender in future which served as barriers to new entrants in the market, driving existing competitors out of the market and restricted/eliminated competition in the market.

R. Prasad
Member (R)