and queries raised by the Commission. The relevant excerpt from the Main Order in this context is reproduced below: 'The Commission makes it clear at this stage that the present order governs the alleged anti-competitive practices and conduct of OPs (1-14) only. The Commission shall pass separate order in respect of three car manufacturers, *viz*., Hyundai, Reva and Premier after affording them reasonable opportunity to make their submissions in respect of the findings of the DG report and queries raised by the Commission. Keeping this in mind, the findings of the DG report and contentions raised, if any, in respect of these three OPs have not been dealt with in this order.'

1.7 In accordance with that decision, subsequently, the Commission vide its order dated 05.11.2014 directed Hyundai, Reva and Premier to appear before the Commission for oral hearing and asked them to file their respective written submissions/objections in response to the DG report, if any. Accordingly, the present Opposite Parties appeared before the Commission and also filed their written submissions. Before dealing with the written submissions and oral arguments made by the present Opposite Parties, the Commission deems it appropriate to elucidate the findings of the DG with respect to these Opposite Parties.

2. Findings of the DG:

2.1 In the Main Order, the Commission has already recorded the overall findings of the DG as enshrined in the main report and specific findings with regard to 14 OEMs. Since the general findings of the DG, as contained in the main DG Report is representative of the specific findings of the DG, as contained in each of the sub-reports, the same should be read as part of this order. Similarly, the present order of the Commission should also be read as part of the Main Order. For the sake of brevity, the general findings of the DG, as recorded in that order, are not reproduced here in detail. The present order contains brief and succinct discussion of the main DG report and the respective sub-reports, dealing with each of the present Opposite Parties i.e. Hyundai, Reva and Premier. Findings of the Main DG report 2.2 The DG Report identified two separate markets for the passenger vehicle sector in India—the primary market, consisting of the manufacture and sale of passenger vehicles and the secondary market (After-Sales Markets), comprising of the complementary products or secondary products which is complementary to and derived from the primary product (i.e., spare parts for passenger vehicles). The DG report has further identified the two sub segments of the aftermarket for passenger vehicles in India, as follows: (a) Supply of spare parts, including diagnostic tools, technical manuals, catalogues etc for the aftermarket usage; and (b) Provision of aftersaleservices, including servicing of vehicles, maintenance and repair services. The second question which the DG has dealt with was to analyze whether the aftermarket segments described above constitute distinct relevant product markets or whether the products in the primary market (i.e. cars) and the products in the aftermarket (i.e., repair services and spare parts) constitute a single market i.e. part of one indivisible „system" of products consisting of a durable primary product and a complementary secondary product. After conducting detailed analysis and providing cogent reasons, the DG concluded that the spare parts market for each brand of cars comprising of vehicle body parts (manufactured by each OEM, spare parts sourced from the local OESs or overseas suppliers), specialized tools, diagnostic tools, technical manuals for the aftermarket service together formed a distinct relevant product market. With regard to the question as to whether maintenance and repair services of the products in the primary market constitute a separate relevant market, the DG has concluded that after sale repair and maintenance services constitute a distinct relevant product market. The DG's investigation has further revealed that the spare parts for a particular brand of vehicle were available through the authorized dealers of the respective OEMs in any part of India and hence concluded that the relevant geographic market would be "India". The DG has further found that each OEM is a dominant player in the relevant market of supply of spare parts (including those manufactured inhouse, sourced from overseas or obtained from local OESs), diagnostic tools, technical manuals, software, etc. required to repair and maintain their respective brand of automobile. Since the diagnostic tools were not sold directly in the aftermarket by the manufacturer of these tools due to restrictions in the agreement or

arrangements between the OEMs and such equipment manufacturers, the DG found each OEM to be the only viable source of supply of these specialized tools, technical manuals, fault codes, etc., for their respective brand of automobiles and hence dominant.

2.7 Finding the conduct of the OEMs abusive, the DG has further observed that in the absence of availability of genuine spare parts, diagnostic tools, technical manuals etc. in the open market, the ability of the independent repairers to offer repair and maintenance services to the vehicle owners and effectively compete with the authorized dealers of the OEMs for similar services was severely hampered. Such conduct was found to be in contravention of section 4(2)(a)(i) and 4(2)(c) of the Act, as it amounts to an imposition of unfair condition and denial of market access to independent repairers by OEMs. Further, as per the DG, each OEMs used their dominant position in the market for the supply of their spare parts to protect their dominance in the market for repair and maintenance services for their respective brands of automobiles which amounted to a violation of section 4(2)(e) of the Act. The DG's investigation also revealed that each OEM had substantially escalated the price of spare parts, for their respective brands of automobiles which showed their ability of imposing unfair prices in the sale of spare parts in terms of section 4(2)(a)(ii) of the Act. The DG has further concluded that the essential facilities doctrine is applicable to the restrictive practices adopted by the OEMs, as the OEMs have put the independent repairers at a distinct disadvantageous position and have jeopardized their ability to undertake repairs of the automobiles manufactured by the OEMs by not making spare parts and diagnostic tools available to them. The DG has also examined the agreements/letters of intent entered into between the OEMs and the OESs and found that most of such agreements/letters of intent had clauses which restricted the ability of the OESs to supply spare parts directly to third parties or in the aftermarketwithout the prior written consent of the OEMs. The DG has found that none of the present Opposite Parties held valid Intellectual Property Rights (IPRs) for any of their spare parts in India to claim exemption under section 3(5)(i) of the Act. Agreements between OEMs and the local OESs were found to contain exclusive distribution agreements and refusal to deal clauses which are in contravention of the provisions of section 3(4)(c) and (d) of the Act, respectively. The DG during the course of the investigation also found that a large number of OEMs, particularly those having foreign affiliations, were sourcing large number of spare parts from overseas suppliers and such overseas suppliers were not supplying spare parts to any entities apart from the OEMs. The DG, therefore, concluded that in such situations there may be a possibility of the existence of an unwritten arrangement between the OEMs and the overseas suppliers for ensuring that the spare parts are supplied to the OEMs or its authorized vendors only, which would be in violation of section 3(4)(c) and 3(4)(d) of the Act. With regard to the agreements between the OEMs and their authorized dealers, the DG has found that certain clauses of the agreements specifically restricted the sale of spare parts over the counter to third parties, which were in the nature of exclusive distribution agreements and amounted to refusal to deal under section 3(4)(c) and 3(4)(d) of the Act. Further, the DG has observed that, though certain agreements entered between the OEMs and their authorized dealers did not contain specific terms restricting the sale of spare parts in the open market, he concluded that there was an unwritten understanding or arrangement between such dealers and the OEMs, contrary to section 3(4)(b) of the Act as the dealers were found to be not selling spare parts in the open market.

2.13 The dealer agreements entered by and between the OEMs and their authorized dealers also contained restrictions on dealing with competing brand of cars and the dealers had to obtain the consent of respective OEMs in writing prior to entering into agreements with competitor brands. The DG has analyzed the appreciable adverse effect on competition ("AAEC") owing to the practices adopted by the OEMs in each of the secondary markets of spare parts and repair and maintenance services. The DG has found that there was AAEC on competition in terms of section 19(3) of the Act in the market of spare parts for each OEM on account of the restrictions such as exclusive supply agreements, refusal to deal and exclusive distribution agreements.

Findings of the DG with respect to Hyundai/HMIL:

3.1 As per the DG‟s investigation report, Hyundai is a 100% subsidiary of M/s Hyundai Motor Company, South Korea (HMC) and was incorporated in the year 1996. Hyundai is involved in the manufacture and sale of motor vehicles, spare parts, after sales and related activities. The wholesale distribution and supply chain solutions for Hyundai are currently being provided by M/s MOBIS India Ltd. ("MIL"). As such, the after sales market for spare parts of Hyundai brand of cars is catered to by MIL. The DG has been informed that MIL is a subsidiary of Mobis Korea which is a part of the Hyundai group and is engaged in the distribution of spare parts in several countries for HMC. Mobis Korea, as part of its global spare part management strategy, handles supply of spare parts in all the countries where Hyundai cars are sold. The specific findings of the DG against the alleged anti-competitive practices of Hyundai are summarized below: Hyundai has entered into a technology and royalty agreement with HMCfor supply of spare parts for its operations in India. On perusal of the said agreement, though the DG could not discover the existence of any clause(s) which prohibits the ability of the overseas supplier from selling directly to the aftermarket in India, the DG has reported that, "the fact that the overseas supplier is the parent company of Hyundai and only supplies spare parts to MIL (a group company of Hyundai for dealing with aftermarket requirements in India), indicates the existence of an arrangement between Hyundai and the overseas supplier for not supplying spare parts directly into the Indian aftermarket." The DG, after reviewing Hyundai's basic purchase agreement (entered with the OESs for supply of spare parts) and other purchase orders executed by Hyundai for procuring of spare parts from various OESs in India, found that such agreements contained clauses which restricted the OESs from supplying spare parts directly to the aftermarket. Such restrictions appeared to be due to use of drawings and designs of Hyundai. Further, based upon the submissions made by independent repairers and multi-brand retailers, the DG found that, in most cases, the dealers refused to sell spare parts in the open market and spare parts of only certain car models were made available over the counter. It was also discovered during the course of DG‟s investigation that the authorized dealers are being permitted to source spare parts from Hyundai directly or from its authorized vendors but not from the OESs who themselves supplied spare parts to Hyundai. Further, the DG has found that during the warranty period, owners of Hyundai cars are totally dependent on its authorized network as the warranty extended is liable to be invalidated if a Hyundai car is repaired by an independent repairer. The ability of the Hyundai dealers to deal in competing brands was also restricted. Hyundai's dealers are not permitted to deal with competing brands without seeking the prior permission of the OEM. The DG could not come across a single instance wherein such permission has been granted.

3.9 Further, the price mark up for top 50 spare parts in terms of revenue generated is observed to be in the range of 28.26% - 502.76% and price mark-up of top 50 spare parts on the basis of consumption is observed to be in the range of 50.04% - 644.68%. Though Hyundai has justified its restrictions on the basis of IPR and safety issues, it has failed to establish before the DG that it possesses valid IPRs in India, with respect to its spare parts for which restrictions are being imposed upon OESs. Further, the DG has opined that refusal to supply diagnostic tools and spare parts by Hyundai to independent repairers amounts to denial of access to an "essential facility". The DG has concluded that the restrictions imposed upon the OESs and the authorized dealers, coupled with the restrictions on the independent repairers (non-availability of spare parts and diagnostic tools used for repairing of Hyundai brand cars) amounts to not only imposition of unfair terms under section 4(2)(a)(i) but also denial of market access under section 4(2)(c) of the Act. The substantial price margin earned on spare parts amounts to unfair pricing within the meaning of section 4(2)(a)(ii) of the Act. The DG has also found that Hyundai has leveraged its dominance in one relevant market (i.e., supply of spare parts) to protect the other relevant market (i.e. market for repair services) in violation of section 4(2)(e) of the Act.

4. Findings of the DG with respect to Reva:

4.1 Reva is a subsidiary of M/s Mahindra and Mahindra which holds 55% stake in Reva. It has been gathered from the public domain that Reva, formerly known as the Reva Electric CarCompany ("RECC"), is an Indian company based in Bangalore, involved in designing and manufacturing of compact electric vehicles. The company's flagship vehicle is the Reva electric car, available in 24 countries with more than 4,000 vehicles sold worldwide. Reva was acquired by the Indian conglomerate M&M in May 2010. The company has its manufacturing facility at the Bommasandra Industrial Area, Bangalore. The company has submitted that it has engaged dealers of M&M to deal in Reva cars and has a dealership network of 25 dealers across the country. During the course of investigation, the DG has found that Reva has executed purchase orders with overseas suppliers for supplying of spare parts for its operations in India. On perusal of the purchase orders, it was found that such overseas suppliers are restricted from supplying spare parts (which have been manufactured based on the designs supplied by Reva) directly into the aftermarket in India. With regards to the agreements with the local OES, the DG has found that OESs are restricted from selling spare parts manufactured based on design, drawing etc. supplied by Reva to other entities and in the open market. With respect to agreements entered with authorized dealers, the DG has analyzed the Letter of Intent ("LOI") but did not find any clause pertaining to the rights of dealers to undertake over the counter sales of spare parts. In actual practice, it was found by the DG that there was only limited availability of spare parts in the open market and there appeared to be an understanding between Reva and its dealers prohibiting the sale of spare parts over the counter. Further, the DG also discovered that, contrary to the contentions of Reva, the dealers of Reva were not permitted to deal with competing brands of cars in any manner without seeking the prior permission of Reva and no such permission had been granted in any instance by Reva. Again, the users of Reva brand cars would stand to lose their warranty if they avail the services of independent repairers.

4.7 The Price mark up for 38 out of top 50 spare parts in terms of revenue generated is observed to be in the range of (-) 66.74% to 797.33% and price mark up of 42 out of top 50 spare parts on basis of consumption is observed to be in the range of (-) 66.74% to 1180.42%. The DG found that the non-availability of diagnostic tools and spare parts necessary to repair the Reva cars hampered the ability of independent repairers to effectively compete with the authorized dealers of Reva. Refusal to supply such diagnostic tools and spare parts was found by the DG to amount to denial of access to an "essential facility". Further, as per the DG's investigation, given the restricted availability of spare parts in the open market, non-availability of diagnostic tools and technical manuals, the ability of independent repairers to undertake repairs and maintenance service of the vehicles of Reva and effectively compete with the authorized dealers of Reva is significantly reduced, thereby amounting to denial of market access in terms of section 4(2)(c) and imposition of unfair condition on independent repairers in terms of section 4(2)(a)(i) of the Act. The pricing of spare parts has also been found to be unfair in terms of section 4(2)(a)(ii) of the Act. Reva is also found to be using its dominant position in the relevant market for supply of spare parts to enter and protect the relevant market for after sales services in contravention of section 4(2)(e) of the Act. The DG has also found that the agreements/arrangements entered by Reva with the OESs, overseas suppliers and authorized dealers are in the nature of exclusive supply, exclusive distribution and refusal to deal as contained in section 3(4)(b), 3(4)(c) and 3(4)(d) of the Act.

5. Findings of the DG with respect to Premier:

5.1 Premier is promoted by M/s Doshi Holding Pvt. Ltd., holding 43.36% of the voting capital in Premier. The company is, *inter-alia*, engaged in the businesses of manufacturing CNC machines, heavy engineering and automotives. The company also sells CNC machines, components for wind mills, auto components etc. The company operates in the automotive business segment and manufactures sports utility vehicles (SUV) and light commercial

vehicles (LCV). Premier's manufacturing facility is located at Chinchwad, Pune. The company has 53 automobile dealers which are located in 53 cities.

5.3 The DG has reviewed the LOI executed by Premier with the local OESs for supplying of spare parts for Premier‟s assembly line and aftermarket requirements and has found that the LOI contains clauses that restrict the OESs from supplying spare parts directly into the aftermarket. The DG has observed that the clause of the LOI require that all the spare part requirements shall be met through Premier and its authorized agents. Although Premier had maintained that its spare parts were freely available over the counter, it was not able to substantiate the said claim in any manner. Further, Premier has claimed that its consumers were under the warranty period at that time and therefore the need for over the counter sales has not arisen yet. Further, the warranty conditions of Premier were found to be such that the owners of Premier cars stand to lose their warranty if they avail the services of independent repairers. Premier has claimed that it is open to technologically support the independent repairers, but as the cars sold by it are all within the warranty period and are not being catered by independent repairers, such contention of Premier remained untested. The DG, during the course of the investigation, did not discover any restrictions being imposed upon the dealers of Premier from dealing with competing brands. The DG could not find out as to whether Premier has marked up the price of its spare parts since Premier was not able to provide the prices of its top 50 spare parts as it had just started the initial market seeding of its vehicles for trial and consumer feedback and related data was not available. Further, the DG has stated that the availability of the diagnostic tools and spare parts in the future (when the consumers of Premier would be in the post warranty period) would be necessary for the independent repairers to repair the Premier cars and also essential to effectively compete with the authorized dealers of Premier. Consequently, in the opinion of the DG, denial to access such diagnostic tools and spare parts amounts to denial to access an “essential facility” and amounts to abuse of dominant position by Premier. The DG has also found that there are implied restrictions on Premier's OESs from supplying spare parts in the aftermarket and the fact that Premier's dealers are allowed to sell spare parts and diagnostic tools in the open market is an untested claim. In the view of the DG, such restrictions enable Premier to be the sole supplier of genuine spare parts in the aftermarket in India and consequently a dominant entity in the aftermarket for Premier branded cars. Further, Premier was also found to be in a position to restrict the availability of spare parts and diagnostic tools in the open market which would amount to an imposition of unfair condition and denial of market access to independent repairers in terms of sections 4(2)(a)(i) and 4(2)(c) of the Act. The DG also opined that provisions of section 4(2)(e) of the Act would be invoked since Premier was using its dominant position in one relevant market i.e. market of supply of spare parts to enter and protect other relevant market of after sales services, repair and maintenance of cars. The DG apprehended that Premier would be able to charge unfair prices for its spare parts in the post warranty periodin the absence of competition in the market for spare parts. The DG has also found that agreements/arrangements entered by Premier and its OESs are in the nature of exclusive supply and exclusive distribution, thereby violating section 3(4)(b) and 3(4)(c) of the Act.

6. Replies of the Parties:

6.1 At the outset it may be mentioned that the Commission, after considering the investigation report submitted by the DG, decided to forward copies thereof to all the 17 Opposite Parties for filing their replies/objections thereto vide its order dated 04.09.2012. Pursuant to that, Reva and Premier had filed their objections to the DG report but did not participate in the matter thereafter as their applications dated 01.02.2013 and 21.12.2012, respectively, filed by them under Regulation 26 of the General Regulations were taken on record but were kept pending. Further, pursuant to Madras High Court's order dated 06.02.2013 granting *ex parte* interim stay in the WP No. 31808/2012 filed by Hyundai challenging the jurisdiction of the Commission, the matter could not be proceeded *qua* Hyundai. At that time, the Commission decided to pass an order with respect to the present OPs separately after passing the order with respect to the remaining 14 OEMs (OP 1 to 14 in the Main Order). In pursuance thereof, the Commission in its ordinary meeting held on 05.11.2014 directed the present Opposite Parties to appear before the Commission for oral hearing. Subsequently, in the ordinary meeting held on 12.02.2015,

the present Opposite Parties were directed to file their replies/objections by way of written submissions to the DG report, if any. 6.3 The replies of the present Opposite Parties have been summarized in the following paragraphs.

6.4 Reply of Hyundai:

6.4.1 In its reply, Hyundai has submitted that the DG has drawn incorrect conclusions and erred in the application of competition law and established competition law principles, *interalia*, in (a) assessing the relevant market; (b) assessing the dominance of Hyundai; (c)assessing the conduct of Hyundai to be abusive; and (d) assessing the agreements between Hyundai on the one hand and OESs and dealers on the other to be anti-competitive. It was submitted that Hyundai is not dominant in any of the relevant markets as defined by the DG and has not engaged in any conduct which would be an abuse of a dominant position under the Act. In addition, Hyundai has not imposed any condition or engaged in any conduct that would constitute an infringement of Section 3 of the Act. On the contrary, the actions of Hyundai were claimed to be pro-competitive. It was contended that Hyundai has a large and one of the most accessible service and sales network as compared to other car manufacturers in India with 412 dealers and more than 1,087 service points located across India. Hyundai has also argued that the unorganized sector in India is characterized by a lack of skills and proper training because the independent repairers are averse to investing in training themselves for repairing of high end and executive premium cars. Further the absence of any effective government regulation and the problem of counterfeits are the major challenges being faced by the OEMs like Hyundai in the Indian market. It was averred that the DG had incorrectly relied upon thedevelopments in USA and EU, with respect to after-market services without considering the differences and dynamics of Indian Automobile Industry. Apart from the preliminary objections, Hyundai has submitted that the DG has fundamentally misconstrued the nature of Hyundai's relationship with its OESs. It was claimed that Hyundai's agreements with its OESs are 'subcontracting arrangements' and as such exclusivity in such arrangements fall outside the purview of Section 3 of the Act because such exclusivity is required to protect Hyundai's significant investments in developing its OESs and contributions to the manufacture of spare parts. Hyundai has further stated that even if the sub-contracting agreements are found to fall within the scope of Section 3, the designs, specifications, drawings and technologies provided by Hyundai to its OESs are protected by unregistered copyright and trade secret. In addition to Hyundai/ HMC drawings and specifications which are entitled to copyright protection, Hyundai has claimed that its drawings/know-how/specifications would also be conferred with IPprotection by virtue of them being confidential information. To substantiate the claim, Hyundai cited the judgment of the Delhi High Court in ***Cattle Remedies and Anr. v. LicensingAuthority/Director of Ayurvedic and Unani Services***, wherein it has been observed that apartfrom specific statutes relating to trade mark, copyright, design and patent, etc., trade secrets are also a form of IP. Further, it was argued that Hyundai‟s agreements with its local OESs do not cause an appreciable adverse effect on competition in India

6.4.7 With regard to the findings on the Hyundai's agreements with its overseas suppliers, it was argued that the DG has failed to establish the existence of an 'agreement' and has wrongly relied on the mere 'possibility' of an agreement to conclude the existence of an agreement. Further, Hyundai has sought exemption for such agreements citing the established principle of 'single economic entity' doctrine as such agreements were between the Hyundai Group companies. It was contended that Hyundai encourages over the counter sale of spare parts and diagnostic tools by authorized dealers, dealer's branch and Hyundai authorized service centres and does not prohibit its dealers from taking competing dealerships and that a number of its dealers have competing dealerships. Hyundai objected to the relevant market identified by the DG based on the concept of after markets, stating that the correct relevant market in this case is a 'systems market' consisting of the sale of cars in India. 6.4.10 Further, it was contended that Hyundai has not abused its dominant position in the market for spare parts for Hyundai vehicles. DG's finding on the applicability of essential facilities doctrine was also objected to by Hyundai on the ground that such doctrine has very strict requirements. It was urged that

there is no denial of access to spare parts for Hyundai vehicles as independent repairers have access to Hyundai branded spare parts as well as to OESs branded and non-branded spare parts. It was also argued that the DG has failed to show that the prices of Hyundai spare parts were unfair or excessive within the meaning of Section 4(2)(a)(ii) of the Act.

6.5 Reply of Reva:

6.5.1 Reva has submitted that it is in the business of manufacturing and sale of electric cars and is one of the pioneer companies to have introduced electric cars in the Indian market. Reva has stated that it remains committed to the cause of manufacturing and selling of a "green car" focusing on the ongoing research and development work on the Reva NXR car that will be launched next year. Reva has submitted that the company has sold only 4500 cars over the last11 years (less than 500 vehicles per year) since Reva was conceptualized in 2001 and it has a very negligible market share. Therefore, as per Reva, the size and resources of the company, when compared to other car manufacturers would reveal that the company has a miniscule share in the market. It was claimed that it has made no profits since the time of its inception. Reva has further submitted that the dealers of the company have not done any significant business over the past 3 years. The electronic components utilized in the Reva car are complex and the mechanics who repair the Reva car must either be diploma holders or automobile engineers, as per the company's standards. Reva has further stated that the company especially trains engineers for this purpose. In order to repair an electric car, specialized skills are required and safety being a critical parameter, the company mandates training before attending to the electric vehicles as opposed to mechanical cars that run on petrol or diesel. It was submitted that *vis-à-vis* Reva's relationship with the OESs from whom it sources spare parts and components for its cars, Reva is on a receiving end because the OESs require minimum quantities to be ordered before they accept an order and this increases the company's costs manifold. Considering the low volume of work opportunity that Reva cars offer, there are not sufficient OESs who would be interested in manufacturing spare parts for Reva. With regard to the findings of the DG regarding agreements between Reva and its authorized dealers, Reva has stated that it has been using the support of the dealership network of the company's promoter's (Mahindra & Mahindra Limited) dealer network. Reva has stated that the company currently has 37 authorized dealers and workshops including certain multibrand workshops (who have been authorized by the company) in some cities. The company continues to be challenged by the fact that the dealers are reluctant to maintain a stock of the spares that may be needed because they do not consider the business as viable. Reva has submitted that since the number of Reva cars on the road is directly proportional to the demand for the spare parts and since the demand and the sale of the Reva cars are low, the spare parts requirements would also be limited. Reva has submitted that it has sought to ensure the availability and appointment of a dealer at least in those cities where there were at least 20 Reva cars registered. Additionally, for those consumers who approach the company and want to buy Reva cars in cities where the company has no dealerships and workshops, Reva attempts to maintain a force of service engineers who visit the residence of such consumers to repair and/or service the car. Reva has further stated that the consumer is made aware of the nonavailability of after sales service and signs an agreement with the company for the availability of offbeat service of the cars. Reva has submitted that it has not revised the price of its spare parts in the last three (3) financial years. Government of NCT of Delhi had initiated a scheme for granting of subsidy to battery operated vehicles (BOVs) sold in Delhi with a view to promote the use of such vehicles so that in due course they emerge as competitors to petrol driven vehicles in maintaining a cleaner environment. This, as per Reva, indicates that the Government and its agencies appreciate that the company needs all possible assistance to emerge as a competitor much less to be in a position to cause AAEC in the market or abuse its dominance. Reva has submitted a list of top 100 parts by quantity of the 583 odd parts that are supplied by the company for the Reva brand of car. Reva has submitted that out of these top 100 parts, there are no IPRs registered or claimed in India on any of the parts except the EMS

(energy management system) Assembly on which the company claims patent rights (U.S. Patent No. 5487002). Reva has submitted that it had not applied for a patent on EMS in Indiaand it has no registered patents or designs with respect to any of these top 100 parts of the company in India. Further, out of the top 100 spare parts referred above, 74 parts have substitutes available in the open market, because (i) the manufacturer uses generic parts for the same, (ii) the manufacturer claims no copyright or other IPR on the same; (iii) not only the company's OESs but also third party suppliers and vendors supply this product into the open market and the same may be procured by any independent repairer for using on the cars manufactured and sold by the company. Reva has justified its high mark up in the prices by stating that due to the low demand for its cars it is not possible for it to achieve any economies of scale. Lastly, Reva has submitted that it is not in a dominant position and, therefore, incapacitated to abuse its dominant position.

6.6 Reply of Premier:

6.6.1 Premier has submitted that both the primary and the secondary activities of the automotive sector constitute one distinct systems market and, therefore, the aftermarket definition provided by the DG is misplaced. The DG has failed to apply any of the factors stated in section 19(7) of the Act and that the relevant market identified by the DG does not confirm to the definition stated in section 2(t) of the Act since: (a) physically the spare parts are but a part of the end product, i.e., the vehicle and therefore a part of the same system and that the DG has erroneously disregarded the physical characteristics or end use of the goods whilst arriving at a conclusion on the relevant market since the end use of the spare part is the functionality of the vehicle and the consumer derives utility not from the spare part itself but by applying the same to the vehicle; (b) the consumer utility is derived only through the use of the final product, i.e., the vehicle and considering the availability of non-genuine products, it is the consumer's choice to opt for a non-genuine product as long as the customer can continue to derive utility by using the primary product; and (c) the primary activities and the secondary activities are undertaken by the same specialized producer and hence it would be erroneous to segregate the products into two separate markets.

6.6.2 Premier has stated that the DG has identified the relevant product market in a counter intuitive manner and that the DG fails to appreciate that in respect of the spare parts that are manufactured in-house, subject to sharing of know-how and technical information, there is no contractual or statutory prohibition on OESs to manufacture or supply the same. Premier has further submitted that with respect to the in-house manufactured auto components there is no after market demand. Further, as per Premier, the products sourced from local OES, diagnostic tools, technical manuals, software etc., are vehicle specific. Premier has submitted that it has a miniscule market share in the passenger vehicle sector and that the same has been acknowledged by the DG in the Reports. Further, it has been contended that even assuming that the alleged vertical restraints exists in terms of section 3(4)(b), (c) and (d) of the Act, the same must be viewed in terms of the minuscule market share of Premier in the passenger vehicle market. There were no restrictions on its OESs to sell its spare parts directly in the aftermarket and that the DG has erroneously disregarded the fact that the alleged restrictive clause is a part of the standard letter of intent issued to a supplier and this stands superseded by the purchase order once the development cycle of the component is over. The DG has made no conclusive finding as to whether there is an operative restriction on sale/supply of spare partsin the aftermarket which contravenes section 3(4) of the Act. The DG did not cite a single OESs who has been restricted/prohibited from dealing in the aftermarket by virtue of the alleged supply/distribution agreements and failed to appreciate the viability of supplying to the aftermarket for the OESs. Premier has submitted that with the miniscule sale figures, it would be unrealistic for an OES to develop transportation and distribution networks, supply chains, packaging, credit risk, promotions and business development for the purpose of aftermarket sales catering to an odd 2000 vehicles (number of vehicles sold since 2009). Further, it

submitted that several other OESs may not engage in direct sales/distribution on account of commercial unavailability, operational hazards or on account of business prudence.

6.6.6 There are no restrictions upon the dealers to source the spare parts from Premier and no restrictions have been imposed on its authorized dealers from undertaking any over the counter sales and the DG has not found any clause in the dealer agreements regarding the restriction on the dealers to undertake over the counter sales of spare parts. Given the fact that most of the cars manufactured by Premier are under warranty, there is no competition in the sector of aftermarket sales, repair and maintenance and that the post warranty period remains untested. Therefore, Premier has submitted that there are no conclusive findings by the DG that the agreements entered into by Premier would cause an AAEC. Even assuming that there was a vertical restraint in the nature of exclusive distribution, the same would be reasonable given the extensive warranty obligations taken up by Premier. At the relevant time, it was manufacturing a single car model, i.e., an SUV by the name of Premier Rio which was running in loss and was in the process of re-entering the Indian automotive sector. Premier has submitted that even assuming that it has applied certain vertical restraints in its dealing with local OESs, the same would be crucial to cement its re-entry in the Indian automotive sector and the pro-competitive effects of the entry of a new market entrant in the automotive sector far outweighs the anti-competitive effects, if any, especially since Premier had a miniscule market share in the Indian automotive sector.

6.6.9 With respect to the observations of the DG regarding the supply of spare parts by the overseas suppliers of Premier, directly into the aftermarket, Premier has stated that the conclusion reached by the DG is erroneous. Firstly, a perusal of the importer agreements have not revealed the existence of any restriction on the ability of the overseas supplier from directly selling the spare parts into the aftermarket; secondly, Premier's overseas suppliers are not catering to the aftermarket; and thirdly, there is no evidence to confirm that overseas suppliers are catering to the aftermarket. Premier has submitted that in the absence of any direct evidence from the overseas supplier, the conclusions reached by the DG should be excluded. With respect to the availability of technical and diagnostic tools, manuals, software, etc., Premier has stated that it would be dangerous to open up the market to an organized sector dominated by two or three players or the unorganized sector dominated by unskilled individual repairers and counterfeit spare parts. Premier has stated that in India there is no requirement of matching quality of spare parts available from nonauthorized sources and, consequently, any liability that such spare parts do not confirm with the legal certification requirements would have to be borne by Premier if independent repairers fail to use genuine spare parts/tools etc. The conclusions reached by the DG regarding the applicability of the “Essential Facilities Doctrine” to Premier are based upon a comparison of the Indian automotive market with that of other mature automobile markets which is erroneous considering the massivecounterfeit/non-genuine spare parts market in India.

6.6.12 Further, Premier has stated that the reliance by the DG on the regulations of the European Union (EU) are erroneous since the quality control mechanism and the market realities of the Indian automobile sector and the EU automobile sector are very different and the EU regulations cannot be applied *mutatis mutandis* to the Indian scenario. Premier has also submitted that, the DG has observed that Premier is the sole supplier of the spare parts for Premier brand automobiles and hence is in a position to influence the ability of independent repairers to attend to its automobiles. However, the DG also opined that this position is untested since most of the Premier brand automobiles are still under warranty and thus are not being attended to outside the dealer network. Premier has submitted that since the DG could not make any conclusive finding as to whether Premier is abusing its alleged dominant position and in the absence of such a finding, merely a position of dominance should not be construed as a contravention of section 4 of the Act. During the course of the oral submissions, on 13.12.2012, Premier requested for striking out its name followed by a written application under Regulation 26 of the General Regulations dated 21.12.2012 on the grounds that (a) Premier has a miniscule market share (below 0.29%) in the Indian automotive market and that approximately only 2000 vehicles of a single model (Premier Rio) of Premier have been sold till date; (b) that the DG has found no evidence of contravention of the Act by Premier. It was

also urged that the DG has erroneously: (i) relied upon certain statements of dealers of Premier stating that they source spare parts for Premier cars from Premier itself without analyzing that in the absence of any demand for spare parts in the aftermarket (during the course of the DG's investigation all Premier brand cars were within the warranty period) why would suppliers wish to retail Premier spare parts and (ii) relied upon a particular clause of the Premier LOI which stated that the spare parts need to be sourced from Premier or its authorized dealers, without analyzing the responses of the Premier's OESs, who have stated that they do not wish to enter the aftermarket for Premier spare parts; and (c) that based upon the DG's investigation, Premier has not abused its dominance under section 4 of the Act and further, the only conduct that can be considered as abusive under section 4(2) of the Act, are conducts that has already taken place and since Premier has not yet performed any of the abusive conducts enumerated in section 4(2) of the Act, it is not liable for abusing its dominance under the provisions of the Act.

7. Decision of the Commission:

7.1 The Commission has carefully gone through the material placed on record and submissions made by the present Opposite Parties. In addition to the substantive issues involved in the matter, objection regarding the jurisdiction of the Commission to inquire into the conduct of the OEMs who were not named specifically in the initial information filed by the Informant has also been raised. At the outset, it may be noted that all the issues, preliminary as well as substantive, which need to be determined through this order have already been dealt with by the Commission in the Main Order in great detail. Before, dealing with the substantive issues the Commission deems it proper to deal first with the objections raised by Hyundai regarding the jurisdiction of the Commission in the present matter.

7.4 Determination of Preliminary Issue regarding jurisdiction of the Commission:

7.4.1 Hyundai has raised preliminary objection on the Commission's jurisdiction to investigate and proceed against any other Opposite Party other than the three OPs, *viz*., Honda, Volkswagen and Fiat, named in the original information. It has been urged that the DG had no power to investigate the conduct and agreements of Hyundai as the Informant did not raise any allegations against it for any violation of the provisions of the Act. The issue of jurisdiction has been dealt with in length in the Main Order wherein the Commission rejected this plea taken by the other OPs. The Commission is a statutory body, established under the Act with the legislative mandate inter alia to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in the markets, in India. To perform the above mentioned functions, under the scheme of the Act, the Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and advisory jurisdiction. As such, the purpose of filing information before the Commission is only to set the ball rolling as per the provisions of the Act. The Commission further mentioned that the scope of inquiry is much broader and the Commission during its inquiry is not restricted to consider the material placed by the parties only. The direction under section 26(1) is an administrative direction to the DG for investigation of the contravention of the provisions of the Act, without entering upon any adjudicatory or determinative process. During the investigation, the DG may come to know that not only the parties named in the direction of the Commission but also other players in the same industry are also involved in the alleged anti-competitive conduct. In such a case to hold that the Commission cannot direct the DG to investigate the conduct of other parties would not only render the inquiry inchoate but would further deprive the Commission from delivering complete justice in the matter and also lead to multiplicity of proceedings relating to the same type of conduct, which the law always seeks to avoid. On the basis of this reasoning, the Commission in its Main Order had held that there was no irregularity in allowing the request of the DG for investigating the conduct of all the OEMs suspected to be indulging in anti-competitive activities. Challenging the jurisdiction of the Commission, Hyundai had filed a

Writ Petition which was admitted in the Madras High Court on 28.11.2012. The Madras High Court, vide interim order dated 06.02.2013 allowed *ex parte* interim stay of proceedings against Hyundai. The Writ Petition was finally disposed off by the final order dated 04.02.2015, wherein the Madras High Court confirmed the jurisdiction of the Commission. The Madras High Court, in its order dated 04.02.2015, has observed that though DG cannot initiate an investigation *suo motu*, the real question is whether in the case on hand, what was done by the DG would tantamount to *suo motu* initiation of investigation or not. The Madras High Court answered the question in negative. While commenting on the scope of the DG‟s investigation, the Madras High Court opined that the DG placed additional information before the Commission. The Commission then passed an order on 26.04.2011. Thereafter, the DG issued a notice to the writ petitioner on 04.05.2011, only in compliance of the directions issued under Section 41(1) of the Act. Citing the foregoing reasons, Madras High Court's order unequivocally held that neither the DG nor the Commission have overstepped the jurisdiction vested in them by law. Even otherwise, since all the OPs were given ample opportunity to present their case and all the OPs have submitted their detailed objections to the DG report,presented their oral arguments and filed their written submissions before the Commission, the Commission is of the view that there has been no procedural irregularity as such in the present case. 7.4.6 In view of the aforesaid, the Commission is of the view that the contention raised by Hyundai challenging the jurisdiction of the Commission is devoid of any merit, especially in the light of the Madras High Court's order dated 04.02.2015.

7.4.7 Before moving to the substantive issues, the Commission feels it appropriate to deal with the applications filed by Reva (dated 01.02.2013) and Premier (21.12.2012) under Regulation 26 of the General Regulations. Reva and Premier have alleged before the Commission that the order dated 05.11.2014 wherein these parties were asked to present their objections to the DG's report was bad in law as the Commission had already exonerated them in the matter. Reva has submitted that during the course of the hearing, on 04.02.2013, the Commission had informed the representatives of Reva that it has taken note of its prayers and has accordingly exonerated Reva from the allegations of the DG's Report and that a substantive order in this regard would be passed in due course. It was further stated that the order of the Commission dated 05.03.2013, had explicitly mentioned that the Commission is considering the application filed on behalf of Mahindra Reva for exemption under Regulation 26 of the General Regulations. Similarly, Premier stated that in its order dated 08.02.2013, the Commission had mentioned that it is considering the application filed on behalf of Premier for striking off its name from the array of Parties. It was also submitted by the aforementioned parties that in the order of the Commission dated 28.05.2013, the Commission had sought additional information from the OPs other than Reva and Premier. Citing these reasons, Reva and Premier have requested, recall of Commission's order dated 05.11.2014 through which the Commission has re-initiated proceedings against them in the present matter.

7.4.8 The Commission has considered the submissions and applications filed by Reva and Premier and perused all the dated orders mentioned above. Based on a combined reading of all the material, it appears that both Reva and Premier have misconstrued the orders and directions of the Commission. During the pendency of the proceedings in Case No. 03/2011, the Commission had only taken on record the applications filed by Reva (dated 01.02.2013) and Premier (dated 21.12.2012) under Regulation 26 of the General Regulations. Since, the final determination on the issue of relevant market definition was pending at that moment; the Commission had put those applications on hold as the determination of the relevant market will have a great bearing on the decision by the Commission on those applications. This is evident from the orders of the Commission dated 08.02.2013 and 05.03.2013 wherein the Commission had categorically stated that the order on such applications will be passed in due course. 7.4.9 Thereafter, the Commission, at the time of passing the Main Order with respect to 14 other Opposite parties, had made it clear that it shall pass a separate order in respect of the present OPs, *viz.* Hyundai, Reva and Premier after affording them a reasonable opportunity to make their submissions in respect of the findings in the DG report and queries raised by the Commission. The Commission, had only deferred its order with respect to these three Opposite Parties and had not at any point of time, exonerated any of them from the proceedings. The

contention raised by Reva and Premier that they should be exempted owing to their miniscule market share in the car segment would also be dealt with later in this order. At this juncture, it would suffice to say that the Commission did not exonerate at any time any of these abovesaid parties from the proceedings.

8. Determination of Substantive Issues:

(1) Issue 1: Whether the present Opposite Parties have violated the provisions of section 4 of the Act?
(2) Issue 2: Whether the present Opposite Parties have violated the provisions of section 3 of the Act?

8.1 Issue 1: Whether the present Opposite Parties have violated the provisions ofsection 4 of the Act?

8.1.1 It has already been mentioned before that the present order is in continuation of the Main Order of the Commission. Consequently, this order should be read in continuation with and as an extension of that Main Order.

Determination of the Relevant Market:

8.1.2 The Commission has discussed in detail the principles governing the determination of the relevant market generally and more specifically for the case at hand in its Main Order and therefore, only the main observations and findings are reproduced hereunder. After considering the relevant provisions of the Act, findings of the DG report, conceptual framework relating to the issues with respect to the “aftermarkets” and “systems market” as concepts of competition law, submissions made by the OPs and other material placed on record, the Commission accepted the aftermarkets definition as opposed to the concept of 'unified systems market' definition advocated by the OPs to argue that the sale of cars and spare parts together constitute a single market. The Commission had held that there exist two separate relevant markets: one for manufacture and sale of cars, and another for sale of spare parts. The latter is further divided into two sub-segments, consisting: (a) supply of spare parts, including diagnostic tools, technical manuals, catalogues etc. for the aftermarket usage and (b) provision of aftersale services, including servicing, maintenance and repair services for vehicles. Further the Commission held that a 'cluster market' exists for all the spare parts for each brand of cars, manufactured by the OEMs, in the Indian automobile market. The Commission rejected the OEMs systems market definition primarily on two grounds - firstly, the consumers/buyers in the primary market (manufacture and sale of cars) do not undertake (and are not capable of undertaking) whole life cost analysis when buying the automobile in the primary market and secondly, reputation effects do not deter the OEMs from setting supra competitive price for the secondary product. The Commission, relying on the hard reality as depicted by the facts, concluded that in-spite of reputational factors, as argued by the Opposite Parties, each OEM has in practice substantially hiked up the price of the spare parts (usually more than 100% and in certain cases approx 5000%); thereby rebutting the theory that reputational concerns in the primary market usually dissuade the OEM from charging exploitative prices in the aftermarket.
8.1.4 With regard to the relevant geographic market, the Commission held that the relevant geographic market consists of the entire territory of India as a car owner can get his car serviced or repaired from repair shops located across the territory of India. The Commission isof the view that the relevant market definition with respect to the present OPs would be the same as provided in the Main Order. Therefore the relevant market in the present case would be as follows:
(i) manufacture and sale of cars in India,
(ii) sale of spare parts in India.
a. supply of spare parts, including diagnostic tools, technical manuals, catalogues etc. for the aftermarket usage in India and;

b. provision of aftersale services, including servicing of vehicles, maintenance and repair services in India Assessment of Dominance of OEMs

8.1.6 In its Main Order, the Commission noted that the underlying principle in the definition of a dominant position is linked to the concept of market power which allows an enterprise to act independently of competitive constraints. Such independence enables an enterprise to manipulate the relevant market in its favour to the economic detriment of its competitors and consumers. It was further revealed during the investigation of the DG that each OEMs had entered into various agreements with their overseas suppliers or OESs to ensure that they become the sole supplier of their own brand of spare parts and diagnostic tools in the aftermarket. The OEMs pursuant to such agreements have effectively shielded themselves from any competition. The Commission also took into account the DG's finding that various multi brand repairer/maintenance service providers were unable to cater to the demand of the customers to service their automobile because of the nonavailability of the spare parts of the OEMs in the open market. Taking into consideration the aforesaid, the Commission held that each OEM is a 100% dominant entity in the aftermarket for its genuine spare parts and diagnostic tools and correspondingly in the aftermarket for the repair services of its brand of automobiles. The Commission discarded the argument raised by various OEMs that they hold a miniscule market share in the primary market of sale of cars and therefore, miniscule share in the aftermarket. It was observed by the Commission, that each OEM has a clear competitive advantage in the aftermarket for sale of spare parts/diagnostic tools and repair services for their respective brand of automobiles, irrespective of the market share they hold in the primary market.

8.1.9 Similarly, with respect to Hyundai, Reva and Premier also, the Commission is of the view that considering the technical compatibility between the products in the primary market and the secondary market, they hold 100% market share and are dominant in the aftermarket of their respective genuine spare parts and diagnostic tools and correspondingly in the aftermarket of their respective repair services for their brand of automobiles. Considering the adoption and application of after markets theory in defining the relevant market in the present case, the argument put forward by Reva and Premier in their respective applications filed under Regulation 26 of the General regulations is liable to be rejected. Since each OEM is dominant in the aftermarket irrespective of the market share it has in the primary market, there is no reason why Reva and Premier should be excluded from the array of OPs. Those applications are, therefore, rejected.

8.1.10 As per the specific findings of the DG report, the present Opposite Parties have ensured through their agreements with the local OESs and overseas suppliers that the independent repairers are not able to effectively compete with the authorized dealers in the secondary market for repairs and maintenance services by denying them access to the required spare partsand diagnostic tools to complete such repair work. Finally, the warranty conditions which the present Opposite Parties impose on their consumers dissuade them from availing the services of independent repairers. In conclusion therefore, the Commission has no hesitation in holding that Hyundai, Reva and Premier hold a position of strength which enables them to affect their competitors in the secondary market, i.e., independent service providers in their favour, thereby limiting consumer choice and forcing the consumers to react in a manner which is beneficial to them, but detrimental to the interests of the consumers.

Abuse of Dominant Position:

8.1.11 A perusal of the agreements entered between OEMs (Hyundai, Reva and Premier) and local OESs and between OEMs and their respective overseas suppliers makes it abundantly clear that these OEMs have imposed restrictions on the supply of genuine spare parts to the independent repairers. In the case of Premier, the DG has found that the LOI executed between Premier and the local OESs for supplying of spare parts for Premier's assembly line and aftermarket requirements contained clauses that restrict the OESs from supplying spare parts directly into the aftermarket. The clauses require that all requirements for spare parts shall be met through Premier and its authorized agents. In case of Reva, the DG has found a restrictive

covenant in the purchase order placed by Reva on its local OES. Further in the case of Hyundai, though the DG could not find a specific clause but the DG has found implied agreement on the basis of facts revealed during the investigation. The DG has examined the technology and royalty agreement entered between Hyundai and its overseas supplier, HMC, for supply of spare parts for its operations in India. Though the DG, on perusal of such agreement, could not discover the existence of any clauses which restricts the ability of the overseas supplier from selling directly into the aftermarket in India, the DG has reported the fact that the overseas supplier is the parent company of Hyundai and only supplies spare parts to MIL (a group company of Hyundai for dealing with the aftermarket requirements in India), indicates the existence of an arrangement between Hyundai and its overseas supplier for not supplying spare parts directly into the Indian aftermarket. Further, the DG has found that the basic purchase agreement (entered with the OESs by Hyundai for the supply of spare parts) and other purchase orders executed by Hyundai for procuring spare parts from various OESs in India contained clauses that restrict the OESs from supplying spare parts directly into the aftermarket which are based upon the drawings and designs of Hyundai.

8.1.13 On the basis of the foregoing discussion, the Commission is of the view that the conduct of Hyundai, Reva and Premier amounts to a denial of market access to the independent repairers to procure genuine spare parts in the aftermarket. As discussed earlier, each OEM holds a dominant position in the aftermarket for its own brand of spare parts and diagnostic tools and is in effect the sole supplier of such spare parts and diagnostic tools in the aftermarket. Therefore, the practice of the OEMs in denying the availability of its genuine spare parts severely limits the independent repairers and other multi brand service providers in effectively competing with the authorized dealers of the OEMs in the aftermarket. Such practices amounts to denial of market access by the OEMs under section 4(2)(c) of the Act. Further, the investigation by the DG has revealed that Hyundai and Reva earn a considerable mark up margin and the margin earned significantly varies across the spare parts. The DG hasfound that a substantial mark up was being earned in most of the top 50 spare parts sold by each of the OEMs.

8.1.16 On the issue of leveraging, the Commission had held that since the car owners purchasing spare parts have to necessarily avail the services of the authorized dealers of the OEMs, OEMs have used their dominance in the relevant market of supply of spare parts to protect the relevant market for after sales service and maintenance thereby violating Section 4(2)(e) of the Act. Further, since the access to specialized diagnostic tools, fault codes, technical manuals, training etc. is critical for undertaking maintenance and repair services of such vehicles, the independent repairers are substantially handicapped from effectively attending to the aftermarket requirements of automobiles due to the lack of access to specialized diagnostic tools. Further, it may be noted that the facts pertaining to the present OPs are substantially similar to the other OEMs considered in the Main Order. Applying the same reasoning, therefore, the Commission is of the view that the conduct of the present OEMs is in contravention of section 4(2)(e) of the Act. 8.1.17 In view of the aforesaid, the Commission finds Hyundai, Reva and Premier to be indulging in abuse of their dominant position thereby contravening the provisions of section 4(2)(a)(i), 4(2)(c) and 4(2)(e) of the Act.

9. Issue 2: Whether the present Opposite Parties have violated the provisions of section 3 ofthe Act?

9.1.1 A perusal of the DG report shows that the OEMs source spare parts for their assembly line and aftermarket requirements from the overseas suppliers and other local OESs, pursuant to the agreements with such overseas suppliers and the local OESs. The OEMs then distribute the spare parts in the aftermarket and also provide after-sale repairs and maintenance services to their various models of cars through their network of authorized dealers. Therefore, as noted in the Main Order, the OEMs enter into three types of agreements: (a) agreements with overseas suppliers; (b) agreements with local OESs and (c) agreements with authorized dealers. The analysis of these agreements in respect of the present Opposite Parties i.e.

Hyundai, Reva and Premier is entailed in the following paragraphs. Analysis of agreements/arrangements entered between the OEMs and their overseas suppliers. During the investigation, the DG has analyzed the importer agreements entered by the OEMs (Hyundai and Reva) with their overseas suppliers. The DG, in case of Hyundai, examined the technology and royalty agreement entered between Hyundai and its overseas supplier, HMC, for supply of spare parts for its operations in India. Though the DG, on perusal of such agreement, could not discover the existence of any clauses which restricted the ability of the overseas supplier from selling directly into the aftermarket in India, the DG has reported that, the fact that the overseas supplier is the parent company of Hyundai and only supplies spare parts to MIL (a group company of Hyundai for dealing with aftermarket requirements in India), indicates existence of an arrangement between Hyundai and such overseas supplier for not supplying spare parts directly into the Indian aftermarket. Further, in case of Reva, the DG has found that it has executed purchase orders with the overseas suppliers for supplying of spare parts for its operations in India. As per Reva's statements before the DG, the purchase order contained terms and conditions that govern the relationship between Reva and its overseas suppliers. Onperusal of such purchase orders, it was found that such overseas suppliers were restricted from supplying spare parts (which have been made with the design of Reva) into the aftermarket in India. Since Premier was found to be procuring all its spare parts from local OESs, there was no finding of the DG against Premier under this sub-head.

9.1.4 On the basis of DG's findings, it is evident that Hyundai and Reva have restricted their respective overseas suppliers from directly supplying spare parts in the aftermarket in India. Hyundai has claimed exemption for such agreements by citing the doctrine of 'single economic entity'. The concept of single economic entity is generally applicable only if there exists inseparability in the economic interest of the parties to the agreement. Therefore, it is a mixed question of law and facts, to be decided based on the facts and circumstances of each case. Considering the facts in this case, the agreement between Hyundai and HML may not be held violative of section 3 of the Act. The purchase orders with respect to Reva are found to be between Reva and an independent overseas supplier. Therefore, the doctrine of single economic entity will not be applicable to Reva. Analysis of agreements/arrangements between the OEMs and the OESs The second category of agreements that the OEMs enter into are with the local OESs for the procurement of spare parts for both assembly line and aftermarket requirements. As noted in the order dated 25.08.2014, the spare parts supplied by the OESs can be broadly categorized under the following heads:

(1) Where the design, drawing, technical specification, technology, knowhow, toolings (which are essentially large machines required for manufacture of the spare parts), quality parameters etc., are provided by the OEMs. The OESs are required to manufacture and supply such spare parts according to the specified parameters;

(2) Where the patents, know-how, technology belongs to the OES, however, the parts are manufactured based on the specifications, drawings, designs supplied by the OEM. The tooling/tooling cost may also be borne by the OEM in some of these cases; and

(3) Where the spare parts are developed by the OESs as per their own specifications or designs or designs and specifications which are commonly used in the automobile industry. Such parts are very few for example, batteries, tyres etc.

9.1.7 As per the DG's report, it has been observed that those OESs supplying spare parts pursuant to agreements/arrangements which fall within category (1) and (2) above; cannot supply spare parts directly into the aftermarket without seeking prior consent of the OEMs. Although the present OPs have alleged that they do not restrict sale of spare parts after prior consent in the aftermarket, the DG's investigation has not revealed any instance where written consent has been granted by OEMs to OESs to supply spare parts directly into the aftermarket.

9.1.8 On the basis of the findings of the DG report and the submission made by the parties, the Commission is of the view that none of the present three OEMs allow their OESs to supply genuine spare parts directly into the aftermarket. Also, all the three OEMs have justified their restrictions on the basis of IPR protection and sought an exemption under section 3(5)(i) of the Act. Accordingly, the Commission deems it appropriate to assess whether such an exemption is available to these OEMs or not before concluding that the agreements between the OEMs

and the OESs are in the nature of "exclusive distribution agreements" and "refusal to deal" as contemplated under section 3(4)(c) and 3(4)(d) read with section 3(1) of the Act respectively.

9.1.9 IPR exemption: All the present Opposite Parties have claimed IPR exemptions statingthat on account of the provisions of section 3(5)(i) of the Act, the restrictions imposed upon the OESs from undertaking sales, of their proprietary parts to third parties without seeking prior consent would fall within the ambit of reasonable condition to prevent infringements of their IPRs. The Commission has already clarified in its Main Order that while determining whether an exemption under section 3(5)(i) of the Act is available or not, it is necessary to consider, inter alia, the following: a) whether the right which is put forward is correctly characterized as protecting an intellectual property; and b) whether the requirements of the law granting the IPRs are in fact being satisfied.

9.1.10 After analysis of the material placed on record with regard to the other 14 OEMs in the Main Order, the Commission had held that the exemption enshrined under section 3(5)(i) of the Act was not available to those OEMs for the following reasons: OEMs had failed to submit the relevant documentary evidence to successfully establish the grant of the applicable IPRs in India, with respect to the various spare parts. OEMs had failed to show that their restriction amounted to imposition of← reasonable conditions, as may be necessary for protection any of their rights. In the light of these observations, therefore, the Commission will ascertain as to whether the exemption under section 3(5)(i) of the Act would be available to Hyundai, Reva and Premier. At the outset it may be noted that as per the observations of the DG and the submissions made by the present Opposite Parties, none of them own any registered IPR on any of their spare parts as such in India. It has been admitted by Hyundai and MIL that they do not possess any valid IPRs in India except for its trademark/logo. The DG has further reviewed the license agreement entered into between Hyundai and HMC and opined that such agreement does not specify the technologies, patents, knowhow, copyrights and other IPRs which are being granted to Hyundai. Similarly, Reva and Premier have also admitted that none of their spare parts are covered by IPRs in India. Further, it needs to be clarified here that though registration of an IPR is necessary, the same does not automatically entitle a company to seek exemption under section 3(5)(i) of the Act. The important criteria for determining whether the exemption under section 3(5)(i) is available or not is to assess whether the condition imposed by the IPR holder can be termed as “imposition of a reasonable conditions, as may be necessary for the protection of any of his rights”. The Commission is of the view that the concept of protection of an IPR is qualified by the word “necessary”. So the relevant question is whether in the absence of the restrictive condition, would the IPR holder be able to protect his IPR. The Commission has dealt with this question in detail in its Main Order. Suffice to conclude that mere selling of the spare parts, which are manufactured end products, does not necessarily compromise upon the IPRs held by the OEMs in such products. Therefore, the OEMs could contractually protect their IPRs as against the OESs and still allow such OESs to sell the finished products in the open market without imposing the restrictive conditions. Furthermore, the Commission is of the view that none of the present three OEMs are eligible to seek exemption under section 3(5)(i) of the Act for the agreements entered between OEMs and OESs. As such, the contravention under section 3(4)(c) and 3(4)(d) read with section 3(1) of the Act for exclusive distribution agreement and refusal to deal stands established. Before we part with this issue, it may be relevant to point out the contention made by Hyundai in this regard. In addition to Hyundai/ HMC drawings and specifications which are entitled to copyright protection, Hyundai claimed that its drawings/knowhow/specifications would also be conferred IP-protection by virtue of being confidential information. Tosubstantiate its claim, Hyundai cited the judgment of the Delhi High Court in ***Cattle Remediesand Anr. v. Licensing Authority/Director of Ayurvedic and Unani Services***, wherein it hasbeen observed that apart from specific statutes relating to trade mark, copyright, design and patent, etc., trade secrets are also a form of IP. The contention of Hyundai is without any merit and is liable to be rejected. With regard to the trade secrets and confidential knowledge, the Commission is of the view that they are not among the listed categories of IPR laws and thus, Hyundai cannot claim any exemption under section 3(5)(i) of the Act.

Analysis of agreements/arrangements between the OEMs and the authorized dealers:
9.1.16During the course of the investigation, the DG has examined the conduct of Hyundai, Reva and Premier with respect to their dealing with their authorized dealers and the terms and conditions of the agreements with them for the sale of automobiles in the primary market and the sale of spare parts and provision of maintenance services in the secondary market. From the perusal of the agreements, the DG has reported the following observations: Though Hyundai has alleged that there is no restriction on the Authorized dealers to make over the counter sale of the spare parts, diagnostic tools etc., it could not substantiate its claims. With regards to Reva, the DG has concluded that the LOI issued to the authorized dealers did not impose any restriction on the over the counter sale of such spare parts. The DG has also observed that the data furnished by Reva suggested that the sale of such spare parts was taking place over the counter. However, taking into account the submissions of independent repairers that such spare parts were available only to a limited extent and not freely, the DG has concluded that there is an implied understanding between Reva and its authorized dealers regarding non-supply of spare parts over the counter. Similarly in case of Premier, the DG has reported that Premier has stated that it allows over the counter sale to the independent repairers of its spare parts, such claim however remains unsubstantiated.
9.1.21 It should be noted that as per the provisions of section 3(4) of the Act, only agreements which cause or are likely to cause an AAEC on competition in India, shall be subject to the prohibition contained in section 3(1) of the Act. Therefore, in order to determine if the agreements entered between the OEMs and the authorized dealers are in the nature of an "exclusive distribution agreement" or "refusal to deal" under section 3(4)(c) and 3(4)(d) of the Act, the Commission needs to determine if such agreements cause an AAEC in the market based upon the factors listed in section 19(3) of the Act. 9.1.22 The Commission has taken note of the justifications offered by the Opposite Parties for imposing restrictions through agreements on the authorized dealers with respect to over the counter sales. The justifications provided by them were as follows: (i) the independent operators may not possess the skills required to replace the parts and undertake repairs thereby causing health hazards, (ii) widespread availability of counterfeit parts; (iii) parallel resale network if established would conflict with the distribution network etc. It may be noted that these justifications have already been rejected by the Commission in respect of the other 14 OPs in the Main Order. Therefore, there is no need to go into the detail of the propriety of such justification with regard to the present three OPs. Additionally, it was found that all these OEMs had stringent warranty conditions which required their customers to only get their automobile repaired through their authorized service network of dealers otherwise their warranty would be invalidated. Therefore, the Commission is of the view that the present OPs, either specifically through theiragreements or otherwise through understanding with their dealers, have restricted/prohibited the sale of spare parts over the counter, thereby resulting in prescribing exclusive distribution agreements and refusal to deal in terms of Section 3(4)(c) and 3(4) (d) of the Act. Further the present OPs, either specifically through their agreements or otherwise through their understanding with their dealers, require them to source spare parts only from them or their approved vendors. These agreements are found to be in the nature of exclusive supply agreements in terms of Section 3(4)(b) of the Act.

ORDER

10. In view of the aforesaid discussions and for reasons recorded in this order as well as the general findings in its Main Order, the Commission is of the considered opinion that the three OPs *viz.* Hyundai, Reva and Premier have contravened the provisions of sections 3(4)(b), 3(4)(c), 3(4)(d), 4(2)(a)(i), 4(2)(c) and 4(2)(e) of the Act, as applicable.
11. It may be noted that the Commission in the Main Order has provided the following directions to the OPs u/s 27 of the Act:-
i) The parties are hereby directed to immediately cease and desist from indulging in conduct which has been found to be in contravention of the provisions of the Act.

ii) OPs are directed to put in place an effective system to make the spare parts and diagnostic tools easily available through an efficient network.
iii) OPs are directed to allow OESs to sell spare parts in the open market without any restriction, including on prices. OESs will be allowed to sell the spare parts under their own brand name, if they so wish. Where the OPs hold intellectual property rights on some parts, they may charge royalty/fees through contracts carefully drafted to ensure that they are not in violation of the Competition Act, 2002.
iv) OPs will place no restrictions or impediments on the operation of independent repairers/garages.
v) The OPs may develop and operate appropriate systems for training of independent repairer/garages, and also facilitate easy availability of diagnostic tools. Appropriate arrangements may also be considered for providing technical support and training certificates on payment basis.
vi) The OPs may also work for standardization of an increasing number of parts in such a manner that they can be used across different brands, like tyres, batteries etc. at present, which would result in reduction of prices and also give more choice to consumers as well as repairers/service providers.
vii) OPs are directed not to impose a blanket condition that warranties would be cancelled if the consumer avails the services of any independent repairer. While necessary safeguards may be put in place from safety and liability point of view, OPs may cancel the warranty only to the extent that damage has been caused because of faulty repair work outside their authorized network and circumstances clearly justify such action.
viii) OPs are directed to make available in the public domain, and also host on their websites, information regarding the spare parts, their MRPs, arrangements for availability over the counter, and details of matching quality alternatives, maintenance costs, provisions regarding warranty including those mentioned above, and any such other information which may berelevant for full exercise of consumer choice and facilitate fair competition in the market.

12. The above stated directions apply to the present OPs with the same force and the Commission hereby directs them to abide by the same with immediate effect. As regards the imposition of the penalty under section 27 of the Act, the Commission has already taken into account the aggravating factors and mitigating factors that apply to the automobile sector generally and the present OPs specifically. Apart from the general factors taken into account in the Main Order, the Commission notes that there are other specific mitigating factors that are applicable to Premier and Reva.

13. The Commission is of the view that though Premier was found to be dominant in the aftermarket for its genuine spare parts and diagnostic tools and correspondingly in the aftermarket for the repair services of its brand of automobiles, its conduct remained untested during the DG investigation. It is to be noted that at the relevant time period of the investigation, all Premier cars were under warranty and as such the conduct of Premier with respect to abuse of dominance remained untested. Furthermore, Premier did not impose any restrictions on its authorized dealers to deal with vehicles of competing brands. In the case of Reva, the Commission has noted that with respect to the agreements entered with the authorized dealers, the DG during the investigation has found that its spare parts were, to some extent, available over the counter.

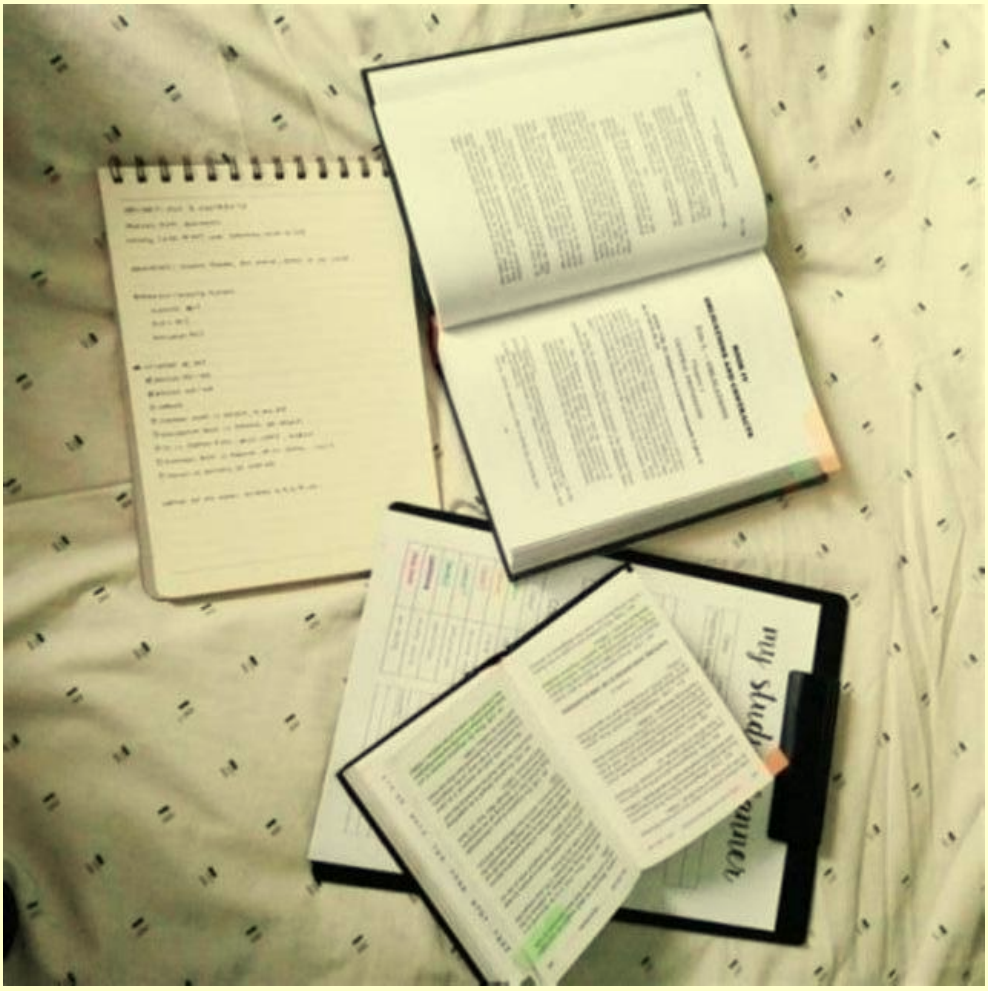
14. The mitigating factors stated above work in favor of Premier and Reva. The Commission finds it appropriate to not to impose any monetary penalty on Premier and Reva, though other directions reproduced in para 11 above would apply to them in the same manner as other OPs in the Main Order.

15. Hyundai has, *inter alia*, urged before the Commission that its case is entirely different from the other OEMs and, therefore, it deserves a reduced penalty. It has been contended that the excessive pricing by the other OEMs was extremely high as compared to Hyundai. It was further urged that it is the very first competition law infringement case against Hyundai and it has effectively cooperated with the DG and also with the Commission. Hyundai also submitted that it allowed over the counters sales partially. It was also contended that the automobile sector is being investigated for the first time and, therefore, no fine should be levied. It may be

noted that most of the factors cited by Hyundai are general in nature which do not qualify for a reduced penalty. 16. In view of foregoing, the Commission is of the opinion that a penalty of 2% of the total turnover in India may be imposed on Hyundai. Resultantly, a penalty of 420.2605 crores (Rupees Four Hundred and Twenty Crores, Twenty Six Lakhs and Five Thousand only)— calculated at the rate of 2% of the average income of Hyundai for three financial years is hereby imposed on it.

18. The directions of the Commission contained in paragraph 11 and 12 of this Order will have to be complied with by the present OPs in letter and spirit. Each OP is directed to file an individual undertaking, within 60 days of the receipt of their order, about compliance to cease and desist from the present anti-competitive conduct, and initiation of action in compliance of the other directions. This will be followed by a detailed compliance report on all directions within 180 days of the receipt of the order. The amount of penalty will have to be paid by Hyundai within 60 days of the receipt of this order.

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



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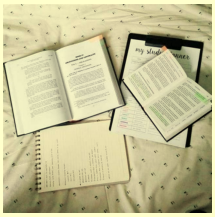

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In re: Raaj Kamal Film International-Informant v. M/s Tamil Nadu Theatre Owners Association

CCI Case No. 01 of 2013

Order under section 26(1) of the Competition Act, 2002

The informant was a registered partnership firm with two partners viz. Shri Kamal Haasan and Shri Chandra Haasan. As per information the opposite party was an association of theatre owners in Tamil Nadu. It is stated in the information that out of total number of theatres (1134) in Tamil Nadu, 698 theatres were members of the opposite party association. The informant had produced a feature film by the title 'Vishwaroopam' in three languages viz. Hindi, Tamil and Telugu. The Hindi version of the movie was called 'Vishwaroop'. The movie in three languages was slated for simultaneous global theatrical release on Friday i.e. 11.01.2013 and the first show was to take place at 8 AM on that day.

2. The informant alleged that it had approached the theatre owners and distributors directly offering them terms of exhibition involving no minimum guarantee amount and only on revenue sharing basis as per the normal industry practice. However, the informant as an innovative and pioneering step and to take advantage of exhibition of film via Direct to Home Satellite Television Services (DTH) platform, wanted to premiere the movie through DTH service providers with one-time viewing to be made available to subscribing consumers between 9 PM on 10.01.2013 and 2 AM on 11.01.2013 i.e. a day prior to its theatrical release, on payment of movie subscription charges by viewers.

3. For the purpose of premiering the movie through DTH platform the informant entered into a 'Content Provider Agreement' for one time telecast of the movie on identical terms with the six DTH providers operating in India under the brand names viz. Airtel, Sun Direct, Tata Sky, Dish TV, Videocon and Reliance Big TV.

4. The case of the informant is that while it was organising premier of the movie in a novel manner, the informant learnt of a decision taken by the opposite party association on 20.12.2012 whereby the association resolved 'not to lend co-operation for screening of any film that is released even before it comes to the theatre, through DTH or any other technology .'

5. The informant's contention is that the aforesaid resolution dated 20.12.2012 passed by the opposite party was a direct and blatant contravention of the provisions of section 3(1) read with section 3(3)(b) of the Act. 6. The Commission has carefully perused the information and the documents filed therewith. The Commission also he ard the informant's oral submissions on 16.01.2013.

7. The informant contended that the opposite party association acted like a cartel as is reflected from the concerted decision of its members not to exhibit any film including Vishwaroopam if it was already released on DTH platform. The impugned resolution was an anti-competitive agreement amongst the theatre owners in Tamil Nadu since the resolution limited and controlled the market of exhibition of films and use of technical development in exhibition of feature films. This as per informant was, in contravention of the provisions of section 3(1) read with section 3(3)(b) of the Act.

8. The objective of Competition law is to promote competition and consumer welfare. Dynamic efficiency is one of the key factors to it. Technological innovations or utilization of existing technology in a more novel manner is the right of every entrepreneur. Such ventures usually have an effect of enhancing competition and promoting consumer welfare. The informant herein was trying to

experiment with an innovative way to have premier of its movie in India through DTH so as to have reach to maximum number of consumers/ viewers at a premier show through DTH medium. The decision of the OP not to exhibit this movie or any other movie released before it was released to theatres, through DTH or any other technology prima facie has an effect of limiting the market of exhibition of films for the benefit of viewers at large in the territories under its control. The decision prima facie also seems to be restricting informant from taking advantage of technological development in the relevant industry at a timing of its choice. Such a decision of OP prima facie seems to be anti competitive as it deters a producer from providing to consumers an opportunity of watching premiere show in an economic manner in the comforts of his home. It also has the potential of adversely affecting the competition and depriving benefit to producers and consumers of newer technologies.

9. The words used in the resolution 'any film' and 'through DTH or any other technology' by the OP prima facie seems to have an effect not only on informant's movie but also would amount to closing doors in future for forthcoming movies to choose innovative technologies as a mode of premiere show/ release of film . The resolution thus appears to be anti-competitive in nature.

10. The facts discussed above prima facie show that the resolution of OP was in the nature of an agreement among the members of the association and was intended to limit and control the market of exhibition of movies as well as innovative use of technical development in exhibition of feature films and thus, prima facie appeared to be in contravention of the provisions of Section 3 of the Act.

11. In view of above discussion the Commission is of the opinion that there exists a prima facie case and the issue needs a thorough investigation by DG. The Commission, therefore, directs the DG under section 26(1) of the Act to cause an investigation to be made into the matter and submit the report to the Commission within 60 days.

Belaire Apartment Owner's Association v. DLF Ltd & HUDA

2011 Comp LR 0239(CCI)
Main Order dated August 12, 2011;
Supplementary Order by Mr. R Prasad (Member, CCI) dated August 12, 2011
and Supplementary Order dated January 3, 2013

DLF Ltd. v. CCI, 2014 Comp LR 01 (CompAT)

The case under consideration concerns competition issues and consumer interests in the residential real estate market in India. With more than 1.2 billion people, India is the second most populous country in the world after China. Since 1991, a series of economic measures have led India to a higher sustained level of growth which has stimulated development across all sectors including the real estate industry. Since the real estate industry has significant linkages with several other sectors of the economy, investment in real estate sector results in incremental additions to the GDP of the country. Along with the growth in real estate industry, accompanied by increased level of income, demand for residential units has also risen throughout India. Residential sector constitutes a major share of the real estate market; the balance comprising of commercial segment like offices, shopping malls, hotels etc. Apart from its importance as a segment of real estate sector, residential housing has a special place in India where investment in a home remains one of the biggest and most important investment in a person's life. Along with food and clothing, a home is one of the most basic necessities of existence according to economic thought.

1.1 The growth in the residential real estate market in India has been largely driven by rising disposable income, a rapidly growing middle class, fiscal incentives like tax concessions, conducive and markedly low interest rates for housing loans and growing number of nuclear families. The residential sector is expected to continue to demonstrate robust growth, assisted by rising and easy availability of housing finance. The higher income levels and rising disposable income are also expected to lead to demand for the high end residential units, a situation which was not witnessed in the earlier days.

1.2 Indian residential real estate sector offers plenty of opportunities. There is a huge shortage of housing units in semi-urban and urban areas and there is a scope of bridging the deficit. The growth in demand due to rising income and expenditure levels, increasing phenomenon of nuclear families and perception of investment in real estate as secure and rewarding has far outstripped the supply of residential housing. The growing rate of urbanization, coupled with rising income has led to demand for better housing with modern amenities. Also the pace of growth of demand is far higher than the pace of growth of supply due to limited supply of urban land, lack of infrastructure in non-urban area, concentration of facilities and amenities as well as income opportunities in urban areas. This is the reason that the sector is witnessing tremendous boom in recent days. Real estate industry in India was said to be worth $12 billion in the year 2007 and is estimated to be growing at the rate of 30 per cent per annum.

1.3 Previously, government's support to housing had been centralized and directed through the State Housing Boards and development authorities. In 1970, the Government of India set upthe Housing and Urban Development Corporation (HUDCO) to finance housing and urban infrastructure activities and in 2002; the government permitted 100 per cent foreign direct investment (FDI) in housing through integrated township development. The residential real estate industry now is driven largely by private sector playe The mushrooming activities in the sector are reflected in the advertisements that come up in the newspapers and number of messages on the cell phones received every day indicating launches of new products. Along with the increased activity in the sector, often reports of problems being faced by the consumers do also surface.

1.4 The informant in this case has alleged unfair conditions meted out by a real estate player. It has been alleged that by abusing its dominant position, DLF Limited (OP-1) has imposed arbitrary, unfair and unreasonable conditions on the apartment - allottes of the Housing Complex 'the **Belaire**', being constructed by it.

1.5.1 The informant in this case is **Belaire** Owners' **Association**. The **association** has been formed by the apartment allottes of a Building Complex, '**Belaire**' situated in DLF City, Phase-V, Gurgaon, being constructed by OP-1. The President of the **association** is Sanjay Bhasin, who himself is one of the allotees in the complex.

1.5.2 DLF Limited (referred to hereafter as DLF or OP-1 and includes group companies), the main Respondent is a Public Limited Company. It commenced business with the incorporation of Raisina Cold Storage and Ice Company Private Limited on March 16, 1946 and Delhi Land and Finance Private Limited on September 18, 1946. Pursuant to the order of the Delhi High Court dated October 26, 1970, Delhi Land and Finance Private Limited and Raisina Cold Storage and Ice Company Private Limited along with another DLF Group company, DLF Housing and Construction Private Limited, merged with DLF United Private Limited with effect from September 30, 1970. Thereafter, DLF United Limited merged with another Company, then known as American Universal Electric (India) Limited (incorporated in the year 1963), with effect from October 1, 1978, under a scheme of amalgamation sanctioned by the Delhi High Court and the Punjab and Haryana High Court. The merged entity was renamed as 'DLF Universal Electric Limited' with effect from June 18, 1980. In 1981 DLF Universal Electric Limited changed its name to DLF Universal Limited and in 2006, DLF Universal Limited changed its name to DLF Limited.

1.5.3 DLF with its different group entities has developed some of the first residential colonies in Delhi such as Krishna Nagar in East Delhi that was completed as early as in 1949. Since then, the company has developed many well known urban colonies in Delhi, including South Extension, Greater Kailash, Kailash Colony and Hauz Khas. However, following the passage of the Delhi Development Act in 1957, the state assumed control of real estate development activities in Delhi, which resulted in restrictions on private real estate colony development. As a result, DLF commenced acquiring land outside the areas controlled by the Delhi Development Authority (DDA), particularly in Gurgaon.

1.5.4 In the initial years of 1980s, DLF Universal Limited obtained its first licence from the State Government of Haryana and commenced development of the 'DLF City' in Gurgaon, Haryana. In the year 1985, DLF Group initiated plotted development, sold first plot in Gurgaon, Haryana and consolidated development of DLF City for township development. In1991, construction of the DLF Group's first office complex, 'DLF Centre', began at New Delhi and in 1993; completion of the DLF Group's condominium project, 'Silver Oaks', at DLF City, Gurgaon, Haryana was accomplished.

1.5.5 In 1996 'DLF Corporate Park', DLF Group's first office complex at DLF City, Gurgaon, Haryana was built and in 1999 DLF golf course was developed. The DLF Group ventured into retail development in Gurgaon, Haryana in 2002 and in the same year DLF ventured into the commencement of operation of 'DT Cinemas' at Gurgaon, Haryana. DLF undertook development of 'DLF Cyber city', an integrated IT park measuring approximately 90 acres at Gurgaon, Haryana in the year 2004. In the year 2005, DLF acquired 16.62 acres (approx) of mill land in Mumbai.

1.5.6 DLF in course of expansion of its business has entered into JV with Laying O'Rourke (one of Europe's largest construction company). DLF has also entered into various Mous, joint ventures and partnerships with other concerns like WSP Group Acquisition, Feedback Ventures, Nakheel LLC, a leading property developer in UAE, Prudential Insurance, MG Group, HSIIDC, Fraport AG Frankfurt Airport Services etc.

1.5.7 The company was listed on July 5, 2007 and is at present listed on NSE and BSE.

1.5.8 Haryana Urban Development Authority (**HUDA**) is a statutory body under Haryana Urban Development Authority Act, 1977. The precursor of **HUDA** was the Urban Estates

Department (U.E.D.) which was established in the year 1962. It used to look after the work relating to planned development of urban areas and it functioned under the aegis of the Town & Country Planning Department. Its functioning was regulated by the Punjab Urban Estates Development and Regulations Act, 1964 and the rules made there under and the various development activities used to be carried out by different departments of the State Government such as PWD (B&R), Public Health, Haryana State Electricity Board etc. In order to bring more coordination, to raise resources from various lending institutions and to effectively achieve goals of planned urban development it was felt that the Department of Urban Estates should be converted into such a body which could take up all the development activities itself and provide various facilities in the Urban Estates expeditiously. Consequently the Haryana Urban Development Authority came into existence on 13.01.1977 under the Haryana Urban Development Authority Act, 1977 to take over work, responsibilities hither to being handled by individual Government departments. The functions of Haryana Urban Development Authority, interalia, are:

a. To promote and secure development of urban areas in a systematic and planned way with the power to acquire sell and dispose of property, both movable and immovable.

b. Use this so acquired land for residential, industrial, recreational and commercial purpose.

c. To make available developed land to Haryana Housing Board and other bodies for providing houses to economically weaker sections of the society, and

d. To undertake building works.

2.2.15 According to the informant, the unfair and deceptive attitude is reflected form the Brochure issued by OP-1 for marketing "the **Belaire**" when compared with the Part E of Annexure-4 to the agreement. While through the Brochure a declaration is made to the generalpublic that innumerable additional facilities, like, schools, shops and commercial spaces within the complex, club, dispensary, health centre, sports and recreational facilities, etc. would be provided to the allottes, however, Part "E" of the agreement stipulates that OP-1 shall have absolute discretion and right to decide on the usage, manner and method of disposal etc.

2.2.16 It has been submitted by the informant that there are various other terms and conditions of the Apartment Buyer's Agreement which are one sided and discriminatory. The Schedule of Payment unilaterally drawn up by OP-1 was not construction specific initially and it was only after OP-1 amassed huge funds unmindful of the delay caused in the process, it made the payment plan construction-linked arising out of the compulsion of increase in the number of floors from 19 to 29.

2.2.17 According to informant, OP-1 from the very beginning has concealed some basic and fundamental information and being ignorant of these basic facts, the allottes have entered into and executed the agreement reposing its total trust and faith on OP-1. Giving specific instances, the informant has submitted that on 04.09.2006 one of the allottee Mr. Sanjay Bhasin, has applied for allotment by depositing the booking amount of 20 lakh pursuant whereto on 13.09.2006 OP-1 issued Allotment Letter for apartment No. D-161, the **Belaire**, DLF City, Gurgaon. On 30.09.2006 a Schedule of Payment for the captioned property was sent. According to the said Schedule, the buyer was obligated upon to remit 95% of the dues within 27 months of booking, namely, by 04.12.2008. The remaining 5% was to be paid on receipt of Occupation Certificate. The Apartment Buyer's Agreement, however, was executed and signed on 16.01.2007. By that date, OP-1 had already extracted from the allottee an amount of 85 lakh (approx.) without the buyer being aware of the sweeping terms and conditions contained in the agreement and also without having the knowledge whether the necessary statutory approvals and clearance as also mandatory sanctions were obtained by OP-1 from concerned Government authorities.

2.2.18 It has been submitted that because of the initial defaults of OP-1 in not applying for and obtaining the sanction of the building plan/lay-out plan, crucial time was lost and delay of several months had taken place. This delay was very much foreseeable but OP-1 deliberately

concealed this fact from the apartment allottes. After keeping the buyers in dark for more than 13 months, OP-1 intimated the buyers on 22.10.2007 that there was delay in approvals and that even the construction could not take off in time. By that time, OP-1 had enriched itself by hundreds of crore of rupees by collecting its timely instalments from scores of buye Before a single brick was laid, the buyers had already paid instalments of November, 2006, January, 2007 March, 2007, June, 2007 and Sept. 2007, up to almost 33% of the total consideration.

2.2.19 According to the informant, only through the letter dated 22.10.2007, the allottes were further ex-post-facto conveyed by OP-1 in an oblique manner that the original project of 19 floors was scrapped and a new project with 29 floors with new terms has been envisaged in its place.

2.2.20 The informant has submitted that the decision to increase the number of floors was without consulting the allottes and while payment schedule was revised based upon the increase in the number of floors, there was no proportionate reduction in the price to be paid by the existing allottes whose rates were calculated purely on the basis of 19 floors and the landbeneath it although their rights/entitlements of the common areas and facilities substantially got compressed due to increase in number of floors and additional apartments, which is in violation of the provisions of the Haryana Apartment Ownership Act, 1983, more particularly, Sections 6(2) which says that the common areas and facilities expressed in the declaration shall have a permanent character and without the express consent of the apartment Owners, the common areas and facilities can never be altered and Section 13 which makes it mandatory that the floor plans of the building have to be registered under the Indian Registration Act, 1908.

2.2.21 The informant has cited the case of one of the members of **Belaire** Owners' **Association**, the RKG Hospitality Private **Ltd**. It was submitted that
concerned with delays, RKG Hospitality Private **Ltd**. in its communication dated 03.06.2009, informed OP-1 that the project had already been delayed by 8 months and also expressed resentment that the number of storeys had unilaterally gone up from 19 to 29. In its reply dated 07.07.2009, with respect to the arbitrary and unilateral increase in the number of floors, OP-1 took refuge in Clause 9.1 of the Apartment Buyer's Agreement. In its reply, without explaining the delay of 8 months, OP-1 tried to assure that it would deliver the possession within the time frame. OP-1 also stated that even if there was delay, compensation @ 5 per sq. ft. per month was already stipulated to meet the plight of the allottes. In an admission that lay-out plans/building plans were not shown to the allottes, OP-1 agreed that the same could be verified by any authorized representative of RKG. RKG, expressing its disapproval of the stand taken by the OP-1, sent a rejoinder on 27.07.2009, that Apartment Buyer's Agreement was unfair, unreasonable and unconscionable.

2.2.22 According to informant, on 25.08.2009, OP-1 responded stating that the buyer had signed the agreement after going through and understanding the contents thereof and as such no objection could be raised that the agreement was one-sided. On 18.09.2009, when the representatives of the RKG visited the office of OP-1 for the purpose of verification/inspection of the building plans they were told by an officer of OP-1 that he didn't have the sanctioned building plans. However, the perusal of title deeds, licensees, etc. revealed that various companies/entities were involved in the transaction. On 21.09.2009, RKG conveyed all of their concerns to OP-1.

2.2.23 It has been submitted by the informant that while the discount given to the prospective buyers after the revised plan was as high as Rs 500 per sq. ft., OP-1 had offered only Rs 250 per sq. ft to the older buye The buyers of the apartments, who invested huge amount of money starting from October, 2006 in 'The**Belaire**' and November, 2006 in 'DLF Park Place' had been put to a disadvantageous position vis-à-vis prospective buyers in November, 2009 i.e., after a period of 3 year Against all these, on 21.12.2009, RKG raised grievance before the Ministry of Housing and Urban Poverty Alleviation showing the helplessness of the buyers who did not have any option even to opt out as the exit route was too heavily tilted in favour of OP-1 and on 28.01.2010 the **Association** in its detailed representation to OP-1 raised many pertinent

issues pointing to the illegal acts of omission and commission of OP-1. The **Association**categorically registered its protest by stating that the agreement was arbitrary, lopsided and unfair, with apparent double standards with respect to the rights and obligationsof OP-1 vis-à-vis the investor In its reply dated 09.03.2010, OP-1 did not furnish any convincing response except for referring to the one-sided clauses of the agreement.

2.2.24 The informant has submitted that the manner in which OP-1 has exercised its arbitrary authority is evidenced by the letter dated 13.04.2010, which it has written to Mr. Pankaj Mohindroo cancelling the allotment of his apartment for alleged non-payment of dues and unilaterally went to the extent of forfeiting an amount of over 51 lac, notwithstanding the fact that Mr. Mohindroo has adhered and fulfilled his obligation of making regular payments of all the installments totaling over 1.29 crore, while OP-1 has defaulted in all its obligations including the targeted date of completion and physical handing over the possession.

2.2.25 The informant has submitted that at the time of seeking permission for public issue of its equity shares in May, 2007, OP-1 gave information to SEBI with regard to **Belaire** as under:

The **Belaire** is expected to be completed in fiscal 2010 and consisting of 368 residential units approximately 1.3 million square feet of saleable space in five blocks of 19 to 20 floors each.

This information given to SEBI almost after six months of the allotment of the apartment to the allottes clearly brings out the fact that either the information given to SEBI was incorrect and misleading or for reasons not known to the allottes, OP-1 scrapped the original project in October, 2007.

2.2.26 It has been submitted by the informant that the OP-2 has framed Haryana Urban Development Authority (Execution of Building) Regulation, 1979 which interalia specifies various parameters for any building. The maximum FAR therein is 175% of the site area and population density is 100 to 300 persons per acre @ 5 persons per dwelling unit. So far as the maximum height of the building is concerned, the Regulation prescribes that in case of more than 60 mts. height, clearances from the recognized institutions like IT Ts, Punjab Engineering College (PEC), Regional Engineering College/National institute of technology etc. and for the fire, safety clearance from institute of Fire Engineers, Nagpur will be required. There is hardly any material to show that the buildings of 'The **Belaire**' have been constructed in adherence to the said Regulations and there has been violation on account of both FAR and density per acre.

2.2.27 As per the informant, engineering norms prescribe that the foundation of a building is laid out keeping in mind a margin of 25% as safety factor. This means if a building is to be constructed up to 19 floors, the foundation work would be such that the 25% more load can be sustained thereon. This 25% extra cushion is only a safety measure and is never utilized in making extra construction. OP-1, however, has increased the height up to 29 floors while the foundation laid out underneath the building is suited only to sustain the load of 19 floo

2.2.28 It has been submitted by the informant that the fact that the project could not be completed in the stipulated time was either within the contemplation of OP-1 or it was reasonably foreseeable by OP-1 from the very threshold stage as the statutory approvals and clearances were not obtained by OP-1. The Act of OP-1 in concealing this fact, therefore, amounts to "suppresio veri". From the very beginning it was in the knowledge of OP-1 that the project has been inordinately delayed. Yet it never informed the apartment allottes of the factor of delay till the time it extracted substantial payment from them. In the said circumstances, the action of collecting the money is absolutely fraudulent and unwarranted.

2.2.29 According to informant, acts and deeds of OP-1 are "culpa-grave" both in attracting the buyers by making promises in the colorful brochure/advertisement to enter into the contract only to be followed by gross and deliberate carelessness in performance of the contract. The informant has contended that in the present form, the agreement is heavily weighted in favour of OP-1. Taking shelter of the expression "Sole Discretion", OP-1 can act arbitrarily without assigning any reason for its inaction, delay in action, etc. and yet disowned its responsibility or liability arising there from. The informant has alleged that the various clauses of the agreement

and the action of OP-1 pursuant thereto are ex-facie unfair and discriminatory attracting the provisions of Section 4(2)(a) of Competition Act, 2002 and per-se the acts and conduct of DLF are acts of abuse of dominant position by OP-1.

2.2.30 The informant finally has also alleged that it is not clear how the various Government Agencies, more particularly, OP-2 and OP-3 have approved and permitted OP-1 to act in this illegal unfair and irrational manner. Various Government and statutory authorities have allotted land and given licenses, permissions and clearances to OP-1 when it is ex-facie clear that OP-1 has violated the provisions of various Statutes including Haryana Apartment Ownership Act, 1983, the Punjab Scheduled Roads and Controlled Areas (Restriction of Unregulated Development) Act, 1963 and Haryana Development and Regulation of Urban Areas Rules, 1976.

3. Reference to Director General

3.1 The Commission, after considering the available information formed an opinion that a prima-facie case exists and directed under Section 26(1) vide order dated 20.05.2010 that investigation be made in the matter by the office of Director General (hereinafter referred to as DG).

3.2 It would be pertinent to note that the order under Section 26(1) of the Commission was challenged before the Competition Appellate Tribunal, interalia raising the issues of jurisdiction. The Tribunal vide order dated 18.08.2010 observed that the Appellant (OP-1) can raise these issues before the Commission and disposed off the appeal accordingly.

5.22 On the issue of dominance it has been stated by OP-1 it does not enjoy "dominant position" within the meaning of explanation (a) of Section 4. In order to find out whether it has a "Dominant Position as defined in Explanation (a) to Section 4, it is to be established that it enjoys a position of strength, in the relevant market, in India, which enables it to act in a manner as provided in Clauses (i) & (ii) thereof. Even though in a general sense, in the context of describing the status of a leading company, it may be referred to as having a "Dominant Position", in various statements/Annual Reports etc., such description would have no relevance, unless there is sufficient material to establish that the enterprise enjoys a "Dominant Position" in terms of the exhaustive definition thereof as set out in Explanation (a).

5.23 According to OP-1, there are many large Real Estate Companies and Builders in India, particularly in Northern India as well as in NCR and Gurgaon who offer stiff competition and give competitive offers in the relevant market of residential apartments to give a wide choice to the consumer Even though OP-1 is a large builder, there are hundreds of other builders all over India as well as in Northern India including NCR, who offer residential apartments to prospective investor.

5.24 According to OP-1, the conditions of offer of each builder are considered by the intending investor and then he makes up his mind as to which offer suits him. The choice of residential property available in the market has never been limited and apart from the Residential properties offered by it there were a large number of residential properties available in the market for the investor to choose from.

5.25 OP-1 has submitted analysis reports from Jones La Salle Meghraj (JLLM), ICICI Direct Analyst, RBS (The Royal Bank of Scotland) Analyst, Knight Frank, Goldman Sachs, Prop Equity, Research to support their contention that they are not dominant in the relevant market. Further, a list of 83 members of CREDAI NCR obtained from their Website also indicates the number of Developers who are their members and operate in NCR, which is indicative of the fact that there are a large number of developers, who offer competition. Based upon these, it has been stated that the residential space offered by OP-1 does not constitute any substantial part of the total residential properties offered by various developer

5.26 OP-1 has also contended that it is not a dominant player as the choice of residential property available in the market was never limited and apart from the Residential properties offered by OP-1, there were a large number of residential properties available in the market for

the investor to choose from. This also included offers from Government and Public Sector Organizations like DDA, **HUDA**, NOIDA Development Authority, Ghaziabad Development Authority, etc.

5.27 OP-1 has also discussed in its reply factors other than the market share mentioned in Section 19(4) of the Act to state that it is not a dominant player in the relevant market. With reference to Clauses (b) & (c) of Section 19(4), it has been stated that its total size and turnover relates to commercial as well as retail business also, which is large. Moreover, it is not confined only to the aforesaid markets under consideration as relevant market. It has other businesses also. Moreover, there are several other large competitors in the relevant market. According to OP-1 so long as it has to face competition from other competitors having large size and resources, it cannot be said to enjoy a "Dominant Position" in terms of Explanation (a). It is immaterial as to who is the largest. So long as there are large players in the market, no one enterprise can enjoy a "Dominant Position" in terms of Explanation (a). Such other competitors with large size and resources also offer competing products which creates intense competition in the market and the customers have ample choice to consider before making any purchase.

5.28 With reference to Clause (f) of Section 19(4), it has been brought out by OP-1 that it cannot be said that any customer is in any way dependent on it when he desires to purchase a residential property. In a case where alternative apartments are available from different sources to the consumer, to choose from, it cannot be said that the consumer is dependent on the enterprise.

5.29 With reference to the factor mentioned in Clause (h) of 19(4) during the period from 2007 onwards, it has been stated by OP-1 that a large number of new developers have entered the market to offer residential apartments including luxury apartments. Such new developers are also creating intense competition in the market and the old existing developers have to meet this intense competition. In such a situation, it cannot be said that because of the "DominantPosition" of any enterprise, there is an impediment for new entrants or that the "Dominant Position" of any enterprise results in "entry barriers for new entrants.

5.30 As regards factor in Clause (j) of Section 19(4), it has been stated by OP-1 that the size of market, even for Residential Properties is very large in Northern India, NCR and even in Gurgaon. The new master plan for Gurgaon also includes within it 'New Gurgaon - Manesar'. Apart from customers who buy apartments for their own residence, there are a large number of customers who buy residential apartments as an investment for value appreciation and renting in the meantime. Apartments in the residential sectors from the point of view of investment are compared on the basis of the likely value appreciation and not necessarily on account of factors which a customer may look for in a luxury apartment for his own personal use. As such, an apartment in different locations and segment may compete with each other, keeping in view the likely appreciation in value and all such apartments would fall in the same segment keeping in view the competitive aspects relating to price appreciation.

5.31 DG has done exhaustive assessment of dominance with reference to explanation (a) to Section 4 of the Act. The DG in his report has assessed dominance of the OP-1 along the lines indicated in Section 19(4) of the Act. The assessment of DG is summarized as under;

5.31.1 Market share of the enterprise: DG has submitted that as per the annual reports of OP-1, it has a number of subsidiaries on which it exercises complete control out of which DLF Home Developers Limited and DLF New Gurgaon Home Developers Private Limited are prominent ones which are engaged in the business of residential real estate development. OP-1 is having 82.72% ownership in M/s DLF Home Developers Limited and 100% ownership in M/s DLF New Gurgaon Home Developers Private Limited as per annual report of OP-1 for the year ending 2009. Under the description -subsidiary companies/partnerships firms under control of OP-1, names of DLF Home Developers Limited and M/s DLF New Gurgaon Home Developer Private Limited are also mentioned. DG has analysed the market share of OP-1 in the relevant market by taking into account the operations of DLF Home Developers Pvt. **Ltd**. and DLF New Guragaon Home Developers Pvt. **Ltd**.

5.32 DG has further submitted that market share analysis is 'static 'and is not suited for application to dynamically competitive markets and that market shares by themselves may not be conclusive evidence of dominance and therefore not a proper substitute for a comprehensive examination of market conditions. Thus, along with market share, analysis of other factors mentioned in Section 19(4) has also been carried out by him to establish dominance. The findings of DG on other factors are summarized as under;

5.33.1 DG has also stated that OP-1 has huge resources at their disposal. As part of their business expansion strategy, they have also diversifed into other real estate related businesses such as the development of SE Zs, the development of super luxury, business and budget hotels as well as service apartments. DG has pointed out that OP-1 has more than 13, 000 acres of prime land. As per draft herring prospectus filed by OP-1 Limited in the year 2007, the group had the total land bank of 10,225 acres, out of which Gurgaon has 49%, which was a big concentration in one city.

5.33.2 OP-1 as per its own projections are developing projects throughout India, which will involve the development of plot, residential, commercial and retail developed area ofapproximately 46 million square feet, 377 million square feet, 88 million square feet and 56 million square feet, respectively, totaling over 574 million square feet. It has taken up two big real estate projects in Mumbai recently. It has also entered into a joint venture with Hilton, a leading US- headquartered global hospitality company, to set up a chain of hotels and serviced apartments in India. It is proposing to set up 20,000 business hotel rooms in the next 5 years in partnership with Hilton. OP-1 had also engaged itself in the buy-out of Aman Resorts business.

5.33.3 DG has also brought out that in one of the presentations, OP-1 has stated that it is India's largest real estate company in terms of revenues, earnings, market capitalisation and developable area with a 62-year track record of sustained growth, customer satisfaction and innovation.

5.34.2 Economic power of the enterprise including commercial advantages over competitors: DG has established that OP-1 has gigantic asset base as compared to its competiton Further, it also has enormous cash profits and Net profit as compared to its competiton The position of Cash profits and Net worth (figures taken from CMIE) shows that OP-1 is far ahead on these accounts also as compared to its competiton Based on a comparison of cash profits and net profit of 128 companies, it has been established by DG that OP-1 has 78% and 63% share respectively. Huge cash profits and net worth of OP-1 is giving them tremendous economic power over their rivals.

5.34.3 DG has stated that OP-1 is active in the market since 1946 and has also the distinction of developing 3000 acre integrated township in Gurgaon. In 2009 it bagged a 350-acre plot for 1,750 crore in Haryana for developing a recreation and leisure project. It has vast Land bank and familiarity with the area which gives it distinct advantage. The Annual Reports of OP-1 for the year 2009 also states that, it is a having a dominant position in Indian offices segment too, "due to the fact that it is founder and pioneer of Grade A office leasing market, it has locational advantages and deep customer relationships having occupancy levels of 98%, more than two-third of client base belonging to Fortune 500 list....

5.34.4 It has been pointed out by DG that going by size of OP-1 and its scale of operations, Unitech may be the only comparable player. However, not only Unitech lags behind sales, assets, market capitalisation, income, profit and overall market share but in other aspects also. Further, it has higher visibility in metro cities, than Unitech. The presence of OP-1 in prime locations in New Delhi and Mumbai (NTC mill land) also suggests the high quality of its land bank.

iv) Based upon analysis- reports of Motilal Oswal, it has been stated by DG that OP-1 has a presence in 32 cities in India. Further, OP-1 has the richest quality land bank, with almost 45% of land bank in Tier I cities and it has a clear market leadership position in commercial, retail, and lifestyle/premium apartments.

5.34.5 It has also been pointed out by DG that OP-1 has significant gross asset value as per reports of Molitlal Oswal in Gurgaon in 2007 and has advantage over other players as far as land cost outstanding as per cent of market capitalization, Land cost outstanding as per cent of net profit is concerned.

5.34.6 It has further been pointed out by DG that in terms of execution, OP-1 is better positioned, due to vast experience in the industry, larger area developed till date and jointventures with strategic partner The JV with Laying O'Rourke (one of Europe's largest construction company) provides access to one of the best technology, processes and engineering skills. OP-1 has also undertaken joint ventures and partnerships with WSP Group to provide engineering and design consultancy and project management services for real estate plans of DLF, Acquisition of stake in Feedback Ventures to provide consulting, engineering, project management and development services for infrastructure projects in India, MoU with Nakheel to develop real estate projects in India through a 50:50 JV company, Joint venture with Prudential Insurance to undertake life insurance business in India, Joint venture with MG Group to enter into a 50:50 joint venture with MG group for real estate development, joint venture with HSIIDC for developing two SEZ projects, Memorandum of Co-operation with Fraport AG Frankfurt Airport Services to establish DLF Fraport SPV which would focus on development and management of certain airport projects in India.

5.34.7 DG has concluded that all these above establish that OP-1 has distinct economic advantage to it as compared to its competiton The analysis of financials of OP-1 over different parameters clearly bring out that it is enjoying a position of market leader.

5.35 Vertical integration of the enterprises or sale or service network of such enterprises: It has been stated by DG that OP-1 has developed 22 urban colonies, and its development projects span over 32 cities. It has about 300 subsidiaries engaged in real estate business. Thus, it has a vast network through which it can do business effectively. According to DG, since OP-1 has large land bank, it is capable of carry out construction without depending upon the requirement of acquiring land. Moreover, the land was also acquired long back, unlike its competitors; the land was acquired by it quite a low cost. Its wide sales network act as a relevant factor conferring upon commercial advantage over its rivals.

5.36 Dependence of consumers on the enterprise: DG has submitted that although there are other real estate developers also in Gurgaon, since OP-1 has acquired land quite early and has developed integrated township in Gurgaon, there is an advantage and if consumers want to have all the developed facilities within the DLF Township, they will have to opt for residential units developed and constructed in Gurgaon. Further, there is superlative brand power of OP-1 which affects consumers in its favour.

A coloniser intending to set up group housing colony has to enter into an agreement with the Director, Town and Country Planning, Haryana in Form LC IV(a) which mandates that adequate health, recreational and cultural amenities in accordance with norms and standards provided in respective development plan of the area are to be provided by the coloniser. The coloniser has to ensure that dwelling unit is sold or leased by him in accordance with the provisions of Haryana Apartment Ownership Act, 1983 with common areas and facilities. Common areas of the plot of land on which Group Housing Colony is developed, in fact, belong to and are meant for the common use of apartment owners and once the apartments are sold, all the common areas and facilities vest jointly in apartment owners and are to be maintained by apartment owners by forming an **association** in terms of the laws laid down by Haryana Govt.

(ix) The coloniser has to sign an agreement with the Haryana Govt. that he shall derive maximum net profit only of 15% of the total project cost of the development of colony aftermaking provisions of statutory taxes. In case the net profit exceeds 15% after completion of the project, the surplus amount either has to be deposited with the State Govt. treasury

within two months of the completion or he has to spend this money on further amenities/facilities in the colony for the benefit of residents.

Further, the Act of 1983 was enacted to provide for ownership of individual apartments and make ownership rights as transferable for the promotion of group housing in the State of Haryana. As per Section 5 of the Act, owner of every apartment, as defined in the Act, is required to execute and get registered a conveyance deed. 'Apartment' in the Act of 1983 has been defined in section 2(a) as a part of a property intended for any type of independent use, as may be prescribed, with a direct exit to a public street, road or highway or to a common area leading to such street, road or highway. 'Apartment owner' has been defined as the person or persons owning an apartment and having undivided interest in the common areas and facilities in the percentage specified and established in the declaration.

31. Judgment of Supreme Court in 'Nihal Chand Lallu Chand Pvt. **Ltd**. vs. Pancholi Cooperative Housing (AIR 2010 SC 3607)' also has bearing. In the judgment, it was held that garage is not an independent unit by itself, but is an appurtenant or attachment to flat within the meaning of Section 2(a-1) of Maharashtra Ownership Flats (Regulations of Promotion of Construction, Sale, Management and Transfer) Act, 1963 (MOFA). Open to sky-parking area or stilted portion usable as parking space was not garage within the meaning of Section 2(a-1) of the Act and not sellable independently as flat or along with flat. However, promoter was entitled to charge price for common areas and facilities from each flat purchaser in proportion to carpet area of flat. Further, the Act mandated the promoter to describe common areas and facilities in advertisement as well as agreement with flat purchaser and indicate price of flat including proportionate price of common areas and facilities. Stilt parking space could not cease to be a part of common areas and facilities merely because promoter had not described the same as such in advertisement and agreement with flat purchaser. Promoter had no right to sell any portion of such building which was not 'flat' within the meaning of section2(a-1) of the Act. He had no right to sell stilt parking spaces as these were neither flat nor apartments or attachment to flat. Hon'ble Supreme Court also observed in this Judgment that the rights arising from the Agreement signed under the MOFA between the promoter and the flat purchasers cannot be diluted by any contract or undertaking to the contrary. The undertaking contrary to Development Controlled Regulations for Greater Bombay 1991(DCR) will not be binding either on the flat purchasers or the Society. It is to be noted that provisions of MOFA 1963 are similar to Haryana Act of 1983.

32. In the light of the above judgment of the Supreme Court, applicable Acts and Rules and development model of the Group Housing societies envisaged under law, the agreement executed between DLF **Ltd**. and members of the informant **Belaire** Owners' **Association** is to be considered and looked upon by the Commission for the purpose of suggesting modifications so that there are no abusive clauses. Several clauses of the agreement are interwoven and have impact on other clauses. Modification of one would necessitate modification of other. The Commission therefore had to consider modifications wherever it found clause of the agreement was abusive.

33. The Commission thus considered all the clauses of the Buyer's Agreement. The reasons for proposed modification are given hereunder. The modifications suggested have been given in tabular form at the end opposite the existing clause.

35. The counsel for the company had vehemently argued that the rights of the allottee are limited to only flat/apartment and the proportionate right in the land at the footprint of the tower in which the apartment is situated. The allottee had no right of ownership over the land and every inch of the place outside the apartment belonged to the company and the right of the allottee was limited only to use of open areas as may be permitted by the company on payment of maintenance charges. This stand of the company is contrary to law and highly abusive. The apartment owners of a complex jointly become owner of the entire land of which FAR is utilised for construction of the complex. The land area and common facilities belong exclusively to the apartment owners as per the Law and Rules discussed above and no right of the company is left in the land area. It is also clear from explanation given to clause 1.1 and

Clause 2 of the existing agreement wherein the company has made it categorically clear to the apartment owners that apart from the cost which the company was charging on per sq. feet of super area, the allottee was liable to pay additional price proportionate to the share in the taxes which are payable by the company or its contractor by way of value added tax, sales taxes (Central and State), works contract, service tax, education cess or any other taxes by whatever name called in connection with construction of the complex and the property of the complex. It is clear from this that all taxes including the tax in respect of the land area of which FAR is used and apartments are constructed are to be borne by the allottees jointly in proportion to the super area purchased by them. The company is not to bear burden of any State Tax or Central Tax in respect of the GH complex. The company cannot claim ownership of even an inch of the open area of the land of the complex. The entire land area of the complex falls under joint ownership of the allottees. The ownership is indivisible and the allottees have a right to manage the same by forming an **association** and can tell the company to move out of the area with lock stock and barrel. Thus, the company's argument that it retains ownership rights over the open area even after sale of apartments is not tenable and all such clauses in the agreement put by the company giving it a claim/right over the open areas/common areas, etc. amounted to abuse of dominance and this abuse can be removed by modifying the abusive clause and providing in the agreement about the obligation of the company to abide by the Laws, Rules and Regulations as applicable to a Group Housing Complex. It would be worthwhile to mention that for making a Group Housing Complex, the maximum FAR applicable in 2009 was 175%. The restriction on number of storeys/floors was, however, removed. The company on removal of this restriction raised the height of the building from 19 floors to 29 floors using the same footprint and same **Belaire** area. However, since the FAR was only 175%, the land area/open area for the Complex would have to be commensurate with total super area of all the apartments in all 29 floor As per the calculations made by the informant, which have not been disputed by the company (and the company has not come up with its own calculations) the total land area on which the Bellaire Complex of 29 floors could be constructed as per FAR was 20.885 acres.

36. The allottees of **Belaire** Complex jointly would have, therefore, undivided ownership rights over land area in ratio of FAR inclusive of the footprint of the building and not alone onthe footprint of the building as is asserted by the company in the agreement. The abuse in different clauses of the agreement could only be removed by specifying the land area of GH complex **Belaire** as per FAR ratio. However, if the company has already deprived the allottees of land area, by abusing its dominance and curtailed the land area, the allottees' right to claim compensation as per law shall be there.

37. In the order, the Commission had observed that when an allottee does not get preferential location, he only gets the refund/adjustment of amount at the time of last instalment without any interest. The preferential location charges were imposed and charged by the company @ of 300 per sq. feet of the super area. The Commission considers that in case the allottee does not get apartment with preferential location, the amount taken by the company for preferential location should be returned to the allottee with a reasonable rate of interest from the date of the payment of the amount till the date amount is returned to the allottee. The rate of interest should be commensurate with rate of interest being charged by the company from allottee on delayed payments. If the amount is adjusted against the balance payment payable by the allottee, it should be adjusted alongwith interest. The suggested modification is given in clause 1.5.

38. In the order, the Commission observed that DLF enjoyed unilateral right to increase or decrease super area at sole discretion without consulting allottees who, nevertheless, were bound to pay additional amount or accept the reduction in area. When the construction of a multi storey building is envisaged, the plans are drawn on drawing board. Most of the group Housing Complexes are sold on the basis of the plans drawn on drawing board. Super area and the actual apartment area are two different concepts. The apartment area is the area which is exclusively enjoyed by the apartment owner. It includes carpet area plus area under the walls

of the apartment, while super area is the sum of apartment area and common areas which the allottee enjoys along with other apartment owne This area is inclusive of lift area, staircase area and other entrance areas, etc. Most of the times, the actual building and the drawing board plans match with each other and the building is constructed in accordance with the construction plan as approved by authorities in advance. However, there may be instances where at the time of actual construction, certain minor changes are required to be made in some of the drawing board plans and the building is constructed slightly different from the drawing board plan but it, more or less, conforms to the drawing board plan. In such a case, there may be either minor (say + 2%) increase or decrease in the super area as well as the carpet area of each apartment. However, the company if substantially changes the lay-out plan resulting, in more than 2% increase or decrease in super area, the allottees' consent should be obtained for such changes in the lay-out plans. Since the price paid by the allottee is per sq. ft. of super area, the price of the apartment would increase or decrease after the actual building is constructed. In order to lay a claim on the basis of increase in super area, the company is supposed to give information to the allottee about the difference in the initial building plan and the actually-constructed building plan on the basis of which the new super area is calculated. The actual plan should be the one submitted to the authorities for completion certificate and on the basis of which occupancy certificate is granted. The calculations of increased area should be sent to the allottee, so that the allottee knows and can verify on ground as to how his super area has increased. A mere letter from the company that the super area has increased is notsufficient to claim any amount from the allottee. Thus, whenever a claim on the basis of increase in super area is made, the company is bound to give the relevant information as to how the super area stands increased. The clauses in this respect therefore need to be modified. Accordingly modified clause 1.6 is given in the table. Clause 9.2 also gets covered by modified clause 1.6.

39. In the order, the Commission had found that the proportion of land on which apartment is situated and over which the allottee would have ownership right was to be decided unilaterally at the discretion of the company (DLF **Ltd**.). In clause 1.7 of the existing agreement, company has stated that it may, at its own discretion for the purpose of complying with the Haryana Apartments Ownership Act, 1983 or other applicable Laws, substitute the method of calculating the proportionate share in the ownership of the land beneath the building/common areas or facilities. The company in so many words stated that the allottee will only have proportionate ownership rights in the land underneath the building i.e. the land which is the footprint of the building in which the said apartment is situated. Similarly, company has unlawfully provided for itself right to further go up in air by increasing the number of floors and reserving to itself terrace rights. This is totally contrary to the law and imposition of this condition on the allottee by DLF is because of its dominance and amounts to gross abuse. All relevant clauses depriving allottee of his lawful rights need to be modified to bring them in conformity with Law, Rules and Regulations so as to remove the abuse vis-à-vis the allottee. Modified clauses are given in the table below.

40. In the order, the Commission observed that the covenant in clause 1.7(viii) of the agreement, giving right to DLF of having full and absolute rights in the community buildings/sites/recreational and sporting activities sites including maintenance of those, was abusive.

41. In the order, the Commission observed that DLF's sole discretion to link one project to another was abusive in nature. Interlinking of projects for the purpose of mobility of residents and for ingress egress is one thing, but interlinking projects for any other purpose without giving equivalent rights to allottee is altogether different. When **Belaire** Complex apartments were agreed to be sold to allottees, the FAR was 175%. If, in future, FAR is increased, only owners of apartments will have collective right to use or not to use increased FAR and the company cannot club the project with its other projects for this purpose. Accordingly, different clauses of the agreement need to be modified and reference to phase V need to be deleted. It should be retained only where rights of allottees are not adversely affected. The modified clauses 1.9 & 1.10 are given in table below.

42. In the order, the Commission observed that clause 1.11 of the agreement was abusive. EDC is charged by Government for development of main lines of roads, drainage, sewage, water and electricity. EDC is proportional to the land area of the project and may be linked with number of dwelling units. EDC is invariably passed over by the builder to the allottees. Entire EDC charges for a complex are burdened on allottees in proportion to super area. There may be a case of State increasing EDC charges. Builder can pass on increased EDC charges to allottees only after informing the allottee about the order of the State Government enhancing EDC (with a copy of letter) and how his share of EDC has been calculated. Non-payment of EDC by an allottee can result only into a recovery action as per law. Neither the allotment can becancelled, nor possession of his apartment can be taken by force. Provision in this clause relating to resumption of the apartment in case of default in payment of EDC is contrary to the provisions of relevant laws. As per section 19 of the Act of 1983 all sums assessed by the**association** of apartment owners towards the share of the common expenses chargeable to any apartment and remaining unpaid has to constitute a charge on such apartment prior to all other charges, except charge, if any on the apartment, for payment of local taxes and all sums unpaid on a first mortgage of the apartment. Further, in case the allottee fails to pay these charges, the Director, Country Planning may recover these charges as arrears of land revenue as per the regulation 19 of Regulations of 1976. The relevant clause 1.11, therefore, should be modified as given in the table below.

43. In the order, the Commission observed that clause 1.14 of the agreement was abusive since it gave sole discretion to DLF regarding arrangement for power supply and rates levied for the sale of power to the allottees. By this clause, the company takes away the right of Allottees' **Association** to get competitive offers from other playe DLF has arbitrarily foisted compulsory payments for another service-provider on the allottee. Clause 1.13 and 1.14 of the agreement are interconnected. Clause 1.13 is about power backup whenever the supply of DHBVN (State Electricity Board) is not there. Clause 1.14 envisages a situation when DHBVN fails to supply electricity to the complex. So long as Resident Welfare **Association** of the Complex does not take charge of services of the complex, the company is bound to provide essential services to the complex in terms of maintenance agreement, but once RWA takes over the responsibilities of the complex, it will have freedom to continue with the service providers engaged by the company or to enter into fresh contracts with some service provider or engage new service provider. Also since the Company marketed and sold **Belaire** Complex as govt. approved residential project and govt. charging heavy amount as EDC, providing of DHBVN connection by the state is mandatory and the company has to ensure DHBVN connection for each allottee. The relevant clauses 1.13 and 1.14 be modified as suggested in the table.

44. In the order, the Commission found clause 4 of the agreement abusive as it provided arbitrary forfeiture of earnest money by the company without even a notice to the allottee. The company provided for forfeiture of amounts of allottee for non-fulfillment of the conditions of agreement by the allottee, but there is no corresponding clause in respect of non-fulfillment of clauses of agreement on the part of company. Clause 5, 8, 10 and 12 of the agreement are highly one-sided and should be modified. Modified clauses are given in the table below.

45. The delivery of possession of the apartment by the company is governed by clause 10 and clause 11 of the Agreement. However, clauses 11.1, 11.2, 11.3 and clause 39 provide for those circumstances under which the company may not deliver the possession in time or may abandon the project altogether without its fault and the consequences. Clause 11.1 talks of non availability of construction, material, strike of the work force, terrorist act, enemy act, act of God, delay in grant of permissions, completion certificate etc. from the government or the property becoming subject matter of litigation in Courts or before Tribunals. Clause 11.2 provides for eventualities of delay in giving possession of apartments due to Govt. rules, orders, notifications, after the agreement and the companies' decision to challenge the same in Courts/Tribunals. Clause 11.1 provides that the company shall not be bound by the existingperiod of delivery in case of eventualities as stated therein and shall have the power to

extend the period of delivery of possession and may also unilaterally alter the terms of agreement. It also provides that in case of abandonment of project by the company, it would be at liberty to cancel the agreement and to refund to the allottee "amount attributable to the agreement" without any interest. 'Amount attributable to the agreement' has not been defined clearly and the same is vague, which gives arbitrary powers to the company. In cases of cancellation/abandonment of the project by the company for none of the fault of the allottee, the company was not even liable to return the amount actually paid by the allottee to the company with interest but the company, out of the amount paid by the allottee was to deduct the interest paid by the allottee and the interest due towards allottee on delayed payment as well as to deduct amount of non refundable nature. The company had not specified as to what was the amount of non-refundable nature to be deducted. Similar provision is there in clause 11.2 towards refund of "amount attributable to the agreement" without interest in case of the project getting scrapped altogether. Clause 11.3 provides that if for the reasons other than clause 11.1, 11.2 and clause 39, the company fails to deliver the possession to the allottees within three years from the date of execution of agreement or within the extended period (the company having liberty to extend the period to any extent.) then the allottee shall be entitled to give notice to the company within 90 days from the expiry of the said period of three years or extended period of terminating the agreement. Even in that event the company was not liable to refund the amount deposited by the allottee along with interests to him. In such an eventuality, the company on receipt of notice, was at liberty to sell/dispose of the apartment to any other party and without accounting for the sale proceeds of the apartment to the allottee within 90 days of the realisation of the price was to refund to the apartment allottee his amount without interest, after deduction of brokerage paid by the company to the broker/sale organiser (in case booking was done through broker/sale organiser) the allottee thereafter could make no claim against the company. If the allottee failed to exercise his/her right of termination within the period as provided in this clause by delivering a written notice to the company then he was not to be entitled to terminate the agreement and was to continue to be bound by the terms of the agreement. In similar way, clause 11.4 provided that in case of abandonment of the project/scheme by the company or if the company failed to give possession within three years of the execution of the agreement or within the extended period as extended by the company itself under various clauses of the agreement, the company shall be entitled to terminate the agreement and the company shall, on such termination refund only the amount paid by the apartment allottee with 9% simple interest for such period for which it was lying with the company. The company was not liable to pay any other compensation. Even in such an eventuality, the company, at its sole option and discretion, could decide not to terminate the agreement and to pay to the allottee and not to anyone else (his successor or subsequently transferee) compensation at 5/- per sq. feet of the super area of the said apartment per month for the period of such delay beyond three years or extended period, subject to condition that apartment allottee was not in default under any term of the agreement. This compensation was also to be adjusted only at the time of giving possession the said apartment to the Allottee. Clause 12 described defaults only on the part of the allottee as if company can commit no default.

These provisions also show that there was no exit option with the allottee and the clauses were abusive and heavily loaded in favour of the company. The company had foisted these clauses on the allottee giving no option to the allottee to bargain for the exit, while the company had liberty to extend the period of delivery of possession on self serving grounds like non availability of material, non availability of work force, any govt. notifications, orders or litigations in the Court, which may even have been invited by the company itself, without any penalty on the company for such extended period of delivery. The allottee in case of delay in payment of the instalment had to pay interest to the company @ 15% within 1st 90 days and 18% thereafter. Even where the company failed to deliver the possession within the extended period, a written notice is to be given by the allottee with duly acknowledge receipt of the company whereas the company unilaterally, without any prior notice could terminate the agreement even in case of default in payment of instalment by the allottee. The abuse of

dominance is self evident from the provisions of these clauses. The Commission considers that the above clauses should be modified in the manner as given in the table to make this agreement non abusive.

46. Clause 13 is regarding execution of conveyance deed in favour of apartment allottee who has paid full consideration amount to company. The transfer of ownership has to be in accordance with the Act of 1983. However, clause is totally one sided putting no obligation on company to execute the conveyance deed once stamp duty papers are sent to the company after paying entire price as per the agreement. Clause 14 of the original agreement is concerning maintenance and it does not recognise the right of allottees to manage the common services of the complex through RWA, as provided in the Act of 1983. Clause 13 & 14 can be made non abusive by suggested modifications given in table below.

47. In para 12.90, the Commission observed that under the agreement DLF had sole authority to make addition and alteration in the building with all benefits flowing to DLF and the allottee having no say in this regard. The abusive provisions are contained in clauses 20, 22 and other clauses of the agreement, excerpts of which were re-produced in the main order of 12th August, **2011**. Clause 20 gives unfettered right to company to make any addition, alteration, improvements, repair whether structural or non structural, ordinary or extraordinary to unsold units within the building with no right to the allottees of other apartment to raise any objection. The allottee as well as the company both are bound by the building bye laws applicable to apartments. If the company has a right to make structural changes in the apartments belonging to it, the same rights have to be available to the allottee also and these rights are naturally to be exercised in accordance with the laws applicable to a GHS Complex. The relevant clauses should be modified as suggested in the annexure.

48. Clause 20 gives the company the right to make additions, alterations, improvements and other changes in unsold apartments. The rights of the company and the apartment owners in their respective apartments are equal. Company cannot have more rights.

49. Clause 22 gives rights to the company to make additional constructions, to put up additional structure in or upon the building or put additional apartments or structures anywhere in the said complex or in the said portion of land as may be approved by the competent authority and additional apartments/buildings have to be the sole property of the companywhich the company would be entitled to dispose of in any way without any interference on the part of the apartment allottee.

The laws applicable to Group Housing Complexes have been briefly narrated above. These laws make it abundantly clear that once the plan for Group Housing Complex is approved by the competent authority as per the applicable FAR and these apartments are sold on the basis of such approved plans, the company is left with no rights either in the sold apartments or in the common areas. Once the apartments of the complex are sold for considerations or agreed to be sold, the company cannot change the plans without approval of the allottees since the allottees are charged not only for the apartment but for all internal and external developments including common areas, open areas, external and internal infrastructure. The allottees while entering into the agreement had before them the complex as promised to be developed by the developer and they put their hard earned money keeping in mind the number of flats to come up, the kind of facilities to be given, population density, the open green areas and other common facilities etc. The joint ownership rights of apartments allottees over common areas and land and the apartment ownership rights of the allottees go together. The company cannot take away these rights from the allottees. Once the company had utilized FAR available at the relevant time in respect of the land over which the complex is to be developed, any subsequent increase in FAR would belong to the allottees and not to the company and it is only the allottees **association** which will have right to put additional construction with consent of all the allottees. The company shall have no right to have additional construction if subsequently FAR is increased. As such, clause 20 & clause 22 and other such clauses are highly abusive, should be modified as suggested in the table.

50. In para 12.90, the Commission had observed that creation of 3rd party rights by the company without allottees consent was to the determinant of allottees interest and was abusive. A reference was made to clause-23 of the agreement. Clause 23 of the Agreement gives right to the company to raise finance, loan for its own purpose from any financial institution, bank by way of mortgage or creating charge over the building/apartment/portion of building or by any other mode subject to condition that when the conveyance deed is executed, the apartment shall be free from all encumbrances. It is further provided that the company/financial institution/bank shall always have first lien/charge on said apartment for their dues and other sums to be payable by the apartment allottee in respect of any loan granted to the company for purpose of construction of the building/complex. While first part of the clause gives right to the company to raise loan before execution of conveyance deed and provides that at the time of conveyance deed it shall be free from all encumbrances, the second part of the clause provides that the banks or financial institution shall have first lien for recovery of their dues on the apartment of the allottee. The first part is contradictory to the second. Moreover, this clause only talks of the apartment and not of the complex. There is no doubt that during the construction and before delivery of possession of apartment of the complex, the property belongs to the company. However, once the complex is complete and completion certificate is obtained and it is ready for transfer to the allottees, the company has to make entire complex free from all encumbrances, before transferring the apartments and other common areas under joint ownership rights. The apartment alone is not the property of the allottee. The allottee is also joint owner of all the open areas, common facilities etc. within the complex. Therefore,when the complex is ready and conveyance deeds are executed with the allottees, the whole complex has to be free from all encumbrances and of mortgage, charges or any kind of loan from financial institutions or banks over the complex. If the company has any unpaid loan of the banks/financial institution after the apartments are sold, the banks etc. can have lien only over unsold apartments for recovery of dues of the company. Clause 23, 24 & 25 should be modified as given in the table below to remove this abuse.

51. The Commission, in its order, observed that while heavy penalties were imposed in the agreement for default of allottee, there were insignificant penalties on DLF for its own defaults. A reference was made to clause 35 of the agreement, which shows abuse of dominance. The company can refuse to condone delay and can cancel the apartment even if the allottee was prepared to pay interest on delayed payment. While in case of company, the company for itself has reserved so many excuses for non delivery of possession and for scrapping the contract altogether or for delaying the project. It has given itself the powers to extend the period of delivering possession but for the allottee, the sole discretion lies with the company to cancel the flat in case of delayed payment. In case of condoning delay, the Company could be charging interest to the tune of 15% for 1st 90 days and thereafter 18%. However, for the default of the company, the company was liable to pay only 9% interest to the allottee on only such amount which the company deemed refundable to the allottee. That makes the clause abusive, one sided and shows blatant abuse of dominance. In clause 12, the company has given events of defaults and consequences for the allottee. The company has nowhere given in the entire agreement the events of defaults for itself. The Commission considers that the defaults can be on the part of the company as well on the part of the allottees and the agreement should provide for defaults of both the parties and the agreement must be equitable in dealing with both the sides and levy of interest/penalty should of equal level on both sides. The Commission also considers that Force Majeure in clause 39 should be defined as understood in common parlance of law. The consequent modifications are suggested in the clauses 35 & 39.

52. In view of the modified clauses/sub clauses as suggested above in the agreement, certain clauses/sub clauses of the agreement have become superfluous. The Commission has suggested deletion of these clauses. Certain clauses of the agreement, in view of the suggested modified clauses, needed small changes so as to bring them in consonance with the modified clauses. These changes are minor in nature and have been suggested wherever needed. Some clauses are closely interlinked with the abusive clauses and had to be modified so that the

abuse was not perpetuated. These interlinked clauses wherever existed have been accordingly modified. The clauses which needed fine tuning with the modified clauses have also been accordingly modified and the suggested clauses have been given in the table below.

53. The terms of the agreement to be entered into with the allottee were never shown to the allottee at the time of booking of the apartment. These terms and conditions of the agreement were prepared and framed by the company unilaterally without consulting the buyer. Once the company had already received considerable amount from the applicants/buyers, this agreement was forced upon the allottees and the allottee had no option but to sign the agreement, as otherwise the agreement provided for heavy penalties and deduction from the money already deposited by the allottees with the company, which itself was an abuse of dominance. Theappropriate procedure would have been that a copy of the agreement which DLF proposed to enter with the allottee should have been made available to the applicants at the time of inviting applications. The agreement should be signed within a reasonable time from the date of allotment and all additional amounts should be demanded from the allottee only when the agreement has been signed. Any allottee, who was not agreeable to the terms of agreement, should have liberty to withdraw his application and should be given the entire application amount back.

54. Secretary is directed to provide a copy of this order to all concerned, besides forwarding the same to Hon'ble Competition Appellate Tribunal (COMPAT). It is ordered accordingly.

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Sh. Surinder Singh Barmi v. Board for Control of Cricket in India (BCCI)

[2013]113 CLA579 (CCI), 2013CompLR297(CCI), [2013]118SCL226(CCI)

In its order of 8 February, 2013, the Competition Commission of India (CCI) has found the Board of Control of Cricket in India (BCCI) to be abusing its dominant position in contravention of Section 4(2)(c) of the Competition Act, 2002 (Competition Act) and imposed a penalty of approximately 52 crores.

CASE NOTE: Inquiry - Section 19(1)(a) of The Competition Act, 2002 ("Act") - Complaint with the Competition Commission of India (CCI) alleging irregularities with the BCCI's grant of franchise rights, media rights, and sponsorship rights in the context of the Indian Premier League (the "IPL"), a private professional Twenty20 cricket league run annually in India - Investigation conducted by the CCI with reference to Competition Law principles - What is the de facto status of BCCI - Held, BCCI has no "statutory status" but their actions in terms of laying down the rules of the game and team selection fall within the ambit of a regulatory role. This status arises on account of the institutional form of BCCI and its inter-linkages with ICC. The approach of Government of India on this matter also needs to be considered. Moreover the background and historical evolution of BCCI will enable to discern the issue.

Despite the fact that BCCI is not recognized by Government of India (GOI) as the regulator of cricket in India, the examination of object clause of Memorandum of Association of BCCI reveals that in substance, BCCI considers it as the regulator of cricket in India. BCCI is a full member of ICC and as such BCCI follows the Rules/Bye Laws made by ICC. Specifically, attention is drawn to Section 32 of ICC Regulations which prescribes the definition of "disapproved cricket"; the Authority of the Members of ICC to "approve" cricket leagues; and the course of action to deal with "disapproved cricket". It is very clear from the reading of the clause that the Members of ICC are authorised to permit/deny the entry of competing leagues. Thus by virtue of Section 32 of ICC Rules, the "right of approval" is vested with BCCI. This "right of approval" is clearly a regulatory role. ICC also vests the rights of deciding on any factor related to cricket with its Members and declares the Members as "custodian" of sport. ICC very clearly declares that the Members of ICC are the custodian of sport of cricket. The word "custodian" clearly highlights the intent of ICC and its Members to regulate/control the sport of cricket in their respective jurisdictions. Another evidence of BCCI as being a de facto regulator and the team participating in International events being Indian team and not a representative of BCCI is found in the ICC Guidelines specifying full member criteria. It expressly states the performance of "national team" as one of the paramete

(a) The substance the "first mover" advantage and the implicit recognition by GOI as the national association for cricket, have contributed to the present status of BCCI.

(b)The Object Clauses of BCCI's Memorandum of Association contradicts the BCCI's stand that it is not a regulator and the team is representing the Board and not India.

(c) The linkages with ICC and the Mndate/Rules/Bye Laws of ICC make it very clear that BCCI is the regulator/custodian of sport of cricket in India. The ICC Bye Laws also makes it very clear that the team is Indian National team and that BCCI is the National Sports Federation.

(d) The submission of GOI to the Supreme Court and the recent attempts made by GOI to bring BCCI within the ambit of Right to Information makes the Government intent clear even if there is absence of any documentary evidence to suggest that BCCI is explicitly declared as a National Association for the sport of cricket in India.

Thus, the Commission from the above evidence concludes that BCCI is a de facto regulator of sport of cricket in India.