LL.B. IV Term

PAPER: LB - 4033 – COMPETITION LAW

Prescribed Legislations:

The Sherman Anti-Trust Act, 1890
The Clayton Act, 1914
Federal Trade Commission Act, 1914
Competition Act, 1998 (UK)
Enterprise Act, 2002 (UK)
MRTP Act, 1969 (India)
The Competition Act, 2002 (India)
The Competition Amendement Bill, 2012(India)
Notifications issued by Competition Commission of India

Prescribed Books:


Prescribed Journals:

Indian Competition Law Review (ICLR)
The Competition Law Review (CompLRev)
Competition Law Insight
Competition Law International
OECD Journal of Competition Law and Policy
European Competition Journal (ECJ)
Antitrust Law Journal (ALJ)
**Topic 1: Introduction and Development of Competition Law**

Basic Concepts – Constitutional aspect of Elimination of Concentration of Wealth and Distribution of Resources Article 39 (b) (c) Relation between Competition Policy and Competition Law – Objectives of Competition Law


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8. Exclusive Motors Pvt. Ltd v. Automobile Lamborghini SPA, Case No. 52/2012,
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10. Belaire Apartment Owners' 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
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Available at: http://www.cci.gov.in/sites/default/files/Mr.%20J%20ChabraDissenting8Nov2011_0.pdf

12. Sh. Surinder Singh Barmi v. Board for Control of Cricket in India (BCCI) [2013]113 CLA579 (CCI), 2013CompLR297(CCI), [2013]118SCL226(CCI) …………………………………………………………………………………………………………………………………………………143


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22. Suo Moto Case No. 03 of 2014, Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items.
Available at: http://www.cci.gov.in/sites/default/files/Order_Suo_Moto_03_of_2014%20%20%20%28Final%29_user_1.pdf

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1) Nagrik Chetna Manch v. Fortified Security Solutions and others, case No. 50 of 2015, order dated 01.05.2018,

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3) Cartelization in respect of tender floated by Indian Railways for supply of brushless DC fans and other electric items, Suo moto case no. 3 of 2014, order dated 18.01.2017,
4) Cartelization of broadcasting service providers by rigging the bids submitted in response to tender floated by sports broadcasters Suo moto case no. 02 of 2013, order dated 11.07.2018

5) In re: Anticompetitive conduct in dry cell batteries market in India, Suo moto case no. 01 of 2017, order 30.08.2018, 6) In re: Alleged Cartelization in flash light in market Suo moto case no. 01 of 2017, order dated 06.11.2018

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**IMPORTANT NOTE:**
1. The topics and cases given above are not exhaustive. The teachers teaching the course shall be at liberty to add new topics/cases.
2. The students are required to study the legislations as amended up-to-date and consult the latest editions of books.
OBJECTIVES OF THE COURSE:

Competition plays a key role in ensuring productive, efficient, innovative and responsive markets. It is recognized that through competition the consumers are ensured availability of ‘goods’ and ‘services’ in abundance of acceptable quality at affordable price. In this direction, competition law, also known as anti-trust law, aims at promoting or maintaining market competition by regulating anti-competitive conduct. In line with the international trend and to cope with changing realities, India has reviewed the Monopolies and Restrictive Trade Practices Act, 1969, and enacted the Competition Act, 2002 with many innovative features.

With the growth of both volume of transactions and the complexity of economies, jurisdictions across the globe have come to realize the need and benefit of having a well-defined competition policy and probably this is the reason the antitrust regime has seen the fastest growth when compared to other economic regulations and have taken a special place which has increased the attractiveness of this subject, and competition lawyers are now prominent in the biggest law firms and institutions advising in complex transactions. The course aims to give a broad overview on the basics of Competition Law in India through a comparison of the main jurisdictions (especially U.S. and UK) and thus provide a solid background for further studies of this subject.

This course on competition law has been structured in a manner to understand the objectives of antitrust laws. To appreciate the law of the land it is essential to also understanding of economic underpinnings of the legal framework. This course initially seeks to reflect upon the competition law of the US and EU as a matter of understanding the historical and existing jurisprudence on the subject. Then, it concentrates on the Indian law on competition. The fascinating feature of the course is that it will examine and compare the application of competition law to business agreements, the exercise of dominant position, the combinations between the firms and sellers and the enforcement mechanisms. Emphasis will be placed on Indian Competition Act, with discussion of laws from selected other jurisdictions such as US, UK and EU. The Competition Commission of India (CCI) has been playing a pivotal role in ensuring competition in Indian market across the sectors. Decisions of the Indian competition authorities will be dealt with exhaustively throughout the course. Therefore, the present course is designed to enable the students to take up professional practice in the field of competition law and policy in India and beyond.
INTRODUCTION OF THE COMPETITION
(AMENDMENT) BILL, 2012 IN INDIA

SALIENT FEATURES AND THE IMPLICATIONS THEREOF

The Competition Act of India (“Act”) was enacted in 2002 as a result of India’s pursuit of globalization and liberalization of the economy. Introduction of the Act was a key step in India’s march towards facing competition – both from within the country and from international players.

The Act is not intended to prohibit competition in the market. What the Act primarily seeks to regulate, are the practices that have an adverse effect on competition in the market(s) in India. In addition, the Act intends to promote and sustain competition in markets, protect consumer interests, and ensure freedom of trade in the market(s) in India.

At the heart of the Act are various activities that will be prohibited as being anti-competitive. The activities comprise:
(a) Anti-competitive arrangements;
(b) Abuse of dominant position; and
(c) Mergers and acquisitions that have an appreciable adverse effect on competition in India.

The Act also provides for the establishment of the Competition Commission of India (“CCI”), which would function as a market regulator for preventing and regulating anti-competitive practices in the country, as well as a Competition Appellate Tribunal (“COMPAT”) which is a quasi-judicial body established to hear and dispose of appeals against any direction issued, or decision made by the CCI.

In light of the experiences gained in its operation and the working of the CCI, the Government of India, in June 2011, constituted an Expert Committee to examine and suggest modifications to the Act. The amendments, approved by the Cabinet in October, are aimed at fine-tuning the regulations to bring rules on par with the prevailing scenario and in light of the experiences gained over the past years. Accordingly, on 7 December 2012, the Central Government introduced the Competition (Amendment) Bill, 2012 in the Lower House (Lok Sabha) (the “Bill”). Typically, a bill has to be passed by both the Houses (Lok sabha and the Rajya Sabha) before it is sent to the President for his assent, pursuant to which, it becomes law.

The salient features of the Bill, as suggested by the Expert Committee, which seek to amend the existing provisions of the Act.

1. Definition of “turnover” under Section 2(y)

Section 2(y) of the Act provides for the definition of “turnover”. The Bill seeks to exclude the taxes levied on sale of goods or provision of services from the definition of turnover. This definition of “turnover” is primarily used for determining thresholds for combinations and for imposition of penalties.

2. Inclusion of provision of “services” under explanation to Section 3(4)

It has been proposed that the explanation to Section 3(4) of the Act (which deals with vertical agreements) should be amended to cover the element of “services” being provided as well. The term “services” has been defined.
Under Section 2(u) of the Act and the same is also incorporated under Section 3(4) of the Act, yet the element relating to the provision of “services” was absent from the explanation to Section 3(4) of the Act.

Thus, for instance, an “exclusive supply agreement” was previously explained as including “any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any foods other than those of the seller or any other person”, it is being proposed to be amended as including “any agreement restricting in any manner the purchaser of goods or recipient of services in the course of his trade from acquiring or otherwise dealing in any foods other than those of the seller or any other person”.

In addition to “exclusive supply agreement(s)”, the explanation to Section 3(4) also provides for scenarios such as tie-in arrangements, exclusive distribution agreements, refusal to deal, resale price maintenance etc., and the proposed amendment (i.e. inclusion of service element) shall apply equally to scenarios under Section 3(4).

3. Inclusion of “collective dominance” aspect under Section 4(1)

It has been proposed that Section 4(1) be amended with the inclusion of the words “jointly or singly”. Accordingly, the proposed revision of the verbiage of Section 4(1) would be: “No enterprise or group, jointly or singly, shall abuse its dominant position”.

There has been a lot of discussion as to how this amendment to Section 4(1) would strengthen the position of the CCI and will introduce a new concept that is in line with the position under Article 82 of the EC Treaty. One line of argument is that the opening words of Article 82 of EC Treaty and Section 4 of the Act, as it presently stands, are divergent, in as much as, Article 82 begins with the phrase “any abuse by one or more undertakings of a dominant position” and it was this phrase “one or more undertakings” which was used by Court of First Instance in Italian Flat Glass case\(^1\) to hold that “there is nothing in principle to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market.” This marked the birth of the concept of “collective dominance” in Europe.

However, Section 4 of the Act aims at “an enterprise” or “group”. Section 4(1) presently reads “[N]o enterprise or group shall abuse its dominant position”. There is nothing in the definition of enterprise under Section 2(h) or in the provisions of Section 4 to suggest that two or more independent entities can be clubbed together to constitute collective dominance.

Having said that, however, in the DTH case\(^2\) in 2011, the dissenting member had opined that an ‘enterprise’ has been defined in Section 2(h) of the Act as including a ‘person’. A ‘[P]erson’ has been defined under Section 2(l) as including ‘as association persons ... whether incorporated or not ...’ and thus, the respondents in that case would together constitute an ‘unincorporated association of persons’, thereby making them an “enterprise” for the purposes of Section 4(1) of the Act.

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\(^1\)Judgment of the Court of First Instance (First Chamber) of 10 March 1992. - Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities – EUR-Lex-61989A0068

\(^2\)Consumer Online Foundation v. Tata Sky Ltd & Ors, Case No. 2/2009, Order dated 24.03.2011 (Dissenting)
Thus, it seems that even without the clarification as proffered in the Bill, there may have been an interpretation of the various provisions of the Act which would have covered the element of “collective dominance” under Section 4(1) of the Act.

4. **Change in threshold levels under Section 5**

The *explanation* to Section 5(b)(i), which provides for a definition of a “group” for the purposes of regulation of “combinations” under the Act, is being proposed to be amended by increasing the threshold levels therein. *Explanation* (b) to Section 5 currently provides that a “group means two or more enterprises which, directly or indirectly, are in a position to -

(i) exercise twenty six percent or more of the voting rights in the other enterprise; or

(ii) appoint more than fifty percent of the members of the board of directors in the other enterprise; or

(iii) control the management or affairs of the other enterprise”.

What the Bill seeks to amend is the threshold of twenty six percent as prescribed under the *explanation* to Section 5(b)(i) above, to **fifty percent**.

The proposed amendment will align the definition of ‘group’ to the exemption which had earlier been granted to a ‘group’ exercising less than fifty percent voting rights in other enterprises, from the applicability of Section 5 of the Act.

5. **Incorporation of a new Section 5(A)**

The Bill seeks to introduce a new enabling section –viz. Section 5(A) under the Act which is supposed to confer upon the Central Government, the power to notify, in consultation with the CCI, different value of assets and turnover for any class or classes of enterprise for the purposes of determining combinations under the Act. The intent behind this proposed new section is to enable the Government and the CCI to set different thresholds for different industry segments.

Introduction of such a provision may establish a low bar for M&A deals and may result in a preponderance of transactions falling under the auspices of the competition regulator. Although this is a dynamic concept, the Expert Committee was of the opinion that as the CCI gained more experience with merger filings, there could be a situation where instead of going through the legislative route, the thresholds could be left to the CCI which could do it through the regulations – which would be less administratively challenging.

6. **Mandatory reference by statutory authority and vice versa (Section 21)**

The Bill seeks to make it mandatory for a statutory authority to refer the matter to the CCI, where an issue arises that any decision of such statutory authority may be contrary to the Act. Likewise, it is proposed to be made mandatory for CCI to refer any matter to the concerned statutory authority where an issue arises that any decision of the CCI may be contrary to any act, whose implementation is entrusted to such statutory authority.

With the proposed amendment, the Bill seeks to ward off conflicts between various regulatory authorities and the CCI and the restrict forum shopping. The proposed amendment is likely to
establish a more transparent legal environment and broaden the CCI’s jurisdiction over all market sectors.

7. **CCI to issue inquiry orders and impose penalties only after hearing the concerned parties (Sections 26 and 27)**

The Bill seeks to amend the inquiry procedure in relation to anti-competitive agreements and abuse of dominance as set out under Section 26(7) and (8) of the Act by providing that in cases where the CCI proposes to cause further investigation or inquiry into a matter, such decision shall be taken by the CCI only after hearing the concerned parties.

The Bill also proposes that under Section 27(b) of the Act, an opportunity to be heard is accorded to the party liable for a penalty. The proposed amendments to Sections 26 and 27 of the Act seem to be with the intent of lowering the procedural objections that are routinely taken up against the CCI’s decisions with the COMPAT.

8. **Period for CCI’s approval to combinations (Section 31(11))**

The Act currently prescribes for a period of 210 days within which, the CCI has to pass an order in relation to a “combination”, failing which, the combination shall be deemed to have been approved.

The Bill seeks to propose a reduction in the period from 210 days to 180 days within which the CCI has to approve / seek modification of / pass orders in relation to a combination notified under the Act. A consequential amendment is proposed under Section 31(12) of the act to exclude extension of time granted at the parties’ request.

9. **Director General’s power of search and seizure (Section 41)**

The Act currently allows for dawn raids, but requires the CCI to seek authorization from the courts after it has conclusive evidence of a violation of the competition laws in India. As a result, there have not been any dawn raids in India by the CCI.

An amendment to Section 41 of the Act is proposed which seeks to confer wider powers of search, seizure, entering places and recording statements on oath, upon the Director General, to facilitate investigations, so long as the Director General has reason to believe that the person concerned has omitted or failed, or would omit or fail or would destroy, mutilate, alter etc, the information and/or documents pertinent to the investigation. Such powers of the Director General are proposed to be exercisable with the prior permission of the Chairman, CCI.

The proposed amendment will thus, facilitate the CCI in investigating cartels, as it will enable the regulator to act independently and efficiently, since the CCI Chairman is proposed to take over the responsibility of authorizing such tactics.

This is a brief synopsis of the proposed amendments to the Competition Act and the same is subject to change as and when the Competition (Amendment) Act comes into force.
BrahmDutt v. Union of India

AIR 2005 SC 730

G.P. MATHUR, C.J. & P.K. BALASUBRAMANYAN, J.:  

The Competition Act, 2002 received the assent of the President of India on 13.1.2003 and was published in the Gazette of India dated 14.1.2003. It is an Act to provide for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith. The statement of objects and reasons indicates that the Monopolies and Restrictive Trade Practices Act, 1969 had become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift the country's focus from curbing the monopolies to promoting competition. Section 1(3) of the Act provides that the Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and provided that different dates may be appointed for different provisions of the Act. Pursuant to this, some of the sections of the Act were brought into force on 31.3.2003 vide S.O. 340 (E) and published in the Gazette of India dated 31.3.2003 and majority of the other sections by notification S.O. 715 (E) dated 19.6.2003. In view of bringing into force Sections 7 and 8 of the Act, the Central Government had to make prescription for the appointment of a Chairman and the members as composing the Commission in terms of Section 9 of the Act.

2. In exercise of the Rule making power under Section 63(2)(a) read with Section 9 of the Act, the Central Government made "The Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules, 2003" and published the same in the Gazette of India on 4.4.2003. Section 9 of the Act provides for the selection of the Chairperson and the other members as may be prescribed. The Rules above referred to was that prescription. Under Rule 3, the Central Government was to constitute a Committee consisting of a person who has been retired Judge of the Supreme Court or a High Court or a retired Chairperson of a Tribunal established under an Act of Parliament or a distinguished jurist or a Senior Advocate for five years or more, a person who had special knowledge of and professional experience of 25 years or more in international trade, economics, business, commerce or industry, a person who had special knowledge of and professional experience of 25 years or more in accountancy, management, finance, public affairs or administration to be nominated by the Central Government. The Central Government was also to nominate one of the members of the Committee to act as the Chairperson of the Committee. The function of the Committee was to fill up the vacancies as and when vacancies of Chairperson or a member of the Commission exits or arises or is likely to arise and the reference in that behalf had been made to the Committee by the Central Government. It is said that the Committee so constituted made a recommendation in terms of Rule 4(3) of 'the Rules' and a Chairman and a member were appointed. Though, the member claims to have taken charge immediately after being appointed, the person appointed as Chairman, has taken the stand that he had not taken charge since he was content to await the orders of this Court in view of the filing of this Writ Petition.

3. The present Writ Petition was filed in this Court by a practicing Advocate essentially praying for the relief of striking down Rule 3 of the Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules, 2003 (hereinafter referred to as 'the Rules') and for other consequential reliefs including the issue of a writ of mandamus directing the Union of India to appoint a person who is or has been a Chief Justice of a High Court or a senior Judge of a High Court in India in terms of the directions contained in the decision in S.P. Sampath Kumar v. Union of India & Others, (1987 ) 1 SCC 124. The
essential challenge was on the basis that the Competition Commission envisaged by the Act was more of a judicial body having adjudicatory powers on questions of importance and legalistic in nature and in the background of the doctrine of separation of powers recognized by the Indian Constitution, the right to appoint the judicial members of the Commission should rest with the Chief Justice of India or his nominee and further the Chairman of the Commission had necessarily to be a retired Chief Justice or Judge of the Supreme Court or of the High Court, to be nominated by the Chief Justice of India or by a Committee presided over by the Chief Justice of India. In other words, the contention is that the Chairman of the Commission had to be a person connected with the judiciary picked for the job by the head of the judiciary and it should not be a bureaucrat or other person appointed by the executive without reference to the head of the judiciary. The arguments in that behalf are met by the Union of India essentially on the ground that the Competition Commission was more of a regulatory body and it is a body that requires expertise in the field and such expertise cannot be supplied by members of the judiciary who can, of course, adjudicate upon matters in dispute. It is further contended that so long as the power of judicial review of the High Courts and the Supreme Court is not taken away or impeded, the right of the Government to appoint the Commission in terms of the statute could not be successfully challenged on the principle of separation of powers recognized by the Constitution. It was also contended that the Competition Commission was an expert body and it is not as if India was the first country which appointed such a Commission presided over by persons qualified in the relevant disciplines other than judges or judicial office since the main functions of the expert body were regulatory in nature, there was no merit in the challenge raised in the Writ Petition.

4. During the pendency of the Writ Petition, two additional counter affidavits were filed on behalf of the Union of India, in which it was submitted that the Government was proposing to make certain amendments to the Act and also Rule 3 of ‘the Rules’ so as to enable the Chairman and the members to be selected by a Committee presided over by the Chief Justice of India or his nominee. This position was reiterated at the time of arguments. Of course, it was also pointed out that the question of amendment had ultimately to rest with the Parliament and the Government was only in a position to propose the amendments as indicated in the additional affidavits. But it was reiterated that the Chairman of the Commission should be an expert in the field and need not necessarily be a Judge or a retired Judge of the High Court or the Supreme Court.

5. We find that the amendments which the Union of India proposes to introduce in Parliament would have a clear bearing on the question raised for decision in the Writ Petition essentially based on the separation of powers recognized by the Constitution. The challenge that there is usurpation of judicial power and conferment of the same on a non-judicial body is sought to be met by taking the stand that an Appellate Authority would be constituted and that body would essentially be a judicial body conforming to the concept of separation of judicial powers as recognized by this Court. In the Writ Petition the challenge is essentially general in nature and how far that general challenge would be met by the proposed amendments is a question that has to be considered later, if and when, the amendments are made to the enactment. In fact, what is contended by learned counsel for the petitioner is that the prospect of an amendment or the proposal for an amendment cannot be taken note of at this stage. Since, we feel that it will be appropriate to consider the validity of the relevant provisions of the Act with particular reference to Rule 3 of the Rules and Section 8(2) of the Act, after the enactment is amended as sought to be held out by the Union of India in its counter affidavits, we are satisfied that it will not be proper to pronounce on the question at this stage. On the whole, we feel that it will be appropriate to postpone a decision on the question after the amendments, if any, to the Act are carried out and without prejudice to the rights of the petitioner to approach this Court again with specific averments in support of the challenge with reference to the various sections of the Act on the basis of the arguments that were raised before us at the time of hearing. Therefore, we decline to answer at this stage, the challenge raised by the petitioner.
and leave open all questions to be decided in an appropriate Writ Petition, in the context of the submission in the counter affidavits filed on behalf of the Union of India that certain amendments to the enactment are proposed and a bill in that behalf would be introduced in Parliament.

6. We may observe that if an expert body is to be created as submitted on behalf of the Union of India consistent with what is said to be the international practice, it might be appropriate for the respondents to consider the creation of two separate bodies, one with expertise that is advisory and regulatory and the other adjudicatory. This followed up by an appellate body as contemplated by the proposed amendment, can go a long way, in meeting the challenge sought to be raised in this Writ Petition based on the doctrine of separation of powers recognized by the Constitution. Any way, it is for those who are concerned with the process of amendment to consider that aspect. It cannot be gainsaid that the Commission as now contemplated, has a number of adjudicatory functions as well.

7. Thus, leaving open all questions regarding the validity of the enactment including the validity of Rule 3 of the Rules to be decided after the amendment of the Act as held out is made or attempted, we close this Writ Petition declining to pronounce on the matters argued before us in a theoretical context and based only on general pleadings on the effect of the various provisions to support the challenge based on the doctrine of separation of power.

8. The Writ Petition is thus disposed of leaving open all the relevant questions.

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Jindal Steel and Power Ltd, the informant, invoked the provisions of Section 19 read with Section 26 (1) of the Act by providing information to the Commission alleging that Steel Authority of India entered into an exclusive supply agreement with Indian Railways for supply of rails, thereby violating Section 3 and 4 of the Act. The Commission formed the opinion that prima facie a case existed against SAIL and directed the Director General to investigate the matter. SAIL filed an interim reply seeking a hearing before the Commission before any interim order is passed. On reiteration of its earlier orders by the Commission, SAIL challenged the correctness of the directions before the Competition Appellate Tribunal. The Tribunal in its order dated 15th February, 2010, inter alia, but significantly held as under:

a) The application of the Commission for impleadment was dismissed, as in the opinion of the Tribunal the Commission was neither a necessary nor a proper party in the appellate proceedings before the Tribunal. Resultantly, the application for vacation of stay also came to be dismissed.

b) It was held that giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review. Thus, the Commission is directed to give reasons while passing any order, direction or taking any decision.

c) The appeal against the order dated 8th December, 2009 was held to be maintainable in terms of Section 53A of the Act. While setting aside the said order of the Commission and recording a finding that there was violation of principles of natural justice, the Tribunal granted further time to SAIL to file reply by 22nd February, 2010 in addition to the reply already filed by SAIL.

This order of the Tribunal dated 15th February, 2010 is impugned in the present appeal.

In order to examine the merit or otherwise of the contentions raised by the respective parties, it will be appropriate for us to formulate the following points for determination:--

1) Whether the directions passed by the Commission in exercise of its powers under Section 26(1) of the Act forming a prima facie opinion would be appealable in terms of Section 53A(1) of the Act?

2) What is the ambit and scope of power vested with the Commission under Section 26(1) of the Act and whether the parties, including the informant or the affected party, are entitled to notice or hearing, as a matter of right, at the preliminary stage of formulating an opinion as to the existence of the prima facie case?

3) Whether the Commission would be a necessary, or at least a proper, party in the proceedings before the Tribunal in an appeal preferred by any party?

4) At what stage and in what manner the Commission can exercise powers vested in it under Section 33 of the Act to pass temporary restraint orders?

5) Whether it is obligatory for the Commission to record reasons for formation of a prima facie opinion in terms of Section 26(1) of the Act?

6) What directions, if any, need to be issued by the Court to ensure proper compliance in regard to procedural requirements while keeping in mind the scheme of the Act and the legislative intent? Also to ensure that the procedural intricacies do not hamper in achieving the object of the Act, i.e., free market and competition.

Submissions made and findings in relation to Point No.1

If we examine the relevant provisions of the Act, the legislature, in its wisdom, has used different expressions in regard to exercise of jurisdiction by the Commission. The Commission may issue directions, pass orders or take decisions, as required, under the various provisions of
the Act. The object of the Act is demonstrated by the prohibitions contained in Sections 3 and 4 of the Act. Where prohibition under Section 3 relates to anti-competition agreements there Section 4 relates to the abuse of dominant position. The regulations and control in relation to combinations is dealt with in Section 6 of the Act. The power of the Commission to make inquiry into such agreements and the dominant position of an entrepreneur, is set into motion by providing information to the Commission in accordance with the provisions of Section 19 of the Act and such inquiry is to be conducted by the Commission as per the procedure evolved by the legislature under Section 26 of the Act. In other words, the provisions of Sections 19 and 26 are of great relevance and the discussion on the controversies involved in the present case would revolve on the interpretation given by the Court to these provisions. (Refer to Sections 19 and 26 of the Act).

The Tribunal has been vested with the power to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission in exercise of its powers under the provisions mentioned in Section 53A of the Act. The appeals preferred before the Tribunal under Section 53A of the Act are to be heard and dealt with by the Tribunal as per the procedure spelt out under Section 53B of the Act. (Refer to Sections 53A and 53B of the Act). As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the existence of a prima facie case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are initiated by the intimation or reference received by the Commission in any of the manners specified under Section 19 of the Act. At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no prima facie case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper. In other words, the order passed by the Commission under Section 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order has been specifically made appealable under Section 53A of the Act. In contradistinction, the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the lis. Closure of the case causes determination of rights and affects a party, i.e. the informant; resultantly, the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations.

The provisions of Sections 26 and 53A of the Act clearly depict legislative intent that the framers never desired that all orders, directions and decisions should be appealable to the Tribunal. Once the legislature has opted to specifically state the order, direction and decision, which would be appealable by using clear and unambiguous language, then the normal result would be that all other directions, orders etc. are not only intended to be excluded but, in fact, have been excluded from the operation of that provision.

The objective of the Act is more than clear that the legislature intended to provide a very limited right to appeal. The orders which can be appealed against have been specifically stipulated by unambiguously excluding the provisions which the legislature did not intend to make appealable under the provisions of the Act. It is always expected of the Court to apply plain rule of construction rather than trying to read the words into the statute which have been specifically omitted by the legislature.

Right to appeal is a creation of statute and it does require application of rule of plain construction. Such provision should neither be construed too strictly nor too liberally, if given
either of these extreme interpretations, it is bound to adversely affect the legislative object as well as hamper the proceedings before the appropriate forum.

In the case of Maria Cristina De Souza Sadder vs. Amria Zurana Pereira Pinto [(1979) 1 SCC 92], this Court held as under:

“...It is no doubt well-settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the lis is commenced in the Court of the first instance, and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof.”

The principle of ‘appeal being a statutory right and no party having a right to file appeal except in accordance with the prescribed procedure’ is now well settled. The right of appeal may be lost to a party in face of relevant provisions of law in appropriate cases. It being creation of a statute, legislature has to decide whether the right to appeal should be unconditional or conditional. Such law does not violate Article 14 of the Constitution. An appeal to be maintainable must have its genesis in the authority of law.

Thus, it is evident that the right to appeal is not a right which can be assumed by logical analysis much less by exercise of inherent jurisdiction. It essentially should be provided by the law in force. In absence of any specific provision creating a right in a party to file an appeal, such right can neither be assumed nor inferred in favour of the party. A statute is stated to be the edict of Legislature. It expresses the will of Legislature and the function of the Court is to interpret the document according to the intent of those who made it. It is a settled rule of construction of statute that the provisions should be interpreted by applying plain rule of construction. The Courts normally would not imply anything which is inconsistent with the words expressly used by the statute. In other words, the Court would keep in mind that its function is jus dicere, not jus dare. The right of appeal being creation of the statute and being a statutory right does not invite unnecessarily liberal or strict construction. The best norm would be to give literal construction keeping the legislative intent in mind.

Recently, again Supreme Court in Grasim Industries Ltd. v. Collector of Customs, Bombay, (2002) 4 SCC 297 has followed the same principle and observed:

“Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for Court to take upon itself the task of amending or altering the statutory provisions.”

Having enacted these provisions, the legislature in its wisdom, made only the order under Section 26(2) and 26(6) appealable under Section 53A of the Act. Thus, it specifically excludes the opinion/decision of the authority under Section 26(1) and even an order passed under Section 26(7) directing further inquiry, from being appealable before the Tribunal. Therefore, it would neither be permissible nor advisable to make these provisions appealable against the legislative mandate. The existence of such excluding provisions, in fact, exists in different statutes. Reference can even be made to the provisions of Section 100A of the Code of Civil Procedure, where an order, which even may be a judgment, under the provisions of the Letters Patent of different High Courts and are appealable within that law, are now excluded from the scope of the appealable orders. In other words, instead of enlarging the scope of appealable orders under that provision, the Courts have applied the rule of plain construction and held that no appeal would lie in conflict with the provisions of Section 100A of the Code of Civil Procedure.

Expressum facit cessaret acitum – Express mention of one thing implies the exclusion of other. (Expression precludes implication). This doctrine has been applied by this Court in various cases to enunciate the principle that expression precludes implication. [Union of India vs. Tulsiram Patel, AIR 1985 SC 1416]. It is always safer to apply plain and primary rule of construction. The first and primary rule of construction is that intention of the legislature is to be found in the words used by the legislature itself.
Applying these principles to the provisions of Section 53A(1)(a), we are of the considered view that the appropriate interpretation of this provision would be that no other direction, decision or order of the Commission is appealable except those expressly stated in Section 53A(1)(a). The maxim estbonijudicisampliarejusticiam, nonjurisdictionem finds application here. Right to appeal, being a statutory right, is controlled strictly by the provision and the procedure prescribing such a right. To read into the language of Section 53A that every direction, order or decision of the Commission would be appealable will amount to unreasonable expansion of the provision, when the language of Section 53A is clear and unambiguous. Section 53B(1) itself is an indicator of the restricted scope of appeals that shall be maintainable before the Tribunal; it provides that the aggrieved party has a right of appeal against ‘any direction, decision or order referred to in Section 53A(1)(a).’ If the legislature intended to enlarge the scope and make orders, other than those, specified in Section 53A(1)(a), then the language of Section 53B(1) ought to have been quite distinct from the one used by the legislature. One of the parties before the Commission would, in any case, be aggrieved by an order where the Commission grants or declines to grant extension of time. Thus, every such order passed by the Commission would have to be treated as appealable as per the contention raised by the respondent before us as well as the view taken by the Tribunal. In our view, such orders cannot be held to be appealable within the meaning and language of Section 53A of the Act and also on the principle that they are not orders which determine the rights of the parties. No appeal can lie against such an order. Still the parties are not remeiless as, when they prefer an appeal against the final order, they can always take up grounds to challenge the interim orders/directions passed by the Commission in the memorandum of appeal. Such an approach would be in consonance with the procedural law prescribed in Order XLIII Rule 1A and even other provisions of Code of Civil Procedure. The above approach will subserve the purpose of the Act in the following manner:

First, expeditious disposal of matters before the Commission and the Tribunal is an apparent legislative intent from the bare reading of the provisions of the Act and more particularly the Regulations framed thereunder. Second, if every direction or recording of an opinion are made appealable then certainly it would amount to abuse of the process of appeal. Besides this, burdening the Tribunal with appeals against non-appealable orders would defeat the object of the Act, as a prolonged litigation may harm the interest of free and fair market and economy. Finally, we see no ambiguity in the language of the provision, but even if, for the sake of argument, we assume that the provision is capable of two interpretations then we must accept the one which will fall in line with the legislative intent rather than the one which defeat the object of the Act.

For these reasons, we have no hesitation in holding that no appeal will lie from any decision, order or direction of the Commission which is not made specifically appealable under Section 53A(1)(a) of the Act. Thus, the appeal preferred by SAIL ought to have been dismissed by the Tribunal as not maintainable.

Submissions made and findings in relation to Point Nos.2 & 5

The issue of notice and hearing are squarely covered under the ambit of the principles of natural justice. Thus, it will not be inappropriate to discuss these issues commonly under the same head. The principle of audi alteram partem, as commonly understood, means ‘hear the other side or hear both sides before a decision is arrived at’. It is founded on the rule that no one should be condemned or deprived of his right even in quasi judicial proceedings unless he has been granted liberty of being heard. In cases of Cooper v. Wands Worth Board of Works [(1863), 14 C.B. (N.S.) 180] and Errington v. Minister of Health, [(1935) 1 KB 249], the Courts in the United Kingdom had enunciated this principle in the early times. This principle was adopted under various legal systems including India and was applied with some limitations even to the field of administrative law. However, with the development of law, this doctrine was expanded in its application and the Courts specifically included in its purview, the right to notice and requirement of reasoned orders, upon due application of mind in addition to the right of hearing. These principles have now been consistently followed in judicial dictum of Courts in India and are largely understood as integral
part of principles of natural justice. In other words, it is expected of a tribunal or any quasi judicial body to ensure compliance of these principles before any order adverse to the interest of the party can be passed. However, the exclusion of the principles of natural justice is also an equally known concept and the legislature has the competence to enact laws which specifically exclude the application of principles of natural justice in larger public interest and for valid reasons. Generally, we can classify compliance or otherwise, of these principles mainly under three categories. First, where application of principles of natural justice is excluded by specific legislation; second, where the law contemplates strict compliance to the provisions of principles of natural justice and default in compliance thereto can result in vitiating not only the orders but even the proceedings taken against the delinquent; and third, where the law requires compliance to these principles of natural justice, but an irresistible conclusion is drawn by the competent court or forum that no prejudice has been caused to the delinquent and the non-compliance is with regard to an action of directory nature. The cases may fall in any of these categories and therefore, the Court has to examine the facts of each case in light of the Act or the Rules and Regulations in force in relation to such a case. It is not only difficult but also not advisable to spell out any straight jacket formula which can be applied universally to all cases without variation.

In light of the above principles, let us examine whether in terms of Section 26(1) of the Act read with Regulations in force, it is obligatory upon the Commission to issue notice to the parties concerned (more particularly the affected parties) and then form an opinion as to the existence of a prima facie case, or otherwise, and to issue direction to the Director General to conduct investigation in the matter. At the very outset, we must make it clear that we are considering the application of these principles only in light of the provisions of Section 26(1) and the finding recorded by the Tribunal in this regard. The intimation received by the Commission from any specific person complaining of violation of Section 3(4) read with Section 19 of the Act, sets into the motion, the mechanism stated under Section 26 of the Act. Section 26(1), as already noticed, requires the Commission to form an opinion whether or not there exists a prima facie case for issuance of direction to the Director General to conduct an investigation. This section does not mention about issuance of any notice to any party before or at the time of formation of an opinion by the Commission on the basis of a reference or information received by it. Language of Sections 3(4) and 19 and for that matter, any other provision of the Act does not suggest that notice to the informant or any other person is required to be issued at this stage. In contra-distinction to this, when the Commission receives the report from the Director General and if it has not already taken a decision to close the case under Section 26(2), the Commission is not only expected to forward the copy of the report, issue notice, invite objections or suggestions from the informant, Central Government, State Government, Statutory Authorities or the parties concerned, but also to provide an opportunity of hearing to the parties before arriving at any final conclusion under Section 26(7) or 26(8) of the Act, as the case may be. This obviously means that wherever the legislature has intended that notice is to be served upon the other party, it has specifically so stated and we see no compelling reason to read into the provisions of Section 26(1) the requirement of notice, when it is conspicuous by its very absence. Once the proceedings before the Commission are completed, the parties have a right to appeal under Section 53A(1)(a) in regard to the ordersterned as appealable under that provision. Section 53B requires that the Tribunal should give, parties to the appeal, notice and an opportunity of being heard before passing orders, as it may deem fit and proper, confirming, modifying or setting aside the direction, decision or order appealed against. Some of the Regulations also throw light as to when and how notice is required to be served upon the parties including the affected party.

Regulation 14(7) states the powers and functions, which are vested with the Secretary of the Commission to ensure timely and efficient disposal of the matter and for achieving the objectives of the Act. Under Regulation 14(7)(f) the Secretary of the Commission is required to serve notice of the date of ordinary meeting of the Commission to consider the information or reference or document to decide if there exists a prima facie case and to convey the
directions of the Commission for investigation, or to issue notice of an inquiry after receipt and consideration of the report of the Director General. In other words, this provision talks of issuing a notice for holding an ordinary meeting of the Commission. This notice is intended to be issued only to the members of the Commission who constitute ‘preliminary conference’ as they alone have to decide about the existence of a prima facie case. Then, it has to convey the direction of the Commission to the Director General. After the receipt of the report of the Director General, it has to issue notice to the parties concerned.

Regulation 17(2) empowers the Commission to invite the information provider and such other person, as is necessary, for the preliminary conference to aid in formation of a prima facie opinion, but this power to invite cannot be equated with requirement of statutory notice or hearing. Regulation 17(2), read in conjunction with other provisions of the Act and the Regulations, clearly demonstrates that this provision contemplates to invite the parties for collecting such information, as the Commission may feel necessary, for formation of an opinion by the preliminary conference. Thereafter, an inquiry commences in terms of Regulation 18(2) when the Commission directs the Director General to make the investigation, as desired. Regulation 21(8) also indicates that there is an obligation upon the Commission to consider the objections or suggestions from the Central Government or the State Government or the Statutory Authority or the parties concerned and then Secretary is required to give a notice to fix the meeting of the Commission, if it is of the opinion that further inquiry is called for. In that provision notice is contemplated not only to the respective Governments but even to the parties concerned. The notices are to be served in terms of Regulation 22 which specifies the mode of service of summons upon the concerned persons and the manner in which such service should be effected. The expression ‘such other person’, obviously, would include all persons, such as experts, as stated in Regulation 52 of the Regulations. There is no scope for the Court to arrive at the conclusion that such other person would exclude anybody including the informant or the affected parties, summoning of which or notice to whom, is considered to be appropriate by the Commission. With some significance, we may also notice the provision of Regulation 33(4) of the Regulations, which requires that on being satisfied that the reference is complete, the Secretary shall place it during an ordinary meeting of the Commission and seek necessary instructions regarding the parties to whom the notice of the meeting has to be issued. This provision read with Sections 26(1) and 26(5) shows that the Commission is expected to apply its mind as to whom the notice should be sent before the Secretary of the Commission can send notice to the parties concerned. In other words, issuance of notice is not an automatic or obvious consequence, but it is only upon application of mind by the authorities concerned that notice is expected to be issued. Regulation 48, which deals with the procedure for imposition of penalty, requires under Sub-Regulation (2) that show cause notice is to be issued to any person or enterprise or a party to the proceedings, as the case may be, under Sub-Regulation (1), giving him not less than 15 days time to explain the conduct and even grant an oral hearing, then alone to pass an appropriate order imposing penalty or otherwise. Issue of notice to a party at the initial stage of the proceedings, which are not determinative in their nature and substance, can hardly be implied; wherever the legislature so desires it must say so specifically. This can be illustrated by referring to the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 under the Customs Tariff Act, 1975. Rule 5(5) provides that while dealing with an application submitted by aggrieved domestic producers accounting for not less than 25% of total production of the like article, the designated authority shall notify the government of exporting country before proceeding to initiate an investigation. Rule 6(1) also specifically requires the designated authority to issue a public notice of the decision to initiate investigation. In other words, notice prior to initiation of investigation is specifically provided for under the Anti-Dumping Rules, whereas, it is not so under the provisions of Section 26(1) of the Act.

Cumulative reading of these provisions, in conjunction with the scheme of the Act and the object sought to be achieved, suggests that it will not be in consonance with the settled rules of interpretation that a statutory notice or an absolute right to claim notice and hearing can be
read into the provisions of Section 26(1) of the Act. Discretion to invite, has been vested in the Commission, by virtue of the Regulations, which must be construed in their plain language and without giving it undue expansion. It is difficult to state as an absolute proposition of law that in all cases, at all stages and in all events the right to notice and hearing is a mandatory requirement of principles of natural justice. Furthermore, that noncompliance thereof, would always result in violation of fundamental requirements vitiating the entire proceedings. Different laws have provided for exclusion of principles of natural justice at different stages, particularly, at the initial stage of the proceedings and such laws have been upheld by this Court. Wherever, such exclusion is founded on larger public interest and is for compelling and valid reasons, the Courts have declined to entertain such a challenge. It will always depend upon the nature of the proceedings, the grounds for invocation of such law and the requirement of compliance to the principles of natural justice in light of the above noticed principles. In the case of Tulsiram Patel (supra), this Court took the view that audi alteram partem rule can be excluded where a right to a prior notice and an opportunity of being heard, before an order is passed, would obstruct the taking of prompt action or where the nature of the action to be taken, its object and purpose as well as the scheme of the relevant statutory provisions warrant its exclusion. This was followed with approval and also greatly expanded in the case of Delhi Transport Corporation vs. Delhi Transport Corporation Mazdoor Congress [(1991) Suppl SCC 600], wherein the Court held that rule of audi alteram partem can be excluded, where having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions, fairness in action does not demand its application and even warrants its exclusion.

The exclusion of principles of natural justice by specific legislative provision is not unknown to law. Such exclusion would either be specifically provided or would have to be imperatively inferred from the language of the provision. There may be cases where post decisional hearing is contemplated. Still there may be cases where 'due process' is specified by offering a full hearing before the final order is made. Of course, such legislation may be struck down as offending due process if no safeguard is provided against arbitrary action. It is an equally settled principle that in cases of urgency, a post-decisional hearing would satisfy the principles of natural justice. Reference can be made to the cases of Maneka Gandhi v. Union of India [(1978) 1 SCC 48] and State of Punjab v. Gurdayal [AIR 1980 SC 319]. The provisions of Section 26(1) clearly indicate exclusion of principles of natural justice, at least at the initial stages, by necessary implication. In cases where the conduct of an enterprise, association of enterprises, person or association of persons or any other legal entity, is such that it would cause serious prejudice to the public interest and also violates the provisions of the Act, the Commission will be well within its jurisdiction to pass ex parte ad interim injunction orders immediately in terms of Section 33 of the Act, while granting post decisional hearing positively, within a very short span in terms of Regulation 31(2). This would certainly be more than adequate compliance to the principles of natural justice. It is true that in administrative action, which entails civil consequences for a person, the principles of natural justice should be adhered to.

Wherever, this Court has dealt with the matters relating to complaint of violation of principles of natural justice, it has always kept in mind the extent to which such principles should apply. The application, therefore, would depend upon the nature of the duty to be performed by the authority under the statute. Decision in this regard is, in fact, panacea to the rival contentions which may be raised by the parties in a given case. Reference can be made to the judgment of this Court in the case of Canara Bank v. Debasis Das [(2003) 4 SCC 557]. We may also notice that the scope of duty cast upon the authority or a body and the nature of the function to be performed cannot be rendered nugatory by imposition of unnecessary directions or impediments which are not postulated in the plain language of the section itself. ‘Natural justice’ is a term, which may have different connotation and dimension depending upon the facts of the case, while keeping in view, the provisions of the law applicable. It is not a codified concept, but are well defined principles enunciated by the Courts. Every quasi
judicial order would require the concerned authority to act in conformity with these principles as well as ensure that the indicated legislative object is achieved. Exercise of power should be fair and free of arbitrariness.

Now, let us examine what kind of function the Commission is called upon to discharge while forming an opinion under Section 26(1) of the Act. At the face of it, this is an inquisitorial and regulatory power. A Constitution Bench of this Court in the case of Krishna Swami vs. Union of India [(1992) 4 SCC 605] explained the expression ‘inquisitorial’. The Court held that the investigating power granted to the administrative agencies normally is inquisitorial in nature. The scope of such investigation has to be examined with reference to the statutory power. In that case the Court found that the proceedings, before the High Power Judicial Committee constituted, were neither civil nor criminal but sui generis.

The exceptions to the doctrine of audi alteram partem are not unknown either to civil or criminal jurisprudence in our country where under the Code of Civil Procedure ex-parte injunction orders can be passed by the court of competent jurisdiction while the courts exercising criminal jurisdiction can take cognizance of an offence in absence of the accused and issue summons for his appearance. Not only this, the Courts even record pre-charge evidence in complaint cases in absence of the accused under the provisions of the Code of Criminal Procedure. Similar approach is adopted under different systems in different countries.

The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice of hearing is not contemplated under the provisions of Section 26(1) of the Act. However, Regulation 17(2) gives right to Commission for seeking information, or in other words, the Commission is vested with the power of inviting such persons, as it may deem necessary, to render required assistance or produce requisite information or documents as per the direction of the Commission. This discretion is exclusively vested in the Commission by the legislature. The investigation is directed with dual purpose: (a) to collect material and verify the information, as may be, directed by the Commission, (b) to enable the Commission to examine the report upon its submission by the Director General and to pass appropriate orders after hearing the parties concerned. No inquiry commences prior to the direction issued to the Director General for conducting the investigation. Therefore, even from the practical point of view, it will be required that undue time is not spent at the preliminary stage of formation of prima facie opinion and the matters are dealt with effectively and expeditiously. We may also usefully note that the functions performed by the Commission under Section 26(1) of the Act are in the nature of preparatory measures in contrast to the decision making process. That is the precise reason that the legislature has used the word ‘direction’ to be issued to the Director General for investigation in that provision and not that the Commission shall take a decision or pass an order directing inquiry into the allegations made in the reference to the Commission. The Tribunal, in the impugned judgment, has taken the view that there is a requirement to record reasons which can be express, or, in any case, followed by necessary implication and therefore, the authority is required to record reasons for coming to the conclusion. The proposition of law whether an administrative or quasi judicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no more res integra and has been settled by a recent
judgment of this Court in the case of Assistant Commissioner, C.T.D.W.C. v. M/s Shukla&Brothers [JT 2010 (4) SC 35].

12. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the Court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of order. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that judgment...

13. The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders.

The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as afore-referred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analyzing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisionsshould be well reasoned. Such an approach can also be justified with reference to Regulation 20(4), which requires the Director General to record, in his report, findings on each of the allegations made by a party in the intimation or reference submitted to the Commission and sent for investigation to the Director General, as the case may be, together with all evidence and documents collected during investigation. The inevitable consequence is that the Commission is similarly expected to write appropriate reasons on every issue while passing an order under Sections 26 to 28 of the Act.

Submissions made and findings in relation to Point No.4
Under this issue we have to discuss the ambit and scope of the powers vested in the Commission under Section 33 of the Act. (Refer to Section 33 of the Act).

A bare reading of the above provision shows that the most significant expression used by the legislature in this provision is ‘during inquiry’. ‘During inquiry’, if the Commission is satisfied that an act in contravention of the stated provisions has been committed, continues to be committed or is about to be committed, it may temporarily restrain any party ‘without giving notice to such party’, where it deems necessary. The first and the foremost question that falls for consideration is, what is ‘inquiry’? The word ‘inquiry’ has not been defined in the Act, however, Regulation 18(2) explains what is ‘inquiry’. ‘Inquiry’ shall be deemed to have commenced when direction to the Director General is issued to conduct investigation in terms of Regulation 18(2). In other words, the law shall presume that an ‘inquiry’ is commenced when the Commission, in exercise of its powers under Section 26(1) of the Act, issues a direction to the Director General. Once the Regulations have explained ‘inquiry’ it will not be permissible to give meaning to this expression contrary to the statutory explanation. Inquiry and investigation are quite distinguishable, as is clear from various provisions of the Act as well as the scheme framed thereunder. The Director General is expected to conduct an investigation only in terms of the directive of the Commission and thereafter, inquiry shall be deemed to have commenced, which continues with the submission of the report by the Director General, unlike the investigation under the MRTP Act, 1969, where the Director General can initiate investigation suo moto. Then the Commission has to consider such report as well as consider the objections and submissions made by other party. Till the time final order is passed by the Commission in accordance with law, the inquiry under this Act continues. Both these expressions cannot be treated as synonymous. They are distinct, different in expression and operate in different areas. Once the inquiry has begun, then alone the Commission is expected to exercise its powers vested under Section 33 of the Act. That is the stage when jurisdiction of the Commission can be invoked by a party for passing of an ex parte order. Even at that stage, the Commission is required to record a satisfaction that there has been contravention of the provisions mentioned under Section 33 and that such contravention has been committed, continues to be committed or is about to be committed.

This satisfaction has to be understood differently from what is required while expressing a prima facie view in terms of Section 26(1) of the Act. The former is a definite expression of the satisfaction recorded by the Commission upon due application of mind while the latter is a tentative view at that stage. Prior to any direction, it could be a general examination or enquiry of the information/reference received by the Commission, but after passing the direction the inquiry is more definite in its scope and may be directed against a party. Once such satisfaction is recorded, the Commission is vested with the power and the informant is entitled to claim ex parte injunction. The legislature has intentionally used the words not only ‘ex parte’ but also ‘without notice to such party’. Again for that purpose, it has to apply its mind, whether or not it is necessary to give such a notice. The intent of the rule is to grant ex parte injunction, but it is more desirable that upon passing an order, as contemplated under Section 33, it must give a short notice to the other side to appear and to file objections to the continuation or otherwise of such an order. Regulation 31(2) of the Regulations clearly mandates such a procedure. Wherever the Commission has passed interim order, it shall hear the parties 71 against whom such an order has been made, thereafter, as soon as possible. The expression ‘as soon as possible’ appearing in Regulation 31(2) has some significance and it will be obligatory upon the fora dealing with the matters to ensure compliance to this legislative mandate. Restraint orders may be passed in exercise of its jurisdiction in terms of Section 33 but it must be kept in mind that the ex parte restraint orders can have far reaching consequences and, therefore, it will be desirable to pass such order in exceptional circumstances and deal with these matters most expeditiously. During an inquiry and where the Commission is satisfied that the act has been committed and continues to be committed or is about to be committed, in contravention of the provisions stated in Section 33 of the Act, it may issue an order temporarily restraining the party from carrying on such act, until the
conclusion of such inquiry or until further orders, without giving notice to such party where it deems it necessary. This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order, inter alia, should: (a) record its satisfaction (which has to be of much higher degree than formation of a prima facie view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; (b) it is necessary to issue order of restraint and (c) from the record before the Commission, there is every likelihood that the party to the lis would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have adverse effect on competition in the market. The power under Section 33 of the Act, to pass a temporary restraint order, can only be exercised by the Commission when it has formed prima facie opinion and directed investigation in terms of Section 26(1) of the Act, as is evident from the language of this provision read with Regulation 18(2) of the Regulations. It will be useful to refer to the judgment of this Court in the case of Morgan Stanley Mutual Funds v. Kartick Das [(1994) 4 SCC 225], wherein this Court was concerned with Consumer Protection Act 1986, Companies Act 1956 and Securities and Exchange Board of India (Mutual Fund) Regulations, 1993. As it appears from the contents of the judgment, there is no provision for passing ex-parte interim orders under the Consumer Protection Act, 1986 but the Court nevertheless dealt with requirements for the grant of an ad interim injunction, keeping in mind the expanding nature of the corporate sector as well as the increase in vexatious litigation. The Court spelt out the following principles:

“36. As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of ex parte injunction are—

(a) whether irreparable or serious mischief will ensue to the plaintiff;
(b) whether the refusal or ex parte injunction would involve greater injustice than the grant of it would involve;
(c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;
(d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;
(e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application;
(f) even if granted, the ex parte injunction would be for a limited period of time. (g) General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court.”

In the case in hand, the provisions of Section 33 are specific and certain criteria have been specified therein, which need to be satisfied by the Commission, before it passes an ex parte ad interim order. These three ingredients we have already spelt out above and at the cost of repetition we may notice that there has to be application of mind of higher degree and definite reasons having nexus to the necessity for passing such an order need be stated. Further, it is required that the case of the informant-applicant should also be stronger than a mere prima facie case. Once these ingredients are satisfied and where the Commission deems it necessary, it can pass such an order without giving notice to the other party. The scope of this power is limited and is expected to be exercised in appropriate circumstances. These provisions can hardly be invoked in each and every case except in a reasoned manner. Wherever, the applicant is able to satisfy the Commission that from the information received and the documents in support thereof, or even from the report submitted by the Director General, a strong case is made out of contravention of the specified provisions relating to anti-competitive agreement or an abuse of dominant position and it is in the interest of free market and trade that injunctive orders are called for, the Commission, in its discretion, may pass such order ex parte or even after issuing notice to the other side. For these reasons, we may conclude that the Commission
can pass ex parte ad interim restraint orders in terms of Section 33, only after having applied its mind as to the existence of a prima facie case and issue direction to the Director General for conducting an investigation in terms of Section 26(1) of the Act. It has the power to pass ad interim ex parte injunction orders, but only upon recording its due satisfaction as well as its view that the Commission deemed it necessary not to give a notice to the other side. In all cases where ad interim ex parte injunction is issued, the Commission must ensure that it makes the notice returnable within a very short duration so that there is no abuse of the process of law and the very purpose of the Act is not defeated.

Submissions made and findings in relation to Point No.6

In light of the above discussion, the next question that we are required to consider is, whether the Court should issue certain directions while keeping in mind the scheme of the Act, legislative intent and the object sought to be achieved by enforcement of these provisions. We have already noticed that the principal objects of the Act, in terms of its Preamble and Statement of Objects and Reasons, are to eliminate practices having adverse effect on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments in the country. In other words, the Act requires not only protection of free trade but also protection of consumer interest. The delay in disposal of cases, as well as undue continuation of interim restraint orders, can adversely and prejudicially affect the free economy of the country. Efforts to liberalize the Indian Economy to bring it at par with the best of the economies in this era of globalization would be jeopardised if time bound schedule and, in any case, expeditious disposal by the Commission is not adhered to. The scheme of various provisions of the Act which we have already referred to including Sections 26, 29, 30, 31, 53B(5) and 53T and Regulations 12, 15, 16, 22, 32, 48 and 31 clearly show the legislative intent to ensure time bound disposal of such matters. The Commission performs various functions including regulatory, inquisitorial and adjudicatory. The powers conferred by the Legislature upon the Commission under Sections 27(d) and 31(3) are of wide magnitude and of serious ramifications. The Commission has the jurisdiction even to direct that an agreement entered into between the parties shall stand modified to the extent and in the manner, as may be specified. Similarly, where it is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, the Commission is empowered to direct such modification. These powers of the Commission, read with provisions mentioned earlier, certainly require issuance of certain directions in order to achieve the object of the Act and to ensure its proper implementation. The power to restructure the agreement can be brought into service and matters dealt with expeditiously, rather than passing of ad interim orders in relation to such agreements, which may continue for indefinite periods. To avoid this mischief, it is necessary that wherever the Commission exercises its jurisdiction to pass ad interim restraint orders, it must do so by issuing notices for a short date and deal with such applications expeditiously. Order XXXIX, Rules 3 and 3A of the Code of Civil Procedure also have similar provisions. Certain procedural directions will help in avoiding prejudicial consequences, against any of the parties to the proceedings and the possibility of abuse of jurisdiction by the parties can be eliminated by proper exercise of discretion and for valid reasons. Courts have been issuing directions in appropriate cases and wherever the situation has demanded so. Administration of justice does not depend on individuals, but it has to be a collective effort at all levels of the judicial hierarchy, i.e. the hierarchy of the Courts or the for a before whom the matters are sub-judice, so that the persons awaiting justice can receive the same in a most expeditious and effective manner. The approach of the Commission even in its procedural matters, therefore, should be macro level rather than micro level. It must deal with all such references or applications expeditiously in accordance with law and by giving appropriate reasons. Thus, we find it necessary to issue some directions which shall remain in force till appropriate regulations in that regard are framed by the competent authority.
Having discernibly stated our conclusions/answers in the earlier part of the judgment, we are of the considered opinion that this is a fit case where this Court should also issue certain directions in the larger interest of justice administration. The scheme of the Act and the Regulations framed thereunder clearly demonstrate the legislative intent that the investigations and inquiries under the provisions of the Act should be concluded as expeditiously as possible.

The various provisions and the Regulations, particularly Regulations 15 and 16, direct conclusion of the investigation/inquiry or proceeding within a “reasonable time”. The concept of “reasonable time” thus has to be construed meaningfully, keeping in view the object of the Act and the larger interest of the domestic and international trade. In this backdrop, we are of the considered view that the following directions need to be issued:

A) Regulation 16 prescribes limitation of 15 days for the Commission to hold its first ordinary meeting to consider whether prima facie case exists or not and in cases of alleged anti-competitive agreements and/or abuse of dominant position, the opinion on existence of prima facie case has to be formed within 60 days. Though the time period for such acts of the Commission has been specified, still it is expected of the Commission to hold its meetings and record its opinion about existence or otherwise of a prima facie case within a period much shorter than the stated period.

B) All proceedings, including investigation and inquiry should be completed by the Commission/Director General most expeditiously and while ensuring that the time taken in completion of such proceedings does not adversely affect any of the parties as well as the open market in purposeful implementation of the provisions of the Act.

C) Wherever during the course of inquiry the Commission exercises its jurisdiction to pass interim orders, it should pass a final order in that behalf as expeditiously as possible and in any case not later than 60 days.

D) The Director General in terms of Regulation 20 is expected to submit his report within a reasonable time. No inquiry by the Commission can proceed any further in absence of the report by the Director General in terms of Section 26(2) of the Act. The reports by the Director General should be submitted within the time as directed by the Commission but in all cases not later than 45 days from the date of passing of directions in terms of Section 26(1) of the Act.

E) The Commission as well as the Director General shall maintain complete ‘confidentiality’ as envisaged under Section 57 of the Act and Regulation 35 of the Regulations. Wherever the ‘confidentiality’ is breached, the aggrieved party certainly has the right to approach the Commission for issuance of appropriate directions in terms of the provisions of the Act and the Regulations in force.

In our considered view the scheme and essence of the Act and the Regulations are clearly suggestive of speedy and expeditious disposal of the matter. Thus, it will be desirable that the Competent Authority frames Regulations providing definite time frame for completion of investigation, inquiry and final disposal of the matters pending before the Commission. Till such Regulations are framed, the period specified by us supra shall remain in force and we expect all the concerned authorities to adhere to the period specified. Resultantly, this appeal is partially allowed. The order dated 15th February, 2010 passed by the Tribunal is modified to the above extent. The Commission shall proceed with the case in accordance with law and the principles enunciated supra.

In the circumstances there will be no order as to costs.

* * * ****
Excel Crop Care Limited v. Competition Commission of India and Another

A.K. SIKRI, J.

All these Civil Appeals arise out of the common judgment and order dated October 29, 2013 passed by the Competition Appellate Tribunal (for short, ‘COMPAT’). These proceedings have their origin in the letter dated February 04, 2011 written by the Food Corporation of India (for short, ‘FCI’) to the Competition Commission of India (for short, ‘CCI’) complaining of an anti-competitive agreement purportedly arrived at between M/s. Excel Crop Care Limited, M/s. United Phosphorous Limited (for short, ‘UPL’), M/s. Sandhya Organics Chemicals (P) Ltd. respectively (the appellants in CA Nos. 2480, 2874 and 2922 of 2014 and hereinafter referred to as the ‘appellants’) and Agrosynth Chemicals Limited, in relation to tenders issued by the FCI for Aluminium Phosphide Tablets (for short, ‘APT’) of 3 gms. between the years 2007 and 2009. The CCI entrusted the matter to the Director General (DG) for investigation, who submitted his report on October 14, 2011 giving his prima facie findings affirming the allegations of the FCI that the appellants had entered into an anti-competitive agreement, which was violative of Section 3(3) of the Competition Act, 2002 (hereinafter referred to as the ‘Act’). On receipt of this complaint, the CCI issued notices to the appellants who filed their objections. After hearing the parties, the CCI passed the order dated April 23, 2012 whereby it concluded that the appellants had entered into the anti-competitive agreement in a concerted manner thereby offending the provisions of Section 3 of the Act. As a consequence, it imposed penalty @ 9% on the average total turnover of these establishments for last three years. Appeals were filed by the appellants before the COMPAT under Section 53-B of the Act. In these appeals, the issue on merits has been decided against the appellants by COMPAT in its judgment dated October 29, 2013. These appeals question the validity of the order of the COMPAT on the aforesaid aspect.

Now the facts in detail:

An Inquiry in this case was initiated by the CCI on the basis of letter/complaint dated February 04, 2011 written by the Chairman and Managing Director of the FCI to the CCI. It was alleged in this complaint that four manufacturers of APT had formed a cartel by entering into an anti-competitive agreement amongst themselves and on that basis they had been submitting their bids for last eight years by quoting identical rates in the tenders invited by the FCI for the purchase of APT. It was alleged that the requirement for APT was almost got doubled during the period 2007-2009 and was likely to rise further in view of the requirement of large quantity of these tablets by the FCI, Central Warehousing Corporation and other State agencies for preservation of food grains, which these agencies were storing in their godowns. The CCI assigned the complaint to the DG for investigation. The DG collected required information from the FCI and other Government agencies dealing in warehousing and storage of food grains and also from Central Insecticides Board and Registration Committee, Faridabad. Representatives of FCI were also examined. After collecting the aforesaid information, the DG submitted his report with the following findings:

(a) There were only four manufacturers of APT, namely, M/s. Excel Crop Care Limited, M/s. UPL, M/s. Sandhya Organics Chemicals (P) Ltd. (which are the three appellants herein) and Agrosynth Chemicals Limited.

(b) It was noted that the FCI had adopted the process of tender, which is normally a global tender. The concerned tender had two-bid system, that is first techno commercial and then
the financial bid. On the basis of the bids, the rate running contracts are executed with successful bidders. The DG found that there was also a Committee comprising of responsible officers for evaluation of technical and price bids. As per the practice, the lowest bidder is invited by the Committee for negotiations and after negotiations, the Committee submits the report giving its recommendations and the contracts are awarded and after that the payment for the purchased tablets is released by the concerned regional offices.

(c) It was found that right from the year 2002, up to the year 2009, all the four parties used to quote identical rates, excepting for the year 2007. In 2002, Rs. 245/- was the rate quoted by these four parties and in the year 2005 it was `310 (though the tender was scrapped in this year and the material was purchased from Central WareHousing Corporation @ `290). In November 2005, though the tenders were invited, all the parties had abstained from quoting. In 2007, M/s. UPL had quoted the price which was much below the price of other competitors. In 2008, all the parties abstained from quoting, while in 2009 only the three appellants, barring Agrosynth Chemicals Limited, participated and quoted uniform rate of `388, which was ultimately brought down to `386 after negotiations. It was also found that the tender documents were usually submitted in-person and the rates were normally filled with hand.

(d) In respect of the tender floated in the year 2009 for procurement of fixed quantity of 600 MT with a provision of ±10%, the three appellants had quoted identical rates of `388. It was found that the tender documentswere to be submitted by 2:00 p.m. on May 08, 2009 and bid was to be opened at 3:00 p.m. on the same day. For submitting the bids, representatives of the three appellants made common entries in the Visitors’ Register. In fact, one Shri S.K. Bose of M/s. Excel Crop Care Limited made these entries on behalf of the representatives of other competitors as well.

(e) By analysing the aforesaid bids carefully and taking into consideration the total number of 16 tenders, including tenders dated May 08, 2009, the DG recorded that:

(i) pricing pattern definitely showed the practice of quoting identical pricing by all the three appellants or at some other times by two appellants, including M/s. Agrosynth Chemicals Limited;

(ii) the explanation given by the appellants was unconvincing. Though, the appellants had stated that rise in price was mostly attributed to increase in price by China during the Beijing Olympics, but it was noticed that even during the period when the Phosphorous prices had fallen, no reflection thereof was seen in the high prices quoted by the appellants;

(iii) examination of the cost structure of each company reflected that there was nothing common between the appellants as far as the said cost structure was concerned and, therefore, quoting of identical prices by all the appellants was unnatural; and

(iv) joint boycotting by the appellants, at times, showed their concerted action, which happened again in March 2011 when the FCI had issued e-tender, which was
closed on July 25, 2011. According to the DG, explanation given by the appellants and M/s. Agrosynth Chemicals Limited for boycotting the said tender to the effect that tender conditions were very stringent, was an afterthought and did not inspire any confidence. As per the DG, even if the conditions were stringent, the appellants could discuss the same with the FCI as there was sufficient time between March 2011 and July 25, 2011, but it was not done.

On the basis of the aforesaid findings, the DG framed an opinion that the appellants had contravened the provisions of Sections 3(3)(a), 3(3)(b) and 3(3)(d) read with Section 3(1) of the Act.

3) The CCI took up the report of the DG for consideration and passed the order that the appellants had entered into an agreement or understanding, and indulged in anti-competitive activities while submitting their bids in response to the tenders issued by the FCI.

4) For indulging in anti-competitive practices in violation of the provisions of Section 3 of the Act, the CCI imposed penalties upon all the three appellants at 9% of average 3 years' turnover of these appellants under Section 27(b) of the Act. Quantifying the same, penalty to the tune of 63.90 crores was imposed upon M/s. Excel Crop Care Limited, 1.57 crores upon M/s. Sandhya Organics Chemicals (P) Ltd., and UPL was fastened with the penalty of 252.44 crores.

5) The appellants filed three separate appeals before the COMPAT. The legal and factual arguments remained the same before COMPAT as well. In addition, argument was raised on the quantum of penalty. The COMPAT has, vide common judgment dated October 29, 2013, rejected all the contentions, except qua penalty, of the appellants. Insofar as imposition of penalty is concerned, COMPAT has held that though penalty @ 9% of three years' average turnover was not unreasonable, the penalty cannot be on the 'total turnover' of these establishments, and has to be restricted to 9% of the 'relevant turnover', i.e. the turnover in respect of the quantum of supplies made qua the product for which cartel was formed and supplies made. In other words, it had to relate to the goods in question, namely, APT and turnover of other products manufactured and sold by the establishments, which were without blemish, could not be included for calculating the penalty.

6) As noted above, before us, three appeals are filed by these manufacturers/suppliers against the findings of the COMPAT holding that there was violation of Sections 3(3)(a), 3(3)(b) and 3(3)(d) of the Act on the part of the appellants. On that basis, it is pleaded that those findings be declared as untenable and penalty imposed be set aside. On the other hand, the CCI has also preferred Civil Appeal Nos. 53-55 of 2014 against that part of the impugned order whereby penalty imposed upon these suppliers is restricted to 'relevant turnover' instead of 'total turnover'. Since submissions before us remain substantially the same, we are not pointing out the reasons given by the COMPAT which weighed with it after taking the aforesaid course of action, inasmuch as, while discussing the submissions of the parties, we shall be referring to the reasons adopted by the COMPAT.

7) Having painted the canvas with seminal and essential facts, it becomes manifest that following issues arise for consideration in these appeals:

(i) Whether the dispute regarding violation of Section 3 of the Act by the appellants could not be gone into in respect of tender of March, 2009, as Section 3 was operationalised only by notification dated 20th May, 2009?

(ii) Whether CCI was barred from investigating the matter pertaining to the tender floated by FCI in
March, 2011 because of the reason that FCI limits complaint dated 4th February, 2011 given to the CCI had not complained about this tender?

(iii) Whether, on the facts of the case, conclusion of CCI that the appellants had entered into an agreement/arrangement and pursuant thereto indulged in collusive bidding by forming a cartel, resulting into contravention of Section 3(3)(a), 3(3)(b) and 3(3)(d) read with Section 3(1) of the Act, is justified?

(iv) Whether penalty under Section 27(b) of the Act has to be on total/entire turnover of the offending company or it can be only on “relevant turnover”, i.e., relating to the product in question?

8) First two issues are in the nature of preliminary objections that were raised by the appellants, which are jurisdictional issues as the attempt of the appellants is to show that CCI was not even empowered to look into the merit of the case because of those objections. Therefore, in the first instance, we deal with these issues.

9) **Issue No.1**

**Re: Applicability of Section 3 of the Act in respect of Notice Inviting Tender (NIT) dated 28th March, 2009**

Section 3 is the first provision in Chapter II of the Act. Chapter II is titled as “Prohibition of certain agreements, abuse of dominant position and regulation of combinations”. It starts by specifying those agreements which are prohibited under this Chapter and Section 3 enumerates such prohibitive agreements.

10) At this juncture, it is the applicability of this Section which is dealt with.

Though, the Competition Act is of the year 2002 and was passed by the Legislature on 13th January, 2003, as per the provisions of Section 1(3), the Act was to come into force from the date to be notified by the Central Government in the Official Gazette. Notification was issued by the Central Government wherein 31st March, 2003 was specified as the appointed date. However, vide this notification, some of the provisions of the Act, and not all the provisions, were enforced. Many other provisions came into force vide notification dated 19th June, 2003 and thereafter by notification dated 20th December, 2007 some more provisions were notified. Insofar as Section 3 of the Act is concerned, this provision along with many other provisions came into force on 20th May, 2009 vide S.O. 1241(E) dated 15th May, 2009 on which date the said notification was published in the Gazette of India as well. Remaining provisions were notified by subsequent notifications. It is, thus, a unique example where the entire Act was not enforced by one single notification but different provisions of the Act were enforced in bits and pieces by issuing various notifications over a span of time.

11) NIT in question was issued by FCI on 28th March, 2009. Last date for submission of bids was 8th May, 2009. Few days thereafter, i.e., on 20th May, 2009, Section 3 of the Act was notified. It is on these facts, the argument constructed by the appellants is that as on 8th May, 2009 when the appellants had
submitted their bids, Section 3 of the Act was not in operation and, therefore, tender of March, 2009 could not be the subject matter of inquiry by the CCI. According to the appellants, if this is allowed, it would amount to introducing the provisions of Section 3 of the Act retrospectively though the provision was introduced only prospectively that is from the date of the notification.

12) The COMPAT has also noted that the anti-competitive conduct of the appellants was not limited to the 2009 tender alone. It had considered tender dated November 03, 2009 floated by the U.P. State Warehousing Corporation, tender dated July 13, 2010 of the Central Warehousing Corporation, tender dated July 15, 2010 of the M.P. State Warehousing Corporation, and tender dated February 14, 2011 of the Punjab State Cooperative SS & Marketing Federation and found that even against these tenders the appellants had quoted identical prices. Keeping in view the said pattern of quotation, the COMPAT opined that notwithstanding any objection of the appellants premised on retrospective application of Section 3, the anti-competitive conduct of APT manufacturers, i.e. the appellants, continued right up to the year 2011, much after Section 3 of the Act had come into force. Therefore, even if 2009 tender was to be completely ignored, the provisions of the Act would nevertheless be attracted in the instant case.

13) The Competition Act, which prohibits anti-competitive agreements, has a laudable purpose behind it. It is to ensure that there is a healthy competition in the market, as it brings about various benefits for the public at large as well as economy of the nation. In fact, the ultimate goal of competition policy (or for that matter, even the consumer policies) is to enhance consumer well-being. These policies are directed at ensuring that markets function effectively. Competition policy towards the supply side of the market aims to ensure that consumers have adequate and affordable choices. Another purpose in curbing anti-competitive agreements is to ensure ‘level playing field’ for all market players that helps markets to be competitive. It sets ‘rules of the game’ that protect the competition process itself, rather than competitors in the market. In this way, the pursuit of fair and effective competition can contribute to improvements in economic efficiency, economic growth and development of consumer welfare.

14) Once the aforesaid purpose sought to be achieved is kept in mind, and the same is applied to the facts of this case after finding that the anti-competitive conduct of the appellants continued after coming into force of provisions of Section 3 of the Act as well, the argument predicated on retrospectivity pales into insignificance.

One has to keep in mind the aforesaid objective which the legislation in question attempts to sub-serve and the mischief which it seeks to remedy. As pointed out above, Section 18 of the Act casts an obligation on the CCI to ‘eliminate’ anti-competitive practices and promote competition, interests of the consumers and free trade. It was rightly pointed out by Mr. Neeraj Kishan Kaul, the learned Additional Solicitor General, that the Act is clearly aimed at addressing the evils affecting the economic landscape of the country in which interest of the society and consumers at large is directly involved. This is so eloquently emphasised by this Court in *Competition Commission of India v. Steel Authority of India Limited & Anr.* in the following manner:

“6. As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the
effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.

15) Having regard to the aforesaid objective, we are of the opinion that merely because the purported agreement between the appellants was entered into and bids submitted before May 20, 2009 are no yardstick to put an end to the matter. No doubt, after the agreement, first sting was inflicted on May 8, 2009 when the bids were submitted and there was no provision like S. 3 on that date. However, the effect of the arrangement continued even after May 20, 2009, with more stings, as a result of which the appellants bagged the contracts and fruits thereof reaped by the appellants when Section 3 had come into force which frowns upon such kinds of agreements.

16) In this behalf, it is to be emphasised again that merely by submitting the tenders, role of the appellants as tenderers had not come to an end. As already pointed out, the DG in its report noted that FCI resorted to global tender which had two-bid systems: techno-commercial bid and financial bid. Those who qualified in techno-commercial process, their financial bids were to be opened. The appellants had submitted their bids on May 08, 2009, which was the last date for this purpose. Bids were to be submitted by 2.00 pm on that day and were to be opened at 3.00 pm on the same day. The committee of responsible officers for evaluating the technical price bids was constituted. As per the practice, the lowest bidder is invited by the committee for negotiations. And after negotiations, the committee submits the report giving its recommendations on the basis of which contract is awarded. If there was variation in the prices quoted by the appellants in their bids, things would have been different. Then L-I could have been called for negotiations. However, all the three appellants quoted identical rates of Rs. 388/-. Because of this reason all the appellants were L-I and had to be called for negotiations. Therefore, bidding process did not come to an end on May 08, 2009 as argued by the appellants. It continued even thereafter when the appellants appeared before the committee for negotiations, much beyond May 20, 2009 the date on which provisions of Section 3 of the Act were enforced.

17) The COMPAT has referred to the explanation to Section 3(3)(d) also while arriving at the conclusion that May 08, 2009 cannot be the determinative date on which the bid was submitted, as ‘manipulating the process of bidding’ is also covered by virtue of the said explanation and this process of bidding continued even after May 20,2009.

18) Learned counsel for the appellants submitted that this explanation has no application as it referred only to ‘bid rigging’ which is different from ‘collusive bidding’. In an attempt to distinguish the two expressions, it was argued that although the terms ‘bid rigging’ or ‘collusive bidding’ may, in certain contexts, overlap even may be referred to as ‘synonyms’, in certain context they may cover activities which are not identical. ‘Bid rigging’ may cover larger and more varied activities than ‘collusive bidding’. It was submitted that in view of the specific exclusion of ‘collusive bidding’ from the ‘Explanation’, an activity which squarely falls within the scope of ‘collusive bidding’ would not be covered by the ‘Explanation’ and would be excluded from it. Submission is that since the allegation in the present case relating to identical pricing or identical reduction in price squarely falls within the term ‘collusive pricing’, the ‘Explanation’ has no relevance to the present case.

19) Mr. Neeraj Kishan Kaul, learned Additional Solicitor General, refuted the aforesaid submission with vehemence by urging that bid rigging and collusive bidding are not mutually exclusive and these are overlapping concepts. Illustratively, he referred to the findings of the CCI, as approved by the
COMPAT, in the instant case itself to the effect that the appellants herein had ‘manipulated the process of bidding’ on the ground that bids were submitted on May 08, 2009 collusively, which was only the beginning of the anti-competitive agreement between the parties and this continued through the opening of the price bids on June 01, 2009 and thereafter negotiations on June 17, 2009 when all the parties reduced their bids by same figure of `2 to bring their bid downto `386 per kg. from `388 per kg. From this example, he submitted that on May 08, 2009 there was a collusive bidding but with concerted negotiations on June 17, 2009, in the continued process, it was rigging of the bid that was practiced by the appellants.

We are inclined to agree with this pellucid submission of the learned Additional Solicitor General.

Even internationally, ‘collusive bidding’ is not understood as being different from ‘bid rigging’. These two expressions have been used interchangeably in the following international commentaries/glossaries and websites of competition authorities:

As the Legislator of the law, it is our task, nay a duty, to give proper meaning and effect to the aforesaid ‘Explanation’: it can easily be discussed that the Legislature had in mind that the two expressions are inter-changeably used. It is also necessary to keep in mind the purport behind Section 3 and the objective it seeks to achieve. Sub-section (1) of Section 3 is couched in the negative terms which mandates that no enterprise or association of enterprises or person or association of persons shall enter into any agreement, when such agreement is in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services and it causes or is likely to cause an appreciable adverse effect on competition within India. It can be discerned that first part relates to the parties which are prohibited from entering into such an agreement and embraces within it persons as well as enterprises thereby signifying its very wide coverage. This becomes manifest from the reading of the definition of ‘enterprise’ in Section 2(h) and that of ‘person’ in Section 2(l) of the Act. Second part relates to the subject matter of the agreement. Again it is very wide in its ambit and scope as it covers production, supply, distribution, storage, acquisition or control of goods or provision of services. Third part pertains to the effect of such an agreement, namely, ‘appreciable adverse effect on competition’, and if this is the effect, purpose behind this provision is not to allow that. Obvious purpose is to thwart any such agreements which are anti-competitive in nature and this salubrious provision aims at ensuring healthy competition. Sub-section (2) of Section 3 specifically makes such agreements as void. Sub-section (3) mentions certain kinds of agreements which would be treated as ipso facto causing appreciable adverse effect on competition. It is in this backdrop and context that ‘Explanation’ beneath sub-section (3), which uses the expression ‘bid rigging’, has to be understood and given an appropriate meaning. It could never be the intention of the Legislature to exclude ‘collusive bidding’ by construing the expression ‘bid rigging’ narrowly. No doubt, clause (d) of sub-section (3) of Section 3 uses both the expressions ‘bid rigging’ and ‘collusive bidding’, but the Explanation thereto refers to ‘bid rigging’ only. However, it cannot be said that the intention was to exclude ‘collusive bidding’. Even if the Explanation does contain the expression ‘collusive bidding’ specifically, while interpreting clause (d), it can be inferred that ‘collusive bidding’ relates to the process of bidding as well. Keeping in mind the principle of purposive interpretation, we are inclined to give this meaning to ‘collusive bidding’. It is more so when the expressions ‘bid rigging’ and ‘collusive bidding’ would be overlapping, under certain circumstances which was conceded by the learned counsel for the appellants as well.
We are, therefore, of the opinion that the two expressions are to be interpreted using the principle of *noscitur a sociis*, i.e. when two or more words which are susceptible to analogous meanings are coupled together, the words can take colour from each other {See – *Leelabai Gajanan Pansare &Ors. v. Oriental Insurance Company Limited &Ors.*, *Thakorlal D. Vadgamav. State of Gujarat*, and *M.K. Ranganathan v. Government of Madras &Ors.*}.

We, thus, answer Issue No. 1 in the negative by holding that the CCI was well within its jurisdiction to hold an enquiry under Section 3 of the Act in respect of tender of March, 2009.

**ISSUE NO.2**

**Re.: Jurisdiction of DG/CCI to investigate into the boycott of 2011 FCI’s tender**

The CCI had entrusted the task to DG after it received representation/complaint from the FCI vide its communication dated February 04, 2011. Argument of the appellants is that since this communication did not mention about the 2011 tender of the FCI, which was in fact even floated after the aforesaid communication, there could not be any investigation in respect of this tender. It is more so when there was no specific direction in the CCI’s order dated February 24, 2011 passed under Section 26(1) of the Act and, therefore, the 2011 tender could not be the subject matter of inquiry when it was not referred to in the communication of the FCI or order of the CCI. The COMPAT has rejected this contention holding that Section 26(1) is wide enough to cover the investigation by the DG, with the following discussion:

“28. As per the sub-section (1) of Section 26, there can be no doubt that the DG has the power to investigate only on the basis of the order passed by the Commission under Section 26(1). Our attention was also invited to sub-section (3) of Section 26 under which the Director-General, on receipt of direction under sub-section (1) is to submit a report of its findings within such period as may be specified by the Commission. The argument of the parties is that if on the relevant date when the Commission passed the order, even the tender notice was not floated, then there was no question of Direction General going into the investigation of that tender. It must be noted at this juncture that under Section 18, the Commission has the duty to eliminate practices having adverse effect on competition and to promote and sustain competition. It is also required to protect the interests of the consumers. There can be no dispute about the proposition that the Director General on his own cannot act and unlike the Commission, the Director General has no suo-moto power to investigate. That is clear from the language of Section 41 also, 28 which suggests that when directed by the Commission, the Director General is to assist the Commission in investigating into any contravention of the provisions of the Act. Our attention was also invited to the Regulations and more particularly to Regulation 20, which pertains to the investigation by the Director General. Sub-regulation (4) of Section 20 was pressed into service by all the learned counsel, which is in the following term:-

“The report of the Director-General shall contain his findings on each of the allegations made in the information or reference, as the case may be, together with all evidences or documents or statements or analyses collected during the investigation:”

29. We have absolutely no quarrel with the proposition that the Director General must investigate according to the directions given by the CCI under Section 26(1). There is also no quarrel with the proposition that the Director General shall record his findings on each of the allegations made 29 in the information. However, it does not mean that if the information is made by the FCI on the basis of
tender notice dated 08.05.2009, the investigation shall be limited only to that tender. Everything would depend upon the language of the order passed by the CCI on the basis of information and the directions issued therein. If the language of the order of Section 26(1) is considered, it is broad enough. At this juncture, we must refer to the letter written by Chairman and Managing Director of FCI, providing information to the CCI. The language of the letter is clear enough to show that the complaint was not in respect of a particular event or a particular tender. It was generally complained that appellants had engaged themselves in carteling. The learned counsel Shri Virmani as well as Shri Balaji Subramanian are undoubtedly correct in putting forth the argument that this information did not pertain to a particular tender, but it was generally complained that the appellants had engaged in the anticompetitive behaviour. When we consider the language of the order passed by the CCI under Section 26(1) dated 23.04.2012 the things becomes all the more clear to us. The language of that order is clearly broad enough to hold, that the Director General was empowered and duty bound to look into all the facts till the investigation was completed. If in the course of investigation, it came to the light that the parties had boycotted the tender in 2011 with pre-concerted agreement, there was no question of the DG not going into it. We must view this on the background that when the information was led, the Commission had material only to form a prima facie view. The said prima-facie view could not restrict the Director General, if he was duty bound to carry out a comprehensive investigation in keeping with the direction by CCI. In fact the DG has also taken into account the tenders by some other corporations floated in 2010 and 2011 and we have already held that the DG did nothing wrong in that. In our opinion, therefore, the argument fails and must be rejected.”

We entirely agree with the aforesaid view taken by the COMPAT.

If the contention of the appellants is accepted, it would render the entire purpose of investigation nugatory. The entire purpose of such an investigation is to cover all necessary facts and evidence in order to see as to whether there are any anti-competitive practices adopted by the persons complained against. For this purpose, no doubt, the starting point of inquiry would be the allegations contained in the complaint. However, while carrying out this investigation, if other facts also get revealed and are brought to light, revealing that the ‘persons’ or ‘enterprises’ had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report. Even when the CCI forms prima facie opinion on receipt of a complaint which is recorded in the order passed under Section 26(1) of the Act and directs the DG to conduct the investigation, at the said initial stage, it cannot foresee and predict whether any violation of the Act would be found upon investigation and what would be the nature of the violation revealed through investigation. If the investigation process is to be restricted in the manner projected by the appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition. We, therefore, reject this argument of the appellants as well touching upon the jurisdiction of the DG.

ISSUE NO.3:

It is not in dispute that in respect of 2009 tender of the FCI, all the three appellants had quoted the same price, i.e. `388 per kg. for the APT. The appellants have attempted to give their explanations and have contended that it cannot be presumed that it was the result of any prior agreement or arrangement between them. This aspect shall be taken note of and dealt with in detail later at the appropriate stage. Before that, it needs to be highlighted that it is not only 2009 FCI tender in respect of which DG found the violation. Pertinently, the investigation of DG revealed that the appellants had been quoting such identical rates much prior to and even after May 20, 2009. No doubt, in relation to
tenders prior to 2009, it cannot be said that there was any violation of law by the appellants. However, prior practice definitely throws light on the formation of cartelisation by the appellants, thereby making it easier to understand the events of 2009 tender. Therefore, to take a holistic view of the matter, it would be essential to point out that the DG in his report had tabulated the tendency of quoting identical rates by these parties in respect of various tenders issued by even other Government bodies before and after 2009. The statistics in this behalf, given in tabulated form by the DG, are reproduced below:

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Tendering Agency</th>
<th>Tender Opening Date</th>
<th>Rates quoted (Rs. Per kg.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>U.P. State Warehousing Corp.</td>
<td>14/03/2007</td>
<td>Excel 225, United 225, Sandhya -</td>
</tr>
<tr>
<td>2.</td>
<td>Punjab State Civil Supplies Corp.</td>
<td>28/04/2008</td>
<td>Excel 260, United 260, Sandhya -</td>
</tr>
<tr>
<td>3.</td>
<td>Central Warehousing Corp.</td>
<td>06/08/2008</td>
<td>Excel 450, United - Sandhya 450, Agro -</td>
</tr>
<tr>
<td>4.</td>
<td>U.P. State Warehousing Corp.</td>
<td>19/09/2008</td>
<td>Excel 449, United 449, Sandhya -</td>
</tr>
<tr>
<td>5.</td>
<td>Punjab State Co-op SS &amp; Mktg. Fed.</td>
<td>26/12/2008</td>
<td>Excel 419, United 419, Sandhya -</td>
</tr>
<tr>
<td>6.</td>
<td>Central Warehousing Corp.</td>
<td>06/01/2009</td>
<td>Excel 414, United 414, Sandhya -</td>
</tr>
<tr>
<td>7.</td>
<td>Punjab State Civil Supplies Corp.</td>
<td>27/02/2009</td>
<td>Excel 409, United 409, Sandhya -</td>
</tr>
<tr>
<td>8.</td>
<td>Food Corporation of India</td>
<td>08/05/2009</td>
<td>Excel 388, United 388, Sandhya 388,</td>
</tr>
<tr>
<td>9.</td>
<td>Punjab State Civil Supplies Corp</td>
<td>15/06/2009</td>
<td>Excel 399, United - Sandhya - 399</td>
</tr>
<tr>
<td></td>
<td>Corpn.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>-------------------------------</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>10.</td>
<td>U.P. State Warehousing</td>
<td>03/11/2009</td>
<td>399</td>
</tr>
<tr>
<td>11.</td>
<td>Director, SS&amp;Disposal, Haryana</td>
<td>01/12/2009</td>
<td></td>
</tr>
<tr>
<td>12.</td>
<td>Punjab State Civil Supplies Corp.</td>
<td>18/03/2010</td>
<td>419</td>
</tr>
<tr>
<td>13.</td>
<td>Central Warehousing Corp.</td>
<td>13/07/2010</td>
<td>421</td>
</tr>
<tr>
<td>14.</td>
<td>M.P. State Warehousing Corp.</td>
<td>15/07/2010</td>
<td>436</td>
</tr>
<tr>
<td>16.</td>
<td>Punjab State Civil Supplies Corp.</td>
<td>15/03/2011</td>
<td></td>
</tr>
</tbody>
</table>

2) The aforesaid table shows identical pricing by these parties even in respect of tenders floated by the U.P. State Warehousing Corporation and Punjab State Civil Supplies Corporation. It was repeated in respect of 2008 tender floated by the Central Warehousing Corporation. Tenders up to S.No. 7 above, no doubt, relate to the period which is earlier to coming into force of the provisions of Section 3. At S.No. 8 is the tender of the FCI of March, 2009, which is held to be covered on the principle of retroactivity, as already held above. However, insofar as tenders mentioned at S.Nos. 9 to 16 are concerned, they all pertain to the period after Section 3 became operational. These are clear cut examples of identical pricing by the three appellants. No doubt, the appellants cannot be penalised in respect of tenders mentioned at S.Nos. 1 to 7 as there was no provision like Section 3 at that time. However, such illustrations become important in finding out the mens rea of the appellants, i.e. arriving at an agreement to enter into collusive bidding which continued with impunity right up to 2011. Further, this trend of quoting identical price in respect of so many tenders, not only of FCI but other Government bodies as well, is sufficient to negate all explanations given by the appellants taking the pretext of coincidence or economic forces.
It needs to be emphasised that collusive tendering is a practice whereby firms agree amongst themselves to collaborate over their response to invitations to tender. Main purpose for such collusive tendering is the need to concert their bargaining power, though, such a collusive tendering has other benefits apart from the fact that it can lead to higher prices. Motive may be that fewer contractors actually bother to price any particular deal so that overheads are kept lower. It may also be for the reason that a contractor can make a tender which it knows will not be accepted (because it has been agreed that another firm will tender at a lower price) and yet it indicates that the said contractor is still interested in doing business, so that it will not be deleted from the tenderee’s list. It may also mean that a contractor can retain the business of its established, favoured customers without worrying that they will be poached by its competitors.

Collusive tendering takes many forms. Simplest form is to agree to quote identical prices with the hope that all will receive their fair share of orders. That is what has happened in the present case. However, since such a conduct becomes suspicious and would easily attract the attention of the competition authorities, more subtle arrangements of different forms are also made between colluding parties. One system which has been noticed by certain competition authorities in other countries is to notify intended quotes to each other, or more likely to a central secretariat, which will then cost the order and eliminate those quotes that it considers would result in a loss to some or all members of the cartel. Another system, which has come to light, is to rotate orders. In such a case, the firm whose turn is to receive an order will ensure that its quote is lower than the quotes of others.

We are here concerned with parallel behaviour. We are conscious of the argument put forth by Mr. Venugopal that in an oligopoly situation parallel behaviour may not, by itself, amount to a concerted practice. It would be apposite to take note of the following observations made by the U.K. Court of Justice in Dyestuffs:

“By its very nature, then, the concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants. Although parallel behaviour may not itself if identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not respond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. Such is the case especially where the parallel behaviour is such as to permit the parties to seek price equilibrium at a different level from that which would have resulted from competition, and to crystallise the status quo to the detriment of effective freedom of movement of the products in the [internal] market and free choice by consumers of their suppliers.

At this juncture, we would advert to tender of May, 2011. It is not in dispute that all the three appellants, as well as M/s. Agrosynth Chemicals Limited did not participate in the said tender. These are the four manufacturers in all. When this fact is not in dispute, the only question is as to whether it was a concerted action on the part of the appellants herein. According to all the appellants, their decision not to participate in the aforesaid bid was the onerous, unreasonable, arbitrary and unquestionable conditions that were put in the said tender. As these were not acceptable to them, they individually decided not to take part in the tender, which was a valid business decision and not result of pre-concerted agreement of the appellants.

The COMPAT, after discussing the matter, arrived at the conclusion that it was clearly an after-thought move, inasmuch as the tender was published on April 28, 2011 and the last date for submitting the
price bids was May 27, 2011, but only a day before i.e. on May 26, 2011, such a letter was sent by M/s. Excel Crop Care Limited to the FCI. Insofar as M/s. UPL is concerned, it did not even bother to give any representation. Likewise, M/s. Sandhya Organics did not approach the FCI at all with the representation that the quantities to be supplied were huge and the tender conditions be suitably modified.

29) We feel that COMPAT has examined the matter in right perspective as after examining the record, one finds that important fundamental conditions were the same which used to be in the earlier tenders. and if the appellants were genuinely interested in participating in the said tender and were aggrieved by the aforesaid conditions, they could have taken up the matter with the FCI well in time. Reaction of not participating in the said tender by four suppliers could have been perceived otherwise, had there been a number of manufacturers in the market and four out of them abstaining. Abstention by hundred percent (who are only four) makes the things quite obvious. Events get quite apparent when examined along with past history of quoting identical prices, an aspect already commented above.

30) Since collusion stands proved by the aforesaid conduct of the appellants in abstaining from the bidding in respect of May 2011 tender, requirement of Section 3(3)(d) of the Act read with ‘explanation’ thereto stands satisfied, viz., concerted action based on an agreement/arrangement between the appellants, resulted in restricting or manipulating competition or process of bidding, since the said act was collusive in nature.

31) We, therefore, agree with the conclusions of the COMPAT on this aspect as well.

32) **Issue No.4**

After giving its finding that there was a contravention of the provisions of Section 3 of the Act by the appellants, the CCI imposed the following penalties on the three entities/appellants:

<table>
<thead>
<tr>
<th>Name of the firms</th>
<th>Average of three years turnover (in Crore)</th>
<th>Penalty at 9% of average turnover (in Crore)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Excel Crop Care Ltd.</td>
<td>710.09</td>
<td>63.90</td>
</tr>
<tr>
<td>United Phosphorus Ltd.</td>
<td>2804.95</td>
<td>252.44</td>
</tr>
<tr>
<td>Sandhya Organics Chemicals (P)Ltd.</td>
<td>57.4 Crore</td>
<td>1.57 Crore</td>
</tr>
</tbody>
</table>

33) Under Section 27(b) of the Act, penalty of 10% of the turnover is prescribed as the maximum penalty with no provision for minimum penalty. CCI had chosen to impose 9% of the average turnover keeping in view the serious nature of the breach on the part of these appellants.

34) The COMPAT has maintained the rate of penalty i.e. 9% of the three years average turnover. However, it has not agreed with the CCI that ‘turnover’ mentioned in Section 27 would be ‘total turnover’ of the offending company. In its opinion it has to be ‘relevant turnover’ i.e. turnover of the product in question. Since, M/s. Excel Crop Care and UPL were multi-product companies, products
other than APT could not have been included for the purpose of imposing the penalty. It, therefore,
held that penalty of 9% would be limited to the product/service in question – in this case, the APT –
which was the relevant product for the enquiry. The penalty, thus, stands substantially reduced in the
cases of M/s. Excel Crop Care and UPL.

Insofar as M/s. Sandhya Organics Chemicals (P) Ltd. is concerned, the ‘relevant turnover’ and ‘total
turnover’ is the same as this company produced only APT tablets. CCI had imposed penalty of ₹1.57
crores on the basis of their turnover of this product. However, in its case also, penalty is reduced on
the ground that it is relatively a small enterprise. Moreover, in respect of May 2011 tender, it could
not have taken part since its production capacity was only 25 MT a month. Though, the aforesaid plea
was not accepted while discussing the merits of the case, the COMPAT deemed it proper to take this
aspect into consideration when it came to imposition of penalty. On the aforesaid basis, COMPAT
reduced the penalty to 1/10th of penalty awarded by CCI i.e. ₹15.70 lakhs.

The CCI is not happy with the aforesaid outcome whereby penalty imposed by it is sharply reduced
by the COMPAT. Against this part of the impugned judgment, CCI is in appeal.

In the aforesaid backdrop, the moot question is as to whether penalty under Section 27(b) of the Act
has to be on ‘total/entire turnover’ of the company covering all the products or it is relatable to
‘relevant turnover’, viz., relating to the product in question in respect whereof provisions of the Act
are contravened. Section 27 of the Act stipulates nature of the orders which the CCI can pass after
enquiry into agreements or abuse of dominant position. This Section empowers CCI to pass various
kinds of ordersthenaturewhereofisstipulatedin(a),(b),(d)and(g) (clauses (c) and (f) stand omitted).
As per clause (b), CCI is empowered to inflict monetary penalties, the upper limit whereof is 10% “of
the average of turnover for the last three preceding financial years”.

Extensive as well as intensive argument of Mr. Kaul, learned Additional Solicitor General, was that in
S. 27(b) of the Act, there is no reference to ‘relevant turnover’. On the contrary, clause (b) of S. 27 in
clear terms, stipulates penalty on the ‘turnover’ i.e. average of the turnover for the last three preceding
financial years and it plainly suggests that this ‘turnover’ has to be of the enterprise which had
contravened the provisions of Section 3 or Section 4. He submitted that clear intention of the
Legislature was to take into consideration entire turnover of the enterprise. Reading the word
‘relevant’ thereto would be doing violence to the plain language of the statute, by adding the word
which is not there.

According to him, the expression ‘turnover’ is not limited or restricted in any manner and
introduction of concept of ‘relevant turnover’ amounts to adding words to the statute. He premised his
submission on well-settled principle of statutory interpretation that where the language of a statute is
plain and clear, the Court ought not to add words to limit or alter the meaning of the statute and cited
the following judgments in support.

Mr. Kaul also placed heavy reliance on the following discussion in the
caseofSteelAuthorityofIndiaLtd.14inthecontextoftheCompetition Act:

“S2. A statute is stated to be the edict of legislature. It expresses the will of legislature and the
function of the court is to interpret the document according to the intent of those who made it. It is a
settled rule of construction of statute that the provisions should be interpreted by applying the plain rule of construction...
35.

Thus, the court can safely apply rule of plain construction and legislative intent in light of the object sought to be achieved by the enactment. While interpreting the provisions of the Act, it is not necessary for the court to implant, or to exclude the words, or overemphasise language of the provision where it is plain and simple. The provisions of the Act should be permitted to have their full operation rather than causing any impediment in their application by unnecessarily expanding the scope of the provisions by implication.”

41)

According to him, a plain reading of Section 27 as a whole, which includes Section 27(a) as well, also makes it clear that the target of the penalty is the ‘person’ or ‘enterprise’ that has acted in violation of the Act, and not the ‘product’ or the ‘service’ alone which is made the subject of the violation. As such, the expression ‘turnover’ must necessarily mean the turnover of the ‘person’ or the ‘enterprise’ which is party to the anti-competitive agreement or abuse of dominance.

42)

Critiquing the approach of the COMPAT, he submitted that it has introduced the concept of ‘relevant’ turnover in Section 27 despite the absence of the word ‘relevant’, failing to notice that wherever the Act wanted to introduce the concept of ‘relevance’ the word ‘relevant’ has, in fact, been used in the appropriate sections. In this regard, he referred to Sections 2(r), 2(s), 2(t), 4(2)(e), 6, 19(6), 19(7), etc. where the expression ‘relevant’ is specifically used. He also referred to the definition of ‘turnover’ as contained in Section 2(y) of the Act, which includes value of goods or services, and submitted that it is the aforesaid definition of ‘turnover’ which has to be applied wherever this expression occurs in the Act and it cannot be read to have different criteria for determining penalty and the thresholds applicable for regulation of combinations. He also sought to highlight that where the expression is used in the same section, it should generally be given the same meaning, as held in Suresh Chand v. Gulam Chisti15 and Raghubans Narain Singh v. Uttar Pradesh Government through Collector of Bijnor16.

43)

Mr. Kaul went to the extent of arguing that even if purposive interpretation is to be given to the provisions of Section 27(b) of the Act, main purpose which cannot be lost sight of and ignored is that it is a deterrent provision. The purpose behind such a provision is to give a message that the persons or enterprises should not indulge in such anti-competitive activities, as otherwise they will be inflicted with heavy penalties. According to him, the kind of cartalisation formed by the appellants in this case is a clear example of ‘hardcore cartel’ behaviour which is deprecated by even the OECD as such hardcore cartels benefit only the cartel members and are extremely injurious to the interest of all others, with extraordinary adverse affect on the market and the consumers. He further submitted that formation of cartels reduces social welfare and the COMPAT has ignored these factors as well while giving restricted interpretation to ‘turnover’ by making it product specific and not person/enterprise specific.

44)

Advancing this very argument further, he even drew parallel with the laws in other jurisdictions by stating the comparative legal position in European Union, United Kingdom, Australia, etc. and submitted that it could be discerned from the law enacted in those jurisdictions that everywhere overall cap is of 10% of ‘worldwide turnover’ and is not restricted to ‘relevant turnover’.

45)

He further submitted that the aforesaid provision imposed a cap on the penalty by stipulating that it shall not be more than 10%. Thus, the CCI had the discretion to impose the penalty from 0% to 10% and this was sufficient safeguard to take care of the proportionality aspects of the penalty wherever penalty on total turnover is found to bring unreasonable results. In other words, in respect of multi-product companies where the turnover covering non-offending products, is quite high, the CCI can
always impose much lesser rate of penalty so that the penalty does not sound to be excessive and unconscionable and remains proportionate to the nature of contravention. However, it is not permissible to tinker the language of a statute.

46) Adverting to the specific case of M/s. Sandhya Organics Chemicals (P) Ltd., submission of Mr. Kaul was that the reason given by COMPAT in reducing the penalty was self-contradictory inasmuch as contention of this appellant that it did not bid in May 2011 tender of FCI was because of the reason that its production capacity was mere 25 MT per month was specifically rejected by the COMPAT, but this very rejected contention formed the basis of reducing the penalty. It was also submitted that in any case there was no justification in reducing the penalty to 1/10th of the penalty imposed by the CCI, i.e. from 9% to 0.9%, when the COMPAT itself observed that the nature of breach committed by the appellants was very serious and going by this consideration, the COMPAT maintained the penalty @ 9% in the case of the other two appellants.

47) Learned counsel appearing for the three appellants attempted to put an astute and sagacious answer to the aforesaid arguments of the Learned Additional Solicitor General. Justifying the approach of the COMPAT in this behalf, it was argued that even the plain language of Section 27(b) leads to the interpretation that is given by the COMPAT. They also stressed that this provision being a penal provision, has to be strictly construed. No wider meaning can be given to it. The learned counsel quoted the illustration in cases where identical infringement is alleged in respect of several enterprises, some of which may be ‘single product companies’ and others may be ‘multi-product companies’ (which was the position in the instant case itself), and submitted that there would be no justification for prescribing the maximum penalty based on the total turnover of the enterprise, as it would result in prescribing a higher maximum penalty for multi-product companies, as against the single product companies, thereby bringing very inequitable results. For identical infringement, there would be no justification for prescribing such differential maximum limits. Keeping this aspect into consideration, it is all the more reason for interpreting Section 27(b) on the basis of its plain language as the word ‘total’ was also not prefixed with ‘relevant’ by the Legislature. Since it was a provision relating to penalty, which was to be imposed on ‘turnover’, the said ‘turnover’ was necessarily relatable to the offending product only and Legislature never intended to punish any person or enterprise even in respect of unblemished product. It was also emphasized that penalty under Section 27(b) is to be levied for contravention of Section 3 in respect of any ‘agreement’ resulting in appreciable adverse effect on competition. Therefore, it would not relate to all the products of the company included in the total turnover of the enterprise. As such, when penalty is being imposed in respect of any infringing product, the turnover of that product would be relevant. The learned counsel criticised the approach of the CCI in imposing penalties by taking the maximum penalty as the starting point of determination and then purporting to reduce it suitably, as totally incorrect approach. It was argued that the quantum of appropriate amount of penalty has to be first determined after taking into consideration the relevant factors. The relevance of the maximum penalty is only for the limited purpose to ensure that the quantum so determined, does not exceed the maximum penalty.

48) Learned counsel for the appellants also advocated for applying the doctrine of proportionality which has universal application and lays down that ‘the broad principles that the punishment must be proportioned to the offence is or ought to be of universal application’ as held in Arvind Mohan Sinha v. Amulya Kumar Biswas & Ors.

49) In addition to the aforesaid arguments, learned counsel appearing for UPL submitted that since it was a multi-product company, its average of the total turnover of three years was ₹2804.95 crores. By
imposing penalty of 9% on the total turnover, the CCI had levied penalty of `252.44 crores, which was highly disproportionate as even the total production and sale of APT tablets, for the three years, was much less than the aforesaid penalty. It was pointed out that the average total turnover of the APT tablets comes to `77.14 crores only, which is hardly 3% of the total turnover. On that basis it was argued that by taking total turnover for the purpose of penalty clearly amounted to disproportionate penalty as it was more than 300% of the total turnover of APT tablets. This, according to the learned counsel, itself provided full justification in the approach of the COMPAT by reading the concept of ‘relevant turnover’ while interpreting Section 27(b) of the Act.

50) We have given our serious thought to this question of penalty with reference to ‘turnover’ of the person or enterprise. At the outset, it may be mentioned that Section 2(y) which defines ‘turnover’ does not provide any clarity to the aforesaid issue. It only mentions that turnover includes value of goods or services. There is, thus, absence of certainty as to what precise meaning should be ascribed to the expression ‘turnover’. Somewhat similar position appears in EU statute and in order to provide some clear directions, EU guidelines on the subject have been issued. These guidelines do refer to the concept of ‘relevant turnover’.

51) In the absence of specific provision as to whether such turnover has to be product specific or entire turnover of the offending company, we find that adopting the criteria of ‘relevant turnover’ for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties. For arriving at this conclusion, we are influenced by the following reasons:

(a) Under Section 27(b) of the Act, penalty can be imposed under two contingencies, namely, where an agreement referred to in Section 3 is anti-competitive or where an enterprise which enjoys a dominant position misuses the said dominant position thereby contravening the provisions of Section 4. In case where the violation or contravention is of Section 3 of the Act it has to be pursuant to an ‘agreement’. Such an agreement may relate to a particular product between persons or enterprises even when such persons or enterprises are having production in more than one product. There may be a situation, which is precisely in the instant case, that some of such enterprises may be multi-product companies and some may be single product in respect of which the agreement is arrived at. If the concept of total turnover is introduced it may bring out very inequitable results. This precisely happened in this case when CCI imposed the penalty of 9% on the total turnover which has already been demonstrated above.

(b) Interpretation which brings out such inequitable or absurd results has to be eschewed. This fundamental principle of interpretation has been repeatedly made use of to avoid inequitable outcomes.

When the agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section 3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the ‘maximum penalty’ imposed in all cases be prescribed on the basis of ‘all the products’ and the ‘total turnover’ of the enterprise. It would be more so when total turnover of an enterprise may involve activities besides production and sale of products, like rendering of services etc. It, therefore, leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of ‘relevant turnover’.
Even the doctrine of ‘proportionality’ would suggest that the Court should lean in favour of ‘relevant turnover’. No doubt the objective contained in the Act, viz., to discourage and stop anti-competitive practices, have been achieved and those who are perpetrators of such
practices need to be indicted and suitably punished. It is for this reason that the Act contains penal provisions for penalising such offenders. At the same time, the penalty cannot be disproportionate and it should not lead to shocking results. That is the implication of the doctrine of proportionality which is based on equity and rationality. It is, in fact, a constitutionally protected right which can be traced to Article 14 as well as Article 21 of the Constitution. The doctrine of proportionality is aimed at bringing out ‘proportional result or proportionality strictosensu’. It is a result oriented test as it examines the result of the law in fact the proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act.

The doctrine of ‘purposive interpretation’ may again lean in favour of ‘relevant turnover’ as the appropriate yardstick for imposition of penalties. It is for this reason the judgment of Competition Appeal Court of South Africa in the *Southern Pipeline Contractors Conrite Walls*, becomes relevant in Indian context as well inasmuch as this Court has also repeatedly used same principle of interpretation. It needs to be repeated that there is a legislative link between the damage caused and the profits which accrue from the cartel activity. Therehastobearelationshipbetweenthenatureofoffenceandthe benefit derived therefrom and once this co-relation is kept in mind, while imposing the penalty, it is the affected turnover, i.e., ‘relevant turnover’ that becomes the yardstick for imposing such a penalty. In this hue, doctrine of ‘purposive interpretation’ as well as that of ‘proportionality’ overlaps.

In fact, some justifications have already appeared in this behalf while discussing the matter on the application of doctrine of proportionality. What needs to be repeated is only that the purpose and objective behind the Act is to discourage and stop anti-competitive practice. Penal provision contained in Section 27 of the Act serves this purpose as it is aimed at achieving the objective of punishing the offender and acts as deterrent to others. Such a purpose can adequately be served by taking into consideration the relevant turnover. It is in the public interest as well as in the interest of national economy that industries thrive in this country leading to maximum production. Therefore, it cannot be said that purpose of the Act is to ‘finish’ those industries altogether by imposing those kinds of penalties which are beyond their means. It is also the purpose of the Act not to punish the violator even in respect of which there are no anti-competitive practices and the provisions of the Act are not attracted.

Thus, we do not find any error in the approach of the order of the COMPAT interpreting Section 27(b).

The upshot of the aforesaid discussion would be to dismiss the appeals of the appellants as well as the appeals filed by the CCI. There shall, however, be no order as to costs.

N. V. RAMANA, J.

A plain reading of Section 27 elucidates that the commission is empowered to impose penalty and to the extent as it deems fit but not exceeding ten percent of the turnover. Section 27(b) emphasize that penalty is to be levied on ‘person or enterprise’ who have contravened Section 3 or Section 4 of the Act. It is to be noted that proviso to Section 27(b), before it was amended, was couched in following terms-

‘provided that in case any agreement referred to in section 3 has been entered into by any cartel, the commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent of the average of the turnover of the cartel for the last preceding three financial years.'
After the amendment [Central Act 39 of 2007] the proviso as it stands today has been quoted above. The change which was brought about by the aforesaid amendment is that the mandatory nature of the Proviso was made discretionary by substitution of ‘shall’ with ‘may’. This amendment was done to bring the proviso in tune with the rest of Section 27, which uses the expression ‘it may pass all or any of the following order’ and main part of clause (b), which confers discretion upon the Commission to impose penalty as it may deem fit, subject to the rider that it shall not be more than 10% of the average of the turnover for the last three preceding financial years.

It is important to note that Clauses (c) and (d) of Section 27 also use the word ‘may’, which signifies that the Commission has the discretion to pass a particular order, which it may deem proper in the facts and circumstances of the case.

Two interpretations were canvassed before us, wherein either the turnover, as occurring under Section 27(b), is equivalent to the ‘relevant turnover’ or is equivalent to the ‘total turnover’. In order to strengthen their arguments, respective Counsel have drawn our attention to various interpretations of ‘turnover’ applied across the globe, such as the judgment of Bundesgerichtshof (German Supreme Court) on 26th February 2013, BCN Aduanasy Transportes, SA v Attorney General, Judgment of the Supreme Court of Spain, No 12/2015, Case 2872/2013, OCL 183 (ES 2015) dated 29th January 2015 and Southern Pipeline Contractors ConriteWalls (Pty) Ltd. and the Competition Commission, 105/CAC/Dec10 (South Africa). Further we have perused Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 (2006/C210/02) issued by the European Commission and Guidance to the appropriate amount of penalty (September 2012) issued by the Office of Fair Trading (OFT), United Kingdom. It is my considered opinion that the interpretation to Section 27(b) of the Act requires fresh indigenous consideration rather than relying on foreign jurisprudence.

1. First a word on interpretation, before we indulge ourselves in the legal discussion. As the interpretative exercise, as this case, involves various equitable facets, literal interpretation might not be conclusive. It should be noted that an interpretation should sub-serve the intent and purpose of the statutory provision. Therefore we would have to look beyond the plain and simple meaning, to extract the intention of the Act and rationalize the fining policy under Section 27(b) of the Act.

2. It is well settled that the Competition Act, 2002 is a regulatory legislation enacted to maintain free market so that the Adam Smith’s concept of invincible hands operate unhindered in the background. Further it is clear from the Statement of objects and reason that this law was foreseen as a tool against concentration of unjust monopolistic powers at the hands of private individuals which might be detrimental for freedom of trade. Competition law in India aims to achieve highest sustainable levels of economic growth, entrepreneurship, employment, higher standards of living for citizens, protect economic rights for just, equitable, inclusive and sustainable economic and social development, promote economic democracy, and support good governance by restricting rent seeking practices. Therefore an interpretation should be provided which is in consonance with the aforesaid objectives.

3. At this point, I would like to emphasize on the usage of the phrase ‘as it may deem fit’ as
occurring under Section 27 of the Act. At the outset, this phrase is indicative of the discretionary power provided for the fining authority under the Act. As the law abhors absolute power and arbitrary discretion, this discretion provided under Section 27 needs to be regulated and guided so that there is uniformity and stability with respect to imposition of penalty. This discretion should be governed by rule of law and not by arbitrary, vague or fanciful considerations.

4. It should be noted that any penal law imposing punishment is made for the general good of the society. As a part of equitable consideration, we should strive to only punish those who deserve it to the extent of their guilt. Further, it is well established by this Court that the principle of proportionality requires the fine imposed must not exceed what is appropriate and necessary for attaining the object pursued. In *Coimbatore District Central Co-operative Bank v. Coimbatore District Central Co-operative Bank Employees Assn.*, this Court has explained the concept of ‘proportionality’ in the following manner:

“‘proportionality’ is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of the decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise- the elaboration of a rule of permissible priorities. De Smith states that ‘proportionality’ involves ‘balancing test’ and ‘necessity test’. Whereas the former (‘balancing test’) permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter (‘necessity test’) requires infringement of human rights to the least restrictive alternative.’

In consonance of established jurisprudence, the principle of proportionality needs to be imbied into any penalty imposed under Section 27 of the Act. Otherwise, excessively high fines may over-deter, by discouraging potential investors, which is not the intention of the Act. Therefore, the fine under Section 27(b) of the Act should be determined on the basis of the relevant turnover. In light of the above discussion, a two-step calculation has to be followed while imposing the penalty under Section 27 of the Act.

**STEP 1: DETERMINATION OF RELEVANT TURNOVER.**

5. At this point of time, it needs to be clarified that relevant turnover is the entity’s turnover pertaining to products and services that have been affected by such contravention. The aforesaid definition is not exhaustive. The authority should have regard to the entity’s audited financial statements. Where audited financial statements are not available, the Commission may consider any other reliable records reflecting the entity’s relevant turnover or estimate the relevant turnover based on available information. However, the Tribunal is free to consider facts and circumstances of a particular case to calculate relevant turnover as and when it is seized with such matter.

**STEP 2: DETERMINATION OF APPROPRIATE PERCENTAGE OF PENALTY BASED ON AGGRAVATING AND MITIGATING CIRCUMSTANCES.**
6. After such initial determination of relevant turnover, commission may consider appropriate percentage, as the case may be, by taking into consideration nature, gravity, extent of the contravention, role played by the infringer (ringleader? Follower?), the duration of participation, the intensity of participation, loss or damage suffered as a result of such contravention, market circumstances in which the contravention took place, nature of the product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, profit derived from the contravention etc. These factors are only illustrative for the tribunal to take into consideration while imposing appropriate percentage of penalty.

7. At the cost of repetition it should be noted that starting point of determination of appropriate penalty should be to determine relevant turnover and thereafter the tribunal should calculate appropriate percentage of penalty based on facts and circumstances of the case taking into consideration various factors while determining the quantum. But such penalty should not be more than the overall cap of 10% of the entity’s relevant turnover. Such interpretation of Section 27 (b) of the Act, wherein the discretion of the commission is guided by principles established by law would sub-serve the intention of the enactment.

8. Lastly, I am of the opinion that the penalty imposed by COMPAT is appropriate in this case at hand and requires no further interference.

9. These appeals are, accordingly, disposed of in the above terms.
A.K. SIKRI, J. This appeal raises an interesting and important question of law touching upon the width and scope of jurisdiction of the Competition Commission of India (for short, the ‘CCI’) under Section 3 of the Competition Act, 2002 (hereinafter referred to as the 'Act'). Before we mention the nuances of the issue that has arisen for consideration, it would be apposite to take stock of the background facts under which the issue needs determination, as the factual canvass would provide clarity of the situation that has led to the dispute between the parties. Respondent No. 2 herein, Mr. Sajjan Kumar Khaitan, is the proprietor of M/s. Hart Video having his establishment in Kolkata. He is in the business of distributing video cinematographic TV serials and telecasting regional serials in the States of Eastern India, which includes the State of West Bengal. M/s. BRTV, Mumbai, which is the producer of T.V. programmes, had produced T.V. Serial named 'Mahabharat', original version whereof was in Hindi. The said BRTV entrusted the sole and exclusive rights of 'Mahabharat' to M/s. Magnum T.V. Serials to dub the Hindi version of the said serial in Bangla with further rights to exploit its Satellite, Pay TV, DTH, IPTV, Video, Cable TV and internet rights till September, 2016. Magnum TV, in turn, appointed Hart Video as the sub-assigner to dub the said serial 'Mahabharat' in Bangla language, which it did. Thereafter, for the purposes of telecasting the said dubbed serial, an agreement was executed for the time slot, on revenue sharing basis, with M/s. Bengal Media Pvt. Ltd., Kolkata, which is the owner of 'Channel 10', as well as with M/s. Calcutta Television Network Private Ltd., Kolkata, which is the owner of CTVN+ Channel. These two channels were given hard disks of four episodes of the serial on 2"nd" February, 2011 and 12"th" February, 2011. An advertisement was placed in Daily Newspapers on 19"th" February, 2011 informing the public at large that serial 'Mahabharat' would be telecast in Bangla on Channel 10 at 10.00 a.m. in the morning and on CTVN+ at 10.00 p.m. every Sunday.

2) Certain producers in Eastern India have formed an association called Eastern India Motion Picture Association (for short, 'EIMPA'). Likewise, the artists and technicians of film and television industry in West Bengal have formed an association known as 'Committee of Artists and Technicians of West Bengal Film and Television Investors (hereinafter referred to as the 'Coordination Committee').

3) Telecasting of serial ‘Mahabharat’ in Bangla after dubbing it in the said language from the original produced Hindi language was not palatable to EIMPA or the Coordination Committee. In their perception, serials produced in other languages and shown on the T.V. Channels after dubbing them in Bangla would affect the producers of that origin and, in turn, would also adversely affect the artists and technicians working in West Bengal. The apprehension was that it may deter production of such serials in Bangla because of the entry of serials produced in other languages and shown to the public by dubbing the same in their language. Because of this reason, on 18"th" February, 2011 CTVN+ received a letter from the Coordination Committee to stop the telecast of the dubbed serial ‘Mahabharat’. Letter dated 1"st" March, 2011 to the similar effect was written by EIMPA to CTVN+. Identical demands were made to this Channel by the Coordination Committee as well. It was stated in this letter that such a step was necessary in the interest of healthy growth of film and television industry in West Bengal. It was also alleged that for the last thirteen years there was a
convention and practice adopted in the said region not to dub any programme from other languages in Bangla and telecast them in West Bengal. Threat was also extended to CTVN+ as well as Channel 10 that in case the telecast is not stopped, their channels would face non-cooperation from these two bodies, i.e., EIMPA and the Coordination Committee.

4) When Mr. Sajjan Khaitan (Respondent No. 2), Proprietor of M/s. Hart Video, came to know of the aforesaid developments and the threat extended to CTVN+ and Channel 10 and found that these two television channels were going to succumb to those pressures, he informed the CCI of the aforesaid details and requested the CCI to take action in the matter, as according to him, the aforesaid act on the part of EIMPA as well as the Coordination Committee contravened the provisions of the Act. Even an interim relief was sought in the nature of direction from CCI to CTVN+ and Channel 10 not to yield to the threats of EIMPA and Coordination Committee and restart the telecast of the serial which was stopped since 17th April, 2011. Hereafter, Respondent No. 2 shall be described as the ‘informant’.

5) The CCI, after receiving the aforesaid information from the informant formed a prima facie opinion that acts on the part of EIMPA and Coordination Committee were anti-competitive. Accordingly, matter was assigned to the Director General (DG) for detailed investigation as per the procedure prescribed in the Act. On investigation, the DG found that the details contained in the information supplied by the informant were factually correct. On that basis, he examined the matter in the context of provisions contained in the Act.

6) In order to understand with clarity the task undertaken and accomplished by the DG, we deem it proper to refer to some of the relevant provisions of the Act at this stage. Chapter II of the Act deals with ‘prohibition of certain agreements, abuse of dominant position and regulation of combinations’. It comprises of Sections 3 to 6. Section 3 deals with anti-competitive agreements and Section 4 prohibits the abuse of dominant position. Section 5, on the other hand, takes care of those acquisitions and mergers which have the potential to become anti-competitive or attain dominant position, with threat to abuse the said position in order to control such acquisition and mergers. Section 6 empowers the CCI to regulate those combinations which are stipulated under Section 5. Thus, this Chapter deals with three kinds of practices which may be anti-competitive, viz., agreements which may turn out to be anti-competitive; abusive use of dominant position by those enterprises or groups which enjoy such dominant position as defined in the Act; and regulations of combination of enterprises by means of mergers or amalgamations so that they do not become anti-competitive or abuse the dominant position which they can attain.

7) The scheme of this Chapter, therefore, is to ensure fair competition by prohibiting trade practices which cause appreciable adverse effects in competition in markets within India. This task of curbing negative aspects of competition is assigned to CCI. In the present case, since we are concerned with the issue as to whether EIMPA and/or Coordination Committee resorted to any anti-competitive agreement, it will be apposite to scan through Section 3 of the Act and other provisions which revolve there around.

8) As can be seen from the bare reading of the provision, sub-section (1) of Section 3 puts an embargo on an enterprise or association of enterprises or person or association of persons from entering into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of services which causes or is likely to cause an appreciable adverse effect on competition within India. Thus, agreements in respect of distribution or provisions of services, if they have adverse effect on competition, are prohibited and treated as void by virtue of sub-section (2). Sub-section (3), with which we are directly concerned, stipulates four kinds of agreements which are presumed to have appreciable adverse effect on competition. Therefore, if a particular agreement comes in any of the said categories, it is per se treated as adversely affecting the competition to an appreciable extent and comes within the mischief of sub-section (1). There is no further need to have actual proof as to whether it has caused appreciable effect on competition. Proviso thereto, however, exempts certain kinds of agreements, meaning thereby if a particular case falls under the proviso, then such a presumption would not be applicable.

9) We have already mentioned in brief the contents of letters which were written by EIMPA and the Coordination Committee to the Channel 10 and CTVN+. The DG was to investigate as to
whether this ‘agreement’ falls within the four corners of Section 3(3)(b) of the Act, namely, whether it limits or controls production, supply, markets, technical development, investment or provisions of services.

10) Section 2(b) defines 'agreement', S.2 (l)“person”, S.2(m) “practice”, S.2(r) : 2(s) “relevant geographic market”, 2(t) “relevant product market; S.2(u) “service”, S.2(x) “trade”.

12) At this stage, we would like to refer to Section 19 of the Act which permits the CCI to conduct an enquiry into certain kinds of agreements and dominant position of enterprise. Sub-section (1) of Section 19 empowers the Commission to inquire into any alleged contravention of the provisions contained in sub-section (1) of Section 3 (i.e. anti-competitive agreements) or sub-section (1) of Section 4 (i.e. abuse of dominant position). Sub-section (3) of Section 19 deals with the factors which have to be kept in mind by the CCI while undertaking an inquiry into anti-competitive agreements.

13) Since the appreciable adverse effect on competition has to be seen in the context of ‘relevant market’ as defined under Section 2(r) of the Act, sub-section (5) of Section 19 stipulates that in order to determine whether a market constitutes a ‘relevant market’ for the purposes of this Act, CCI shall have due regard to the ‘relevant geographic market’, and ‘relevant product market’. The factors which are to be taken into account while determining relevant geographic market are mentioned in sub-section (6) of Section 19. Likewise, the factors which are to be taken into consideration while determining the relevant product market are stipulated in sub-section (7) of Section 19.

14) Having noticed the relevant provisions postulating the scheme qua prohibited anti-competitive agreements, on the basis of which investigation is to be made by the DG, the first aspect was to determine as to what would be the ‘relevant market’. The DG, in his report submitted to the CCI, opined that in the instant case ‘relevant market’ would be the ‘film and television industry of West Bengal’. He further recorded that the Coordination Committee consisted of persons or association of persons who were dealing with identical market of film making. In his opinion any agreement of joint action taken by the constituents, being in the nature of horizontal agreement, could be examined under the provisions of Section 3(3) of the Act. The impugned action of the Coordination Committee and EIMPA threatening non-cooperation in case telecast of the serials was not stopped and holding demonstrations as well as organising strike, which resulted in actually stopping the telecast of the serial by Channel 10 (though CTVN+ continued to telecast), amounted to restricting its commercial exploitation and was, therefore, unjustified. He found that following conduct of the Coordination Committee specifically contravened the provisions of the Act:

“a. Act of the Co-ordination Committee writing a letter on 18.02.2011 to CCTVN Plus Channel asking it to stop the telecasting of Mahabharata serial.

b. Further, act of the Co-ordination Committee writing a letter on 01.03.2011 to Channel 10 and letters on 11.03.2011, 12.03.2011 and 14.03.2011 to CTVN Plus Channel asking them to stop the telecast of Mahabharata serial.

c. Observance of one-day work stoppage on 07.04.2011 against telecast of the Mahabharata serial by the members of all the constituents of Co-ordination Committee and demonstration on the same day from 11.00AM to 02.00PM at Rani Rasoni Road in Kolkata.

d. The Co-ordination Committee approached Shri Mithun Chakraborty, the leading actor of Indian Film Industry and the Chief Adviser of Channel 10 and finally succeeded in getting the telecast of Mahabharata stopped by Channel 10.”

15) The DG concluded that the action on the part of Coordination Committee had resulted in foreclosure of competition by hindering entry into the market. The DG also held that by not allowing the dubbed version of the serial, the Coordination Committee foreclosed the business opportunities for the businessmen engaged in the production, distribution, and exhibition, telecast of such programmes. The DG, therefore, concluded that the actions on the part of EIMPA and Coordination Committee were in violation of the provisions of Section 3(3)(b) of the Act, since they restricted and controlled the market and supply of dubbed versions of serials on the Television Channels through collective intent of all the constituents/associations coming together on one platform.
16) Certain fundamental objections were taken by the Coordination Committee as well as EIMPA touching upon the jurisdiction of the DG to inquire into the matter as according to them the inquiry was beyond the scope of the Act. In nutshell, it was argued:
(a) The Coordination Committee comprised of artists and technicians of West Bengal Film and T.V. Industry and consisted of West Bengal Motion Picture Artists’ Forum and Federation of Cine Technicians and Workers of Eastern India only. The other members like WATP, ATA and EIMPA were not in the Coordination Committee. It was, in fact, a trade union of the artisans and technicians under the Trade Union Act. Therefore, the Coordination Committee was not an 'enterprise'. Likewise, it was not a ‘person or ‘association of persons’ who were in the business of production, supply and distribution or providing services etc. Therefore, their act would not fall under Section 3(1) of the Act.
(b) It was argued that the Coordination Committee was not in a position to control production programming marketing and up linking of any serial in the satellite channel and, therefore, provisions of the Act would not apply to it.
(c) According to the Coordination Committee, the action which they had taken was in the form of an agitation against the telecast of Hindi serial after dubbing the same into Bangla in order to safeguard the interest of its members. It was their constitutional right to lodge such protests under Article 19(1)(a) of the Constitution of India.

17) The DG, however, did not get convinced with the aforesaid defence put by the Coordination Committee and found that the agitation of the Coordination Committee was uncalled for inasmuch as there was a huge potential of local film artists, and the industry was not likely to suffer on account of the dubbed serials shown on the said channels. He also found the industry of television channels in Bangla was growing by leaps and bounds and, therefore, argument of the Coordination Committee was not based on facts. Thus, their action was held to be unjustified, as it had resulted in foreclosure on competition by entering into the market as well as foreclosure of business opportunities for the businessmen engaged in the production, distribution and exhibition/telecast of such programmes. This, according to him, came within the mischief of Section 3(3)(b) of the Act.

18) Against the aforesaid report of the DG, being adverse to the Coordination Committee as well as EIMPA, both of them preferred their objections before the CCI. These objections were almost on the same lines which were taken before the DG and, therefore, it is not necessary to repeat the same at this stage inasmuch as we would be turning to the stand of the Coordination Committee at the appropriate stage, in any case.

19) The CCI, after scanning through those objections, formulated two questions which according to it fell for consideration. These are:
   **Issue 1** Whether EIMPA and Co-ordination Committee imposed/attempted to impose restrictions on the telecast of dubbed serial ‘Mahabharat’?
   **Issue 2** Whether the act and conduct of imposing restrictions on telecast of the said serial is in violation of provisions of the Act?

20) The CCI gave a fractured verdict on the aforesaid issues. As per the majority, the complainant was able to give clinching evidence thereby proving both the issues. The majority held that Channel 10 stopped the telecast of serial as a direct consequence of the threats extended to it by EIMPA as well as Coordination Committee through their various letters coupled with the agitations and demonstration held by them. In this manner, pressures were exerted on both Channel 10 and CTVN+ not to telecast the dubbed serial, though as far as CTVN+ is concerned it did not succumb to such a pressure. But Channel 10 gave in by discontinuing the telecast of the serial. In this manner, first issue was decided in the affirmative.

Taking up the second issue, the majority members held that since the Coordination Committee was not an 'enterprise', question of breach of Section 4 did not arise. However, the activities of the Coordination Committee fell within the ambit of Section 3 of the Act and violated that provision since it had adverse effect on competition. It accepted that the Coordination Committee (and for that
matter even EIMPA) were trade unions. Notwithstanding, they were not exempted from the purview of the Act. Qua the Coordination Committee specifically, the CCI was influenced by the fact that even when bodies like WATP, ATA and EIMPA were not members of the Coordination Committee, still it was found that the Coordination Committee takes the measures in consultation with these associations and, therefore, the Coordination Committee must be deemed to be comprised of all the five members.
21) Judicial member in the CCI put discordant note as he differed from the majority opinion. According to him, first mistake committed by the DG was that he did not identify the 'relevant market' correctly. According to him, 'relevant market' was 'broadcast of TV serial' and not 'Film and TV Industry of West Bengal' as found by the DG. After identifying the relevant market as broadcast of TV serials, learned member opined that broadcast of TV serials took place either by way of Direct to Home Services (DTH) or through Cable and, therefore, broadcasting service is altogether a separate market, different from production, exhibition and distribution of films. Insofar as the two channels, namely, CTVN+ and Channel 10 are concerned, they were in the market for telecasting programmes for the viewers of the DTH category or Cable TV category and were not in production, distribution or exhibition of dubbed films. According to the minority view, since the offending parties, i.e., Coordination Committee and EIMPA, were not active in the relevant market of broadcast of dubbed TV serials, there was no question of any violation of any provisions of the Act. It was further held that Section 3 of the Act does not take into its fold coercive actions taken by workers' union affecting the various facets or products or service market, affecting production, distribution and supply of goods or services. It was accepted that, as a matter of fact, the Coordination Committee as well as EIMPA had put pressure on these channels from broadcasting the dubbed TV serial in question through various means. However, it could not be treated as an economic pressure. It was an act of trade union putting such pressures which was outside the domain of the Act and not an 'agreement' amongst the enterprises, active in the same relevant market, which resulted in discontinuing the telecast of dubbed serials. Further, the TV channels were at liberty to ignore such coercive facts. The minority opinion went to the extent of expressing that right to hold dharnas, boycotts, strikes etc. was fundamental right of any trade union guaranteed under Article 19(1)(a) of the Constitution which could not be taken away by the Act, unless it is shown that the offending parties were involved in economic activities in the same 'relevant market' and they had entered into an 'agreement' which finds foul with the provisions of Section 3 of the Act.

22) Significantly, it is only the Coordination Committee which preferred the appeal before the Competition Appellate Tribunal (hereinafter referred to as the 'Tribunal'). EIMPA, by its conduct, accepted the majority decision of the CCI. It is for this reason the Tribunal did not go into the issue with reference to EIMPA. It discussed the stand of the Coordination Committee and deliberated itself confining to the activities of the Coordination Committee to find out whether majority view of CCI was correct in law. By the impugned judgment, it has held otherwise thereby setting aside the majority view and accepting the minority opinion of the CCI resulting into allowing the appeal of the Coordination Committee and holding that there is no contravention of Section 3 of the Act which could not even be invoked on the facts of this case. In the first place, the Tribunal has affirmed the opinion of the dissenting member of the CCI on the question of 'relevant market' by holding that it was not the ‘Film and Television Industry in the State of West Bengal’, but the relevant market was the ‘telecasting of the dubbed serial on television in West Bengal’. Thereafter, the Tribunal took note of the provisions of Section 3(3) of the Act and concluded that the Coordination Committee was not trading in any groups, or provisions of any services, much less by the persons engaged in identical or similar trade or provisions of services. Therefore, it could not be said that there was any 'agreement' as envisaged in Section 3 entered into. According to the Tribunal, Section 3(3)(b) of the Act applies to the competitors who would be in the same line of commercial activity and by their agreement tend to restrict the competition. No evidence to this effect was available in the instant case. It was merely a protest of the Coordination Committee voicing its grievance for the benefit of its members and even if such a move on the part of the Coordination Committee was wrong and even if its agitation was influenced by foul play in projecting that exhibiting dubbed TV serial would affect their prospects of getting further work, that by itself would not become a competition issue covered by the Act.

23) Challenging the aforesaid view of the Tribunal, Mr. Chandhiok, learned senior advocate appearing for the CCI, referred to the various provisions of the Act and also extensively read out from the exercise undertaken by the DG and the majority view of the CCI. His submission was that exercise undertaken by the DG and approved by the CCI in its majority decision was correct in law. He questioned the manner in which 'relevant market' has been assigned limited sphere as,
according to him, the matter related to film and television industry of the State of West Bengal and the concerted action of the Coordination Committee was to obviously effect the competitiveness in the entire film and television industry of the State of West Bengal. He also read out various definitions from the Act, which we have already reproduced above. His submission was that the definition of 'agreement' contained in Section 2(b) had a much wider connotation and any such agreement which was anti-competitive in nature between persons or association of persons was hit by Section 3.

24) Learned counsel appearing for the Coordination Committee, on the other hand, heavily relied upon the impugned judgment and submitted that the conclusion drawn therein was correct in law as the Coordination Committee, which was in the nature of a trade union, and not in the business of production, supply, distribution, storage, acquisition or control of goods or provision of services, could not be covered within the scope of Section 3 of the Act. He also submitted that the action on the part of the Coordination Committee had nothing to do with the competition and it was the fundamental right of the Coordination Committee, as a trade union, to lodge legitimate protest. He submitted that even if in this protest the Coordination Committee had exceeded the limits, that may be an action actionable under any other law but would not fall within the domain of Competition Law.

25) We have given our due consideration to the respective submissions and have minutely gone through the orders passed by various authorities, glimpse whereof is already reflected above.

26) Two fundamental aspects which need determination are:

(i) What is the 'relevant market' for the purposes of inquiry into the impugned activity of the Coordination Committee?

(ii) Whether the action and conduct of the Coordination Committee is covered by the provisions of Section 3 of the Act?

27) Before we discuss the aforesaid questions, it would be necessary to clear the air on some of the fundamental aspects relating to the Act.

28) The Competition Act of 2002, as amended in 2007 and 2009, deals with anti-trust issues, viz. regulation of anti-competitive agreements, abuse of dominant position and a combination or acquisition falling within the provisions of the said Act. Since the majority view of the CCI also accepted that the impugned activities of the Coordination Committee did not amount to abuse of dominant position, and it treated the same as anti-competitive having appreciable adverse effect on competition, our discussion would be focused only on anti-competitive agreements. Section 3 of the Act is the relevant section in this behalf. It is intended to curb or prohibit certain agreements. Therefore, in the first instance, it is to be found out that there existed an ‘agreement’ which was entered into by enterprise or association of enterprises or person or association of persons. Thereafter, it needs to be determined as to whether such an agreement is anti-competitive agreement within the meaning of the Act. Once it is found to be so, other provisions relating to the treatment that needs to be given thereto get attracted.

29) While inquiring into any alleged contravention, whether by the Commission or by the DG, and determining whether any agreement has an appreciable adverse effect on competition under Section 3, factors which are to be taken into consideration are mentioned in sub-section (3) of Section 19.

30) The word 'market' used therein has reference to 'relevant market'. As per sub-section (5) of Section 19, such relevant market can be relevant geographic market or relevant product market. The factors which are to be kept in mind while determining the relevant geographic market are stipulated in sub-section (6) of Section 19 and the factors which need to be considered while determining the relevant product market are prescribed in sub-section (7) of Section 19. It is for this reason, the first and foremost aspect that needs determination is: 'What is the relevant market in which competition is effected?'

31) Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings behaviour and of preventing them from behaving independently of effective competitive pressure.
Therefore, the purpose of defining the 'relevant market' is to assess with identifying in a systematic way the competitive constraints that undertakings face when operating in a market. This is the case in particular for determining if undertakings are competitors or potential competitors and when assessing the anti-competitive effects of conduct in a market. The concept of relevant market implies that there could be an effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market insofar as specific use of such product is concerned.

32) While identifying the relevant market in a given case, the CCI is required to look at evidence that is available and relevant to the case at hand. The CCI has to define the boundaries of the relevant market as precisely as required by the circumstances of the case. Where appropriate, it may conduct its competition assessment on the basis of alternative market definitions. Where it is apparent that the investigated conduct is unlikely to have an adverse effect on competition or that the undertaking under investigation does not possess a substantial degree of market power on the basis of any reasonable market definition, the question of the most appropriate market definition can even be left open.

33) The relevant market within which to analyse market power or assess a given competition concern has both a product dimension and a geographic dimension. In this context, the relevant product market comprises all those products which are considered interchangeable or substitutable by buyers because of the products' characteristics, prices and intended use. The relevant geographic market comprises all those regions or areas where buyers would be able or willing to find substitutes for the products in question. The relevant product and geographic market for a particular product may vary depending on the nature of the buyers and suppliers concerned by the conduct under examination and their position in the supply chain. For example, if the questionable conduct is concerned at the wholesale level, the relevant market has to be defined from the perspective of the wholesale buyers. On the other hand, if the concern is to examine the conduct at the retail level, the relevant market needs to be defined from the perspective of buyers of retail products.

34) It is to be borne in mind that the process of defining the relevant market starts by looking into a relatively narrow potential product market definition. The potential product market is then expanded to include those substituted products to which buyers would turn in the face of a price increase above the competitive price. Likewise, the relevant geographic market can be defined using the same general process as that used to define the relevant product market.

35) Bearing in mind the aforesaid considerations, we concur with the conclusion of the Tribunal. It is the notion of 'power over the market' which is the key to analysing many competitive issues. Therefore, it becomes necessary to understand what is meant by the relevant market. This concept is an economic one.

36) In the instant case, the geographic market is the State of West Bengal and to this extent there is no quarrel inasmuch as activities of the Coordination Committee were limited to the said State. The dispute is as to whether relevant market would cover ‘broadcast of TV serial’ or it would take within its sweep ‘film and TV industry of the State of West Bengal’. TV serial in question was produced in Hindi. It was thereafter dubbed in Bangla. When the two channels, namely CTN+ and Channel 10, decided to broadcast this TV serial in dubbed form, i.e. in Bangla language, this move was opposed by the Coordination Committee and EIMPA. The Tribunal has upheld the minority view of CCI in saying that nature of the information does not show anything which could even be distinctly connected with the whole 'film and television industry in the State of West Bengal'. The information is only against showing the dubbed serial on the television and it has no relation whatsoever with production, distribution, etc. of any film or any other material on the TV channels. We feel that this is a myopic view taken by the Tribunal which ignores many other vital aspects of this case, most important being the width of the effect of the aforesaid cause on which the agitation was led by the Coordination Committee. The effect is not limited to the telecast or broadcast of the television serial. No doubt, the Coordination Committee was against the ‘broadcast of the television serial ‘Mahabharat’ on the aforesaid two channels, in the dubbed form. However, even as per the agitators, the said broadcast was going to adversely affect the TV and Film Industry of West Bengal and the alleged purport behind the threats was to save the entire TV and Film Industry. The Coordination Committee itself mentioned so in its letter dated February 18, 2012 as under:

“We came to know that you are publicizing in your channel that Bengali dubbed version of “Mahabharat” will be telecasted in your channel, shortly this is for your kind
information that the whole TV and Film Industry had fought back ruthlessly against telecast of Bengali dubbed versions of Hindi serials in DD-1 slot in 1997 and since that agitation DD National Network has stopped telecasting any Bengali dubbed version of Hindi programs. At the same time, it is to be noted that the film industry was also successful in debarring the release of Bengali dubbed version of Hindi Movie “Luv Kush” produced by Mr. DilipKankaria of Deluxe Films in the year 1997.

We have done this to stop withering away of the prestigious and internationally acclaimed Bengali Film and Television Industry, thereby creating job for artistes, workers and allied people associated with this industry. Hence we would request you to stop telecast of dubbed Bengali version of “Mahabharat” in your channel. (emphasis added)”.

37) The relevant market was, therefore, not limited to the broadcasting of the channel but entire film and television industry of West Bengal. Whether it was the misgiving of the Coordination Committee that telecast of dubbed version of ‘Mahabharat’ is going to affect Bengali film and television industry or it was a genuine concern, is not the relevant factor while defining the ‘relevant market’. It is the sweep of the aforesaid action which is to be considered. Even in the perception of the Coordination Committee, telecast of Bengali dubbed version of ‘Mahabharat’ was going to affect the whole Television and Film Industry. In view thereof, it was hardly a matter of debate as to what would be the relevant market.

38) With this we advert to the central issue that bogs the parties, namely, whether the activities in which the Coordination Committee indulged in can be treated as ‘agreement' for the purpose of Section 3 of the Act.

39) At the outset, it may be noticed that the entities which are roped in, whose agreements can be offending, are enterprise or association of enterprises or person or association of persons or where the agreement is between any person and an enterprise. The expression 'enterprise' may refer to any entity, regardless of its legal status or the way in which it was financed and, therefore, it may include natural as well as legal persons. This statement gets further strengthened as the agreement entered into by a 'person' or 'association of persons' are also included and when it is read with the definition of 'person' mentioned in Section 2(l) of the Act. Likewise, definition of ‘agreement' under Section 2(b) is also very widely worded. Not only it is inclusive, as the word 'includes' therein suggests that it is not exhaustive, but also any arrangement or understanding or even action in concert is termed as 'agreement'. It is irrespective of the fact that such arrangement or understanding is formal or informal and the same may be oral as well and it is not necessary that the same is reduced in writing or whether it is intended to be enforceable by legal proceedings or not. Therefore, the Coordination Committee would be covered by the definition of ‘person’. However, what is important is that such an ‘agreement', referred to in Section 3 of the Act has to relate to an economic activity which is central to the concept of Competition Law. Economic activity, as is generally understood, refers to any activity consisting of offering products in a market regardless of whether the activities are intended to earn a profit. Some examples may be given which would not be covered by Section 3(3) of the Act. An individual acting as a final consumer is not an enterprise or a person envisaged, as he is not carrying on an economic activity. We may also mention that the European Union Competition Law recognises that an entity carrying on an activity that has an exclusively social function and is based on the principle of solidarity is not likely to be treated as carrying on an economic activity so as to qualify the expressions used in Section 3. The reason is obvious. The 'agreement' or 'concerted practice' is the means through which enterprise or association of enterprises or person or association of persons restrict competition. These concepts translate the objective of Competition Law to have economic operators determine their commercial policy independently. Competition Law is aimed at frowning upon the activities of those undertakings (whether natural persons or legal entities) who, while undertaking their economic activities, indulge in practices which effect the competition adversely or take advantage of their dominant position.

40) The notion of enterprise is a relative one. The functional approach and the corresponding focus on the activity, rather than the form of the entity may result in an entity being considered an enterprise when it engages in some activities, but not when it engages in others. The relativity of the concept is most evident when considering activities carried out by non-profit-making organisations or public bodies. These entities may at times operate in their charitable
or public capacity but may be considered as undertakings when they engage in commercial activities. The economic nature of an activity is often apparent when the entities offer goods and services in the marketplace and when the activity could, potentially, yield profits. Thus, any entity, regardless of its form, constitutes an 'enterprise' within the meaning of Section 3 of the Act when it engages in economic activity. An economic activity includes any activity, whether or not profit making, that involves economic trade.

41) In the instant case, admittedly the Coordination Committee, which may be a 'person' as per the definition contained in Section 2(l) of the Act, is not undertaking any economic activity by itself. Therefore, if we were to look into the 'agreement' of such a 'person', i.e. Coordination Committee, it may not fall under Section 3(1) of the Act as it is not in respect of any production, supply, distribution, storage, acquisition or control of goods or provision of services. The Coordination Committee, which is a trade union acting by itself, and without conjunction with any other, would not be treated as an 'enterprise' or the kind of association of persons' described in Section 3. A trade union acts as on behalf of its members in collective bargaining and is not engaged in economic activity. In such circumstances, had the Coordination Committee acted only as trade unionists, things would have been different. Then, perhaps, the view taken by the Tribunal could be sustained. However, what is lost in translation by the Tribunal i.e. in applying the aforesaid principle of the activity of the trade union, is a very pertinent and significant fact, which was taken note of by the DG as well as the CCI in its majority opinion. It is this: The Coordination Committee (or for that matter even EIMPA) are, in fact, association of enterprises (constituent members) and these members are engaged in production, distribution and exhibition of films. EIMPA is an association of film producers, distributors and exhibitors, operating mainly in the State of West Bengal. Likewise, the Coordination Committee is the joint platform of Federation of Senior Technician and Workers of Eastern India and West Bengal Motion Pictures Artists Forum. Both EIMPA as well as the Coordination Committee acted in a concerted and coordinated manner. They joined together in giving call of boycott of competing members i.e. the informant in the instant case and, therefore, matter cannot be viewed narrowly by treating Coordination Committee as a trade union, ignoring the fact that it is backing the cause of those which are ‘enterprises’. The constituent members of these bodies take decision relating to production or distribution or exhibition on behalf of the members who are engaged in the similar or identical business of production, distribution or exhibition of the films. Decision of these two bodies reflected collective intent of the members. When some of the members are found to be in the production, distribution or exhibition line, the matter could not have been brushed aside by merely giving it a cloak of trade unionism. For this reason, the argument predicated on the right of trade union under Article 19, as professed by the Coordination Committee, is also not available.

42) When the lenses of the reasoning process are duly adjusted with their focus on the picture, the picture gets sharpened and haziness disappears. One can clearly view that prohibition on the exhibition of dubbed serial on the television prevented the competing parties in pursuing their commercial activities. Thus, the CCI rightly observed that the protection in the name of the language goes against the interest of the competition, depriving the consumers of exercising their choice. Acts of Coordination Committee definitely caused harm to consumers by depriving them from watching the dubbed serial on TV channel; albeit for a brief period. It also hindered competition in the market by barring dubbed TV serials from exhibition on TV channels in the State of West Bengal. It amounted to creating barriers to the entry of new content in the said dubbed TV serial. Such act and conduct also limited the supply of serial dubbed in Bangla, which amounts to violation of the provision of Section 3(3)(b) of the Act.

43) Resultantly, the instant appeal of CCI stands allowed. No costs.

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1. In both these petitions under Article 226 of the Constitution of India, the petitioners challenge the separate show cause notices dated 21st December 2009 issued by the Competition Commission of India, Respondent No. 2 herein, under Section 26(8) read with Section 3(3) of the Competition Act, 2002.

2. The petitioners in both these petitions have challenged the said show cause notices mainly on the ground that the Competition Commission established under the Competition Act, 2002 (hereinafter referred to as the "Competition Act") does not have any jurisdiction to initiate any such proceedings in respect of films for which the provisions of the Copyright Act, 1957 contain exhaustive provisions.

3. The facts leading to issuance of impugned show cause notices are already stated in the show cause notices themselves.

It has been stated in the information that the members of these organizations are perpetrating cartel like activity which is violative of provisions of Section 3(3) of Competition Act 2002. It has also been alleged that these Associations/Enterprises, who jointly control approximately 100% of the market share for production and distribution of Hindi Motion Pictures exhibited in Multiplexes, by organizing themselves under the umbrella of UPDF, took a collective decision not to release films to the Multiplexes from 4th April 2009 onwards with the objective to extract higher revenue sharing ratio from the members of the informant and this cartel like activity has appreciable adverse effect on competition in India.

The Commission took cognizance of the matter under Section 19 of the Act and on forming an opinion under Section 26(1) that there exists a prima facie case, it issued directions to Director General (DG) to investigate into the matter.

After conducting investigation, the DG submitted his report dated 24/9/09 and also a supplementary report dated 27/11/09 to the Commission.

As per the findings of the D.G. in these reports, the allegations made in the information have been found to be substantiated against you.

In these reports, the DG has concluded that you along with other persons named in the report of DG have acted in concert by forming a cartel with a view to extracting higher revenue sharing ratio for the supply of films to the Multiplexes and for achieving your object, you indulged in limiting/controlling supply of films in the market by refusing to release films to Multiplexes for exhibition and succeeded in achieving your objective by raising your revenuesharing ratio and have thus by your conduct and activities contravened the provisions of Section 3(3) of the Competition Act, 2002.

After considering the reports of DG, the Commission has decided to proceed further in the matter in accordance with the provisions of the Competition Act and the regulations framed thereunder.

In view of the above and in compliance to the directions of the Commission, the copies of reports of the DG are being furnished to you for inviting your replies/objections, if any.

You are, therefore, directed to submit your objections/ replies within a period of 15 days from the date of receipt of this notice. If you wish, you may also make request for inspection of the relevant record and may also submit facts and material in support of your contentions.
6. The petitioners have challenged the jurisdiction of the Competent Commission to initiate any proceedings under the Competition Act against the petitioners on the following main grounds:

   (i) The exhibition of a feature film, which is a subject matter of copyright exploitation alone, is specifically excluded under Section 3(5) of the Competition Act and hence the proceedings initiated against the petitioners are without jurisdiction.

   (ii) Issuance of notice dated December 21, 2009 to petitioner No. 2 in Writ Petition No. 358 of 2010 and of the notice to petitioner Nos. 2 and 3 in Writ Petition No. 526 of 2010, who are not producers of a feature film in their individual capacity is also without jurisdiction and shows non-application of mind.

   (iii) The petitioners did not delay or withhold releasing of any film from any multiplex nor did they take any action as alleged in the report. The petitioners had merely participated in certain meetings with other film producers to discuss the issue about disputes on revenue sharing, wrongful deductions by the multiplex owners before paying the producers/distributors, delays in payment and non-payments by the multiplex owners to the producers/distributors and other matters which adversely affected the producers/distributors with multiplex owners who in fact were acting in concert against the producers/distributors.

   (iv) It is further contended that in the course of such negotiations, the name "United Producers/Distributors Forum (UPDF) was coined to describe the producers who were negotiating with the multiplex owners. However, this was not a registered body nor did it represent all the film producers.

   (v) The disputes that had arisen between the multiplex owners and producers of Hindi feature films were resolved in or about June 2009 and thereafter agreements are being signed between each individual producer for its respective films with each individual multiplex and films are being released through multiplexes by Hindi film producers and hence the allegations and the impugned show cause notices have become academic and stale as no grievance remains to investigate.

   (vi) The information received by the respondents from FICCI- Multiplex Association of India, on the basis of which the case was filed against the petitioners, was not disclosed to the petitioners. The petitioners further state that after the petitioners received letter dated 11th August 2009 indicating the information about the alleged violation of the provisions of Section 3(3) of the Competition Act, the petitioners had responded by writing letters dated 17th August 2009 and 1st September 2009 in Writ Petition No. 358 of 2010 and letter dated 17th August 2009 in Writ Petition No. 526 of 2010. The Director General of Investigation held a hearing on 23rd November 2009. Even thereafter the Competition Commission issued the impugned show cause notices without considering various legal contentions including lack of jurisdiction of the Competition Commission, raised in the petitioners' replies.

7. At the hearing of these writ petitions, learned Senior Counsel Mr. Hidayatullah and Mr. JanakDwarkadas have challenged the show cause notices mainly on the ground of lack of jurisdiction and made the following submissions:

   (a) Sub-section (1) of Section 3 of the Competition Act prohibits an anti-competitive agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. The right to release a film can never be considered as goods or services and, therefore, the Competition Act, 2002 can never apply to a dispute regarding the distribution rights in relation to films.

   (b) Without prejudice to the above contention, it is submitted that Sub-section (5)(i)(a) of Section 3 specifically provides that nothing in Section 3 shall restrict the right of any person to restrain an infringement of, or to impose reasonable conditions as may be necessary for protecting, any of his rights which have been or may be conferred upon him under the Copyright Act, 1957.
(c) Section 13(1)(b) of the Copyright Act, 1956 confers copyright in cinematograph films and Section 14(1)(d)(ii) provides that copyright means the exclusive right to do or authorise the doing or to authorise to sell or give on hire or offer for sale or hire any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions and under Sub-section (iii) to communicate the film to the public. The producer of the film has exclusive right to decide as to whom he shall sell or give on hire any copy of the film for communicating the film to the public. Section 18 confers upon the owner of the copyright right to assign to any person a copyright either wholly or partially. Section 30 recognises the right of the owner of the copyright to grant any interest in the right by licence in writing. It is, therefore, submitted that when a producer makes a cinematograph film, he has an exclusive right to sell or give on hire any copy of the film and unless the owner of the copyright has assigned the rights or has given licence in writing and has granted interest in the right by licence any right to a third party, the only other permissible mode or method for any person to acquire any right in respect of such copyright is by making a complaint to the Copyright Board under Section 31 and satisfy the Copyright Board that the necessary conditions stipulated in Section 31 are satisfied. Section 31 provides that if a complaint is made to the Copyright Board that the owner of the copyright in the film has refused to allow the performance in the public of the work and by reason of such refusal, the work is withheld from the public or has refused to allow the communication to the public, such work on terms which the complainant considers reasonable, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding inquiry, if it is satisfied that the grounds for such refusal are not reasonable, the Copyright Board may direct the Registrar of Copyright to grant to the complainant a licence to republish the work, perform the work in public or communicate the work to the public subject to payment to the owner of the copyright of such compensation and subject to such terms and conditions as the Copyright Board may determine.

(d) Assuming, while denying, that the petitioners had insisted upon unreasonable terms for granting the right to exhibit the films in favour of the multiplex owners was to approach the Copyright Board under Section 31 of the Copyright Act, 1957. Anything done otherwise than in accordance with the aforesaid statutory scheme of the Copyright Act, will give the owner of the copyright the right to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights under the Copyright Act. It is, therefore, clear that the Competition Commission has no jurisdiction to initiate any proceedings which will interfere with the rights of the owner of the copyright in the cinematograph film under the Copyright Act. The impugned show cause notices proceed on the assumption that the Competition Commission has such jurisdiction. The impugned show cause notices are, therefore, issued without any jurisdiction and without any authority of law whatsoever.

(e) The Competition Commission having already taken a particular stand even after the petitioners submitted their reply to the letter of Director General of Investigation, no useful purpose will be served by requiring the petitioners to appear before the Competition Commission, as it has already pre-judged the issue. In support of the said contention, reliance is placed by the learned Counsel for the petitioners on the decision in Siemens Ltd v. State of Maharashtra MANU/SC/8259/2008 : (2006) 12 SCC 33 and particularly paragraph 11 thereof, which reads as under:

11. A bare perusal of the order impugned before the High Court as also the statements made before us in the counter- affidavit filed by the respondents, we are satisfied that the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the appellant. If in passing the order the respondent has already determined the liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show-cause notice. The writ petition, in our opinion, was maintainable.

9. Mr. Janak Dwarkadas, the learned Counsel for the petitioners has also placed reliance on the following decisions:

(a) Ramesh Chandra Sankla and Ors v. Vikram Cement and MANU/SC/7810/2008 : (2008) 14 SCC 58, is relied upon in support of the contention that if the jurisdictional fact does not exist, the tribunal cannot act. If an authority or tribunal wrongly assumes the existence of such facts, a writ of certiorari lies, because by erroneously assuming existence of jurisdictional fact, a subordinate tribunal cannot confer upon itself jurisdiction which it otherwise does not possess.

(b) Entertainment Network (India) Limited v. Super Cassette Industries Limited MANU/SC/2179/2008 : (2008) 13 SCC 30, is relied upon for the purpose of analysing the scheme of the Copyright Act and particularly Sections 14, 30 and 31 of the said Act. Relying on the principles laid down in paragraphs 92 to 96 of the above judgment, it is vehemently submitted that a copyright owner has complete freedom to enjoy the fruits of his labour by assigning the copyright for an agreed royalty through the issuance of licences and that such right is subject only to right of others to obtain compulsory licence as also the terms on which such licence can be granted. The underlying philosophy of the Copyright Act is that the owner of the copyright is free to enter into voluntary agreement or licences on terms mutually acceptable to him and the licensee. The Act also expressly recognises the concept of the exclusive licence subject only to the grant of compulsory licence by the Copyright Board as also the terms on which such licence can be granted under Section 31 of the Act. It is also contended that what is prohibited by the Competition Act is an agreement by an association of enterprises or by association of persons which cause or is likely to cause an appreciable adverse effect on competition within India but Copyright Act and particularly Sections 33 and 34 thereof specifically provide for the registration of a copyright society and empowers the copyright society to accept from the owner exclusive authorisation to administer any rights in any work by issuance of licence or collection of licence fees or both. It is, therefore, submitted that in view of the specific exclusion clause provided in Sub-section (5) of Section 3 of the Competition Act, the producer's right under the Copyright Act can never be taken away by any authority or even the Competition Commission under the Competition Act, 2002.

(c) The decision dated 22nd January 2010 of this Court in the case of Music Choice India Pvt. Ltd. v. Phonographic Performance Ltd. Appeal No. 150 of 2009 in Suit No. 2124 of 2007, is relied upon in support of the contention that it is the Copyright Board alone which has the exclusive jurisdiction to grant compulsory licence to a complainant under Section 31 of the Copyright Act and that no other Court or Commission can grant such a right to a third party. It is submitted that the Competition Commission does not have and cannot have jurisdiction to grant something which would frustrate the provisions of the Copyright Act and that Legislative intent is more than clear from Sub-section (5) of Section 3 of the Competition Act.


10. On the other hand, the petitions are opposed by Mr. Khambatta, learned Additional Solicitor General appearing for the Union of India and the Competition Commission. It is submitted that the matter is still at the show cause notice stage and, therefore, the petitions are premature. All the issues raised in the petitions and the correspondence addressed on behalf of
the petitioners can and must be decided by the Competition Commission. The petitioners have participated in the proceedings before the Competition Commission and they have already indicated that they would be filing a reply to the show cause notices and they have also sought a hearing from the Competition Commission. Having accepted the jurisdiction and authority of the Competition Commission to proceed in the matter pursuant to the said notices and having unequivocally appeared before the Commission, the petitioners are now estopped from raising any objection to the said proceedings.

11. Without prejudice to the above submissions, it is further submitted by the learned Additional Solicitor General as under:

(a) The Competition Commission can decide constitutional, legal and even jurisdictional issues. In L. Chandra Kumar v. Union of India AIR 1987 SC 1125 (paras 90 and 93) and Special Director and Anr. v. Mohd. Ghulam Ghouse MANU/SC/0025/2004 : AIR 2004 SC 1467 (para 5), the Apex Court has deprecated the practice of litigants raising constitutional issues to directly approach the High Court and thus subvert the jurisdiction of the tribunals. The tribunal can decide all such issues and even jurisdictional issues can also be decided by the tribunal. The only exception is that the tribunal cannot decide the constitutional validity of the statute under which the tribunal is established.

(b) It is premature to interfere with a show cause notice and stop proceedings. No prejudice is caused by mere issuance of the show cause notice. Even jurisdictional issues can be urged before and adjudicated upon by the tribunal as held by this Court in Vodafone International Holdings BV v. Union of India 2009 (4) BCR 258 and confirmed by the Apex Court in MANU/SC/0105/2009 : (2009) 179 Taxman 129 (SC).

(c) In Kingfisher Airlines Ltd. v. The Competition Commission of India and O Writ Petition No. 1785 of 2009, this Court has considered a premature challenge to proceedings under the Competition Act and has refused to interfere in its extraordinary jurisdiction under Article 226 of the Constitution of India.

(d) The forum created by a statute that creates a liability or obligation should not be disregarded. The Competition Act creates obligations and liabilities which are not common law liabilities or obligations and, therefore, in such cases the High Court should not entertain petitions under Article 226 and ignore the statutory forum. Strong reliance is placed on the decision dated 12th April 2010 of the Apex Court in Raj Kumar Shivhare v. Assistant Director, Enforcement Civil Appeal No. 3221 of 2010.

12. Without prejudice to the above submissions, Mr. Khambatta, learned Additional Solicitor General has also submitted that just for the purposes of prima facie discussion and to indicate that the petitioners do not have a cast iron case on the question of jurisdiction of the Competition Commission, he would make the following submissions:

What the petitioners are seeking to do is to redraft the language of Sub-section (5) of Section 3 of the Competition Act, 2002 to read that nothing contained in this section (Section 3 of the Competition Act) shall apply to the right of any person under the Copyright Act, 1957. All that Sub-section (5) of Section 3 provides is that Sub-section (1) of Section 3 shall not take away or restrict the right of any person to restrain any infringement of copyright or the right of any person to impose reasonable conditions for protecting his rights under the Copyright Act. Hence all the defences which can be raised before the Copyright Board can be also raised before the Competition Commission.

In support of this submission, reference is made to the provisions of Sections 60, 61 and 62 of the Competition Act, 2002. Section 61 provides for exclusion of jurisdiction of civil Courts in respect of any matters which the Commission or the Appellate Tribunal is empowered by the Competition Act to determine. Section 60 gives the Act overriding effect over other laws. Section 62 of the Competition Act, 2002, reads as under:

62. Application of other laws not barred- The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.
Relying on the preamble of the Competition Act that the Act has been enacted to provide "for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto", it is, submitted that the protection of interests of consumers is an important object for enactment of the Competition Act, 2002 and, therefore, if the Competition Act has provided for an additional forum for protection of consumers' rights in addition to the forum of Copyright Board provided under the Copyright Act, 1957, it cannot be said that the Competition Commission is acting without jurisdiction.

13. Having heard the learned Counsel for the parties, we have given anxious consideration to the rival submissions.

14. It is vehemently contended on behalf of the petitioners that issuance of notices by the Competition Commission proceeds on the basis of incorrect assumption of certain facts and issues. It is, therefore, necessary to discuss the power of the Commission to determine jurisdictional facts. It is true that the jurisdictional fact is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction to decide a particular matter. In Chaube Jagdish Prasad and Anr. v. Ganga Prasad Chaturvedi MANU/SC/0133/1958 : AIR 1959 SC 492 (para 17), the Apex Court quoted with approval the following observations of Lord Esher M.R., in the Queen v. Commissioner for Special Purposes of the Income Tax (1888) 21 QBD 313, 319:

When an inferior Court or tribunal or body, which has to exercise the power of deciding facts is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction on finding that it does exist, to proceed further or dosomething more. When the legislature are establishing such a tribunal or body with limited jurisdiction they give them, whether there shall be any appeal from their decision, or there will be none. In the second of two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction.

The Apex Court then stated as under:

These observations which relate to inferior Courts or tribunals with limited jurisdiction show that there are two classes of cases dealing with the power of such a tribunal (1) where the legislature entrusts a tribunal with the jurisdiction including the jurisdiction to determine whether the preliminary state of facts on which the exercise of its jurisdiction depends exists and (2) where the legislature confers jurisdiction on such tribunals to proceed in a case where a certain state of facts exists or is shown to exist. The difference is that in the former case the tribunal has power to determine the facts giving it jurisdiction and in the latter case it has only to see that a certain state of facts exists.
Whatever may be the debate about the scope of review by the Writ Court of the decision of a Tribunal on a jurisdictional fact, every Tribunal has the jurisdiction to determine the existence or otherwise of the jurisdictional fact, unless the statute establishing the Tribunal provides otherwise.

On a bare reading of the provisions of the Competition Act, 2002, it is clear that the Competition Commission has the jurisdiction to determine whether the preliminary state of facts (on which the further exercise of its jurisdiction depends) exists. There is nothing in the Competition Act, 2002 to indicate that the Competition Commission is not invested with the jurisdiction to determine such jurisdictional fact.

15. The question whether the Competition Commission has jurisdiction to initiate the proceedings in the fact situation of these cases is a mixed question of law and fact which the Competition Commission is competent to decide. The matter is still at the stage of further inquiry. The Commission is yet to take a decision in the matter. There is no reason to believe that the Competition Commission will not consider all the contentions sought to be raised by the petitioners in these petitions including the contention based on Sub-section (5) of Section 3 of the Competition Act.

16. The submission of the respondents that the Writ Court would not entertain a petition challenging a show cause notice, is sought to be countered on behalf of the petitioners by relying on the decision in Calcutta Discount Co. Ltd., (supra).

The contention which appealed to the Apex Court in the above case was the following:

26. Mr. Sastri next pointed out that at the stage when the Income Tax Officer issued the notices he was not acting judicially or quasi-judicially and so a writ of certiorari or prohibition cannot issue. It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.

(emphasis supplied)

17. In the facts of the instant case, it cannot be said that requiring the petitioners to appear before the Competition Commission will subject the petitioners to lengthy proceedings and unnecessary harassment. Sections 8 and 9 of the Competition Act provides that the Commission shall consist of a Chairperson and two to six Members having special knowledge of, and professional experience of at least fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy. The Chairperson and Members of the Commission are to be appointed by the Central Government from a panel of persons recommended by a Selection Committee headed by the Chief Justice of India or his nominee.

In case the final decision of the Competition Commission is adverse to the petitioners, the petitioners will have right to challenge the same in an appeal before the Competition Appellate Tribunal established under Section 53A of the Competition Act and the said Appellate Tribunal is headed by a former Judge of the Supreme Court of India. It, therefore, appears to us that the decision of the Apex Court in Calcutta Discount Co. Ltd. (supra), in which the challenge was to the show cause notice issued by an Income Tax Officer for re-assessment, cannot be applied to a case where a show cause notice has been issued by the Competition Commissioner under the Competition Act. Against the decision of the Commission an appeal would lie before the Appellate Tribunal headed by a sitting or a former Judge of the Supreme Court of India or a Chief Justice of a High Court as provided in Section 53D of the Competition Act. Sub-section (2) of Section 53D of the Competition Act also provides that Members of the Appellate Tribunal shall be persons of ability, integrity and standing having special knowledge of and professional experience of at least twenty-five years in competition
matters, including competition law and policy, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration. As provided in Section 53E of the Competition Act, the Chairperson and Members of the Appellate Tribunal are appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of the Chief Justice of India or his nominee as the Chairperson, and the Secretary in the Ministry of Corporate Affairs and the Secretary in the Ministry of Law and Justice as the Members of the selection committee.

18. The contention that the Competition Commission has already pre-judged the issue also cannot be accepted. Under Sub-section (1) of Section 26, the Commission directed an investigation by Director General into the complaint of FICCI-Multiplex Owners' Association. Under Sub-section (3) thereof, the Director General submitted a report of his findings that there is contravention of Section 3(3) of the Act and under Sub-section (4), the Commission forwarded a copy of the report to the petitioners. After consideration of the petitioners' objections, the Commission has formed an opinion under Sub-section (8) that further inquiry is called for. Hence all that the Commission is doing is to hold an inquiry into such contraventions as reported by the Director General. All the authorities including disciplinary authority in service matters initiate departmental inquiries upon receiving preliminary inquiry report of subordinate officer indicating misconduct having been committed, but once the inquiry is held by observing the applicable statutory provisions and the principles of natural justice, the concerned disciplinary authority takes a final decision in the matter in accordance with law. Hence, mere issuance of a show cause notice under Section 26(8)/Section 27, like issuance of a charge-sheet in a departmental inquiry, cannot be treated as pre-judging the issue, merely because the petitioners had raised some of the legal contentions in the replies to the notice issued by the Director General of Investigation and thereafter also the Commission has issued show cause notices. That can never mean that the Competition Commission will not consider the petitioners' objections against maintainability of the proceedings.

19. Since we are inclined to dismiss the petitions only on the ground that the petitions challenge show cause notices and that it is open to the petitioners to raise all available contentions, including preliminary objection against legality or otherwise of initiation of the proceedings against the petitioners, we do not express any opinion on merits of controversy between the parties and, therefore, we do not think it fit to deal with those contentions on merits, as we do not wish to express any opinion either way even on the merits of the preliminary objections raised by the petitioners about jurisdiction of the Tribunal to initiate the proceedings against the petitioners. All contentions are kept open.

20. If the petitioners wish to submit any reply/further reply to the impugned notices, the petitioners may do so within one month from today and the Commission shall accept the same and give the petitioners an opportunity of personal hearing before taking any decision in the matte

21. Subject to the above clarifications and directions, the petitions are dismissed.

* * * * *
Builders Association of India v. Cement Manufacturers'
Case No. 29/2010, CCI, Date of Order: 20.06.2012.

The CCI, through its order dated 20 June 2012, imposed a penalty of approximately six thousand crores (approx. USD 1.1 billion) on cement manufacturers in India after holding them guilty of cartelsisation in the cement industry. The penalty has been imposed at the rate of 0.5 times the net profit of such manufactures for the past two years. Additionally, the Cement Manufacturer’s Association (the CMA) has been fined 10% of its total receipts for the past two years for its role as the platform from which the cartel activity took place.

The decision of the CCI emanates from information filed by the Builders’ Association of India on 26 July 2010 against the CMA and ACC, Gujarat Ambuja Cements Limited (now Ambuja Cements Limited), Ultratech Cements, Grasim Cements (now merged with Ultratech Cements), JK Cements, India Cements, Madras Cements, Century Textiles & Industries Limited, Binani Cements, Lafarge India and Jaiprakash Associates Limited.

On 15 September 2010, the CCI formed a prima facie opinion on the contravention of the Competition Act, 2002 (the Competition Act) and directed investigations in the matter. On 31 May 2011, the Director General (DG) submitted his report (the Report) detailing contravention of the Competition Act by the respondents.

The CCI called for comments and objections from the respondents, and after considering their submissions came to the conclusion that the respondents had contravened sections 3(3) (a) and (b) of the Competition Act.

Before going to the principal findings of the CCI, it is important to note that the CCI restricted itself to the cement companies named in the information owing to the fact that such companies were the prominent participants in the market and were key players in the whole arrangement.

Similarly, as to the period of contravention, the CCI limited the period from 20 May 2009 to 31 March 2011. However, it made clear that this limitation was only relevant to the present case and would be independent of other cases.

Preliminary Issues

Jurisdiction: The respondents had raised concern over the DG’s investigation and reliance on data prior to 20 May 2009 (the date on which the provisions of Section 3 of the Competition Act were brought into force). The CCI held that mere examination of data prior to 20 May 2009 cannot be construed to mean that the provisions of the Competition Act have been applied retrospectively. Moreover, relying on the Bombay High Court decision in Kingfisher Airlines v CCI, the CCI took the view that if the effects of acts taken place prior to 20 May 2009 were continuing, it had the jurisdiction to examine such conduct.

Failure to provide opportunity to cross examination: The respondents contented that the DG did not give them an opportunity to cross examine witnesses relied upon by him. The CCI rejected this submission and stated that by giving the respondents the chance to submit oral and written evidence before it, the proceedings were in accordance with the principles of natural justice.

Incorrect reliance on motivated information and press reports: The respondents stated that the information filed by the Builders’ Association was motivated. This, again, was rejected by the CCI. It held that under the scheme of the Competition Act, the final outcome was to be determined on the basis of an inquiry after going into the questions whether competition forces were being inhibited due to certain anti-competitive behaviour.

Substantive Issues

The substantive question before the CCI was whether the conduct of the cement companies violated sections 3 (anti-competitive agreements) (discussed below). The CCI also examined whether there was an abuse of dominant position, but found that the market was characterised by several players and no single firm or group was in a position to operate
independent of competitive forces or affect its competitors or consumers in its favour (cf. explanation (a) to section 4 of the Competition Act).

In respect of violations of sections 3(1) (a) and (b), the CCI examined the following facts and submissions:

Market Structure of the Cement Industry: As previously stated, the CCI observed that no player can be said to be dominant in India as per the prevailing market structure. The industry is characterised by twelve cement companies having about 75% of the total capacity in India with about 21 companies controlling about 90% market share in terms of capacity. Given the oligopolistic nature of the market, each company takes into account the likely reactions of other companies while making decisions particularly as regards prices. In such a scenario, collusion between companies is possible and can be adduced from circumstantial evidence.

Circumstantial evidence is sufficient to prove violation: The chief objection taken by the cement companies was that the DG failed to support his findings with any direct evidence. The CCI, relying on international practice, noted that given the clandestine nature of cartels, circumstantial evidence is of no less value than direct evidence to prove cartelisation.

Section 3 does not require a delineation of relevant market: The CCI has held that for an inquiry under section 3 of the Competition Act, there is no requirement under the Competition Act to determine a ‘relevant market’. The Commission states that there is a distinction between ‘market’ as used in section 3 and the ‘relevant market’ as defined in section 4 of the Competition Act.

CMA is engaged in collecting competition sensitive data: The respondents contended that CMA collects retail and wholesale prices data from different parts of the country and transmits them to the Ministry of Commerce, as per the latter’s request. The CCI held that the competitors were interacting using the platform of the CMA and this gave them an opportunity to determine and fix prices. The fact that it was being under the instruction of DIPP did not absolve them of liability.

Further, the CCI noted that the CMA publishes statistics on production and dispatch of each company (factory wise) and circulates such information amongst its members. The sharing of price, production and dispatch data makes co-ordination easier amongst the cement companies.

High Power Committee Meetings: The CCI took note of the fact that cement prices increased immediately after the High Power Committee Meetings of the CMA which were attended by the cement companies in January and February 2011. It further noted that ACC and ACL, despite having ceased to be members of the CMA, attended these meetings. The CCI observed that whilst ACC and ACL admitted to having attended these meetings, both CMA and JAL refuted their presence. The inconsistencies in the statements of the different respondents established that they were keen on hiding material information.

Amendments to the CMA constitutional documents: Certain rules and regulations of CMA had serious competition concerns. These were highlighted in a CMA meeting on 30 November 2009. However, the amendments to those rules and regulations were only carried out once the DG sent notice to the respondents in the instant case.

Price Parallelism: The DG had conducted an economic analysis of price data which indicated that there was a very strong positive correlation in the prices of all companies. This, according to the DG, confirmed price parallelism. The respondents argued that the correlation benchmark of 0.5 taken by the DG was arbitrary. Moreover, the prices used by the DG were incomparable since the prices submitted by the companies differed from each other (some had submitted gross prices, while others had submitted depot prices, average retail prices etc.). The CCI did not accept these arguments and stated that given the nature of data exchanged between the parties, price parallelism could not be a reflection of non-collusive oligopolistic market conditions.
Limiting and controlling production: The Report submitted by the DG suggested that whilst capacity utilisation increased during the last four years, the production has not increased commensurately during this period. The various respondents contested these figures and led evidence to show that capacity utilisation was on the increase. It was also argued that the DG had incorrectly relied upon ‘name plate’ capacity whereas actual capacity was dependent on raw materials, plant stabilisation time, power supply etc. Therefore, if the aforesaid is taken into account, the capacity utilisation would be much higher. These submissions did not hold water with the CCI, which observed that on a year on year and plant wise basis, the capacity utilisation across the respondents had decreased.

Limiting and controlling supply: The CCI observed that the forces of demand and supply dictated that the dispatch figures should have been more than or equal to consumption of cement in the corresponding period of the previous year. However, in two months of November and December 2010, the dispatch was lower than the actual consumption for the corresponding months of 2009. It was not the case that the market could not absorb the supplies, but, instead, the lower dispatches coupled with the lower utilisation establishes that the cement companies indulged in controlling and limiting the supply of cement in the market.

Production Parallelism: The production figures across cement companies (in a particular geographical region) showed strong positive correlation. According to the CCI, in November – December 2010 the cement companies reduced production collectively, although during the same period in 2009, the production of the cement companies differed. This was a clear indication of co-ordinated behaviour.

Dispatch Parallelism: It was observed that the dispatches made by the cement companies have been almost identical for the period from January 2009 to December 2010. The cement companies argued that the parallelism in both production and dispatch is on account of the commoditised nature of cement, the cyclical nature of the cement industry and the ability of competitors to intelligently respond to the actions of their competitors. The CCI noted that the drop in production and dispatch in the November 2010 was unusual especially when November 2009 witnessed a mixed trend. Interestingly, the CCI held that the parties to a cartel may not always co-ordinate their action; periodically their conduct may reflect a competitive market. Where co-ordination proves gainful, parties will substitute competition for collusion.

Increase in price: The deliberate act of shortage in production and supplies by the cement companies and almost inelastic nature of demand of cement in the market resulted into higher prices for cement. The CCI was of the view that there was no apparent constraint in demand which could justify the lower capacity utilisation. Further, there was no constraint in demand during November and December 2010, and, in fact, the construction industry saw a positive growth in the third quarter of 2010-11.

Price Leadership: The CCI noted that the given the small number of major cement manufacturers, the price leaders gave price signals through advanced media reporting which made it easier for other manufacturers to co-ordinate their strategies.

High Profit Margins: The profit margins of all the cement companies were examined by the Commission, which arrived at the conclusion that some companies posted a high Return on Capital Employed and higher EBITDA in 2010-11 as compared with 2009-10. Additionally, the CCI observed that the respondents earned huge margins over the cost of sales.

Factors set out in Section 19(3) of the Competition Act: It is worth noting that the CCI has stated that where contraventions of sections 3(3) (a) and (b) are proved, the adverse effect on competition is presumed. However, on account of the rebuttals raised by the respondents, it considered the factors mentioned in section 19(3) to determine whether an appreciable adverse effect on competition has been caused.

Although, the Commission did not go into the factors set out in section 19 (3) (a), (b) and (c), it held that the increase of price and reduced supply in the market was to the detriment of the consumer. Further, the efficiency defences in section 19 (e) and (f) were not available as the
conduct of the respondents neither caused any improvement in production or distribution of goods nor any promotion of technical, scientific and economic development.

In view of the evidence and the analysis of the factors mentioned in sections 19(d) to (f), the contraventions of sections 3(3) (a) and (b) stood established.

Directions of the CCI

In cartel cases, the CCI has the power to fine parties up to three times of its profit for each year of the continuance of the cartel or 10% of its turnover for each year of the continuance of the cartel, whichever is higher. The turnover and profit for the cement companies were examined and accordingly the following penalties were levied on the cement companies.

<table>
<thead>
<tr>
<th>Company</th>
<th>Penalty (INR in Crores)</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACC Ltd.</td>
<td>1147.59</td>
</tr>
<tr>
<td>Ambuja Cements Ltd.</td>
<td>1163.91</td>
</tr>
<tr>
<td>Binani Cements Ltd.</td>
<td>167.32</td>
</tr>
<tr>
<td>Century Textiles Ltd.</td>
<td>274.02</td>
</tr>
<tr>
<td>India Cements Ltd.</td>
<td>187.48</td>
</tr>
<tr>
<td>J K Cements Ltd.</td>
<td>128.54</td>
</tr>
<tr>
<td>Lafarge India Pvt. Ltd.</td>
<td>480.01</td>
</tr>
<tr>
<td>Madras Cements Ltd.</td>
<td>258.68</td>
</tr>
<tr>
<td>Ultratech Cement Ltd.</td>
<td>1175.49</td>
</tr>
<tr>
<td>Jaiprakash Associates Ltd.</td>
<td>1323.60</td>
</tr>
</tbody>
</table>

In addition, the CMA was fined 10% of its total receipts for the past two years.

The respondents have been directed to pay the above penalties within 90 days of the receipt of the CCI order.

The CCI also directed the companies to ‘cease and desist’ from indulging in agreement or understanding on prices, production and supply of cement in the market. Similarly, the CMA has been directed to disengage and disassociate itself from collecting wholesale and retail prices through the member cement companies and also from circulating the details on production and dispatches of cement companies to its members.

* * *
Exclusive Motors Pvt. Limited v. Automobile Lamborghini S.P.A
CCI Case No. 52/2012, Order Date: 06.11.2012

The present information has been filed by Exclusive Motors Pvt. Limited ('the informant') under Section 19(1)(a) of the Competition Act, 2002 ('the Act') against Automobili Lamborghini S.P.A. ('the opposite party') alleging inter-alia contravention of Section 3 and Section 4 of the Act.

2. The informant claimed to be in the business of importing and selling of 'Super Sports Cars' in the territory of Delhi. The opposite party is well known manufacturer of Super Sports Cars. The opposite party is the subsidiary of Audi Ag which in turn is a part of Volkswagen group. Volkswagen group is stated to own majority of luxury car brands such as Audi, SEAT, Lamborghini, Volkswagen, Skoda, Bentley, Bugatti and Porsche.

3. Briefly stated, the informant alleged that it was appointed as the importer and dealer of Super Sports Cars manufactured by the opposite party in 2005 by way of a Dealership Agreement. Thereafter, the informant invested substantial time, efforts and money to develop Indian market for opposite party's cars which was negligible prior to this agreement. Sometime in 2011, the opposite party appointed its own group company, Volkswagen Group Sales Pvt. Ltd. (Volkswagen India) as exclusive importer of opposite party's cars and the informant was requested (through a letter dated 24.01.2012) to terminate the existing dealership agreement with the opposite party and to bring in place a fresh dealership agreement with Volkswagen India. The new agreement entailed a larger deposit amount and the notice period required for termination was sought to be reduced from 12 months to 3 months. The informant, therefore, did not agree to the new arrangement. In response to this, the opposite party withdrew the new arrangement and served a 12 month's notice to the informant for terminating the existing dealership agreement entered between them in 2005. It is alleged that during the notice period the opposite party had offered its products to the informant at a much higher price than its own company i.e. Volkswagen India thereby adopting discriminatory pricing policy.

4. The informant, therefore, alleged contravention of section 3 and 4 of the Act. The agreements of the opposite party with its group company (Volkswagen India) and its Partner (Auto-Hanger) are alleged to be anti competitive and in contravention of section 3(3)(a) as they directly determine sale and purchase price of the car. Also, the exclusive distribution agreement between opposite party and its group company Volkswagen India is alleged to be in violation of section 3(4)(c) of the Act since it excluded the informant and other prospective dealers to become the importers and dealers of opposite party products. With regard to section 4, the informant considered the relevant market as market for 'distributing super sports cars in India'. The informant stated that the opposite party held 52% share in this market individually while with other group cars of Volkswagen group (Martin and Porsche) its share amounted to 60%. Informant insisted that this showed dominant position of the opposite party which enabled it to impose unfair and discriminatory conditions on the informant. Therefore, the opposite party violated section 4(2)(a)(i) and (ii) by imposing unfair and discriminatory conditions and section 4(2)(c) by denying market access to the informant. On the aforesaid basis, the informant prayed the Commission to direct
an inquiry under section 26(1) of the Act into the anti-competitive practices adopted by
the opposite party and Volkswagen India.

5. The Commission has perused the information and heard the counsel for the
informant at length.

6. To establish a contravention under Section 3, an agreement is required to be proven
between two or more enterprises. Agreement between opposite party and its group
company 'Volkswagen India' cannot be considered to be an agreement between two
enterprises as envisaged under section 2(h) of the Act. Agreements between entities
constituting one enterprise cannot be assessed under the Act. This is also in accord
with the internationally accepted doctrine of 'single economic entity'. It was averred by
the counsel for the informant that as per opposite parties letter dated April 2, 2011,
Volkswagen India was 'not a subsidiary of the Automobili Lamborghini S.p.A but was
a separate legal entity owned by Volkswagen Group'. This does not help the
informant's case in any manner whatsoever. As long as the opposite party and
Volkswagen India are part of the same group, they will be considered as single
economic entity for the purposes of the Act. Any internal agreement between them is
not considered as an agreement for the purposes of Section 3 of the Act.

6.1 Relevant Market: The relevant product market determined by the informant seems
correct. Section 2(t) defines relevant product market as 'a market comprising all those
products or services which are regarded as interchangeable or substitutable by the
consumer, by reason of characteristics of the products or services, their prices and
intended use'. Market for 'Super Sports Cars' constituted a separate market within the
auto industry because of its characteristics, price, intended use etc. The super sports
cars are generally 2-door automobiles with high engine capacity and low weight. They
differ from other cars in the auto industry because of their use only for sports purposes.
Their engine capacity (3500cc or higher), horse power (450 HP or higher) and weight
(2000 kg or lower) enable them an exceptionally high speed of at least 250 kmph. The
price of these super sports cars is also Rs. 2 crores or above, making these
cars exclusively catering to a distinct class of consumers. These features of the super
sports cars make them different from other passenger and luxury cars owing to their
physical design, price, intended use etc. A consumer desiring to buy a sports car will
not buy a normal luxury passenger car and vice-versa. Manufacturers, apart from the
opposite party, producing cars falling within this market of super sports cars in India
are Aston Martin, Audi, Ferrari, Mercedes, Porsche etc. Therefore, considering their
characteristics, price and end use, super sports cars constitute a distinct relevant market
within the auto industry which cannot be substituted for other types of cars in the auto
industry. Having regard to the foregoing, it may be concluded that market for 'super
sports cars' constitute a distinct market, relevant for this case. The relevant geographic
market in this case is proposed to be the 'whole of India' which appears to be correct.
Therefore, the relevant market is market for 'super sports cars in India'.

6.2 In order to show dominance of Opposite Party, the informant has relied upon the
market share of Opposite Party in the relevant market. It is alleged that Opposite Party
held more than 50% of market share in the market of Super Sports Car in India and
thus was dominant. Section 19(4) of the Competition Act provides that while
considering whether an enterprise enjoyed a dominant position, the Commission would
have due regard to market share or any of the following factors:-
(a) market share of the enterprise;
(b) size and resources of the enterprise;
(c) size and importance of the competitors;
(d) economic power of the enterprise including commercial advantages over competitors;
(e) vertical integration of the enterprises or sale or service network of such enterprise.
(f) dependence of consumers on the enterprise;
(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
(i) countervailing buying power;
(j) market structure and size of market;
(k) social obligations and social costs;
(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have appreciable adverse effect on competition.

7. The informant had not devolved upon the size of the Opposite Party nor compared the size with the other competitors. The information is silent upon the economic power of the Opposite Party nor had talked of any commercial advantage which the Opposite Party has over the competitors, rather the cause of the informant is that while prior to his becoming importer and dealer of Opposite Party, the competitor was selling more cars than the Opposite Party. He increased the sale of Opposite Party. The information also reveals that the informant was the only agent of the Opposite Party in India till last year and it is only recently that the Opposite Party opened another agency in Mumbai for importing its car. It is also a fact that these cars are made ready only on orders of consumers who place orders considering price, cost of the product of each manufacturers. There is no special liking of the consumers for the opposite party product. There are no entry barriers for other competitors nor cost-wise other products are costlier or cheaper. A consumer can place order according to his pocket. Size of the market in India of the Super Sports Car is minuscule. According to the informant, in the last five years, only 93 cars of all manufacturers had been sold i.e. on an average in one year not even 19 cars in this category have been sold. The other competitors having some presence in Indian market are Aston Martin, Maserati, Bugatti and GumpertApolo. Brands like Aston Martin, Ferrari and Lamborghini form part of this market but the presence of these cars in India is at such a small level that none of them can be said to be a dominant as far as market share is concerned. Economic strength wise and resource wise, all the competitors stand at the same footing and none of them has commercial advantage over the other. Thus it cannot be said that the Opposite Party was a dominant enterprise in the market of Super Sports Car in India.

8. Even if the plea of informant that Opposite Party was dominant was considered as correct (though it is not), the informant has failed to show an abuse of any kind on the part of the Opposite Party. The informant was having a dealership agreement dated 16.12.2005 with the Opposite Party. Under this dealership agreement, the informant was appointed as sole dealer for the area of Delhi. However, since there was no other
dealer in India, the informant started catering to the needs of people outside Delhi also. The Opposite Party appointed one of its own group company as dealer in Mumbai and right to import its car was given only to its group company and the status of informant was restricted to that of a reseller of car and not that of importer. The right of an enterprise to appoint its own group company as an importer in a country cannot be assailed on the ground of dominance. A company has a right to open its office in any country and directly import cars through that office or can constitute a subsidiary company to import its car in other country. There is no abuse involved nor any competition issue is involved. Since the number of cars being sold in India is so less, it was not at all necessary for Opposite Party to have many importers and if the Opposite Party itself wanted to import cars in India through its group company that cannot be a cause for initiating proceedings against the Opposite Party, even if the Opposite Party were a dominant player. The Opposite Party gave an offer to the informant of terminating the existing agreement and to execute a fresh agreement with its group company - Volkswagen India. The informant refused this offer and resisted termination of the agreement dated 16.12.2005 on the ground of contractual obligation as stated in the agreement itself. The informant claims that the new agreement which Opposite Party wanted it to execute was altogether different from earlier agreement, while in earlier agreement a notice of 12 months was required to be given for termination, in the new agreement, a notice of only three months was required to be given. Under the new agreement, right to import was not given to the informant, but the import was to be done by Volkswagen India. On refusal of informant to execute new agreement with Volkswagen, the Opposite Party, in terms of earlier agreement, gave 12 months notice to the informant for terminating the contract in terms of the agreement. The informant grievance now is that after Opposite Party had made its own group company a dealer in Mumbai, the informant was being offered product at higher price as compared to the new dealer. The orders placed by it were not being given priority whereas the orders booked by informant were being delayed on false pretext. The informant was being discriminated also in respect of supply of spare parts.

9. On the basis of aforesaid, the Commission is of the view that since the Opposite Party is not dominant, there is no ground for directing DG to investigate the matter.

10. There is no prima facie case either under Section 3 or under section 4 of the Act. The case deserves to be closed under section 26 (2) of the Act and is accordingly hereby closed.

11. The Secretary is directed to communicate the decision of the Commission to all concerned accordingly.

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

1. The present information has been filed under section 19(1) (a) of the Competition Act, 2002 ("the Act") by Express Industry Council of India ("the Informant") against Jet Airways (India) Ltd. ("the Opposite Party No. 1"/ "OP-1"), IndiGo Airlines ("the Opposite Party No. 2"/ "OP-2"), SpiceJet Ltd. ("the Opposite Party No. 3"/ "OP-3"), Air India Ltd. ("the Opposite Party No. 4"/ "OP-4") and Go Airlines (India) Ltd. ("the Opposite Party No. 5"/ "OP-5"), (collectively, “the Opposite Parties”/ “OPs”) alleging, inter alia, contravention of the provisions of section 3 of the Act.

Facts:

The Informant is a non-profit company incorporated under section 25 of the Companies Act, 1956, having as its main object, inter alia, to secure the welfare of the express industry in all aspects. The Informant is stated to be an apex body of leading express companies and has around 29 members, including several international express companies like Blue Dart, FedEx, DHL, First Flight, UPS etc. It is averred in the information that in May 2008, certain domestic Airlines in India connived to introduce a "Fuel Surcharge" (FSC) for transporting cargo. This surcharge was fixed at a uniform rate of 5/ Kg and came into force on May 15, 2008. It is alleged that although there does not appear to be any legal provision under which such FSC could have been levied by the Airlines, the ostensible reason given was to mitigate the volatility of fuel prices. It has been further stated that the very fact of levying FSC at a uniform rate from the same date itself constitutes an act of cartelization covered under section 3 of the Act. The said cartel of the Airlines is stated to be continuing till date. It is the case of the Informant that although the levy of FSC was ostensibly introduced as being an extra charge linked to fuel prices, it is an admitted fact that when such prices were reduced (as in the past), there had been no corresponding decrease in FSC. It was further stated that FSC has actually been increased by the Opposite Parties again acting in concert and that too, by almost the same rate and from almost the same date. Likewise, FSC has been uniformly increased in the past even without a corresponding increase in the fuel prices. The Informant avers that it drew attention, through its various communications, of the Opposite Parties to the international practice where FSC is benchmarked to an index, which results in logical transparency and suggested that a similar formula be adopted in India. However, this suggestion was ignored by the Opposite Parties who have taken undue advantage of their dominant position and have continued the practice of increasing FSC uniformly, with no correlation to the increase/decrease of fuel prices. The Informant has also averred that even when fuel prices declined substantially, the Airlines had, in concert, uniformly increased FSC. Reference was also made to the various circulars issued by the Opposite Parties to show that FSC prices have been uniformly raised in concert by the same percentage from the same date. It was alleged that freight charges have been uniformly increased by the Opposite Parties in collusion, in the garb of increasing FSC. This increase is stated to be not only detrimental to the interests of freight companies but also adversely affecting the consumers as higher costs are invariably passed on to the ultimate consumers.

11. Based on these allegations and averments, the Informant has filed the instant information before the Commission. Directions to the DG. The Commission after considering the entire material available on record vide its order dated 02.09.2013 passed under section 26(1) of the Act, directed the DG to cause an investigation to be made into the matter and submit a report. The DG, after receiving the directions from the Commission, investigated the matter and after seeking extensions submitted the investigation report on 05.02.2015. Investigation by the DG. It was concluded by the DG that the analysis of information and evidences gathered during the
course of investigation did not prove the allegations levelled by the Informant that the domestic Airlines indulged in anti-competitive conduct during the period 2008-2013 in violation of the provisions of section 3(1) read with section 3(3)(a) of the Act. It was, however, noted by the DG that although no evidence of collusion was found during the course of investigation, behaviour of the Airlines with respect to imposition of FSC was not to be in conformity with market conditions where the domestic players were actively competing. The fuel surcharge which was introduced to address the sharp volatility in Air Turbine Fuel (ATF) prices around 2008 was found to be used by the Airlines as a revenue smoothening levy that bore little correlation with changes in ATF price. Consideration of the DG report by the Commission. It was argued that if a conclusion of “concerted behaviour” for which there was “no plausible explanation” was arrived at by the DG, who states that this “can certainly not be simply on account of any coincidence”, the DG ought to have taken notice of the fact that the concerted behaviour which began in 2008 was continued even thereafter. Further, it was contended that it was not understood as to why after coming to a definite conclusion that there was “concerted action”, the DG sought to find out if there was “concerted practice”. It was submitted that the finding of “concerted action” was more than enough to bring a case under section 3 of the Act, and the attempted distinguishing between these two concepts was not warranted. It was argued that what the law required was that the parties should act in concert (“concerted action”), and not that they should practice in concert (“concerted practice”). It was further contended that the finding of the DG to the effect that going by the absolute change criteria, all correlations were very close to +1 (being as high as .977 in one case), was itself a sufficient pointer to the cartelized conduct of the Opposite Parties. It was, however, argued that having found a close to perfect positive correlation, the DG noted that obtaining correlation coefficient on the basis of absolute change in the price may not give the correct picture. From this, the DG deduced that these figures suggested that during the period 2008-12, the airlines had not behaved in tandem in all time periods included in the said time span, with respect to FSC.

21. Challenging the aforesaid deductions drawn by the DG, it was submitted that all such coefficients were also positive and this fact itself further supports the conclusions arrived at previously. It was also argued that the conclusion of the DG to the effect that the airlines had not behaved in tandem “in all time periods” was unwarranted as it was premised on a wrong proposition that the concerted action in a cartel is necessary at all time periods. Next, it was submitted that the present case related to an investigation of a possible cartel in the matter of FSC, and not in the matter of freight charges. As such, it was argued that the DG had drawn a conclusion after relying upon an irrelevant consideration i.e. the variability and dynamism of freight rates. It was vehemently argued that the freight rate was not the subject matter of the present investigation as the Informant had raised the issue of cartel behaviour in the matter of FSC, and not freight tariff. It was also pointed out that the observations of the DG in the investigation report clearly showed that there was a “possibility of prior consultation through direct or indirect exchange of information” between the airlines, and that “no specific reason” was given for “this seemingly parallel action”. It was, thus, submitted that having come to a definite conclusion about the parallel conduct of the airlines in the matter of FSC, there was no need for the DG to go into the matter of overall pricing- which was neither within the scope of the investigation, nor did a matter complain of. It was argued that it is a well-established principle in law that if a conclusion was based on even one irrelevant factor or consideration, the entire conclusion was vitiated. Since overall pricing or overall freight charges did not form the subject matter of present investigation, any conclusion on FSC based on this factor made the conclusion untenable in the eyes of law.

24. Grievance was also made of the fact that in the present case no real effort was made by the DG to collect evidence regarding exchange of information in respect of prices between the Opposite Parties. Heavy criticism was made of the “interesting” procedure followed by the DG in asking the airlines if they had indulged in a cartel, and if so, to produce the relevant documents. It was vehemently submitted that if such a procedure was followed to detect a cartel, no conclusion of cartelization could ever be reached. It was also alleged that the DG failed to approach any third party regularity authority to obtain details of exchange of phone
calls, messages, e-mails or other similar exchange of information which took place between the airlines over such a long period of time. Criticism was also made of the fact that the DG was apparently swayed by the fact that FSC is only 20-30% of the cargo revenue. In this connection, it was argued that the complaint and the investigation pertained to this 20-30% only, and as such, when looked at from this angle, this 20-30% becomes 100% of what is being investigated. It was argued that it hardly needed to be said that it was the duty of the DG to investigate any cartel behaviour and it was irrelevant whether the cartel component is 20% or 30% or even less, of the total price. It was pointed out by the counsel that this further became impossible, and not merely difficult, if the parties investigated themselves were asked to produce such evidence. The number of coincidences were far too many to warrant a finding of no contravention. Concluding the submissions, it was submitted that the preponderance of the evidence collected by the DG itself points out to nothing short of a cartel and that, even if the DG’s Report is taken at its face value, the Commission would, in all probability, come to a definite conclusion of cartel behaviour.

29. Replies/ objections/ submissions of OP-1:

Jet Airways i.e. OP-1 in its reply dated 14.07.2015 to the objection filed by the Informant submitted that the statements and assertions made by the Informant were incorrect and untenable. It was submitted that after detailed investigation, the DG had noted that in any oligopolistic market, competitors tend to follow each other. It was alleged that the Informant continued to make incorrect assertions and bald statements which were factually insupportable despite the detailed analysis and examination of the factual position, which had culminated in the DG Report. It was also submitted that the Informant proceeded on misconceived notions that there had to be direct correlation between fuel costs and FSC despite the fact that this aspect had been explained in detail in the response filed by OP-1 from time to time. With regard to the issue raised by the Informant that no attempt was made to collect documentary evidence, it was submitted that OP-1 had furnished circulars, e-mails addressed by its General Sales Agents (GSA) to the agents with respect to changes in FSC, correspondence, minutes of meetings of the associations [International Air Transport Association (IATA) and Air Cargo Forum India (ACFI)] and also invoices pertaining to purchase of ATF, details of cargo agents, copies of certain e-mails exchanged between concerned officials of OP-1, data pertaining to cargo sales revenue, cargo sales report, etc. As such, it was stated that the contentions and allegations made by the Informant were without any substance or basis. Moreover, the DG had not recorded any finding that the Opposite Parties herein have not furnished any data/material. It was argued that the repeated complaint about ‘important organization like BAR and other fora where airlines have an opportunity to meet’ was misconceived and contrary to the factual position and was only an attempt to cause prejudice. OP-1 submitted that there was no finding that the Opposite Parties had discussed the issue of FSC at any fora or that there was any concert as falsely alleged. That the Informant’s fanciful grievance of OP-1 not furnishing ‘direct evidence’ was totally misconceived and legally absurd. With regard to the alleged abuse of ‘dominant position’ it was argued that none of the ingredients of section 4 of the Act was applicable in the facts and circumstances of the present case.

32. OP-1 further averred that the Informant had misrepresented by contending that there was ‘clear admission’ that the ‘…Airlines shared information on FSC informally with other airlines’. It was submitted that the purported and alleged ‘admission’ was a statement made by an independent agent and not by any airline. As such, the inference sought to be drawn was patently untenable and the assertions made thereon were incorrect and unwarranted. Further, it was equally misconceived and inferential to contend that merely because the airlines work in close proximity in the airport premises the same amounted to a concerted. It was submitted that the business of any company whether in the field of aviation or any other field, depended on the comparative market study and the existing market/ competitive circumstances. Any deviation by one was very likely to be followed by the rest of the companies in the same line
of business. That such a pricing pattern did not and could not amount to cartelization by any stretch of imagination unless there existed strong evidence of an agreement or decision to form a cartel and/or to fix a certain price. Moreover, the information did not contain any particulars of even a single instance of any act that had been committed by OP-1 which in any manner whatsoever was contrary to the provisions of the Act. On the allegation that the concept of FSC got distorted, OP-1 reiterated its earlier reply dated 17.02.2014 to the DG’s questionnaire wherein it had stated that “While levying the fuel surcharges, other important factors such as USD-INR rate of exchange has to be considered for arriving at an amount to be levied as FSC and as such, ATF price alone is not the sole factor. Often the entire incidence of increase/decrease in the price of ATF may not be passed on to the consumer and the same depends upon the market condition, competitive position along with the cost environment etc. The fuel surcharge is also linked to and pushed by the increased costs arising out of USD-INR rate of exchange”. OP-1 also pointed out that it had also stated that “since we do not have specific surcharges for other cost elements, sharp escalations of costs such as airport charges are sometime factored in as well.” It was argued that the Informant's objection regarding the FSC mechanism adopted by the airlines by referring to selective paragraphs from the DG report could lead to an improper and incorrect depiction of the factual position, which in turn could create enormous prejudice against the Opposite Parties. It was contended that the allegation of cartelization amongst the airlines for fixation of FSC was incorrect, unsubstantiated and baseless and had been negated by the DG in its Report. That there was no ‘admission’ by OP-1 anywhere or any averment even remotely suggesting that the Opposite Parties worked in close contact with one another or in a concerted manner. 36. With regard to the allegation that none of the airlines was able to substantiate the fact that pricing decisions were based on the feedback of the market or other costing factors, it was submitted that it had already been brought on record that whatever market information was available with OP-1 was made available by the agents. It was further submitted that the mere fact that FSC was not commissionable did not, in any manner, render the same illegal or anticompetitive, nor did it give any credence to the suggestion that airlines were acting in concert when they fixed the FSC from time to time. The business of any company whether in the field of aviation or any other field, depended on the comparative market study and the existing market/competitive circumstances and the market intelligence analysis. Any deviation by one was very likely to be followed by the rest of the companies in the same line of business. Such a pricing pattern does not amount to cartelization. In the premises of the aforesaid, it was submitted that there was no warrant, basis or material or justification to contend or come to a conclusion that, there was any concert in respect of fixation of FSC as alleged and as such, the prayer made in the objections ought to be dismissed in limine.

39. Replies/ objections/ submissions of OP-2 Indigo:

Indigo (OP-2) filed its written submission dated 25.08.2015 in furtherance to the DG’s Report, the objections filed by Informant on 23.04.2015 and arguments made by the Informant and OP-2 at the oral hearing on 13.08.2015. With respect to the DG’s Report, OP-2 submitted that it was in agreement with the conclusion of the DG that there was no violation of section 3(1) read with section 3(3)(a) of the Act by the OPs in setting and changing of FSC. 41. With regard to the objections raised by the Informant during the oral hearing on 13.08.2015, OP-2 submitted that the Informant had cherry picked specific statements from the DG's Report in order to show a favourable case and a keen consideration of the said Report would suggest that the conclusion arrived at was in line with the factual findings contained therein. It was further stated that a perusal of the table of FSC changes provided in the DG Report suggest two facts: first, there was a strong correlation between prices of ATF and FSC and; secondly, no pattern emerged with respect to the changes in FSC. Therefore, it was contended that it could not be said that all the OPs including OP-2 implemented changes to FSC in a similar manner. It was submitted that from the observations deduced from data enclosed with its submissions, there was unilateral introduction and revision of FSC which was also recorded by the DG in its Report. Furthermore, one coincidence was not enough to establish the existence of a cartel. It
was argued that the levy of FSC by the OPs could not be considered in isolation and the market structure should be considered. In this regard, it was stated that OP-2 concurred with the DG's assessment of the market structure and that the domestic air cargo market was an oligopolistic market. It was also pointed out that the Informant's contention that the OPs collectively introduced FSC in March 2008 was factually incorrect. It was clarified that OP-2 introduced FSC in March 2007 whereas Air India introduced FSC in March 2006, not May 2008 as contended by the Informant. Regarding the Informant's contention that Commission can take cognizance of a pre-2009 cartel if it is found that the effects of the cartel are continued to be felt, it was submitted that since post-2009 any anticompetitive conduct of OP-2 could not be substantiated by the DG, the pre-2009 analysis was also infructuous. Furthermore, it was contended that 'previous tacit agreement', as averred by the Informant, did not exist. The existence of such an agreement was premised on the supposed collective introduction of FSC by all OPs in May 2008. Additionally, it was stated that each revision in FSC was an independent and separate movement in the FSC and it could not be said that the effect of the May 2008 revision was continuing or was being acted upon. Further, each revision was subject to different triggering factors in addition to ATF prices such as the USD-INR exchange rate (Jet Airways), financial health (Air India) etc. Thus, the Act remained inapplicable for any instance prior to 20 May 2009.

45. It was argued that there was no question of independent agents forming a channel of communication between the OPs. It was submitted that in an oligopolistic market, it was not uncommon to find conscious parallelism between the market participants. This information on FSC was publicly available when the circular is published since the market itself functions in a transparent manner. It was argued that the allegation of a cartel between the OPs stood negated on account of their fluctuating market shares in the domestic air cargo market. It was also submitted that the cargo revenue forms less than 10% of the total revenue of all the airlines in the relevant period. FSC itself accounts for around 1-2% of OP-2's total revenue. Therefore, it was contended that it could not be held to be sufficient incentive to cartelize or indulge in 'action in concert' particularly given that there was no direct or even circumstantial evidence to substantiate such a theory. In view of the foregoing, OP-2 prayed that the matter against the OPs be closed.

49. Replies/ objections/ submissions of OP-3:

OP-3 in its reply to the DG’s report dated 18.05.2015 stated that FSC was only a component of the cargo tariff and given that the OPs compete on the overall tariff, it would make no economic sense to cartelize on FSC. It was pointed out that the DG's conclusion that revenue from FSC component was predictable unlike freight revenue, was based on an incorrect assumption that “average tonnage carried by an airline is always predictable taking into account its fleet size”. It was further submitted that the DG seemed to suggest that since FSC was a flat rate (and not dynamic like the overall price) and the average tonnage carried by an airline was predictable, hence, an airline can forecast with a fair degree of accuracy, the revenue from FSC. However, it was argued that this analysis by the DG overlooked the fact that the OPs compete with each other on the overall price, and competition at this level influences the actual tonnage carried by an airline. Although the total capacity of the airline is known based on the fleet size, the actual tonnage of cargo carried is unpredictable and varies based on factors such as FSC and the other component of the overall price. It was stated that OP-3's corresponding total revenue for the period 2011-12 was 394326.2 lakhs and not 4490.12 lakhs as mentioned in the report. This implied that the FSC revenue was approximately 1% of OP-3's total cargo and passenger revenue. Therefore, it rendered any alleged decision to cartelize on such a small component of the overall revenue commercially absurd especially given the serious repercussions of such conduct. It was contended that mere price parallelism did not indicate collusion as it might be a consequence of interdependence in a market that was oligopolistic in nature. Given the air cargo transport market in India is an oligopoly, prices of various airlines tend to broadly move in tandem as they respond to market
forces of demand and supply, including the price of their competitors. Therefore, mere similarity in prices or other features that may be observed in an oligopoly which are due to unilateral decision making by the firms alone cannot be considered as proof of an anti-competitive agreement between the firms in the absence of substantially compelling plus factors. 52. OP-3 stated that besides the airlines, there are other scheduled air cargo operators such as Blue Dart Aviation Ltd. which is the largest player with 24% market share in the Indian air cargo market competing with the OPs. It was argued that unlike a cartel, where members generally have stable market shares, in the market for air cargo transport in India, the market shares of the players are fluctuating, which indicates absence of collusion in the market. Further, it was stated that the air cargo industry in India is extremely competitive which, by itself, indicates a free market and absence of collusion amongst market players. OP-3 stated that the primary business of airlines is to carry passengers and their accompanied baggage and it is only thereafter, that any spare capacity is used for carrying cargo. The cargo capacity varies for each flight and cannot be predicted with certainty. Therefore, given such uncertainty in the available cargo capacity, it was submitted that it would be difficult for the airlines to collude for gaining a stable revenue and market share. OP-3 explained the correlation between FSC and ATF prices by stating that there have been only two aberrations (from 1 May 2012 to 5 June 2012 and from 16 September 2012 to 19 November 2012) in the correlation between ATF prices and FSC in the 4 year period which was reviewed by the DG. That these two aberrations can be substantiated by the fact that the comparison between FSC and ATF price is not point-to-point and dependent only upon a change in FSC. It was submitted that the comparison ought to be more dynamic taking into consideration the movement in ATF price in the period between the FSC changes. In simple terms, the comparison between FSC and ATF prices should consider that while ATF price is revised on a fortnightly basis, the FSC is more stable and not revised on such a frequent basis. As a result, OP-3 absorbed the ATF cost increase and did not pass it on with every revision of ATF prices, but accordingly revised the FSC at an appropriate time based on market conditions.

55. It was stated that the fact that tonnage carried by an airline was not predictable even when fleet size was considered shows the variation over time in average monthly tonnage and total tonnage carried by the airline and the weight load factor of OP-3. It was explained that the total tonnage carried by OP-3 increased from 15,547 tons in 2009 to 77,833 tons in 2014, and the average monthly tonnage increased from 3,109 tons to 6,486 tons over the same period. However, since this increase could be attributable to an increase in OP-3’s fleet, it was also important to analyze OP-3’s weight load factor, which is an indicator of OP-3’s capacity utilization with respect to cargo. If such weight load factor does C. No. 30 of 2013 Page 19 of not vary then, as suggested by the DG, based on its fleet size, OP-3 will be in a position to predict its average tonnage and thus the FSC revenue component. However, OP-3 provided a table to highlight that the weight load factor did vary over the period of 2009-2014, which suggested that the tonnage carried by it and thus, FSC revenue cannot be predicted.

56. It was submitted that there has been a variation in the way OPs have revised their FSCs based on the change in ATF prices over time. That this variation in the behavior of OPs indicates absence of any collusion or cartel in the air cargo industry in India. OP-3 has provided a table to yet again highlight that generally ATF price and FSC have been rising over time. It was stated that the only period when ATF price decreased constantly for a long period was from August 2008 to March 2009 and during that period, some of the OPs responded to the fall in ATF price by decreasing the FSC while some withdrew FSC. For instance, in February 2009, Air India withdrew FSC and so did OP-3 in March 2009. Indigo reduced FSC to 3 from 5 per kilogram with effect from 1 March 2009, and Kingfisher from 5 to 2. Thus, the Informant’s contention that FSC was neither decreased nor withdrawn is false as the DG’s investigation identified instances where FSC was, in fact, decreased or withdrawn. It was submitted that in the case of OP-3, FSC is related to ATF price and was withdrawn when ATF price decreased steadily for a long duration. Additionally, the variation in the OPs’ response to this decline in ATF price- some reducing FSC, some withdrawing it and some keeping FSC constant – also indicated lack of collusion among the OPs. The mere movement of FSC rates
of all OPs in the same direction was not indicative of any form of collusive activity. In fact, the similarity in the price movement of the OPs implies that each of the OPs, has no control over the market and that their price changes are subject to the prevalent market conditions. The similarity in movement, as submitted above, was therefore a consequence of the market being oligopolistic in nature, and not of any collusion among the OPs. Adverting to the objections filed by the Informant to the DG report, OP-3 submitted that the Informant's objections were baseless and without any merit. It was further submitted that the Informant's averment that the DG has contradicted itself was incorrect and without any basis. OP-3 contended that the Informant's own allegation of contradictions in the DG Report was devoid of any legal analysis. That where the DG Report stated that 'an anti-competitive practice or agreement must be inferred from a number of coincidences', the DG was only setting out the relevant standard required. It was stated that the necessary documents and evidence were submitted as when directed by the DG and the same can be accessed by the Informant also. Therefore, it was submitted that the Informant's averment that the DG has failed to assess all the documents and evidence ought to be rejected on this ground alone. It was further submitted that the allegation that the DG ought to have analyzed the concept of group dominance stood negated as such concept is not recognized under the Act. Further, on the issue of charging FSC based on factors other than increasing ATF prices, it was submitted that the factors on the basis of which the FSC was revised have no bearing on the finding of collusive activities amongst the OPs. That is, regardless of whether the FSC was revised pursuant to a change in ATF prices or manpower costs or lease costs, there continues to be insufficient evidence to establish the requisite standard of proof for finding the OPs in violation of section 3 of the Act. Lastly, it was also averred that apart from being deliberately misleading, the Informant's objections were also misguided and have failed to rebut the analysis of the DG. That the conclusion drawn was also incorrect. It was therefore submitted that the Informant's objections were false, and misleading and the same amount to a vexatious litigation.

62. Replies/ objections/ submissions of OP-4, Air India:

Air India, i.e. OP-4 in its reply dated 24.03.2015 to the DG report stated that it agreed with the DG' report unless specifically disagreed in its submissions. It was stated that that the levy of Fuel Surcharge is related to the overall operating costs of the airline and not to ATF prices alone. That in such a case, the question of levying fuel surcharge in concert with other domestic airlines, as alleged by the Informant, does not arise as each airline has its own operating cost and charges fuel surcharge accordingly. It was further submitted that OP-4 had first introduced levy of Fuel Surcharge of 2/- per Kg w.e.f. 1st May, 2006. Subsequently, the levy of Fuel Surcharge was modified as per the change in ATF prices and in the operating costs of the Airline. However, a small fluctuation/ reduction in the fuel cost would not have a substantial impact on the operating costs of the airline, hence the fuel surcharge was only marginally increased to account for the same. In view thereof, it was submitted that any allegation regarding the lack of transparency in the levy of fuel surcharge was only to mislead the Commission and should be rejected at the very outset. It was further stated that the Informant has not produced any evidence regarding discussions or meetings that OP-4 had with any other airline operator in respect of the increase in fuel surcharge to be levied. Furthermore, the date of implementation and the levy of fuel surcharge was different in the case of OP-4 than those of the other domestic operators. Hence, it was submitted that the allegation of cartelization was completely unfounded. It was vehemently urged that there was no agreement between OP-4 and other airlines, either tacit or otherwise and that merely because the levy of fuel surcharge by some of the airlines happened to somewhat coincide, would not amount to there being an agreement by nod or wink either. Further, the fuel surcharge was increased keeping in view the operating costs of the airline and also to protect against the volatility of fuel prices. That it was quite obvious that such a similar practice may also be followed by the other airlines to protect their interests in respect of fluctuating fuel prices and in order to maximize their revenue. It was pointed out that the Informant has not presented the correct rates of FSC qua OP-4 before the Commission which clearly indicated
that FSC was withdrawn in 2009 contrary to what the Informant had falsely represented. It was further added that oil companies typically revise their ATF prices on a monthly or even on a fortnightly basis. It is not feasible for OP-4 to revise fuel surcharge so frequently, as the shippers work out their business projections based on OP-4's rates and that they require some extent of rate stability. Frequent rate changes cause disruption in the market and create confusion among the customers. It was further stated that OP-4 has revised the fuel surcharge only 8 times since its re-introduction in 2010. Hence, the FSC may not increase in the same proportion as the increase in ATF prices, as it also has to account for the ATF price rise in the intervening period. It was also mentioned that the cargo fuel surcharge levied by OP-4 is a flat rate on chargeable weight basis. OP-4 being one of the many players in the cargo market cannot be totally disconnected from the overall market trends vis-à-vis cargo tariffs being charged. That in view of its precarious financial position, it was incumbent on OP-4 to set a competitive charge which benefits customers while at the same time earn revenues to mitigate losses. Hence, it was submitted that while OP-4 has periodically increased FSC in view of the overall upward ATF price trend as well as the overall rise in the FSC being levied in the market, to mitigate their losses and improve their financial position; and has nevertheless consistently levied an FSC lower than what other airlines are charging in order to reduce the burden on the customers.

67. It was stated that fuel surcharge is not solely dependent on ATF prices but on the overall operating costs as well as the overall market scenario. Moreover, the total cargo sales included the basic cargo charge, the fuel surcharge and other charges as applicable. It was submitted that the commission is paid by OP-4 to cargo agents as a percentage of the basic cargo charge component of their sales only. That OP-4 does not pay commission to agents on cargo fuel surcharge. No separate agreement is signed between OP-4 and the cargo sales agents for payment of commission and such commission is determined by IATA norms. It was also stated that the associations of which OP-4 is a member do not relate to fuel surcharges. That they do not deal with cargo tariffs of individual airlines. Commission was traditionally paid on the basic freight charges and not on other charges like Air Waybill (AWB) fee, delivery charges, etc., which were a payment against costs incurred by OP-4 on those heads. Fuel surcharge was also introduced as a charge separate from basic freight rate as it was meant to offset costs incurred on fuel. Hence, it was kept as non-commissionable. Furthermore, it was pointed out that the DG contradicted itself when it referred to the domestic air cargo market as an oligopoly. That the DG's own market share analysis supported by the analysis done by the Director General of Civil Aviation which gave unflinching credence to the fact that domestic air cargo industry is intensely competitive. Therefore, the statistics presented by the DG itself exhibit the procompetitive nature of this industry. Moreover, it was wrong for the DG to allege that there does not exist cross elasticity of demand as the carriers solely dedicated to freight such as Bluedart, FedEx et al constantly keep a check on the pricing of the domestic airlines regarding cargo. The allegation of presence of barriers to entry was also not supported with any evidence and moreover, the domestic cargo industry does not involve essential facilities. Therefore, it was submitted that it cannot be alleged that there was existence of barrier to entry in the aviation industry.

70. It was stated that it was clear from the statistics provided by the DG that cargo forms under 10% revenue share for most airlines and that for OP-4 it was merely around 6%. Therefore, clearly indulging in price fixing of the Fuel Surcharge as alleged by the informant will lack any windfall financial gains for the airlines including OP-4. 71. Fuel surcharge does not vary by aircraft type/ flight distance/ flight sector/ flight timing; rather it is based on ATF price movements, operating costs, and market trends. In view of a steady increase in ATF prices, FSC has also been increasing. While the exact percentage of increase of FSC vis-a-vis ATF price may not be the same over different points in time, the same overall trend of a steady increase was there. With regard to the data tabulated by the DG in its report on the movement of FSC in domestic market and its inference from the same that the prices of all the companies have generally moved in the same manner and towards similar direction was rebutted by OP-4 stating that the finding was contrary to the statistical data relied upon. It was submitted that levy of Fuel Surcharge by OP-4 has been much lower than the competing airlines and not in
tandem as wrongfully alleged in the Report. That the Fuel Surcharge was also withdrawn in 2006 and 2009 by OP-4 while other competing airlines did not do this.

76. In its main reply, OP-4 submitted that the allegation of concerted action of the OPs was speculative and does not have any evidentiary support. It was stated that the DG was correct in noting that freight pricing was dynamic and highly competitive which does not figure in the AWB. Furthermore, agents are provided attractive deal rates by airlines which made freight pricing highly variable thereby blunting any apprehensions regarding collusive price fixing. It was argued that just because certain international airlines were guilty of price fixing, does not imply that the OPs under investigation herein would have necessarily indulged in cartel like behavior. The DG has unequivocally held that there has been no evidence of concerted action regarding FSC between the OPs and therefore, the present case can be clearly distinguished from the international cases that were cited by the Informant. It was further argued that despite the voluminous investigation report of the DG which was prepared after thorough investigation, no evidence of any kind- direct or indirect- of concerted action between the OPs was found. It was alleged that notwithstanding this, the Informant was still harping on its false allegations without producing even a shred of evidence to support its claims. The Board of Directors of OP-4 does not issue directives qua FSC. That it has produced all the minutes of internal meetings/ circulars regarding determination of FSC. Apart from explaining the pricing mechanism followed in pricing domestic cargo, revenue attributable to cargo, factors contributing towards determination of fuel surcharge, it was submitted that the domestic cargo FSC may have accounted for 30% of the domestic cargo revenue but it is only about 1% of the total airlines revenues. That the overall cargo rate is factored in by the customers choosing a carrier and not individual components like FSC. Many airlines offer lump-sum all inclusive rates with FSC not being separately factored in at all. That the break-up of the total rate in terms of FSC may affect the agent's commission but will not affect the end customer. Moreover, it was stated that the FSC has not resulted in any profits to OP-4 which has been running in deep losses. Therefore, there was no question of levy of penalty on OP-4. Furthermore, FSC stood withdrawn w.e.f. 1st April 2015. Lastly, it was submitted that the conclusion reached by the Informant was baseless and that the chart produced by the Informant was incorrect qua OP-4.

80. Replies/ objections/ submissions of OP-5:

Besides supporting the DG's report, OP-5 in its reply dated 22.07.2015 to the Informant's objection to the DG report submitted that the complaint filed by the Informant was without any basis and merits qua OP-5. It was stated that at every stage of the investigation, OP-5 has cooperated with the DG and provided all the necessary documents in support of its statements. It was further submitted that OP-5 has never operated directly as cargo carrier and has assigned the business of transporting cargo to cargo agents. Therefore, the customers never booked cargo directly with OP-5 and neither did it issue any bills or receipts to the customers booking cargo with it. OP-5 has no role in levying or in the revision of FSC or any kind of details pertaining to FSC since it shared aircraft belly space with different vendors over a period of time and was never part of any commercial and economic aspects of fuel surcharges. Moreover, OP-5 has shared the belly space of its aircrafts exclusively to an entity called Sovika Aviation Services Private Limited on a firm revenue commitment basis. It was stated that the Sovika is not OP-5's agent but it acts as the sole cargo service provider. It was further stated that in the past OP-5 has engaged M/s Gammon Logistics Limited as the Sales Agent for Cargo on the Go Air Network. FSC collected from the customers, if any, is always collected by cargo service providers and OP-5 has no role to play and neither the proceeds of the same are transferred to OP-5's account. That the cargo service provider determined the cargo freight prices and FSC. Neither has it issued any circular with regard to the rates of charging FSC. It was contended that OP-5 had never indulged or planned to introduce FSC for transporting cargo and therefore, the allegation of levying FSC and further leading to the act of cartelization was without any factual basis. It was further contended that for air transport the fuel cost is not the only overhead expense but also included several expenses which have been concealed by
the Informant. Also, the charges further varied depending upon the category of airline i.e. low cost carrier or full facility carrier. In addition to the submissions made before the DG, it was submitted that OP-5 never connived to introduce FSC for transporting cargo and had never signed any agreement nor was there any consensus between the airline companies on FSC. Moreover, no such communication or issuance of letter was made by OP-5, which denied the averment of the Informant that all the OPs are members of IATA, BAR, etc. In this regard, it was submitted that OP-5 is only a member of Federation of Indian Airlines (FIA) and is not a member of any of the organizations stated by the Informant in its reply. Further, on the submission of the Informant that Competition Authorities in various other jurisdictions have fined the airlines on the issue of fixing FSC, it was argued that the Informant had never earlier relied on the copies of articles and findings of international jurisdiction when the information was instituted before the Commission and not even at any further stage of hearing. It was only now, at this belated stage, is the Informant seeking to rely on these articles and judgments of international jurisdictions. Further, it was stated that OP-5 was never involved in direct cargo operations and had never indulged in any violation of the statutory provision of the Act. It was further submitted that the alleged admission pointed out in the Informant's reply that 'FSC rate of other airlines are also one of the key factors for determining FSC' was made by one M/s Sovika Aviation Services- the agent of OP-5 to whom it had rented out its cargo belly space on a monthly basis. Payment of this is made by Sovika to OP-5 via a monthly royalty fee which enables Sovika to load their cargo in cargo belly space rented out by OP-5 and that OP-5 was in no manner concerned with any charges/fee that Sovika charges their clients since it is not OP-5 but Sovika that accepted cargo bookings from their clients. It was once again highlighted that FSC rates were not charged by Go Air but in fact were charged by its cargo agents. Lastly, it was denied that on 14.05.2008 a circular was issued by OP-5 announcing charging of FSC. It was submitted that it was possibly the cargo agents of OP-5 who had sent such communications with regard to charging of FSC to its customers on whom the management of OP-5 has no control. It was also denied that OP-5 has made any statement or tendered any evidence with regard to how FSC rates are determined. Furthermore, OP-5 has no remote connection with the levy of FSC rates unlike other airlines operators and hence, statements tendered by any other airline cannot be blindly applied to OP-5. It was also contended that OP-5 has never imposed any FSC and thus, allegations pertaining to concerted action on behalf of domestic airlines to increase FSC charges do not concern OP-5 and thus it cannot be brought within the ambit of any illegality committed, if any.

89. Analysis:

On a careful perusal of the information, the report of the DG and the replies/ objections filed and submissions made by the parties and other material available on record, the following issue arises for consideration and determination in the matter:

1) Whether the OPs have operated in concerted manner while fixing the FSC and thereby violated the provisions of section 3(1) read with section 3(3) of the Act? It is noted that the Informant - an apex body of leading express companies and has around 29 members, including several international express companies like Blue Dart, FedEx, DHL, First Flight, UPS etc. - is essentially aggrieved of the conduct of the OPs in fixing the FSC rates over a period of time which allegedly affected the interests of freight companies. Before advertizing to the merits of the case, the Commission deems it appropriate to address some attendant issues which have a bearing upon the present case. To begin with, it would be appropriate to ascertain as to what are the factors which are taken into consideration by the airlines while calculating the overall pricing of the air cargo charges. On a careful consideration of the replies filed by the parties, it appears that, apart from FSC, other components like Airway Bill fee, freight documentation, X-ray, delivery order charges, etc. are considered by the airlines while formulating the overall pricing of air cargo charges. Further, the Commission is also in agreement with the DG’s finding that the freight tariff, which is the most important component
in the overall pricing of air cargo transportation by airlines, is highly variable and dynamic. It may be also seen that the air cargo rates for any airline vary from sector to sector, flight to flight, nature of cargo, weight of cargo, flight timings, belly space, etc. As such, it appears that each airline takes into account several factors including FSC while deciding its overall calculation of the air cargo prices. Further, it is observed from the DG report that cargo revenue ranged from 20% to 30% of the overall revenue of the airlines and thus cartelization could not be ruled out. In fact, considering the annual tonnage carried by each airline and the fact that FSC is levied at a flat rate on per kg of chargeable weight of cargo, it was observed by the DG that the revenue on account of FSC component is a predictable amount and unlike freight tariff, which is dynamic and not amenable to revenue forecasting, revenue on account of FSC can be easily forecasted with a fair degree of accuracy. Thus, it was noted that FSC is not only a significant component of overall cargo pricing but also a predictable amount.

In this connection, the Informant argued that whether FSC is a component of the overall price or not was secondary but it nevertheless agreed with the DG's finding that it is a significant component. OP-3, however, argued that the DG overlooked the fact that the OPs compete with each other on the overall price and competition at this level influences the actual tonnage carried by an airline. Although the total capacity of the airline is known based on the fleet size, the actual tonnage of cargo carried is unpredictable and varies based on factors such as FSC and the other component of the overall price. The Commission notes that the revenues generated by the airlines through FSC are not insignificant for the airlines. Further, it is also an admitted fact that the levy of FSC is at flat rate on per kilogram basis of the cargo weight. OP-1 to OP-4 have further confirmed the same in their replies to the DG that FSC is not affected by aircraft type/ flight distance/ flight sector/ flight timings, etc. This is indicative of the fact that the revenue on account of FSC can be easily forecasted with a fair degree of accuracy. In view of the foregoing, it is opined that FSC plays a vital role in generating revenue for the airlines. The Commission, therefore, agrees with the DG that FSC is certainly a significant component of the overall price so as not to rule out any possibility of any cartelization. At this stage, it would be instructing to note the various factors which influence the determination of FSC by the airlines. In this connection, the DG, after having examined the replies and statements of all the parties concerned, noted that all the airline companies indicated that turbulence in ATF price was the main reason for introduction of FSC in domestic cargo market. Apart from ATF price, certain other factors which were stated to be taken into account while determining FSC included financial health of the company, dollar exchange rate, cost environment and market feedback etc. It was further noted that none of the airlines was able to furnish any data or costing studies of any kind whatsoever in support of the determination of FSC. No Airline has been able to give any systematic break-up of weight attached to any parameter claimed to be important in determination of FSC. The above was found by the DG to point towards the premise that there had been no systematic basis for fixing the FSC and the same was a nebulous, unilateral fixation by each airline. In this regard, the Informant submitted that one of the factors considered by airlines to levy FSC was the levy of FSC by competitors and the same fact was also admitted by OP-4 and recorded in the DG report. Further, OP-4 submitted that the levy of fuel surcharge was related to the overall operating costs of the airline and not to ATF prices alone and it has its own operating cost and charges a fuel surcharge accordingly. It was further pointed out that though OP-5 has categorically denied that it had taken decision on FSC, the circular dated 14.05.2008 issued by it announcing charge of FSC says otherwise. It was alleged by the Informant that despite bringing such facts to the notice of the DG, the same were ignored.

On a careful perusal of the material on record, the Commission is of opinion that ATF price movement is the main factor considered for determining FSC by all the airlines. Apart from this, other factors that are taken into account are market conditions/ trends, pricing by competitors, USD-INR rate of exchange, operating costs, infrastructure, manpower, etc. It is noted that each airline takes into account several factors to determine FSC, yet ATF price is the only consistent factor amongst all the airlines. The Commission also takes note of the fact as pointed out by the DG that none of the airlines was able to furnish any data or costing studies of any kind whatsoever in support of the determination of FSC rates. Adverting to the
justifications put forth by the airlines in respect of changes/revision in FSC, the DG noted from the replies of the OPs that no specific reason for FSC revision on various instances was provided by the airlines. It was further noted that though ATF price volatility has been stated to be the most important factor, this correlation between ATF price and FSC breaks down on several occasions. Further, after having examined the correlation between ATF and FSC rates, the DG noted that there were certain instances when FSC rate was increased despite the fall in ATF price. It was also noted that the authorized representatives of OPs could not furnish the rationale for revision of FSC on certain occasions. Therefore, the DG found that explanation put forth by the OPs in respect of changes/revision of FSC was not justified. The Commission notes that in case of OP-1, it has given the explanation that due to increase in ATF price coupled with increase in dollar exchange rate, the FSC rate was increased. However, on certain dates even though the ATF price came down there was an increase in the US dollar rates and on certain dates US dollar rate would decrease and ATF price would increase. In such scenario also, OP-1 was apparently compelled to increase the rate of FSC. When questioned as to how the rate of FSC was increased on 12.11.2012 despite the decrease in ATF price as well as USD rate, the reasoning provided was that the increase in ATF price and USD rate in the last few months had a very detrimental effect. This reasoning cannot be accepted. On the one hand, OP-1 submits the increase of either ATF or USD rate caused the increase in FSC rate and on other hand it is seen that neither ATF nor USD rate had any effect on the FSC rate to be charged. OP-2 has also cited ATF price rise as one of the main reasons to increase the FSC rate but has failed to justify as to how FSC was increased when ATF price was stable. Similarly, OP-3 failed to provide any rationale on the same. Further, after having examined the movement of FSC vis-à-vis the movement of each airline, it is noted that FSC changes have not been made in tandem with the fluctuation in ATF price on various instances and such behaviour is seen to be exhibited by the airlines in similar time period particularly in the years 2011 and 2012. There have been instances of revision of FSC when there was negative correlation between ATF price and FSC rate. The OPs were neither able to substantiate the correlation between FSC and other components.

102. It is seen from the above that FSC is an important component of the overall pricing of the total cargo charges and generates significant amount of revenue for all the airlines. However, it is noted that the explanation given by the OPs regarding the changes in FSC rates due to the changes in ATF prices and USD rates were not satisfactory. Though it was stated that apart from ATF price and USD rates there were various other components to be considered, they were unable to provide any cost studies or data to support their submissions. OP-1 even stated that it has no formal meetings or internal notings with reference to each FSC rate revision. It is strange to note that OP-1, OP-2 and OP-3 despite admitting to discussions and meetings of their respective Cargo Department staff members relating to determination of FSC; have failed to furnish any internal notings/minutes of the meetings. In fact, they have singularly failed to place copies of the minutes of even a single meeting before the Commission. It may be pertinent to note here that all these OPs have given the same reply that they do not have the minutes of any meeting with them on record. OP-4, however, has provided at least one document regarding the introduction of FSC. OP-5 claimed that it did not charge FSC and therefore had no such documents to furnish. In these circumstances, the plea taken by the parties contending that no records of the meetings where FSC rates are determined and maintained, does not inspire any confidence. 103. In view of the above, the Commission finds that the explanations provided by the parties on the changes/revision in FSC rates were not justified. 104. The Commission may now move to address the main issue arising for determination in the present case i.e. whether the OPs have operated in a concerted manner in fixing the FSC and thereby violated the provisions of section 3(1) read with section 3(3) of the Act. 105. It may be noted that the definition of 'agreement' as given in section 2(b) of the Act requires _inter alia_, any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. The definition, being inclusive and not exhaustive, is a wide one. The understanding may be tacit and the definition covers situations where the parties act on the basis of a nod or wink. There is rarely a direct
evidence of action in concert and in such situation the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in cooperation with each other. In the light of the definition of the term 'agreement', the Commission has to find sufficiency of evidence on the basis of benchmark of preponderance of probabilities. In view of the above and further considering the fact that since the prohibition on participating in anti-competitive agreements and the penalties the offenders may incur being well known, it is normal that such activities are conducted in a clandestine manner, where the meetings are held in secret and the associated documentation reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful conduct between enterprises such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstruct certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an agreement.

115. It is noted that whenever the FSC of one airline has gone up it was followed by the rest of the airlines simultaneously on several occasions. Thus, it is seen that the airlines exhibited parallel behaviour. However, parallel behaviour of competitors can also be a result of intelligent market adaptation in an oligopolistic market. Therefore, it becomes important at this stage to analyze if collusion is the only reasonable explanation to the conduct of the OPs. The Commission observes that the DG has examined the correlation between behaviour of individual airlines; behaviour of market in terms of tonnage during periods of revision of FSC by one airline and the dynamics and competitiveness of overall prices and came to the conclusion that no concerted action could be inferred from the same.

119. With regard to the behaviour of market in terms of tonnage during the revision of FSC, it was noted by the DG that on some occasions, the cargo carried by an airline increased with the fall in FSC, while on other occasion decreased and vice versa. The DG was, therefore, of the view that since there was variations in cargo tonnage carried by the airlines, there was no pattern being followed by the airlines. That FSC being only a component of a total freight, a change in FSC will not affect the demand of cargo services so much. In other words, with limited options left with the consumers, the demand of cargo space will hardly be affected irrespective of the fact that FSC was charged high or low. The Commission agrees on this aspect with the DG, however, it disagrees that FSC has insignificant role to play in the whole cargo services. The DG has tried to obfuscate the matter by putting in the FSC and cargo tonnage unrelated link in the analysis. It may be noted here that it has already been opined above that FSC plays a vital role in generating revenue for the airlines. Furthermore, by stating that FSC is only a component of the total freight charge, the DG has contradicted its own earlier finding. In view of the above, it is opined that the DG was not correct in coming to the conclusion that there was no concerted practice amongst the airlines regarding the revision of FSC. Further, the Commission has examined other aspects also in order to come to a conclusive finding that the parallel conduct of the OPs was due to collusion amongst them only. It is noted that the DG failed to establish if there was any contact or communication exchanged between the airlines directly or indirectly regarding FSC rates though several statements of parties including third parties were recorded. It may be noted that a parallel conduct is legal only when the adaptation to the market conditions was done independently and not on the basis of information exchanged between the competitors, the object of which is to influence the market. One of the elements that indicates concerted action is the exchange of information between the enterprises directly or indirectly. Price competition in a market encourages an efficient supply of output/services by companies. Any company is free to change/ revise its prices taking into consideration the foreseeable conduct of its competitors. That however is not suggestive of the fact that it cooperates with the competitors. Such a coordinated course of action relating to a change of prices ensures its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date, etc. 121. Shri K. Rammohan, Senior General Manager of OP-1 stated before the DG that the information on revision of FSC though communicated between their own staff, there is likelihood of transmission of such information
to other competitors by agents though it is understood and implied that confidentiality should be maintained. It was also stated that information on competitors’ price revision on FSC is received through multiple sources and through common agents. Similarly, Ms. Madhuri Madan, Deputy General Manager (Cargo Department) of OP-4, Shri Raghuraman Venkatraman, Vice President (Cargo) of OP-3 and Shri Mahesh Kumar Malik, Vice President (Cargo Sales & Services) of OP-2 stated that the information on pricing by other airlines including FSC rates are provided by common agents too. Such point of contacts eliminates or substantially reduces in advance any uncertainty that might otherwise would have existed regarding commercial conduct of other competitors in the market and also in such scenario the concerned company takes into account such information before determining its own conduct. It is clearly evident that the airlines were well aware of the changes in FSC rates, if any, by their competitors in advance. The increments of the rates on same dates or nearby dates are reflective of some sort of understanding amongst the OPs. Also, the unreasonable explanation of increase of FSC rates clubbed with no data on cost analysis, evasive replies and no documents despite admitting to the fact that meeting/ discussions took place with regard to FSC rate only further confirm the fact that airlines were acting in concerted manner. Though there is no evidence of direct meetings, the OPs participated in passive manner as they had the requisite means to access and exchange information through their common agents and circulars. This also shows that the OPs had a way to express their intentions in the market indirectly.

122. In view of the foregoing, it is opined that the OPs have acted in parallel and the only plausible reason for increment of FSC rates by the airlines was collusion amongst them. Thus, such conduct has, in turn, resulted into indirectly determining the rates of air cargo transport in terms of the provisions contained in section 3 (3)(a) of the Act. It may be noted that in terms of the provisions contained in section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void. By virtue of the presumption contained in subsection (3), any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

123. In case of agreements as listed in section 3(3) (a) - (d) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition; the onus to rebut the presumption would lie upon the opposite parties. In the present case, the opposite parties could not rebut the said presumption. It has not been shown by the opposite parties how the impugned conduct resulted into accrual of benefits to consumers or made improvements in production or distribution of goods in question. Neither, the opposite parties could explain as to how the said conduct did not foreclose competition. As regards OP-5, it was noted by the DG from the replies submitted and deposition made during the course of the investigation that it gave cargo belly space to third party vendors to undertake cargo functions. Further, it was stated that OP-5 has no control and was never part of any commercial/ economic aspects of cargo operations done by vendors including imposition of FSC. As such, the DG did not include OP-5 in its analysis in the investigation report and no finding of contravention was recorded against it. 125. Further, so far as OP-4 is concerned, there are certain peculiar features which need to be taken into account. From the analysis made earlier in the order in respect of movement of FSC rates in domestic cargo, it is noted that during September 2012, all the airlines had increased the rates
in an identical manner and fixed the FSC rate identically @ 13 per kg, whereas OP-4 during this period fixed FSC rate @ 11 per kg C. No. 30 of 2013 Page 48 of 51 which was lower than the rate fixed by other airlines. Similarly, lower rate can be also observed during November 2012 when all other airlines charged FSC rate @ 15 per kg whereas OP-4 charged the same @ 13 per kg during that period. Moreover, it appears that in respect of OP-4 FSC rates were almost consistently moving in tandem with the change in ATF rates. The Commission has also taken note of the submissions made by OP-4 to the effect that it had first introduced levy of Fuel Surcharge of 2/- per Kg w.e.f. 1st May, 2006 and subsequently, the levy was modified as per the change in ATF prices and in the operating costs of the Airline. A table on the changes in Fuel Surcharge over time was also provided by OP-4 to demonstrate that where there was a substantial decline in the fuel costs, the fuel surcharge was withdrawn. In these circumstances, it is difficult to record any definite finding of contraventions against OP-4 as well.

126. In the result, the Commission is of the considered view that OP-1, OP-2 and OP-3 have acted in a concerted manner in fixing and revising the FSC rates and thereby contravened the provisions of section 3(1) read with section 3(3)(a) of the Act. 127. The Commission, therefore, passes the following:

ORDER

128. OP-1 to OP-3 are directed to cease and desist from indulging in the practices which have been found to be anti-competitive in the preceding paragraphs under the provisions of section 3(1) read with section 3(3)(a) of the Act. The Commission, for the reasons recorded below, finds the present case fit for imposition of penalty. Under the provisions contained in section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse. Further, in cases of cartelization, the Commission may impose upon each such cartel participant, a penalty of up to three times of its profit for each year of continuance of the anticompetitive agreement or ten per cent of its turnover for each year of continuance of such agreement, whichever is higher. It is evident that the legislature has conferred wide discretion upon the Commission in the matter of imposition of penalty. It may be noted that the twin objectives behind imposition of penalties are: (a) to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and (b) to ensure that the threat of penalties will deter the infringing undertakings. Therefore, the quantum of penalties imposed must correspond with the gravity of the offence and the same must be determined after having due regard to the mitigating and aggravating circumstances of the case. The Commission would now bestow a thoughtful consideration to the aggravating and the mitigating circumstances that may be available to the OPs. The basic concern in the present case is the overcharging of cargo freight, in the garb of fuel surcharge, by the air cargo transport operators which adversely affect consumers besides stifling economic development of the country. Such cartels in the air cargo industry particularly undermine economic development in a developing country. It is important for the growth of the market that these cartels be broken and more transparency be brought in price fixing by the airlines by taking firms steps in this direction. Else, the fuel surcharge, which was essentially introduced to mitigate the fuel price volatility, will continue to be used as a pricing tool to the detriment of the users who include express companies, freight forwarders and ultimately the end users and thereby will also harm the competition. At the same time, it cannot be disputed that airlines are incurring losses besides groaning under accumulated debts. After duly considering the matter, the Commission finds it appropriate to impose a penalty on OP-1 to OP-3 at the rate of 1 % of their average turnover of the last three financial years based on the financial statements filed by

Accordingly, the Commission imposes a sum of 151.69 crores on OP-1, 63.74 crores on OP-2, 42.48 crores on OP-3 as penalties for the impugned conduct in contravention of the provisions of section 3(1) read with section 3(3)(a) of the Act. The Commission further directs the above
OPs to deposit the penalty amount within 60 days of receipt of this order. It is ordered accordingly.

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**Shamsher Kataria v. Honda Siel Cars India Ltd.**

CCI Case No. 03/2011

Date of Order: 27.07.2015

ORDER UNDER SECTION 27 OF THE COMPETITION ACT, 2002

1. Factual Background:

1.1 The information in the present case was filed by Shri Shamsher Kataria ("Informant") under Section 19 (1)(a) of the Competition Act, 2002 (hereinafter, referred to as the “Act”) on 18.01.2011 against Honda Siel Cars India Ltd., Volkswagen India Pvt. Ltd. and Fiat India Automobiles Ltd., alleging anti-competitive practices on the part of these three car manufacturers, whereby the genuine spare parts of automobiles manufactured by them were not made freely available in the open market. The Commission considered the matter and on perusal of the material on record, passed *prima facie* order dated 24.02.2011 under section 26(1) of the Act directing the DG to conduct an investigation into the matter and submit his investigation report. From the preliminary enquiries made during the investigations, the DG opined that other automobile manufactures or Original Equipment Manufacturers ("OEMs") (other than the three car manufacturers named by the Informant) might also be indulging in similar restrictive trade practices with respect to after sales service, procurement and sale of spare parts from the Original Equipment Suppliers ("OES"), setting up of dealerships etc. It appeared that the case involved a much larger issue relating to the prevalence of anti-competitive conduct by the automobile players in the Indian automobile sector and its implications on the consumers at large. Consequently, the DG proposed before the Commission that the investigation should not be restricted to the 3 car manufacturers alone and it should be expanded to examine the alleged anti-competitive trade practices of all car manufacturers in India, as per the list maintained by the Society of Indian Automobile Manufacturers ("SIAM"). The Commission considered the abovementioned request of the DG and, vide order dated 26.04.2011, approved the request to initiate investigation against 14 other OEMs operating in India, in addition to the three car manufacturers named in the information filed by Shri Shamsher Kataria. These 14 OEMs were: BMW India Pvt. Ltd. ("BMW"), Ford India Pvt. Ltd. ("Ford"), General Motors India Pvt. Ltd. ("GM"), Hindustan Motors Ltd. ("Hindustan Motors"), Hyundai Motor India Ltd. ("Hyundai" or "HML"), Mahindra & Mahindra Ltd. ("M&M"), Mahindra Reva Electric Car Company (P) Ltd. ("Reva"), Maruti Suzuki India Ltd. ("Maruti"), Mercedes-Benz India Pvt. Ltd. ("Mercedes"), Nissan Motor India Pvt. Ltd. ("Nissan"), Premier Ltd. ("Premier"), Skoda Auto India Pvt. Ltd. ("Skoda"), Tata Motors Ltd. ("Tata") and Toyota Kirloskar Motor Pvt. Ltd. ("Toyota")

1.5 After considering the investigation report submitted by the DG, the Commission 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 filed applications dated 01.02.2013 and 21.12.2012 respectively under Regulation 26 of the Competition Commission of India (General) Regulations, 2009 ("General Regulations") requesting for striking out of their names from the array of parties. The Commission decided to dispose of these applications with the final order. With regards to Hyundai, a Writ Petition No. 31808/2012 was filed by it before the Madras High Court challenging the jurisdiction of the Commission. Madras High Court granted an ex-parte stay in the matter vide its interim order dated 06.02.2013 and, therefore, the matter could not be proceeded *qua* Hyundai also. Therefore, the Commission vide its order dated 25.08.2014 under Section 27 of the Act ("Main Order") had *inter alia* imposed penalties only on fourteen out of the seventeen Opposite Parties (OPs). For the reasons recorded in the preceding paragraph, the order of the Commission has remained pending against Hyundai, Reva and Premier ("present Opposite Parties") as the Commission decided to pass separate order against the present Opposite Parties after affording them...
reasonable opportunity to make their submissions in respect of the findings in the DG report 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 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)(c) 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 aftermarket without 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 HMC for 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 Car Company (“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 automobiles. 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 period 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 quia 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 the developments 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 are protected by unregistered copyright and trade secret. To substantiate the claim, Hyundai cited the judgment of the Delhi High Court in *Cattle Remedies and Anr. v. Licensing Authority/Director of Ayurvedic and Unani Services*, wherein it has been observed that apart from 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 last 11 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 India and 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 parts in 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 massive counterfeits/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 *suomotu*, the real question is whether in the case on hand, what was done by the DG would tantamount to *suomotu* initiation of investigation or not. The Madras High Court answered the question in negative. While commenting on the scope of the DG 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.
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 of section 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 is of 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 parts and 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 has found 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 of the 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 stating that 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 of 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. To substantiate 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 has been 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:

9.1.16 During 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 their agreements 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 be relevant 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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A.K. SIKRI, J.

1) All these appeals are filed against the orders dated 20th December, 2013 passed by the Competition Appellate Tribunal (hereinafter referred to as ‘COMPAT’). The COMPAT by the said judgment has upheld the findings of the Competition Commission of India (for short, ‘CCI’) that the appellants/suppliers of Liquefied Petroleum Gas (LPG) Cylinders to the Indian Oil Corporation Ltd. (for short, ‘IOCL’) had indulged in cartelisation, thereby influencing and rigging the prices, thus, violating the provisions of Section 3(3)(d) of the Competition Act, 2002 (for short, the ‘Act’).

2) We may point out at the outset that all these appellants are manufacturing gas cylinders of a particular specification having capacity of 14.2 kg which are needed for use by the three oil companies in India, namely, IOCL, Bharat Petroleum Corporation Ltd. (BPCL) and Hindustan Petroleum Corporation Ltd. (HPCL) [all public sector companies]. It is also a matter of record that apart from the aforesaid three companies there are no other buyers for these cylinders manufactured by the appellants. Insofar as IOCL is concerned, it is a leading market player in LPG as its market share is 48%. Thus, in case a particular manufacturer is not able to supply its cylinders to the aforesaid three companies, there is no other market for these cylinders and it may force that company to exit from its operations.

4) The suo-motu proceedings were started by the CCI on the basis of the information received by it in Case No. 10 of 2010 titled M/s. Pankaj Gas Cylinders Ltd. Vs. Indian Oil Corporation Ltd. in that case a complaint was made by M/s. Pankaj Gas Cylinders before the CCI complaining about unfair conditions in the tender floated by IOCL for the supply of 105 lakh 14.2 Kg. capacity LPG Cylinders with SC valves in the year 2010-11, the tender No. being LPG-O/M/PT-03/09-10. While considering the Director General’s investigation report in Case No. 10 of 2010, the CCI in pursuance of its duties under Section 18 felt that investigation was necessary in the case of all bidders who were the suppliers of 14.2 kg. LPG cylinders in that tender. In the investigation report in the said case, the Director General had noted that out of 63 bidders who participated in the tender, 50 bidders were qualified for opening of price bids, while 12 bidders were qualified as new vendors who were not required to submit price bids and one bidder was not qualified for the opening of the price bid. The technical bid of the subject tender was opened on 3.3.2010 and the price bids of 50 qualified bidders were opened on 23.3.2010. According to the Director General, there was a similar pattern in the bids by all the 50 bidders who submitted price bids for various States. The bids of a large number of parties were exactly identical or near to identical for different States. The Director General had observed that there were strong indications of some sort of agreement and understanding amongst the bidders to manipulate the process of bidding.

5) It was on this basis the CCI directed further investigation in the matter. The Director General after careful consideration submitted a detailed investigation report to the CCI. After the CCI considered the freshly ordered investigation report, it directed that a copy of the report be sent to the parties seeking their objections. In all, 44 opposite parties submitted their objections. After giving them the opportunity to be heard, the CCI passed the order in question.

6) As per the Director General’s report, the process of bidding followed by the IOCL in the tender was as under:-
   i) The bidders would submit their quotations with the bid documents.
   ii) The existing bidders, who were existing suppliers, were required to submit the price bids and technical bids.
   iii) The bidders were to quote for supplies in different States of India in keeping with their installed capacity.
   iv) After price bids were opened the bidders were arranged according to the rates in the categories of L-1, L-2 and L-3.
   v) The rates for the supplies in different States were approved after negotiations with L-1 bidder. In case the L-1 bidder could not supply a required number of cylinders in a particular State, the orders of
supplies went to L-2 and also L-3 bidder or likewise depending upon the requirement in that State as per fixed formula provided in the bid documents.

vi) Certain bidders were called new parties. They were required to submit only technical bids and to supply as per L-1 rates determined after the negotiations.

vii) One bidder could quote for maximum eight States.

7) The Director General after analyzing the bids came to the conclusion that there was not only a similarity of pattern in the price bids submitted by the 50 bidders for making supply to the IOCL but the bids of large number of parties were exactly identical or near to identical in different States. It was also found that bidders, who belonged to same group, might have submitted identical rates. It was found that not only there was identical pricing in case of group concerns but the rates of other entities not belonging to the group were also found to be identical. The D.G. painstakingly noted the names of group companies as well as non-group companies. He came to the conclusion that in all 37 entities could not be said to be belonging to any single group and were independently controlled. The Director General found it unusual that unrelated firms had quoted identical rates in different States. The D.G. had analyzed the bidding pattern for the various parties for all the 25 States.

8) The D.G. had found further that though the factors like market conditions and small number of companies were different, there was a largescale collusion amongst the bidding parties. He also arrived at a finding to the effect that the LPG Cylinder Manufacturers had formed an Association in the name of Indian LPG Cylinders Manufacturers Association and the members were interacting through this Association and were using the same as a platform. The date for submitting the bids in the case of the concerned tender was 3.3.2010 and just two days prior to it, two meetings were held on 1st and 2nd March, 2010 in Hotel Sahara Star in Mumbai. As many as 19 parties took part and discussed the tender and, in all probability, prices were fixed there in collusion with each other. The D.G. reported that the bidders had agreed for allocation of territories, e.g., the bidders who quoted the bids for Western India had not generally quoted for Eastern India and that largely the bidders who quoted the lowest in the group in Northern India, had not quoted generally in Southern India. The D.G. also concluded that this behavior created entry barrier and that there was no accrual of benefits of consumers nor were there any plus factors like improved production or distribution of the goods or the provision of services.

9) Ultimately, the D.G. came to the conclusion that there was a cartel like behaviour on the part of the bidders and that the factors necessary for the formation of cartel existed in the instant case. It was also found that there was certainly a ground to hold concerted action on the part of the bidders. The D.G. had also noted that the rates quoted for the year 2009-10 and in years previous to that were also identical in some cases. Thus, he came to the conclusion that the bids for the year 2010-11 had been manipulated by 50 participating bidders. It was thereafter that the CCI decided to supply the D.G.’s investigation report to the concerned parties and invite their objections.

10) A common reply came to be filed as also the individual replies. After considering the same, the CCI formulated the following issue for determination: -

“Whether there was any collusive agreement between the participating bidders which directly or indirectly resulted in bid rigging of the tender floated by IOCL in March 2010 for procurement of 14.2 kg. LPG cylinders in contravention of Section 3(3)(d) read with Section 3(1) of the Act?”

11) After considering the oral as well as written submissions, the CCI answered the issue against the Cylinders Manufacturers and inflicted the penalties against the present appellants. In its impugned order, while determining the issue, the CCI, in the first instance, considered the common replies to the DG’s report filed by as many as 44 opposite parties. It was more or less pleaded that every part of LPG Cylinder is regulated by the Rules through various Notifications and that the price of steel constitutes 50% of the total manufacturing cost, so also the price of the paint, it being an essential raw material. All these factors, including the taxes which vary from State to State, determine the overall bidding pattern of the bidders. In para-5.2.3 of the common objection, it was added that these 44 parties had nominated six agents for depositing their bids on their behalf and it was a common practice amongst the bidders to direct their agents to keep close watch on the rates offered by their competitors in respect of a particular State and this led to the possibility of copying and matching of the rates quoted in the price bids by
many suppliers in a particular State, who may have appointed common agents. Due to this reason, cutting and over-writing in the price bids for the tender in question was noticed by the Director General.

12) It was further pointed out that there were only 62 qualified tenderers in the whole country, out of whom 12 bidders were classified as new parties, meaning thereby that they had not supplied Cylinders in last three years and were not required to bid in the tender. Out of the remaining 50 bidders, there were group companies controlled by single management.

13) The CCI in its detailed order began with considering the scope of constructed bid rigging agreement and cartel. In that the CCI also considered the 18 famous observations by Lord Denning in case of RRTA vs. W. H. Smith & Sons Limited regarding the quiet and secret nature of the agreement between the parties. The CCI then went on to record its inference holding that there was element of agreement and considered the following factors in coming to the conclusion. They being: -

1. Market conditions
2. Small number of suppliers
3. Few new entrants
4. Active trade association
5. Repetitive bidding
6. Identical products
7. Few or no substitutes
8. No significant technological changes
9. Meeting of bidders in Mumbai and its agenda.
10. Appointing common agents
11. Identical bids despite varying cost.

14) After consideration of these factors, the CCI came to the conclusion that it did suggest collusive bidding.

15) The COMPAT after discussing the findings of the CCI and also taking note of the arguments of the appellants which were advanced before the CCI, proceeded with its own discussion. It started with the admitted facts of the case, and took note of the following such facts:

(A) The tender offers were to be made at Mumbai on 03.03.2010. Admittedly there were meetings in Hotel Sahara Star, Mumbai on 1st and 2nd March, 2010 which were attended by some of the appellants. The D.G. has held that 19 appellants were represented by various persons in that meeting. The fact of the meeting having been held was not disputed. Though some of the appellants stated that they did not attend the meeting and those who attended the meeting maintained that nothing was discussed about the tender, the same was not believed by the COMPAT and it held that these meetings did relate to the tender offers which were to be submitted on 03.03.2010. This finding is premised on the basis that nobody came with the explanation as to what transpired in the meeting or gave any proof that prices were discussed. Minutes of the meeting were also not produced.

(B) There is an association of the cylinder manufacturers. All the parties, except few competing with each other, stated that they were not the members of that association. A feeble argument was also raised by some appellants that though they were the members but they were not the active members thereof. Some of the appellants also argued that they had abandoned the membership by not contributing the subscription in the later years. However, the appellants could not deny the position that there was an association called Indian LPG Cylinder Manufacturers’ Association. It was a registered association, its Memorandum of Association provided that one of the objectives was to protect common interest and welfare of LPG cylinder manufacturers. According to COMPAT, there was a definite platform available for all cylinder manufacturers and practically all the appellants appear to be the members of that Association.

(C) A common written reply was submitted by as many as 44 parties. Further, the appellants had nominated six agents for depositing bids on their behalf. These common agents were instructed to keep a close watch on the price quoted by the competitors in a particular State.

Though some of the appellants had contended that they had not appointed the common agents, the plea was not accepted by the COMPAT. The COMPAT, therefore, proceeded on the ‘admitted
grounds’ that there was an association of cylinder manufactures; practically all the appellants were members of the said association; this association was an active association; it held meetings on the eve of entry tender obviously for discussing tenders, its conditions etc.; these meetings were attended by representatives of at least 19 appellants; and these appellants had six common agents at Mumbai who were instructed to watch the prices offered by the others. A dinner meeting as also a munch was held and one Mr. Chandi Prasad Bhartia of M/s. Haldia Precision Engineering Private Limited paid the bill for the same. Dinner and lunch held in Sahara hotel were attended by about 50 persons in all. From this the COMPAT inferred that there was no reason to disbelieve that the parties had an access to each other through their association which was an active association. The existence of such an association under the aegis of which meetings took place just before the submission of tender has been noted as a very relevant factor by the COMPAT in affirming the findings of CCI on cartelisation and it summed up the position in the following manner:

“26. What is important is not whether a particular appellant was a member of the association or not. The existence of an association is by itself sufficient, as it gives opportunity to the competitors to interact with each other and discuss the trade problems. There will be no necessity to prove that any party actually discussed the prices by actively taking part in the meeting. If there is a direct evidence to that effect that is certainly a pointer towards the fact that such party had a tacit agreement with its competitors. However, the existence of an association and further holding of the meetings just one or two days prior to the last date of making offers and further admission that the parties had appointed common agents with the instructions to keep watch on the prices quoted by the competitors would go a long way in providing plus factors in favour of the agreement between the parties. All these factors would form a back drop, in the light of which, the further evidence about agreement would have to be appreciated. We have seen the comments of Director General as also the findings of the CCI. We are convinced that CCI has not committed any error in considering all these factors as plus factors to come to the conclusion that there was a concerted agreement between the parties on the basis of which the identical or near identical prices came to be quoted in tenders for the supply of cylinders to the 25 States. In view of this, we need not dilate on the individual claims by some of the appellants that they were not the members of the association or that they were only the dormant members or that they had abdicated their membership. We also need not go on the claim that while the meeting was attended by the 19 parties as held by the D.G. and confirmed by the CCI, it was not attended by the rest of the appellants because that would be of no consequence. Once there was a meeting, there was every opportunity to discuss or to communicate to each other whatever transpired in the meeting.

27. We have seen the order of the CCI and while commenting about the meeting, the CCI has painstakingly noted the details of that meeting. The CCI has referred to the evidence of Mr. Dinesh Goyal, who was an active member of the Indian LPG Cylinder Manufacturers’ Association and noted that he had attended the meeting. He has also referred to the statement of Mr. Sandeep Bhartia of Carbac Group though initially he denied to have organized the conference, he later on had confirmed about such a conference having been held along with Mr. Sandeep Bhartia of Carbac Group. The CCI also noted that he admitted that in such meetings there were discussions on pre-bid issues. He also admitted that though there are about 50 competitors, in fact about 25 persons control the whole affairs. From this evidence, the CCI correctly deduced that pre-bid issues were discussed in that meeting. The CCI has then referred to the evidence of Mr. Manvinder Singh of Bhiwadi Cylinders Limited, Mr. Chandi Prasad Bhartia of Haldia Precision Engineering P. Ltd., Mr. Vijay Kumar Agarwal of SM Sugar Pvt. Ltd., Mr. S. Kulanadhaiswamy, MD of Lite Containers Pvt. Ltd. and Secretary of the Association, Mr. Ramesh Kumar Batra, Director of Surya Shakti Vessels Pvt. Ltd. and on that basis came to the correct conclusion that not only was the meetings held on 1st and 2nd March, but thorough discussions went on in those meeting on the pre-bid issue of the concerned tender. The CCI has also correctly noted about the agenda of the meeting and has also referred to an admission made by one of the witnesses that the matching of the quotation was a matter of co-incidence and telephonic discussions do
take place amongst the parties regarding the trends. We are thus thoroughly convinced about holding of the meeting, the discussion held therein and also the discussion regarding the pre-bid issue having been taken place in that meeting.”

16) Another significant argument which was canvassed before us also with great emphasis was that it was an oligopolistic market wherein there was a likelihood of each player being aware of actions of the other and in such a situation price parallelism would be a common phenomenon. Thus, merely because there was a price parallelism, it would not be construed as evidence of collusion. The COMPAT rejected this argument as well. In the process, it analysed the order of CCI, conclusion whereof was founded on the following factors:

1) The prevailing market conditions were such that there was a constant demand for cylinders not only by IOCL but by other two oil manufacturing companies as well. Therefore, there was a constant need for the cylinders which facilitated factor for the collusion.

2) There was small number of suppliers. Among the 50 participating companies, only 37 companies could be said to be independent bidding companies and there were seven groups consisting of 20 participating companies. This small number of suppliers should also be a facilitating factor.

3) There were very few new entrants.

4) The existence of an active trade association in which all the bidders, except seven companies, were members would be another facilitating factor.

5) Few other factors like repetitive bidding, identical products, few or no substitutes and no significant technological changes were the additional factors which persuaded the CCI to arrive at such a conclusion.

6) These manufacturing companies had their factories at different places in India, where the costs of the components would differ from State to State. Even the taxing structure, the labour conditions and other factors like cost of electricity etc. were bound to be different. Still the prices quoted were almost identical.

7) On the above considerations, the defence of the appellants was rejected as unconvincing, thereby undergoing the factors considered by the CCI.

17) According to the COMPAT all these could not have been possible unless there were internal agreements between the appellants. The COMPAT has approved the finding of the CCI that owing to the collusion, the IOCL could not get lower or the competitive prices.

19) It negated the argument of the appellants that when the IOCL was placing orders on the basis of negotiated rates there could be no possibility of incentive to collude. According to it, even where the rates are fixed, the bid rigging can still take place to keep the big amounts to a pre-determined level. Such pre-determination can be by way of intentional manipulation by members of the bidding group and where the L-1 rates themselves get fixed like in the present case at higher level even if there are negotiations the negotiators would have to take into consideration the benchmark rates. There is also a possibility that such benchmark rates could go higher in the subsequent tenders; known as rippel effect in long term.

21) Having examined the relevant provisions whereupon these appeals centre around, we proceed to take note of the arguments that were advanced by various counsel appearing for the appellants and the manner in which respondents endeavoured to meet the same.

22) Ms. Madhavi Divan, learned counsel appearing in the appeal filed by Rajasthan Cylinders and Containers Ltd., attacked the very basis and foundation on which CCI came to conclusion that there was an agreement or cartelisation by the appellants aimed at bid rigging. She premised her case on the following three propositions:

(i) the inherent nature of the market of cylinder manufacturers itself precludes the possibility of competition;
(ii) alternatively, there is no collusive agreement or bid-rigging in the present case; and
(iii) further, in the alternative, even assuming that there is a collusive agreement or bid-rigging in the present case, there is no appreciable adverse effect on competition.
23) On the first proposition, argument developed by Ms. Divan was that the Act prohibits anti-competitive practices, which would imply that there has to be a competition in the market, in the first place. As a corollary, if there is no such competition, Section 3(1) of the Act does not get triggered. According to her, in the instant case, the fact would show that there was a tight control and regulation by the IOCL and, thus, it did not lead any scope of competition at the very threshold. She stressed that the conditions of monopsony/oligopsony prevailed. For the existence of monopsony/oligopsony, she referred to the Glossary of Industrial Organization Economics and Competition Law published by the Organisation for Economic Co-operation and Development (OECD), as per which a monopsony consists of a market with a single buyer. When there are only a few buyers, the market is described as an oligopsony. In general, when buyers have some influence over the price of their inputs, they are said to have monopsony power. The ability of a firm to raise prices, even when it is a monopolist, can be reduced or eliminated by monopsony or oligopsony buyers. To the extent that input prices can be controlled in this way, consumers may be better off.

24) According to her, these conditions were adequately present in the instant case. In her attempt to make this proposition good, she highlighted the following features and conditions surrounding the contract:

(i) Extremely limited number of buyers and for this particular kind of market - a sole buyer, i.e., IOCL. IOCL controls 48% of the market share. There are no other purchasers of 14.2 Kg gas cylinders except for HPCL and BPCL, both of whom invite e-tenders, having a market share of 26% and 25% respectively.

(ii) The product is standardized and special to the extent that it is tightly controlled and regulated by the Government and also there are no other takers for it.

(iii) There are entry barriers in the market. As per the Tender conditions, only those manufacturers having valid approval from the Chief Controller of Explosives (CCOE) and Bureau of Indian Standards (BIS) license for manufacture of 14.2 kg LPG cylinders as per IS-3196 (Part 1) could submit bids for the tender.

(iv) Even the machinery used to manufacture this product is special and will become obsolete and reducible to scrap if IOCL and the aforesaid two players were to discontinue contracts for supply of 14.2 kg cylinders.

She pointed out that this was accepted in the Expert Report of Dr. Rughvir K.S. Khemani.

(v) The tender conditions state that it can be rejected without furnishing reasons. Therefore, the lowest price is not sacrosanct (clause 11 of the contract).

(vi) L2 and L3 have also been granted contracts irrespective of the price they have quoted.

(vii) Effective price has no sanctity since not only L2 and L3 also get contracts in addition to or in exclusion of L1 but further, the final negotiated price is determined on the basis of privately conducted negotiations with individual bidders for which the benchmark is not the price quoted by them but the internal estimates arrived on the basis of objective criteria.

(viii) In most States, the final negotiated price was concluded at a rate lower than the internal estimate. The internal estimate had absolutely no correlation with the quoted rates by L1 or any other party. In this behalf, she pointed out that the IOCL had carried out the exercise of ascertaining the estimated cost of the cylinder through its experts. In the report given by the expert, the estimated cost per cylinder was arrived at Rs. 1106.61 paisa per cylinder. As against this, the final negotiated price at which the appellants had supplied cylinders to the IOCL was much lesser. According to her, in the whole process the price determination was on the basis of internal estimates by IOCL which could not be influenced by the appellants at all. In fact, even after the tenderers submitted their bids, final price was the price negotiated by IOCL which fact was accepted by Mr. Y. Ramana Rao of IOCL in his deposition recorded by the Director General of CCI. This, according to the learned counsel, clearly proved that there was no adverse effect on competition, in any case.

(ix) The internal estimates were drawn up long after the price bids were made, i.e., on 5th May, 2010. Price bids were opened on 23rd March, 2010 and negotiations were held only after the submission of Mott MacDonald Report on 05.05.2010.

(x) The pattern shows that since L1, L2 and even L3 were awarded the contract and not merely L1, quoting the lowest price did not even determine the identity of the parties who were to get the contract, therefore, the manner in which the process was conducted or controlled by IOCL, completely leaves no scope for either determination of price or the identity of the parties who would get the contract.
25) She submitted that in such market conditions where on account of the vertical agreement there is virtually no scope of competitive forces between horizontal players, the question of anti-competitive conduct by virtue of horizontal agreements does not arise. There is no competition in the market even before a player enters the fray. Therefore, the first premise for the application of Section 3, i.e., the presence of an otherwise competitive market is absent. The burden of proof is on the respondent—CCI to establish that there is competition in the market before it can justify invoking Section 3. There is no automatic presumption under Section 3 that there is competition in the market.

26) From the aforesaid factors, Ms. Divan tried to deduce that price control was entirely in the hands of IOCL and in a situation like this, question of entering into any agreement with the motive of bid rigging or collusive bidding did not arise.

27) She also referred to LPG (Regulation of Supply and Distribution) Order, 2000 published vide Notification dated 26th April, 2000 as per which only Government oil companies can supply LPG to domestic consumer of 14.2 kg LPG cylinders with dimensions as specified therein. Predicated thereupon, her submission was that the LPG supply in 14.2 kg gas cylinders is an essential commodity; the distribution of such cylinders takes place only through Government oil companies; the price to the consumer is controlled by the Government; and parallel marketeers, supplier and distributior of LPG cylinders may do so only for cylinders and specifications other than 14.2 kg cylinders. This control of the Government, insofar as supply of 14.2 kg gas cylinders is concerned, would also show tight control over the pricing. In such a statutorily tight control price fixing mechanism there could not be bid rigging, was the submission of Ms. Divan. She supported this submission by drawing the attention of the Court to the following observations in *Ashoka Smokeless Coal India (P) Ltd. v. Union of India*:

127. While fixing a fair and reasonable price in terms of the provisions of the Essential Commodities Act (although the price is not dual), it is essential that price is actually fixed. Such price fixation is necessary in view of the fact that coal is an essential commodity. It is, therefore, vital that price is actually fixed and not kept variable. Fixation of price of coal is of utmost necessity as it is a mineral of grave national importance. Non-availability of coal and consequently, the other products may lead to hardship to a section of citizens. It may entail closure of factories and other industries which in turn would lead to loss to the State exchequer; as they would be deprived of its taxes. It will lead to loss of employment of a large number of employees and would be detrimental to the avowed object of the Central Government to encourage small-scale industries.”

31) She, thus, argued that merely because there was price parallelism, it could not have been the reason to arrive at a conclusion that there was a collusive agreement or bid rigging. She submitted that in a monopsonistic market where there are few buyers, the price is set by the buyers, and the conditions are such that sellers can predict demand, there is a repetitive bidding process and the products are identical and specialized, the likelihood of price parallelism is natural.

32) Further, price parallelism is inevitable where the buyer has a high degree of control and determines price, quantity, and even the identities of the awardees at its discretion. Referring to the following discussion in *Union of India v. Hindustan Development Corporation*4, she argued that mere identical pricing cannot lead to the conclusion of cartelisation:

“7. […] (1) There is not enough of material to conclude that M/s H.D.C., Mukand and Bhartiya formed a cartel. Because of mere quoting identical tender offers by the said three manufacturers for which there is some basis, the conclusion that the said manufacturers had

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3 (2007) 2 SCC 640
4 (1993) 1 SCC 467
formed a cartel does not appear to be correct. However since the offers of the said three tenderers were identical and the price was somewhat lower, the Tender Committee entertained a suspicion that a cartel had been formed and the same got further strengthened by the post-tender attitude of the said manufacturers which further resulted in entertaining the same suspicion by the other authorities in the hierarchy of decision making body including the Minister of Railways. […]

34) The learned counsel pointed out that the CCI arrived at an inference of a collusive agreement based, *inter alia*, on the presence of circumstances which have acted as ‘facilitating factors’ for collusion. These factors which describe the nature of the industry are:

(i) Predictability of demand  
(ii) Small number of suppliers  
(iii) Few new entrants  
(iv) Active trade association  
(v) Repetitive bidding  
(vi) Identical products  
(vii) Few or no substitutes  
(viii) No significant technological changes, i.e., a standardised product in respect of which there has been no change or alteration in design.

36) Adverting to her 2nd proposition, namely, there was no collusive agreement or bid rigging in the present case, her submission was that CCI has relied on a dinner attended by some manufacturers on 1st March, 2010 and a lunch on 2nd March, 2010 as evidence of a price fixing agreement. Her response was that the factum of meetings of an association by itself in any case cannot lead to a conclusion of collusion. Likewise, the COMPAT also upheld that inference based on the factum of the meetings of the Association. The COMPAT went to the extent of holding that it is irrelevant whether a particular party was a member of the Association or not and the existence of Association is by itself sufficient. This approach was attacked as contrary to the fundamental right to form an association under Article 19(1)(c)(g) of the Constitution of India.

37) So far as the meetings over dinner and lunch are concerned, both were hosted by individual members. In the case of the dinner meeting on 1st March, 2010, it was hosted by Mr. C.P. Bhartiya, MD of North India Wires. The lunch on 2nd March, 2010 was hosted by Mr. Santosh Bhartiya of Haldia Precision. It is not as if that the Association paid or the expenses were shared by all members who attended.

38) She also submitted that insofar as appellant – Rajasthan Cylinders and Containers Limited is concerned, no representatives of appellant attended the said meeting. Further, many other members did not attend the meeting. Even as per the findings of the Director General, only 12 persons representing 19 parties are said to have attended the meeting. Her submission was that as per the allegations, 45 persons had entered into an agreement of cartelisation which should not be established only with the said meeting which was not attended by all and in fact very few members.

41) The test as laid down in the case of *Ahlstrom Osakeyhtio v. Commission*⁵ is: Is the concertation the only plausible explanation for the conduct?

“126. Following that analysis, it must be stated that, in this case, concertation is not the only plausible explanation for the parallel conduct. To begin with, the system of price announcements may be regarded as constituting a rational response to the fact that the pulp market constituted a long-term market and to the need felt by both buyers and sellers to limit commercial risks. Further, the similarity in the dates of price announcements may be regarded as a direct result of the high degree of market transparency, which does not have to be described as artificial. Finally, the parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain period. Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation.

This test is not met in the present case for reasons that are enumerated.

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⁵31.3.1993, ECJ (paragraph 115, Internal P.1611) ("Woodpulp")
i) Her third proposition was that in any case there was no appreciable adverse effect on competition. She tried to make this submission good by contending that when industry is an oligopoly, the price parallel or a finding of identical quoting of price does not by itself lead to the conclusion of a concerted price. Moreover, in the instant case, number of entrants had increased as 12 new entrants submitted their bid for the year 2010-11. Therefore, the finding of the CCI, upheld by the COMPAT, that there has been a creation of barriers for new entrants is without any basis.

ii) Mr. Jaiveer Shergil, who argued for the appellant—Om Containers (C.A. No. 6369 of 2014) submitted that in order to attract the presumption contained in Section 3(3) about the appreciable adverse effect on competition, in the first instance, there has to be a finding that there has been an agreement of the kind set out in Section 3(3)(a) to (d). Since, the allegation against the appellants was that the agreement resulted in bid rigging and case is covered under Section 3(3)(d) of the Act, it was necessary that there is a positive finding to the aforesaid effect, namely, that there was agreement which had resulted in bid rigging. According to him, since the definition of bid rigging in Explanation to Section 3(3) uses the words ‘means’, the definition is a hard and fast definition and no other meaning can be assigned to the expression than is put down in the definition, as held in Punjab Land Development & Reclamation Corporation Ltd. vs. Presiding Officer, Labour Court6 in the following words:

“72. The definition has used the word ‘means’. When a statute saysthat a word or phrase shall “mean”— not merely that it shall “include” — certain things or acts, “the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition” (per Esher, M.R., Gough v. Gough [(1891) 2 QB 665 : 65 LT 110]).

44) Thus, according to him, for it to be a case of bid rigging, the agreement must be such which is defined in the Explanation to Section 3(3)(d) creating the effect of:
   a. Eliminating or reducing competition for bids or
   b. Adversely affecting the process for bidding or
   c. Manipulating the process for bidding.

46) He submitted that there is no positive evidence of this nature at all and the CCI as well as COMPAT has proceeded on inferences as regards bid rigging and, therefore, such orders cannot be sustained.

In the absence thereof, submitted the learned counsel, doctrine of reverse burden which was put on the appellants would not apply. He referred to the following judgments in support.

47) The counsel relied upon the following observations in CCI v. Artistes & Technicians of W.B. Film & Television:

“31. The Competition Act, 2002, as amended in 2007 and 2009, deals with anti-trust issues viz. regulation of anti-competitive agreements, abuse of dominant position and a combination or acquisition falling within the provisions of the said Act. Since the majority view of CCI also accepted that the impugned activities of the Coordination Committee did not amount to abuse of dominant position, and it treated the same as anti-competitive having appreciable adverse effect on competition, our discussion would be focused only on anti-competitive agreements. Section 3 of the Act is the relevant section in this behalf. It is intended to curb or prohibit certain agreements. Therefore, in the first instance, it is to be found out that there existed an “agreement” which was entered into by enterprise or association of enterprises or person or association of persons. Thereafter, it needs to be determined as to whether such an agreement is anti-competitive agreement within the meaning of the Act. Once it is found to be so, other provisions relating to the treatment that needs to be given thereto get attracted.”

6(1990) 3 SCC 682
Taking aid of the aforesaid legal principle, it was submitted that in the present case it will be seen that the CCI, rather arriving at a finding with focus on the aforesaid factors, proceeded to analyse factors which attach to the general market conditions of the industry to ‘infer’ the ‘possibility’ of bid rigging and then concluded that the ‘facilitating factors’ which may be ‘considered conducive for cartelisation’ are present. The D.G. found that ‘in all the probability, prices were fixed there at the meeting in Bombay in collusion with each other. Such an inference and assumption based on ‘higher chances’, ‘probability’, ‘tendencies’ or ‘likelihood’ by the CCI does not meet the requirement of the definition contained in Explanation to Section 3(3) and certainly does not constitute a finding of ‘bid rigging’ as defined therein. The Tribunal has also proceeded on the basis that it ‘is to be deduced...that these meetings did relate to the tender offers’. There was, thus, not clear cut, precise and consistent evidence to support that the alleged bid rigging took place.

Next submission of Mr. Shergil was that apart from the complete absence of a finding of bid rigging, in the present IOCL tender, as a matter of fact there cannot be any bid rigging as defined in Section 3(3). To take the first ingredient, i.e., eliminating or reducing competition for bids, the report of D.G. itself finds that out of the 60 bidding parties 37 entities were not belonging to any single group and are independently controlled. Hence, straight away there is no case of ‘eliminating or reducing competition for bids’ which is one of the possible ingredients of bid rigging as there were 37 entities who were free of mind to participate and bid of their own accord in the absence of any control by any cartel.

As regards the second and third requirement of bid rigging, i.e., adversely effecting or manipulating the bidding process, he argued that the submission of bids by the appellant (even if identical) can have no effect of ‘adversely effecting or manipulating the bidding process’ this being on account of the very nature of the present tender process. Although, bids are invited from bidders, IOCL has a fixed/base procurement price of Rs. 1106.61 per cylinder. IOCL then works out an estimated rate per State based on certain factors peculiar to that State such as octroi, freight etc. The bid offered by the L1 (lowest bidder) is then subject to further downward negotiations by IOCL as per the tender clause and a further finalised rate is arrived at. Such finalised rate is eventually even lower10 than the L1 bid amount. Thus, factually, logically and in reality any bid submitted by any party can never be one which is said to adversely affect or manipulate the bidding process. All of this information is with IOCL as part of its bidding process preparations, estimates and financial workings and could easily have been taken into consideration. In support, Mr. Shergill also referred to the terms and conditions of the IOCL tender.

His further submission was that CCI, or for that matter COMPAT, were wrong in getting influenced by the submissions of identical bids by the appellants as it could not be, ipso facto, inference of bid rigging. Such identical prices could be for various reasons and he shared that the reasons given by Ms. Divan predicated her submissions on oligopsony/monopsony.

Various other counsel also argued on the same lines and in addition referred to facts or their specific cases and it is not necessary to state all those arguments to avoid repetition.

Per contra, Mr. Salman Khurshid, learned senior counsel appearing for CCI highlighted the purpose for which the Act is enacted and, in particular, objective behind Section 3 of the Act, which is taken note of by this Court in Excel Crop Care Limited as well as West Bengal Artists Association. Insofar as instant case is concerned, his submission was that it is a stark and clear-cut case of bid rigging as a result of anti-competitive agreement amongst LPG manufacturers in respect of a tender (Tender No. LPG-O/M/PT-03/09-10) floated by IOCL for procurement of approximately 1,05,00,000 (105 lakhs) LPG Cylinders. This is a matter of serious public concern because these cylinders were to be used to supply Liquefied Petroleum Gas (LPG) for domestic consumption across 25 States. A rise in price resulting from anti-competitive activities would affect the cost of living for the common man, and has serious ramifications for the economy as a whole.

Mr. Khurshid referred to the findings of the CCI as approved by COMPAT and submitted that there was a strong economic evidence of collusion which is evident from the following aspects:

(a) Identical or near-identical bidding by all 50 empanelled LPG vendors resulting in bid rigging.
(b) Results of the tender revealed that these bids were made in such a way that all the bidders were awarded some portion of the tender and no bidder was left empty handed, i.e., Market Sharing Arrangement.

(c) Geographical/Territorial allocation of market, i.e., the bids were placed in such a way that entities located in the northern parts of the country were awarded the tender in the northern States, entities located in the southern parts were awarded the tender in respect of southern States etc.

(d) No plausible economic rationale or explanation was forthcoming for the identical bids, despite obvious difference in cost of production, location, input cost etc.

(e) The overall effect of increase in price of procurement of LPG Cylinders over previous years.

57) He also submitted that pattern of identical and near identical bids, which was all pervasive throughout, could not be brushed aside lightly as that was the clear indicator of price bidding as a result of agreement between the parties. The analysis of the bids also shows that it had already been decided amongst the LPG Cylinder manufacturers as to who the L1 and L2 bidders were going to be prior to submission of bids. For instance, in the State of Punjab, the L1 bidder (Shri Ram Cylinders) bid Rs. 1080 whereas the four L2 bidders placed identical bids at Rs. 1080.50, i.e., a difference of only 50 paise from the L1 bid. Similarly, in Rajasthan, the L1 bidder (M/s. Rajasthan Cylinders) quoted Rs. 1130, whereas nine L2 bidders quoted identically by just 50 paise more, at Rs. 1130.50. This pattern is repeated across a number of States.

58) Not only this, in order to achieve the pre-decided outcome, some of the bidders hastily made corrections to their bid documents. One such case is that of M/s. Jesmajo Industrial Fabrications (appellant in C.A. No. 4868 of 2014). In the bid documents, the bid of Rs. 1103 was cut-corrected to make it Rs. 1103.60 even though the calculation of VAT was done only on the figure of Rs. 1103.

59) Mr. Khurshid also refuted the submission of the appellants that there was no competition and, therefore, Section 3 was not applicable. According to him, if the matters are examined on such basis most of the culprits will get away. The purpose of the Act was not only to eliminate cartelisation but also to promote competition. His submission was that the findings of the CCI and COMPAT are accepted that there was an agreement, such an agreement was obviously for the purpose of curbing the competition.

60) Answering the argument of ‘price parallelism’ which according to the appellants resulted in identical and near identical bids, Mr. Khurshid argued that legal submission in this respect was settled by this Court in Excel Crop Care case wherein such an argument was rejected in the following words:

“48…It was argued that since dominant position is enjoyed by the buyer, it leads to parallel pricing and this conscious parallelism takes place leading to quoting the same price by the suppliers. The explanation, thus, given for quoting identical price was the aforesaid economic forces and not because of any agreement or arrangement between the parties. It was submitted that merely because same price was quoted by the appellants in respect of the 2009 FCI tender, one could not jump to the conclusion that there was some “agreement” as well between these parties, in the absence of any other evidence corroborating the said factum of quoting identical price. In respect of this submission, Mr Venugopal had also referred to a few judgments.

49. The aforesaid argument is highly misconceived. A neat and pellucid reply of Mr. Kaul, which commands acceptance, is that argument of parallelism is not applicable in bid cases and it fits in the realm of market economy. It is for this reason that entire history of quoting identical price before coming into operation of Section 3 and which continued much after Section 3 of the Act was enforced, has been highlighted…”

63) Mr. Khurshid also highlighted that in spite of there being difference in location of appellant’s units and their input cost, the bids submitted by various tenderers were identical and there cannot be any plausible economic rationale for such identical bidding. Therefore, the inference drawn by the CCI as well as COMPAT based on the aforesaid features and factors was justified and valid in law. He also referred to certain judgements of this Court as well as other jurisdictions, such as, European Commission and the Court of Justice of European Union to which reference would be made at the appropriate stage.
68) In *Excel Crop Care Limited*, scope of Section 3 of the Act which prohibits three kinds of practices as anti-competitive, was taken note of as follows:

“20. Chapter II of the Act deals with three kinds of practices which are treated as anti-competitive and prohibited. These are:

(a) where agreements are entered into by certain persons with a view to cause an appreciable adverse effect on competition;

(b) where any enterprise or group of enterprises, which enjoys dominant position, abuses the said dominant position; and

(c) regulating the combination of enterprises by means of mergers or amalgamations to ensure that such mergers or amalgamations do not become anti-competitive or abuse the dominant position which they can attain.”

70) The Court also mentioned, in particular, that competition leads to economic efficiency, economic growth and development as well as consumers welfare. The Court also spelled out the manner in which competition contributed to increase economic growth and increased productivity.

71) It follows from the above that whereas on the one hand the economic policy of the nation has ushered in the era of liberalisation and globalisation thereby giving freerplay to the private sector in the manner of conducting business, at the same time, in public interest and in the interest of consumers, a regime of regulators has also been brought to ensure certain checks and balances. Since competition among the enterprises or businessmen is treated as service for a public purpose and, therefore, there is a need to curb anti-competitive practices, the CCI is given the task (as a regulator) to ensure that no such anti-competitive practices are undertaken. In fact, Section 18 of the Act casts a specific and positive obligation on CCI to ‘eliminate’ anti-competitive practices and promote competition, interest of the consumer and free trade.

72) As mentioned above, one of the anti-competitive practices is cartelisation, the essential postulate whereof is agreement between enterprises or association of enterprises or persons or associations of persons in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of service, which causes or is likely to cause an appreciable adverse effect on competition within India. Such an agreement is treated as void. The types of agreement which may fall foul of Section 3 are mentioned in sub-section (3) thereof. These include sharing the market by way of allocation of geographical areas of market [clause (c)] and the agreements which result in bid-rigging or collusive bidding whether directly or indirectly [clause (d)]. There is a presumption that four types of agreements mentioned in sub-section (3) will have an appreciable adverse effect on competition.
We may also state at this stage that Section 19(3) of the Act mentions the factors which are to be examined by the CCI while determining whether an agreement has an appreciable adverse effect on competition under Section 3. However, this inquiry would be needed in those cases which are not covered by clauses (a) to (d) of sub-section (3) of Section 3. Reason is simple. As already pointed out above, the agreements of nature mentioned in sub-section (3) are presumed to have an appreciable effect and, therefore, no further exercise is needed by the CCI once a finding is arrived at that a particular agreement fell in any of the aforesaid four categories. We may hasten to add, however, that agreements mentioned in Section 3(3) raise a presumption that such agreements shall have an appreciable adverse effect on competition. It follows, as a fortiorari, that the presumption is rebuttable as these agreements are not treated as conclusive proof of the fact that it would result in appreciable adverse effect on competition. What follows is that once the CCI finds that case is covered by one or more of the clauses mentioned in sub-section (3) of Section 3, it need not undertake any further enquiry and burden would shift upon such enterprises or persons etc. to rebut the said presumption by leading adequate evidence. In cases such an evidence is led, which dispels the presumption, then the CCI shall take into consideration the factors mentioned in Section 19 of the Act and to see as to whether all or any of these factors are established. If the evidence collected by the CCI leads to one or more or all factors mentioned in Section 19(3), it would again be treated as an agreement which may cause or is likely to cause an appreciable adverse effect of competition, thereby compelling the CCI to take further remedial action in this behalf as provided under the Act. That, according to us, is the broad scheme when Sections 3 and 19 are to be read in conjunction.

In these appeals, the Court is concerned with the alleged agreement entered into between the appellants falling in clause (d) of sub-section (3) of Section 3, which talks of bid rigging or collusive bidding. Therefore, it would be necessary to understand the meaning of the expression ‘bid rigging’ and ‘collusive bidding’.

The necessary ingredients of bid rigging, thus, are: (a) agreement between the parties; (b) these parties are engaged in identical or similar production or trading of goods or provisions of services; and (c) the agreement has the effect of eliminating or reducing competition of bids or adversely affect or manipulating the process for bidding.

Though the expression ‘collusive bidding’ is not defined in the Act, it appears that both ‘bid rigging’ and ‘collusive bidding’ are overlapping concepts. This position stands accepted in Excel Crop Care Limited case which should be found from the following discussion therefrom:

“38. Mr Neeraj Kishan Kaul, learned Additional Solicitor General, refuted the aforesaid submission with vehemence by urging that bid rigging and collusive bidding are not mutually exclusive and these are overlapping concepts. Illustratively, he referred to the findings of CCI, as approved by COMPAT, in the instant case itself to the effect that the appellants herein had “manipulated the process of bidding” on the ground that bids were submitted on 8-5-2009 collusively, which was only the beginning of the anti-competitive agreement between the parties and this continued through the opening of the price bids on 1-6-2009 and thereafter negotiations on 17-6-2009 when all the parties reduced their bids by same figure of Rs 2 to bring their bid down to Rs 386 per kg from Rs 388 per kg. From this example, he submitted that on 8-5-2009 there was a collusive bidding but with concerted negotiations on 17-6-2009, in the continued process, it was rigging of the bid that was practiced by the appellants. We are inclined to agree with this pellucid submission of the learned Additional Solicitor General.

39. Richard Whish and David Bailey [Competition Law, 7th Edn., p. 536.] , in their book, have given illustrations of various forms of collusive bidding/bid rigging, which include:
(a) Level tendering/bidding (i.e. bidding at same price — as in the present case).

(b) Cover bidding/courtesy bidding.

(c) Bid rotation.

(d) Bid allocation.

40. Even internationally, “collusive bidding” is not understood as being different from “bid rigging”. These two expressions have been used interchangeably in the following international commentaries/glossaries and websites of competition authorities:

(a) UNCTAD Competition Glossary dated 22-6-2016

“Bid rigging or collusive tendering is a manner in which conspiring competitors may effectively raise prices where business contracts are awarded by means of soliciting competitive bids. Essentially, it relates to a situation where competitors agree in advance who will win the bid and at what price, undermining the very purpose of inviting tenders which is to procure goods or services on the most favourable prices and conditions.”

(b) OECD Glossary of Industrial Organisation Economics and Competition Law

“Bid rigging is a particular form of collusive price-fixing behaviour by which firms coordinate their bids on procurement or project contracts. There are two common forms of bid rigging. In the first, firms agree to submit common bids, thus eliminating price competition. In the second, firms agree on which firm will be the lowest bidder and rotate in such a way that each firm wins an agreed upon number or value of contracts.

Since most (but not all) contracts open to bidding involve Governments, it is they who are most often the target of bid rigging.

Bid rigging is one of the most widely prosecuted forms of collusion.”

Collusive bidding (tendering) — See “bid rigging”.

(This shows collusive bidding and bid rigging are treated as one and the same.)

(c) OECD Guidelines for fighting bid rigging

“Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process.”

(d) United States Office of the Inspector General, Investigations (Fraud Indicators Handbook)

“Collusive bidding, price fixing or bid rigging, are commonly used interchangeable terms which describe many forms of an illegal anti-competitive activity. The common thread throughout all these activities is that they involve any agreements or informal arrangements among independent competitors, which limit competition. Agreements among competitors which violate the law include but are not limited to:
(1) Agreements to adhere to published price lists.

(2) Agreements to raise prices by a specified increment.

(3) Agreements to establish, adhere to, or eliminate discounts.

(4) Agreements not to advertise prices.

(5) Agreements to maintain specified price differentials based on quantity, type or size of product.”

(e) Australian Competition and Consumer Commission

“Bid rigging, also referred to as collusive tendering, occurs when two or more competitors agree they will not compete genuinely with each other for tenders, allowing one of the cartel members to ‘win’ the tender. Participants in a bid rigging cartel may take turns to be the ‘winner’ by agreeing about the way they submit tenders, including some competitors agreeing not to tender.”

41. As the Liegeman of the law, it is our task, nay a duty, to give proper meaning and effect to the aforesaid “Explanation”. It can easily be discussed that the legislature had in mind that the two expressions are interchangeably used. It is also necessary to keep in mind the purport behind Section 3 and the objective it seeks to achieve:

41.1. Sub-section (1) of Section 3 is couched in the negative terms which mandates that no enterprise or association of enterprises or person or association of persons shall enter into any agreement, when such agreement is in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services and it causes or is likely to cause an appreciable adverse effect on competition within India. It can be discerned that first part relates to the parties which are prohibited from entering into such an agreement and embraces within it persons as well as enterprises thereby signifying its very wide coverage. This becomes manifest from the reading of the definition of “enterprise” in Section 2(h) and that of “person” in Section 2(l) of the Act. The second part relates to the subject-matter of the agreement. Again it is very wide in its ambit and scope as it covers production, supply, distribution, storage, acquisition or control of goods or provision of services. The third part pertains to the effect of such an agreement, namely, “appreciable adverse effect on competition”, and if this is the effect, purpose behind this provision is not to allow that. Obvious purpose is to thwart any such agreements which are anti-competitive in nature and this salubrious provision aims at ensuring healthy competition. Sub-section (2) of Section 3 specifically makes such agreements as void.

41.2. Sub-section (3) mentions certain kinds of agreements which would be treated as ipso facto causing appreciable adverse effect on competition. It is in this backdrop and context that “Explanation” beneath sub-section (3), which uses the expression “bid rigging”, has to be understood and given an appropriate meaning. It could never be the intention of the legislature to exclude “collusive bidding” by construing the expression “bid rigging” narrowly. No doubt, clause (d) of sub-section (3) of Section 3 uses both the expressions “bid rigging” and “collusive bidding”, but the Explanation thereto refers to “bid rigging” only. However, it cannot be said that the intention was to exclude “collusive bidding”. Even if the Explanation does contain the expression “collusive bidding” specifically, while interpreting clause (d), it can be inferred that “collusive bidding” relates to the process of bidding as well. Keeping in mind the principle of purposive interpretation, we are inclined to give this meaning to
“collusive bidding”. It is more so when the expressions “bid rigging” and “collusive bidding” would be overlapping, under certain circumstances which was conceded by the learned counsel for the appellants as well.

42. We are, therefore, of the opinion that the two expressions are to be interpreted using the principle of noscitur a sociis i.e. when two or more words which are susceptible to analogous meanings are coupled together, the words can take colour from each other. (See Leelabai Gajanan Pansare v. Oriental Insurance Co. Ltd. [Leelabai Gajanan Pansare v. Oriental Insurance Co. Ltd., (2008) 9 SCC 720], Thakorlal D. Vadgama v. State of Gujarat [Thakorlal D.Vadgama v. State of Gujarat, (1973) 2 SCC 413 : 1973 SCC (Cri) 835] and M.K. Ranganathan v. State of Madras [M.K. Ranganathan v. State of Madras, (1955) 2 SCR 374 : AIR 1955 SC604].)

77) The first proposition of Ms. Divan, viz. there is no competition, has two facets. First, the legal one which concerns the jurisdiction of the CCI to deal with such matters and the other is factual, which is to be examined on the basis of facts in these cases. Insofar as the first component is concerned, having regard to the aforesaid scheme of the Act, we are not convinced with the argument of Ms. Madhavi Divan that there is no possibility of a competition in these cases and, therefore, CCI had no jurisdiction to carry out any such investigation. The scope and ambit of the provisions of Section 3 have been considered in detail in Excel CropCare Limited case. This Section prohibits anti-competitive agreements and brings about the prime objective of the Competition Act.

78) We would like to reemphasise that the purpose of the Act is not only to illuminate practices having adverse effect on the competition but also to promote and sustain competition in the market. Enforcement provides remedies to avoid situation that will lead to decrease competition in the market. Therefore, effective enforcement is important not only to sanction anti-competitive conduct but also to deter future competitive practices. In the present case itself, there are sixty suppliers of the product for which there are three buyers. After all, each supplier would like to be L-1 or L-2 so that it is able to get order for larger quantities than the other. In this sense, there would be a competition among them. Further, it would also be in the interest of the buyers like IOCL etc. that the elements of healthy competition persists in the market. In any case, it is the duty of the CCI to ensure that the conditions which have tendency to kill the competition are to be curbed. It is also the function of the CCI to ensure that there is a competition so that benefits of such competition are reaped by the consumers. However, insofar as certain factual aspects highlighted by the appellants are concerned, they would be dealt with while examining the third proposition, as we deem it more appropriate to discuss these two aspects together.

79) Second proposition of Ms. Divan was that there was no collusive bidding in the present case. The CCI and COMPAT have rejected this argument in view of the fact that there is an active trade association of the suppliers; a meeting took place couple of days before the date of bidding; common changes were pointed out by these appellants who submitted bids on their behalf; and bids were of identical amounts despite varying cost, which were repetitive in nature. The respondents may be right in their submission that there may not be a direct evidence on the basis of which cartelisation or such agreement between the parties can be proved as these arguments are normally entered into in closed doors.

81) It is also significant to state that respondents had drawn attention of this Court to OECD Policy Roundtables Prosecuting Cartels without Direct Evidence 2006 which discussed the nature of evidence that is required for proving cartel agreement, relevant portion thereof contained in para 2 of the said Policy is reproduced below:

“Available evidence for proving cartel agreements
2.1 Categories of evidence

Evidence used to prove a cartel agreement can be classified into two types: direct and circumstantial. Circumstantial evidence, in turn, consists of “communication” evidence and economic evidence, which include firm conduct, market structure, and evidence of facilitating practices.

Common types of direct evidence include:

- A document or documents (including email messages) essentially embodying the agreement, or parts of it, and identifying the parties to it.

- Oral or written statements by co-operative cartel participants describing the operation of the cartel and their participation in it.

There are different types of circumstantial evidence. One is evidence that cartel operators met or otherwise communicated but does not describe the substance of their communications. It might be called communication evidence for purposes of this discussion. It includes:

- Records of telephone conversations between competitors (but not their substance), or of travel to a common destination or of participation in a meeting, for example during a trade conference.

- Other evidence that the parties communicated about the subject e.g., minutes or notes of a meeting showing that prices, demand or capacity utilisation were discussed; internal documents evidencing knowledge or understanding of a competitor’s pricing strategy, such as an awareness of a future price increase by a rival.

A broader category of circumstantial evidence is often called economic evidence. Economic evidence identifies primarily firm conduct that suggests that an agreement was reached, but also conduct of the industry as a whole, elements of market structure which suggest that secret price fixing was feasible, and certain practices that can be used to sustain a cartel agreement.

Conduct evidence is the single most important type of economic evidence. As noted earlier, observation of certain, suspicious conduct frequently triggers an investigation of a possible cartel. And as the section in this paper on economics highlights 11 careful analysis of the conduct of parties is important to identify behaviours that can be characterised as contrary to the parties’ unilateral self-interest and which therefore supports the inference of an agreement. Conduct evidence includes, first and foremost:

- Parallel pricing – changes in prices by rivals that are identical, or nearly so, and simultaneous, or nearly so. It includes other forms of parallel conduct, such as capacity reductions, adoption of standardised terms of sale, and suspicious bidding patterns, e.g., a predictable rotation of winning bidders.

Industry performance could also be described as conduct evidence.

It includes:
- abnormally high profits;
- stable market shares
- A history of competition law violations.

Evidence related to market structure can be used primarily to make the finding of a cartel agreement more plausible, even though market structure factors do not prove the existence of such an agreement. Relevant economic evidence relating to market structure includes:
- high concentration;
- low concentration on the opposite side of the market;
- high barriers to entry;
- high degree of vertical integration;
- Standardised or homogeneous product.

The evidentiary value of structural evidence can be limited, however. There can be highly concentrated industries selling homogeneous products in which all parties compete. Conversely, the absence of such evidence cannot be used to show that a cartel did not exist. Cartels are known to have existed in industries with numerous competitors and differentiated products.

A specific kind of economic conduct evidence is *facilitating practices* – practices that can make it easier for competitors to reach or sustain an agreement. It is important to note that conduct described as facilitating practices is not necessarily unlawful. But where a competition authority has found other circumstantial evidence pointing to the existence of a cartel agreement, the existence of facilitating practices can be an important complement. They can explain what kind of arrangements the parties set up to facilitate the formation of a cartel agreement, monitoring, detection of defection, and/or punishment, thus supporting the ‘collusion story’ put together by the competition law enforcer. Facilitating practices include:

- information exchanges;
- price signalling;
- freight equalisation;
- price protection and most favoured nation policies;
- Unnecessarily restrictive product standards.”

82) Thus, even in the absence of proof of concluded formal agreement, when there are indicators that there was practical cooperation between the parties which knowingly substitute the risk of competition, that would amount to anti-competitive practices. Then, there are guidelines on the applicability of Article 101 of the Treaty on the functioning of the E.U. to horizontal cooperation agreements which records as under:
“60. Information exchange can only be addressed under Article 101 if it establishes or is part of an agreement, a concerted practice or a decision by an association of undertakings. The existence of an agreement, a concerted practice or decision by an association of undertakings does not prejudge whether the agreement, concerted practice or decision by an association of undertakings gives rise to a restriction of competition within the meaning of Article 101(1). In line with the case-law of the Court of Justice of the European Union, the concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.

83) According to us, the real question in the present case is as to whether there was a possibility of such an agreement having regard to market conditions even when we proceed on the basis that meeting did take place. Possibility of such an agreement has been inferred by the CCI on the grounds that identical bidding takes place thereafter and various suppliers gave such a bid despite varying cost and also that they have appointed common changes etc. as pointed out above.

84) The first and foremost issue which needs to be considered is that whether there was a situation of monopsony or oligopsony.

85) From the aforesaid discussion, it is clear that as far as CCI is concerned, it has come to the conclusion that there was a cartelisation among the appellants herein and a concerted decision was taken to rig the bids which were submitted pursuant to the tenders issued by IOCL. On the other hand, the appellants argue that there was no such agreement and even if the bids of many bidders were identical in nature, the bids were driven by market conditions. Their plea is that there was a situation of oligopsony and the modus which was adopted by IOCL in floating the tenders and awarding the contracts would show that the determination of price was entirely within the control of the IOCL. As per them, the way price was determined for supply of these cylinders, it had become an open secret known to everybody. Therefore, there was no question of any competition and no possibility of adversely affecting that competition by entering into any contract.

86) The factors which have influenced the authorities below in coming to the conclusion that the appellants had colluded and formed a cartel which led to bid rigging have already been noted above. To recapitulate, the authorities below have been influenced by the following factors:

1. Market conditions
2. Small number of suppliers
3. Few new entrants
4. Active trade association
5. Repetitive bidding
6. Identical products
7. Few or no substitutes
8. No significant technological changes
9. Meeting of bidders in Mumbai and its agenda.
10. Appointing common agents
11. Identical bids despite varying cost.

After deliberating on the aforesaid aspects, the CCI has concluded that there is an active trade association in which many of the appellants are members. That product in question, namely, gas cylinder is of a particular specification which is needed by IOCL in large numbers every year and there are very few manufacturers and suppliers of this product to IOCL and two other buyers. For this identical product which is to be supplied by all the suppliers, there is no substitute and no significant technology change. Further, there is an active trade association in which most of the appellants are the members. Their interest is
to ensure that no new entrants are able to join. Further, the trade association also ensures that all the members are able to get some order. It is for this reason the bids submitted in various standards which are floated by IOCL at different places are almost identical despite varying cost. The authorities below attributed this identical bidding to the concerted action of the appellants. This has been inferred from the fact that 2-3 days before the submission of bids, meeting of the association took place which most of the appellants attended. Not only this, common agents, six in number, were appointed who submitted the bids on behalf of these appellants.

87) We may say at the outset that if these factors are taken into consideration by themselves, they may lead to the inference that there was bid rigging. We may, particularly, emphasise the fact that there is an active trade association of the appellants and a meeting of the bidders was held in Mumbai just before the submission of the tenders. Another very important fact is that there were identical bids despite varying cost. Further, products are identical and there are small number of suppliers with few new entrants. These have become the supporting factors which persuaded the CCI to come to the conclusion that these are suggestive of collusive bidding.

88) However, that is only one side of the coin. The aforesaid factors are to be analysed keeping in mind the ground realities that were prevailing, which are pointed out by the appellants. These attendant circumstances are argued in detail by the counsel for the appellants which have already been taken note of. We may recapitulate the same in brief hereinbelow:

(i) In the present case there are only three buyers. Among them, IOCL is the biggest buyer with 48% market share. It is also a matter of record that all these appellants are manufacturers of 14.2 kg gas cylinders to the three buyers who are available in the market, namely, IOCL, HPCL and BPCL. If these three buyers do not purchase from any of the appellants, that particular appellant would not be in a position to sell those cylinders to any other entity as there are no other buyers.

(ii) There are only three buyers, it may not attract many to enter the field and manufacture these cylinders. It is because of limited number of buyers and for some reason if they do not purchase, the manufacturer would be nowhere. That may deter the persons to enter the field.

(iii) The manner in which the tenders are floated by IOCL and the rates at which these are awarded, are an indicator that it is the IOCL which calls the shots insofar as price control is concerned. It has come in evidence that the IOCL undertakes the exercise of having its internal estimates about the cost of these cylinders. Their own expert arrived at a figure of Rs. 1106.61 paisa per cylinder. All the tenders which have been accepted are for a price lesser than the aforesaid estimate of IOCL itself. That apart, the modus adopted by the IOCL is that that final price is negotiated by it and the contract is not awarded at the rate quoted by bidder who turns out to be L-1. Negotiations are held with such a bidder who is L-1 which generally leads to further reduction of price than the one quoted by L-1. Thereafter, the other bidders who may be L-2 or L-3 etc. are awarded the contract at the rate at which it is awarded to L-1. Thus, ultimately, all the bidders supply the goods at the same rate which is fixed by the IOCL after negotiating with L-1 bidder. The only difference is that bidder who is L-1 would be able to receive the order for larger quantity than L-2 and L-2 may get an order of more quantity than L-3.

(iv) It has also come on record that there are very few suppliers. For the tender in question, there were 50 parties already in the fray and 12 new entrants were admitted. Number of 12, in such a scenario, cannot be treated as less. Therefore, the conclusion of CCI that the appellants ensured that there should not be entry of new entrant may not be correct.

(v) Since there are not many manufacturers and supplies are needed by the three buyers on regular basis, IOCL ensures that all those manufacturers whose bids are technically viable, are given some order for the supply of specific cylinder. For this purpose, it has framed its broad policy as well. This also shows that control remains with IOCL.

Thus, the appellants appear to be correct when they say that all the participants in the bidding process were awarded contracts in some State or the other which was aimed at ensuring a bigger pool of manufacturers so that the supply of this essential product is always maintained for
the benefit of the general public. Had IOCL left some manufacturers empty handed, in all likelihood, they would have shut their shops. However, IOCL wanted all manufacturers to be in the fray in its own interest. Therefore, it was necessary to keep all parties afloat and this explains why all 50 parties obtained order along with 12 new entrants.

(vi) There is another very relevant factor pointed out by the appellants, viz., the governmental control which is regulated by law. As pointed out above, it is not only the three oil companies which can supply LPG to domestic consumers in 14.2 kg LPG cylinders as mandated in the LPG (Regulation and Distribution) Order, 2000 which is issued under the provisions of Essential Commodities Act, 1955, even the price at which the LPG cylinder is to be supplied to the consumer is controlled by the Government.

89) The manner in which tendering process takes place would show that in such a competitive scenario, the bid which the different bidder would be submitting becomes obvious. It has come on record that just a few days before the tender in question, another tender was floated by BPCL and on opening of the said tender the rates of L-1, L-2 etc. came to be known. In a scenario like this, that obviously becomes a guiding factor for the bidders to submit their bids.

90) When we keep in mind the aforesaid fact situation on the ground, those very factors on the basis of which the CCI has come to the conclusion that there was cartelization, in fact, become valid explanations to the indicators pointed out by the CCI. We have already commented about the market conditions and small number of suppliers. We have also mentioned that 12 new entrants cannot be considered as entry of very few new suppliers where the existing suppliers were only 50. Identical products along with market conditions for which there would be only three buyers, in fact, would go in favour of the appellants. The factor of repetitive bidding, though appears to be a factor against the appellants, was also possible in the aforesaid scenario. The prevailing conditions in fact rule out the possibility of much price variations and all the manufacturers are virtually forced to submit their bid with a price that is quite close to each other. Therefore, it became necessary to sustain themselves in the market. Hence, the factor that these suppliers are from different region having different cost of manufacture would lose its significance. It is a situation where prime condition is to quote the price at which a particular manufacturer can bag an order even when its manufacturing cost is more than the manufacturing cost of others. The main purpose for such a manufacturing would be to remain in the fray and not to lose out. Therefore, it would be ready to accept lesser margin. This would answer why there were near identical bids despite varying cost.

91) Insofar as meeting of bidders in Mumbai just before the date of submission of tender is concerned, some aspects pointed out by the appellants are not considered by the CCI or the COMPAT at all. No doubt, the meeting took place a couple of days before the date of tender. No doubt, the absence of agenda coming on record would not make much difference. However, only 19 appellants had attended that meeting. Many others were not even members or did not attend the meeting. In spite thereof, even they quoted almost same rates as the one who attended the meeting. This would lead us to the inference that reason for quoting similar price was not the meeting but something else. The question is what would be the other reason and whether the appellants have been able to satisfactorily explain that and rebut the presumption against them?

92) The explanation is market conditions leading to the situation of oligopsony that prevailed because of limited buyers and influence of buyers in the fixation of prices was all prevalent. This seems to be convincing in the given set of facts. The situation of oligopsony can be both ways. There may be a situation where the sellers are few and they may control the market and by their concerted action indulge into cartelization. It may also be, as in the present case, a situation where buyers are few and that results in the situation of oligopsony with the control of buyers.
93) To recapitulate, the two prime factors against the appellants, which are discussed by the CCI, are that there was a collusive tendering, which is inferred from the parallel behaviour of the appellants, namely, quoting almost the same rates in their bids.

94) Monopsony consists of a market with a single buyer. When there are only few buyers the market is described as an oligopsony. What is emphasised is that in such a situation a manufacturer with no buyers will have to exit from the trade. Therefore, first condition of oligopsony stands fulfilled. The other condition for the existence of oligopsony is whether the buyers have some influence over the price of their inputs. It is also to be seen as to whether the seller has any ability to raise prices or it stood reduced/eliminated by the aforesaid buyers.

95) On a holistic view of the matter, we find that the appellants have been able to discharge the onus by referring to various indicators which go on to show that parallel behaviour was not the result of any concerted practice.

96) In Dyestuffs, the European Court held that parallel behaviour does not, by itself, amount to a concerted practice, though it may provide a strong evidence of such a practice. Nevertheless, it is a strong evidence of such a practice. However, before such an inference is drawn it has to be seen that this parallel behaviour has led to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, size and volume of the undertaking of the said market. Thus, we examine the matter from the stand point of market economy where question of oligopsony assumes relevance. Whenever there is a situation of oligopsony, parallel pricing simplicitor would not lead to the conclusion that there was a concerted practice there has to be other credible and corroborative evidence to show that in an oligopoly a reduction in price would swiftly attract the customers of the other two or three rivals, the effect upon whom would be so devastating that they would have to react by matching the cut.

101) After taking note of the test that needs to be applied in such cases, which was laid down in Dyestuffs and accepted in Excel Crop Care Limited, we come to the conclusion that the inferences drawn by the CCI on the basis of evidence collected by it are duly rebutted by the appellants and the appellants have been able to discharge the onus that shifted upon them on the basis of factors pointed out by the CCI. However, at that stage, the CCI failed to carry the matter further by having required and necessary inquiry that was needed in the instant case.

102) We are emphasising here that in such a watertight tender policy of IOCL which gave IOCL full control over the tendering process, it was necessary to summon IOCL. This would have cleared many aspects which are shrouded in mystery and the dust has not been cleared.

103) We, thus, arrive at a conclusion that there is no sufficient evidence to hold that there was any agreement between the appellants for bid rigging. Accordingly, we allow these appeals and set aside the order of the Authorities below. As a consequence, since no penalty is payable, appeals of the CCI are rendered infructuous and dismissed as such. All the pending applications stand disposed of.

No orders as to costs.

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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 up the 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 - allottees 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 allottees 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 allottees 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. In 1991, 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, HSIIIDC, 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 general public 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 allottee, 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 allottees 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 where to 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 allottees. 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 buyers 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 allottees 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 allottees 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 allottees whose rates were calculated purely on the basis of 19 floors and the land beneath 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 allottees. In an admission that lay-out plans/building plans were not shown to the allottees, 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 obligations of 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 allottees clearly brings out the fact that either the information given to SEBI was incorrect and misleading or for reasons not known to the allottees, 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 floor

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 "suppressioveri". 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 allottees 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 OP-1, 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 "Dominant Position" 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 diversified 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 of approximately 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-based 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 competition. Further, it also has enormous cash profits and Net profit as compared to its competition. 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 competition. 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 Motilal 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 joint ventures with strategic partner The JV with Layeng 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 Franport AG Frankfurt Airport Services to establish DLF Franport 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 competition. 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 section 2(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 on the 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 along with 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 owner. 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 not sufficient 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-a-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 be cancelled, 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 players. 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 government approved residential project and government 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 existing period 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 $/- 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
allotteesassociation 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 detriment 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. The appropriate 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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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.
Enterprise - Scope and meaning of - Section 19(1)(a) of The Competition Act, 2002 (“Act”) - Complaint with the 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 Commission with reference to Competition Law principles - Whether BCCI is an enterprise for the purpose of the Act –

Held, the BCCI's role as ICC governing body for cricket in India was “custodian” for the game and “organizer” of matches. Although the BCCI was a “not for profit” society, its activities were revenue generating (e.g., it sold media rights as well as tickets). Accordingly, the CCI held that insofar as their entrepreneurial (i.e., revenue generating) conduct is concerned, all sports associations are to be regarded as “enterprises” for the purposes of the Act and treated “at par with other business establishments.” In so holding, the Commission placed reliance on established European law decisions (e.g., MOTOE v. Elliniko and Meca-Medina) which held that the commercial exploitation of sport constitutes an economic activity which would be the subject of European competition rules. In India also in a recent decision in Hemant Sharma and O v. Union of India), Delhi High Court held All India Chess Federation (which performs similar functions as BCCI for the game of Chess) to be an enterprise for the purpose of the Act. Thus, in line with the provisions of the Act, international jurisprudence and Delhi High Court decision in case of Chess Federation, it was concluded that BCCI is an enterprise for the purpose of the Act and therefore within the jurisdiction of the Commission.

Determination of relevant market - Section 19(1)(a) of The Competition Act, 2002 (“Act”) - Complaint with the 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 Commission with reference to Competition Law principles - Abuse of dominant position by BCCI in relevant market

Held, the Act considers relevant market as the market of various goods or services that are regarded as interchangeable by consumer with reference to product characteristics, intended use and price. The objective of this definition is for precise understanding of the competitive constraints the market forces are subjected to. Moreover, the Act emphasises that definition of relevant market needs to be viewed from the demand perspective and based on characteristics of the product, price and intended use. Thus, the Commission considered the definition in accordance with the parameters laid down under the Act. The Commission differentiated (1) sports from other forms of television (including movies and general entertainment programs), (2) cricket from other forms of sport, and (3) first class/international cricket (e.g., Test Matches, One Day Internationals, or Ranji Trophy cricket) from cricket played in “private professional leagues” (such as the IPL). The differentiations were based on qualitative and subjective demand considerations (e.g., “every sports event is unique in itself”) as well as some viewer data. Considering the basic test of non-transitory relative price rise of 5 per cent to 10 per cent also known as SNNIP test for a cricket event and considering the consumer behaviour, it seems quite unreasonable to believe that a consumer would substitute cricket event with any other form of entertainment viz. Films, TV shows etc. or any other sporting event. There is enough behavioural evidence to suggest the same is reflected in data regarding viewership above. After concluding that cricket is not substitutable with other sports or other entertainment events, the Commission considered it necessary to examine whether there are inherent differences between the two broad categories of events also viz. First Class/International events and Private Professional League Cricket events as noted in review of sports sector above which merit examination for determination of relevant market. This distinction arose from the fact that entry of private professional leagues saw the merger of media and entertainment to raise the level of cricket to a different height altogether, contributing to the commercialization of the game. A new genre of cricket emerged with a
market distinct from existing cricket events. The Commission, therefore, opined that the relevant market is the Organization of Private Professional Cricket Leagues/Events in India.

Dominant player in relevant market - Section 19(1)(a) of The Competition Act, 2002 (“Act”) - Complaint with the 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 Commission with reference to Competition Law principles - Abuse of dominant position - Assessment of Dominance of BCCI in market for Organization of Private Professional League Cricket events –

Held, undoubtedly the most significant source of dominance is the regulatory powers of BCCI. In the given case, BCCI was already the monopoly organizer of First Class Cricket leagues and matches in India. With the advent of the “private professional league”, BCCI extended its monopoly to the new genre of cricket in the establishment of Indian Premier League, IPL. In their justification of venturing to IPL, BCCI refers to re-ploughing of funds generated in the development of game as a primary objective in addition to other objectives of IPL such as: i) to identify and nurture Indian talent and provide a platform for them to perform; ii) to promote the game of cricket with a sense of competition at the domestic level, and provide opportunity and international exposure to players playing at domestic level; and iii) to bring in newer audiences to the sport especially women and children. It is already noted that BCCI is a de facto regulator within the pyramid and in this capacity is vested with certain rights by ICC. BCCI has assumed the right to sanction/approve cricket events in India. This right vests BCCI from the conditions laid down in Section 32 under the heading “Disapproved Cricket” with the onerous task of ensuring a free and transparent sanctioning of competing private professional leagues. Thus, considering the ICC Bye Laws, the Commission noted that BCCI approval was required by any prospective private professional leagues and binding for access to the vital inputs (stadium, list players) required to ensure successful conduct of the league. Thus, the approval of BCCI is critical to the organization and success of any competing league and is a very important source of dominance for BCCI. Internationally too there has been concern that role overlap may lead to competition concern. In the present case, it is strengthened by the powers vested with BCCI to give consent to application for authorisation to organise cricket events. The concern deepens if this power is not subjected to restrictions, obligations and review, sports associations such as BCCI in the present case to thwart competition by favouring events which it organises or those in whose organisation it participates. The other significant factor is the infrastructure owned and controlled by BCCI. Over a period of time, BCCI or its member sports federations were allotted land by GOI at subsidized rates for construction of stadiums to help the cause of development of the sport and was also granted tax exemptions. With the changed paradigm in cricket this emerged as a tool of significant commercial advantage for BCCI.

It cites, supported by European law, the BCCI's role as gatekeeper, i.e., its ability to “approve leagues” and considers that to be “critical to the organization and success of any competing league.”

Dominance also stems from the role of BCCI as an organizer of First Class/International Cricket events. With this role, BCCI controls a pool of cricketers under contract with BCCI for First Class/International events. The sentiments of Indian fans are reflected in the slogan seen at many matches which reads, “Cricket is my religion and Sachin is my God”. Thus to an Indian cricket fan, these players are icons and their participation can make any league a success. BCCI's ability to control an input which is indispensable to the success of cricket events is also a source of dominance for it.

Further, if historical evidences are considered, this Court have the case of ICL which is now temporarily suspended. The reasons for the failure of the league were lack of infrastructure facilities, BCCI/ICC's refusal to approve the league and provide infrastructural support, among other reasons that might be relevant. Thus, while it cannot be conclusively
said that ICL’s failure was solely attributable to BCCI’s dominance, it can be said that BCCI’s dominance was definitely a factor in ICL’s failure.

Thus, owing to regulatory role, monopoly status, control over infrastructure, control over players, ability to control entry of other leagues, historical evidences, BCCI is concluded to be in a dominant position in the market for organizing private professional league cricket events in India.

Abuse of dominant position - Section 19(1)(a) of The Competition Act, 2002 (“Act”) - Complaint with the 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 Commission with reference to Competition Law principles - Contravention of Section 4 of the Act - Whether BCCI has abused its dominance in contravention of Section 4 of the Act?

Held, the Commission examined all the related issues including the procedures followed and the agreements entered into to determine whether there was any anti-competitive conduct on the part of BCCI. On examination of the IPL media rights agreement, the Commission noted Clause 9.1(c)(i), which reads as follows “BCCI represents and warrants that it shall not organize, sanction, recognize or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league.” This Agreement had been entered between BCCI and MSM for a period of 10 years. Thus, BCCI had clearly bound itself not to organize, sanction, recognize any other private professional domestic league/event which could compete with IPL. Clause 9.1(c)(i) clearly and unambiguously amounts to a practice through a contractually binding agreement resulting in denial of market access to any potential competitor and is decidedly a violation of Section 4(2)(c) of the Act.

The Commission examined the above clause further considering the provisions in ICC Bye Laws Section 32 regarding “Disapproved Cricket”. The insistence on rival leagues to get approval from National Sports Federation defended on the grounds of the same being inherent and proportionate remedy to preserve the integrity of the sport, orderly development and consistency in application of technical rules of the sport may have certain merit. But the creation of monopoly by a regulatory power is an overreach to protect the market and the regulatory power to approve an event should not be used for this purpose.

Examination of Section 32 reveals that the intent behind this Regulation introduced by the international regulator at the top of pyramid ICC is not so much in preserving the specificities of sport rather of assuring revenue for Cricket Sports Federations under the guise of pyramid structure.

Thus, an analysis of the position clearly brings out that there is an overlap between the way BCCI is discharging its regulatory and commercial roles respectively, and the modus operandi/decision making process does not clearly separate the two roles. The conduct of BCCI in incorporating the clause (Clause 9.1(c)(i)) mentioned above in its Agreement conclusively indicates that BCCI has also used its regulatory power in the process of arriving at a Commercial Agreement. The Commission notes that by explicitly agreeing not to sanction any competitive league during the currency of media rights agreement BCCI has used its regulatory powers in arriving at a Commercial Agreement, which is at the root of a violation of Section 4(2)(c).

The Commission has noted that BCCI by virtue of its role as the custodian of cricket vested with the rights to sanction a cricket event thereby facilitating the success of the event took unto itself the right of restricting economic competition in sporting event. The Commission however, strongly holds the view that competition is essentially for benefits to be widespread. The game of cricket and the monetary benefits of playing professional league matches must be spread out and not concentrated in a few hands, in a few franchisees. In a country of large young population more private professional leagues opens up more venues
for youngsters to play cricket, to earn a livelihood and to find champions where least expected. BCCI in its dual role of custodian of cricket and organizer of events has on account of role overlap restricted competition and the benefits of competition. The objective of BCCI to promote and develop the game of cricket has been compromised.

The Commission, therefore, concludes that BCCI has abused its dominant position in contravention of Section 4(2)(c) of the Act.

1. This case was initiated on the basis of information filed by Sh. Surinder Singh Barmi, a cricket fan from New Delhi against Board for Control of Cricket in India (hereinafter "BCCI") to the Competition Commission of India (hereinafter "Commission") under Section 19(1)(a) of The Competition Act, 2002 (hereinafter "Act") on November 02, 2010. The Commission, upon examination of the facts of the information, passed an order under Section 26(1), on December 09, 2010 recording its opinion that there exists a prima facie case, and directed the Director General (hereinafter "DG") to investigate into the matter.

1.1 The DG submitted the investigation report on February 21, 2012. The investigation report was sent to the parties seeking their response on the same and further process of inquiry was undertaken in accordance with the provisions of the Act and relevant regulations thereunder. Full opportunity was given to both BCCI and the informant for perusal of all relevant records and making their submissions, both in writing and orally before the Commission.

**Factual Background**

1.2 The Opposite Party (OP), BCCI, is a society registered under Tamil Nadu Societies Registration Act, 1975 with the primary objectives as stated in the Memorandum of Association (MoA) of controlling the game of cricket in India, promoting the game in India, framing the laws of cricket in India, selecting teams to represent India in Test Matches, ODIs and Twenty 20 matches played in India or abroad. It is a 'full member' of International Cricket Council ("ICC")

1.3 A party related to the OP is ICC. ICC is the global governing body for international cricket. It is responsible for administration of men's and women's cricket including the management of playing conditions and officials for Test Match and One Day International (ODI) Cricket and the staging of international cricket events for men, women and juniors. It has three categories of Members viz. Full Members, Associate Members and Affiliate Members.

1.4 Full Members are the governing bodies for cricket of a country recognised by the ICC, or nations associated for cricket purposes, or a geographical area, from which representative teams are qualified to play official Test matches (10 Members).

The alleged irregularities pertained to:

1. Grant of franchise rights for team ownership;
2. Grant of media rights for coverage of the league;
3. Award of sponsorship rights and other local contracts related to organization of IPL.

**Key Issues**

The issues framed by the CCI were as follows:

- Whether BCCI is an enterprise for the purpose of the Competition Act?
- What is the *de facto* status of BCCI i.e. whether it is a regulator/custodian of cricket in India or an organizer of cricket events or both?
Whether actions of BCCI associated with organization of IPL contravene any of the provisions of the Competition Act, in particular Section 4 of the Competition Act?

Decision

The CCI traced the historical evolution of BCCI and its linkages with the International Cricket Council (ICC) to hold that the BCCI is a de facto regulator of the sport of cricket in India. At the same time, BCCI organized cricket events and was thus a commercial beneficiary of the sport. Given BCCI’s revenue-generating capacity by virtue of being an organizer, the CCI held that BCCI was an ‘enterprise’ under the Competition Act.

In determining the relevant market, the CCI observed that from a demand perspective, cricket was not comparable to the general entertainment programs in terms of advertisement revenue and further, TRP ratings suggested that other sports were not in the same market as a cricket league event. The CCI observed that IPL - a new genre of cricket wherein revenue generation was a primary consideration – formed a distinct market from existing cricket events. Thus the CCI held the relevant market in the present case to be organization of private professional cricket leagues/events in India.

The CCI further held that BCCI was in a dominant position in the relevant market for the following reasons: (a) BCCI was a de facto regulator of cricket in India; (b) BCCI was empowered by ICC by-laws with the right to sanction/approve cricket events in India and consequently, its approval is required by any prospective private professional league; (c) BCCI was at a significant commercial advantage by owning infrastructure; (d) BCCI controlled a pool of cricket players under contract.

The CCI then examined whether BCCI had abused its dominant position in contravention of Section 4 of the Competition Act. The CCI declined to go into the issue of BCCI’s conduct vis-à-vis Indian Cricket League (ICL) as it related to the period prior to the notification of Sections 3 and 4 of the Competition Act. The CCI, however, examined whether BCCI had been anti-competitive in matters related to IPL. The CCI observed that there was an overlap in BCCI’s regulatory and commercial roles, with no clear demarcation between the two. The BCCI had used its regulatory power in the process of entering into commercial agreements. In this respect, the CCI examined Clause 9.1(c)(i) of the IPL media rights agreement whereby BCCI had agreed to not organize, sanction, recognize or support any other professional domestic T-20 tournament which is competitive to the IPL. The CCI held that the above restriction was anti-competitive inasmuch as it resulted in denial of market access to any potential competitor. It was held that this was in violation of Section 4(2)(c) of the Competition Act. The CCI observed that BCCI had overreached its powers under ICC bye laws to sanction/approve cricket events to protect its market.

For the above contravention, the CCI imposed a penalty of 52.24 crores, being 6% of the average annual revenue of BCCI for the past three years.

The dissenting opinion written by a single member of the CCI states that the relevant market in the case was promotion and regulation of the sport of cricket in India. While observing that BCCI was in a dominant position in the above relevant market, the dissenting member held that Clause 9.1(c)(i) of the IPL media rights agreement was not anti-competitive as it was necessary to incorporate such a clause to attract investment since the success of the IPL format could not be predicted with precision at the initial stages. Further, the member observed that such a clause was in consonance with international practice because the ICC rules envisaged commercial partners to take steps to protect their investments.

Analysis

The CCI order is an important ruling inasmuch as it confirms that sports regulatory bodies exercising a commercial role are within the purview of competition laws. The order
emphasizes the need for subjecting such regulatory power to restrictions, obligations and review.

However, the methodology and tests adopted by the CCI to determine relevant market, dominant position and abuse thereof are likely to be tested at the appellate level.

At the crux of the debate is the idea that the concept of ‘denial of market access’ under Section 4(2)(c) is linked to the essential facilities doctrine. The doctrine deals with situations where a dominant player is in control of certain essential facilities/infrastructure and refuses to share the same with competitor. This is because the cost of replication of the infrastructure would be prohibitive for the competitor.

The concept of denial of market access is unlikely to be maintainable in the context of any corporate entity generally entering into commercial arrangements through, for instance, media rights arrangement. However, where an entity exercises monopoly control over goods/services, it will be under an obligation to ensure that its commercial arrangements do not constitute abuse of dominant position through denial of market access.

In the present case, it appears that the fact that BCCI was the de facto monopolist regulator of cricket in India and it undertook a commercial venture in the form of IPL to the exclusion of other leagues constituted sufficient proof in the mind of CCI to hold that competition had been affected.

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1.1 The instant case relates to competition concerns arising in the stock markets services in India, which is an important part of the financial market in the country. Therefore, it is essential to outline a brief history and nature of this sector at the start for putting the market dynamics in a perspective.

1.2 Financial market can broadly be divided into money market and capital market. Securities market is an important, organized capital market where transaction of capital is facilitated by means of direct financing using securities as a commodity. Securities market can further be divided into a primary market and secondary market.

1.3 Primary market is that part of the capital markets that deals with the issuance of new securities. It is where the initially listed shares are traded first time.

1.4 The secondary market is an on-going market, which is equipped and organized with its own infrastructure and other resources required for trading securities subsequent to their initial offering. It refers to a specific place where securities transaction among several and unspecified persons is carried out through the medium of the securities firms such as licensed brokers or specialized trading organizations in accordance with the rules and regulations established by the exchanges and the extant laws and regulations laid down by the regulators. Such an institution is called a stock exchange. To be able to trade a security on a certain stock exchange, it must be listed there.

1.9 An important event in the history of the stock market in India was the formation of the Native Share and Stock Brokers Association at Bombay in 1875, the precursor of the present day Bombay Stock Exchange. During that time trading in stock market was just a nascent concept and was limited to merely 12-15 brokers. The “stock market” was situated under a banyan tree in front of the Town hall in Bombay (now Mumbai). After 5 decades of existence, the Bombay Stock Exchange was recognized 6 in May 1927 under the Bombay Security Contracts Control Act, 1925.

1.10 Recognizing the growing importance of stock exchanges and the consequent need to regulate their affairs, the Government of India passed the Securities Contract Act In 1956. With the start of the era of economic reforms and liberalization in the ’90s, the Government revoked the outdated Capital Issue Act of 1947 and established The Securities and Exchange Board of India (SEBI) on April 12, 1992 in accordance with the provisions of the newly framed Securities and Exchange Board of India Act, 1992. The Preamble of the Securities and Exchange Board of India describes the basic functions of the Securities and Exchange Board of India as “…..to protect the interests of investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith or incidental thereto”
1.11 With time, new technologies and new systems were introduced in the Indian stock exchange. The decade of ‘90s saw considerable evolution of the stock exchanges and capital market products traded in India. Simultaneously, there was growth in the financial markets as well. Over the Counter (OTC) market was established in 1992 and National Stock Exchange (NSE) was established in 1994. In February 2000, internet trading was permitted. In August 2008, the market for stock exchange traded currency derivative was opened on recommendation of RBI and SEBI. All these events changed picture of stock markets in India.

(Informant) MCX Stock Exchange Ltd. (MCX-SX) is a public limited company incorporated on August 14, 2008. As per the information, MCX-SX is a Stock Exchange recognized by the Securities and Exchange Board of India (‘SEBI’) under section 4 of the Securities Contract (Regulation) Act, 1956 (‘SCRA’). The initial recognition has been extended from time to time by SEBI vide gazette notifications.

The promoters of the informant are Financial Technologies of India Ltd. (“FTIL”) and Multi Commodity Exchange of India Ltd. (“MCX”). FTIL is engaged in the business of developing and supplying software for financial and securities market. FTIL is also the principal provider of software solutions for brokers and other market intermediaries for use in their front office, middle office and back office for the purpose of dealing in securities through exchanges.

National Stock Exchange (NSE) – Opposite Party NSE was incorporated in November, 1992 and was recognized as a stock exchange in April, 1993 under SCR Act, 1956.

2.2 The informant submitted that the informant and NSE are providing currency futures exchange services. The NSE through its circular dated 26.08.2008 announced a transaction fee waiver in respect of all currency future trades executed on its platform. NSE has continued to extend its waiver programme from time to time despite the fact that the Currency Derivatives (CD) segment is now mature and trading, the CD segment has become high volume and potentially profitable.

2.3 It is alleged that due to transaction fee waiver by the NSE, the MCX was forced to also waive the transaction fee for the transactions on its platform for CD segment from the date of its entry into the stock exchange business which results into losses to the MCX.

2.4 It is also alleged that NSE is charging no admission fee for membership in its CD segment as compared to charging of membership fee in the equity, F&O and debt segments. NSE also does not collect the annual subscription charges and an advance minimum transaction charges in respect of CD segment. The cash deposits to be maintained by a member in the CD segments are also kept at a very low level compared to its other segments.

2.5 It is also alleged that NSE is not charging any fee for providing the data feed in respect of its CD segment ever since the commencement of the segment. On account of this waiver by NSE, MCX has also not been in a position to charge the information vendors for the data feed pertaining to its CD segment, which is presently its only operational segment. It is alleged that this action of NSE is aimed at blocking the residual revenue stream of the MCX.

2.6 That Omnesys is a software provider for financial and security market. The NSE has taken 26% stake in Omnesys through DotEx, 16 which is a 100% subsidiary of NSE. The DotEx / Omnesys has introduced a new software known as “NOW” to substitute a software called “ODIN” develop by Financial Technologies India Ltd. (FTIL), which is the promoter of the MCX and the market leader in the brokerage solution sector. 2.7 After taking the stake in Omnesys, DotEx intentionally wrote individually to the NSE members offering them “NOW” free of cost for the next year.
Simultaneously, NSE has refused to share its CD segment Application Programme Interface Code (APIC) with FTIL, thus disabling the ODIN users from connecting to the NSE CD segment trading platform through their preferred mode. The product thus thrust upon the consumers desirous of the NSE CD segment was the product “NOW” developed by DotEx / Omnesys, in place of ODIN. NSE is using “NOW” on a separate computer terminal for accessing its CD segment.

2.8 The main advantage of ODIN software was that a trader could view multiple markets using the same terminal and take appropriate calls. Shifting between different terminals (NOW and ODIN) severely hampers the traders ability to do so. Thus the expected response from a common trader will be to confine to one terminal which connects to the dominant player only i.e. to use the 17 “NOW” terminal (free of cost) and confine himself to the NSE CD segment, which has both a first mover advantage in CD segment as well as dominant player advantage in stock exchange business.

2.9 It is further alleged that the losses suffered by informant in the CD Segment is much higher than the loss suffered by the NSE because the NSE enjoys the economies of scale and has the ability to cross-finance the losses from the profits made in other segments and has the financial strength to fund its predatory practices based on massive reserves built through accumulation of monopoly profits over the years. In contrast, Informant is dependent solely on the revenues from the CD Segment and its losses are mounting in view of its transaction fee waiver, the continuation of which is compelled by the NSE’s decision to continue with the fee waiver.

2.10 It is also alleged that the continuation of NSE’s fee waiver would not only eliminate the business of the informant in CD segment but also eliminate potential and efficient competitors from the entire stock exchange services. Informant has alleged that the fee waiver and other concessions in CD segment have been adopted by the NSE as an exclusionary device to kill competition and competitors, and to eliminate the Informant from the market as a supplier of stock exchange services. NSE has therefore, used its 18 dominant position in the relevant market to eliminate competition and competitors. Informant has also alleged that the NSE along with DotEx and Omnesys violated provisions of section 4 of the Act by denying the integrated market watch facility to the consumers by denying access of Application Programme Interface Code (APIC) to the promoter of Informant.

3. Reference to the Office of the Director General (DG): 20 3.1 The Commission in its meeting held on 30.03.2010 considered the information and opined that prima facie, a case exists for referring the matter to the Office of Director General for conducting an investigation into the matter under section 26(1) of the Act.

10.1 The Commission has given due consideration to facts given in the information, the investigation report of the DG, the detailed written and oral submissions made by the concerned parties along with opinions and analysis of experts relied upon by the Informant and the OPs. The relevant material available on record and the facts and circumstances of the case throw up the following issues for determination in this case:
(Issue 1) What is the relevant market, in the context of section 4 read with section 2 (r) and section 19 (5) of the Competition Act, 2002?
(Issue 2) Is any of the OPs dominant in the above relevant market, in the context of section 4 read with section 19 (4) of the Competition Act?
(Issue 3) If so, is there any abuse of its dominant position in the relevant market by the above party?

Findings
Issue no. 1
While examining facts of a particular case, the Commission must give due regard to any or all factors mentioned in section 19 (6) with respect to “relevant geographic market” and section 19(7) with respect to “relevant product market”.

10.4 The Commission first considers the RBI-SEBI Standing Technical Committee Exchange Trade Currency Futures report (RBI – SEBI report) of 2008. This report in its para 5.2 of Chapter 5 advocated a clear separation of CD segment from other segments in any recognized stock exchange where other securities are also being traded.

10.7 The second indicator to be kept in mind is the fact that the Informant, MCX-SX was incorporated on 14.8.2008 and was initially authorised by SEBI to operate an exchange platform in trades in CD segment for currency futures in USD – INR of different tenures up to 12 months. NSE was an existing exchange and got permission to commence trading in CD segment on 29.8.2008. The latest entrant into the segment, USE got approval of SEBI in January, 2009. 10.8 The Information in this case has been filed by MCX-SX which is only permitted to operate in the CD segment. The competition concerns which may arise for any enterprise would be in respect of the market in which it is operating and not in context of a market that does not concern its operation.

Here it would not be out of place to discuss a few concepts:

i. Equity market: The equity market in the context of the information is the secondary market which allows trading in the equities of various companies at the stock exchanges. The underlying asset in this market is equity. Largely, investment in the stock of companies performing well is a major consideration for picking up equity in that company.

ii. F&O (Futures and Options) market: Futures are contracts to buy or sell an asset on or before a future date at a price specified today. Options are contracts that give the owner the right but not the obligation to buy (in the case of call option) or sell (in the case of a put option) an asset. The considerations for trading in this market are largely the same as those in the equity market and consequently, the participants are basically the same.

iii. WDM market: RBI has permitted banks, primary dealers and financial institutions in India to undertake transactions in debt instruments among themselves or with non-bank clients through the members and stock exchanges. Accordingly, stock exchanges commenced trading in Government Securities and other fixed income instruments.

iv. The CD market is a futures derivative market where underlying securities are currencies.

v. 10.16 This Commission found it rather unnecessary to dive into technical tests such as SSNIP, particularly in the absence of historic data of prices. The SSNIP test is a tool of econometric analysis to evaluate competitive constraints between two products. It is used for assessing competitive interaction between different or differentiated products. Ideally, time-series price data or trend should be examined to see whether a small but significant non-transitional increase in price has led to switching of consumers from one product to another. However, international jurisdictions have not reposed excessive faith in this test. The US Horizontal Merger Guidelines, 2010 considers SNIPP test as solely a methodological tool for performing hypothetical monopolist test for the analysis of mergers. Similarly, in its notice published in the Official Journal C 372, 09/12/1997 P, 005 – 0013, the European Commission advises action 100 on the applicability of SSNIP test for determining market definition in terms of Article 82 of the European Union Treaty. In the instant case, firstly, the CD segment did not exist prior to August, 2008 and secondly, right since inception, transaction fees, data feed fees etc., which may be said to constitute price, have not been charged by any market player. In such a scenario, an attempt to determine even hypothetical competitive prices would be nothing
more than pure indulgence of intellect and unwarranted misuse of an econometric tool, which in itself, is not error-proof. Such an attempt is bound to attract the criticism drawn in the United States v/s El du Pont de Nemour & Company (Case No. 351 US 377 – 1956), notorious in the competition lexicon as the “Cellophane Fallacy” case where the SNIPP test exaggerated the breadth of the market by the inclusion of the false substitutes.

10.18 Similarly, there is little point in going into any extended debate to distinguish the words “interchangeable” from “substitutable”, given the facts of the case and different aspects of capital market in India. It is undisputed fact that as underlying assets, equities and currencies are entirely different. Consequently, related derivatives are also different. From any practical point of view, a product over CD segment exchange cannot be said to be either interchangeable or substitutable by a product in segments like equity and F&O for the purchaser.

As an analogy, the capability of a grain mandi (wholesale market) to also start a wholesale spice mandi does not mean that grain and spices are interchangeable and substitutable nor does it mean that the platforms of the two mandis are interchangeable or substitutable.

In this case, the stock exchange services in respect of the CD segment in India is clearly an independent and distinct relevant market.

Issue No. 2

10.26 Having delineated the relevant market in consideration for the instant case, it is now possible to examine facts to determine whether NSE has “dominant position” in the relevant market.

10.28 Unlike in some international jurisdictions, the evaluation of this “strength” is to be done not merely on the basis of the market share of the enterprise but on the basis of a host of stipulated factors such as size and importance of competitors, economic power of the enterprise, entry barriers etc. as mentioned in Section 19 (4) of the Act. This wide spectrum of factors provided in the section indicates that the Commission is required to take a very holistic and pragmatic approach while inquiring whether an enterprise enjoys a dominant position before arriving at a conclusion based upon such inquiry. 10.29 The investigation by the DG followed by the inquiry by the Commission during the course of the proceedings before it has thrown up several facts which, when viewed holistically, project a clear image. Some of the most important facts are mentioned below: a. In the equity segment of stock exchange services in India, NSE has continuously held high market share for the past 8 years going beyond 71% in 2008-09. b. In the F&O segment, NSE has almost 100% market share. c. In WDM segment, NSE has maintained more than 90% market share for the past 6 – 7 years. d. Putting together equity, F&O, WDM and CD segments, NSE have garnered 92% market share as of 2008-09. e. In CD segment itself, NSE has a market share of 48% according to the DG report. 106 f. NSE has been in existence since 1994 as against incorporation of MCX-SX IN August, 2008. g. As at 31.3.2009, reserves and surplus of NSE stood at Rs.18.64 million, deposits at Rs. 9.17 billion and profit before tax at Rs. 6.89 billion. h. In comparison, BSE had a net profit of Rs.2.6 billion only and MCX-SX carried forward net loss of Rs.298.7 million for the period ending 31.3.2009. i. NSE has presence in 1486 cities and towns across India. BSE has presence mainly in Maharashtra and Gujarat and is now reduced to mostly operating in equity segment. MCX-SX has only about 450 centres and operates only in CD segment. j. NSE has high degree of vertical integration ranging from trading platform, front-end information technology, data information products, index services etc. k. Stock exchange services in India are highly regulated and require approvals of SEBI to start a new exchange.
10.30 The above facts are not disputed on any substantive ground. Triangulation of the above facts creates a hologram picture of the players in the capital market in general and in the relevant market of exchange traded currency derivatives forwards in particular.

10.32 The explosive rate of growth of the Indian economy in the new millennium and the dramatic improvements in the variety of products and technology encouraged some new players to start stock exchanges in limited segments. Despite the presence of an undisputed giant like NSE in the exchange services sector, optimism about the Indian economy and overall size of the growing pie led to MCX-SX and later USE venturing into the arena.

10.34 An important point in consideration of this issue is the current market structure. As of now, the relevant market has only three players, viz. NSE, MCX-SX and USE. According to some recent figures published in the public domain, this market is currently divided almost equally with about 34% share with MCX-SX, 30% with NSE and 36% with the latest entrant USE, as of October, 2010. Incidentally, this is a very dynamic market and market shares could vary with time. But the important thing is that in a market with just three players, each would have at least some ability to affect its competitors or the relevant market in its favour even if it is not capable of operating completely independent of competitive forces or affecting consumers in the relevant market.

10.35 However, this is a very limited ability which comes from the relevant market being a triopoly. This is not the “strength” which would come not just from market share (which is fairly evenly distributed at the moment) but from several other factors mentioned in section 19 (4) referred to above.

What has to be seen is whether a particular player in a relevant market has clear comparative advantages in terms of financial resources, technical capabilities, brand value, historical legacy etc. to be able to do things which would affect its competitors who, in turn, would be unable to do or would find it extremely difficult to do so on a sustained basis. The reason is that such an enterprise can force its competitors into taking a certain position in the market which would make the market and consumers respond or react in a certain manner which is beneficial to the dominant enterprise but detrimental to the competitors.

10.38 In the context of the Competition Act, what has to be ascertained is whether an enterprise has “strength” and whether it has the ability to use that strength in its favour. Explanation (a) to Section 4 raises many possible ways in which such strength could be used. These possibilities can be examined individually or in a combined manner, depending upon the facts of a case. In the instant case, we can first ascertain whether NSE has a position of strength which enables it to affect MCX-SX as a competitor in its favour. The question is not whether NSE is doing so but whether all the indicative facts point out that it has the ability to do so. This assessment can be done by posing a few questions.

10.39 Firstly, can NSE sustain zero pricing policy in the relevant market long enough to outlive effective competition?

10.40 To answer this, it must be kept in mind that the rationale for doing any business is to earn some profit out of it. Although there could be slightly diverse strategies such as output optimisation, turnover maximisation, profit maximisation, positioning etc., the fact remains that earning of zero profit or accumulating losses for indeterminate period would never be the goal of any commercial enterprise. Looking at the financial statements of NSE, its reserves and surplus or its profits after tax, it cannot be argued that the capacity of NSE to defer profits or to bear long-term risk of possible
market failure is lesser than that of MCXSX in the relevant market. This clearly is a position of strength.

10.41 Secondly, is there any indication that the conduct of NSE shows that it is aware of its capability? This Commission has not found any acceptable justification for why a professionally managed enterprise like NSE would not want to keep any track of the commercial viability of its operations or does not have any concerns about the desire of its shareholders to earn higher dividends. It is unthinkable that a professionally managed modern enterprise can afford such financial complacency in the face of competition unless it is part of a bigger strategy of waiting for the competition to die out. This complacence can only point to awareness of its own strength and the realisation that sooner or later, it would be possible to start generating profits from the business, once the competition is sufficiently reduced.

The Commission has also given due consideration to some important cases from international jurisdictions such as AKZO, United Brands, Du Pont amongst others as also guidance papers of some other jurisdictions. A perusal of these indicates that authorities have taken a very wide and varied range of market shares as indicators of dominance, going down to 40% in some jurisdiction. In context of the Indian law, this indicator does not have to be pegged at any point but has to be considered in conjunction with numerous factors given in section 19(4) of the Act.

10.49 In view of the discussion above, the Commission is of the firm opinion that NSE has a position of strength and, therefore, enjoys dominant position in the relevant market in context of Section 4 read with section 19(4) of the Act.

Issue No.3

As regards waiver of data feed fee on the basis of customer requests, this Commission notes that the same magnanimity is not evidenced in respect of other segments where data feed has not been waived. Generation of data, creation of backend and front-end software and live data feed involves considerable technical and commercial investment and costs, not to speak of investment of billable man hours. No profit making enterprises delivering such costly services would deliver it free of cost for years merely on customer requests. Even with regard to customer requests not sufficient evidence was produced by the OPs to show that there was overwhelming demand for free services. Even this magnanimity would not have been felt had the only source of earning for the data feed services been the CD segment. For these reasons, this Commission finds no merit in the justification given by the OPs regarding data feed fee waiver.

10.63 Regarding denial of access interface code (APIC) for ODIN supposedly done due to programme vulnerabilities and client complaints, this Commission notes that the denial has only been with respect to data feed for CD segment trading on NSE. No denial of APIC has been done in respect of data feed for any other segment. It is also noted that ODIN is a software developed by FTIL, which is one of the promoters of MCX-SX. Vulnerability or defects, if any, in ODIN would be a matter of concern for other segments also. Normally, APIC should have been denied for all segments but this was not the case.

10.64 All these facts put together take the wind out of the sails of the justification given by the OPs for denial of APIC for CD segment operations or for putting FTIL on its watch list. This conduct of NSE/DotEx smacks of dubious anti competitive intent when all the facts are viewed together.
10.72 It has been amply demonstrated in the DG report that there are manpower, hardware, infrastructure and other resources dedicated to CD segment operations by NSE. Several of these heads of expenditure are variable in nature. The operation of CD segment cannot be run without employing those resources and none of those resources including manpower and electricity etc. come for free. Even though it may not be easy to make cost allocations as claimed by NSE, it is certainly desirable and not impossible. Had NSE been operating in no other segment, it would certainly have ascertained its own cost of operations. As mentioned elsewhere while discussing dominance, this cavalier attitude of not allocating cost of operation for a clearly segregated operation can come only from a position of strength and the intent to wait for competition to die out.

10.74 As discussed above, NSE has a position of strength which has enabled it to resort to zero pricing since August, 2008. MCXSX does not have such strength or deep pockets. There is practically no justifiable reason for NSE to continue offering its services free of charge for such a long duration when it is paying for manpower and other resources for running the business.

10.75 MCS-SX, which operates only in the CD segment, has no other source of income. This is a major constraint. In these circumstances, the zero price policy of NSE cannot be termed as anything but unfair. If this Commission were to treat it as fair, it would go against the grain of the Competition Act and betray the economic philosophy behind it. If even zero pricing by dominant player cannot be interpreted as unfair, while its competitor is slowly bleeding to death, then this Commission would never be able to prevent any form of unfair pricing including predatory pricing in future.

10.76 Had NSE and MCX-SX been on equal footing in terms of resources directly available, spectrum and scale of operation, nationwide presence, length of existence etc. perhaps perception of unfairness would not have been so blatant and impossible to ignore, but in this case, the sense of the two being equal or even almost equal does not exist. Therefore, this Commission concludes that the zero price policy of NSE in the relevant market is unfair.

10.80 The Indian Competition Act recognizes leveraging as an act by an enterprise or group that “uses by its dominant position in one relevant market to enter into, or protect, other relevant market.” Nowhere does the Act indicate that there has to be a high degree of associational link between the two markets being considered for this sub section. This is so because competition concerns are much higher in India than in more mature jurisdictions because of the historical lack of competition laws. In India, if an enterprise dominant in the market of audio-visual (AV) equipment enters into the market of say, computers, it is possible for it to use its strength in terms of finances, technological expertise, sales network etc. in the AV market to muscle its way into and protect its position in the computer market, even though the two markets are not at all connected. That is why the Act does not indicate any requirement of associational link.

10.81 At this stage, the Commission would like to clarify the intent as well as the import of section 4(2)(e) of the Competition Act, 2002. It is incorrect to argue that the whole of section 4 pivots around determination of only one “relevant market” or that determination of a second “relevant market” is not possible or that having treated a particular market as the “relevant market” for the purpose of explanation (a) to section 4, that market cannot be treated as the “other market” for the purpose of section 4(2)(e) as per the wordings of the provision.

10.82 Explanation (a) is for defining what dominant position means for any market being examined under section 4 while section 4(2)(e) deals with a situation where an enterprise in dominant position
in (any) delineable relevant market uses its strength therein to enter or protect any other (delineable) relevant market.

10.83 Section 4(2)(e) uses the terms, “one relevant market” and “other relevant market”. The section recognizes the fact that an enterprise may be multi-product and may be operating in two (or more) markets. It may be possible for such enterprise to use its position of strength derived in one market to leverage its position and gain unfair advantage in the other market. While its conduct in the second market has to be separately examined for abuse if and after it acquires a dominant position there, the fact that it has used the strengths from the first market to wrongfully enter into or to protect the second market is independently considered harmful to competition under the Act. The “relevant market” of the explanation (a) applies equally in intent for sections 4(1) and (2) but the relevant market in respect of clauses (a) to (d) of section 4(2) can be different than the relevant market for the purpose of clause (e).

10.84 In the instant case, the relevant market in respect of clauses (a) to (d) of section 4(2) has been taken as stock exchange services for currency derivatives in India. It must be emphasized that this Commission has considered NSE as being in dominant position in this market based on factors given in section 19(4). But it must be kept in mind that NSE is also operating in other markets, such as equity, F&O and WDM. It is not the place to go into a discussion whether each of these is independent relevant market or some are interchangeable / substitutable for the consumer and therefore constitute a single market. What is important is that this Commission has clearly differentiated the CD segment as an independent relevant market. For the sake of convenience, we shall refer to the rest of the market (or markets) as the “market of stock exchange services for the non CD segment”. In this discussion, we shall call the relevant market as the “X market” and the market of stock exchange services for the non CD segment as the “Y market”. The complexity in this case arises from the fact that NSE has been considered as dominant in the X market due to its strengths in the Y market (amongst other things). A question can then be posed as to how, once determined as dominant in the X market, can the charge of leveraging the position in the X market to enter or protect the same X market itself be made? But this question is assuming that once X has been taken as the “relevant market” then wherever the word “relevant market” occurs in clauses (a) to (e), it should automatically refer to X market.

10.85 This is distortion of the provisions. As explained earlier, the “relevant market” for clause (e) can be different from the “relevant market” for clause (a) to (d) but the aspects of dominance given in explanation (a) would apply equally to both. In fact, the scheme of the section, particularly when read with section 19(4), is such that it is possible to take one market as the “relevant market” for sub sections (a) to (d) of section 4(2) and the same market as the “other market” for section 4(2)(e).

10.86 In the Indian Competition Act, under section 19(4), the ability to leverage, in itself, is taken as one of the factors of dominance. This revalidates our observation above that both “position of strength” as well as the concept of leveraging has slightly different nuances in the Indian Act. Phrases like “size and importance of competitors”, “vertical integration”, “relative advantage” etc. are concepts that indicate the strength to leverage based on strengths in other markets. It is this strength that would render an enterprise dominant in the relevant market itself and would expose its conduct therein to evaluation of any other abuse of dominance separately. At the same time, the wrongful exercise of that strength by itself is also held as abusive conduct in its own right, under section 4(2)(e).
10.87 To further clarify, if an enterprise merely uses its dominant position in any “relevant market” to enter or protect some other “relevant market” wrongfully, it can only be held guilty of contravening section 4(2)(e). But if the enterprise, after entering the other relevant market through such leveraging and acquiring 135 dominant position there, commits further acts of abuse (such as unfair pricing) in that relevant market, then there would be a separate violation of section 4(2)(a).

10.88 The conduct of NSE has been examined within the relevant market delineated for this case (X market). The cumulative impact of those conducts also translates into the act of protecting its position in the X market by the dint of its strengths in the Y market where also NSE is dominant. Whereas X market is the “relevant market” for sub sections (a) to (d), the Y market is the “relevant market” for sub section (e).

10.89 It is worthwhile to observe here that the language of section 4(2)(e) does not exclude the possibility that the enterprise is dominant in both, the “relevant market” as well as the “other relevant market”. An enterprise can be dominant in one market and can enter another market, acquire position of strength there and then commit acts to protect its position. This is the situation in this case. The acts of abuse in the market of stock exchange services in CD segment have to be examined in terms of sub sections (a) to (d) of section 4(2), whereas, the anti-competitive use of might arising from the market of stock exchange services in non CD segment is to be examined under section 4(2)(e).

10.90 Having clarified the existence of two market necessary for examining section 4(2)(e) and without prejudice to our view on the requirement of associational links under the Indian law, we now examine if the two markets have associational link. This can be done by considering the following questions: (a) Whether NSE holds a position of strength on the CD segment market comparable to its position in the CD and non CD segment markets as a whole? (b) Whether the NSE enjoys advantages in the CD segment market by virtue of its dominance in the non CD segment market? (c) Whether the NSE customers in one market are potential customers in the other? (d) Whether the NSE and its competitors can become competitors in both markets? 10.91 As evident from our discussion in the section on dominance, the NSE possesses almost the same strengths in the CD segment as it does in the combined stock exchange market. This fact gives it definitive advantages in the CD segment. There is high commonality of brokers and traders in other segments and CD segment. As indicated in the introductory section of this order, MCX-SX has already applied for permission to operate in the equity/cash (“Equity”) and equity derivatives - Futures and Options (“F&O”) segments and has also communicated its willingness to SEBI to commence the SME (small and medium enterprises) segment. At this point in time, the necessary regulatory approvals have not been given and the matter is sub judice. However, potentially, NSE and MCX-SX can be competitors in those segments. Indeed, MCX-SX is desirous to compete with NSE in other segments. Therefore, all the above four questions can be answered in the positive. Consequently, it can be said that the two relevant markets have associational links. Therefore, it is concluded that NSE has used its position of strength in the non CD segment to protect its position in the CD segment.

10.92 In the instant case, the acts of NSE such as fee waivers, denial of APIC for ODIN and distribution of NOW for free are clear acts of protecting its position in the CD segment and are possible due to its position of strength in the non CD segment.

Conclusion

11.1 In the previous section, the Commission framed three issues for determination and has discussed them in great detail. The findings of the Commission, based on the above discussions are summarized as below.
11.2 The stock exchange services in respect of CD segment in India is clearly an independent and distinct relevant market. In this delineated relevant market, NSE has a position of strength and, therefore, enjoys dominant position in the relevant market in context of Section 4 of the Act.

11.3 In the facts and circumstances of the case, the defence of nascent market development and historical philosophy of fee waivers by NSE and DotEx is not tenable.

11.4 This Commission finds no merit in the justifications given by the OPs regarding waivers of transaction fees, admission fees or data feed fee waiver. Therefore, the zero price policy of NSE in the relevant market is unfair. It can, in fact, be termed as annihilating or destructive pricing. This is contravention of section 4(2)(a)(ii).

11.5 The conduct of NSE / DotEx in denying APIC to ODIN and putting FTIL on watch list is an exclusionary conduct both, in the aftermarket for software for trading on NSE as well as in the relevant market delineated in this case. This is contravention of sections 4(2)(b)(i) and (ii); 4(2)(c) and 4(2)(d).

11.6 Lastly, NSE has used its position of strength in the non CD segment to protect its position in the CD segment. This is contravention of section 4(2)(e).

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Indian Exhibition Industry Association v. Ministry of Commerce and Industry and Indian Trade Promotion Organisation
2014 Comp LR 87 (CCI);
Indian Trade Promotion Organisation v. CCI &Ors
CompAT Decision.

Order under Section 27 of the Competition Act, 2002

1. The present information under section 19(1)(a) of the Competition Act, 2002 ("the Act") was filed by Indian Exhibition Industry Association ("the informant") against Ministry of Commerce & Industry ("OP 1") and Indian Trade Promotion Organization ("OP 2"/ ITPO) alleging inter alia contravention of the provisions of section 4 of the Act. The Commission after considering the entire material available on record vide its order dated 06.05.2013 passed under section 26(1) of the Act, directing the DG to cause an investigation to be made into the matter and to submit a report.

Brief facts of the Case
2. The informant is an association of exhibition organisers/ venue owners/ service providers, registered under the Societies Registration Act, 1860 with the objectives of inter alia promoting development of Trade Fairs & Exhibition Industry and to support its orderly growth.

3. OP 1 is responsible for development of trade, commerce and industries in the country. OP 2 is a company registered under section 25 of the Companies Act, 1956 and is stated to be wholly owned by the Government of India which has administrative control over it. It is further stated that the main object for creating ITPO was to promote, organize and participate in industrial trade fairs and exhibitions in India or abroad and to take all the measures incidental thereto and to organize, undertake and publicize tradeshows and fair exhibitions depots in India as well as abroad and to undertake promotion of export to explore new market for traditional items of export etc.

4. Briefly, the informant is aggrieved by the alleged time gap restriction imposed by OP 2 between two exhibitions/ fairs. As per the informant, OP 1 issued a letter dated 27.02.2003 to OP 2 stating therein that the time gap restrictions prescribed in the guidelines issued by OP 2 for Licensing of Exhibition Space & Facilities in Pragati Maidan ("the Guidelines") should be lifted to make the system transparent and afford greater freedom to the organizers to hold exhibitions/ fairs in a manner which promotes the business interests. Accordingly, OP 2 intimated OP 1 vide its letter dated 28.03.2003 that the Guidelines have been amended to drop the "time gap restriction" between two exhibitions/ fairs irrespective of where the exhibitions/ fairs are held.

5. However, in 2006, OP 2 re-formulated the said Guidelines and added clause 6.2 therein which imposed a “time gap restriction” of 15 days between two events having similar product profiles/ coverage and in case of ITPO fairs, 90 days before start or 45 days after the close of an ITPO show. The Guidelines were re-considered in October, 2007 wherein a gap of 15 days between two events having similar product profiles/ coverage was maintained whereas in case of ITPO and third party fairs having similar product profiles, a gap of 90 days before ITPO’s show and 45 days after ITPO’s show was imposed.

6. In 2011, OP 2 further amended the said “time gap restriction” and revised the same to
90 days before and after the fair in case of ITPO fairs and third party fairs having similar product profiles.

7. Highlighting the above amendments as arbitrary and discriminatory, the informant alleged that OP 2 adversely affected the established exhibitions of other players in the market by scheduling its own unrecognized exhibitions and refusing the permission to other players on the pretext of arbitrary time gap restrictions. It was further alleged that OP 2 would announce its exhibitions and later cancel them causing loss to OP 2 as well as the industry as a whole. Lastly, it was alleged that in addition to these abuses, exhibitors were also forced by the ITPO to avail certain services which were not required by them but were imposed by OP 2 by way of unreasonable and arbitrary conditions in the agreement.

8. Based on the above averments and allegations, the informant alleged abuse of dominant position by OP 2 by virtue of playing a dual role as a regulator as well as the organiser of exhibitions which, as per the informant, led to the contravention of section 4 of the Act.

9. The Director General (“the DG”), after receiving the directions from the Commission, investigated the matter and submitted the investigation report on 14.02.2014. On investigation, the DG found OP 2 to be a dominant entity in the relevant market of “provision of venue for international and national trade fairs and exhibitions in Delhi”. It was observed that various competition concerns emerge due to the conflict of interest on account of OP 2 being an event organizer at Pragati Maidan as well as the entity which decides the applications and makes rules for leasing space at Pragati Maidan to third parties, who compete with OP 2 as event organizer. The DG found that from time to time, OP 2 had amended the time gap restrictions between two similar profile events at Pragati Maidan which were much more stringent for third party events as compared to OP 2’s own events.

10. Noting that there may be an economic rationale for time gap restrictions like confusion between events, free riding concerns etc., the DG opined that the same was not per se unfair. However, since the restrictions were discriminatory and more stringent for third party events as compared to OP 2’s own events, the DG concluded contravention of the provisions of section 4(1) read with section (4)(2)(a)(i) of the Act. Further, it was noted that in the year 2011, OP 2 shifted its own event (IISE) into the period traditionally reserved for other competing events (Smart Expo, IIFEC). As such, the DG was satisfied that OP 2 discriminated against third party organizers by altering the time gap restriction guidelines, rescheduling its own events and delaying the confirmation of allotment dates to third parties which resulted in denial of market access to third parties to use the venue Pragati Maidan for their events at their usual slots. Such acts of the OP 2 were found to have the effect of limiting the provision of services of holding trade fairs and exhibitions at Pragati Maidan and also denial of market access to such third party exhibitors and was accordingly found by the DG to be in contravention of section 4(1) read with section 4(2)(b)(i) and section 4(2)(c) of the Act. The DG further noted that OP 2 leveraged its dominant position in the relevant market of „provision of venue for holding international and national exhibitions in Delhi” to protect its activities in the other market of organization of events at Pragati Maidan” thereby contravening section 4(2)(e) of the Act.

11. The DG, however, did not come across any evidence of role/responsibility of OP 1 in the aforesaid conduct. Rather, it was found that through directions issued on 27.02.2003, OP 1 had specifically directed OP 2 for removal of time gap restrictions between similar profile events to make the system more transparent.
12. Further, the allegations regarding allotment of venue subject to acceptance of supplementary obligations such as conditions of compulsorily taking of foyer area, engaging of empanelled housekeeping agency, non-invoicing of such charges by OP 2 for its own events were found to be causing no contravention of the provisions of the Act.

13. The Commission considered the DG report, the submissions of the parties and the information available in public domain. The main issues before the Commission in this case are as follows:

Issue 1: What is the relevant market in the present case? Issue 2: Whether OP 2 is dominant in the relevant market? Issue 3: If yes, whether OP 2 has abused its dominant position within the meaning of section 4 of the Act?

**Issue 1: Relevant Market**

14. “Relevant product market” has been defined in section 2(t) of the Act meaning as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. Furthermore, to determine the “relevant product market”, the Commission is required to have due regard to all or any of the following factors viz. physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products.

15. The DG noted the relevant product market as “provision of venue for organizing national and international exhibitions and trade fairs”. It may be noted that the allegations in the present case relate to the policies and procedures stipulated by OP 1 and OP 2 with respect to licensing of venues to exhibitors for conducting fairs and exhibitions. In order to attract exhibitors and visitors, the venue for exhibition plays a key role. The venues which regularly hold exhibitions and trade fairs ideally have large space to accommodate multiple exhibitions, are centrally located and are well known on the world map and are, therefore, most preferred by the exhibitors particularly for organizing international and national exhibitions and trade fairs.

16. Hence, the venues regularly used for organizing national and international exhibitions and trade fairs can be distinguished from venues for other kind of events in terms of parameters such as physical characteristics, consumer preferences.

17. In view of the above, the Commission is of the opinion that the relevant product market delineated by the DG i.e. market for “provision of venue for organizing national and international exhibitions and trade fairs” is correct.

18. Further, “relevant geographic market” has been defined in section 2(s) of the Act meaning as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. To determine the „relevant geographic market“, the Commission is required to have due regard to all or any of the following factors viz., regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services.
19. The DG delineated the relevant geographic market in the present case as Delhi. As highlighted in the DG report, Delhi has been hosting exhibitions at Pragati Maidan since 1977 and it has a rich historical background as a venue for holding international and national exhibitions and trade fairs. Factors like better public transport system, connectivity to airports, railway stations and inter-state bus terminals, centralized location nearby hotels, substantially large exhibition and open display space at its venue Pragati Maidan, location of Central and State Ministries etc. also distinguish and create preference for exhibitors as well as visitors for Delhi over other places in the country. Further, as brought out in the DG report, such fairs usually require liaisoning and approvals from governmental authorities which makes Delhi as an advantageous location as a venue. Lastly, it may also be highlighted that Delhi being the capital of the country also adds to its attractiveness as a preferred location.

20. The Commission is satisfied with DG’s observations on this aspect. Further, in terms of the available infrastructure of other exhibitions centres in comparison to Pragati Maidan, the conditions of competition of supply and demand for venues for national and international exhibitions in Delhi are different from those prevailing outside. Further, the factors such as consumer preference, adequate facilities, transport cost etc. make Delhi a distinct destination for holding international and national exhibitions and trade fairs. Considering all the above stated factors, the Commission is of the view that Delhi as a venue for holding international trade fairs and exhibitions cannot be substituted with other venues in NCR or other cities in the country. Therefore, the relevant market in the present case is “provision of venue for organizing international and national trade fairs/exhibitions in Delhi”.

**Issue 2: Dominance of OP 2 in the Relevant Market**

21. On the issue of dominance, the DG on the basis of the available facts and assessment in terms of parameters contained in section 19(4) of the Act, found OP 2 to be dominant in the relevant market of “provision of venue for organizing international and national exhibitions, trade fairs (events) in Delhi” within the meaning of section 4 of the Act.

22. DG noted that there were no competitors of OP 2 in the relevant market which could match it in terms of size and importance. It was also observed that even outside Delhi, OP 2 as a venue provider stood way above other venue providers in terms of various parameters such as area of operation, space, location, resources, infrastructure etc. Furthermore, multiple roles were performed by OP 2 at different levels involved in the holding of events i.e. as a regulator it issues necessary permissions and no objection certificate, as an organizer of international events in India and abroad, it formulates policies and guidelines for holding such events, grants approvals for third party exhibitions held at Pragati Maidan and other international events at other venues. Additionally, it also organizes trade fairs and exhibitions at Pragati Maidan. These plural functions and powers conferred on OP 2 only strengthen its position of dominance in the relevant market. Due to the unique features and characteristics of Pragati Maidan, it becomes the first preference and almost irreplaceable for holding important national and international events. Further, since Government has envisaged ITPO to play a significant role in various facets of organizing national and international events, the consumers are heavily dependent upon ITPO for holding events at Pragati Maidan. There are entry barriers in terms of availability of adequate space, appropriate location, state of art infrastructure, visibility on global map, approvals for being in the relevant market of providing venue for holding international and national events in Delhi. In the absence of alternate venues, most of the third party organizers are dependent on ITPO for venue for conducting international and national
events in Delhi. The DG also observed the absence of any countervailing buying power which could be exerted upon ITPO.

23. The Commission is in agreement with the DG’s finding on the issue of dominance of OP 2 in the relevant market. It may be additionally pertinent to note that OP 2 has acceded to DG’s findings by accepting that it is a dominant player in the exhibition industry by virtue of owning one of the largest exhibition venues at a prime location in the capital of the country. OP 2 submitted that the venue is spread over an area of 123 acres of land hosting large number of events/exhibitions and generating substantial revenue.

24. In view of the facts before the Commission and OP 2’s own submissions, the Commission has no hesitation in holding that OP 2 is dominant in the relevant market for “provision of venue for organizing international and national exhibitions, trade fairs (events) in Delhi”. Pragati Maidan is the only established venue for holding international and national trade fairs/exhibitions (events) in Delhi and OP 2 as venue provider for holding events in Delhi has absolute control and dominance.

**Issue 3: Abuse of dominant position by OP 2**

25. The DG conducted a detailed investigation into the various issues and allegations arising out of the information. The main allegation of the informant pertained to arbitrary and discriminatory time gap restrictions imposed by OP 2 between two events. Though the DG did not find time gap restrictions per se as abusive, the conduct of OP 2 in stipulating, amending and applying the same was found to be abusive in terms of the provisions contained in sections 4(2)(a)(i), 4(2)(b)(i), 4(2)(c) and 4(2)(e) of the Act.

26. On perusal of the DG’s observations and findings on the time gap restriction, it is evident that by stipulating favourable time gap restrictions for its own events as compared to third party organized events, OP 2 imposed unfair and discriminatory conditions on the third party event organizers at Pragati Maidan. The findings show that the time gap restriction between two “third party events” was 15 days before and after the event whereas in case of OP 2’s own organised events/exhibitions, the time gap restriction was 90 days before and 45 days after the event in case of OP 2 events (which was amended to 90 days before and after the event in 2011). This has been accepted by OP 2 in its own written submissions. Such a conduct is clearly in contravention of the provisions of section 4(2)(a)(i) of the Act. Besides, it also limited/ restricted the provision of services and market thereof in contravention of the provisions of section 4(2)(b)(i) of the Act. Further, increase in the time gap restrictions for holding third party events, before and after OP 2’s own events of similar profile, amounted to denial of market access to the third parties who compete with OP 2 for organizing events at Pragati Maidan in contravention of the provisions of section 4(2)(c) of the Act. The Commission also believes that OP 2 has used its dominant position in the relevant market of venue provider in Delhi for organizing events to protect and enhance its position in the market of event organization and thereby contravened the provisions of section 4(2)(e) of the Act.

27. The informant also alleged that OP 2’s guidelines for reserving slots for regular events and allocation on first-come-first basis was often disregarded for benefiting its own events. It was alleged that OP 2 would take unreasonable time to confirm the booking which allowed it to manipulate the bookings. The informant cited various instances in support of this allegations. From chronology of events in processing applications for events received from third party organizers viz. “UBM and Electronics Today”, it is evident that OP 2 imposed unfair and discriminatory conditions upon the third party organizers by taking long time in confirming the allotment dates; by not deciding applications on first-come-
first-basis; coupled with altering of time gap restriction guidelines to its advantage; giving preferential treatment to its own fairs over competing fairs in contravention of the provisions of section 4(2)(a)(i) of the Act. Further, such conduct amounted to denial of market access to the third parties who competed with OP 2 for organizing events at Pragati Maidan in contravention of the provisions of section 4(2)(c) of the Act.

28. The other allegations of the informant with regard to compulsion for taking the “foyer area” along with the allocated area, compulsory usage of OP 2's designated housekeeping agency etc. do not appear to raise any competition concern. OP 2 submitted that the charges imposed on the third party organizers for common foyer area were to: (i) to prevent unauthorized/unregulated use of this area by any of the organizers (ii) to avoid conflict between multiple organizers regarding use of this area and to ensure controlled allocation of this area and (iii) to ensure smooth conduct of the event, movement of visitors. The Commission is satisfied with the explanation furnished by OP 2 and, therefore, no contravention is found on this ground.

29. Similarly, the issue of designating housekeeping agency on their panel and not giving any option to the exhibitors to engage any other housekeeping agency does not raise any competition concern to warrant Commission’s intervention. From the submissions made by OP 2 before DG, it appears that third party organizers were free to engage housekeeping agencies of their choice though that would be in addition to the conservancy charges to be paid by them. The DG opined that OP 2 being the owner of the Pragati Maidan was vested with the responsibility of ensuring cleanliness, maintenance, proper sanitary conditions as per international standards. This necessitated OP 2 to provide housekeeping services for the entire venue. We agree with the finding of the DG and hence, the appointment of housekeeping agencies for the aforesaid purpose and levying of conservancy charges on the third party organizers appear to be justified subject to the quantum being levied in a fair, transparent and non-discriminatory manner. No contravention is found on this ground.

30. On the issue of non-charging of rental, foyer charges by OP 2 for its own events, the Commission is satisfied with the explanation provided by OP 2. The informant alleged that since every organizer has to include in their costing the hall rental, foyer charges, housekeeping charges etc. charged by OP 2, the cost charged by the other organizers was very high in comparison to the cost charged by OP 2. This was alleged to be an abusive conduct of the dominant undertaking. OP 2 submitted that it is entrusted with the responsibility of promoting external and domestic trade of India in a cost effective manner by organizing and participating in international trade fairs in India and abroad. The main focus of OP 2 is to support and assist small and medium enterprises to access markets both in India and abroad. OP 2's events cover a wide variety of sectors such as handlooms, handicrafts, textiles, manufacturing, processed food, publishing and printing industry, agriculture, leather goods. Thus, OP 2 organizes events in Pragati Maidan with an objective of trade promotion and as such the cost of participation in ITPO's events in Pragati Maidan is required to be kept at a reasonable level as compared to the events organised by third party organize. Commission cannot completely ignore the fact that while a third party event in Pragati Maidan is primarily organized by companies/organizations with profit-motive keeping the cost of participation high, OP 2 generally targets small and medium enterprises to provide them a platform to exhibit their products at a reasonable cost. Therefore, the Commission is satisfied with the explanation furnished by OP 2 in this regard and no contravention is found on this ground as well.
31. The last allegation made by informant was with regard to onerous terms and conditions imposed in the Agreement entered into between OP 2 and third party organizers in case of cancellation or re-scheduling of events. The Commission has perused the clauses in the Agreement pertaining to cancellation and rescheduling and apparently the different regime for liability of OP 2 and third party organizer is *ex facie* discriminatory which can be noticed from a bare perusal of the impugned clauses noted below:

**7.21 Rescheduling** The exhibition organizers may be permitted to reschedule their events subject to the following conditions:

(a) Re-scheduling will be permitted only once and the rescheduled dates should be within 6 months of the original booking. Any rescheduling beyond 6 months will be treated as cancellation of original booking and applicable penalty has to be paid by the organizer.

(b) Minimum of 5 months notice from the date of the original tenancy of the booking.

(c) Atleast 50% of the committed License Fees should have been paid.

(d) The proposed rescheduling should be for the same quantum of area booked in terms of per sqm./day. In the event of shortfall, the applicable penalty will have to be paid before such rescheduling.

5.20 Liability of ITPO limited to refund of deposit in the event of halls being unavailable.

ITPO is in the process of undertaking a modernization program or facilities in Pragati Maidan. ITPO will inform the organizers in advance of any dislocation in the halls blocked by the organizers in the event of implementation of modernization program. In such an eventuality, ITPO's liability is limited to refunding the advance license fee received from the organizer.

32. In view of the above, Commission is of considered opinion that the above stipulations amount to imposition of unfair conditions on third party organizers by OP 2 in exercise of its dominant position in contravention of the provisions of section 4(2)(a)(i) of the Act. Resultantly, Commission is of view that OP 2 has contravened the provisions of section 4(2)(a)(i), 4(2)(b)(i), 4(2)(c) and 4(2)(e) read with section 4(1) of the Act, as detailed above.

33. Before parting with this order, it may be pointed out that the informant has also impleaded OP 1 (Ministry of Commerce & Industry) as opposite party in the present case. Though no specific allegations are levelled against the Ministry, yet the same was presumably arrayed as a party due to its role in policy formulation with regard to development of trade, commerce and industry in the country as well as implementation projects. The Commission is of the considered opinion that the aforesaid functions of the Ministry do not qualify it to render an „enterprise“ within the meaning of section 2(h) of the Act.

34. In view of the above, the Commission passes the following order.

**ORDER**

35. The Commission directs OP 2 to cease and desist from indulging in such anti-competitive practices which have been found to be abusive in terms of the provisions of section 4 of the Act in the preceding paras of this order.

36. Before levying the penalty on OP 2 for contravention of the provisions of section 4 of the Act, it may be pointed out that subsequent to filing of information, the discriminatory features that earlier existed due to non-parity in time gap restrictions applicable to two „third party events“ and that between an ITPO and third party events have been largely removed through the amendment dated 20.05.013, barring a small element of comparative advantage that OP 2 fairs continue to enjoy due to the 3 days of time gap restriction which is not available between two third party events. The time gap, as it stands presently, is very
small and was sought to be justified by OP 2 on logistical grounds and the same does not appear to have any adverse effect in the market.

37. With this mitigating factor in mind along with OP 2’s self submission and admissions, the Commission considers it appropriate to impose penalty @ 2% of the average of the Income/Receipt/Turnover for the last three preceding financial years as calculated below.

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Fast Track Call Cab Pvt. Ltd. & Meru Travel Solutions Pvt. Ltd. V. ANI Technologies Pvt. Ltd.
(CCI, Case No. 6 & 74 of 2015 Order Dated 19/07/2017)

CORAM
Mr. Devender Kumar Sikri (Chairperson; Mr. S. L. Bunker (Member), Mr. Sudhir Mital, (Member), Mr. Augustine Peter (Member), Mr. U. C. Nahta(Member), Mr. Justice G. P. Mittal (Member).

Order under Section 26 (6) of the Competition Act, 2002

Fast Track Call Cab Pvt. Ltd. and Meru Travel Solutions Pvt. Ltd. (the ‘Informants’) had filed information, separately, under Section 19(1) (a) of the Competition Act, 2002 (the ‘Act’) against ANI Technologies (the ‘Opposite Party’/‘OP’) alleging inter alia contravention of the provisions of Section 4 of the Act. Since the allegations were similar in both the cases, the Commission decided to club the matters for the purposes of investigation and final disposal.

Facts, in brief
8. The Informant in Case No. 06 of 2015 is a company engaged in the business of providing radio taxi services, under the brand name ‘FastTrack’, in the southern part of India.

9. The Informant in Case No. 74 of 2015 is a group holding company engaged in radio taxi business through its wholly owned subsidiaries namely Meru Cab Company Pvt. Ltd., (MCCPL) and V-Link Automotive Services Pvt. Ltd. (VASPL or V-Link). Both these subsidiaries of the Informant are engaged in the business of providing radio taxi services under the brand names ‘Meru’, ‘Meru Genie’ and ‘Meru Flexi’ in many major cities across India.

10. OP (common in both the cases) is a company engaged in the business of providing radio taxi services, under the brand name ‘OLA’. The main allegation of the Informants in both the cases is that OP has abused its dominant position in the relevant market by offering heavy discounts to the passengers and incentives to the cab drivers associated with them which amounts to predatory pricing under Section 4(2)(a)(ii) of the Act. This conduct, as per the Informants, has affected other competitors in the market who cannot offer similar discounts/incentives to commuters/drivers.

11. At that stage, the Commission, based on the high market share of OP, was prima facie of the view that OP held a dominant position in the market for ‘Radio Taxi servicesin the city of Bengaluru’ and that it was abusing its dominant position. Vide order dated 24th April 2015, the Commission directed the Director General (DG) to conduct detailed investigation into the matter. Thereafter, as stated earlier, another information based on similar facts and allegations, in Case No. 74 of 2015, against OP was received by the Commission. The Commission, vide order dated 30th September 2015, clubbed this information with the earlier case which was being investigated by the DG and directed the DG to submit investigation report covering both the Informants. During the course of investigation, the DG sought information from the parties and other radio cab companies (third parties), including Uber India Pvt. Ltd. (‘Uber’), operating in the geographic region of Bengaluru.

Observations and findings of the DG
6. The issues before the DG for investigation were twofold-(i) whether, OP held a dominant position in the relevant market or not; and (ii) if it held a dominant position, whether its conduct would amount to abusive practice (predatory pricing) within the meaning of Section 4(2)(a)(ii) of the Act.
7. The DG analyzed the taxi industry in India in general and Bengaluru, in particular. The DG also looked into the emergence of radio taxi market in India and the distinctive features which radio taxis have with respect to the traditional taxis. Before the DG, OP contended that it is a technology company which connects potential customers and the drivers through technology platform. It referred itself as an ‘aggregator’ of taxis and claimed that it is not in the business of radio taxis, like other players such as Fast Track, Mega Cabs, Easy Cabs and Meru which have obtained license from the respective transport authorities as radio taxi operators. The DG analyzed various business models prevailing in the radio taxi service industry, i.e. asset-owned model, aggregator model and hybrid model. The DG observed that while the radio taxis are owned by the radio taxi service providers under the asset-owned model; in the aggregator’s model, the operator does not own the radio cabs but only acts as an aggregator (platform) that connects the drivers with the prospective consumers. OP operates under the aggregators’ model and one of its competitors, working on the same business model, in the relevant market, is Uber. The DG also observed that there are certain players who operate as a mix of both these models like ‘Mega’ and ‘Meru’ (one of the Informants).

9. Despite OP’s argument that it is only a technology software service provider, which is primarily engaged in providing internet and mobile technology platform for taxi hiring by commuters and is thus different from radio taxi companies operating under asset-owned model, the DG opined that taxis operating under these different business models are functionally substitutable.

10. OP also submitted, before the DG, that in Bengaluru, the radio taxis running on OP’s platform compete with equally other commercial modes of transport and accordingly, the relevant market should be defined broadly to capture all such alternative modes of transport as well as they pose an effective competitive constraint on OP’s taxis. The DG, however, found no merit in this contention and observed that the key features of radio taxi, viz. point-to-point pick and drop facility, ease of booking, pre-booking facility, round the clock availability even at obscure places, predictability in terms of expected waiting and journey time, reliability in terms of GPS/GPRS tracking, ease of payment, quality vehicles, professional and well trained drivers, feedback facility etc. makes them, i.e. radio taxi services, different from other modes of transport. Highlighting the distinctions between radio taxis and all these other modes of transport, the DG delineated the relevant market as ‘market for radio taxi services’. With regard to the geographic market, the DG observed that transport is a State subject under the Constitution and therefore, the radio taxi/city taxi schemes formulated by the State Governments/ Regional Transport Authorities (RTAs) differ from State to State and City to city. Thus, the regulatory conditions of competition are homogenous only in a particular city like Bengaluru and distinct from conditions prevailing in any other neighboring cities/states. Further, the radio/local point-to-point taxi service is a highly localized service from demand side and supply side perspective. Based on these considerations, the DG delineated the relevant geographic market as the city of Bengaluru.

11. The DG then analyzed the position of strength of OP in the relevant market of ‘market for services of radio taxi in Bengaluru’ to assess whether it held a dominant position in the said market during June 2012 till September 2015 or not. The DG has based its analysis taking into account the market shares of OP in comparison to the other radio taxi operators on the basis of number of trips (both monthly and annually). The DG also obtained information regarding the total fleet size and active fleet size for different players in the relevant market for assessment of dominance. However, these parameters were not found to be appropriate indicators for assessment of market shares because there are chances of one radio taxi getting registered on multiple platforms, giving rise to the problem of multiple counting.
13. The DG has opined that for a player to have a dominant position in the relevant market, it should be able to hold its market share for a reasonable period of time. In the present case, OP’s market share has started declining as Uber entered the relevant market almost three years after OP’s entry.

14. The DG also took into account the findings made by Raghavan Committee Report to observe that factors other than market share are relevant to assess whether a given entity is dominant in the relevant market or not.

Findings of Raghavan Committee Report
“[..] even a firm with low market share of just 20% with the remaining 80% diffusedly held by a large number of competitors may be in position to abuse its dominance, while a firm with say 60% market share with the remaining 40% held by a competitor may not be in a position to abuse its dominance because of the key rivalry in the market. Specifying a threshold or an arithmetical figure for defining dominance may either allow real offenders to escape or result in unnecessary litigation. Hence in a dynamic changing economic environment, a static arithmetical figure to define dominance will be an aberration [..]”

[..] As already stated there is no single objective market share criteria that can be blindly used as a test of dominance. [...]”

16. Furthermore, the DG took into account the European case laws (AKZOChemie BV vs European Commission, United Brands Case and Hoffman-La Roche Case) to establish that though market share is important, it is only one of the indicators from which the existence of a dominant position may be inferred. There can be factors other than market shares which play a vital role in assessing dominance of an enterprise.

18. The DG, thus, noted that backed by its marketing technology and logistics and financial support, Uber was able to successfully counter the pricing strategy of OP, and being able to sustain losses, which restrained OP from exercising market power in the relevant market. This was evident from the fact that similar strategy was followed by Uber and as a result, the gap in market share between OP and Uber narrowed down from 69% in January 2015 to 22% by September 2015.

19. The DG also noted that in a scenario where the cab drivers have an option of getting themselves registered onto another platform and customers have an option of booking taxis from another platform, it is difficult for an incumbent to exercise market power. Thus, neither the customers nor the drivers are locked up in any manner. The DG further stated that, in the present case, competitive constraints can also be exerted by the customers/commuters in the form of countervailing buyer power, as they have an option of booking taxis from other platforms like Uber.

20. It was further noted that the potential impact of expansion of the existing competitors or entry of potential competitors is also relevant while assessing the competitive constraints on an enterprise. The DG noted that the regulatory requirement in the present case did not constitute a barrier for a new entrant. Further, the key feature of the aggregator model is that the company does not have to invest capital on purchase of cabs and therefore, the capital investment as an entry barrier is not high enough to deter new entrants.

21. In its analysis, the DG also pointed out the ‘network externalities’ prevalent in two sided markets, observing that the aggregator’s model of radio taxi service can only be profitable when the service/platform provider has a sizeable number of customers availing the service and sizeable number of cabs/drivers at various locations within the city providing the services to meet the demand. The
demand for taxis depends on the tariff structure and quick availability of the taxis while the supply of taxis depends upon the incentive structure and minimum assured bookings.

22. One of the Informants, Meru, argued before the DG that OP’s market share has been over 50% consistently for a period of two years, and therefore, it was dominant in the relevant market. However, the DG noted that after achieving a growth rate of 75-76% in January 2015, OP’s share started to decline and came down to 58-59% by September 2015. Further, with the steady increase in Uber’s market share from 6-7% in January 2015 to 36-37% in September 2015, it could not be said whether OP would be in a position to hold on to its market share for a sustainable period for assessment of dominance in the relevant market.

23. Based on the foregoing analysis, the DG concluded that OP is not in a dominant position in the relevant market to act, to an appreciable extent, independently of its competitors and customers.

24. The main allegation of abuse in the present case was below-cost pricing strategy by OP. The DG noted that in the absence of dominance of an entity, the question of abuse would not arise. However, the DG analyzed the pricing strategy of OP vis-à-vis its competitors and rather found Uber to be a more aggressive player, in terms of below-cost pricing, in the relevant market than the OP. Thus, DG opined that both OP and Uber have adopted ‘below-cost pricing strategy’. However, since the scheme of the Act only attracts the provisions of Section 4 when an incumbent is found to be dominant, the DG stated that OP can be said to have indulged in abuse by way of predatory pricing, only if it is found to be dominant in the relevant market. Since OP was not found to be dominant, the DG concluded that OP did not contravene the provisions of Section 4 of the Act.

Replies/ objections/ submissions of the Parties to the Investigation Report

Replies/ objections/ submissions of the Informants (FastTrack and Meru)

25. The Informants have vehemently argued that the finding of the investigation report regarding (non) dominance of OP is solely based on the fact that Uber is present in the relevant market and is engaging in a similar conduct as OP.

26. The Informants have agreed with the delineation of the relevant market proposed by the DG. It is submitted that the radio taxi market forms a separate relevant market in itself and can be distinguished from other modes of transport.

27. The argument of OP that it is merely a technology company has been challenged by the Informant. The Informants contend that the services offered by OP are that of a radio taxi provider and the services being consumed by the users of OP are that of radio taxis. They are also soliciting their business as radio taxi providers through advertisements. It is stated that OP enters into contracts with the taxi owners and uses its brand image, platform to offer the services of taxis to the customers. It has also been submitted that OP determines the tariffs payable by the consumers for the taxi services and has control over all aspects of taxi services. Hence, it is submitted that the argument that it is merely a platform which is connecting customers and drivers cannot be accepted.

29. As regards dominance, it has been submitted that OP is a self-proclaimed dominant player in the market. There have been public statements made by the promoters of OP that it has a high market share in the radio taxi industry in India.

30. The Informant has contested the findings of the DG with regard to the fact that since the market share of OP has been declining from February, 2015 to September, 2015, OP is not dominant.
As per the Informant, the dip in the market share does not vitiate the fact that OP is dominant in the market. To substantiate its claim, the Informant has placed reliance on various case laws including the General Court’s decision in *AstraZeneca v. Commission* (Case T-321/05) and *British Airways plc v. Commission* (Case T-219/99) case, wherein it was noted that decline in the market share cannot be taken as an evidence that the entity is not dominant.

31. Besides OP’s high market share, the Informants have also alleged high entry barriers in the relevant market. It is stated that radio taxi market is characterized by network effects which can act as an entry barrier. Since it would take considerable time for a new player to capture a good position and compete against an established player, the network effects result in high entry barriers for potential entrants. The Informants have placed reliance on international case laws where network effects were shown to be posing a significant barrier to entry viz, European Commission decision in *Microsoft* case (COMP/C-3/37.792) and District Court of New York’s decision in *MasterCard/Visa* case. It is claimed that OP was the first player to build a strong network with the help of its predatory model by virtue of which, it tipped the market in its favour, which has given it a strong edge in the market over its competitors.

32. The Informants have submitted that OP was paying an incentive of Rs. 302 per trip in January, 2015. The high incentives paid by OP hooked on more number of drivers to its platform. Even post January 2015, the number of trips of OP were high and there was no decrease in the incentives paid by OP to its drivers. The ultimate effect of OP continuing to pay such high incentives even post January, locked in a lot of drivers and increased its customer base as well. Further, the agreement that OP enters into with its drivers contains an exclusivity clause and thus, locks in a lot of drivers. It is alleged that other operators in this industry do not enter into agreements containing such clauses which further proves that OP is in a dominant position.

33. The Informant has pointed out high capital requirement in the radio taxi market as an entry barrier. It is submitted that OP has been able to practice predatory pricing because of huge funding which acts as an entry barrier for the small and medium enterprises which cannot enter the market because of inadequate funds. This is also stated to be a barrier for expansion for the existing players. However, the DG has wrongly concluded that there is no entry barrier in the radio taxi market as Uber was able to expand in the said market, when OP was already existing and had a high market share. The Informants have also mentioned that the first mover advantage is not limited to having a large presence in the market, but also relates to the fact that most of the credible investors, who have invested in OP, are not likely to invest in other companies.

34. Another argument put forth by the Informants is that the exclusionary conduct of OP itself demonstrates the economic strength enjoyed by it. The Informant has relied upon the European Commission’s case of *United Brands v. Commission*, to infer that the conduct of an alleged dominant firm could be taken into account in deciding whether it is dominant or not. The Commission’s order in the *MCX Stock Exchange Ltd v. NSE and other* has also been relied upon in this regard, wherein it was noted that levying zero transaction fee by NSE and incurring huge losses in the process demonstrated that NSE was in a dominant position. Thereafter, zero pricing was held to be an abuse of dominant position by NSE. The Informants have also relied upon the Commission’s order in *M/s HT Media v. Super Cassettes Industries Limited* to substantiate the same.

35. As per the Informants, it is a fallacy that the pre-requisite of finding an enterprise to be dominant is its ability to increase prices above competitive levels. However, as per the EU guidelines, market power is the ability to influence prices which would not only include the ability of the firms to
increase prices beyond competitive levels, but also their ability to keep them suppressed over a longer period of time, thereby adversely affecting its competitors in a market. Therefore, OP which has built the network for itself and forced other competitors to follow its model shows that it has market power.

36. According to the Informants, the DG has erroneously held OP to be not dominant merely because of the existence of Uber in the relevant market. It is argued that existence of another entity in the relevant market, indulging in a similar conduct, does not preclude a finding on OP’s dominance. In the alternative, the Informants have averred that it is not necessary that only one entity can be dominant in a particular relevant market. There is a possibility of two entities exercising dominance at the same time. In this regard, the Informants have claimed that the analysis of the DG is pointing towards presence of more than one dominant player in the relevant market. The DG has, in its report, admitted the growth of both OP and Uber and also, that their growth is not the result of any technological innovation or efficiency but the result of a practice to charge substantially below the average variable cost. The Informants have relied upon the observations of the Canadian Competition Tribunal, which noted that both MasterCard and Visa can individually possess market power in the relevant market. It has thus been submitted that a conclusion of simultaneous dominance of OP and Uber is not incompatible with the provisions of the Act.

37. The first Informant, Fast Track, has submitted that OP and Uber, through their below cost pricing, have pushed the Informant to a situation of virtual nonexistence. The second Informant, Meru, on the other hand, has claimed that established players like itself and Mega have lost market shares and are on the verge of elimination. Thus, DG’s observation OP is not dominant as hat none of the players are ousted from the market has been challenged by the Informant, stating that elimination is not a necessary condition for ascertaining dominance and abuse.

38. The decision of the European Court of Justice in the case of AKZOChemie has also been relied upon by the Informants to infer that any price below the average variable cost by means of which a dominant enterprise seeks to eliminate a competitor must be regarded as an abusive practice since there is no conceivable economic purpose for charging a price below average variable cost by an enterprise other than elimination of a competitor. Since OP has charged prices below average variable cost, as has been demonstrated by the DG, it is sufficient to imply that it has indulged in an anti-competitive conduct.

39. As per the Informants, the defence of below cost pricing in a nascent market is untenable. It has been argued by OP that below cost pricing is a result of promotions, achieving economies of scale and expanding network. In this regard, it is submitted that market expanding efficiencies are generally not accepted as a defence in predation cases. Further, it is unlikely that any efficiency pursuant to predatory price would outweigh its anti-competitive effects. The Informant has relied upon the European Commission’s decision in Wanadoo Interactive case (COMP/38.233) (hereinafter referred to as ‘Wanadoo Interactive case’), in which it was noted that economies of scale which are enjoyed by any enterprise by virtue of such pricing cannot exempt the liability of such undertaking.

40. The Commission in its prima facie order passed, under Section 26(1) of the Act, noted that OP has contravened the provisions of Sections 3 or 4 of the Act. However, the DG has failed to come to a conclusion on Section 3 of the Act. In this regard, it is submitted that the agreements entered into between OP and its drivers have caused an appreciable adverse effect on competition in India. Therefore, the DG should have carried out the investigation with respect to Section 3 of the Act.

Replies/ objections/ submissions of OP
41. OP endorsed the findings of the DG with regard to it not being dominant, though the delineation of the relevant market has been challenged by it. Further, OP has also challenged the observations and findings of the DG in relation to the nature of services provided by it and its pricing below Average Variable Cost (AVC).

42. OP submitted that it is only a technology software service provider engaged in providing internet and mobile technology platform for taxi-hailing by the commuters and the finding of the DG that it is a ‘radio taxi service provider’ is fundamentally flawed and not an accurate representation of the service being provided by it.

43. OP claims to have created a software platform in the form of a mobile application i.e., a portal that can be downloaded by commuters as well as licensed taxi drivers, on their respective mobile phones. Once the portal is downloaded, it allows the commuters to register themselves, along with allowing them a wide range of customisations such as, preferred payment method, preferred type of cab, etc. In the case of licensed drivers, the portal allows them to register themselves, after a thorough screening process involving a valid commercial driver’s license, a KnowYour Customer (‘KYC’) complaint bank account, a car with a taxi permit, a background check on the character of the driver, etc. It is claimed that OP does not employ drivers (they are self-employed) and does not own any cars. It is stated that the portal aggregates a wide range of choices for the commuters and driver and once the commuter makes his choice and the driver accepts the ride, the driver would provide the end-to-end service of picking up the commuter from the preferred pick-up point and dropping the commuter to the preferred destination. At the end of the ride, the portal provides an opportunity for the driver as well as the commuter to rate each other respectively.

44. Further, OP also relied upon the definition of ‘information society service’ under the Directive 98/34 of the European Union and contended that it falls under that definition on numerous counts. Firstly, OP’s services are provided ‘at a distance’ since the service is provided without the driver and the commuter being simultaneously present. Secondly, the services are clearly provided ‘by electronic means’, i.e., a mobile software application. Thirdly, OP’s services are provided ‘at the individual request of a recipient of services’ to both commuters and drivers, which request the service by connecting to the portal. Finally, the services are ‘service normally provided for remuneration’. While OP’s services can be termed as ‘ride sharing’ or ‘app hailing’, there is a clear pecuniary element to the transaction in that the driver expects a payment for transporting the commuter. It is claimed that OP can be described as an online platform in that it connects producers (in this case, drivers) with consumers (in this case, commuters) and facilitates their interactions and exchanges. In other words, OP does not create value by performing transport services, but by enabling direct interactions between two distinct categories of users.

45. OP further submitted that it is functioning in a two-sided market that brings together two different user groups providing network benefits to each other. The peculiarity of a two-sided market is that an intermediary is engaged in the activity of connecting two different and distinct ends of the supply chain, by charging a fee or consideration for such a connection. However, the intermediary is worthless and its utility is nullified if one end of the supply chain stops using the intermediary. Thus, the pricing structure must be balanced in a way to attract both sides of the platform.

46. Further, OP also relied upon case laws of the Commission (Mr Ramakant Kini v. L.H. Hiranandani Hospital, M/s ESYS Information Technologies Pvt. Ltd. v. Intel Corporation (Intel Inc) &Ors. etc.) to contend that the market share of an entity is only one of the factors which decides whether an enterprise is dominant or not, the same cannot be conclusive proof of dominance.
47. Without prejudice, OP submitted that the market share of OP was not sufficient enough to exercise market power and affect competitors or consumers in the relevant market. OP also relied upon the DG’s observation of Uber being an effective competitor to OP, with greater economic power, in the relevant market. Further, the dynamic nature of the relevant market along with the volatility of market shares was claimed to be sufficient to conclude that Uber exerted sufficient competitive pressure on OP. OP also relied upon the Commission’s decision in MCX Stock Exchange Ltd v. NSE and other to profess that ‘position of strength’ is not some objective attribute that can be measured along a prescribed mathematical index. Rather, what has to be seen is whether a particular player in a relevant market has clear comparative advantages in terms of financial resources, technical capabilities, brand value etc. to be able to do things which would affect its competitors who, in turn, would be unable to or would find it extremely difficult to do so on a sustained basis. OP also stated that the investigation report demonstrates that Uber was comparatively stronger than OP, and was potentially capable of acquiring the market share of OP in the event of OP operating independent of the market forces.

57. OP also challenged the methodology used by the DG to arrive at a conclusion that OP has indulged in below Average Variable Cost (AVC) pricing. It was reiterated that OP, being a technology software service provider, connects two distinct user groups namely the taxi service provider and the commuter. Thus, its revenue is based on a revenue sharing model shared with the taxi service provider in terms of the amount of commission. It is stated that the revenue sharing between the taxi driver and OP varies between 95:5 (%) to 80:20 (%) depending upon inter alia city and car category, with OP earning positive (5% to 20% of the Gross Merchandise Value (“GMV”)) revenue per ride. Since the variable cost for OP (i.e. payment to the drivers, 80% to 95%) is lower than the pricing by 20% to 5%, therefore the pricing at all times, is more than the AVC. This argument of OP was based on the proposition that customer discounts, bonus and driver incentives are not variable costs. OP claimed customer discounts, bonus and driver incentive are budgeted fixed costs and that its low Effective Net Take Rate (‘ENTR’) was not due to below cost pricing. As such, OP has not indulged in predatory pricing by pricing its services below AVC. OP also submitted that it has been subject to sufficient competitive constraint from Uber in the relevant market.

58. Based on these submissions, OP prayed that DG’s finding of it not being dominant in the relevant market be upheld and the DG’s finding with regard to nature of services offered by OP and its pricing be dismissed.

Observations and Findings of the Commission

59. The Commission has examined the material available on record, including the information, investigation report, written submissions filed by the parties, and heard the oral submissions made by their respective learned counsels on 15th February 2017 and 1st March 2017.

60. The primary allegation of the Informants in this case is regarding abuse of dominant position by OP, by way of predatory pricing, in the relevant market, in contravention of Section 4(2)(a)(ii) of the Act. This, as per the Informants, has distorted fair competition in the market, resulted in business loss to equally efficient but small players like the Informants and has foreclosed market to potential entrants. For examining the allegations pertaining to Section 4 of the Act, delineation of the relevant market is essential to ascertain dominance and analyzing the alleged abusive conduct of OP in the present case.

61. The Informants have also raised an objection as to the DG not investigating the allegation of exclusivity condition imposed upon the drivers by OP under Section 3(4) of the Act. In this regard,
the Commission notes that the *prima facie* order of the Commission directed the DG to investigate with respect to allegations under Section 4 of the Act. Moreover, while investigating under Section 4 of the Act, the DG found that the drivers are allowed to opt for another platform and they were not restricted because of their association with OP. Thus, the allegation of the Informant is not established. Just because this fact was not investigated specifically under Section 3(4) of the Act, it will not alter the fact that there was no exclusivity condition imposed upon the drivers. This point thus does not require any further deliberation.

62. The Informants have proposed the delineation of relevant product market on the same lines as done by the DG *i.e.* ‘*market for radio taxi services’*. The OP, however, has argued at length that it is only a ‘technology company’ and cannot be termed as a radio taxi service provider. The Commission has considered the submissions made by OP but finds them to be implausible for the reasons provided hereinafter. The Commission is aware that OP acts as a platform and operates in the radio taxi service market as an aggregator. It is also well acknowledged that it does not own any of the taxis registered on its network and only acts as an intermediary. However, none of these factors supports the argument of OP that it is not part of the same relevant market as that of other players operating under the asset-owned model. By merely adopting a new business model of operation for providing the same goods/services, the incumbent cannot qualify for a distinct relevant product market.

63. While defining the relevant product market under Section 2(t) of the Act, all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use, need to be included in the realm of relevant product market. The purpose of defining the market is to encompass all those products or services which are considered to be the effective substitutes for the product or service in question, by the consumers. It is observed that OP has, undoubtedly, replaced the ownership/asset based model in the radio taxi service business and is operating under the platform based model. It outsources the bookings to the drivers/vehicle owners who are attached to its platform, instead of providing the same by taxis owned by it. However, this fact alone cannot make it a distinct category of service provider when the basic nature of service provided by it is same as that provided by other players operating under the traditional business model.

64. In this regard, the Commission agrees with the contentions of the Informants that the services offered by OP are that of a radio taxi service provider and the services being consumed by the users of OP are that of the radio taxis. OP enters into contracts with taxi owners/drivers and uses its brand image, platform to offer these services to the customers. The tariff payable by the consumers for the taxi services rendered is determined by OP, which has control over all aspects of taxi services. Moreover, the gross billing amount received from customers is shown as revenue in OP’s books of accounts, instead of ‘commission’. Also, the amount paid/payable to the drivers is a share of revenue from the amount so received from the passengers/customers and is shown as the fleet operators cost. It is evident that OP is providing the same functional product which the players operating under the asset-owned model are providing. This is also clear from the fact that OP’s Article of Association, *inter alia*, also refer to ‘Uber’, ‘Meru Cabs’, and ‘TaxiForSure’ (subsequently acquired by it) as its competitors. For the end consumer, who is booking a taxi ride through OP’s platform, identity of the driver who owns the taxi is inconsequential. The consumer perceives OP as a service provider of radio taxi service whose service is substitutable with the services provided by other radio taxi service operators, irrespective of the business model followed by them. Thus, substitutability, in the radio taxi industry, is between the operators and not between the drivers.
65. The Commission has considered the regulatory framework along with the advisory issued by the Ministry of Road Transport and Highways, Govt. of India in October 2015 and subsequent amendments made by various state transport authorities which indicate that the aggregators are included within the scope of radio taxi schemes. Specifically, pursuant to an amendment in the Delhi’s City Taxi Scheme 2015, aggregators are included in the same category as that of radio taxi service providers. All the requirements under the said scheme are equally applicable to aggregators such as OP. Although, we are dealing with a different geographic market, it can be safely inferred that app (application) based aggregators are also covered under the category of radio taxi service providers. Similarly, the Government of Karnataka’s ‘City Taxi Service Scheme 1998’ mandates that each motor cab is required to be connected with radio telephone/GPRS/GPS/company operated control room having facility to monitor the movements of the cabs. In view of the existence of regulatory framework in various States in India specifically stipulating the inclusion of aggregators under the category of radio taxis, it can be inferred that services provided by OP are that of radio taxis.

Accordingly, the Commission finds no merit in the argument of OP that it is only a technology software service provider and not a radio taxi service provider.

66. Based on these reasons, the Commission is of the view that the relevant product market in the instant case is ‘market for radio taxi services’.

67. With regard to the relevant geographic market, the Commission agrees with observations made by the DG that transport is classified as a state subject under the Constitution of India, therefore the regulatory conditions governing competition are homogeneous only across a particular city/State. Further, the consumers availing point-to-point radio taxi service in a city would not avail the radio taxis operating in another city/State. The point-to-point taxi service is a localized service that is offered with the intent of meeting the local travel demand of consumer within a particular city/State. From the supply side also, it would not be feasible for a taxi service provider to generally offer taxi services in another city for local point-to-point travel due to factors such as cost, distance and regulatory barriers. Although in some cities/states, taxi operators might provide services between two neighboring cities/states, no such fact was highlighted by the Informants, OP or DG the present case. Thus, in the absence of any evidence to the contrary, the relevant geographic market would be the city of Bengaluru.

68. Accordingly, the relevant market in the present case would be the ‘market for radio taxi services in Bengaluru’.

69. In this relevant market, OP is alleged to be engaging in abusive conduct by way of predatory pricing within the meaning of Section 4 of the Act. The discounts/incentives offered by OP to the commuters/drivers are alleged to be anti-competitive, as the same are stated to be backed by deep pockets rather than an efficient pricing model of OP.

70. The scheme of the Act is such that provisions of Section 4 are only attracted when the entity under scrutiny holds a dominant position in the relevant market. Thus, whether OP holds a dominant position in the relevant market for radio taxi services in Bengaluru is a key issue for determination.

71. The Act explains dominant position as a position of economic strength enjoyed by the enterprise in the relevant market, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitor or consumer or the relevant market in its favour. Such ability of the enterprise to behave independently of competitive forces needs to be assessed in light of all relevant circumstances and the factors enlisted under Section 19(4) of the Act.
A complete and correct assessment warrants comprehensive examination of the competitive conditions of the market, taking into account the inherent characteristics of the market, the market structure, nature of competition, competitive strategies adopted by the market participants and all such factors that strengthen or weaken the market position of the enterprise under scrutiny. Thus, the assessment of a case would be unique to its own facts and market under consideration.

72. The market in the instant case is that of radio taxi services in Bengaluru. As per the investigation report, radio taxis got introduced in the city of Bengaluru in the year 2008 when Meru launched its services. Subsequently, the market saw the entry of new players like Mega Cabs, Easy Cabs and KSTDC. All these initial players were operating under an asset-owned model, wherein either they owned the vehicles or had third party owned vehicles exclusively attached to them. The mode of booking of taxis was via telephone calls to customer care or online through the respective website of the radio taxi operator.

73. The entry of OP into the relevant market, in the year 2011, marked a shift in two key dimensions of the radio taxi market in Bengaluru. First, the market witnessed the emergence of platform-based model, which connected the riders with driver-owned taxis, thus obviating the need for capital investment in acquiring and maintaining an exclusive fleet as required in the then prevalent asset-owned model. Second, it capitalized on the widespread use and adoption of internet and smartphone technology which facilitated the matchmaking between the drivers and commuters instantaneously in real time through a software application (‘App’) designed by OP and accessed by the riders/commuter on one side and drivers on the other side. The App takes a request for a ride from the prospective rider, search for the available (nearby) taxis on its platform, makes a match and puts the driver and the rider in contact with each other. An algorithm then sets the price and the revenue is shared between the driver and OP. This platform-based model competed with the labour intensive system of matching taxi drivers with riders through telephones and dispatch centers/websites.

74. Leveraging technology, the new model reduced transaction costs associated with matching dispersed drivers and riders which also meant lower search cost for riders and drivers. The use of new technology changed the nature of commercial transactions enabling OP to appropriate the untapped demand by reaching markets that they would not otherwise have reached. The platform facilitated transactions that search and transaction costs would otherwise have prevented. It is also pertinent to note that being the early adopter of the disruptive technology, OP left other competitors in the market in the position of followers. Thus, the entry of OP was a potential disruptive incursion into existing markets, thereby resulting in a shift of commuters availing transport services from other modes of transportation (not just from the existing radio taxis) to the App based radio taxis, which is evidenced by the manifold growth in the market for radio taxis that ensued.

75. The Informants, among other things, have delved into the issue of OP’s market share in the relevant market and its interpretation in the context of assessment of dominance at great length. The Informants have repeatedly hammered the argument that OP held a high market share in the relevant market throughout the period of investigation and is, thus, dominant. It is also submitted that a market share of more than 50% of an entity creates a presumption of dominance.

76. The data collected by the DG indicates that Meru was the market leader in 2012-13 and 2013-14 with an annual market share of 59-60% and 50-51% respectively in terms of number of trips. However, it lost its market position in the subsequent years with its share coming down to a miniscule 6-7% in 2015-16. Likewise, Easy cabs, which was the second largest player in 2012-13, lost its share drastically to have only an negligible market presence in 2015-16. On the other hand, Uber, which
entered the relevant market in 2013-14, expanded its network rapidly to account for nearly one third of the active fleet in the relevant market in 2015-16. In terms of annual number of trips, its share increased from 1-2% in 2013-14 to 30-31% in 2015-16.

77. On perusal of the market shares of OP and its competitors on the basis of annual/monthly number of trips in the relevant market during the period of investigation, two key observations are discernible. First, the incumbents such as Meru, Mega Cabs, Easy Cabs etc. have witnessed a decline in their market shares during the period of investigation, in terms of number of trips.

78. Second, notwithstanding the rapid growth in the market share of OP, a sharp deceleration in its share is observed in 2015-16, in terms of number of trips. In terms of monthly data, a decline in the market share of OP from February 2015 is evident. This decline was matched by a commensurate increase in Uber’s market share during the period.

79. The Informants have argued that OP has maintained a healthy lead over its competitors and maintained its market share in spite of the competition posed by Uber. It is also averred that decline in market share is not an indication of absence of dominance. Further, the market share of OP is more than the aggregate of its next two competitors and that the dip in the market share figures would make no difference to the analysis of dominance. To substantiate these arguments, the Informants relied on the judgements of General Courts in the European Commission in cases such as Akzo case, United Brands v. Commission, Wanadoo Interactive, British Airways, Astra Zeneca, Hoffman-la Roche etc., along with orders of the Commission in HT Media v. Super Cassettes and MCX-SX.

80. In this regard, the Commission notes that Section 19(4) of the Act emphasizes on the size and importance of the competitors, rather than the market shares of competitors. As a matter of record, in the present case, OP does not have an edge over all its competitors in terms of the size and resources. Interestingly, the investigation revealed that that Uber Inc., which is the parent company for Uber had a total capital investment of about 15 to 20 times of OP’s financial resources.

81. Based on the foregoing observations, the Commission is of the view that competitive constraints in the relevant market are to be assessed in a holistic manner, not solely on the basis of market shares of the alleged dominant entity. Market shares must be interpreted in the light of all the relevant market conditions. The cases relied upon by the Informants, when tested in the light of prevailing competition conditions in the relevant market, are found to be not applicable to the facts of the present case.

82. The Informants have argued that because of the strong network that OP has, it is difficult for other players to enter into the market. In this connection the Commission notes that, these sectors are often characterized by network externalities. The Informants have alleged that the network effects, posed by the platform-based model of OP, act as a barrier to entry and/or expansion. Existence/absence of entry barriers is also one of the relevant factors enshrined under Section 19(4) of the Act, while determining dominance of an enterprise. Accordingly, the issue of network effects and its bearing on dominance would merit careful attention.

83. In two-sided markets, network effects may enable a large platform/network to become dominant and insulate itself from potential competition as entrants may find it difficult to challenge the large incumbent. The strength of network effects thus becomes a key factor in the determination of dominance in such market. However, the strength of network effects will vary depending upon the nature of platform market under consideration. Generally, the number of participants or consumers using a platform is positively correlated with the value they get from their use of the platform. In other
words, large networks offer more value to users than small networks. Thus, platforms de-facto have to reap network effects to get a viable critical mass. In these markets, competition is often for control of the market by way of having a large and strong network. Aggressive competition in the early stages of network creation takes place, until the market settles in favour of a few enterprises. In such markets, market leadership position can be fragile or transient during the initial stage of evolution of the market.

84. In the relevant market under scrutiny, there are certain countervailing market forces that reduce the ability of even a very large platform to insulate itself from competition. The Commission agrees with the Informants that in a two/multi-sided market, network effects have a role to play in determining the competition dynamics and relative position of strength held by market players. The transportation service networks are likely to exhibit indirect cross-side network effects because increase in the number of riders attracts drivers and increase in the number of taxis/drivers benefits the riders. However, whether the network effects would act as an entry barrier in the relevant market depends on various factors.

85. In the present case, both OP and Uber are found to be aggressively competing with each other to attract participants, i.e. drivers and riders, on both sides of their platforms, which is necessary for reducing search and matching frictions. Despite OP having the largest network, the network effect was not strong enough to deter entry and rapid expansion of Uber.

86. Further, there are no significant costs preventing consumers from switching between different radio taxi apps. The radio taxi apps are offered for free and can be easily downloaded on smartphones and can coexist on the same handset. Thus, availing the services of one aggregator’s network does not preclude the use of another. Once these apps are installed on a device, riders can switch from one app to another in no-time. In fact, both drivers and riders can have applications developed by multiple service providers and can ‘multi-home’. The DG has clearly brought out in its report that the drivers/fleet owners connected to various aggregators through apps, can easily switch between different aggregators depending on the incentive scheme etc. by simply switching off or switching on their mobile handsets. The possibility and ease of multi-homing constrains the power of the platforms to act independently of the market forces. Absence of switching costs between different networks in the relevant market limits the constraints exerted by the established networks on newer entrants. The Commission is, therefore, of the view that the network effects in the present case do not seem to affect entry or expansion by the players equipped with strategies capable of attracting drivers/riders to new/existing networks. Moreover, as of now, competition in the relevant market is still unfolding and the market certainly has not tipped in favour of OP, as claimed by the Informants.

87. While examining entry conditions, it would be pertinent to also delve into other factors relevant for entry. In the erstwhile asset/ownership-based model, to be able to compete with the incumbent firms, an entrant needed to possess a significant number of cars in order to attract consumers. The new model, i.e. matching demand for and supply of rides via a platform, has obviated this requirement because a large number of individual drivers can be easily reached. Platform-based players hence find it easier to enter the market than traditional entrants given the reduced upfront costs of starting a business. Further, the entry of these enterprises does not necessarily have to split existing demand. Instead, innovative pricing and other business strategies allow them to increase demand and supply in an existing market.

88. Massive amount of capital mobilized by OP has also been pointed out as a key constraint faced by the smaller competitors or potential entrants in the relevant market. The Informant has relied
upon certain case laws to argue that requirement of huge finances in this market, for funding
discount/incentive schemes, act as a barrier to entry/expansion. In this regard, it is important to note
that though a very high capital requirement may have been perceived as an entry barrier traditionally,
in new economy sectors, the traditional concept of ‘capital requirements’ may not be applicable in
totality. What is notable and of significance in this context is the existence of a level-playing field in
access to finance. This is evidenced by the experience of technology start-ups across sectors in the
country which could access funding from various sources such as venture capital, angel networks,
private equity funds etc. Recently, network industries financed by capital markets have observed very
intense competition in innovative activities in India. The key to success in this fiercely competitive
environment is fast adaptation to changes and constant innovation in business models, technology,
pricing models to shake the markets out of equilibrium, and render old ways of doing business
uncompetitive, dislodging the existing market leaders.

89. The Commission further notes that the Informants have stressed upon the circular approach to
dominance and have suggested that the conduct of OP, i.e., predatory pricing, is an evidence of
dominance in itself. Relying on international jurisprudence and the order of the Commission in the
case of MCX Stock Exchange Ltd v. NSE and other, the Informants have suggested that abusive
conduct of the enterprise can also be relied on as a factor in assessing dominance. In this regard, the
Commission observes that the conduct of the enterprise can only be used as a complement rather than
a substitute for comprehensive analysis of market conditions. Most firms, dominant or not, can engage
in practices, such as exclusive dealing, below cost pricing, loyalty discounts etc. New entrants
commonly engage in such practices to gain a toehold in the market and holding them dominant based
on simple observation of conduct may have the undesirable result of chilling competition. On the
issue of interpretation of dominance based on the ability to affect consumers/competitors/relevant
market, it is to be borne in mind that market power is a matter of degree. In most markets, every
enterprise will have some degree of market power, by virtue of which they can affect consumers or
competitors in its favour to some extent. The narrow interpretation of the concept of dominance
offered by the Informant would mean that an entrant armed with a new idea, a superior product or
 technological solution that challenges the status quo in a market and shifts a large consumer base in
its favour would have to be erroneously held dominant. To preclude possibilities of such anomalies in
approach in assessing dominance, the Act lays down a holistic framework for assessing dominance
and lists out the relevant factors including relative strength of competitors, entry conditions and
countervailing power. Thus, the Commission is not convinced that conduct of OP, in the absence of
other important factors that determine dominance, can be accepted to be indicative of dominance.

90. Besides the aforesaid arguments, the Informants have also contested DG’s finding on
dominance, being solely based on the entry and presence of Uber in the relevant market. It is argued
that there has not been any effective entry in the relevant market post 2013, which shows the state of
competitive interactions amongst the players in the market. The Commission finds these arguments
are bereft of the correct understanding of basic tenets of competition law. Competition is not an end in
itself; it is a means towards a greater end which presumes that competition in or for the market inter
alia leads to desirable outcomes for the consumers ensuring wide variety of quality products/services
at best possible prices. Towards that end, as long as there is competition in and for the market
satisfying these outcomes, regulatory intervention is not warranted to either protect the existing
players or to increase the number of players in the market. Competition and competition law is not
about counting the number of firms in a particular relevant market to determine whether or not that
market is competitive.
Further, the Informants’ argument that decline in market share is not an indication of absence of dominance is not relevance in the current discussion as this was not the sole criteria for the Commission’s assessment of dominance. It is not only the decline in OP’s market share, but also the competitive constraints present in the relevant market that guided the Commission’s determination on the allegation of OP’s dominance.

In conclusion, based on collective consideration of the facts that the competitive process in the relevant market is unfolding, market is growing rapidly, effective entry has taken place thereby leading to gradual decline in OP’s market share, entry barriers are not insurmountable, there exist countervailing market forces that constrain the behavior of OP and the nature of competition in dynamic, innovation-driven markets, the Commission is of the considered view that OP’s dominance in the relevant market remains unsubstantiated.

The Commission further notes that in the alternative, the Informants have argued that Uber and Ola can both be held dominant simultaneously in the relevant market. While doing so, the Informant has also relied upon international case-laws, including a Canadian case law, where two entities MasterCard/Vista were held to be dominant. To substantiate their claim, the Informants have also stressed upon the following sub-clause (b) of Section 27 of the Act:

Section 27 (b): Impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

It has been argued that the use of word ‘enterprises which are parties to such agreements and abuse’ implies that there can be more than one enterprise which can be dominant and hence abusing their dominant positions. In this regard, the Commission notes that the Informants have mistakenly relied upon a penalty provision to infer an interpretation which is contrary to the charging section. In doing so, the Informants have applied the rules of literal interpretation in a very narrow sense to Section 27(b) without realizing that the literal interpretation of statutory provisions have to be dispensed with if they lead to absurd interpretation. Although rule of literal interpretation suggests that words used in a statute have to be construed as per their literal meaning, there are sufficient exceptions if the same leads to absurdity or meaning which is contrary to the other provisions of the Act. In any case the use of words ‘parties’ or ‘enterprises’ in Section 27(b) seems to be meant for parties entering into anti-competitive agreements and not for enterprise indulging in unilateral conduct.

The Commission observes that there are various provisions in the Act that signify the intent of the legislature that there cannot be more than one dominant enterprise in the relevant market at a particular point of time.

Provisions of Section 4 of the Act clearly stipulate that dominant position can be held by only one enterprise or one group. Section 4(2) states that "There shall be an abuse of dominant position, if an enterprise or a group—. The term ‘a’/‘an’ used in section 4(2) evidently states the singular form, which shows that the intention of the legislature was never to hold more than one enterprise to be in a dominant position, unless they are part of the group within the meaning of Section 5 of the Act.

Besides the usage of ‘a’/ ‘an’ in Section 4(2), the explanation (a) to Section 4 of the Act states as follows:

“dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to –
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(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect competitors or consumers or the relevant market in its favour.

(emphasis supplied)

98. The usage of words ‘operate independently’ appearing in the aforesaid definition clearly shows that the concept of ‘dominance’ is meant to be ascribed to only one entity. Further, the underlined words in the above explanation indicates that the whole essence of Section 4 of the Act lies in proscribing unilateral conduct exercised by a single entity or group, independent of its competitors or consumers. In the presence of more than one dominant entity, none of those entities would be able to act independent of one another.

99. Further, Section 19(4) of the Act, which enlists factors assessment of dominance, is also of relevant in this regard. The plain reading of the factors mentioned under Section 19(4) signifies that the focal point of such assessment is the alleged dominant entity, around which the assessment revolves. If there was any scope of more than one entity being envisaged by the Act, factors like ‘size and resources of competitors’, ‘economic power of the enterprise including commercial advantages over competitors’ etc. would not have found place under Section 19(4) of the Act.

100. Furthermore, in Section 28 of the Act, which specifically deal with division of enterprises enjoying dominant position, the usage of the words unambiguously indicates that the Act does not provide for more than one enterprise to be dominant in the relevant market.

101. Lastly, the Commission finds it appropriate to refer to the Competition (Amendment) Bill, 2012 (Bill No. 136 of 2012) which lapsed due to dissolution of Lok Sabha. Clause 4 of the said Bill states as follows:

‘In section 4 of the principal Act, in sub-section (1), after the words "orgroup", the words "jointly or singly" shall be inserted.’ (emphasis supplied)

102. The aforesaid proposed amendment further reinforces the proposition that there is no scope in the present scheme of the Act, either expressly or by implication, to contemplate the presence of two independent entities as dominant at the same time in the relevant market. Had there been any scope for such interpretation, this amendment would not have been required.

103. Based on the foregoing discussions, it can be concluded that the Act does not allow for more than one dominant player under Section 4. Rather the existence of two strong players in the market is indicative of competition between them, unless they have agreed not to compete, which also can be only be looked into under Section 3 of the Act, not Section 4. Hence, the present argument of the Informant regarding the collective dominance of OP and Uber is rejected herewith.

104. The in-depth analysis in the preceding paragraphs clearly demonstrates that, during the period under investigation, OP did not have the ability to act independently of its competitors or consumers in the market. In the absence of dominance of OP, examination of abuse or any analysis of pricing strategy by OP is neither warranted nor permitted under the provisions of the Act.

105. Taxis are not a new feature in the transport sector in India. Historically, the sector featured a mix of black-yellow and private taxis, which were mainly unorganised. While the black yellow taxis could be booked by hailing a hand or approaching at a taxi stand, the private taxis were restricted in terms of accessibility owing to information asymmetry between the riders/drivers about the demand/supply situation. The introduction of radio taxi model in the year 2008, by Meru, brought some transformation that enabled booking of taxis via telephone calls or online. Soon, other players
like Mega Cabs, Easy Cabs etc. entered the market. All of these were operating under the asset-owned model.

106. The emergence of platform-based model, introduced by OP in the relevant market, challenged the well-established asset-owned model in this industry. The platform-based model allowed real-time tracking of prospective riders and drivers on an App to facilitate quick booking and availability of taxis at a click/touch of a button/icon. The drivers were no more constrained to run the taxis idle, after dropping a rider and the riders were also not obliged to pay for the taxi’s return fare, which was a norm, at least in the unorganized sector.

107. Thus, to attract prospective consumers/rider to experience the taxi services on this newly introduced model, it was necessary to make it attractively affordable to riders and profitable to drivers. The data on record shows that the taxi industry grew exponentially after the emergence of platform-based model (as much as 1900%) which can be attributed to the strategies adopted by the app based taxi operators. OP and Uber have, in a manner, revolutionized the taxi market by providing radio taxi services at abysmally low prices.

108. The Commission does not fully disagree with the Informants that the low prices of OP are not because of cost efficiency, but because of the funding it has received from the private equity funds. But as discussed above, there is no evidence that the access to such funding was inequitable and that the market for financing was not competitive and had aberrations. Moreover, it was their penetrative pricing strategy that facilitated them to garner high market shares in short span of time as well as develop the networks to a size that could provide sufficient positive externalities to the participants of the network.

109. At this stage, it is difficult to determine with certainty the long-term impact of this pricing strategy as the market is yet to mature. Without going into the legitimacy of OP’s pricing strategy, suffice to say that besides statutory compulsion of non-intervention in the present case, as OP is not dominant in the relevant market, the Commission is hesitant to interfere in a market, which is yet to fully evolve. Any interference at this stage will not only disturb the market dynamics, but also pose a risk of prescribing sub-optimal solution to a nascent market situation.

110. Based on the foregoing reasons, the Commission is of the view that the evidence on record does not establish the dominance of OP and its consequent abuse within the provisions of Section 4 of the Act. Hence, the cases are thus hereby closed.

111. The Secretary is, hereby, directed to inform the parties accordingly.

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(CCI, Case No. 66 of 2012, Dated : 05/11/2012)

CORAM
H.C. Gupta (Member), R. Prasad (Member), Geeta Gauri(Member), Anurag Goel (Member), M.L.
Tayal (Member), Justice S.N. Dhingara (Retd.)(Member).

ORDER UNDER SECTION 26(2) OF THE COMPETITION ACT, 2002

The present information has been filed by Ajay Devgn Films (‘the informant’) under Section 19(1)(a)
of the Competition Act, 2002 (‘the Act’) against Yash Raj Films Private Limited (‘OP No. 1’), Yash
Raj P.P. Associates Private Limited (‘OP No. 2’), Yash Raj Puri& Co. Pvt. Ltd. (‘OP No. 3’), Yash
Raj Pal Film Distributors (Banglore) Pvt. Ltd. (‘OP No. 4’), Yash Raj Vandana Film Distributors Pvt.
Ltd. (‘OP No. 5’) and Yash Raj Kushagra Arts Pvt. Ltd. (‘OP No. 6’) (collectively referred to as
‘opposite parties) alleging inter-alia contravention of sections 3 and 4 of the Act.

2. The informant is a sole proprietary concern of a well known Bollywood actor engaged in
production of films. OP No. 1 is a company incorporated under the Companies Act, 1956, engaged in
production and distribution of films. OP No. 2 to 6 are various other companies associated with OP
No. 1 engaged in distribution of films all over India. As per the allegations, the opposite parties were
dominant in the relevant market of ‘film industry in India’. The film business mainly involves three
stages—production, distribution and exhibition. A producer spends money during the making of the
film. A film Distributor acquires distribution rights from the producer of the film. The distributor then
makes copies of the film, spends money on publicity, advertising, marketing, cost of prints and other
distribution costs. The film distributors, either themselves or through sub-distributors, then enter into
agreement with the exhibitors (owners of the single screen theatres and multiplexes) for screening of
the films. The revenue generated at the exhibition stage is shared by the producers, distributors and
exhibitors as per their respective revenue-sharing arrangements.

3. The informant’s grievance is that the opposite party released its mega starer film EkTha Tiger on
15th August, 2012. At that time the opposite parties were contemplating to release another untitled
film later named as Jab Tak Hai Jahan (JTHJ) at the time of Diwali. The opposite parties before the
release of EkTha Tiger had put a condition on single screen theatres that if they wanted to exhibit
EkTha Tiger, they would have to simultaneously agree to exhibit the other film JTHJ at the time of
Diwali. Any single screen theatre who did not agree to this and did not enter into the agreement.

4. It is contended by the informant that since EkTha Tiger was a big ticket film bound to be a block
buster and its exhibition was profitable for the single screen theatres, majority of single screen
theatres entered into agreement for exhibition of both the films because of the big name and
dominance of opposite party. Since there was a threat that the opposite parties would not allow
exhibition of even EkTha Tiger if the contract for exhibition of other film was not entered
simultaneously, it amounted to abuse of dominance. The single screen theatres under compulsion had
to enter into this contract. The informant alleged that this was violation of section 3 as well as section
4 of the Competition Act. The informant submitted that EkTha Tiger was released at the time of EID
and JTHJ is to be released at the time of Diwali. This grievance of the informant arose because the
informant feared that he would not get enough theatres for his own film Son of Sardar because of the
agreement of single screen theatres with the opposite parties at the time of releasing EkTha Tiger. The
informant contended that the agreement between the opposite parties and the film exhibitors for exhibition of the two films together amounted to contravention of section 3(4)(a), 3(4)(b) and 3(4)(d) as well as contravention of section 4(2)(a).

5. The Commission has perused the information and heard the counsels for the informant. The informant alleged contravention of sections 3(4) and 4 of the Act. Dealing first with section 3(4), it may be noted that the agreements between the opposite parties and single screen theatres are undoubtedly vertical in nature. The distributors and exhibitors operate at different levels in the value chain of film business, and the impugned agreement between them is vertical. The informant, inter alia, argued that this agreement is in the nature of a tie-in arrangement prohibited under section 3(4)(a) of the Act. The Commission is not convinced with the said allegation. There is a tie-in arrangement in this case whereby the opposite parties tied its earlier release with its forthcoming release. However, as per the scheme of the Act, tie-in arrangements per se are not violative of section 3(4)(a) of the Act. Whether such an agreement is prohibited under the Act depends upon its actual or likely appreciable adverse effect on the competition in India. The governing principle under section 3(4) is 'appreciable adverse effect on Competition in India'. The guiding factors are stated under section 19(3) to assess whether any agreement is causing or likely to cause an appreciable adverse effect on competition. The factors are as follows:

(a) creation of barriers to new entrants in the market;
(b) driving existing competitors out of the market;
(c) foreclosure of competition by hindering entry into the market;
(d) accrual of benefits to consumers;
(e) improvements in production or distribution of goods or provision of services;
(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

6. Considering the effect of the impugned agreement on the touchstone of factors elucidated under section 19(3), the Commission is of the view that the impugned agreement is not affecting the competition in the Indian markets as such. The agreement has neither created entry barriers for new entrants nor drove existing competitors out of the market, nor is there any appreciable effect on the benefits accruing to the ultimate consumers viz. the viewers. The single screen theatres were aware at the time of entering this agreement in July, 2012, that many other films were likely to be released during Diwali. At that particular time, the single screen theatres took a business decision to screen two films of opposite parties (one during Eid and other at Diwali, respectively) rather than screening any other film that may be released. Some single screen theatres refused to enter into such an agreement and were free to screen any film they wished to, including that of the informant. This is also a competitive decision taken by the single screen theatres in their own interest. It was a legitimate commercial decision taken by the parties to the agreement at that particular time. Also, the agreements have not curtailed informant's right to screen its film altogether. Single screen theatres, as per the earlier report of DG, contribute only 35% of revenue and multiplex theatres contribute about 65% of the revenue. The multiplexes are not constrained from exhibiting informant's film. The Informant is free to exhibit its film on multiplexes and on those single screen theatres which did not enter into agreement with opposite parties. Moreover, the release of film can be preponed or postponed as per the availability of screens by a distributor. The impugned agreement is purely commercial in nature
between parties promoting their economic interests and as such does not affect any particular market. The impugned agreement, therefore, does not violate section 3(4) of the Act.

7. The act of booking theatres by a distributor for its two films simultaneously when the theatre owners have the liberty either to agree or not to agree, is not a restraint on the freedom of business of theatre owners. The theatre owners can wait for other films and can refuse to book their theatres simultaneously for two films. Even otherwise the non significant position held by the single screen theatres does not cause any adverse effect on the competition. As per the information available with the Commission, even single screen theatres in some of the states are further sub-divided in category A, category B and category C and the distributors discriminate between these categories and do not allow release of new films in category B or category C theatres and only choose category A theatres. Thus the market of exhibition of new films on single screen theatres in the context of this case is not of enough significance to cause an appreciable adverse effect on the competition. Even otherwise, the market cannot be restricted to any particular period like Eid or Diwali and the market has to be considered a market available throughout the year. If many high ticket mega starrer films compete with each other to be released only on the occasion of festivals, the choice lies with the theatres and each theatre is at liberty to book its theatre even in advance and it cannot be said that this had appreciable adverse effect on the market. The subject of appreciability is of huge practical importance for the competition. The Commission cannot issue restraint orders in respect of agreements which are of minor importance. While issuing restraint orders, the Commission has to keep in mind the overall exhibition market and not a particular period of the market.

8. As far as section 4 is concerned, the informant alleged that the opposite parties were dominant in the relevant market of 'film industry in India'. The informant however failed to substantiate how 'film industry in India' was the relevant market and how the opposite parties were dominant in this relevant market. While inquiring whether an enterprise enjoys a dominant position or not under section 4, the Commission is required to consider all or any of the following factors stated under section 19(4), namely:—

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market;
(k) social obligations and social costs;

(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry.

9. The informant did not place on record data either of market share or of economic strength to show how the opposite parties were dominant in the proposed relevant market on the basis of above stated guiding factors. It was argued by the counsels for the informant that the opposite parties were dominant because OP No. 1 was big banner production house and 6 had big name and had given several block buster films. No enterprise can be considered dominant on the basis of big name. Dominance has to be determined as per law on the basis of market share, economic strength and other relevant factors stated under section 19(4) of the Act. The Commission is unable to accept such a narrow approach while determining the relevant market. A large number of movies are released in India every year. As per the information available in public domain, in Bollywood itself, 107 and 95 films were released in 2011 and 2012 (till now) respectively. Out of this, the opposite parties produced only 2-4 films each year. This cannot be said to amount to dominance even in the Bollywood industry, leave aside film industry in India. Therefore, the claim of the informant that opposite parties were dominant players in the market 'film industry in India' cannot be accepted. There is prima facie no contravention of section 4 of the Act.

10. In view of the forgoing, the Commission is prima facie of the opinion that there is no contravention of the provisions of the Act in the present case. This case is, therefore, fit for closure under section 26(2) of the Act.
Etihad Airways PJSC and Jet Airways (India) Limited Combination
Combination Registration No. C-2013/05/122 Date of Order: 12.11.2013

Order under Section 31(1) of the Competition Act, 2002:

A. INTRODUCTION
1. On 1st May 2013, the Competition Commission of India received a notice under sub-section (2) of Section 6 of the Competition Act, 2002 given by Etihad Airways PJSC and Jet Airways (India) Limited. The notice was given to the Commission pursuant to an Investment Agreement (“IA”), a Shareholder’s Agreement (“SHA”) and a Commercial Co-operation Agreement (“CCA”), all executed on 24th April 2013……
2. In terms of Regulation 16 (1) of the Combination Regulations, the Parties, vide their letter dated 3rd June 2013, informed the Commission that, on 27th May 2013, they have made certain amendments to the SHA, CCA and the Corporate Governance Code (“CGC”), a code agreed to be adopted pursuant to the SHA. The Parties submitted that the changes to the SHA, CCA and the CGC were clarificatory in nature and the core nature of the transaction remains unchanged. The Commission considered the changes and noted the same on 6th June 2013….
3. In terms of sub-regulation (3) of Regulation 19 of the Combination Regulations, Air India was required to furnish its views/comments on the proposed combination by 29th October 2013. After seeking extension of time twice, Air India furnished its response on 8th November 2013, broadly raising two main concerns viz. impact of the alliance on the competitive landscape of the India-Abu Dhabi route and impact of the alliance on Indian aviation and Air India. These concerns have been considered and addressed in the assessment of the combination.

B. COMBINATION
10. It has been stated in the notice that the proposed combination relates to acquisition of 24% equity stake and certain other rights in Jet by Etihad.

C. PARTIES TO THE COMBINATION
11. Etihad, a company incorporated in the United Arab Emirates (UAE), is stated to be the national airline of UAE and is based in the emirate of Abu Dhabi. Etihad is wholly-owned by the Government of Abu Dhabi and is primarily engaged in the business of international air passenger transportation services. Etihad also operates Etihad Holidays (a division of Etihad Airways offering holiday packages to the airline’s passenger destinations, including its home base, Abu Dhabi), Etihad Cargo (a division of Etihad Airways offering cargo services linked to its international route network and aircraft fleet) and a global contact centre organization as part of its commercial group. The Abu Dhabi International Airport located at Abu Dhabi, the capital of the UAE, operates as Etihad’s hub airport. Etihad is also stated to hold 29.21 percent equity stake in Air Berlin; 40 percent equity stake in Air Seychelles; 10 percent equity stake in Virgin Australia and 2.9 percent equity stake in Aer Lingus.
12. Jet, a listed company incorporated in 1992 under the provisions of the Companies Act, 1956, is primarily engaged in the business of providing low cost and full service scheduled air passenger transport services to/from India. Jet also provides air transportation services for cargo, maintenance, repair & overhaul services and ground handling services. Jet Airways Cargo is the cargo division of Jet which operates through the passenger flights with belly space cargo capacity and does not operate any dedicated cargo flight. Jet Lite (India) Limited is a wholly-owned subsidiary of Jet and operates low cost air transportation service under the brand name ‘JetKonnect’.

D. JURISDICTION
13. As per the details provided in the notice, the combined value of assets and turnover of the Parties meet the threshold requirements for the purpose of Section 5 of the Act.
14. In the instant case, both the Parties are engaged in the business of providing international air transportation services. The background of the IA pursuant to which 24 percent equity interest in Jet is proposed to be acquired categorically states that the Parties wish to enhance their airline business through a number of joint initiatives. In such a case, Etihad’s acquisition of twenty-four percent equity stake and the right to nominate two directors, out of the six shareholder directors, including the Vice Chairman, in the Board of Directors of Jet, is considered as significant in terms of Etihad’s ability to participate in the managerial affairs of Jet.

15. With a view to achieve the purported objective of enhancing their airline business through joint initiatives, the Parties have also entered into the CCA. Under the CCA, the Parties have *inter alia* agreed that: (A) they would frame co-operative procedure in relation to (i) joint route and schedule coordination; (ii) joint pricing; (iii) joint marketing, distribution, sales representation and cooperation; (iv) joint/reciprocal airport representation and handling; (v) joint/reciprocal technical handling and belly-hold cargo and dedicated freight capacity on services (into and out of Abu Dhabi and India and beyond); (B) the Parties intend to establish centres of excellence either in India or Abu Dhabi; (C) Etihad would recommend candidates for the senior management of Jet; (D) Jet would use Abu Dhabi as its exclusive hub for scheduled services to and from Africa, North and South America and UAE; and (E) Jet would refrain from entering into any code sharing agreement with any other airline that has the effect of: (i) bypassing Abu Dhabi as the hub for traffic to and from the above said locations, or (ii) is detrimental to the co-operation contemplated by the CCA.

16. It is observed that the Parties have entered into a composite combination comprising *inter alia* the IA, SHA and the CCA, with the common/ultimate objective of enhancing their airline business through joint initiatives. The effect of these agreements including the governance structure envisaged in the CCA establishes Etihad’s joint control over Jet, more particularly over the assets and operations of Jet.

E. ASSESSMENT OF THE PROPOSED COMBINATION

*Indian aviation sector*

17. According to a recent report of the Ministry of Civil Aviation, Government of India, over the past decade, the domestic passenger segment of the Indian civil aviation sector grew by a Compound Annual Growth Rate (CAGR) of 14.2% and the air cargo segment grew by 7.8%. An IATA report further points out that the market already has some 150 million travellers passing through its airports, and by 2020 traffic at Indian airports is expected to reach 450 million, making it the third largest aviation market in the world. In 2012, the number of international passengers was approximately 41 million. Of those, 28.5 million travelled to the west of India, mainly to Europe and North America. Based on the latest IATA growth forecast this market is expected to grow to approximately 42.6 million passengers by 2018.

18. However, the sector has multiple challenges and issues to address in order to realize an effective passenger growth in future. To address the concerns surrounding the operational viability of Indian carriers, the Government of India has initiated a series of measures including allowing Foreign Direct Investment by foreign airlines (up to 49% stake) in Indian carriers.

19. The CCA between Jet Airways (India) Limited and Etihad Airways PSIC, as a part of the acquisition of 24% equity stake, is so drafted such that the parties through their proposed strategic alliance can extract the potential of a wider airline network. It is in this background that the competition assessment of this deal has been undertaken.

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1 Alliances are cooperation agreements entered into by airlines with the objective of integration of services. The alliance partners operate as a single entity. However, their individual corporate identity is still maintained. Airline passengers demand seamless service on international markets ‘from anywhere to anywhere’. However, no airline is able to efficiently provide such a service on its own metal as traffic density on many city pairs does not make it viable for a single airline to provide non-stop services on all conceivable routes. In order to meet such diverse travel demands at an efficient cost, airlines have had to seek commercial partners to help them provide the network and service coverage required.
International Aviation Regulatory Framework

20. The regulatory framework for the international aviation industry has developed on the basis of principles laid in the 1944 Convention on International Civil Aviation. The Convention recognises exclusive sovereignty of countries over their airspace and different freedoms that could be granted by a country to a foreign nation/airline.

21. Air transport services between two nations primarily depend on the bilateral air service agreement (BASA) between them, which establishes the framework for scheduled air services between them. The BASAs generally specify the entitlements of the designated airline(s) of both countries in terms of frequency of operations, number of seats, points of call etc. BASAs envisaging minimal or no restriction on the ability of designated airlines of the party nations are referred to as open-skies agreement. For instance, the BASA between India and United States provides for an open skies arrangement, allowing the designated carriers to operate scheduled air services without limitation on the number of flights that could be operated and the number of passengers who could be carried.

Relevant Market

22. In order to assess the impact of the proposed transaction on competition, the first step is to define the relevant market. Relevant Market for passenger air transport services is normally defined on the basis of point of origin or point of destination (“O&D”) pair approach on a non-directional basis. According to this approach, every combination of a point of origin and a point of destination is considered to be a separate market from the consumers' viewpoint. Furthermore, two or more adjacent airports may be categorized in the same relevant O&D market. Consumers may consider multiple airports, within a reasonable distance or time for a given O&D pair, substitutable. If airports are considered substitutable, then these too can be included as origin and destination.

23. The O&D approach to market definition is an appropriate starting point for the competition analysis in air transport cases. The O&D approach is essentially a demand-based approach to market definition. It has the advantage of being capable of taking into account several relevant competition aspects in the airline sector, if not all. The O&D approach is applied by the European Commission as well as by many other competition authorities. This approach of defining the relevant market is also in consonance with the definition of the relevant market as given in Section 2(t) of the Act, where a group of products or services lie in the same relevant market if they are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices or intended use.

24. Further, consumers may consider direct flights (i.e. non-stop services) and indirect flights (i.e. one-stop services) as substitutable. The main factors that determine whether indirect flights provide a competitive constraint to direct flights are the type of passengers (whether they are time-sensitive or non-time-sensitive), the duration of the flight and the connecting time, flight schedules and prices. Either one or all of the factors can be of consideration, by a consumer based on her trade-offs and preferences, in determining substitutability. Furthermore, for the purpose of concluding substitutability, indirect flights offered by independent competitors of the parties can be considered as a competitive alternative for passengers.

25. Thus, when taking a demand-based approach to market definition it is essential to make a distinction between different groups of passengers, given that different services may be substitutable for different kinds of customers. It is particularly worth considering a distinction between time-sensitive and non-time-sensitive passengers as well as between point-to-point passengers and connecting passengers.

26. For a time-sensitive passenger, price considerations may not be that important and she may not find indirect flights substitutable for direct flights. For a very price-sensitive passenger, price consideration may dominate all decisions and she may thus find substituting indirect flights with direct flights even if it means sacrificing on time.

27. This distinction can be of great importance in competition assessment. Generally, time-sensitive travelers expect faster connections and timeliness in the flight schedules. Non-time-sensitive travelers expect faster connections and timeliness in the flight schedules. Non-time-
sensitive travelers are interested in obtaining the lowest fares, and are willing to accept longer travel time and less flexibility as long as their price considerations are met.

28. The assessment of the proposed combination primarily focuses on the effect of the proposed combination on those services that are offered by both the Parties.

29. The Acquirer (i.e. Etihad) is the national airline of Abu Dhabi, primarily offering international airline services to and from Abu Dhabi, and between other international destinations using Abu Dhabi airport as the transit hub. Whereas, Jet is a listed Indian company offering both domestic and international air transportation services. Jet is stated to offer services between different call points in India to 20 destinations abroad.

30. At the outset, it is observed that Etihad is not operating in Indian domestic air transportation services i.e. air transportation between two airports located within India. Therefore, the proposed combination is not likely to raise any competition concern in the said sector.

31. Considering that India has adopted an open skies policy in respect of international air cargo transportation and relatively more number of players including dedicated freight carriers are present in the said sector, the proposed combination is considered not likely to give rise to any competition concern in the business of international air cargo transportation services to and from India.

32. In the light of the foregoing discussion, the Commission is of the view that the relevant market for the purpose of this transaction is the market for international air passengers:
(a) on the O&D pairs originating from or ending in 9 cities in India (Kochi (COK), Bombay (BOM), Hyderabad (HYD), Thiruvananthapuram (TRV), Bangalore (BLR), Kozhikode (CCJ), Ahmedabad (AMD), Delhi (DEL) and Chennai (MAA)) to/from United Arab Emirates (UAE) from;
(b) on the O&D pairs originating from or ending in India to/from international destinations on the overlapping7 routes of the parties to the combination.

33. In arriving at the relevant market definition the Commission made a distinction between different groups of passengers and observed that Indian passengers on the 9 direct overlapping O&D pairs are generally more price sensitive and less time sensitive. Moreover, passengers living in the catchment areas of two or more airports may consider those airports as possible substitutes when choosing which airport they fly from and which airport they fly to. For instance, it must be stressed that in the case of passengers travelling to Abu Dhabi, there are 3 international airports in UAE that passengers might consider as substitutable with each other i.e. Abu Dhabi (AUH), Dubai (DXB) and Sharjah (SHJ). Depending on the O&D pair, either DXB or SHJ airport can be considered in the same O&D pair. Abu Dhabi, Dubai and Sharjah airports are within 2 hours distance from each other. Several carriers serve Delhi and Mumbai with direct flights to/from DXB. Etihad and Emirates offer free shuttle bases between Abu Dhabi and Dubai, and there are other modes of public transport between them as well. The direct horizontal overlap between Jet and Etihad occurs between the UAE and India as origin and destinations points.

34. India-UAE passenger traffic consists of approximately 3.5 million origin and destination passengers per year. Out of this, Jet has only 20 percent share and Etihad carries only 5 percent of the market. Jet and Etihad provide overlapping services in 9 nonstop markets between India and UAE. On all these nine routes Jet and Etihad services can be considered as substitutable. When the two airlines cooperate on such routes, they no longer compete against each other and there is an apprehension that competition may be reduced. However, the market share of Jet and Etihad combined in all nine nonstop O&D city pairs is below 36% and face intense competition from other airlines serving the same routes. The elasticity of demand is expected to be sufficiently high on all O&D pairs, as the Commission observed that Indian passengers flying to these destinations are fare sensitive and in many cases time insensitive. So, any tendency to raise fares on such routes will not be profitable for the airlines.

35. Having accepted the fare sensitivity of the Indian passengers, the Commission also undertook a competition assessment of the O&D city pairs between India and Abu Dhabi alone, since Jet and Etihad both fly to AUH and currently provide competition constraint to each other. Moreover, Etihad has its hub in AUH. Air India in its response of November 8, 2013
had expressed concern about the competitive landscape of the India-AbuDhabi route. The competition assessment of the Commission for these 9 O&D pairs between India and Abu Dhabi is as follows: (a). AUH-BLR: Etihad (EY) Airways is already dominant and the deal does not alter the picture. For the given small market size on this route there are still many indirect flights such as Qatar, Air India, Oman and Sri Lankan that can restrain market power, if exercised. (b). AUH-HYD: For the given small market size on this route there are still many indirect flights such as Emirates, Air India and Oman that can restrain market power, if exercised. The airport substitutability with DXB (with Emirates as the carrier to DXB), in any case increases the catchment area for this O&D city pair and hence there are no competition concerns. (c). AUH-BOM: The combined market share of Jet and Etihad increases to 55% but competition concerns are addressed by the presence of AI as a credible competitor with a market share of 32%. The airport substitutability with DXB in any case increases the catchment area for this O&D city pair that will substantially reduce the possibility of exercise of market power. Moreover, indirect flights can also restrain market power, if exercised. (d). AUH-DEL: The combined market share of Jet and Etihad increases to 50% but competition concerns are addressed by the presence of AI as a credible competitor with a market share of 24%. The airport substitutability with DXB (with Emirates as the carrier to DXB), in any case increases the catchment area for this O&D city pair that will substantially reduce the possibility of exercise of market power. Moreover, indirect flights can also restrain market power, if exercised. (e). AUH-MAA: Similar arguments of airport substitutability (DXB and AUH in the same catchment area) and other cheaper indirect flights apply. (f). AMD-AUH: A very small market size (10 passengers a day) that cannot support multiple direct flights, many one stop flight options available (g). AUH-TRV: AI Express cheaper and has a direct flight, airport substitutability with DXB and other indirect flight options provide sufficient competition constraints. (h). AUH-COK: Similar arguments as for AUH-TRV, hence sufficient competition constraints exist. (i). AUH-CCJ: Similar arguments as for AUH-TRV, hence sufficient competition constraints exist.

While it may be relevant to understand whether the other airports in UAE are substitutable to Abu Dhabi, considering the fact that the Parties and Air India are likely to increase their services, in a phased manner, on Mumbai-Abu Dhabi and Delhi-Abu Dhabi routes, the potential apprehension regarding reduced competition, if any, is mitigated. It is also likely that other airline show interest in these routes as and when the Government proposes to allocate the remaining seats under the MoU.

There are 38 routes to/from India to other destinations where Etihad and Jet fly and there is at least one competitor on the route. Of these, on only 7 routes Jet Etihad have a combined market share of greater than 50 percent. Of these 7 routes, on 3 routes either Jet or Etihad has a market share of less than 5 per cent. For instance, on the Bombay (BOM)-Brussels (BRU) route, Jet has a market share of 72.90% and Etihad has a market share of 3.30%. On the AMD-BRU route Jet has a market share of 72.90% and Etihad has a market share of 3.30%. On the AMD-BRU route Jet has a market share of 83.10% while Etihad has a market share of 2.61%. Thus, post transaction change in market share is marginal for the combined entity and the deal does not alter the competition dynamics.

As discussed for the UAE market, the Commission did consider airport substitutability in the same catchment area of these O&D pairs and the possibility of their being in the same relevant market. When these airports are considered as substitutable, the combined market share of Jet and Etihad decrease significantly (it comes down to around 30%). For the one remaining route Chennai-Toronto (i.e MAA-YYZ), where market share is greater than 50%, Jet and Etihad are not the closest competitor and there is at least one credible competitor in the market from which the customers can choose from an alternative (Emirates, Lufthansa, and British Airways). In summary, on all routes, passengers have a major carrier to choose from other than Jet and Etihad which can constraint the pricing behavior of Jet and Etihad and ensure that the passengers can select between more than one airline even after the combination.
39. The Commission has gone beyond the O&D approach for competition assessment and has also given due consideration to the potential of network effects of the proposed combination. Some aspects of network competition can be dealt within the framework of the O&D approach (e.g. the role of connecting traffic, the substitutability of indirect services) but many aspects can get overlooked in a pure O&D approach of competition assessment. The network effects can be described as the macro competition issues, which have been discussed in addition to individual O&D markets, such as competition between airline hubs and between alliances. A more comprehensive competition assessment is not just restricted to the market share analysis of the hub airline (EY in this instance) - i.e. not just restricted to the market shares between cities in India to the hub (AUH in this instance) but the competition in the onward bound traffic and competition between systems.

40. The parties have submitted data on 21st June 2013 and 30th August 2013 in respect of market share on various O&D route pairs from India to points in United States viz. New York, Chicago, Washington, San Francisco and Los Angeles. According to the data, the MIDT combined market size from points in India to the above stated destinations in US is 10.49 lakh passengers and the combined market share of Jet and Etihad work out to 1.09 lakh passengers i.e. 10.42 %.

41. When considering network effects, the competition assessment is carried out beyond gateway traffic and is not just restricted to O&D pairs. In evaluating the proposed combination the Commission accordingly considered competition between airline systems. Airline systems are either formed through alliances (that are multilateral) or strategic equity partnership between two airlines of the kind in this proposed combination. Linked hub-and-spoke airline network form integrated system of complementary markets, and this is what is proposed in this combination. The complementarity of routes of Jet and Etihad makes the network effects stronger. Hubs, increased access to gates, slots, and other infrastructure interfaces that link markets- competition is increasingly among systems and not merely on point to point (PTP) O&D City pairs. In this context, merely high market shares of the hub airline on point to point, O&D pairs do not imply lack of competition. In fact there are many instances where the hub airline may have high market shares in PTP O&D pairs. Oman Air has a 56 percent market share in the Kozhikode (CCJ)-Muscat (MCT) route and Sri Lankan Airlines has a 59 percent market share in the Colombo (CMB)-Delhi (DEL) PTP O&D. Many such instances can be cited. So, Jet-Etihad combined market share on AUH-DEL and AUH-BOM route would not mean that competition is absent on west bound traffic from India and in fact, competition would be present from alternative networks and alliances/systems for the west bound traffic.

Abu Dhabi as the exclusive hub

42. One of the clauses of the CCA requires Jet to use Abu Dhabi as its exclusive hub for scheduled services to and from Africa, North and South America and the UAE (the Exclusive Territories), and there will be certain O&D pairs where Jet cannot code share with other airlines. For eg: Mumbai-Chicago, Delhi-Chicago, New Delhi- New York, Mumbai – New York Mumbai-Johannesburg etc. are O&D city pairs on which Jet has to cancel its code share with other airlines and flow its traffic through Abu Dhabi.

43. It is conceivable that cancellation of code share agreements can lead to market foreclosure and abuse of dominance on such routes in the absence of other strong competitors. However, all such routes face competition from other credible players such as American Airlines, Air India, Emirates, South African Airways, Qatar Airways etc. which would constrain the market power of Etihad-Jet combined. On the majority of such O&D pairs, the combined market share of Jet and Etihad is less than 30% and there are other strong players present on such routes. Further, Etihad already has strong presence on routes to Chicago and Johannesburg from few cities in India. However, Jet’s share is negligible on such routes and post transaction change in market share is negligible. Thus, on all these O&D pairs, the competitive concern from concentration of market shares does not arise.

44. At the moment, as part of the deal the parties have decided to extend their relationship to
23 cities. Thus, Jet flights from multiple points in India would operate to Abu Dhabi and then continue onwards to points in Middle East and North America. This allows a Jet customer to 'cross-connect' at Abu Dhabi further on to any number of Jet and Etihad flights beyond Abu Dhabi, creating a whole host of cities. For instance, Jet could leverage Etihad’s strong presence in Europe by bringing Indian passengers through Abu Dhabi. Etihad directly flies to 17 destinations and, through its elaborate code sharing agreements with 13 airlines, offers seamless connectivity to more than 80 cities.

45. The code share relationship also allows customers in multiple Indian cities, the ability to seamlessly connect to other destinations including smaller markets abroad using the Etihad network. Abu Dhabi’s proximity to India enables the option of deployment of smaller, narrow body aircraft from these secondary markets in which larger wide body aircraft would have been unviable. In addition, by utilizing the hub in Abu Dhabi and the transfer flows that it creates, Jet will be able to sustain larger aircraft on the routes from Delhi and Mumbai to North America which will increase the capacity and therefore choice available to the Indian consumer.

**Potential efficiencies**

46. Airline alliances create substantial opportunities for generating economic benefits, many of which are dependent at least in part on the closer integration achievable. These benefits can be viewed as demand-side – relating to the creation of new or improved services through expanded networks or seamless service, or supply-side – essentially the ability to produce the same services at lower cost taking advantage of traffic densities, improved utilization of capacity and lower transaction costs.

47. In the aviation industry two carriers and passengers might benefit by integrating complementary networks. One of the benefits of the proposed transaction would be lower fares for passengers travelling to smaller cities in India through one of 9 major destinations served by Etihad. Jet and Etihad already have a code share agreement on such one stop routes. Post transaction, Jet and Etihad will cooperate on pricing decision on such routes through the proposed CCA. The possibilities to coordinate pricing, fares and inventory/yield management will eliminate inherent inefficiencies to pricing and enable the members to offer more attractive fares to customers from smaller cities can seamlessly travel to international destinations without interlining to Delhi or Mumbai and thus saving on interline fares. 48. Perhaps one of the most fundamental potential benefits from closer cooperation and integration arises from economies of traffic density. This type of economy of scale is a key feature of airline network models. Airline alliances extend the Hub and Spoke (H&S) network with a large presence at both ends of the market. Feeder routes and services delivering connecting traffic can increase the traffic density on a city-pair, allowing airlines to operate larger, more efficient aircraft and to spread end point fixed costs over a larger number of passengers.

49. On the issue of likely impact on fares on routes from India to destinations in exclusive territories, the proposed transaction will generate significant synergies for both airlines in terms of network efficiencies and cost savings. Additionally, the parties to the transaction plan to introduce substantial capacity into the Indian market. Both of these factors could and generally do create downwards pressure on fares.

50. Airline alliance has an increased incentive to harmonize and improve customer service standards. They have an incentive to integrate their operations to provide a true ‘online’ quality experience throughout the processes of ticketing, seat selection, airport lounges, gate location for connecting services, on board amenities and service quality, baggage policies and problem resolution, frequent flyer plans and refunds and exchanges. As these aspects are integrated and jointly managed, the customer receives a correspondingly simplified and consistent service. This aspect of cooperation is likely to provide consumer benefit without anti-competitive results, due to the intense, global competition between alliances for customer loyalty.

51. In addition to the potential efficiencies of the proposed combination on account of the synergies expected to be generated, the Commission also considered the importance of the proposed equity infusion and its implication for the Indian aviation sector. Jet, which has been
beleaguered with debt, in addition to infusion of cash, hopes to access a large global network. Jet’s debt of INR 89,994 million on March 31, 2013 is nearly 50% of its 2013 revenues and the business reported substantial negative equity at the end of March 2013 of minus INR 18,272 million. This equity infusion will be beneficial to Jet as it will strengthen its operational viability. The Commission is of the view that this partnership will allow Jet to continue to compete effectively in the relevant markets in India and internationally.

**Contestability**

52. On the issue of contestability, one of the major impediments to domestic airlines launching international services is the 5 year/20 aircraft rule. This regulation requires that Indian carriers must complete five years of domestic operations before being permitted to launch international services, a restriction which does not apply to foreign airlines. Once this rule is relaxed, the contestability of the Indian aviation sector is likely to increase and make the Indian aviation sector more competitive.

**Impact of BASA**

53. As per the Bilateral Air Services Agreement (BASA) entered into between India and the UAE in 2008 (as amended), Abu Dhabi was entitled to operate 13,330 seats per week in each direction through points specified viz. Mumbai, Delhi, Thiruvananthapuram, Kochi, Chennai, Kozikhode, Jaipur and Kolkata. Three additional points were further granted (Hyderabad, Bangalore and Ahmedabad) in 2009. Now, with the latest bilateral agreement signed, the seat entitlement is agreed to be increased to 24,330 seats per week with immediate effect, 37,130 seats from IATA winter 2014 and 50,000 seats from IATA 2015 schedule. The bilateral agreement and consequent increase in seats is of relevance to the competition assessment of this deal, given the fact that Abu Dhabi is to be used as an exclusive hub by Jet.

54. With very realistic assumptions regarding the distribution of increased seats to Jet in addition to the increased seats to Etihad (totalling 50,000 total seats per week/each way up from current 13,300, to Etihad), the market shares forecasted as a consequence of the revised bilateral of the combined entity increases from 17.06 to 22 percent. This does not portend any possibility of market power that is likely to be exploited.

55. Moreover, the Commission also recognizes that ASAs for other airlines are not likely to be static and some of the other airlines including European airlines have the flexibility of increasing fleet capacity as they are governed by almost open skies or similar ASAs. Secondly, the increase in BASA for Jet and Etihad has to be implemented in phases.

56. Last but not the least, the Commission is of the view that the dynamic responses of other airlines as a consequence of this proposed deal which, cannot be completely evaluated ex-ante, will change the competitive landscape that is most likely to benefit the Indian aviation passenger.

**F. CONCLUSION:**

57. Considering the facts on record and the details provided in the notice given under sub-section (2) of Section 6 of the Act and the relevant factors mentioned in sub-section (4) of Section 20 of the Act, the Commission is of the opinion that the proposed combination is not likely to have appreciable adverse effect on competition in India and therefore, the Commission hereby approves the same under sub-section (1) of Section 31 of the Act. This approval however, shall have no bearing on proceedings under section 43A of the Act.

58. It is however to be noted, that the Commission is granting the present approval, under section 31(1) of the Act, and that such approval is being granted, pursuant to the underlying competition assessment, based upon the information/details provided by the Parties, in the notice given under subsection (2) of Section 6 of the Act, as modified and supplemented from time to time. This approval should not be construed as immunity in any manner from subsequent proceedings before the Commission for violations of other provisions of the Act. It is incumbent upon the Parties to ensure that this ex-ante approval does not lead to ex-post violation of the provisions of the Act……
Note: One of the members, Mr. Anurag Goel, passed a minority order stating that the proposed combination is likely to cause an appreciable adverse effect on competition within the market of international air passenger transportation from and to India.

In addition on 19.12.2013, the Commission, in exercise of its power under Section 43A of the Act imposed a penalty of Rupees One Crore on Etihad for consummating parts of the deal without getting its approval.

The appeal filed was dismissed by CompAT on account of no locus standi in the Appellant. (Appeal No. 44 of 2013).

* * * *
**Sun Pharmaceutical Industries Limited and Ranbaxy Laboratories Limited Combination**

Combination Registration No. C-2014/05/170
Date of Order: 05.12.2014

Order under Section 31 (7) of the Competition Act, 2002

**INTRODUCTION**
1. On 06.05.2014, the Competition Commission of India received a notice under sub-section (2) of Section 6 of the Competition Act, 2002 given by Sun Pharmaceutical Industries Limited and Ranbaxy Laboratories Limited
2. The Notice was filed with the Commission pursuant to (a) a scheme of arrangement approved on 06.04.2014 by the respective board of directors of Sun Pharma and Ranbaxy under Sections 391 - 394 and other applicable provisions of the Companies Act, 1956 and the Companies Act, 2013 (b) Transaction agreement executed between the Parties on 06.04.2014 and (c) Investor agreement executed on 06.04.2014 between Sun Pharma and Daiichi Sankyo Company Limited, which holds approximately 63.40 per cent of the outstanding shares of Ranbaxy……..

**PARTIES TO THE COMBINATION**
5. Sun Pharma is an integrated specialty pharmaceutical company. It manufactures and markets a large basket of pharmaceutical formulations as branded generics in India, USA and several other markets across the world. The key therapy areas of Sun Pharma are central nervous system, dermatology, cardiology, orthopaedics, ophthalmology, gastroenterology, nephrology, etc. It is also *inter alia* engaged in manufacture and sale of active pharmaceutical ingredients (APIs).
6. Ranbaxy is a vertically integrated company that *inter alia* develops manufactures and markets generic, branded generic, over-the-counter (OTC) products, APIs and intermediates. It has a presence in many therapy areas including anti-infectives, cardiovascular, pain management, central nervous system, gastrointestinal, respiratory, dermatology, orthopaedics, nutritionals and urology. Ranbaxy holds 46.79 per cent equity in Zenotech Laboratories Limited (“Zenotech”) which is stated to be a pharmaceutical company engaged in development, manufacture and supply of injectible products having portfolio of niche therapies like chemical oncology and biotechnology products from bacterial and mammalian cell-culture.

**PROPOSED COMBINATION**
7. The proposed combination relates to the merger of Ranbaxy into Sun Pharma pursuant to the scheme of arrangement approved by their respective board of directors under Sections 391 - 394 and other applicable provisions of the Companies Act, 1956 (as amended) and the Companies Act, 2013. Post combination, the existing shareholders of Ranbaxy will hold approx. 14 per cent of the equity share capital of the Merged Entity on a pro forma basis. As stated by the Parties, pursuant to the proposed combination, the promoter group of Sun Pharma is expected to own approx. 54.7 per cent equity share capital of the Merged Entity. Further, asRanbaxy holds 46.79 per cent equity share capital of Zenotech, the proposed combination would result in acquisition of this 46.79 per cent equity share capital of Zenotech by Sun Pharma from Ranbaxy. Zenotech is a listed company and as per the details given in the Notice, in terms of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011, Sun Pharma has announced an open offer for 28.1 0 per cent equity share capital of Zenotech through the public announcement dated 11.04.2014 to be commenced after the merger of Ranbaxy into Sun Pharma.

**INVESTIGATION UNDER SECTION 29 OF THE ACT**
8. The Commission in its meeting held on 07.07.2014 considered the facts on record, details provided in the Notice and the responses filed by the Parties and formed a *prima facie* opinion
that the proposed combination is likely to cause an appreciable adverse effect on competition in the relevant markets in India. Therefore, the Commission decided to issue a show-cause notice to the Parties in terms of subsection (1) of Section 29 of the Act. Accordingly, a show cause notice was issued to the Parties under sub-section (1) of Section 29 of the Act (“SCN”) on 16.07.2014, as per which the Parties were directed to respond, in writing, within thirty days of the receipt of SCN, as to why investigation in respect of the proposed combination should not be conducted.

9. The response of the Parties to the SCN was received on 19.08.2014. The Commission considered and assessed the Response to the SCN in its meetings held on 25.08.2014 and 27.08.2014 and formed a prima facie opinion that the proposed combination is likely to have an appreciable adverse effect on competition. Accordingly, under sub-section (2) of Section 29 of the Act read with Regulation 22 of the Combination Regulations, the Commission directed the Parties to publish details of the proposed combination within ten working days from the date of the direction, for bringing the proposed combination to the knowledge or information of the public and persons affected or likely to be affected by such combination. The said direction was communicated to the Parties vide letter dated 27.08.2014.

10. In accordance with the directions of the Commission, the said details of the proposed combination were published by the Parties on 04.09.2014 in Form IV contained in Schedule II to the Combination Regulations and other applicable provisions. Vide the said publication, the Commission invited comments/objections/suggestions in writing, in terms of the provisions of sub-section (3) of Section 29 of the Act, from any person(s) adversely affected or likely to be affected by the proposed combination, within fifteen working days from the date of publication, i.e., by 25.09.2014.

11. Pursuant to such publication, the Commission received comments from different stakeholders which were duly noted by the Commission in its meeting held on 13.10.2014. In terms of sub-section (4) of Section 29 of the Act, the Commission further decided to seek para-wise clarification(s) from the Parties on the comments submitted by stakeholders and certain other information. Accordingly, a letter was issued to the Parties seeking such details on 17.10.2014, the response to which was submitted by the Parties on 03.11.2014.

12. The Commission considered the proposed combination in its meeting held on 03.11.2014. The Commission also considered the response of the Parties submitted on 03.11.2014 and the proposed combination in its meeting held on 20.11.2014 and decided to propose Divestiture to the Parties in respect of certain relevant markets. In the said meeting, the Commission was also of the view that response of the Parties was not comprehensive enough to arrive at the proposal for modification under sub-section (3) of Section 31 of the Act. Accordingly, the Commission decided to seek detailed information from the Parties in relation to structuring of the divestiture package, transitional supply and other arrangements, etc., under the provisions of sub-section (4) of Section 29 of the Act and sub regulation 4 of Regulation 5 of the Combination Regulations. Accordingly, on 21.11.2014, a letter was issued to the Parties seeking aforesaid information, the response to which was received by the Commission on 24.11.2014. The Commission in its meeting held on 26.11.2014 considered the said response of the Parties and decided to proceed with the case in accordance with the provisions contained in Section 31.

COMPETITION ASSESSMENT

Relevant Market

13. It is observed that both the Parties are engaged in the manufacture, sale and marketing of various pharmaceutical products including formulations/medicines and APIs. Both the Parties are primarily generics manufacturers (i.e., producers of generic copies of originator drugs) with a small number of licensed molecules. Sun Pharma and Ranbaxy are also in the process of research and development on various pharmaceutical products. For the purpose of the
competition analysis, the Parties categorized their products on the basis of classification of pharmaceutical products given by the AIOCD (All India Organization for Chemists and Druggists) in terms of the hierarchy of therapeutic area, super group, group, and molecule.

14. The various generic brands of a given molecule are chemical equivalents and are considered to be substitutable. Therefore, the molecule level would be most appropriate for defining relevant markets on the basis of substitutability. Alternatively, pharmaceutical drugs falling within a therapeutic group may also be considered as constituting a potential relevant market. However, in this regard it is noted that the pharmaceutical drugs within a group may not be substitutable because of differences in the intended use, mechanism of action of the underlying molecule, mode of administration, contra indications, side effects etc. Moreover, in generics markets, competition primarily takes place between different brands based on the same molecule.

15. Accordingly, it is appropriate to define the relevant product market at the molecule level, i.e., medicines/formulations based on the same API may be considered to constitute a separate relevant product market. Further, as per the submissions in the Notice, the products of the Parties are available across India and therefore, the relevant geographic market is considered to be the territory of India.

16. It is observed that there are horizontal overlaps between the products of the Parties in various molecules. The relevant market of formulations based on each of these molecules was examined for the purpose of competition analysis of the proposed combination.

17. In addition to identification of horizontal overlaps between the products of the Parties in certain molecules, the Commission also considered the pipeline products of the Parties with a view to assess the potential competition concerns, if any.

18. In relation to APIs, it is noted that APIs are the primary inputs in the manufacture of formulations and thus constitute a separate relevant market, distinct from formulations. In this regard, as per the information given in the notice, the Commission observed that both the Parties sell APIs to third parties.

I. Market for Formulations

19. **Horizontal Overlap:** On the basis of combined market share of the Parties, incremental market share as a result of the proposed combination, market share of the competitors, number of significant players in the relevant market etc., the Commission focussed its investigation on forty nine relevant markets where the proposed combination was likely to have appreciable adverse effect on competition in the relevant market in India.

20. In addition to these forty nine relevant markets, the Commission also identified two relevant markets for formulations wherein Sun Pharma is already marketing and selling its products whereas Ranbaxy has pipeline products to be launched in the near future.

**Markets with appreciable adverse effect on competition**

21. Based on its assessment of the following relevant markets, the Commission is of the view that the proposed combination is likely to result in appreciable adverse effect on competition in the following markets:

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Market</th>
<th>Share of Ranbaxy (%)</th>
<th>Share of Sun Pharma (%)</th>
<th>Other Competitors (Name and %)</th>
<th>Conclusion Drawn</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>TAMSULOSIN + TOLTERODINE G4C13</td>
<td>60-65</td>
<td>30-35</td>
<td>Intas (5-10)</td>
<td>The combined market share of the Parties is [90-95] per cent resulting in near monopoly in the</td>
</tr>
</tbody>
</table>
The proposed combination will eliminate a significant competitor and is likely to have an appreciable adverse effect on competition in this relevant market.

The combined market share of the Parties is [90-95] per cent resulting in near monopoly in the market. The proposed combination will eliminate a significant competitor and is likely to have an appreciable adverse effect on competition in this relevant market.

The other players in the relevant market have negligible market share and thus may not be in a position to exert significant competitive constraint on the Merged Entity. Moreover, the market share of other players has been decreasing over the period of last four years. The proposed combination will eliminate a significant competitor and is likely to have an appreciable adverse effect on competition in this relevant market.

Ranbaxy has recently entered this market and
therefore, the proposed combination will eliminate a significant competitor and is likely to have an appreciable adverse effect on competition in this relevant market.

<table>
<thead>
<tr>
<th>Product Description</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Market Share</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Olanzapine + Fluoxetine, N5A6</td>
<td>20-25</td>
<td>40-45</td>
<td>Intas (30-35)</td>
<td>The combined market share of the Parties is [65-70] per cent. The proposed combination will eliminate a significant competitor and is likely to have an appreciable adverse effect on competition in this relevant market.</td>
</tr>
<tr>
<td>Levosulpiride + Esomeprazole, A3F49</td>
<td>5-10</td>
<td>50-55</td>
<td>Torrent (35-40)</td>
<td>The combined market share of the Parties is [60-65] per cent. The proposed combination will eliminate a significant competitor and is likely to have an appreciable adverse effect on competition in this relevant market.</td>
</tr>
<tr>
<td>Olmesartan + Amlodipine + Hydrochlorothiazide, C9E22</td>
<td>5-10</td>
<td>30-35</td>
<td>Macleods (15-20), Micro Labs (10-15)</td>
<td>Pursuant to the proposed combination, the Merged Entity is likely to be the market leader with a market share of [40-45] per cent. The market share of Merged Entity would be almost double the market share of next competitor. Moreover, market share of Micro Labs has been continuously decreasing over the last four years. The proposed combination will eliminate a significant competitor from the market and number of significant competitors would reduce from four to three. Therefore, the proposed combination is likely to have an appreciable adverse effect on competition in this relevant market.</td>
</tr>
</tbody>
</table>
Markets without appreciable adverse effect on competition

22. In relation to five relevant markets of formulations containing, i.e., Ibandronate | M5A5, Olopatadine | R6A47, Lactitol | V6E4, Lubiprostone | A6F5 and Cyclobenzaprine | M3B7, the Parties have submitted that Ranbaxy has discontinued its product and accordingly, at present there is no horizontal overlap between the products of the Parties. Further, in relation to relevant market of Somatostatin | H1D3, it has been submitted by the Parties in the Response to SCN that the products of Sun Pharma and Ranbaxy are entirely different and it is only due to an error that they had been classified in a single category in the AIOCD database. Sun Pharma’s product is based on Somatostatin which is used in the treatment of severe and acute intestinal bleeding whereas Ranbaxy’s product is based on Somatropin which is used for the treatment of growth hormone deficiency. Accordingly, it is noted that at present there being no overlap, the proposed combination is not likely to have an appreciable adverse effect on competition in the said markets.

23. It is noted that some of the molecules identified above for further investigation are covered in the National List of Essential Medicines (NLEM). In respect of these molecules, the Parties have submitted that these are subject to price control by the National Pharmaceutical Pricing Authority (NPPA). Further, exit from these markets is cumbersome and requires approval of the NPPA. Out of the above said forty nine relevant markets, formulations based on four molecules are covered under NLEM. The detailed assessment of these four relevant markets is as follows:

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Market</th>
<th>Share of Ranbaxy (%)</th>
<th>Share of Sun Pharma (%)</th>
<th>Other Competitors (Name and %)</th>
<th>Conclusion Drawn</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>OLANZAPINE, N5A5</td>
<td>0-5</td>
<td>35-40</td>
<td>Intas, 30-35; Alkem 5-10; Micro Labs 5-10</td>
<td>The combined market share of the Parties is [35-40] per cent. However, the incremental market share is only [0-5] per cent and the market position of the Merged Entity will only be marginally strengthened by the proposed combination. Also, the market share of Ranbaxy has been declining over the past few years. The competitors are likely to be in a position to exert significant competitive constraint on the Merged Entity. The proposed combination is not likely to have an appreciable adverse effect on competition in this relevant market.</td>
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<td>2.</td>
<td>CLOPIDOGREL, B1C5</td>
<td>0-5</td>
<td>25-30</td>
<td>Lupin, 15-20; Torrent, 10-15; Intas</td>
<td>The combined market share of the Parties is [30-35] per cent. However, the incremental</td>
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<tr>
<td>10-15; Cipla, 5-10; Sanofi, 5-10; market share is only 0-5 per cent and the market position of the Merged Entity will only be marginally strengthened by the proposed combination. Thus, the proposed combination is not likely to have an appreciable adverse effect on competition in this relevant market.</td>
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<tr>
<td>The combined market share of the Parties is 20-25 per cent. These competitors are likely to be in a position to exert significant competitive constraint on the Merged Entity. Thus, the proposed combination is not likely to have an appreciable adverse effect on competition in this relevant market.</td>
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<tr>
<td>The combined market share of the Parties is 20-25 per cent. These competitors are likely to be in a position to exert significant competitive constraint on the Merged Entity. The proposed combination is not likely to have an appreciable adverse effect on competition in this relevant market.</td>
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</table>

24. (In 32 relevant markets, the CCI concluded that the combination is not likely to have an appreciable adverse effect on competition on grounds like existence of significant competitors in the relevant market, incremental market share being marginal, decline in the market shares of the parties over the past years and presence of market leader in the relevant market other than the parties etc.).

25. **Pipeline Products**: In addition to the above said markets, the Commission also identified two pipeline products of Ranbaxy, i.e., formulations containing Sitagliptin, which fall under therapeutic category Oral Anti-diabetics and are expected to be launched in the near future. In this regard, it is noted that Sun Pharma already markets formulations containing these molecules under the brand name “Istavel” and “Istamet”, respectively, under a licence from the patent owner, viz., MSD. There is one more player, i.e., Glenmark which also markets its products in both of these markets. It is likely that on consummation of the proposed combination, the development of these formulations by Ranbaxy could be stalled and the product(s) would not be launched in the market.

26. As per the information given by the Parties, it is noted that the validity of the said patent is under dispute and the decision of the relevant judicial authority is awaited. If the said patent is upheld by the judicial authorities, then generic versions of these formulations cannot be launched. However, if the said patent is rejected, then considering the attractiveness of the market, many companies are likely to be in a position to launch their generic versions of these
molecules. It has also been submitted by the Parties, that MSD has secured injunctions against few companies from launching their products in India, thus indicating that there is a likelihood of new entries in these markets, if the patent is rejected by the courts. Thus, the proposed combination is not likely to have an appreciable adverse effect on competition in these pipeline products.

II. Market for APIs

27. **Horizontal Overlap**: As already noted above, both the Parties sell APIs to Third Parties. However, it is observed that the horizontal overlap in APIs is insignificant to raise any competition concern.

28. **Vertical integration post-merger**: The primary competition concern due to vertical integration post-merger is whether the proposed combination leads to input foreclosure (i.e., the Merged Entity raises downstream rivals' costs by restricting their access to an important input) or to customer foreclosure (i.e., the Merged Entity forecloses upstream rivals' access to their downstream customers). It is observed that both the Parties are engaged in the business of APIs as well as formulations. Post combination, there is a possibility of vertical integration between the Parties as the APIs manufactured and sold by one Party can be used as raw material for the formulations produced by the other.

29. In this regard, it is noted that manufacturing and sale of APIs is not the primary business of either of the Parties. Sun Pharma’s revenue from the sale of APIs constitutes only five per cent of its total revenues. Similarly for Ranbaxy, the sale of APIs constitutes only six per cent of its total revenues. It is further observed from the information provided by the Parties that in relation to the APIs sold by the Parties to the Third Parties, there are a number of suppliers, both within and outside India, which supply APIs to the formulation manufacture. Moreover, as per the information available in the public domain and the information provided by the Parties, these APIs are also imported into India. Accordingly, the proposed combination is not likely to result in vertical foreclosure.

30……..The Commission is of the opinion that the proposed combination is likely to have an appreciable adverse effect on competition in India in the following relevant markets for the formulations containing:

i. Tamsulosin + Tolterodine
ii. Rosuvastatin + Ezetimibe
iii. Leuprorelin
iv. Terlipressin
v. Olanzapine + Fluoxetine
vi. Levsulpiride + Esomeprazole
vii. Olmesartan + Amlodipine + Hydroclorthiazide.

32……..The Commission is of the opinion that the adverse effect of the proposed combination on competition can be eliminated by suitable modification.

33. Accordingly, the Commission proposed modification to the combination in terms of sub-section (3) of Section 31 of the Act ….. The Commission proposed that:

a. Sun Pharma shall Divest:

i. All products containing Tamsulosin + Tolterodine which are currently marketed and supplied under the Tamlet brand name.
ii. All products containing Leuprorelin which are currently marketed and supplied under the Lupride brand name.

b. Ranbaxy shall Divest:

i. All products containing Terlipressin which are currently marketed and supplied under the Terlibax brand name.
ii. All products containing Rosuvastatin + Ezetimibe which are currently marketed and supplied under the Rosuvas EZ brand name.
iii. All products containing Olanzapine + Fluoxetine which are currently marketed and supplied under the Olanex F brand name.
iv. All products containing Levsulpiride + Esomeprazole which are currently marketed and supplied under the Raciper L brand name.
v. All products containing Olmesartan + Amlodipine + Hydrochlorothiazide which are currently marketed and supplied under the Triolvance brand name.
c. The Parties shall Divest, or procure the Divestiture of the Divestment Product(s) within the First Divestiture Period, absolutely and in good faith, to Approved Purchaser(s), pursuant to and in accordance with Approved Sale and Purchase Agreement(s).
d. The Divestiture shall not be given effect to unless and until the Commission has approved (i) the terms of final and binding sale and purchase agreement(s) and (ii) the purchaser(s) proposed by the Parties. e. The proposed combination shall not be effected by the Parties until Approved Sale and Purchase Agreement(s) have been entered into in accordance with the Order. Pursuant to execution of the Approved Sale and Purchase Agreement(s), the Parties shall ensure that the Closing takes place within First Divestiture Period.
34. The Parties submitted below mentioned amendment to the modification proposed by the Commission under the provisions of sub-section (6) of Section 31 of the Act. The Parties have further submitted that in case an amendment is not acceptable to the Commission, it may be ignored.

a. The Commission may reconsider/modify the requirement provided in subparagraph (e) of paragraph 33 above.
b. With respect to the relevant market of products containing Leuprorelin, the Commission may consider Divestiture of products containing Leuprorelin currently marketed and supplied by Ranbaxy under the brand name Eligard instead of divestiture of products containing Leuprorelin currently marketed and supplied under Sun Pharma’s brand name Lupride.
35. The Commission in its meeting held on 05.12.2014 considered the above said amendments and decided as follows:

a. Not to accept the amendment submitted by the Parties under sub-paragraph (a) of paragraph 34 above.
b. To accept the amendment submitted by the Parties in relation to the relevant market of products containing Leuprorelin, i.e., Ranbaxy shall Divest its products containing Leuprorelin currently marketed and supplied under the brand name Eligard. As an additional safeguard, as proposed by the Parties, in the event the Divestiture of distribution rights of Eligard is not achieved within the First Divestiture Period, Sun Pharma shall Divest its products containing Leuprorelin currently marketed and supplied under Sun Pharma’s brand name Lupride.
36. Pursuant to the above, the Commission hereby approves the proposed combination under sub-section (7) of Section 31 of the Act, subject to the Parties carrying out the modification to the proposed combination as provided below:

**MODIFICATION TO THE PROPOSED COMBINATION**

37. Sun Pharma shall Divest all products containing Tamsulosin + Tolerodine which are currently marketed and supplied under the Tamlet brand name.
38. Ranbaxy shall Divest:
   i. All products containing Leuprorelin which are currently marketed and supplied under the Eligard brand name. In the event the Divestiture of distribution rights of Eligard is not achieved within the First Divestiture Period, Sun Pharma shall Divest its products containing Leuprorelin currently marketed and supplied under Sun Pharma’s brand name Lupride,
   ii. All products containing Terlipresslin which are currently marketed and supplied under the Terlibax brand name.
   iii. All products containing Rosuvastatin + Ezetimibe which are currently marketed and supplied under the Rosuvas EZ brand name.
iv. All products containing Olanzapine + Fluoxetine which are currently marketed and supplied under the Olanex F brand name.

v. All products containing Levosulpiride + Esomeprazole which are currently marketed and supplied under the Raciper L brand name.

vi. All products containing Olmesartan + Amlodipine + Hydrochlorothiazide which are currently marketed and supplied under the Triolvance brand name.

(The brands Tamlet, Eligard, Terlibax, Rosuvas EZ, Olanex F, Raciper L and Triolvance shall be collectively referred to as “Divestment Brands”). The Divestment Brands shall include all strengths, indications, dosages and packaging (in all forms).

39. The modification to the proposed combination aims to maintain the existing level of competition in the relevant markets in India through:
   a. the creation of a viable, effective, independent and long term competitor in the relevant markets pertaining to the Divestment Product(s);
   b. ensuring that the Approved Purchaser of Divestment Product(s) has the necessary components, including transitional support arrangements to compete effectively with the Merged Entity in the relevant markets in India.

40. The modification to the proposed combination shall be given effect to in accordance with the terms and conditions provided below.

Structure of the Divestment Product(s)

46. As stated by the Parties in their response dated 24.11.2014 none of the Divestment Product(s) are currently operated as a standalone business held by distinct legal entities within the respective Parties’ group of companies, or by dedicated management, sales and marketing personnel. On the basis of the said submission of the Parties, the Commission is of the opinion that the Divestment Product(s) shall include, inter alia, the Assets detailed in sub-paragraph (a) to (d) below and the transitional arrangements provided in (e) below, as agreed between the Parties and the Approved Purchaser subject to the approval of the Commission.

   a. All tangible assets including but not limited to all raw materials, stocks, work in progress, and semi-finished and finished goods relating to the Divestment Product(s).
   b. Intangible assets (including intellectual property rights) which contribute to the current operation or are necessary to ensure the economic viability, marketability and competitiveness of the Divestment Product(s); in case of shared know how (retained by the Parties for use in their other business), the Parties shall grant a non-exclusive, irrevocable, royalty free and perpetual licence.
   c. All licences, permits and authorisations (including marketing authorisations) issued by any governmental organisation, relating to the Divestment Product(s) and all contracts, leases, commitments and customer orders, relating to the Divestment Product(s).
   d. All customer records, credit records and other records, relating to the Divestment Product(s).
   e. At the option of the Approved Purchaser(s), the Parties shall extend such transitional support as may be required by the Approved Purchaser in order to ensure the continued supply of the Divestment Product(s) in the relevant markets.

47. The Divestment Product(s) shall not include:
   a. Any manufacturing facilities of the Parties.
   b. Intellectual property rights which do not contribute to the current operations and/or is not necessary to ensure the economic viability, marketability and competitiveness of the respective Divestment Product(s).
   c. Any rights to the domain name of the Parties.
   d. Books and records required to be retained pursuant to any statute, rule, regulation or ordinance, provided that an Approved Purchaser shall be entitled to obtain a copy of the same and shall be permitted access to the original of such books and records during normal business hou
e. General books of account and books of original entry that comprise the Parties permanent accounting or tax records.
f. Monies owed to the Parties by customers for the purchase of Divestment Product(s) and monies owed by the Parties to suppliers for materials used in the production of the Divestment Product(s), or to suppliers for the production of the Divestment Product(s).
g. The Parties names or logos in any form (except the logos and names pertaining to Divestment Product(s)).

Purchaser Requirements
55. The purchaser proposed by the Parties, in order to be approved by the Commission, must, *inter alia*:
   a. be independent of and with no connection whatsoever with the Parties;
   b. have the financial resources, proven expertise, manufacturing capability or ability to outsource manufacturing and incentive to maintain and develop the Divestment Product(s) as a viable and active competitor to the Parties in the relevant markets;
   c. be a company active in the sales and marketing of pharmaceutical products in the India; and
   d. neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Order will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Product(s).

Alternative Divestment Product(s)
60. If, the Parties do not reach agreement with the purchaser(s) regarding the Divestiture of all Divestment Product(s) within the First Divestiture Period, the Commission may direct the Parties to Divest the Alternative Divestment Product(s) and may under Regulation 27 of the Combination Regulations, appoint an independent agency as Divestiture Agency to effect the Divestiture.
61. In order to maintain the structural effect of the modification, the Parties shall, for a period of five years after the Closing Date, not acquire direct or indirect influence over the Alternative Divestment Product(s) pursuant to sale of Alternative Divestment Product(s) to Approved Purchaser(s)……
74. In carrying out the aforesaid modification, the Parties shall comply with the provisions of the Act, the Combination Regulations and the Competition Commission of India (General Regulations), 2009.
75. The Order shall stand revoked, if any time, the information provided by the Parties is found to be incorrect.

Note:
The Commission further made an order on March 17, 2015 whereby the Commission approved (a) Emcure as the Approved Purchaser of the Divestment Products and (b) the APA (Asset Purchase Agreement) and the SA (Supply Agreement), as agreed between the Parties and Emcure in relation to the Divestment Products.

* * * * *
Wal-Mart and Flipkart Combination
Combination Registration No. C-2018/05/571
Date of Order: 08.08.2018

Order under Section 31(1) of the Competition Act, 2002

A. Combination
1. On 18th May, 2018, the Competition Commission of India (Commission) received a notice under sub-section (2) of Section 6 of the Competition Act, 2002 (Act) given by Wal-Mart International Holdings, Inc. (Walmart), a subsidiary of Walmart Inc. for acquisition between 51% and 77% of the outstanding shares of Flipkart Private Limited (Flipkart) and matters incidental thereto (Proposed Combination). The notice was given pursuant to the execution of a Share Purchase Agreement on 9th May, 2018 by and among Walmart and certain shareholders of Flipkart (SPA); and a Share Issuance and Acquisition Agreement on the same day by and among Walmart and Flipkart (SIAA).

2. In terms of Regulation 14 of The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Combination Regulations), vide letter dated 24th May, 2018, Walmart was required to provide certain information/document(s) by 29th May, 2018. After seeking due extension of time, Walmart filed its response on 7th June, 2018.

3. Further, in terms of Regulations 5 and 19 of the Combination Regulations, vide letters dated 13th June, 2018 and 4th July, 2018, Walmart was asked to furnish additional information in relation to the Proposed Combination. Walmart filed its response on 26th June, 2018 and 23rd July, 2018, respectively.

4. As per the information provided in the notice, the various steps involved in the Proposed Combination are as under:

4.1. Pursuant to the SIAA, Walmart will subscribe to the ordinary shares issued by Flipkart for an aggregate purchase price of USD 2 billion in cash. WIH may assign its rights under the SIAA in whole or in part, to any other entity.

4.2. Pursuant to the SPA, contemporaneously with the closing of the Share Issuance, Walmart will purchase from the sellers preference shares and ordinary shares of Flipkart for an aggregate purchase price of approximately USD 14 billion in cash. Walmart may assign its rights under the SPA in whole or in part, to any other entity.

4.3. Immediately after the closing of the above acquisitions, all Flipkart preference shares will convert into ordinary shares. As a result, Walmart will hold approximately 51% - 77% of the outstanding shares of Flipkart.

4.4. At closing of the Share Transactions, Walmart or another affiliate of Walmart Group, Flipkart, and certain other shareholders of Flipkart will enter into a Shareholders Agreement, which will set forth the agreement of the Parties relating to the activities and governance of Flipkart and ownership and disposition of its shares.
B. Parties to the proposed combination

5. Walmart is a subsidiary of Walmart Inc. and belongs to the Walmart group. Walmart Inc. is an American multinational retail corporation that operates a chain of hypermarkets, discount department stores, and grocery stores. Walmart Group is present in India through its indirect wholly owned subsidiary - Walmart India Private Limited, which is engaged in wholesale cash and carry of goods (B2B Sales). On account of restrictions under the Foreign Direct Investment (FDI) Policy, Walmart India cannot engage in direct sales to consumers (B2C Sales). B2B Sales of Walmart India are carried on through the following two channels:

5.1. Best Price Stores: Walmart India owns and operates 20 Best Price Stores in 9 States across India. The first store opened in Amritsar in May 2009. A typical Best Price Store spans over 50,000 square feet and sells around 5,000 products, including a wide range of fresh, frozen and chilled foods, fruits and vegetables, dry groceries, personal and home care, hotel and restaurant supplies, clothing, office supplies and other general merchandise items, at competitive wholesale prices. Best Price Stores operate on a member only model and to enter and purchase from Best Price Stores, it is mandatory to become a member. In compliance with the Foreign Direct Investment norms, members are not retail consumers and usually belong to different business categories, such as: resellers, offices and institutions and hotels, restaurants and caterers. Walmart India also has an operational fulfilment centre in Mumbai that focuses on storing and delivering fast moving consumer goods to registered business members of Walmart India.

5.2. B2B e-commerce for members only: On 1st July 2014, Walmart India launched B2B e-commerce platform to make the products provided at the Best Price Stores available to members through the e-commerce platform also (https://www.bestprice.in/). This platform acts as an exclusive virtual store available only to registered Best Price members. Walmart India does not provide e-commerce B2B services in the market and the presence of Walmart India in the e-commerce segment is limited to its members.

6. As per the notice, Flipkart is principally an investment holding company incorporated in Singapore. In India, besides being engaged in B2B sales, Flipkart is also providing online marketplaces to facilitate trade between customers and sellers. The business activities of Flipkart in India are as under:

6.1. Wholesale cash and carry of goods (B2B Sales): Flipkart group is engaged in B2B sales across several product categories. Flipkart does not operate in the online B2B space. Goods are bought from various manufacturers, suppliers, distributors and the same are sold on an offline B2B basis to various third party retailers and re-sellers.

6.2. Marketplace based e-commerce platforms: Flipkart offers online marketplaces for e-commerce. These online platforms offered are Flipkart.com, Myntra.com, Jabong.com, etc. Under the FDI Policy, a marketplace based e-commerce platform cannot hold inventory and it could only act as an interface to facilitate sales between buyers and sellers. The marketplace based e-commerce platform, thus, just acts as an intermediary between various retailers and the final consumers. As per extant policy the company that operates the marketplace cannot itself be a retailer offering goods to the final consumer. Thus, Flipkart cannot maintain inventory and sell goods on
themarketplace as a retailer, its role is limited to a platform connecting retailers with the final consumers.

6.3. Provision of other ancillary services: Incidental to its main business activities, Flipkart also provides the following ancillary services:

(a) payment gateway, unified payment interface and prepaid payment instrument services;
(b) advertising services;
(c) information technology product related issues;
(d) logistics, courier and other allied services;
(e) installation, repair and other allied services; and
(f) technology based services.

6.4. Additionally, Flipkart is engaged in private labelling of products manufactured through third parties under certain brand names.

C. Assessment of the proposed combination

7. Before this Order delves into the competition assessment of the proposed acquisition, the Commission considers it pertinent to elaborate its legal mandate while assessing a combination as opposed to a conduct related to anticompetitive agreements and abuse of dominance. Unlike anti-competitive agreements and abuse of dominance conduct, that are prohibited, combinations (i.e. mergers, amalgamations and acquisitions) are only regulated under the Act.

8. A market structure with the presence of a large number of players, presence of a formidable competitor of sufficient scale and size and ease of entry are some of the fundamental factors indicative of a competitive market that will not allow any competition harm of a combination to play out in the market postcombination. If combinations do not alter the competition both in the horizontal and vertical markets based on the above parameters as spelt out in section 20(4) of the Act, then the combination does not pose any competition harm. The purpose of this assessment is to assess the extent of competition that would be lost solely as a result of the proposed combination. In general, a combination would pose competition concerns if the parties are close competitors in similar lines of business (horizontal overlaps, in combination parlance). Similarly, a combination between a manufacturer and distributor who are at different stages or levels of production chain in different markets (vertical overlaps, in combination parlance) may pose competition concerns if it is likely to foreclose the market for other distributors. The perception of competition harm would be an assessment of the competition landscape of the relevant markets based on several factors including market share, barriers to entry, extent of vertical integration, extent of competition likely to remain after the combination, etc.

9. In the instant case, pursuant to the Proposed Combination, Walmart group would hold substantial shares and control over Flipkart, which, inter alia, is engaged in B2B Sales, and provision of online marketplace platforms to facilitate trade between retailers and consumers (B2C). The Commission would examine the proposed combination from the perspective of horizontal overlap and vertical overlap.

9.1. Horizontal overlap

9.1.1. The Commission observes that both the parties are engaged in B2B sales and thus, there exists horizontal overlap between their businesses in the said segment. Walmart has proposed the relevant market as ‘pan-India market for B2B
sales’, which is being characterized by intense competition among a very large number of competitors – both online and offline; and both channels give the customers a plethora of choice.

9.1.2. It is observed that the both the parties to the Proposed Combination are entities with foreign investments and are thus governed by the stipulations under FDI Policy, which explains B2B Sales as “Cash & Carry Wholesale trading/Wholesale trading, would mean sale of goods/merchandise to retailers, industrial, commercial, institutional or other professional business users or to other wholesalers and related subordinated service providers. Wholesale trading would, accordingly, imply sales for the purpose of trade, business and profession, as opposed to sales for the purpose of personal consumption. The yardstick to determine whether the sale is wholesale or not would be the type of customer to whom the sale is made and not the size and volume of sales. Wholesale trading would include resale, processing and thereof sale, bulk imports with export/ex-bonded warehouse business sales and B2B e-Commerce.” This lays the boundaries of B2B sales within which the parties to the combination have to operate.

9.1.3. The Commission notes that B2B supply chain entails flow of goods from manufacturer to the wholesaler, retailer or institutional buyers. Such goods are typically bought in bulk and the recipient buys such goods for the purpose of using as inputs/raw materials for production of goods for sale or for re-sale of the products. Apart from the sellers and buyers in this segment, there are other incidental service providers who may facilitate the B2B Sale. Walmart has submitted that between every level of supply chain, there are enablers like logistics, financial intermediaries, service providers, etc.

9.1.4. The competition assessment of this transaction reveals that the parties are neither close competitors in the B2B sales nor have a combined market share that raises competition concern. Walmart has submitted that as per Indian Brand Equity Foundation, the retail market size of India for 2017 was estimated at USD 672 billion and 93% of retail trade is unorganized (traditional) trade. Walmart estimates that 30-40% of this to be the size of B2B sales across India and the combined market share of the parties in that would be less than five percent. It has been submitted that given the limited size of the B2B Sales of the parties to the Combination, the Proposed Combination is not likely to cause any adverse impact on competition. As per the notice, the market share of Walmart in B2B sales in India is less than half a percent and thus, the incremental changes on account of the proposed combination is insignificant.

9.1.5. In order to understand the extent of overlap, Walmart was asked to provide further information regarding B2B business of both the parties at the granular level of verticals. Upon examination of the relevant details, it was found that the operations of Flipkart were relatively strong in mobile and electronics products, which constituted substantial majority of its business. However, operations of Walmart in the same products was insignificant. On the other hand, operations of Walmart were focussed on groceries but Flipkart was not present in this segment. Both the parties do have some horizontal overlap in lifestyle products, which include skincare, haircare, oral care, baby & feminine hygiene, personal wash, apparel and shoes & accessories. But again, the combined value of sales of the parties in this segment is low and relatively insignificant to the size of the market for the said products. At the margin this combination, therefore, does not alter the current market structure.

9.1.6. The parties have not made a distinction between organized and unorganized B2B sales. They have considered both these as part of one relevant market. However, even if both the segments are redefined as separate markets and the parties
are considered to be present in organised B2B sales, such market still looks competitive due to the presence of larger players such as Reliance Retail, MetroCash and Carry, Amazon wholesale etc. Apart from these players, unorganised sector also pose a significant constraint on organised wholesalers.

9.1.7. Based on the foregoing, the Commission is of the view that the Proposed Combination is not likely to have any adverse implication on competition irrespective of the whether the market is taken as all B2B sales or narrower B2B markets on the basis of particular category of product sold by the parties to the combination. Accordingly, the relevant market for B2B segment is left open.

9.2. Vertical overlap

9.2.1. With respect to B2C sales, Walmart has submitted that the FDI Policy restricts the parties from engaging in business to consumer sales and thus, they are not engaged in the said segment. However, there is no restraint on the parties to offer an online marketplace platform to facilitate sales between retailers and consumers. Flipkart operates such platforms in the name of Flipkart.com, Myntra.com, Jabong.com, etc. Presently, Walmart is not engaged in any online marketplace business for B2C sales. Based on these, it has been further submitted that there is no vertical overlap between the businesses of the parties.

9.2.2. As the parties have regulatory restriction to engage in B2C sales and are admittedly not engaged in the same, the Commission does not find any vertical overlap between B2B business of Walmart and the online marketplaces of Flipkart.

10. Furthermore, the Commission notes that the proposed combination is not resulting in elimination of any major player in the relevant market. The Flipkart marketplace platform will remain under the operation of Walmart, thus not only preserving a successful e-commerce platform but also enhancing the financial strength of the platform. This would enable the combined entity to compete effectively with competitors in a dynamic e-commerce market characterised with network effects. It is also relevant to note that 100% FDI under automatic route is permitted in marketplace model of e-commerce and B2B segment, which is an encouraging factor for entry of new players.

D. Third party representations

11. During the inquiry into the matter, the Commission received representations against the Proposed Combination from trade associations, traders/retailers, etc., which besides expressing concerns on compliance of FDI norms by Flipkart; ‘predatory’ practices and preferential treatment to specified sellers in Flipkart’s online marketplaces; also expressed concerns on the impact of the Proposed Combination on employment, entrepreneurship, small and medium scale enterprises, retailing, etc. Some of these also placed reliance upon the decision dated 25th April, 2018 of Income Tax Appellate Tribunal in Flipkart India Private Limited v. Assistant Commissioner of Income-Tax [ITA No.693/Bang/2018 (Asst. Year - 2015-16)] to suggest ‘predatory’ pricing by Flipkart and its nexus with certain specified retailers in the online marketplaces.

12. The Commission notes that majority of the concerns expressed in the representations referred above have no nexus to the competition dimension of the Proposed Combination. Issues falling beyond the scope of the Act cannot be a subject matter of examination by the Commission, though they may merit policy intervention.
As per FDI Policy an e-commerce platform cannot influence market prices directly or indirectly. However, this is a matter of consideration for the appropriate regulatory/enforcement authority. The issues concerning FDI policy would need to be addressed in that policy space to ensure that online market platforms remain a true marketplace providing access to all retailers.

13. The limited concerns in the representations that may merit examination from a competition perspective were deep discounting and preferential treatment to select retailers in online marketplaces of Flipkart. In this context, Walmart was asked to furnish detailed information on the said aspects to gauge whether the Proposed Combination would have nexus to any of the said concerns. Upon examination of the relevant facts, it was found that a small number of sellers in Flipkart’s online marketplaces contributed to substantial sales. Almost all of these were customers of Flipkart in B2B segment, and hence were common customers, availing significant discounts from Flipkart in both B2B segment as well as in the online marketplaces. Further, the revenue earned from these common customers in the online marketplaces was relatively less vis-à-vis the non-common sellers whose sales on the platform was considerably low. It was also seen that the top common customers in the Flipkart online marketplaces were incorporated on or after 2016.

14. While the above factors may merit examination from the perspective of anticompetitive vertical restraints under the Act, the same to be a subject matter of regulation under Section 6 of the Act has to be a consequence of the Proposed Combination. Competition assessment of a combination involves analysis of two counterfactual market scenarios i.e. with and without the combination. The Commission considers the relevant factors mentioned under Section 20(4) of the Act, which, inter alia, includes market share of the parties to the combination, entry barriers, extent of vertical integration and the economic strength of the parties, and determines the effect of the Proposed Combination on competition in the relevant markets. In doing so, the endeavour is to address potential adverse implications resulting from the combination but not to address pre-existing conditions that are not attributable to the proposed combination or problems in the markets, in general. Based on the facts on record, the Commission observes that the discounting practice of Flipkart and its preference, if any, to select retailers in its online marketplaces are not specific to the Proposed Combination, as they are already prevalent in the market even without the proposed acquisition by Walmart. In other words, the issues about common customers of Flipkart are not directly or indirectly related to the Proposed Combination and thus, the same is not likely to alter the competition dynamics as it exists today.

15. Section 6(1) of the Act regulates combinations that are likely to cause appreciable adverse effect on competition. Section 6(2) requires parties proposing combination to give prior notice to the Commission. In terms of Section 6(2A) of the Act, such combination reported to the Commission shall not come into effect for a period of 210 days from the date of notification or earlier approval by the Commission. These envisage ex ante regulation of combinations, the purpose of which is to provide an opportunity to the Commission to evaluate and address potential competition concerns, if any, emanating as a result of the Proposed Combination. The Commission deliberated extensively on the concerns raised in the representations but concluded that the instrument of Regulation of Combinations cannot address these and different policy and legal instruments may be taken recourse to. Thus, this review process cannot be a window to resolve concerns that are not incidental or arise from the Proposed Combination. Nevertheless, there is no bar on the Commission at any point of time to examine such issues under the relevant provisions of sections 3(4) and 4 of the Act and regulations made thereunder.
E. Decision of the Commission

16. Considering the facts on record and the foregoing assessment, the Commission is of the opinion that the Proposed Combination is not likely to have an appreciable adverse effect on competition in India and therefore, the same is hereby approved in terms of Section 31(1) of the Act.

17. The information provided by Walmart is confidential at this stage, in terms of and subject to the provisions of Section 57 of the Act.

18. This order shall stand revoked if, at any time, the information provided by Walmart is found to be incorrect or misleading.

19. The Secretary is directed to communicate to Walmart accordingly.

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Suo Motu Case No. 02 of 2016
In Re: Cartelisation in respect of zinc carbon dry cell batteries
market in India

Against

1. Eveready Industries India Ltd.
2. Indo National Ltd.
3. Panasonic Energy India Co. Ltd.
4. Association of Indian Dry Cell Manufacturers

Order under Section 27 of the Competition Act, 2002

1. Introduction

1.1 The instant case was taken up by the Competition Commission of India (hereinafter, ‘Commission’) suomotu, pursuant to an application dated 25 May, 2016 filed by Panasonic Energy India Co. Ltd. (OP-3), a subsidiary of Panasonic Corporation Japan under Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 (hereinafter, ‘Lesser Penalty Regulations’) read with Section 46 of the Competition Act, 2002 (hereinafter, the ‘Act’).

1.2 OP-3 in its Lesser Penalty Application submitted that there existed a cartel amongst OP-1, OP-2, and OP-3, which were all engaged in the business of, inter alia, manufacture and supply of zinc-carbon dry cell batteries, to control the distribution and price of zinc-carbon dry cell batteries in India, in contravention of the provisions of Section 3(3) read with Section 3(1) of the Act. (hereinafter, OP-1, OP-2 and OP-3 are collectively referred to as ‘Manufacturers’).

1.3 It was also disclosed that the Manufacturers were members of a trade association, namely, Association of Indian Dry Cell Manufacturers (hereinafter, ‘AIDCM’/ ‘OP-4’) which facilitated transparency between the Manufacturers by collating and disseminating data pertaining to sales and production by each of the Manufacturers. (hereinafter, Manufacturers and OP-4 are collectively referred to as ‘OPs’).

1.4 As per the Lesser Penalty Application, the Manufacturers were under stress in 2013 due to rise in input costs and the depreciating rupee and resistance to previous attempts of the Manufacturers to raise prices of zinc-carbon dry cell batteries to off-set the rising input costs. Therefore, the senior management of the Manufacturers, which had known each other for several years, decided to raise the maximum retail price (hereinafter, ‘MRP’) of their respective zinc-carbon dry cell batteries to improve their sale realisations.

1.5 Revealing the modus operandi of the Manufacturers, it was stated in the application that employees of OPs actively involved in the cartelisation, inter alia, used to meet and agree on the price increase, which was to be led by one manufacturer of zinc-carbon dry cell batteries and followed by others under the pretext of following the market leader. It was also stated that the Manufacturers agreed not to push sales through their channel/ distribution partners aggressively to avoid price war amongst themselves.

2. Direction of the Commission to the Director General (hereinafter the ‘DG’)
to conduct an investigation

2.1 Based on the disclosure under Lesser Penalty Application of OP-3, the Commission noted that the alleged conduct of cartelisation essentially took place through, (a) coordinated price increase by the Manufacturers; (b) active measures by the Manufacturers to implement price control and reduce possibilities of price competition amongst them; and (c) reduction of price competition at the stockist/retailer/wholesaler level by controlling and agreeing on the level of incentives to be provided.

2.2 After examining the material on record, the Commission was of the *prima facie* view that the case involved contravention of the provisions of Section 3 of the Act. Accordingly, the Commission, *vide* its order dated 22 June 2016 passed under Section 26(1) of the Act, directed the Director General (hereinafter, the ‘DG’) to conduct an investigation into the matter and submit an investigation report. The DG was also directed to investigate the role of persons/officers of OPs who were in-charge of and responsible for the conduct of the businesses of such parties at the time of the alleged contravention. Further, the DG was directed to conduct a detailed investigation into the contraventions disclosed in the information up-to-date without restricting or confining itself to the duration mentioned in the information.

2.3 During the course of investigation, the DG, pursuant to the issue of search warrant from the Chief Metropolitan Magistrate, Delhi, carried out search and seizure operations at the premises of OP-1, OP-2 and OP-3 simultaneously on 23 August, 2016, in terms of powers vested with the DG under Section 41(3) of the Act, and incriminating material and documents were seized therefrom.

3. Lesser Penalty Application of OP-1 and OP-2

3.1 Subsequently, on 26 August 2016, OP-1 filed an application under Regulation 5 of the Lesser Penalty Regulations read with Section 46 of the Act.

3.2 On 13 September 2016, OP-2 also filed an application under Regulation 5 of the Lesser Penalty Regulations read with Section 46 of the Act.

4. Industry Overview

4.1 The Commission first of all notes that though dry cell batteries are broadly of three types: (a) zinc-carbon; (b) alkaline; and (c) rechargeable, infringement in the instant case pertains to cartelisation in the zinc-carbon dry cell battery only, in India. In this regard, it is useful to have a glance at the product involved *i.e.* dry cell battery, in general, and zinc-carbon dry cell battery, in particular.

4.2 Battery is a device that converts chemical energy into electrical energy. It consists of one or more electrochemical cells with external connections to power electrical devices such as flashlights, remote controls of various electronic gadgets, smart phones *etc.*

4.3 Primary (single-use or “disposable”) batteries are used once and discarded. Secondary (rechargeable) batteries can be recharged multiple times using mains power from wall socket.
4.4 A dry cell is a disposable battery, which uses a paste electrolyte, with only enough moisture to allow current to flow. A common dry cell is the zinc-carbon battery, sometimes called the dry Leclanche cell, with a nominal voltage of 1.5 volts, the same as the alkaline battery (since both use the same zinc-manganese dioxide combination). A standard dry cell comprises of a zinc anode, usually in the form of a cylindrical pot, with a carbon cathode in the form of a central rod. The electrolyte is ammonium chloride in the form of a paste next to the zinc anode.

4.5 Dry Cell Battery market in India

a) Highlights of the Indian market for dry cell batteries, as per one of the publicly available research report on dry cell market (by Emkay Global Financial Services Ltd., dated 5 September 2014) are, as follows:

i. Dry cell batteries are generally of different sizes, namely, D size, C size, AA size and AAA size. Zinc-carbon dry cell battery segment contributes about 97% of the total dry cell market, while high priced alkaline batteries are just 3% of the market.

ii. Alkaline batteries though popular in western countries, have not yet emerged as a serious alternative to zinc-carbon batteries in the Indian market due to price sensitive nature of the Indian consumers.

iii. Consumers have shifted from the more expensive ‘D’ size batteries to AA’ sized ones. The shares of the principal battery categories (in percent) for a three year period are as tabulated below:

<table>
<thead>
<tr>
<th>Product Line (size of dry cell batteries)</th>
<th>FY 2013-14</th>
<th>FY 2012-13</th>
<th>FY 2011-12</th>
</tr>
</thead>
<tbody>
<tr>
<td>D</td>
<td>14.5</td>
<td>15.4</td>
<td>17.5</td>
</tr>
<tr>
<td>C</td>
<td>0.3</td>
<td>0.3</td>
<td>0.4</td>
</tr>
<tr>
<td>AA</td>
<td>74.3</td>
<td>74.8</td>
<td>73.1</td>
</tr>
<tr>
<td>AAA</td>
<td>10.9</td>
<td>9.5</td>
<td>9.0</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

iv. A growing need for portable power and the advent of a number of battery operated gadgets like remote controls, toys, clocks and flashlights has catalysed the consumption of dry cell batteries. Since these gadgets are used regularly, the battery demand is not cyclical in nature.

v. The latest trend indicates that the market will continue to grow @ 4-4.5% per annum. ‘AA’ size should grow lower than market growth; whereas D’ size should decline. However, due to increase in digitisation, the ‘AAA’ size category will continue to show high double digit growth.
4.6 In this context, OP-1 has submitted the estimated annual market shares of itself (including Power cell), OP-2 and OP-3 based on the reported sales figures circulated by OP-4 from 1 April 2009 to 30 September 2016:

Table 2: Market share in percent for the period 1 April, 2009 to 30 September, 2016

<table>
<thead>
<tr>
<th>Brand</th>
<th>Year-wise Share (in percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>OP-1</td>
<td>47.7</td>
</tr>
<tr>
<td>OP-2</td>
<td>31.0</td>
</tr>
<tr>
<td>OP-3</td>
<td>18.2</td>
</tr>
</tbody>
</table>

5. Profile of the parties

5.1 *Eveready Industries India Ltd. (OP-1)*

a) The brand Eveready entered the Indian market in 1905. The company was incorporated in 1934 under the erstwhile Companies Act 1913. Previously the company was a subsidiary of Union Carbide Corporation, USA. Shri B. M. Khaitan and the Williamson Magor Group of Companies acquired OP-1 in 1993. OP-1 is headquartered in Kolkata and is currently involved in the marketing of various product categories such as batteries (including dry-cell batteries), flashlights, general electric products, packet tea and appliances.

b) As per its annual report for the year 2015 – 2016, OP-1 was selling over 1.3 billion units of dry cell batteries annually. The sales of OP-1 from dry cell batteries was about Rs. 760.19 crores, which constituted 56.36% of its total turnover.

5.2 *Indo National Ltd. (OP-2)*

a) OP-2, incorporated in 1972, has its registered office at Chennai. Upon grant of license by the Government of India for manufacture of zinc-carbon dry cell batteries on 28 August, 1972, it entered into a technical collaboration agreement with Matsushita Electrical Industrial Company Limited of Japan for manufacturing of dry cell batteries which are sold under brand name Nippo (Matsushita renamed subsequently as ‘Panasonic Corporation’).
b) As per its annual report for the year 2015-16, out of OP-2’s total turnover for the year i.e. Rs. 353 crores, sales from dry cell batteries constituted 88.57% of the total turnover for the year.

5.3 Panasonic Energy India Company Limited (OP-3)

a) The company, established in 1972 as Lakhanpal National Limited, is a subsidiary of Panasonic Corporation, Japan. It is a public listed company, headquartered in Vadodara (Gujarat) and is primarily engaged in the manufacture and supply of dry cell batteries. Majority of OP-3’s business comprises of zinc-carbon batteries. In addition to dry cell batteries, OP-3 also trades in torches but the same constitutes only a minimal portion of its business.

b) As per its annual report for the year 2015-16, out of OP-3’s total turnover for the year i.e. Rs. 278 crores, sales from dry cell batteries constituted 93% of the total turnover for the year.

5.4 The Association of Indian Dry Cell Manufacturers (OP-4)

a) AIDCM is an unregistered association of dry cell manufacturers primarily comprising of three members i.e. Eveready, Nippo and Panasonic. The DG has gathered that till 1987, there were 12 to 13 members of AIDCM who were all manufacturers. However, most of them have since closed down.

b) AIDCM has described its main activities as, inter alia, to encourage good relations amongst the manufacturers and marketers of dry cells in general and members of the association in particular; to promote dry cell/battery industry in India, including manufacturers of raw materials and components used in batteries; and to be a central point of contact for queries on dry cells and torches for different ministries and departments of the government.

6. DG’s Investigation

6.1 With respect to the alleged contravention of Section 3 of the Act by OPs, investigation by the DG has brought to the fore the details/conducts of OPs, mentioned in the succeeding paragraphs.

6.2 During investigation, the DG examined the emails, fax and other incriminating material and documents obtained from the search and seizure operations at the premises of the Manufacturers as well as the evidence furnished by them with their respective Lesser Penalty Applications and responses to the notices of the DG. Further, the DG also recorded the statements on oath of certain individuals of the Manufacturers.

6.3 From the evidence gathered in the case, the DG found that the Manufacturers had an arrangement whereby they exchanged commercially sensitive information amongst themselves for the purpose of price-coordination. Such arrangement was found to be in place since 2008 i.e. much prior to 20 May 2009, the date on which Section 3 of the Act became enforceable, and continued until 23 August 2016 i.e. the date of search and seizure operations by the DG.

6.4 Examination of evidence collected by the DG revealed that top management of the Manufacturers maintained regular contacts by way of personal visits, meetings of association, exchange of fax messages, emails, etc., and shared pricing and other vital, confidential commercial information. They used all this to mutually agree on
the price increases (MRP). They also decided implementation modalities of price increase which included deciding the schedule of start of production, commencement of billing with new MRP and availability of products (with revised rates) in the market.

6.5 In order to give effect to the decided price increase in the market, the market leader i.e. OP-1 used to make announcement of increase in MRP through press releases. Such price increase by OP-1 was immediately followed by OP-2 and OP-3. In this manner, MRP was increased by OPs at least on six occasions by Rs 0.50 (fifty paisa) each, resulting in about sixty percent increase in price of the concerned product since January, 2010.

6.6 Illustratively, one of the e-mails referred to by the DG to establish the coordination amongst the Manufacturers for the purposes of price increase in 2010, is an email dated 19 January 2010 sent by Shri R. P. Khaitan (of OP-2) to Shri SuvamoySaha (of OP-1). In this e-mail, the two OPs have shared their price and MRP with suggestions. The remarks column in the shared document contains comments like “as agreed MRP to change Rs 15 and trade price w.e.f. April, 2010 in 2 phases”. When this e-mail was shown to Shri SuvamoySaha (of OP-1), he explained that the email contained the price and MRP structure details of OP-2 and OP-1 and that through this email, Shri R. P. Khaitan (of OP-2) had circulated a previously discussed price and MRP structure with his comments to OP-1. This was confirmed by OP-2, who also provided copy of the said email. Similarly, the DG found other evidence of contacts and communications amongst OPs through e-mails, fax and even meetings, which showed coordination amongst the Manufacturers to increase prices in not only in 2010 but in 2013, 2014 and 2015 as well.

6.7 Further, the investigation showed that coordination amongst OP-1, OP-2 and OP-3 not only pertained to the MRP of their products but also exchange of information about the components of pricing structure of their products including trade discount, wholesale price, dealers/ stockist landing cost, open market rates, retailers margin, sales promotion schemes etc. to monitor effective implementation of price increase and determine price for distributors/whole sellers/retailers and end consumers, for allocation of market amongst themselves on the basis of types/sizes of batteries and/or geographical areas, and to control output to establish higher prices and control supply (especially to the Institutional buyers like Geep, Godrej etc. and modern retail channels like Walmart, Metro C & C etc.).

6.8 With respect to AIDCM (OP-4), the DG found that it facilitated cartel activities amongst its members by providing a convenient platform for sharing /discussing prices and other commercially sensitive issues on the pretext of discussing the market conditions. Further, by collating and providing regular information on production/sales data of the member companies, it provided information that assisted the Manufacturers in monitoring the cartel implementation.

6.9 Based on foregoing analysis, the DG concluded that OPs had indulged in anti-competitive agreement/ conduct and concerted practices, in the domestic dry cell battery market of zinc carbon batteries, during the period 20 May 2009 to 23 August, 2016 and thereby contravened the provisions of Section 3(3)(a), 3(3)(b) and 3(3)(c) read with Section 3(1) of the Act.
6.10 After finding contravention as above, the DG identified certain persons in terms of Section 48 of the Act who played active role in the contravention of the provisions of Section 3 of the Act and also those who were incharge of and responsible to the respective companies for the conduct of their businesses. In this regard, the DG found active involvement of the top management of OPs including their Managing Director, Joint Managing Director and Whole-time Director, Head of Marketing & Sales etc. as well as other officers/ office bearers.

6.11 The following individuals were identified by the DG to be liable under Section 48 of the Act:

**OP-1:**

a) The DG found five officers of OP-1 to be liable in terms of Section 48 (2) of the Act for their specific role in cartelisation, namely, Shri Suvamoy Saha, Whole-time Director; Shri Partha Biswas, Vice President; Shri Anil Bajaj, Vice President – Flashlights and Batteries; Shri Kunal Gupta, Vice President – Powercell; and Shri Indranil Roy Chowdhury, Vice President – Finance.

b) The DG also found two persons of OP-1 to be liable in terms of Section 48 (1) of the Act as persons incharge of running the affairs of the company during the cartel period, namely, Shri Deepak Khaitan, Former Managing Director and Shri Amritanshu Khaitan, Managing Director.

**OP-2:**

a) The DG found seven officers of OP-2 to be liable in terms of Section 48 (2) of the Act for their specific role in cartelisation, namely, Shri R. P. Khaitan, Joint Managing Director; Shri M. Sankara Reddy, Chief Financial Officer; Shri B. L. N. Prasad, Head Marketing and Institutional Sales; Shri Latesh Madan, General Manager Sales; Shri Manas Mitra, Manager – Sales; Shri Santosh Tanmay, General Manager – Sales; and Shri Hemant Gupta, AGM Sales.

b) The DG also found one person of OP-2 to be liable in terms of Section 48 (1) of the Act as person incharge of running the affairs of the company during the cartel period, namely, Shri P. Dwarakanth Reddy, Managing Director and CEO.

**OP-3:**

a) The DG found five officers of OP-3 to be liable in terms of Section 48 (2) of the Act for their specific role in cartelisation, namely, Shri Hideya Maekawa, Former Vice President – Sales and Marketing; Shri A. K. Dhanda, General Manager – Sales; Shri R. R. Desai, Deputy General Manager – Sales; Shri Parimal Vazir, General Manager – Institutional Sales and Shri Ketan Valand, Officer Marketing.

b) The DG also found one person of OP-3 to be liable in terms of Section 48 (1) of the Act as person incharge of running the affairs of the company during the cartel period, namely, Shri S. K. Khurana, former Chairman and Managing Director.
c) The DG found two office-bearers of OP-4 to be liable in terms of Section 48 (2) of the Act for their specific role in cartelisation, namely, Shri SubramaniaKumaraswami, Secretary of AIDCM from 1 April, 2009 to 31 October, 2014 and Shri Ravindra Grover, Secretary of AIDCM from 1 November, 2014 onwards.

d) The DG also found three persons of OP-4 to be liable in terms of Section 48 (1) of the Act as persons incharge of running the affairs of the association during the cartel period, namely, Shri Deepak Khaitan, President; Shri S. K. Khurana, Chairman and Shri R. P. Khaitan, President.

6.12 The DG, with the above findings, submitted its investigation report to the Commission on 20 February 2017.

7. Consideration of the investigation report of the DG

The Commission considered the investigation report of the DG and decided to forward an electronic copy of the same to OPs and the persons identified by the DG to be liable under Section 48 of the Act, for filing their suggestions/objections thereto. OPs were heard on 28 November 2017.

8. Submissions of OPs to the DG’s Investigation Report

Submissions of OP-1 and its individuals

8.1 OP-1 submitted that it has made ‘significant value addition’ in the case by providing a full, true and vital disclosure about the said cartelisation in the zinc-carbon dry cell battery. In this regard, it has also disclosed that Geep Batteries (India) Private Limited (hereinafter, ‘Geep’) was a member of AIDCM along with other Manufacturers and was involved in the said cartel till 2012. Furthermore, it has named AIDCM (OP-4) as one of the participants of the said cartel, which strengthened the investigation conducted by the DG, though both OP-2 and OP-3 had denied the role of AIDCM in fixing the price. Furthermore, OP-1 submitted that it disclosed the name of an individual of OP-3, Shri Osamu Oyamada, who was involved in the said cartel.

8.2 OP-1 also submitted that it has provided evidence demonstrating that the cartel was in existence for several years including periods before 20 May 2009 and at least until 23 August 2016.

8.3 OP-1 further submitted that OP-1 and its individuals have fully cooperated in the investigation and accordingly, the Commission should grant them immunity from penalty.

8.4 OP-1 also requested the Commission to consider various mitigating factors while imposing penalty, if any, such as the fact that per capita consumption of batteries in India is one of the lowest in the world and hence, the market potential of demand in batteries is limited; and rise in the cost of raw materials for zinc-carbon dry cell batteries resulting in loss of battery business for OP-1 from the financial year 2011-12. Further, OP-1 submitted that the price increase affected by OP-1 was largely in the range of the price movement of the overall basket of consumer goods in the country.
Submissions of OP-2 and its individuals

8.5 OP-2 submitted that it does not have any objection to the findings in the DG report and it has made ‘significant value addition’ by providing a full, true and vital disclosure in relation to the said cartelisation of zinc-carbon dry cell batteries. Furthermore, OP-2 and its individuals have extended genuine, full, continuous and expeditious cooperation to the DG and the Commission throughout the investigation.

8.6 OP-2 also requested the Commission to consider various mitigating factors while imposition of penalty, if any, such as stagnant demand of zinc-carbon dry cell batteries and increase in the cost of raw materials for zinc-carbon dry cell batteries; and that there has not been any profiteering by OP-2 because of the said cartelisation as zinc-carbon dry cell batteries are a low value product.

8.7 Further, OP-2 submitted that it understands the seriousness of the violation and therefore, is in a process of putting in place an effective Competition Law Compliance Program, which will assist in ensuring that it adopts policies and practices that are in conformity with the requirements of the Act.

8.8 OP-2 has requested the Commission to provide the maximum penalty waiver available to OP-2 and its individuals indicted in the said cartelisation.

Submissions of OP-3 and its individuals

8.9 OP-3 submitted that because of the Competition Compliance Program in its organisation, it became aware of the existing cartel of Manufacturers and accordingly approached the Commission under the Lesser Penalty Regulations.

8.10 OP-3 further submitted that it was the first to disclose the details of the cartel and provided full and complete disclosure, including all relevant information/documents/submissions, which helped establish the existence and methodology of the cartel in operation. Further, it cooperated throughout the proceedings with the Commission and the DG.

8.11 OP-3 also submitted that its Lesser Penalty Application not only enabled the Commission to order investigation, but also was sufficient to establish contravention of the Act. Accordingly, OP-3 and its individuals ought to be granted hundred percent reduction in the penalty.
Submissions of OP-4 (AIDCM) and its individuals

8.12 AIDCM submitted that it had no role to play in the pricing decisions of the dry cell batteries of the Manufacturers, which stands substantiated by OP-2 and OP-3, respectively. As regards its individuals, OP-4 has stated that Secretary of the association is the only an employee of OP-4 who functions only in an administrative capacity and cannot be considered liable under Section 48 of the Act.

8.13 In this regard, present Secretary of AIDCM, Shri Ravindra Grover in his submissions has raised the contention that proceedings against an officer of the ‘company’ under Section 48 of the Act can only be initiated once finding of contravention against the ‘company’ is established under Section 27 of the Act.

8.14 Further, it has been contended that Section 48 of the Act relates to contravention by companies. So, it does not apply to an unregistered association of companies. As Shri Ravindra Grover is not Secretary of any company, no proceedings against him can be initiated under Section 48(2) of the Act. Furthermore, it has been argued that the Commission has not informed Shri Ravindra Grover whether Section 48(1) or Section 48(2) of the Act is being invoked against him in the instant case thereby preventing him from discerning the exact nature of the case being made out against him and accordingly filing a proper response.

9. Analysis of the Commission

9.1 The Commission has considered the Lesser Penalty Applications filed by the Manufacturers, the investigation report of the DG and the submissions of OPs and their individuals. It is noted that all the Manufacturers have admitted the fact that they were involved in the cartelisation of zinc-carbon dry cell batteries.

9.2 From the information and evidence furnished by OPs and the investigation by the DG, it is observed that the Manufacturers indulged in anticompetitive conduct of price coordination, limiting production/supply as well as market allocation. The price coordination amongst the Manufacturers encompassed not only increase in the MRP of the zinc carbon dry cell batteries but also exclusion of ‘price competition’ at all levels in the distribution chain of zinc-carbon dry cell batteries to ensure implementation of the agreement to increase price. In addition, the Manufacturers also agreed to control supply in the market to establish higher prices and indulged in market allocation by requesting each other to withdraw their products from the market. For these purposes, the Manufacturers exchanged amongst themselves confidential and commercially sensitive information about pricing as well as other information such as production and sales data.

9.3 In order to increase price of the zinc carbon dry cell batteries, the Manufacturers mutually agreed on the implementation modalities of MRP. They not only decided the schedule of start of production of units with new MRP but also the start of billing as well as availability of products, with revised rates in the market.

9.4 The evidence gathered during investigation and submission of OPs shows that the individuals of the Manufacturers regularly discussed and agreed when to give
effect to the price increase during the personal /AIDCM meetings. OP-1 being the market leader would take lead by issuing press release to announce increase in price of its zinc-carbon dry cell batteries. Thereafter, OP-2 and OP-3 would respond to it immediately with corresponding increase in price of their batteries on the pretext of following the market leader.

9.5 For example, in 2013, senior employees of the Manufacturers held a meeting on 10 April 2013, and, *inter alia*, agreed to increase the MRP of ‘Economy’ category of batteries. On 12 April 2013, OP-1 issued a press release announcing the increase in MRP of its ‘Economy’ range of dry cell batteries effective from May, 2013. OP-2 and OP-3 simultaneously increased MRP of their ‘Economy’ segment batteries from May, 2013.

9.6 The next press release by OP-1 was on 20 September 2013 announcing price increase of its ‘Economy’ dry cell batteries from October 2013. This was after the AIDCM meeting on 12 September 2013. OP-2 and OP-3 also increased MRP of their products from October 2013.

9.7 Subsequent meeting of AIDCM was held on 25 February 2014. OP-1 made a press release dated 20 March 2014 announcing price increase in all types of dry cell batteries from April 2014. This was followed by OP-2 and OP-3 increasing MRP of their ‘Economy’ and ‘Premium’ category of batteries from April 2014. The same *modus operandi* was followed in 2015 as well.

9.8 The evidence on record shows that price increases made by OP-2 and OP-3 immediately following announcement of price increase by OP-1 were with prior information of imminent price increase by OP-1. Due to this, OP-2 and OP-3 were able to increase prices of their respective products on most of the occasions with little or no time lag though ordinarily such actions of changing the price label of the product, packaging with new price tag etc. would take considerable time.

9.9 Further, evidence collected during investigation shows that price coordination agreement amongst the Manufacturers was not limited to deciding and implementing increase in MRP of zinc-carbon dry cell batteries alone but extended to include monitoring and controlling of prices at all levels so as to exclude ‘price competition’ in the entire distribution chain of zinc-carbon dry cell batteries.

9.10 Notably, in the distribution chain, the Manufacturers sold the batteries to the distributors/ wholesalers and through them to the retailers on ‘principal to principal’ basis. Once the batteries were sold to wholesalers/ retailers they pushed sales of the batteries by offering attractive margins/ incentives. At the same time, sales staff of the companies tried to promote sales performance of their products by resorting to promotional schemes - like scratch coupons, gifts, combo offers, festival offerings etc. All this resulted in ‘price competition’ at various levels. For instance, if wholesalers / retailers of OP-1 tried to boost sale of OP-1’s products, by offering incentives to the consumers, it would result in lower sales for OP-2 and OP-3.

9.11 Since the ‘price competition’ in the distribution chain, as stated above, could have rendered the agreement/ understanding reached among the Manufacturers ineffective, they entered into agreement/ understanding/ coordination amongst themselves to cover all other elements of the price structure besides MRP,
comprising trade discount, wholesale price, dealer/ stockist landing cost, open market rates, retailers’ margin, sales promotion schemes etc.

9.12 The evidence on record shows that despite the above agreement/ understanding/ coordination, the Manufacturers faced problem in actual implementation of increased MRP in the market. Since deviation from the agreed stand by any of the Manufacturers could result in drop of sales volume of others, they would bring to one another’s notice concerns about slow implementation of the mutually agreed decisions and would seek corrective action if deviations from the agreement were observed in the market. Besides, they would regularly share amongst them information regarding operating margin rates, wholesale offer price etc. prevailing in various states/ cities/ towns collected by the sales staff and would even control supply in the market to establish higher prices of batteries.

9.13 The e-mails exchanged amongst the Manufacturers show that there was also an understanding amongst them to allocate market based on geographical area and types of batteries. They would often request each other to withdraw their products from a particular geographical area such as a state or town or city.

9.14 Apart from all this, Manufacturers in their meetings held under the aegis of AIDCM, would share common concerns about low rates of batteries offered by other maverick players, mostly importers/ traders, as this occasionally caused constraints in raising/ maintaining the higher market price of their battery products. The evidence gathered by the DG shows that on one occasion in AIDCM meeting on 10 February 2012, the Manufacturers deliberated the impact of alkaline and rechargeable batteries on the market of the zinc–carbon dry cell batteries and contemplated reduction in MRP of AA and AAA size batteries by reducing trade margins. Also, the Manufacturers discussed the low rates at which their batteries were being sold by the modern retail channels like ‘Walmart’ and ‘Metro Cash & Carry’ etc. and agreed on the strategy to counter such issues. The Commission observes that while it may be legitimate for enterprises engaged in the same line of business to share common concerns, the Manufacturers in the instant case used the platform of AIDCM to coordinate their actions, inter alia, on pricing.

9.15 The top management of the Manufacturers played an active role in this collusion. It is observed that the coordination amongst the Manufacturers took place at the highest level in these companies. The top managerial personnel discussed various aspects of coordination in the meetings of AIDCM (reflected in the minutes of such meetings), on the sidelines of meetings of AIDCM (reflected in the hand-written notes and agenda points prepared by the individual members for the meeting) and in private meetings. Moreover, there were frequent direct email/ fax communications amongst the individuals of OPs, which show their close personal and friendly relations and the underlying deep commitment to adhere to ‘gentlemen’s agreement’.

...
9.16 This conduct of the Manufacturers is summarised very well in the submission of Shri S. K. Khurana during his deposition before the DG wherein he stated as follows:

“...PECIN had an understanding with other competitors namely Eveready and NIPPO not to enter into price war, i.e. not to resort to severe undercutting and such understanding existed for a long time even way before 2009.”

9.17 Thus, based on the evidence furnished by OPs as well as that collected by the DG during investigation, Commission is of the opinion that the Manufacturers indulged in anti-competitive conduct in the domestic dry cell battery market of zinc carbon batteries.

9.18 In respect of OP-4, which has stated that it had no role to play in pricing decisions of the dry cell batteries of the Manufacturers, the Commission observes that the DG has given a finding that platform of AIDCM had been used for the purpose of cartelisation. Investigation by the DG has revealed that the data on volume of production and sales of member companies in respect of, *inter alia*, dry cell batteries (both zinc-carbon and alkaline) and flashlight / torches was formally shared on a monthly basis by AIDCM in a prescribed format. This has been admitted by OPs in their written replies as well as in the statements of their individuals. Besides, data on total import of zinc-carbon battery was also shared.

9.19 An illustration of such information sharing is contained in the email dated 15 January 2016 which was sent by Shri Ravindra Grover, Secretary of AIDCM, to each of the Manufacturers. This e-mail reveals that micro details of production and sales data of the Manufacturers were available to the Manufacturers by the first fortnight of the ensuing month. The information on production and sales of zinc-carbon batteries of the Manufacturers, being compiled by AIDCM comprised company-wise detailed information for different battery sizes with further breakup on the basis of premium / popular types as well as the aggregate data of the industry.

9.20 When Shri Ravindra Grover was confronted with the aforesaid e-mail during his deposition before the DG on 5 January 2017, he stated that

“This practice has been going on since prior to my joining the association. One of the reasons for collection of this data was to calculate the membership subscription payable by the companies. This was also done to basically understand the market conditions. Sometimes, we also used to get request from the Government seeking such data....”

9.21 Contrary to this, when similar question was posed to Shri S. Kumaraswami, former Secretary of AIDCM during his deposition before the DG on 10 January 2017, he responded as under:

“The main objective of the association is collection and collation of production and sales figures of its member companies on monthly basis. It is done to calculate their market shares. This information was shared with the members themselves.”

9.22 From the above statements, it is evident that reasoning given by Shri Ravindra Grover that data collated by AIDCM was being used for calculation of membership fee is not plausible. For the purpose of such a calculation, other publicly available information like aggregate turnover of the members given in
their annual financial statements, could have been used. While the explanation by
OPs that the Government agencies often require industry information is
understandable, this cannot be a cogent reason to circulate such a granular and
detailed information relating to production and sales among the competitors on a
regular basis. In fact, the segregated data was seldom shared with any other
agency/ organisation except the Manufacturers.

9.23 There is further evidence to show that by collating and disseminating crucial
business data of the competitors, AIDCM facilitated better coordination amongst
the Manufacturers. The monthly data on production and sales of the Manufacturers
collected by AIDCM was used to compare/ assess the impact of the overall
arrangement on pricing and other business strategies, on their market shares over a
period. For instance, in one of the fax messages dated 13 February 2015 from Shri
SuvamoySaha of OP-1 to Shri R. P. Khaitan of OP-2, Shri Saha is stating that he
has compared the sales data of OP-2 with that of OP-1 and OP-3 for the years
2013-14 and 2014 -15 (till January 2015) and he tries to explain that negative
growth of OP-2 could not be attributed to pricing i.e. price increase. Shri
SuvamoySaha has also proposed in that message to Shri R. P. Khaitan to have an
open discussion in the forthcoming meeting in Delhi.

9.24 The Commission finds that practice by AIDCM of compiling and
disseminating commercially sensitive data was greatly helpful to the
Manufacturers to monitor the outcome of overall ‘agreement/ understanding’
reached at amongst them with regard to pricing, output, sale/ supply, allocation of
market, etc. In fact, comparison of the market shares of OPs for the past six years
i.e. from 2010-11 to 2015-16 based on their sales of zinc carbon dry cell batteries
shows that market share of each of the OPs remained stable over these years. This
is a clear indicator of the effectiveness of the cartel arrangement.

9.25 The evidence on record also shows that OP-4 through Shri S. Kumaraswami,
former Secretary AIDCM, had been privy to the intended price increase by the
members of AIDCM. Some of email communications of Shri S. Kumaraswami in
2012 indicate that when the Manufacturers were contemplating measures to
increase prices, they roped in AIDCM for giving the press release. The emails
exchanged show that, in 2012, Shri SuvamoySaha after consulting Shri R. P.
Khaitan of OP-2 had forwarded a draft on price increase measures of the members
i.e. the Manufacturers vide email dated 23 March 2012 to Shri Kumaraswami and
requested him to seek concurrence of Shri S. K. Khurana of OP-3 for the same.
Shri Kumaraswami in turn contacted Shri S. K. Khurana and wrote back to Shri
SuvamoySaha conveying that Shri Khurana required details of the modalities of
newspaper advertising etc. Subsequently, Shri Kumaraswami after an informal
discussion with Shri Gupta of TPM consultants, wrote an e-mail dated 24 March
2012 to Shri SuvamoySaha of OP-1 raising an apprehension that such press release
by the association, i.e. AIDCM may attract attention of the Competition
Commission of India. This e-mail is reproduced below:

“Dear Suvamoy,
This is further to my mail giving my suggestions on the draft. I had a meeting with
Mr. Gupta this afternoon to discuss various issues post initiation of investigation –
now expected by 28th or 29th. I was casually talking to him that the industry will
be passing on duty increases with immediate effect and that the Association may be issuing a press release in this connection. According to him such a release by the association may, repeat may, attract the attention of Competition Commission – very active these days – and should be avoided. He has not- neither have I- come across any press release by any association on such matters. I have seen news items planted by individual companies mostly carmakers. Pl discuss internally and with other members and advice.

Regards
Kumar”

9.26 In view of the apprehension raised by Shri Kumaraswami in his e-mail, Shri SuvamoySaha asked OP-4 not to issue any press release. When Shri Kumaraswami during his deposition on 10 January 2017 was asked to offer his comments on the above e-mail. He stated as follows:

“Mr. SuvamoySaha of Eveready had suggested the issue of press release regarding price hike to be released by the Association, but I refused to let the Association be drawn into such thing.”

9.27 The Commission is of the view that contention of Shri Kumaraswami that he refused to be drawn into such things i.e. price announcement, cannot be accepted considering that he played an active role in seeking concurrence of Shri Khurana, provided feedback to Shri Saha and later, after an informal discussion with Shri Gupta rendered considered advice to Shri Saha. There is also evidence on record to show that subsequently Shri Kumaraswami, vide email dated 20 March 2014, passed on the information of press release on price increase by OP-1 to the other two members, namely, OP-2 and OP-3. This shows that the individuals of OPs including OP-4 were fully aware that their conduct was in contravention of the Act.

9.28 In view of the foregoing, the Commission finds that OP-4 through its practices, decisions and conduct of the office bearers i.e. individuals of OP-4, facilitated anti-competitive agreement/ understanding and concerted action amongst its members in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act.

9.29 Further, the Commission finds that contention of Shri Ravindra Grover, Secretary of OP-4, that Section 48 of the Act does not apply to an unregistered association of companies and no proceedings against him can be initiated under Section 48(2) of the Act as he was not the Secretary of a ‘company’ but an association, is misconceived. In this regard, it is pointed out that Explanation (a) to Section 48 of the Act clearly provides that the term ‘company’ means a body corporate and includes a firm or other association of individuals. Thus, AIDCM being an association of individuals/ companies is squarely covered under Section 48 of the Act and individuals of OP-4 can be held liable under Section 48 of the Act once it is established that contravention has been made by the association.

9.30 In view of the foregoing, the Commission is of the opinion that OP-1, OP-2 and OP-3 have been involved in cartelisation of zinc-carbon dry cell batteries in India which has been facilitated by OP-4, in contravention of the provisions of Section 3(3)(a), 3(3)(b) and 3(3)(e) read with Section 3(1) of the Act. Further, the individuals of OPs have also been actively involved in the said cartelisation in the domestic market.
10. Evaluation of Applications for Lesser Penalty

10.1 As mentioned earlier, the Commission received Lesser Penalty Applications from OP-1, OP-2 and OP-3 in the present matter. Keeping in view the sequence in which they approached the Commission under Regulation 5 of Lesser Penalty Regulations read with Section 46 of the Act, it granted First Priority Status to OP-3, Second Priority Status to OP-1 and Third Priority Status to OP-2.

10.2 The Commission observes that the information and evidence provided by OP-3, first applicant to file Lesser Penalty Application, was crucial in assessing the domestic market structure of the zinc-carbon dry cell batteries, nature and extent of information exchanges amongst OPs with regard to the cartel and identifying the names, locations and email accounts of key persons of OPs actively involved in the cartel activities. The information and cooperation received from OP-3 enabled the DG to conduct search and seizure operations at the premises of the Manufacturers and seize quality evidence in the form of emails, handwritten notes and various other documents. Thus, full and true disclosure of information and evidence and continuous cooperation provided by OP-3, not only enabled the Commission to order investigation into the matter, but it also helped in establishing the contravention of Section 3 of the Act by.

10.3 With respect to the Lesser Penalty Applications of OP-1 and OP-2, the Commission notes that incriminating documents (both hard and soft copies) recovered and seized from the premises of the Manufacturers during the search and seizure operations on 23 August 2016 were independently sufficient to establish the contravention of Section 3 of the Act by OPs. Therefore, information/evidence on cartel including the period of cartel, submitted by OP-1 and OP-2 did not result in ‘significant value addition’ as is claimed by them in their submissions. But, the Commission also notes that both OP-1 and OP-2 have provided genuine, full, continuous and expeditious cooperation during the course of investigation in the present case.

10.4 On the basis of the foregoing, the Commission decides, as follows:

(a) The Commission grants reduction of 100 (hundred) percent of the penalty leviable under the Act, to OP-3.

(b) The Commission observes that OP-1, who is second in making a disclosure in this case, approached the Commission not at the beginning but at a later stage of the investigation, i.e. three days after the search and seizure operations had been carried out by the DG. OP-1 has claimed that the disclosures made in its Lesser Penalty Application regarding product involved, commencement/duration of cartel, membership of Geep in AIDCM, modus operandi of cartel, evidence of role of AIDCM and involvement of certain individuals such as Shri Osamu Oyamada etc. demonstrated that it had met the requirements of ‘significant value addition’. On careful examination of the material submitted by OP-1, the Commission finds that almost all disclosures made by OP-1 were available with the Commission/DG either as disclosures by OP-3 or material obtained by DG during search and seizure operation. However, OP-1 through several oral statements supported by contemporaneous documents, corroborated information already in possession of the DG and helped connect the evidence gathered during
the search and seizure operations. Taking into account these factors, priority status as well as continuous and expeditious co-operation extended by OP-1 including admission of cartelisation, the Commission decides to grant 30 (Thirty) percent reduction in the penalty to OP-1 than what would otherwise have been imposed on it had it not cooperated with the Commission and admitted to the cartelisation.

(c) The Commission notes that OP-2, who is third in making a disclosure in this case, has also through several oral statements supported by contemporaneous documents, corroborated certain information already in possession of the DG and explained the evidence gathered during the search and seizure operations. However, the Applicant approached the Commission not at the beginning but after nearly three weeks of the search and seizure operations of the DG. Taking into account these factors, the priority status granted and continuous and expeditious co-operation extended by OP-2 including admission of cartelisation, the Commission decides to grant 20 (Twenty) percent reduction in the penalty to OP-2 than what would otherwise have been imposed on it had it not cooperated with the Commission and admitted to the cartelisation.

ORDER
11. In view of the above findings of contravention against OP-1, OP-2, OP-3 and OP-4 and their aforementioned individuals, the Commission directs them to cease and desist from indulging in such anti-competitive conduct in future.

12. As regards the penalty to be imposed under Section 27 of the Act, the Commission observes that the Manufacturers have accepted that they had an understanding / arrangement with each other to cartelise in the zinc-carbon dry cell battery in the domestic market. Moreover, conduct of OP-4 as a facilitator, stands conclusively established by the DG.

13. Further, it is noted that in the instant case the cartel continued for a period of more than six years. The Manufacturers had a clear agreement/ understanding to increase price of zinc-carbon dry cell battery in the market. To this end, they exchanged information on prices, monitored each other’s prices and took steps to curb price competition amongst them. They also allocated market amongst them based on geographical area and types of batteries. The Manufacturers admitted to these anti-competitive activities unequivocally in their Lesser Penalty Applications; however, they also pointed out certain mitigating factors peculiar to the zinc-carbon dry cell battery industry such as less per capita demand, rising input costs, low value of the product, little margin/ profit in sale of the product, competition from cheap imports etc. in their response to the investigation report of the DG.

14. Considering the totality of facts and circumstances of the present case, the Commission decides to impose penalty on OP-1, OP-2 and OP-3 in terms of the proviso to Section 27 (b) of the Act which provides as follows:

“Provided that in case any agreement referred to in Section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of upto three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.”
15. On careful consideration of the aggravating and mitigating factors in the case and keeping in view the above provision of the Act, the Commission decides to levy penalty at the rate of 1.25 times of the profits of the Manufacturers for each year for the duration of the cartel. In case of AIDCM (OP-4), the Commission notes that the receipts of OP-4 are not significant and for achieving deterrent effect it would be appropriate to levy the penalty at the rate of 10 (ten) percent of the average of its gross receipts for the last preceding three financial years. Accordingly, the leviable penalty is tabulated below:

**EVEREADY INDUSTRIES INDIA LTD. (OP-1)**

<table>
<thead>
<tr>
<th>Years</th>
<th>Profit After Tax</th>
<th>Penalty at 1.25 times of relevant profit (Rupees in crores)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009-10</td>
<td>31.57</td>
<td>34.06*</td>
</tr>
<tr>
<td>2010-11</td>
<td>24.03</td>
<td>30.04</td>
</tr>
<tr>
<td>2011-12</td>
<td>-11.66*</td>
<td>0</td>
</tr>
<tr>
<td>2012-13</td>
<td>5.12</td>
<td>6.40</td>
</tr>
<tr>
<td>2013-14</td>
<td>7.94</td>
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<td>2014-15</td>
<td>43.95</td>
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<tr>
<td>2015-16</td>
<td>53.91</td>
<td>67.39</td>
</tr>
<tr>
<td>2016-17</td>
<td>85.23</td>
<td>42.32*</td>
</tr>
<tr>
<td><strong>Total Penalty</strong></td>
<td></td>
<td><strong>245.07</strong></td>
</tr>
</tbody>
</table>

**INDO NATIONAL LTD. (OP-2)**

<table>
<thead>
<tr>
<th>Years</th>
<th>Profit After Tax</th>
<th>Penalty at 1.25 times of relevant profit (Rupees in crores)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009-10</td>
<td>8.19</td>
<td>8.83*</td>
</tr>
<tr>
<td>2010-11</td>
<td>6.50</td>
<td>8.12</td>
</tr>
<tr>
<td>2011-12</td>
<td>-1.67*</td>
<td>0</td>
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<tr>
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<tr>
<td>2014-15</td>
<td>12.62</td>
<td>15.77</td>
</tr>
<tr>
<td>2015-16</td>
<td>7.38</td>
<td>9.22</td>
</tr>
<tr>
<td>2016-17</td>
<td>14.28</td>
<td>709*</td>
</tr>
<tr>
<td><strong>Total Penalty</strong></td>
<td></td>
<td><strong>52.82</strong></td>
</tr>
</tbody>
</table>

**PANASONIC ENERGY INDIA CO. LTD. (OP-3)**

<table>
<thead>
<tr>
<th>Years</th>
<th>Profit After Tax</th>
<th>Penalty at 1.25 times of relevant profit (Rupees in crores)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009-10</td>
<td>8.39</td>
<td>9.05*</td>
</tr>
<tr>
<td>2010-11</td>
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<td>9.72</td>
</tr>
<tr>
<td>2014-15</td>
<td>19.95</td>
<td>24.93</td>
</tr>
</tbody>
</table>
2015-16 | 18.29 | 22.87
2016-17 | 1.01 | 0.50*

Total Penalty 74.68

*On a pro-rata basis for the duration of the cartel for the said financial year. For FY 2009-10, relevant profit considered from 20.05.2009 to 31.03.2010 i.e. 315 days out of 365 days. For FY 2016-17 relevant profit considered from 01.04.2016 to 23.08.2016 i.e. 145 days out of 365 days

#Negative profit for the concerned financial years (excluded).

ASSOCIATION OF INDIAN DRY CELL MANUFACTURERS (OP-4)

<table>
<thead>
<tr>
<th>Financial Years</th>
<th>Amount in INR(Total Receipts)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014-15</td>
<td>6,36,980</td>
</tr>
<tr>
<td>2015-16</td>
<td>15,27,719</td>
</tr>
<tr>
<td>2016-17</td>
<td>33,98,810</td>
</tr>
<tr>
<td>Average turnover for preceding 3 years</td>
<td>18,54,503</td>
</tr>
<tr>
<td><strong>Total Penalty (10 percent of average turnover for preceding 3 years)</strong></td>
<td><strong>1,85,450</strong></td>
</tr>
</tbody>
</table>

16. Considering that the Commission has decided to grant 30 (Thirty) percent reduction in penalty to OP-1 under Section 46 of the Act, as recorded hereinabove, total amount of penalty to be paid by OP-1 is INR 171.55 crores (Rupees One Hundred Seventy-One crores and Fifty-Five lakhs).

17. Considering further that the Commission has decided to grant 20 (Twenty) percent reduction in penalty to OP-2 under Section 46 of the Act, as recorded hereinabove, total amount of penalty to be paid by OP-2 is INR 42.26 crores (Rupees Forty-Two crores and Twenty Six lakhs).

18. Lastly, considering that the Commission has decided to grant 100 (One Hundred) percent reduction in penalty to OP-3 under Section 46 of the Act, as recorded hereinabove, total amount of penalty to be paid by OP-3 is NIL.
19. Total amount of penalty to be paid by OP-4 is INR 1,85,450 (Rupees One Lakh Eighty Five Thousand Four Hundred and Fifty).

20. The Commission directs OPs to deposit the penalty amount within 60 days of receipt of this order.

21. So far as the liability of the individuals of OPs in terms of the provisions of Section 48 of the Act is concerned, the DG after finding OPs *i.e.*, OP-1, OP-2, OP-3 and OP-4 to be in contravention of the provisions of the Act, has investigated and highlighted the individual roles of their personnel for the purposes of Section 48 as below:

*Individuals of OPs found to be guilty of contravention of the Act and liable for penalty under Section 48 of the Act:*

22. The Commission has already held that the impugned acts / conduct of OP-1, OP-2, OP-3 and OP-4 are in contravention of the provisions of Section 3(3)(a), 3(3)(b) and 3(3)(c) read with Section 3(1) of the Act. The liability of the individuals of OP-1, OP-2, OP-3 and OP-4 under the provisions of Section 48 of the Act flows vicariously. In the instant case, the Commission observes that individuals of the respective OPs, as mentioned in Para 6.11, have been identified to be liable under Section 48 of the Act by the DG.

23. No individual of OPs has shown that contravention of the Act was committed without his knowledge or that he had exercised due diligence to prevent the commission of contravention. But for two individuals of OP-2, namely, Shri P. Dwaraknath Reddy and Shri Hemant Gupta, who have questioned the finding of the DG, none of the other individuals of the Manufacturers mentioned by the DG, have disputed the finding in respect of those held liable under Section 48 of the Act. Therefore, each one of them is deemed to be guilty of the contravention of the Act and is liable for penalty under Section 48 of the Act.

24. In respect of Shri Reddy and Shri Gupta, who have disputed the finding of their involvement in the cartelisation of zinc-carbon dry cell battery, the Commission observes as under:

a) In respect of involvement of Shri P. Dwaraknath Reddy, the Commission has considered the submission that no incriminating evidence has been found against him by the DG and accordingly, he may be exonerated. The Commission observes that Shri P. Dwaraknath Reddy has been the Managing Director and CEO of OP-2 since October 2009. The collusion for such a long period of time could not have been possible without his knowledge and implicit approval. Moreover, in the Lesser Penalty Application of OP-2, Shri P. Dwaraknath Reddy has been named as a person associated with the cartel. During investigation also, it was identified that Shri P. Dwaraknath Reddy is overall in-charge of running the affairs of OP-2. More importantly, Shri P. Dwaraknath Reddy has neither been able to demonstrate that contravention of the Act was committed without his knowledge nor anything to show that he had exercised due diligence to prevent the commission of contravention. Therefore, Shri P. Dwaraknath Reddy is deemed to be guilty of the contravention and is liable for penalty under Section 48(1) of the Act.

b) In respect of Shri Hemant Gupta’s involvement in the cartel, the Commission has considered the submission that he was only executive assistant of the Joint Managing
Director of OP-2 and accordingly, he has not been involved in the cartel. The Commission, however, observes that in the Lesser Penalty Application of OP-2, Shri Hemant Gupta has been named as a person associated with the cartel. Further, the investigation has revealed that, Shri Hemant Gupta, AGM-Executive Assistant to Joint Managing Director of OP-2, had assisted Shri R. P. Khaitan, Joint Managing Director of OP-2, in the cartel arrangement by providing regular feedback points/agenda for discussion with the individuals of OP-1 and OP-3. Not only that, Shri Hemant Gupta directly exchanged commercially sensitive information with senior personnel and his counterparts in OP-1 and OP-3. Thus, there is enough evidence to show that Shri Hemant Gupta was actively involved alongwith his superiors and he executed the anti-competitive directions of his seniors on his own volition. Therefore, the Commission holds Shri Hemant Gupta liable under Section 48(2) of the Act.

25. Role of the individuals of OP-4: The Commission holds two individuals of AIDCM, namely, Shri Ravindra Grover and Shri S. Kumarswami, who were functioning as Secretary of AIDCM liable for violation of Section 48 of the Act as they played an active role in aiding cartelisation in the domestic dry cell battery market. The Commission also holds Shri S. K. Khurana, who was the Chairman of OP-4 from February 2012 to September 2015, and Shri R. P. Khaitan, who was President of OP-4 from September 2015 to August 2016, liable in their capacity as the office-bearers of OP-4. Although Shri Deepak Khaitan of OP-1, the former President of AIDCM was also found liable by the DG, the Commission has allowed the request for deletion of his name as he passed away on 9 March 2015.

26. Thus, considering the totality of facts and circumstances of the present case, the Commission decides to impose penalty in terms of Section 27(b) of the Act calculated at the rate of 10 percent of the average of their income for the last three preceding financial years on the following individuals of OP-1, OP-2, OP-3 and OP-4:

**INDIVIDUALS OF OP-1**

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Name</th>
<th>Income in FY 2014-15</th>
<th>Income in FY 2015-16</th>
<th>Income in FY 2016-17</th>
<th>Average Income for three years</th>
<th>Penalty Imposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>Shri Suvamoy Saha</td>
<td>2,20,06,658</td>
<td>2,39,27,708</td>
<td>2,66,39,966</td>
<td>2,41,91,444</td>
<td>24,19,144</td>
</tr>
<tr>
<td>(ii)</td>
<td>Shri Partha Biswas</td>
<td>83,88,108</td>
<td>93,17,406</td>
<td>1,00,25,057</td>
<td>92,43,524</td>
<td>9,24,352</td>
</tr>
<tr>
<td>(iii)</td>
<td>Shri Anil Bajaj</td>
<td>55,93,721</td>
<td>53,31,617</td>
<td>55,83,200</td>
<td>55,02,846</td>
<td>5,50,285</td>
</tr>
<tr>
<td>(iv)</td>
<td>Shri Kunal Gupta</td>
<td>48,64,011</td>
<td>50,47,482</td>
<td>60,71,233</td>
<td>53,27,575</td>
<td>5,32,758</td>
</tr>
<tr>
<td>(v)</td>
<td>Shri Indranil Roy Chowdhury</td>
<td>40,72,723</td>
<td>51,13,169</td>
<td>62,38,902</td>
<td>51,41,598</td>
<td>5,14,160</td>
</tr>
<tr>
<td>(vi)</td>
<td>Shri Amritanshu Khaita n</td>
<td>1,99,41,302</td>
<td>2,87,64,271</td>
<td>3,19,93,973</td>
<td>2,68,99,849</td>
<td>26,89,985</td>
</tr>
</tbody>
</table>

**INDIVIDUALS OF OP-2**
<table>
<thead>
<tr>
<th>S. No.</th>
<th>Name</th>
<th>Income in FY 2014-15</th>
<th>Income in FY 2015-16</th>
<th>Income in FY 2016-17</th>
<th>Average Income for three years</th>
<th>Penalty Imposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>Shri R.P. Khaitan</td>
<td>1,11,12,525</td>
<td>1,35,21,434</td>
<td>1,27,54,779</td>
<td>1,24,62,913</td>
<td>12,46,291</td>
</tr>
<tr>
<td>(ii)</td>
<td>Shri M. Sankara Reddy</td>
<td>55,15,144</td>
<td>61,62,402</td>
<td>67,85,157</td>
<td>61,54,234</td>
<td>6,15,423</td>
</tr>
<tr>
<td>(iii)</td>
<td>Shri B. L. N. Prasad</td>
<td>22,54,841</td>
<td>25,24,510</td>
<td>29,05,877</td>
<td>25,61,743</td>
<td>2,56,174</td>
</tr>
<tr>
<td>(iv)</td>
<td>Shri Hemant Gupta</td>
<td>18,62,140</td>
<td>19,84,315</td>
<td>20,76,347</td>
<td>19,74,267</td>
<td>1,97,427</td>
</tr>
<tr>
<td>(v)</td>
<td>Shri P. Dwaraknath Reddy</td>
<td>80,99,043</td>
<td>94,65,632</td>
<td>93,20,005</td>
<td>89,61,560</td>
<td>8,96,156</td>
</tr>
<tr>
<td>(vi)</td>
<td>Shri Santosh Tanmay/ Santosh Kumar</td>
<td>16,57,863</td>
<td>24,53,281</td>
<td>20,55,572</td>
<td>20,55,572</td>
<td>2,05,557</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Name</th>
<th>Income in FY 2013-14</th>
<th>Income in FY 2014-15</th>
<th>Income in FY 2015-16</th>
<th>Average Income for three years</th>
<th>Penalty Imposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>Shri Manas Mitra/ Shri Santosh Tanmay/ Santosh Kumar</td>
<td>8,38,963</td>
<td>8,70,849</td>
<td>8,69,252</td>
<td>8,59,688</td>
<td>85,969</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Name</th>
<th>Income in FY 2011-12</th>
<th>Income in FY 2012-13</th>
<th>Income in FY 2013-14</th>
<th>Average Income for three years</th>
<th>Penalty Imposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>Shri Latesh Madan/ Shri Santosh Tanmay/ Santosh Kumar</td>
<td>15,06,025</td>
<td>22,70,205</td>
<td>22,21,136</td>
<td>19,99,122</td>
<td>1,99,912</td>
</tr>
</tbody>
</table>

* Shri Santosh Tanmay / Santosh Kumar was employee of OP-2 from 1 April 2015 to 31 May 2017. Income details have been considered, accordingly
* Shri Manas Mitra was employee of OP-2 from 1 December, 1983 to 31 December, 2015. Income details have been considered, accordingly
* Shri Latesh Madan was employee of OP-2 from 5 September, 2011 to 1 June, 2013. Income details have been considered, accordingly

**INDIVIDUALS OF OP-3**

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Name</th>
<th>Income in FY 2014-15</th>
<th>Income in FY 2015-16</th>
<th>Income in FY 2016-17</th>
<th>Average Income for three years</th>
<th>Penalty Imposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>Shri A.K. Dhanda</td>
<td>10,86,882</td>
<td>14,71,239</td>
<td>14,37,327</td>
<td>13,31,816</td>
<td>1,33,182</td>
</tr>
<tr>
<td>(ii)</td>
<td>Shri R. R. Desai</td>
<td>10,71,187</td>
<td>10,83,395</td>
<td>10,76,126</td>
<td>10,76,903</td>
<td>1,07,690</td>
</tr>
<tr>
<td>(iii)</td>
<td>Shri Parimal Vazir</td>
<td>14,11,753</td>
<td>16,63,516</td>
<td>14,96,228</td>
<td>15,23,832</td>
<td>1,52,383</td>
</tr>
<tr>
<td>(iv)</td>
<td>Shri Ketan Valand</td>
<td>3,63,891</td>
<td>4,11,434</td>
<td>4,00,441</td>
<td>3,91,922</td>
<td>39,192</td>
</tr>
<tr>
<td>(v)</td>
<td>Shri S.K. Khurana</td>
<td>90,36,610</td>
<td>1,25,85,124</td>
<td>1,62,61,701</td>
<td>1,26,27,812</td>
<td>12,62,781</td>
</tr>
<tr>
<td>S. No.</td>
<td>Name</td>
<td>Income in FY 2013-14</td>
<td>Income in FY 2014-15</td>
<td>Income in FY 2015-16</td>
<td>Average Income for three years</td>
<td>Penalty Imposed</td>
</tr>
<tr>
<td>--------</td>
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<td>--------------------------------</td>
<td>------------------</td>
</tr>
<tr>
<td>(vi)</td>
<td>Shri Hideya Maekawa@</td>
<td>37,35,396</td>
<td>55,14,609</td>
<td>27,61,857</td>
<td>40,03,954</td>
<td>4,00,395</td>
</tr>
</tbody>
</table>

@ Shri Hideya Maekawa was employee of OP-3 from January 2012 to November 2015

### INDIVIDUALS OF OP-4

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Name</th>
<th>Income in FY 2011-12</th>
<th>Income in FY 2012-13</th>
<th>Income in FY 2013-14</th>
<th>Average Income for three years</th>
<th>Penalty Imposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>Shri Subramania Kuma raswami, Secretary</td>
<td>6,39,615</td>
<td>6,55,289</td>
<td>8,38,166</td>
<td>7,29,023</td>
<td>71,102</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Name</th>
<th>Income in FY 2014-15</th>
<th>Income in FY 2015-16</th>
<th>Income in FY 2016-17</th>
<th>Average Income for three years</th>
<th>Penalty Imposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>(ii)</td>
<td>Shri Ravindra Grover, Secretary</td>
<td>22,50,108</td>
<td>26,98,559</td>
<td>32,99,870</td>
<td>27,49,512.33</td>
<td>2,74,951</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Name</th>
<th>Income in FY 2014-15</th>
<th>Income in FY 2015-16</th>
<th>Income in FY 2016-17</th>
<th>Average Income for three years</th>
<th>Penalty Imposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>(iii)</td>
<td>Shri S. K. Khurana</td>
<td>90,36,610</td>
<td>1,25,85,124</td>
<td>1,40,34,071</td>
<td>1,26,27,812</td>
<td>12,62,781</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Name</th>
<th>Income in FY 2014-15</th>
<th>Income in FY 2015-16</th>
<th>Income in FY 2016-17</th>
<th>Average Income for three years</th>
<th>Penalty Imposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>(iv)</td>
<td>Shri R.P. Khaitan</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

27. The Commission has decided to levy penalty on individuals of OP-4 as shown in Para 26 above. With respect to Shri R. P. Khaitan, it is pointed out that he has already been penalised as individual of OP-2. Accordingly, no penalty is levied on him separately for his role in the cartelisation as office bearer of OP-4.

28. Considering that the Commission has decided to grant 30 (Thirty) percent reduction in penalty to OP-1 under Section 46 of the Act as recorded hereinabove, the Commission allows the reduction in penalty by the same quantum to Shri Amritanshu Khaitan, Shri Suvamoy Saha, Shri Partha Biswas, Shri Anil Bajaj, Shri Indranil Roy Chowdhury and Shri Kunal Gupta of OP-1 under Section 46 of the Act. Thus, the total amount of penalty to be paid by each of above individuals of OP-1 is as follows:
<table>
<thead>
<tr>
<th>S.No.</th>
<th>Name</th>
<th>Penalty Payable after Reduction</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>Shri Suvamoy Saha</td>
<td>16,93,401</td>
</tr>
<tr>
<td>(ii)</td>
<td>Shri Partha Biswas</td>
<td>6,47,047</td>
</tr>
<tr>
<td>(iii)</td>
<td>Shri Anil Bajaj</td>
<td>3,85,199</td>
</tr>
<tr>
<td>(iv)</td>
<td>Shri Kunal Gupta</td>
<td>3,72,930</td>
</tr>
<tr>
<td>(v)</td>
<td>Shri Indranil Roy Chowdhury</td>
<td>3,59,912</td>
</tr>
<tr>
<td>(vi)</td>
<td>Shri Amritanshu Khaitan</td>
<td>18,82,989</td>
</tr>
</tbody>
</table>

29. Similarly, considering that the Commission has decided to grant 20 (Twenty) percent reduction in penalty to OP-2 under Section 46 of the Act, the Commission allows the same quantum of reduction in penalty to Shri R. P. Khaitan, Shri M. Shankara Reddy, Shri B. L. N. Prasad, Shri Hemant Gupta and Shri P. Dwarkanath Reddy under Section 46 of the Act. Thus, the amount of penalty to be paid by each of the above individuals of OP-2 is as follows:

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Name</th>
<th>Penalty Payable after Reduction</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>Shri R. P. Khaitan</td>
<td>9,97,033</td>
</tr>
<tr>
<td>(ii)</td>
<td>Shri M. Sankara Reddy</td>
<td>4,92,339</td>
</tr>
<tr>
<td>(iii)</td>
<td>Shri B. L. N. Prasad</td>
<td>2,04,940</td>
</tr>
<tr>
<td>(iv)</td>
<td>Shri Hemant Gupta</td>
<td>1,57,941</td>
</tr>
<tr>
<td>(v)</td>
<td>Shri P. Dwarkanath Reddy</td>
<td>7,16,925</td>
</tr>
<tr>
<td>(vi)</td>
<td>Shri Santosh Tanmay</td>
<td>1,64,446</td>
</tr>
<tr>
<td>(vii)</td>
<td>Shri Manas Mitra</td>
<td>63,814</td>
</tr>
<tr>
<td>(viii)</td>
<td>Shri Latesh Madan</td>
<td>1,59,930</td>
</tr>
</tbody>
</table>

30. So also, considering that the Commission has decided to grant cent percent (Hundred percent) reduction in penalty to OP-3 under Section 46 of the Act as recorded hereinafore, the Commission allows the same reduction in penalty to Shri Hideya Maekawa, Shri A. K. Dhanda, Shri R. R. Desai, Shri Parimal Vazir, Shri Ketan Valand and Shri S. K. Khurana of OP-3 under Section 46 of the Act. Thus, no penalty is levied on any of these individuals of OP-3.

31. The Commission directs the parties to deposit the respective penalty amount
within 60 days of receipt of this order.

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

*****
Concept note on Advocacy Activities of CCI

Source: CCI Website available at:
http://www.competitioncommission.gov.in/advocacy/Concept_note_on_Advocacy_Activities_of_CCI.pdf

The Competition Law has come into being in India with the passage of the Competition Act, 2002 (hereinafter referred to as the Act) in January 2003. The Competition Commission of India (hereinafter referred to as the CCI or Commission) has been established under section 7 of the Act by a Government Notification dated 14th October, 2003.

2. The Commission, is mandated under the Act to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India. For achieving the aforesaid mandate, the Commission has jurisdiction to:

   iii) Enquire into Anti-Competitive Agreements (eg. Cartel, bid-rigging, etc.);
   iv) Enquire into abuse of dominant position (eg. Predatory Pricing, etc.);
   v) Regulate combinations (Mergers / Amalgamation, Acquisition of shares or controls etc.); and
   vi) Undertake Competition Advocacy (including advice to the Central Government on competition policy issues), Create Public Awareness and Impart Training on competition issues.

Thus, the jurisdiction of the Commission includes seeking compliance of its mandate by taking both enforcement and non-enforcement measures. Whereas, the enforcement measures extend to enquiries and regulations, as aforesaid and as the case may be, the non-enforcement measures imply undertaking Competition Advocacy, Creating Public Awareness and Imparting Training on competition issues.

3. Regarding the measures to be included under the broad category of Competition Advocacy, it would be apt to quote from the Report of the “High Level Committee on Competition Policy and Law”, constituted by the Government of India. In para 6.4.7 and 6.4.8 of its Report, the Committee has conceptualized the competition advocacy in the following words:-

“6.4.7 Competition Advocacy

The mandate of the Competition Commission of India (‘CCI’) needs to extend beyond merely enforcing the Competition Law. It needs to participate more broadly in the formulation of the country’s economic policies, which may adversely affect competitive market structure, business conduct and economic performance. The CCI, therefore, needs to assume the role of competition advocate, acting proactively to bring about Government policies, that lower barriers to entry, promote de-
regulation and trade liberalization and promote competition in the market place. There is a direct relationship between competition advocacy and enforcement of Competition Law. The aim of competition advocacy is to foster conditions that will lead to a more competitive market structure and business behaviour without the direct intervention of the Competition Law Authority, namely the CCI.

6.4.8 A successful competition advocacy can be viewed in terms of the following:

1. CCI must develop relationship with the Ministries and Departments of the Government, regulatory agencies and other bodies that formulate and administer policies affecting demand and supply positions in various markets. Such relationships will facilitate communication and a search for alternatives that are less harmful to competition and consumer welfare;
2. CCI should encourage debate on competition and promote a better and more informed economic decision making;
3. Competition advocacy must be open and transparent to safeguard the integrity and capability of the CCI. When confidentiality is required, CCI should publish news releases explaining why; and
4. Competition advocacy can be enhanced by the CCI establishing good media relations and explaining the role and importance of Competition Policy / Law as an integral part of the Government’s economic framework.”

4. The concept of competition advocacy elucidated in the Report of the High Level Committee finds its echo in Chapter-VII, Section 49 of the Competition Act, 2002. However, the scope of advocacy activities to be undertaken have been widened in the Act by including the measures required for creation of awareness and imparting training about competition issues in addition to advising the Central Government on policies impacting competition and measures for promotion of competition advocacy per se. Under the Act, the Commission is required to proactively interact with the Government Departments / Ministries, media and all other stakeholders, such as, the business community and organizations, academia, consumer organizations and professional bodies, as an advocate of competition, and, foster conditions to create a more competitive policy regime, market structure and business behavior. To elucidate this assertion further, Chapter VII, Section 49 is reproduced below:-

“Competition Advocacy

49. (1) In formulating a policy on competition (including review of laws related to competition), the Central Government may make a reference to the Commission for its opinion on possible effect of such policy on competition and on receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, which may thereafter formulate the policy as it deems fit.
(2) The opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government in formulating such policy.
(3) The Commission shall take suitable measures, as may be prescribed, for the promotion of competition advocacy, creating awareness and imparting training about competition issues.”
5. Thus, the Commission has to transcend beyond being merely an authority to enforce competition law, and don the mantle of an advocate of competition and take suitable non-enforcement measures under section 49, together with the enforcement measures as prescribed under the Act. Competition law enforcement is both the foundation and the tool for fostering sustainable competitive markets that result in healthy inter-firm rivalry, opportunities for new entry, entrepreneurship, increased economic efficiency and consumer welfare. Competition advocacy can augment these and other benefits of competition. The measures to be taken under section 49, therefore, should aim to foster a competition culture where voluntary compliance of competition law becomes a reality and competition is internalized as a key driver for economic growth and consumer welfare by all the stakeholders. Competition Advocacy, thus quintessentially means non-enforcement mechanism for compliance of competition law and creation of competition culture.

6. In the context of the aforesaid, the Commission envisages the following advocacy activities to be undertaken as an competition advocate:-

6.1 Promotion of Competition Advocacy and creation of awareness about competition issues:

i) The Commission shall endeavour and undertake programmes, activities etc. for the promotion of competition advocacy and creation of awareness about competition issues in India and abroad as considered appropriate by the Commission;

ii) The Commission may constitute Advocacy Advisory Committee(s) with a view to have expert and stakeholder participation and consultation, on continuous basis, to carry forward the agenda of competition advocacy and creation of awareness about competition issues;

iii) The Commission may develop and disseminate advocacy literature, including audio-visual and other material with a view to promote competition advocacy and create awareness about competition issues. For doing so, the Commission may outsource the professional services as deemed appropriate;

iv) The Commission may make extensive use of the media, both print and electronic, for promotion of competition advocacy and creation of awareness on competition issues, and, for this purpose may, inter-alia convene media meets, issue press notes, arrange publication and dissemination of articles/news, release advertisements and undertake other publicity related activities on competition issues as deemed appropriate;

v) The Commission shall proactively interact with the organizations of stakeholders, academic community, sectoral regulators, Central and State Governments, Civil society and other organisations concerned with competition matters and encourage debate on competition and promote a better and more informed economic decision making;
vi) The Commission may undertake studies and market research for the purpose of competition advocacy and creation of awareness about competition issues;

vii) The Commission may assume the role of a competition advocate and proactively interact with the Central and State Governments and other bodies in legislative policy and other areas, such as, but not limited to, trade liberalization, economic regulation, state aids, disinvestments; to bring about policies that lower barriers to entry, promote de-regulation and trade liberalization and promote competition in the market place. For this end in view, the Commission may, inter-alia, undertake studies and research on the Central and State Government policies, and, arrange for the dissemination of the reports thereof as deemed appropriate;

viii) The Commission may encourage the academic and professional institutions to include competition law and policy in the curricula administered by them; and

ix) The Commission may encourage and interact with the organizations of stakeholders, academic community, sectoral regulators, Central and State Governments, Civil society and other organizations concerned with competition matters to undertake activities, programmes, studies, research work etc. relating to competition issues and may support such endeavours financially as considered appropriate.

6.2. Imparting Training about competition issues -

(i) The Commission shall arrange appropriate training in India and abroad for the Chairperson, Members, Officers and other employees assisting the Commission including the Director General about competition issues and participation in international events as considered necessary by the Commission;

(ii) The Commission may also arrange appropriate training in India or abroad for the stakeholders as considered necessary;

(iii) The Commission may have arrangements with any national or international institution, as the case may be, for such training and may undertake to set up a center on competition law and policy as deemed appropriate; and

(iv) The Commission may provide internship facilities to the students and professionals sponsored by universities, academic and professional institutions for undertaking studies, research etc. on competition issues and may extend financial assistance therefore as considered appropriate.

7. Many of the above activities are currently being undertaken. The activities will get scaled up eventually once the Commission gains in experience and certain administrative and financial impediments are resolved.

Note: The students are also advised to read competition advocacy of other countries.
1. These petitions have been filed by Ericsson impugning orders dated 12th November, 2013 and 16th January, 2014 (the ‘impugned orders’) passed by the CCI under Section 26(1) of the Competition Act, 2002. The impugned order dated 12th November, 2013 was passed pursuant to an information filed by Micromax under Section 19(1)(a) of the Competition Act and the impugned order dated 16th January, 2014 was passed pursuant to an information filed by Intex.

3. Both Micromax and Intex have alleged that Ericsson, which has a large portfolio of Standard Essential Patents (SEPs) in respect of technologies that are used in mobile handsets and network stations, has abused its position of dominance. The information filed by them before the CCI under Section 19 of the Competition Act has persuaded the CCI to pass the impugned orders directing the Director General (DG) CCI to investigate the matter regarding violation of the provisions of the Competition Act. The substratal dispute between Ericsson and Micromax/Intex relate to Ericsson’s demand for royalty in respect of SEPs held by Ericsson and which it claims has been infringed by Micromax and Intex.

4. According to Ericsson, the impugned orders passed by the CCI are without jurisdiction as it lacks the jurisdiction to commence any proceeding in relation to a claim of royalty by a proprietor of a patent (patentee). Ericsson contends that any issue regarding a claim for royalty would fall within the scope of Patents Act, 1970 and cannot be a subject matter of examination under the Competition Act.

8. Ericsson holds several patents in India in respect of technologies relating to infrastructure equipment, including 2G, 3G and 4G networks as well as mobile phones, tablets, data cards and dongles etc. Some of the patents held by Ericsson are SEPs. Essentially, these are the technologies which have been accepted as standards to be uniformly accepted and implemented across various countries in order to ensure uniformity and compatibility for a seamless transmission of data and calls across the world.

9. The use of a standard technology ensures that there is a uniformity and compatibility in communications network across various countries. Thus, any technology accepted as a standard would have to be mandatorily followed by all enterprises involved in the particular industry. In order to accept and lay down standards, various Standard Setting Organizations' (SSOs) have been established. European Telecommunication Standard Institute (ETSI) is one such body, which has been set up to lay down the standards for the telecommunication industry and particularly 2G (GSM, GPRS, EDGE), 3G (UMTS, WCDMA, HSPA) and 4G (LTE) standards. In cases where the technology adopted as a part of an essential standard is patented, the technology/patent is referred to as a Standard Essential Patent (hereafter 'SEP'). The implication of accepting a patented technology as a standard is that all devices/equipments compliant with the established standard would require to use the patented technology and its manufacture would necessarily require a licence from the patentee holding the SEP.

10. In order to ensure that a patentee cannot prevent access to SEP, clause 6.1 of the —ETSI Intellectual Property Rights Policy expressly provides that:

“When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory (“FRAND”) terms and conditions under such IPR to at least the following extent:

● MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE;
● sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURED;
● repair, use, or operate EQUIPMENT; and
● use METHODS.

The above undertaking may be made subject to the condition that those who seek licences agree to reciprocate.”

Admittedly, Ericsson is bound by the aforesaid policy and in terms thereof, has undertaken to offer its SEPs on Fair, Reasonable And Non Discriminatory (FRAND) Terms. The disputes between the
parties relate to the patents concerning the technologies pertaining to 2G and 3G devices that are claimed by Ericsson to be SEP’s for which Ericsson is bound to offer licences on FRAND terms.

11. Ericsson alleges that the products manufactured and dealt with by Micromax and Intex violate its patents. Ericsson further claims that it made best efforts to negotiate a Patent Licensing Agreement (PLA) with Micromax and Intex on FRAND terms but its efforts were unsuccessful. Consequently, Ericsson was constrained to initiate proceedings for infringement of its patents.

14. On 24th June, 2013 Micromax filed a complaint/information under Section 19(1)(a) of the Competition Act before the CCI, inter alia, alleging that Ericsson had contravened the provisions of the Competition Act.

15. Micromax alleged that Ericsson had abused its dominant position by demanding an unfair royalty structure from Micromax in respect of its SEPs relating to the GSM Technology. It asserted that the royalty demanded by Ericsson was excessive and had no basis in the Indian commercial realities. Micromax contended that profit margin of Indian mobile companies was in the range of six to eight percent and if Micromax was called upon to pay royalties at the rate demanded by Ericsson, its business would be rendered unviable.

17. Micromax also accused Ericsson of attempting to limit the development of technology relating to mobile phones in India to the prejudice of the Indian consumers by seeking excessive royalties for its technology. Micromax asserted that as a consequence of Ericsson’s demand for excessive royalties, the Indian handset manufacturers were denied market access in respect of the GSM market.

19. Intex also filed information under Section 19(1)(a) of the Competition Act, alleging that Ericsson and its subsidiary in India, Ericsson India Pvt. Ltd., had abused its dominant position. The specific allegations made by Intex are summarized as under:-

19.2. That Ericsson had abused its position of dominance by insisting on Intex obtaining licences without disclosing the patents that were alleged to have been infringed by Intex.

19.3. That Ericsson had insisted on execution of a NDA as a necessary pre-condition for informing Intex of the specifics of the alleged infringement.

19.4. That Ericsson exerted pressure on Intex to conclude a Patent Licensing Agreement (PLA) without providing complete details of the patents and on terms which were alleged to be “grossly onerous, oppressive, unfair, unreasonable and discriminatory”.

19.5. That the royalty rates demanded by Ericsson were exorbitant and excessive.

19.6. That the royalty rates were based at the end value of the mobile device rather than the components of the device using the patented technology. It was alleged that in this manner, Ericsson had sought to unfairly appropriate the value created by others in respect of the end product.

19.7. That Ericsson was not only charging separate rates from SEP holding companies and non-SEP holding companies but was also offering different royalty rates and commercial terms to potential licensees from the same category. And, it was doing so with a view to make unreasonable gains. It was alleged that this had the effect of altering the conditions of competition.

19.8. That Ericsson had failed to offer any objective basis for its royalty demands.

19.9. That Ericsson had offered its entire pool of patents as a bouquet and had refused to offer specific royalty rates in respect of each of the SEPs allegedly infringed by Intex. Thus, Ericsson was endeavoring to compel Intex to acquire licence for all its patents relating to 2G and 3G technologies without giving any choice to Intex to acquire the rights in respect of only some of the specific patents. This, according to Intex would amount to a practice of bundling and tying, which is proscribed under the Competition Act.

19.10. That the conduct of Ericsson was opaque and non-transparent and, in effect, sought to impose unfair and discriminatory terms/prices and restrict the provisions of goods and services.

20. The CCI passed the impugned order dated 12th November, 2013 under Section 26(1) of the Competition Act pursuant to an information filed by Micromax. The CCI took note of the fact that Ericsson was a member of ETSI and held several SEPs which were recognized as standard by ETSI. The CCI also noted that as per clause 6 of ETSI IPR policy, the IPR holder/owner is required to give an irrevocable written undertaking that it would grant irrevocable licence on FRAND Terms to be applied fairly and uniformly to similarly placed parties. The CCI noted that Ericsson had declared that it had standard patents in respect of 2G, 3G and EDGE technologies, which were also accepted by the Department of Telecommunications, Ministry of Communications and Information Technology, Government of India. The 'Unified Access Service License' granted by the Government of India also
required all GSM/CDMA network and equipments imported into India to meet the international standards of international telecommunication technology. In view of the fact that in case of SEPs, there is no possibility of using a non-infringing technology, CCI formed a prima facie view that Ericsson enjoyed complete dominance over its present and prospective licensees in the relevant product market.

21. CCI further concluded that the information provided by Micromax indicated that the practices adopted by Ericsson were discriminatory and contrary to FRAND terms. In particular, CCI noted that the royalty rates charged by Ericsson had no link to the patented product and that was contrary to what was expected of a patentee holding SEPs; CCI was of the prima facie view that royalties linked with the cost of the end product were contrary to the FRAND obligations.

22. Insofar as the Ericsson’s suit against Micromax was concerned, CCI held that the same was in respect of infringement of Ericsson’s IPR rights and the pendency of the civil suit did not prevent the CCI from proceeding under the Competition Act and consequently, directed the DG to investigate any violation of the provisions of the Competition Act.

23. The impugned order dated 16th January, 2014 passed pursuant to the information filed by Intex is more or less similar to the impugned order dated 12th November, 2013 in Case No.50/2013. CCI specifically noted that it had already formed a prima facie opinion under Section 26(1) of the Competition Act on the information submitted by Micromax and had directed the DG to conduct an investigation. CCI was of the view that Intex's Case be clubbed for causing an investigation under proviso to Section 26(1) of the Competition Act. Accordingly, the DG was also directed to investigate the matter by looking into the allegations made by Intex within the specified period.

24. to 28. **Submissions on behalf of Ericsson:** Mr C.S. Vaidyanathan, learned Senior Advocate appearing for Ericsson contended in Intex Petition:

- the Patents Act is a special act and contains comprehensive provisions for addressing all the matters including protecting the interest of consumers and general public, the Competition Act has been enacted as a general law to promote and sustain competition in the market and to prevent practices having an adverse effect on competition.

- Reference was made to various provisions of the Patents Act - in particular Sections 83-90, 92 & 92A - to emphasize that the Patents Act contains provisions to adequately redress the grievances of any person in respect of non-availability of rights to use a patent on reasonable terms.

- the Controller of Patents and/or a Civil Court were vested with the function and the power to remedy any grievance relating to a patentee’s demand for excessive or unreasonable royalty by grant of compulsory licence and the CCI, on the other hand, had no jurisdiction to grant such relief.

- Section 4 of the Act was not applicable in respect of licensing of patents- (a) That a patentee insofar as grant of patent license is concerned, is not an ‘enterprise’ within the meaning of Section 2(h) of the Act. (b) That the patentee insofar as licensing of patent is concerned, is not engaged in purchase or sale of goods or services. (c) Patents are not a goods or services and a licence for a patent is also not goods or services. Thus, licensing of patent would also not fall within the scope of sale of goods or sale of services.

- Various provisions to address the anti-competitive practices were incorporated in the antitrust laws applicable in United Kingdom. However, in India, similar provisions were introduced in the Patents Act and not in the Competition Act. Thus the intention of the Parliament was that the issues regarding abuse of dominance by a patentee in respect of patent licensing be addressed under the Patents Act and not under the Competition Act.

- CCI was not competent to effectively redress the grievance voiced by Intex as CCI would have no power to direct grant of licence for a patent but could only pass a cease and desist order or levy penalty; neither of which were effective remedies.

- Reference was made to Section 60 & 61 of the Competition Act which indicated that no Civil Court would have the jurisdiction to entertain any suit or proceedings in respect of which CCI was empowered to determine under the Competition Act. Therefore, the jurisdiction of the Civil Court was not ousted in respect of various matters relating to patent
and in particular, grant of injunction; determination of fair terms for licensing of a patent and
determination of damages.

29. -33. Mr T.R. Andhyarujina, Learned Senior Advocate, appearing on behalf of Ericsson in
Micromax Petition:
   • the Patents Act was a special statute which allowed monopoly by granting a patent and at the
     same time also contained provisions for controlling the abuse of such monopoly.
   • the High Court has the jurisdiction to decide all issues pertaining to patents, which included,
     the issue of grant or non-grant of injunctions to prevent infringement of a patent; the terms
     on which such injunctions could be granted, if any; enforcement of other remedies such as
     customs inspections etc.; and issues regarding validity and fixing of reasonable fees and
     damages.
   • the Competition Act did not provide any remedy to prevent anti-competitive practices in
     relation to patent rights and, therefore, the only recourse for redressal of grievances
     regarding demand of excessive licence fee would be under the Patents Act and not under the
     Competition Act.
   • Reference was made to Section 60 of the Competition Act which provided that the Act
     would apply notwithstanding anything inconsistent contained in any other law. Since the
     Competition Act did not provide for grant of a compulsory licence or for determination of a
     royalty, there was no inconsistency between the Competition Act and the Patents Act.
   • Since CCI had no jurisdiction to determine the reasonableness of the royalties in respect of
     the patented technologies, it would not have the jurisdiction to entertain any complaint in
     that regard particularly when a suit in regard to the same subject matter was pending before
     this Court.
   • the impugned order dated 12th November, 2013 passed by CCI was also invalid inasmuch as
     it made observations which were adjudicatory and determinative in nature even prior to the
     conduct of investigation by the DG.

34. -35. Ms. Singh, learned Senior Advocate appearing for Ericsson supplemented the submissions made
by Mr C.S. Vaidyanathan and Mr T.R. Andhyarujina. She submitted that:
   • the abuse of dominance and anti-competitive behavior as alleged by Micromax and Intex
     related solely to the royalty sought by Ericsson for use of its patented technology. And this
     issue was outside the jurisdiction of CCI as the Patents Act provided an adequate mechanism
     to address all issues/reliefs.
   • the order passed by CCI was without application of mind. CCI had failed to consider any of
     the contentions regarding the challenge to its jurisdiction while passing the impugned orders.
   • the relevant market described by CCI in the impugned order dated 12th November, 2013 as
     initially uploaded on the website indicated the relevant market to be "market of GSM and
     CDMA technology in India", which was palpably erroneous and also clearly indicated that
     the CCI had not understood the subject of the SEPs for which royalty was claimed by
     Ericsson.

36. -40. Submissions on behalf CCI: Mr Haksar, learned Senior Advocate, appearing for CCI submitted
that:
   • the impugned orders were not amenable to judicial review under Article 226 of the
     Constitution of India as the said orders did not amount to a final expression of opinion on
     merit.
   • CCI was not required to give any notice or hear the parties before passing an order under
     Section 26(1) of the Competition Act as an order under Section 26(1) only required
     formation of a prima facie opinion and the Competition Act provided sufficient safeguards
     by affording the parties an opportunity to be heard at a subsequent stage.
   • the provisions of the Competition Act were in addition to and not in derogation of any other
     law. Reference was made to Section 60 of the Competition Act which expressly provided the
     provisions of the Competition Act to have effect notwithstanding anything inconsistent
     contained in any other law. Thus, the CCI was not concerned with any other aspect
regarding grant or exercise of any right pertaining to a patent except to ensure the compliance with Section 3 and 4 of the Competition Act.

- there was no conflict between the Competition Act and the Patents Act as both the said legislations were independent in their respective spheres.
- The definition of the term ‘enterprise’ was wide enough to include any person engaged in any activity relating to production and supply of articles or goods. Stressing upon the expression ‘relating to’, it was submitted that Ericsson’s SEPs had a co-relation with production, distribution and control of articles or goods. It was not necessary that an enterprise be directly engaged in production of goods and an enterprise engaged in controlling the technology for production of goods would also fall within the scope of Section 2(h) of the Competition Act.

41. **Submissions on behalf of Intex:** Mr Arun Kathpalia, learned Advocate appearing for Intex, at the outset, challenged the maintainability of the present petition on the strength of the decision of the Supreme Court in Steel Authority of India. He submitted that:

- a High Court would exercise its supervisory jurisdiction in respect of orders passed by the Tribunals only where an order suffered from a serious error of law manifest on the face of the record.
- a Tribunal would also have the jurisdiction to determine questions regarding its own jurisdiction. If such questions involved contentious issues and if the complaint was not self evident and required long drawn arguments, it could not be said to be an error apparent on the face of the record and a writ of certiorari would not ordinarily be issued.

He contended that, none of the conditions for issuing a writ of certiorari existed as there was no lack of inherent jurisdiction with the CCI to issue the impugned orders.

42. The complaint further disclosed that (a) Ericsson had abused its position of dominance as Ericsson had attempted to bundle SEPs held by Ericsson which were not required by Intex; (b) royalty demanded was unfair, unreasonable and discriminatory; (c) necessary information was sought to be obfuscated; and (d) that royalty was demanded on the price of the end product and not on the basis of the value of the component that used or housed the relevant SEP. It is contended that the aforesaid allegations prima facie disclosed violation of Section 4 of the Competition Act and, therefore, fell within the exclusive jurisdiction of CCI.

43. He submitted that: (a) Section 60 of the Competition Act expressly stated that the Act would have effect notwithstanding anything inconsistent therewith in other laws; (b) there was nothing in the Patents Act which would either impliedly or expressly oust the jurisdiction of CCI; (c) the Competition Act was a later enactment; and (d) the scope and substance of the Competition Act and the Patents Act was different.

45. Insofar as the contention that CCI lacked the technical competence to examine issues relating to patents, Mr Kathpalia referred to Section 21A of the Competition Act and on the strength of the provisions, argued that in cases where CCI required any inputs from the Controller of Patents, it could always make a reference to the Controller of Patents and seek its opinion.

46. Mr Kathpalia next submitted that the reliance placed by Ericsson on the provisions of Section 3(5) of the Competition Act was misplaced as the complaint made by Intex did not relate to anti-competitive agreements under Section 3 of the Competition Act but alleged abuse of dominance which fell within the scope of Section 4 of the Competition Act. He also contended that the plain language of Section 3(5) of the Competition Act could also not be read to mean that jurisdiction of CCI was ousted.

48. **Submissions on behalf of Micromax:** Mr Salman Khurshid, learned Senior Advocate appearing on behalf of Micromax also contested the submissions made on behalf of Ericsson on by advancing arguments similar to those advanced by Mr. Haksar and Mr. Kathpalia.

49. **Mr Aditya Narain, Amicus Curiae,** submitted that the subject matter of disputes related to negotiation of licences for SEPs. Thus, CCI, at the threshold, had to consider whether Ericsson could be considered as an ‘enterprise’ within the meaning of Section 2(h) of the Competition Act; but, CCI had failed to consider the aforesaid issue while passing the order under Section 26(1) of the Competition Act. According to him, the expression ‘any activity’ as used in Section 2(h) of the Competition Act would not include negotiation of patent licences and, therefore, Ericsson could not be considered as an enterprise for the purposes of Section 4 of the Competition Act. He further
submitted that the impugned orders also did not indicate whether Micromax and/or Intex could be considered as consumers within the meaning of Section 2(f) of the Competition Act and; apparently, CCI had also failed to consider the same.

**Whether the petition is maintainable – Scope of judicial review**

60. I have reservations as to merits of the contention that a direction under Section 26(1) of the Competition Act to conduct an investigation does not prejudice the party being investigated in any manner, as it does not amount to a final determination of the allegations made. Indisputably, a direction to conduct an investigation may not involve an adjudicatory process and does not foreclose or in any manner affect the defence that is available to the party being investigated. But, nonetheless, it does have the effect of subjecting a party to an inquisitorial process at the hands of DG. The DG is obliged to carry out the directions of CCI and conduct an investigation into any contravention regarding provisions of the Competition Act. By virtue of Section 42(2) of Competition the Act, the DG has the same powers as conferred upon the CCI under Section 36(2) of the Act. Section 36(2) of the Competition Act expressly enacts that CCI will have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908.

61. Section 43 of the Competition Act also provides for imposition of penalty upon any person who fails to comply with the directions issued by the DG under Section 41(2) of the Competition Act. Any person subjected to an investigation would also have to endure the attendant inconvenience and, depending on the extent of investigation, would probably have to commit significant resources for complying with the demands for supply of information as well as for production of evidence including examination of persons employed or associated with the enterprise being investigated.

62. By virtue of Section 41(3) of the Competition Act, the provisions of Sections 240 and 240A of the Companies Act, 1956 would also apply to an investigation made by the DG, or any person investigating under his authority, as they apply to an Inspector appointed under the Companies Act, 1956.

63. The DG or any person acting under his authority would have an unmitigated access to any document available with the enterprise being investigated. Obviously, such documents may also include confidential and sensitive information and even though the DG may keep the same as confidential, it can hardly be disputed that an enterprise furnishing sensitive information to DG would run the risk of the information being leaked or disclosed. It also cannot be overlooked that the fact that an enterprise is being investigated in respect of allegations of its anti-competitive conduct may also result in loss of reputation and goodwill.

65. The submission made on behalf of Ericsson that impugned orders were being used in litigations by various parties not only in India but also in other jurisdictions was not controverted.

66. In the aforesaid circumstances, it could hardly be disputed that the commencement of investigation against Ericsson would certainly prejudice Ericsson. In the given facts, I am unable to accept that Ericsson's challenge to the impugned orders should be rejected at this stage solely on the ground that it does not affect Ericsson's right and, therefore, Ericsson cannot agitate any grievance in that regard.

68. In the aforesaid view, it is next to be examined as to whether the impugned orders passed under Section 26(1) of the Competition Act can be subjected to judicial review under Article 226 of the Constitution of India. Indisputably, scope of judicial review of the directions issued under Section 26(1) of the Competition Act is limited and does not extend to examining the merits of the allegations.
the statute would clearly fall within the scope of judicial review under Article 226 of the Constitution of India.

78. In terms of Section 26(1) of the Competition Act, a direction to cause an investigation can be made by CCI only if it is of the opinion that there exists a prima facie case. Formation of such opinion is sine qua non for exercise of any jurisdiction under Section 26(1) of the Competition Act. Thus, in cases where the commission has not formed such an opinion or the opinion so formed is ex-facie perverse in the sense that no reasonable person could possibly form such an opinion on the basis of the allegations made, any directions issued under Section 26(1) of the Competition Act would be without jurisdiction and would be liable to be set aside.

79. Any direction under Section 26(1) of the Competition Act could also be challenged on the ground - as is sought to be contended in the present case - that the subject matter is outside the pail of the Competition Act. However, it must be added that a challenge to the jurisdiction of the CCI to pass such directions under Section 26(1) of the Competition Act must be examined on a demurrer; that is, the information received under Section 19 must be considered as correct; any dispute as to the correctness or the merits of the allegations - unless the falsity of the allegations is writ large and ex-facie apparent from the record - cannot be entertained in proceedings under Article 226 of the Constitution of India. Equally, in cases where the direction passed is found to be malafide or capricious, interference by this Court under Article 226 of the Constitution of India would be warranted.

80. In the present case, Ericsson has contested the jurisdiction of CCI to entertain any complaint regarding the rates of royalty in respect of SEPs as according to Ericsson, the same is outside the scope of the Competition Act. Since this issue relates to the jurisdiction of CCI, it would clearly fall within the limited scope of judicial review as available in respect of directions passed by the CCI under Section 26(1) of the Competition Act. In addition, Ericsson has also contested the impugned directions as being perverse and without application of mind. It is trite law that no authority has the jurisdiction to pass perverse orders and, therefore, this challenge would also fall within the limited scope of judicial review.

81. It is, thus, amply clear that Ericsson does have an alternative remedy of preferring an appeal but that remedy would be available only on a final determination. However, the fact that an alternate remedy by way of appeal is available to a party would not denude the jurisdiction of this Court under Article 226 of the Constitution of India.

83. In view of the above, the contention that the present petition is not maintainable, is without merit. However, the validity of the impugned orders can be examined only from the perspective of: (a) whether allegations made by Intex and Micromax could form the subject matter of proceedings under the Competition Act; and (b) whether the impugned orders are perverse?

Jurisdiction of CCI to entertain the complaints of Micromax and Intex under the Competition Act, 2002

84. The central challenge in these petitions is to the jurisdiction of the CCI to entertain complaints filed by Micromax and Intex in relation to what is described as Ericsson’s exercise of rights granted under the Patents Act. It is Ericsson’s case that by virtue of being granted the subject patents under Section 48 of the Patent Act, it has the exclusive right to prevent third parties from making, using, offering for sale, selling or importing the products using Ericsson’s patents without its consent. Ericsson asserts that the patents in question are SEPs and in accordance with its obligations to the SSO’s it has offered licences for its SEPs to Intex and Micromax on FRAND terms. It is urged that having so complied with its commitments to SSO, Ericsson was well within its rights to seek injunctions restraining Ericsson and Intex from infringing its SEPs.

85. It is further claimed that the allegations made could not possibly constitute abuse or misuse of dominance and, therefore, the impugned orders passed by the CCI are wholly without jurisdiction.

87. Ericsson's challenge to the jurisdiction can - as is apparent from the submissions made by the counsel - be considered under the following broad heads:
   (i) Ericsson is not an enterprise within the meaning of Section 2(h) of the Competition Act and, therefore, Section 4 of the Competition Act is wholly inapplicable in any matter relating to its exercise of its rights as a proprietor of its SEPs.
(ii) The Patents Act is a special Act vis-à-vis the Competition Act and therefore it shall prevail over
the provisions of the Competition Act; consequently, insofar as exercise of patent rights are
concerned, proceedings under the Competition Act would not be competent and outside the scope of
that Act.

(iii) The allegations made by Micromax and Intex in their complaints cannot by any stretch constitute
abuse of dominance under the Competition Act and, therefore, impugned orders passed by CCI are
without jurisdiction.

(iv) The disputes between parties – alleged demand for excessive royalty, breach of FRAND
assurances, imposition of unreasonable terms for licencing etc. – are subject matter of proceedings in
the suits filed by Ericsson and, therefore, outside the scope of the Competition Act.

(v) The complaints made by Micromax and Intex are not maintainable as they have denied Ericsson’s
claim for infringement and Intex has also initiated proceedings for revocation of Ericsson’s SEPs and,
therefore cannot allege abuse of dominance by Ericsson as the same is premised on Ericsson being the
proprietor of the subject SEPs. Micromax and Intex are unwilling licensees and therefore, their
complaints with regard to licensing terms could not be entertained.

(vi) In the given facts and circumstances of the case, CCI’s view that a prima facie case is made out is
perverse and thus the impugned order is wholly without jurisdiction.

(i) Ericsson is not an ‘enterprise’ within the meaning of Section 2(h) of the Competition Act:

88. The next issue to be examined is whether Section 4(1) of the Competition Act - which is alleged to
have been violated by Ericsson - could have any application inasmuch as it is contended that Ericsson
is not an ‘enterprise’ within the meaning of Section 2(h) of the Competition Act.

93. The question whether Ericsson is an enterprise within the meaning of Section 2(h) of the Competition
Act would, thus, have to be answered by ascertaining whether it is engaged in any activity relating to
production, supply, distribution, acquisition or control of articles or goods. Admittedly, Ericsson has a
large portfolio of patents and is, inter alia, engaged in developing technologies and acquiring patents.
Thus, if patents are held to be goods, Ericsson would indisputably fall within the definition of
‘enterprise’ within the meaning of Section 2(h) of the Competition Act, since it is admittedly engaged
in activities which entail acquisition and control of patents.

94. This brings us to the question whether patents are ‘goods’.

95. As is apparent, the definition of goods is extremely wide and takes within its fold every kind of
movable property. The word 'property' is defined by virtue of Section 2(11) of the Sale of Goods Act
to mean "the general property in goods, and not merely a special property;”.

96. The expression 'movable property' has not been defined under the Sale of Goods Act, 1930. Thus, in
absence of such definition, one would have to turn to the General Clauses Act, 1897 which defines
'movable property' to mean "property of every description, except immovable property". Section 3(26)
of the General Clauses Act, 1897 defines 'immovable property' to "include land, benefits to arise out
of land, and things attached to the earth, or permanently fastened to anything attached to the earth".
Thus, plainly, the word 'goods' would encompass all kinds of property other than land, benefits to
arise out of land and things attached to the earth, or permanently fastened to anything attached to the
earth.

97. Next, it is necessary to examine the nature of patent rights. Grant of a patent, essentially, provides the
grantee, the right to exclude others from using the patented invention for the specified period; it does
not provide the grantee (patentee) the right to use the patent but merely a right to restrain others from
doing so.

100. Insofar as tangible property is concerned, the ownership carries with it, the right to use that
property and to that extent, patent rights are different inasmuch as they only grant a right to exclude
without further right to use. In the case of real or personal property, the right to exclude others
essentially follows from the proprietor's right to fully enjoy that property, but in case of a patent, the
right to exclude is the only substantive right that is granted to the patentee. However, this distinction
between real property and patents does not detract from the fact that patents are property.

103. As noted above, the nature of patent rights - right to exclude without the right to use - does
not in any manner exclude patent rights from the scope of 'goods' as defined under the Sale of Goods
Act, 1930. All kinds of property (other than actionable claims, money and immovable property)
would fall within the definition of 'goods' and this would also include intangible and incorporeal property such as patents.

104. Consequently, Ericsson would fall within the definition of 'enterprise' under Section 2(h) of the Competition Act.

105. The question whether licences for patents are goods is a contentious one. Since grant of licence does not extinguish the rights of a patent holder in the subject matter, it may not amount to sale of goods. There may be some merit in the contention that a case for abuse of dominant position under clause (a) of Section 4(2) of the Competition Act has not been made out. However, I do not propose to examine that question in these proceedings. The disputes as to whether Ericsson has fallen foul of any of the clauses of Section 4(2) of the Competition Act are as yet open and have not been finally adjudicated. Suffice it to say that the proceedings initiated by the CCI for violation of Section 4(1) of the Act cannot, at the threshold, be held to be without jurisdiction on account of Ericsson not being an enterprise within the meaning of Section 2(h) of the Competition Act.

(ii) Whether the Patents Act as a special Act would prevail over the Competition Act.

107. The key question is whether provisions of the Patents Act exhausts all remedies that are available in respect of abusive conduct by a patentee or whether an abuse of dominant position by a patentee could also be subject matter of proceedings and orders under the Competition Act. The aforesaid issue has to be addressed bearing in mind the objective, express provisions and the operative legislative fields of the two enactments.

110. Whereas patent laws are concerned with grants of rights enabling the patent holder to exclude others from exploiting the invention, and in that sense promoting rights akin to a monopoly; the competition law is essentially aimed to promote competition and, thus, fundamentally opposed to monopolization as well as unfair and anticompetitive practices that are associated with monopolies.

143. Chapter XVI of the Patents Act provides for grant of compulsory licences as well as revocation of patents in certain cases including in cases where the reasonable requirements of the public as specified under Section 84(7) of the Patents Act have not been satisfied. Section 84(7) of the Patents Act, is couched in wide terms and takes within its sweep instances where a refusal by a patentee to grant licence on reasonable terms results in prejudicing the existing trade or industry or any person or class of persons trading or manufacturing in India. Plainly, Section 84(7) would also include instances of abuse that are proscribed under Section 4 of the Competition Act. Section 140 of the Patents Act also postulates certain restrictive conditions to be void.

144. As discussed above, the Patents Act not only provides for a statutory grant of Patent rights but also contains provisions relating to the exercise of and enforcement of those rights. Further, the Patents Act also includes provisions for redressal in the event of abuse of Patents rights. On the other hand, the Competition Act proscribes certain anti-competitive agreements and abuse of dominance in addition to regulating combinations to avoid concentration of market power in general. Undoubtedly, the Competition Act and Patents Act are special acts operating in their respective fields, however, viewed in the aforesaid perspective the Patents Act would be a Special Act, vis-à-vis, the Competition Act in so far as patents are concerned. The Patents Act is a self contained code.

146. It is also relevant to notice Section 62 of the Competition Act which reads as under:-

The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

147. It is evident from the above provision that the intention of the Parliament in enacting the Competition Act was not to curtail or whittle down the full scope of any other law and, therefore, it is expressly stated that the Competition Act would be in addition to, and not in derogation of any other Act.

148. Thus, in my view Section 60 of the Competition Act, which provides for the provisions of the said Act to have an effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, must be read harmoniously with Section 62 of the Competition Act and in the context of the subject matter of the Competition Act. As discussed earlier, the Competition Act is directed to prohibit certain anti-competitive agreements, abuse of dominant position and formation of combinations which cause or are likely to cause appreciable adverse effect on competition. Plainly, agreements which may otherwise be lawful and enforceable under the general law - such as the Indian Contract Act, 1872 - may still be anti-competitive and fall foul of Section 3 of the Competition Act.
Similarly, a practice or conduct which may be considered as an abuse under Section 4 of the
Competition Act may otherwise but for the said provision be legitimate under the general law.
Equally, mergers and amalgamations that are permissible under the general law may result in
aggregation of market power that may not be permitted under the Competition Act. Section 60 of the
Competition Act must be read in the
aforesaid context.

151. Thus, if there are irreconcilable differences between the Patents Act and the Competition Act
in so far as anti-abuse provisions are concerned, the Patents Act being a special act shall prevail
notwithstanding the provision of Section 60 of the Competition Act.

152. This brings up the next issue, that is, whether there is any irreconcilable conflict between the
Competition Act and the Patents Act and whether both the Acts could be construed harmoniously in
the context of the Patents Act.

156. The provisions of the Patents Act which can be construed as dealing with a subject matter
which is common with the Competition Act are essentially provisions of Chapter XVI and Section
140 of the Patents Act. Section 84 of the Patents Act provides for grant of compulsory licences in
certain cases where reasonable requirement of public with respect to the patented inventions have not
been satisfied or where the patented invention is not available to the public at a reasonably affordable
price or where the patented invention is not worked in the territory of India.

157. Sub-section (7) of Section 84 lists out different instances where the requirements of public
shall be deemed not to have been satisfied. Section 85 of the Patents Act provides for Revocation of
patents where even after expiry to two years from the date of grant of compulsory licence the patented
invention has not been worked in the territory of India or where reasonable requirements of public
with respect to the patented invention have not been satisfied. In addition, Section 92 of the Patents
Act also provides grant of compulsory licences.

158. Undisputedly, several of the instances listed out in Section 84 (7) could be construed, in
certain circumstances, as an abuse of dominance if grant of patent rights places the right holder in a
position of dominance. Remedy in cases as specified under Section 84(7) of the Patents Act is grant of
compulsory licences and a possible revocation of licence.

159. It is relevant to note that in terms of Section 84 (4) of the Patents Act, the Controller is
empowered to settle the terms on which the compulsory licence is to be granted. Section 90 of the
Patents Act provides guidelines to the Controller for settling the terms of a compulsory licence. It is
apparent that the only remedy that is available under the Patents Act, to a willing prospective licensee
who has been denied a licence on reasonable terms is a compulsory licence under Section 84 of the
Act on such terms as may be settled by the Controller.

162. The remedies as provided under Section 27 of the Competition Act for abuse of dominant
position are materially different from the remedy as available under Section 84 of the Patents Act. It is
also apparent that the remedies under the two enactments are not mutually exclusive; in other words
grant of one is not destructive of the other. Thus, it may be open for a prospective licensee to
approach the Controller of Patents for grant of compulsory licence in certain cases. The same is not
inconsistent with the CCI passing an appropriate order under Section 27 of the Competition Act.

164. It is apparent from the above that the Competition Act also contemplates a situation where an
order by CCI may be contrary to another statute being administered by another authority. Similarly,
Section 21 of the Competition Act provides for a statutory authority to make a reference to the CCI if
it proposes to take a decision which may be contrary to the provisions of the Competition Act.

165. The above provisions also indicate that the intention of the Parliament is not that the
Competition Act impliedly repeal other statutes or stand repealed by other statutes that present any
inconsistency; but that it be worked and implemented in addition to and in not in derogation of other
statutes. Therefore, the Competition Act expressly contemplates that statutory orders passed - either
by CCI under the Competition Act or by any other statutory authority under any other statute, - be
made after the concerned authority has taken into account the opinion of the other statutory authority.
In the aforesaid context, clause (ix) of Sub-section (1) of Section 90 of the Patents Act may also be noticed. The said clause provides that the Controller General of Patents may also permit export of the patented product under a compulsory licence in cases where the licence is issued to remedy a practice that has been determined to be anti-competitive after a judicial or an administrative process. This clause also indicates the legislative intention that the Competition Act and the Patents Act be worked harmoniously. Thus, it is mandated that the Controller take into account any finding of anticompetitive practice, that is returned after a judicial or administrative process including by the CCI under the Competition Act, while settling the terms of a compulsory licence issued to remedy such practice.

At this stage, one may also refer to Section 3 of the Competition Act which prohibits a person, enterprise or association of persons/enterprises from entering into certain anti-competitive agreements which cause or are likely to cause appreciable adverse effect on competition within India. There does not appear to be any provision(s) of such wide import under the Patents Act. Sub-section (5) of Section 3 of the Competition Act expressly provides that Section 3 would not restrict the right of any person to impose reasonable conditions for protecting its right, inter alia, under the Patents Act.

It follows from the above that whilst an agreement which imposes reasonable condition for protecting Patent Rights is permissible, an anti competitive agreement which imposes unreasonable conditions would not be afforded the safe harbor of Section 3(5) of the Competition Act and would fall foul of Section 3 of the Competition Act. The question as to whether a condition imposed under the agreement is reasonable or not would be a matter which could only be decided by the CCI under the provisions of the Competition Act. Neither the Controller of Patents discharging his functions in terms of the Patents Act, nor a Civil Court would have any jurisdiction to adjudicate whether an agreement falls foul of Section 3 of the Competition Act. This is so because the Controller of Patents cannot exercise any powers which are not specifically conferred by the Patents Act and by virtue of Section 61 of the Competition Act, the jurisdiction of Civil Courts to entertain any suit or proceedings in respect of any matter which the CCI or the COMPAT is empowered to determine, stands expressly excluded. Thus, in so far as the scope of Section 3 of the Competition Act is concerned, there does not appear to be any overlap or inconsistency with the Patents Act.

Facially, it may appear that the gravamen of the two enactments are intrinsically conflicting; however, when one views the same in the perspective that patent laws define the contours of certain rights, and the anti-trust laws are essentially to prevent abuse of rights, the prospect of an irreconcilable conflict seems to reduce considerably.

In my view, there is no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act. And, in absence of any irreconcilable conflict between the two legislations, the jurisdiction of CCI to entertain complaints for abuse of dominance in respect of Patent rights cannot be ousted.

It is apparent from section 84(6) of the Patents Act that a prospective licensee who applies for a compulsory licence is expected to have made, prior to his application, efforts to obtain a licence on reasonable terms. However, it further specifies that this consideration would not be relevant where the conduct of a patentee is found to be anti-competitive. In my view, the aforesaid proviso to Section 84(6) cannot be read to mean that a patentee's anti-competitive conduct would have to be first established in proceedings under the Competition Act before the Controller could take that into account. Sub-section (6) of Section 84 only indicates certain factors that would be required to be taken into account by the Controller and the question whether a patentee had adopted anti-competitive practices could also be considered by the Controller. However, if CCI has finally found a patentee's conduct to be anti-competitive and its finding has attained finality, the Controller would also proceed on the said basis and - on the principle akin to issue estoppel - the patentee would be estopped from contending to the contrary.

In view of the aforesaid discussion, the contention that the jurisdiction of CCI under the Competition Act is ousted in matters relating to patents cannot be accepted.

(3) Whether the allegations made could be construed as an abuse of dominance

Given the nature of the right that a patentee enjoys, it is not easy to reconcile a patent holder's refusal to grant a licence to use his patent as a violation of antitrust laws. The interface between IPR
rights and antitrust laws have been a subject matter of debate in various jurisdictions and more particularly in cases where a patentee holds an SEP.

199. In view of the aforesaid, there is good ground to hold that seeking injunctive reliefs by an SEP holder in certain circumstances may amount to abuse of its dominant position. The rationale for this is that the risk of suffering injunctions would in certain circumstances, clearly exert undue pressure on an implementer and thus, place him in a disadvantageous bargaining position vis-a-vis an SEP holder. A patent holder has a statutory right to file a suit for infringement; but as stated earlier, the Competition Act is not concerned with rights of a person or an enterprise but the exercise of such rights. The position of a proprietor of an SEP cannot be equated with a proprietor of a patent which is not essential to an industry standard. While in the former case, a non-infringing patent is not available to a dealer/manufacturer; in the latter case, the dealer/manufacturer may have other non-infringing options. It is, thus, essential that bargaining power of a dealer/manufacturer implementing the standard be protected and preserved.

200. In the present case, apart from instituting suits for infringement against Micromax and Intex, Ericsson has also threatened Micromax with complaints to SEBI, apparently, while Micromax was contemplating and/or in the process of floating a public offer of its shares. Such threats were, undoubtedly, made with the object of influencing Micromax to conclude a licensing agreement. It is not necessary for this Court to examine whether in the facts of this case, such threats also constitute an abuse of Ericsson's dominant position. Suffice it to state that in certain cases, such threats by a proprietor of a SEP, who is found to be in a dominant position, could be held to be an abuse of dominance. Clearly, in certain cases, such conduct, if it is found, was directed in pressuring an implementer to accept non FRAND terms, would amount to an abuse of dominance.

(iv) The disputes, being subject matter of suits, could not be entertained by CCI.

201. The proceedings under the Competition Act before the CCI are not in the nature of a private lis. The object of the proceedings is to prevent and curb the practices which have an adverse effect on the competition in India. The proceedings in the suits filed by Ericsson and the proceedings before CCI are not mutually exclusive. It is also necessary to bear in mind that it is not necessary that an adverse finding against Ericsson by CCI would necessarily results in the grant of relief as prayed for by Intex or Micromax. The scope of enquiry before CCI would obviously be limited to whether Ericsson has abused its dominant position and, if so found, CCI may issue orders as contemplated under Section 27 of the Act. Additionally, it must be noted that Ericsson had filed a suit after Intex had made a complaint before the CCI.

202. The question whether there is any abuse of dominance is solely within the scope of the Competition Act and a civil court cannot decide whether an enterprise has abused its dominant position and pass orders as are contemplated under Section 27 of the Competition Act. Merely because a set of facts pleaded in a suit may also be relevant for determination whether Section 4 of the Competition Act has been violated, does not mean that a civil court would be adjudicating that issue. Further, merely because certain reliefs sought by Micromax and Intex before CCI are also available in proceedings under the Patents Act also does not exclude the subject matter of the complaints from the scope of the Competition Act. An abuse of dominant position under Section 4 of the Competition Act is not a cause that can be made a subject matter of a suit or proceedings before a civil court.

(v) Whether Micromax/Intex could maintain a complaint for abuse of dominance since they had contested Ericsson’s claim for infringement

203. It is Ericsson’s case that it is the proprietor of subject SEPs and, therefore, it is not open to Ericsson to contend that its conduct in respect of those SEPs cannot be made subject matter of enquiry by CCI on the ground that SEPs have been denied by Micromax and Intex. As mentioned above, the proceedings under the Competition Act are not in the nature of private lis and the scope of enquiry would be only limited to whether there is any abuse of dominance which is proscribed under Section 4
of the Competition Act. Of course, the conduct of Micromax and Intex would have to be taken into account in determining whether Ericsson had violated its FRAND obligations.

204. The issue whether a licensee/prospective licensee could enter into negotiations for a licence on FRAND terms while reserving its right to challenge the rights of a patentee is also a contentious issue.

205. In my view, a potential licensee cannot be precluded from challenging the validity of the patents in question. The expression —willing licensee— only means a potential licensee who is willing to accept licence of valid patents on FRAND terms. This does not mean that he is willing to accept a licence for invalid patents and he has to waive his rights to challenge the patents in question. Any person, notwithstanding that he has entered into a licence agreement for a patent, would have a right to challenge the validity of the patents. This is also clear from clause (d) of Section 140(1) of the Patents Act, that it would not be lawful to insert in any contract in relation to sale or lease of a patented article or in a licence to manufacture or use of patented article or in a licence to work any process protected by a patent, a condition the effect of which may be to prevent challenges to validity of a patent. Thus, a licensee could always reserve its right to challenge the validity of a patent and cannot be precluded from doing so.

206. It follows from the above, that a potential licensee, could without prejudice to his rights to challenge the validity of patents could take such steps or proceedings which are premised on the patents being valid.

207. In view of the above, it would not be necessary for Micromax or Intex to waive their rights to challenge a patent for instituting a complaint which is based on the premise that Ericsson’s patents are valid. The CCI, cannot be faulted for proceeding on the basis that Ericsson holds the SEP’s that it asserts it holds; at any rate, Ericsson cannot be heard to complain against CCI proceeding on such basis.

(vi) Whether impugned orders are without jurisdiction as being perverse

208. In the given facts and circumstances, it is difficult to form an opinion that the conduct of Ericsson indicates any abuse of dominance considering the fact that it does appear that Ericsson had made efforts to arrive at a negotiated settlement with Micromax and Intex, who on the other hand, appear to have been manufacturing/dealing with products using the patented technologies without either obtaining a licence from Ericsson or approaching the Controller of Patents for a compulsory licence. However, it is not open for this court, in proceedings under Article 226 of the Constitution of India, to supplant its views over that of the concerned authority; in this case the CCI. This is not a case where it can be held that no reasonable person could have formed a view that the complaints filed by Intex and Micromax, prima facie, disclosed abuse of dominance by Ericsson. This is also not a case where the impugned orders can be stated to have been passed on no material at all. Therefore, I am unable to accept that the impugned orders passed by CCI are perverse and, therefore, without jurisdiction.

209. Mr Narain had pointed out that the CCI having permitted Ericsson to file its submission ought to have considered the various issues raised by Ericsson but the impugned orders do not disclose that the CCI had considered the contentious issues. In my view, there is considerable merit in the said submission. Although at the stage of passing an order under Section 26(2) of the Act, the CCI is not required to enter into an adjudicatory process, nonetheless, it has to form a prima facie view and this would include a view as to its jurisdiction to entertain the information/complaint. It was thus apposite for the CCI to at least notice the contours of the controversy raised by Ericsson and take a prima facie view. This would also be necessary to outline the area in which investigations were required to be undertaken by the DG. Having stated the above, I do not consider it necessary to remand the matter to CCI for reconsidering its prima facie view, particularly as the issues pertaining to the CCI’s jurisdiction as canvassed by Ericsson have been examined in these proceedings.

212. In view of the aforesaid, the writ petitions are dismissed.
Competition Commission Of India vs Bharti Airtel Ltd
CIVIL APPEAL NO(S). 11843 OF 2018

Reliance JioInfocomm Limited (hereinafter referred to as ‘RJIL’) has filed information under Section 19(1) of the Competition Act, 2002 (hereinafter referred to as the ‘Competition Act’) before the Competition Commission of India (for short, ‘CCI’) alleging anti-competitive agreement/cartel having been formed by three major telecom operators, namely, Bharti Airtel Limited, Vodafone 1 India Limited and Idea Cellular Limited (Incumbent Dominant Operators) (hereinafter referred to as the IDOs). Similar Informations under Section 19 of the Competition Act were also filed by one Mr. Ranjan Sardana, Chartered Accountant, and Mr. Justice Kantilal Ambalal Puj (Retd.). These were registered by the CCI as Case Nos. 80-81, 83 and 95 respectively. As per Section 26 of the Competition Act, on receipt of such an information, the CCI has to form an opinion as to whether there exists a prima facie case or not. If it is of the opinion that there exists a prima facie case, the CCI directs the Director General to cause an investigation to be made into the matter. Apart from the IDOs, certain allegations were also made against the Cellular Operators Association of India (for short, ‘COAI’). The CCI issued notice to these parties and after hearing the RJIL, the aforesaid cellular companies and COAI, it passed a common order dated April 21, 2017 in all these cases (by clubbing them together) holding a view that prima facie case exists and an investigation is warranted into the matter. It, accordingly, directed the Director General to cause investigation in the case.

Introduction:
3) Four writ petitions came to be filed by the Bharti Airtel Limited, Vodafone India Limited, Idea Cellular Limited and COAI respectively. The prayed for quashing of the aforesaid order and consequential action/proceedings on the ground that the CCI did not have any jurisdiction to deal with such a matter. Show-cause notices were issued pursuant to which the CCI as well as RJIL filed their counter affidavits. The mater was heard and vide judgment dated September 21, 2017 the High Court has allowed these writ petitions and quashed/set aside the order dated April 21, 2017 passed by the CCI and consequently notices issued by the Director General of the CCI have also been quashed. We may reproduce the conclusions and operative portion of the order passed by the Bombay High Court here itself, which are as under: "130. Conclusions: a) All the Writ Petitions are maintainable and entertainable. This Court has territorial jurisdiction to deal and decide the challenges so raised against impugned order (majority decision) dated 21 April 2017, passed by the Competition Commission of India (CCI) under the provisions of Section 26(1) of the Competition Act, 2002 in case Nos. 81 of 2016, 83 of 2016 and 95 of 2016 and all the consequential actions/notices of the Director General under Section 41 of the Competition Act arising out of it. b) The telecommunication Sector/Industry/Market is governed, regulated, controlled and developed by the Authorities under the Telegraph Act, the Telecom Regulatory Authority of India Act (TRAI Act) and related Regulations, Rules, Circulars, including all government policies. All the parties, persons, stakeholders, service providers, consumers and enterprise are bound by the statutory agreements/contracts, apart from related policy, usage, custom, practice so announced by the Government/Authority, from time to time. c) The question of interpretation of clarification of any contract clauses, unified license, interconnection agreements, quality of service regulations, rights and obligations of TSP between and related to the above provisions, are to be settled by the Authorities/TDSAT and not by the Authorities under the Competition Act. d) The concepts of subscriber, test period, reasonable demand, test phase and commercial phase rights and obligations, reciprocal obligations of service providers or breaches of any contract and/or practice, arising out of TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/TDSAT under the TRAI Act only. e) The Competition Act and the TRAI Act are independent statutes. The statutory authorities under the respective Acts are to discharge their power and jurisdiction in the light of the object, for which they are established. There is no conflict of the jurisdiction to be exercised by them. But the Competition Act itself is not sufficient to decide and deal with the issues, arising out of the provisions of the TRAI Act and the contract conditions, under the Regulations. f) The Competition Act governs the anti-competitive agreements and its effect the issues about abuse of dominant position and combinations. It cannot be used and utilized to interpret the contract conditions/policies of telecom Sector/Industry/Market, arising out of the Telegraph Act and the TRAI Act. g) The Authority under the Competition Act has no jurisdiction to decide and deal with the various statutory agreements, contracts, including the rival rights/obligations, of its own. Every aspects of development of telecommunication market are to be regulated and controlled by the
concerned Department/ Government, based upon the policy so declared from time to time, keeping in mind the need and the technology, under the TRAI Act. h) Impugned order dated 21 April 2017 passed by the Competition Commission of India (CCI) under the provisions of Section 26(1) of the Competition Act, 2002 and all the consequential actions/notices of the Director General under Section 41 of the Competition Act proceeded on wrong presumption of law and usurpation of jurisdiction, unless the contract agreements, terms and clauses and/or the related issues are settled by the Authority under the TRAI Act, there is no question to initiating any proceedings under the Competition Act as contracts/agreements go to the root of the alleged controversy, even under the Competition Act. i) The Authority, like the Commission and/or Director General, has no power to deal and decide the stated breaches including of delay, denial, and congestion of POIs unless settled finally by the Authorities/TDSAT under the TRAI Act. Therefore, there is no question to initiate any inquiry and investigations under Section 26(1) of the Competition Act. It is without jurisdiction. Even at the time of passing of final order, the Commission and the Authority, will not be in a position to deal with the contractual terms and conditions and/or any breaches, if any. The uncleared and vague information are not sufficient to initiate inquiry and/or investigation under the Competition Act, unless the governing law and the policy of the concerned market has clearly defined the respective rights and obligations of the concerned parties/persons. j) Impugned order dated 21 April 2017 and all the consequential actions/notices of the Director General under the Competition Act, therefore, in the present facts and circumstances, are not mere administrative directions. k) Impugned order dated 21 April 2017 and all the consequential actions/notices of the Director General under the Competition Act are, therefore, illegal, perverse and also in view of the fact that it takes into consideration irrelevant material and ignores the relevant material and the law. l) Every majority decision cannot be termed as cartelisation. Even ex-facie service providers and its Association COAI have not committed any breaches of any provisions of the Competition Act. 131. Hence the following ORDER a) Impugned order dated 21 April 2017, passed by the Competition Commission of India (CCI) under the provisions of Section 26(1) of the Competition Act, 2002 in case Nos. 81 of 2016, 83 of 2016 and 95 of 2016 and all the consequential actions/notices of the Director General under Section 41 of the Competition Act, are liable to be quashed and set aside, in exercise of power under Article 226 of the Constitution of India. Order accordingly. b) All the Writ Petitions are allowed. c) There shall be no order as to costs. d) In view of the above, nothing survives in Civil Application (Stamp) No. 17736 of 2017 in Writ Petition No. 7164 of 2017 and the same is also disposed of. No costs. 4) Gist of the aforesaid order, as per the High Court, is that insofar as the telecom sector/industry/market is concerned, same is governed, regulated, controlled and developed by the authorities under the India Telegraph Act, 1885 (hereinafter referred to as the Telegraph Act), the Telecom Regulatory Authority of India Act, 1997 (for short, TRAI Act), and as well as the related Regulations, Rules, Circulars, etc. Therefore, the question of interpretation or clarification of any contract clauses, unified license, interconnection agreements, quality of service regulations, rights and obligations of TSP between and related to the above provisions, are to be settled by the Authorities/Telecom Disputes Settlement and Appellate Tribunal (TDSAT) and not by the Authorities under the Act. It has also held that the Competition Act and the TRAI Act are independent statutes and the statutory authorities under the respective Acts are to discharge their power and jurisdiction in the light of the objectives for which they are established. The Competition Act is itself not sufficient to decide and deal with the issues arising out of the provisions of the TRAI Act etc. Thus, the CCI has no jurisdiction to decide and deal with the various statutory agreements, contracts, including rival rights/obligations, of its own. The issues arising out of contract agreements, terms and clauses and/or the related issues are to be settled by the authority under the TRAI Act in the first instance and unless these issues are decided, there is no question of initiating any proceedings under the Act. In a nutshell, it is held that insofar as contracts, etc. which are regulated by the TRAI Act are concerned, in the first instance, it is the authority under the TRAI Act which has to decide these questions. Once there is a determination of the respective rights and obligations under these licenses by the authority under the TRAI Act, which provided an information to the effect that the particular act appears to be anti- competitive, only thereafter the CCI gets jurisdiction to go into the question of such anti-competitive practice. Primarily the message behind the decision of the High Court is that jurisdictional facts are to be decided by the authorities under the TRAI Act which has the exclusive jurisdiction to determine those issues as the TRAI is the statutory authority established for this very purpose, and unless there is a determination of
these facts, the machinery under the Competition Act cannot be invoked. To put it otherwise, the judgment proceeds to decide that it was premature for the CCI to entertain the Information for want of determination of such issues that fall within the domain of the TRAI Act. 5) It is obvious that the RJIL is not happy with the aforesaid outcome. Even the CCI feels aggrieved. CCI has impugned this decision by filing four special leave petitions, while the other one has been filed by the RJIL. 6) The material facts which are absolutely essential to determine the controversy, eschewing the unnecessary details, may now be recapitulated:

7) In the instant appeals, width and scope of the powers of the CCI under the Competition Act, 2002 pertaining to telecom sector i.e. in respect of the companies in telecom industry providing telecom services is to be defined vis-a-vis the scope of the powers of TRAI under the TRAI Act, 1997. It has arisen in these appeals, in the following background: As mentioned above, TRAI is the regulatory which regulates the functioning of the telecom service provider i.e. the telecom sector. Section 11 of the TRAI Act enumerates various functions which TRAI is supposed to perform under the Act. Section 13, likewise, empowers the TRAI to issue directions, from time to time, to the service provider. In exercise of powers under Section 13 read with Section 11 of the TRAI Act, the TRAI issued directions dated June 07, 2005 to all the telecom service providers to provide interconnection within ninety days of the applicable payments made by the interconnection seeker. The purpose behind providing interconnection by one service provider to the other service provider is to ensure smooth communication by a subscriber of one service provider to the cell number which is provided by another service provider. In that sense, this direction facilitates smooth functioning of the cell phone network even when it is managed by different companies as it ensures interconnectivity i.e. connectivity from one service provider to other service provider. 8) On October 21, 2013, RJIL was granted Unified License and Unified Access Service License under Section 4 of the Telegraph Act by the Department of Telecom (DoT) for providing telecommunication services in all 22 circles/licensed service areas in India. Soon thereafter, RJIL executed interconnection agreements (ICA) with existing telecom operators inter alia including, Bharti Airtel Limited and Bharti Hexagon Limited (hereinafter collectively referred to as the Airtel), Idea Cellular Limited (hereinafter referred to as the Idea); Vodafone India Limited/Vodafone Mobile Services Limited (hereinafter collectively referred to as the Vodafone). RJIL commenced test trial of its services after intimation and approval of the DoT and TRAI. 9) By its firm demand letter of June 21, 2016, RJIL vide separate letters requested IDOs to augment Point of Interconnection (POIs) for access, National Long Distance (NLD) and International Long Distance (ILD) services, as according to it, the capacity already provided to it was causing huge POI congestion, resulting in call failures on its network. According to RJIL, these companies intentionally ignored the aforesaid request. Accordingly, RJIL sent a letter dated July 14, 2016 to TRAI stating that the POIs provided by IDOs are substantially inadequate and leading to congestion/call failures on its network in all circles. Hence, TRAI was requested to intervene and direct these telecom operators to augment the POI capacities as per the demands made by RJIL. TRAI vide separate letters dated July 19, 2014 requested inter alia the aforementioned telecom operators to augment POIs as per the RJILs request. Further, responses of the respective companies were also sought on the issues raised by RJIL, within seven days. Idea responded by sending letter dated July 26, 2016 to RJIL denying that there had been any delay in augmentation of POIs and further stated that it is willing to fully support RJIL and that it had instructed its circle teams to augment the POIs on the basis of traffic congestion as per the ICA. Likewise, Airtel also sent reply dated August 03, 2016 to TRAI inter alia stating that augmentation of POIs shall be undertaken as per the terms and conditions of the ICA and on the basis of traffic trends post their commercial launch. RJIL was not satisfied with such responses. It sent another letter dated August 04, 2016 to TRAI reiterating its earlier request for augmentation of POIs by the subject telecom operators. In the meantime, even Cellular Operators Association of India (COAI) intervened by addressing communication dated August 08, 2016 to TRAI wherein it took a stand by stating that the RJIL was providing free service to millions of users under the guise of testing which led to choking of POIs. It was further suggested that due to the free service provided by RJIL, a substantial imbalance in voice traffic had occurred for which the existing operators were not adequately compensated under the Interconnection Usage Charges regulations (IUC) in place. 10) There was further exchange of correspondence between the parties and even by the parties to the TRAI which shows that the parties stuck to their respective positions and it may not be necessary to refer to those communications in detail. Suffice it is to
mention that RJIL fixed September 05, 2016 as the launch date, which fact was informed to other service providers as well who were also told that the subscriber base was expected to substantially and swiftly increase resulting in even more POI congestion. On that basis, request was made for urgent POI augmentation vide letter dated September 02, 2016. The TRAI even facilitated a meeting between the representatives of RJIL and other service providers (respondents herein) to sort out and resolve the differences in the interest of the consumers. At the same time, in the said meeting, the three telecom operators (respondents herein) also raised a grievance that free calls being provided by RJIL has resulted in an unprecedented traffic congestion on their respective networks and the current IUC regime is inadequate to cover the cost of efficiently maintaining such high traffic. Thereafter, vide letter dated September 14, 2016, addressed by Airtel to RJIL, it stated that the POIs (also known as E1s) would be converted into 50:50 ratio to outgoing and incoming E1s. In other words, the E1s provided would be converted to only outgoing or only incoming i.e. one-way E1s. RJIL replied by stating that it was acceptable to them. 11) Soon thereafter, i.e. in September 2016 itself, Mr. Rajan Sardana, a Chartered Accountant, filed information under Section 19 of the Competition Act (registered as Case No. 81 of 2016) and similar application was filed by Justice K.A. Puj (retired) (registered as Case No. 83 of 2016). Then, it was followed by information under Section 19 of the Competition Act by RJIL in November, 2016

Proceedings before TRAI: 12) As the matter was with the TRAI as well, it issued show cause notices dated September 27, 2016 to IDOs and RJIL for violation of Standard of Quality of Service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009 (hereinafter referred to as the QoS) and for provision of the License Agreements. Similar show cause notices were also sent to other telecom operators. On October 21, 2016, TRAI issued recommendations to DoT after finding that IDOs have violated conditions under the QoS, interconnection agreements and Unified License. The TRAI inter alia stated in its recommendation as under: "21. (vii) It is evident from the above clauses that the licensees are mandated to provide interconnection to all eligible telecom service provider. However, as mentioned in para 6 above, Airtel along with other service providers have jointly through their association (COAI), declined Point of Interconnection to RJIL which is willful violation of the above mentioned license conditions. ...(x) COAI's letter dated 2nd September, 2016 which was confirmed by Airtel in the meeting held on 9th September, 2016 clearly indicates attempt by three service providers namely, Airtel, Vodafone India Limited and Idea Cellular Limited to stifle competition in the market and willfully violate the license conditions; 23. While the Authority has been taking necessary steps to ensure effective interconnection between Airtel and RJIL, it is evident from Para 21 that Airtel is in non-compliance of the terms and conditions of license and denial of interconnection to RJIL appears to be with ulterior motive to stifle competition and is anti-consumer. 13) TRAI recommended that Rs. 50 crore per local service area (LSA) be imposed on all the above three telecom operators for failure to adhere to TRAI norms and regulations. Similar recommendations were also issued to DoT against other telecom operators. Against the recommendations dated October 21, 2016 of TRAI, Vodafone filed a Writ Petition being Writ Petition (C) No. 11740 of 2016 before the High Court at Delhi. Meanwhile, on January 17, 2017, TRAI also recommended imposition of penalty of Rs. 1,90,000/- on Idea for its rejection of mobile number portability (MNP) requests to RJILs network. Against the aforesaid recommendation, Idea has preferred a Writ Petition being Writ Petition (C) No. 685 of 2017 before the High Court at Delhi. The DoT after examining the matter referred it back to TRAI for fresh consideration vide DoTs reference dated April 05, 2017 whereby its recommendations imposing penalty upon IDOs were sent back for reconsideration. The TRAI sent its response dated May 24, 2017 to the DoT, wherein it took a categorical stand that telecom operators have intentionally denied and delayed the augmentation of POIs to RJIL. Proceedings before CCI:

14) The CCI took the cognizance of the three informations given to it under Section 19 of the Competition Act which were registered as Case Nos. 81, 83 and 95 of 2016. It gave hearing to the respondents service providers as well as COAI and passed order dated April 21, 2017 under Section 26(1) of the Competition Act as per which it came to a prima facie conclusion that case for investigation was made out and directed the Director General to cause investigation in the case. This order was passed by majority of 3:2 as two members of CCI dissented from the said order. Operative portion of the majority order holds as under: "23. The Commission notes that allegations of anticompetitive agreement as well as abuse of dominant position have been made for the same
conduct of refusal to facilitate call termination services and denial of mobile number portability. As discussed earlier, the Commission is satisfied that there exist a prima facie contravention of Section 3(3)(b) of Act, as the ITOs appear to have entered into an agreement amongst themselves through the platform of COAI, to deny POIs to RJIL. Having been prima facie convinced that the impugned conduct is an outcome of the anti-competitive agreement amongst ITOs, Commission does not find it appropriate to consider the same impugned conduct as unilateral action by each of the ITOs. The Commission therefore at this stage does not find it necessary to deal with the allegations and submissions regarding abuse of dominance in contravention of the provisions of Section 4 of Act.

Proceedings before the High Court:

21) The Bombay High Court in the impugned judgment has, thus, inter alia, held as under: "(i) the Competition Commission of India (CCI) had no jurisdiction in view of the Telecom Regulatory Authority of India Act, 1997 and the authorities and regulations made thereunder; (ii) the CCI could exercise jurisdiction only after proceedings under the TRAI Act had concluded/attained finality; (iii) the order dated 21.04.2017 passed under section 26(1) of the Competition Act was not an administrative direction, but rather a quasi judicial one that finally decided the rights of parties and caused serious adverse consequences, because a detailed hearing had been given and many materials had been tendered in the courts of the hearings; (iv) on the merits of the matter, there was no cartelisation as alleged and COAI was exonerated; and (v) the order of the CCI was perverse and liable to be interfered with under writ jurisdiction."

Arguments:

47) Insofar as the argument of the respondents that the TRAI Act is a complete code and the jurisdiction of CCI is totally ousted, the argument proceeded on the following basis: The real issue which arises is comparison of two regimes one regulated by TRAI under the Indian Telegraph Act, 1885, Wireless Telegraphy Act, 1933 and the TRAI Act, 1997 which together forms a comprehensive and complete code; and the other being CCI under the Competition Act. The various provisions under these legislations seen with the terms of the License Agreement show that the issues arising out of interconnection between different operators shall be determined within the overall framework of the interconnection regulations/directions/orders issued by TRAI from time to time. The Object and Reasons of the TRAI Act itself lays down that it is mandated to make arrangements for protection and promotion of consumer interest and ensuring fair competition and to ensure orderly and healthy growth of telecommunication infrastructure. Moreover, the competition in the telecom sector is of a different kind as it has to function under the constant monitoring and regulation of TRAI. TRAI effectively plays the role of a watchdog of the sector as otherwise the entire sector would collapse if there is no interdependence between the telecom operators. Moreover, under Section 11(1)(a)(iv) of the TRAI Act, the authority is required to take measures to facilitate competition in the market. CCI can ensure competition only in an unregulated sector and not in the likes of the telecom sector wherein even the tariffs are capped/determined by TRAI.

74) In order to ensure that there is smooth interconnectivity and a consumer who is the subscriber of mobile phone of one service provider, say for e.g. Vodafone, and wants to make call to a mobile phone of his friend which is provided by another service provider, say Idea Cellular, the unified Competition licenses put an obligation on all these licensees to interconnect with each other on the POI. This is so mentioned in Clause 27.4 of Part I of the Schedule to the unified licence. Such interconnectivity of POI is subject to compliance of regulation/directions issued by TRAI. The interconnection agreement, inter alia, provides for the following clauses: (a) to meet all reasonable demand for the transmission and reception of messages between the interconnect systems; (b) to establish and maintain such one or more POIs as are reasonably required and are of sufficient capacity and in sufficient numbers to enable transmission and reception of the messages by means of applicable systems; and (c) to connect and keep connected to the applicable systems. Some of the other clauses of the interconnection agreement are as follows: A minimum four weeks written notice has to be given by either party for augmentation of interconnect links. Augmentation shall be completed within 90 days of receipt of requisite charges specified in the Schedule. Either party shall provide a forecast in writing, in advance for its requirements of port capacity for Telephony Traffic for the next six months to enable the other party to dimension the required capacity in its network. The interconnection tests for reach and every interface will be carried out by mutual arrangement between signatories of the agreement. By virtue of the licence, the licensee is obligated to ensure quality of service as prescribed by the licensor or TRAI and failure on their part to adhere to the
quality of service stipulated by TRAI would make the licensor liable to be treated for breach of the terms and conditions of the licence. In order to render effective services, it is mandatory for the licensee to interconnect/provide POIs to all eligible telecom service providers to ensure that calls are completed to all destinations and interconnection agreement is entered into between the different service providers which mandates each of the party to the agreement to provide to the other interconnection traffic carriage and all the technical and operational quality service and time lines, i.e. the equivalent to that which the party provides to itself. The interconnection agreement separately entered into different service providers is based on the format prescribed in the Telecommunication Interconnection (Reference Interconnect Offer) Regulations, 2002. 75) POI is defined in the agreement, in the following words: "POI are those points between two network operators which allow voice call originating from the work of one operator to terminate on the network by other operator 77) From the aforesaid analysis of the scheme contained in the TRAI Act, it becomes clear that the functioning of the telecom companies which are granted licence under Section 4 of the Telegraph Act is regulated by the provisions contained in the TRAI Act. TRAI is a regulator which regulates the telecom industry, which is a statutory body created under the TRAI Act. The necessity of such regulators has been emphasised by a Constitution Bench of this Court in Modern Dental College and Research Centre and Others v. State of Madhya Pradesh and Others17 in the following words: "Need for regulatory mechanism 87. Regulatory mechanism, or what is called regulatory economics, is the order of the day. In the last 60-70 years, economic policy of this country has travelled from laissez faire to mixed economy to the present era of liberal economy with regulatory regime. With the advent of mixed economy, there was mushrooming of the public sector and some of the key industries like aviation, insurance, railways, electricity/power, telecommunication, etc. were monopolised by the State. Licence/permit raj prevailed during this period with strict control of the Government even in respect of those industries where private sectors were allowed to operate. However, Indian economy experienced major policy changes in early 90s on LPG Model i.e. liberalisation, privatisation and globalisation. With the onset of reforms to liberalise the Indian economy, in July 1991, a new chapter has dawned for India. This period of economic transition has had a tremendous impact on the overall economic development of almost all major sectors of the economy. 88. When we have a liberal economy which is regulated by the market forces (that is why it is also termed as market economy), prices of goods and services in such an economy are determined in a free price system set up by supply and demand. This is often contrasted with a planned economy in which a Central Government determines the price of goods and services using a fixed price system. Market economies are also contrasted with mixed economy where the price system is not entirely free, but under some government control or heavily regulated, which is sometimes combined with State led economic planning that is not extensive enough to constitute a planned economy.

78) Thus, with the advent of globalisation/liberalisation leading to free market economy, regulators in respect of each sector have assumed great significance and importance. It becomes their bounden duty to ensure that such a regulator fulfils the objectives enshrined in the Act under which a particular regulator is created. Insofar as the telecom sector is concerned, the TRAI Act itself mentions the objective which it seeks to achieve. It not only exercises control/supervision over the telecom service providers/ licensees, TRAI is also supposed to provide guidance to the telecom/mobile market. Introduction to the TRAI Act itself mentions that due to tremendous growth in the services it was considered essential to regulate the telecommunication services by a regulatory body which should be fully empowered to control the services, in the best interest of the country as well as the service providers. Likewise, the Statement of Objects and Reasons of this Act, inter alia, stipulates as under: "1. In the context of the National Telecom Policy, 1994, which amongst other things, stresses on achieving the universal service, bringing the quality of telecom services to world standards, provisions of wide range of services to meet the customers demand at reasonable price, and participation of the companies registered in India in the area of basic as well as value added telecom services as also making arrangements for protection and promotion of consumer interest and ensuring fair competition, there is a felt need to separate regulatory functions from service providing functions which will be in keeping with the general trend in the world. In the multi-operator situation arising out of opening of basic as well as value added services in which private operator will be competing with Government operators, there is a pressing need for an independent telecom regulatory body for regulation of telecom services for orderly and healthy growth of telecommunication infrastructure
apart from protection of consumer interest. xx xxxx 4. The powers and functions of the Authority, inter alia, are. (i) ensuring technical compatibility and effective inter-relationship between different service providers; (ii) regulation of arrangement amongst service providers of sharing their revenue derived from providing telecommunication services; (iii) ensuring compliance of licence conditions by all service providers; (iv) protection of the interest of the consumers of telecommunication service; (v) settlement of disputes between service providers; (vi) fixation of rates for providing telecommunication service within India and outside India; (vii) ensuring effective compliance of universal service obligations. 79) TRAI is, thus, constituted for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest. It is assigned the duty to achieve the universal service which should be of world standard quality on the one hand and also to ensure that it is provided to the customers at a reasonable price, on the other hand. In the process, purpose is to make arrangements for protection and promotion of consumer interest and ensure fair competition. It is because of this reason that the powers and functions which are assigned to TRAI are highlighted in the Statement of Objects and Reasons. Specific functions which are assigned to TRAI, amongst other, including ensuring technical compatibility and effective inter-relationship between different service providers; ensuring compliance of licence conditions by all service providers; and settlement of disputes between service providers. 80) In the instant case, dispute raised by RJIL specifically touches upon these aspects as the grievance raised is that the IDOs have not given POIs as per the licence conditions resulting into non-compliance and have failed to ensure inter se technical compatibility thereby. Not only RJIL has raised this dispute, it has even specifically approached TRAI for settlement of this dispute which has arisen between various service providers, namely, RJIL on the one hand and the IDOs on the other, wherein COAI is also roped in. TRAI is seized of this particular dispute. 81) It is a matter of record that before the TRAI, IDOs have refuted the aforesaid claim of RJIL. Their submission is that not only required POIs were provided to RJIL, it is the RJIL which is in breach as it was making unreasonable and excessive demand for POIs. It is specifically pleaded by the IDOs that: (i) RJIL raised its demand for POIs for the first time on June 21, 2016. (ii) In the letter dated June 21, 2016, it was admitted that RJIL was in test phase. (iii) There was no express mention of any commercial launch date. (iv) As per the letter, immediately on commercial launch RJIL would have a 22mn subscriber base for which number series was already allotted. (v) As per the DoT Circular dated August 29, 2005 test customers are not considered as subscribers and test customers can only be in the form of business partners. It was highlighted that problem, if any, of congestion has been suffered on account of provisioning of full-fledged services during test phase. (vi) RJIL in its complaint before the TRAI was not considering the period of 90 days as was prescribed in the Interconnection Agreement. It was instead proceeding on the basis that the demand for POIs should be met on an immediate basis. (vii) There was several errors in the forecast made by RJIL. (viii) The tables given by the RJIL are wrong as they take into account its total demand at the end of nine months against what was actually provided. 83) We are of the opinion that as the TRAI is constituted as an expert regulatory body which specifically governs the telecom sector, the aforesaid aspects of the disputes are to be decided by the TRAI in the first instance. These are jurisdictional aspects. Unless the TRAI finds fault with the IDOs on the aforesaid aspects, the matter cannot be taken further even if we proceed on the assumption that the CCI has the jurisdiction to deal with the complaints/information filed before it. It needs to be reiterated that RJIL has approached the DoT in relation to its alleged grievance of augmentation of POIs which in turn had informed RJIL vide letter dated September 06, 2016 that the matter related to inter-connectivity between service providers is within the purview of TRAI. RJIL thereafter approached TRAI; TRAI intervened and issued show-cause notice dated September 27, 2016; and post issuance of show-cause notice and directions, TRAI issued recommendations dated October 21, 2016 on the issue of inter-connection and provisioning of POIs to RJIL. The sectoral authorities are, therefore, seized of the matter. TRAI, being a specialised sectoral regulator and also armed with sufficient power to ensure fair, non-discriminatory and competitive market in the telecom sector, is better suited to decide the aforesaid issues. After all, RJILs grievance is that inter-connectivity is not provided by the IDOs in terms of the licenses granted to them. TRAI Act and Regulations framed
thereunder make detailed provisions dealing with intense obligations of the service providers for providing POIS. These provisions also deal as to when, how and in what manner POIs are to be provisioned. They also stipulate the charges to be realised for POIs that are to be provided to another service provider. Even the consequences for breach of such obligations are mentioned. 84) We, therefore, are of the opinion that the High Court is right in concluding that till the jurisdictional issues are straightened and answered by the TRAI which would bring on record findings on the aforesaid aspects, the CCI is ill-equipped to proceed in the matter. Having regard to the aforesaid nature of jurisdiction conferred upon an expert regulator pertaining to this specific sector, the High Court is right in concluding that the concepts of subscriber, test period, reasonable demand, test phase and commercial phase rights and obligations, reciprocal obligations of service providers or breaches of any contract and/or practice, arising out of TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/TDSAT under the TRAI Act only. Only when the jurisdictional facts in the present matter as mentioned in this judgment particularly in paras 56 and 82 above are determined by the TRAI against the IDOs, the next question would arise as to whether it was a result of any concerted agreement between the IDOs and COAI supported the IDOs in that endeavour. It would be at that stage the CCI can go into the question as to whether violation of the provisions of TRAI Act amounts to abuse of dominance or anti-competitive agreements. That also follows from the reading of Sections 21 and 21A of the Competition Act, as argued by the respondents. 85) The issue can be examined from another angle as well. If the CCI is allowed to intervene at this juncture, it will have to necessarily undertake an exercise of returning the findings on the aforesaid issues/aspects which are mentioned in paragraph 82 above. Not only TRAI is better equipped as a sectoral regulator to deal with these jurisdictional aspects, there may be a possibility that the two authorities, namely, TRAI on the one hand and the CCI on the other, arrive at a conflicting views. Such a situation needs to be avoided. This analysis also leads to the same conclusion, namely, in the first instance it is the TRAI which should decide these jurisdictional issues, which come within the domain of the TRAI Act as they not only arise out of the telecom licenses granted to the service providers, the service providers are governed by the TRAI Act and are supposed to follow various regulations and directions issued by the TRAI itself. 86) This takes us to the next level of the issue, viz. whether TRAI has the exclusive jurisdiction to deal with matters involving anti-competitive practices to the exclusion of CCI altogether because of the reason that the matter pertains to telecom sector? 87) The IDOs have argued that not only TRAI is an expert body which can deal with these issues and has been assigned this function specifically under the TRAI Act, even the anti-competitive aspects of telecom sector are specifically assigned to the TRAI in the TRAI Act itself. On that premise the submission is that the TRAI Act is a special legislation which prevails over the provisions of the Competition Act as the Competition Act is general in nature. It is also argued that even if the Competition Act is treated as a special statute, between the two special statutes the TRAI Act would prevail as it is a complete code in itself which regulates the telecom sector in its entirety, including the aspects of competition. 88) Such a submission, on a cursory glance, may appear to be attractive. However, the matter cannot be examined by looking into the provisions of the TRAI Act alone. Comparison of the regimes and purpose behind the two Acts becomes essential to find an answer to this issue. We have discussed the scope and ambit of the TRAI Act in the given context as well as the functions of the TRAI. No doubt, we have accepted that insofar as the telecom sector is concerned, the issues which arise and are to be examined in the context of the TRAI Act and related regime need to be examined by the TRAI. At the same time, it is also imperative that specific purpose behind the Competition Act is kept in mind. This has been taken note of and discussed in the earlier part of the judgment. As pointed out above, the Competition Act frowns the anti-competitive agreements. It deals with three kinds of practices which are treated as anti-competitive and are prohibited. To recapitulate, these are: (a) where agreements are entered into by certain persons with a view to cause an appreciable adverse effect on competition; (b) where any enterprise or group of enterprises, which enjoys dominant position, abuses the said dominant position; and (c) regulating the combination of enterprises by means of mergers or amalgamations to ensure that such mergers or amalgamations do not become anti-competitive or abuse the dominant position which they can attain. 89) The CCI is specifically entrusted with duties and functions, and in the process empower as well, to deal with the aforesaid three kinds of anti-competitive practices. The purpose is to eliminate such practices which are having adverse effect on the competition, to promote and sustain competition and
to protect the interest of the consumers and ensure freedom of trade, carried on by other participants, in India. To this extent, the function that is assigned to the CCI is distinct from the function of TRAI under the TRAI Act. Learned counsel for the appellants are right in their submission that the CCI is supposed to find out as to whether the IDOs were acting in concert and colluding, thereby forming a cartel, with the intention to block or hinder entry of RJIL in the market in violation of Section 3(3)(b) of the Competition Act. Also, whether there was an anti-competitive agreement between the IDOs, using the platform of COAI. The CCI, therefore, is to determine whether the conduct of the parties was unilateral or it was a collective action based on an agreement. Agreement between the parties, if it was there, is pivotal to the issue. Such an exercise has to be necessarily undertaken by the CCI. In Haridas Exports, this Court held that where statutes operate in different fields and have different purposes, it cannot be said that there is an implied repeal of one by the other. The Competition Act is also a special statute which deals with anti-competition. It is also to be borne in mind that if the activity undertaken by some persons is anti-competitive and offends Section 3 of the Competition Act, the consequences thereof are provided in the Competition Act. Section 27 empowers the CCI to pass certain kinds of orders, stipulated in the said provision, after inquiry into the agreements for abuse of dominant position.

90) Obviously, all the aforesaid functions not only come within the domain of the CCI, TRAI is not at all equipped to deal with the same. Even if TRAI also returns a finding that a particular activity was anti-competitive, its powers would be limited to the action that can be taken under the TRAI Act alone. It is only the CCI which is empowered to deal with the same anti-competitive act from the lens of the Competition Act. If such activities offend the provisions of the Competition Act as well, the consequences under that Act would also follow. Therefore, contention of the IDOs that the jurisdiction of the CCI stands totally ousted cannot be accepted. Insofar as the nuanced exercise from the stand point of Competition Act is concerned, the CCI is the experienced body in conducting competition analysis. Further, the CCI is more likely to opt for structural remedies which would lead the sector to evolve a point where sufficient new entry is induced thereby promoting genuine competition. This specific and important role assigned to the CCI cannot be completely wished away and the comity between the sectoral regulator (i.e. TRAI) and the market regulator (i.e. the CCI) is to be maintained. 91) The conclusion of the aforesaid discussion is to give primacy to the respective objections of the two regulators under the two Acts. At the same time, since the matter pertains to the telecom sector which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are findings returned by the TRAI which lead to the prima facie conclusion that the IDOs have indulged in anti-competitive practices, the CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion. This balanced approach in construing the two Acts would take care of Section 60 of the Competition Act as well. 92) We, thus, do not agree with the appellants that CCI could have dealt with this matter at this stage itself without availing the inquiry by TRAI. We also do not agree with the respondents that insofar as the telecom sector is concerned, jurisdiction of the CCI under the Competition Act is totally ousted. In nutshell, that leads to the conclusion that the view taken by the High Court is perfectly justified. Even the argument of the learned ASG is that the exercise of jurisdiction by the CCI to investigate an alleged cartel does not impinge upon TRAIs jurisdiction to regulate the industry in any way. It was submitted that the promotion of competition and prevention of competitive behaviour may not be high on the change of sectoral regulator which makes it prone to regulatory capture and, therefore, the CCI is competent to exercise its jurisdiction from the stand point of the Competition Act. However, having taken note of the skillful exercise which the TRAI is supposed to carry out, such a comment vis-a-vis TRAI may not be appropriate. No doubt, as commented by the Planning Commission in its report of February, 2007, a sectoral regulator, may not have an overall view of the economy as a whole, which the CCI is able to fathom. Therefore, our analysis does not bar the jurisdiction of CCI altogether but only pushes it to a later stage, after the TRAI has undertaken necessary exercise in the first place, which it is more suitable to carry out. B. Whether the writ petitions filed before the High Court of Bombay were maintainable? 93) Here comes the scope of judicial interference under Article 226 of the Constitution. As per the RJIL as well as CCI, the High Court could not have entertained the writ petition against an order passed under Section 26(1) of the Competition Act which was a pure
administrative order and was only a prima facie view expressed therein, and did not result in serious adverse consequences. It was submitted that the finding of the High Court that such an order was quasi-judicial order is not only erroneous but it is contrary to the law laid down in the case of Steel Authority of India Limited. The respondents, on the other hand, have submitted that the judgment in the above case had no application in the instant case as it did not deal with the sector that is regulated by a statutory authority. Moreover, such an order was quasi-judicial in nature and cannot be treated as an administrative order since it was passed by the CCI after collecting the detailed information from the parties and by holding the conferences, calling material details, documents, affidavits and by recording the opinion. It was submitted that judicial review against such an order is permissible and it was open to the respondents to point out that the complete material, as submitted by the respondents, was not taken into consideration which resulted in an erroneous order, which had adverse civil consequences inasmuch as the respondents were subjected to further investigation by the Director General. 94) We may mention at the outset that in the case of Steel Authority of India Limited, nature of the order passed by the CCI under Section 26(1) of the Competition Act (here also we are concerned with an order which is passed under Section 26(1) of the Competition Act) was gone into. The Court, in no uncertain terms, held that such an order would be an administrative order and not a quasi-judicial order. It can be discerned from paragraphs 94, 97 and 98 of the said judgment, which are as under: "94. The Tribunal, in the impugned judgment, has taken the view that there is a requirement to record reasons which can be express, or, in any case, followed by necessary implication and therefore, the authority is required to record reasons for coming to the conclusion. The proposition of law whether an administrative or quasijudicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no more res integra and has been settled by a recent judgment of this Court in CCT v. Shukla & Bros. [(2010) 4 SCC 785: (2010) 2 SCC (Cri) 1201 : (2010) 2 SCC (L&S) 133], wherein this Court was primarily concerned with the High Court dismissing the appeals without recording any reasons. The Court also examined the practice and requirement of providing reasons for conclusions, orders and directions given by the quasi-judicial and administrative bodies. xx xxxx 97. The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as aforereferred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analysing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned. 98. Such an approach can also be justified with reference to Regulation 20(4), which requires the Director General to record, in his report, findings on each of the allegations made by a party in the intimation or reference submitted to the Commission and sent for investigation to the Director General, as the case may be, together with all evidence and documents collected during investigation. The inevitable consequence is that the Commission is similarly expected to write appropriate reasons on every issue while passing an order under Sections 26 to 28 of the Act. 95) There is no reason to take a contrary view. Therefore, we are not inclined to refer the matter to a larger Bench for reconsideration. 96) It was, however, argued that since the case of Steel Authority of India Limited was not dealing with the telecom sector, which is regulated by the statutory regulator, namely, TRAI under the TRAI Act, that judgment would not be applicable. Merely because the present case deals with the telecom sector would not change the nature of the order that is passed by
the CCI under Section 26(1) of the Competition Act. However, it raises another dimension. Even if the order is administrative in nature, the question raised before the High Court in the writ petitions filed by the respondents touched upon the very jurisdiction of the CCI. As is evident, the case set up by the respondents was that the CCI did not have the jurisdiction to entertain any such request or information which was furnished by RJIL and two others. The question, thus, pertained to the jurisdiction of the CCI to deal with such a matter and in the process the High Court was called upon to decide as to whether the jurisdiction of the CCI is entirely excluded or to what extent the CCI can exercise its jurisdiction in these cases when the matter could be dealt with by another regulator, namely, the TRAI. When such jurisdictional issues arise, the writ petition would clearly be maintainable as held in Barium Chemicals Ltd. and Another v. Company Law Board and Others18 and Carona Limited. In Carona Limited, this Court held as under: "26. The learned counsel for the appellant company submitted that the fact as to paid-up share capital of rupees one crore or more of a company is a jurisdictional fact and in absence of such fact, the court has no jurisdiction to proceed on the basis that the Rent Act is not applicable. The learned counsel is right. The fact as to paid-up share capital of a company can be said to be a preliminary or jurisdictional fact and said fact would confer jurisdiction on the court to consider the question whether the provisions of the Rent Act were applicable. The question, however, is whether in the present case, the learned counsel for the appellant tenant is right in submitting that the jurisdictional fact did not exist and the Rent Act was, therefore, applicable. 18 AIR 1967 SC 295 27. Stated simply, the fact or facts upon which the jurisdiction of a court, a tribunal or an authority depends can be said to be a jurisdictional fact. If the jurisdictional fact exists, a court, tribunal or authority has jurisdiction to decide other issues. If such fact does not exist, a court, tribunal or authority cannot act. It is also well settled that a court or a tribunal cannot wrongly assume existence of a jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not possess. 28. In Halsbury's Laws of England (4th Edn.), Vol. 1, Para 55, p. 61; Reissue, Vol. 1(1), Para 68, pp. 114-15, it has been stated: Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive. The existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a court or tribunal. 36. It is thus clear that for assumption of jurisdiction by a court or a tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the court or tribunal has power to decide adjudicatory facts or facts in issue. Thus, even when we do not agree with the approach of the High Court in labelling the impugned order as quasi-judicial order and assuming jurisdiction to entertain the writ petitions on that basis, for our own and different reasons, we find that the High Court was competent to deal with and decide the issues raised in exercise of its power under Article 226 of the Constitution. The writ petitions were, therefore, maintainable. C. Whether the High Court could give its findings on merits? 98) Once we hold that the order under Section 26(1) of the Competition Act is administrative in nature and further that it was merely a prima facie opinion directing the Director General to carry the investigation, the High Court would not be competent to adjudge the validity of such an order on merits. The observations of the High Court giving findings on merits, therefore, may not be appropriate. 99) At the same time, since we are upholding the order of the High Court on the aspect that the CCI could exercise jurisdiction only after proceedings under the TRAI Act had concluded/attained finality, i.e. only after the TRAI returns its findings on the jurisdictional aspects which are mentioned above by us, the ultimate direction given by the High Court quashing the order passed by the CCI is not liable to be interfered with as such an exercise carried out by the CCI was premature. The result of the discussion would be to dismiss these appeals, subject to our observations on certain aspects. Ordered accordingly.
IMPORTANT NOTIFICATIONS

MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 30th August, 2017

S.O. 2828(E).—In exercise of the powers conferred by clause (a) of Section 54 of the Competition Act, 2002 (12 of 2003), the Central Government in the public interest hereby exempts, all cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalized banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970) and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980), from the application of provisions of Sections 5 and 6 of the Competition Act, 2002 for a period of ten years from the date of publication of this notification in the Official Gazette.

[F. No. Comp-07/4/2017-Comp-MCA]
K. V. R. MURTY, Jt. Secy

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MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 10th August, 2017

S.O. 2561(E).—In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts the Regional Rural Banks in respect of which the Central Government has issued a notification under sub-section (1) of section 23A of the Regional Rural Banks Act, 1976 (21 of 1976), from the application of provisions of sections 5 and 6 of the Competition Act, 2002 for a period of five years from the date of publication of this notification in the Official Gazette.

[F. No. 5/31/2015-CS]
K. V. R. MURTY, Jt. Secy

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MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 29th June, 2017

S.O. 2039(E).—In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts every person or enterprise who is a party to a combination as referred to in section 5 of the said Act from giving notice within thirty days mentioned in sub-section (2) of section 6 of the said Act, subject to the provisions of sub-section (2A) of section 6 and section 43A of the said Act, for a period of five years from the date of publication of this notification in the Official Gazette.

[F. No. 5/9/2017-CS]
K. V. R. MURTY, Jt. Secy

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S.O. 988(E).—In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts the enterprises being parties to —

(a) any acquisition referred to in clause (a) of section 5 of the Competition Act;

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, referred to in clause (b) of section 5 of the Competition Act; and

(c) any merger or amalgamation, referred to in clause of section 5 of the Competition Act,

where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India, from the provisions of section 5 of the said Act for a period of five years from the date of publication of this notification in the official gazette.

2. Where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under section 5 of the Act. The value of the said portion or division or business shall be determined by taking the book value of the assets as shown, in the audited books of accounts of the enterprise or as per statutory auditor’s report where the financial statement have not yet become due to be filed, in the financial year immediately preceding the financial year in which the date of the proposed combination falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout design or similar other commercial rights, if any, referred to in sub-section (5) of section 3. The turnover of the said portion or division or business shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company.

[F. No. 5/33/2007-CS]
K. V. R. MURTY, Jt. Secy.

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MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 4th March, 2016

S.O. 673(E).—In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts the ‘Group’ exercising less than fifty per cent. of voting rights in other enterprise from the provisions of section 5 of the said Act for a period of five years with effect from the date of publication of this notification in the official gazette.

[F. No. 5/33/2007-CS (Part)]
MANOJ KUMAR, Jt. Secy.

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MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 4th March, 2016

S.O. 674(E).—In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts an enterprise, whose control, shares, voting rights or assets are being acquired has either assets of the value of not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India from the provisions of section 5 of the said Act for a period of five years from the date of publication of the notification in the official gazette.

[F. No. 5/33/2007-CS (Part)]
MANOJ KUMAR, Jt. Secy.

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MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 4th March, 2016

S.O. 675(E).—In exercise of the powers conferred by sub-section (3) of Section 20 of the Competition Act, 2002 (12 of 2003), the Central Government in consultation with the Competition Commission of India, hereby enhances, on the basis of the wholesale price index, the value of assets and the value of turnover, by hundred per cent for the purposes of section 5 of the said Act, from the date of publication of this notification in the Official Gazette.

[F. No. 5/7/2013-CS]
MANOJ KUMAR, Jt. Secy.

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REVISED THRESHOLDS

On March 4, 2016, the Central Government issued notifications pertaining to the statutory thresholds for the purposes of “combinations” under Section 5 of the Competition Act, 2002 (“Act”).

1. Increase in thresholds: Pursuant to Notification No. S.O. 675(E) dated March 4, 2016, the value of assets and the value of turnover has been enhanced by 100% for the purposes of Section 5 of the Act. Accordingly, the revised thresholds for notification to the Competition Commission of India (“Commission”) are:

<table>
<thead>
<tr>
<th>Enterprise Level</th>
<th>Assets</th>
<th>OR</th>
<th>Turnover</th>
</tr>
</thead>
<tbody>
<tr>
<td>India</td>
<td>&gt; 2000 INR crore</td>
<td>OR</td>
<td>&gt;6000 INR crore</td>
</tr>
<tr>
<td>Worldwide with India leg</td>
<td>&gt;USD 1 bn with at least &gt;1000 INR crore in India</td>
<td>OR</td>
<td>&gt;USD 3 bn with at least &gt;3000 INR crore in India</td>
</tr>
</tbody>
</table>

OR

<table>
<thead>
<tr>
<th>Group Level</th>
<th>Assets</th>
<th>OR</th>
<th>Turnover</th>
</tr>
</thead>
<tbody>
<tr>
<td>India</td>
<td>&gt;8000 INR crore</td>
<td>OR</td>
<td>&gt;24000 INR crore</td>
</tr>
<tr>
<td>Worldwide with India leg</td>
<td>&gt; USD 4 bn with at least &gt;1000 INR crore in India</td>
<td>OR</td>
<td>&gt; USD 12 bn with at least &gt;3000 INR crore in India</td>
</tr>
</tbody>
</table>

2. Increase in thresholds of De Minimis Exemption: Pursuant to Notification No. S.O. 674(E) dated March 4, 2016, acquisitions where enterprises whose control, shares, voting rights or assets are being acquired have assets of not more than Rs. 350 crore in India or turnover of not more than Rs. 1000 crore in India, are exempt from Section 5 of the Act for a period of 5 years. Accordingly, the revised thresholds for availing of the De Minimis exemption for acquisitions are:

<table>
<thead>
<tr>
<th>Target Enterprise</th>
<th>In India</th>
<th>Assets</th>
<th>OR</th>
<th>Turnover</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>≤350 INR crore</td>
<td>OR</td>
<td>≤1000 INR crore</td>
</tr>
</tbody>
</table>

3. Definition of Group: As per Notification No. S.O. 473(E) dated March 4, 2016, the exemption to the “group” exercising less than fifty per cent. of voting rights in other enterprise from the provisions of Section 5 of the Act under Notification No. S.O. 481(E) dated March 4, 2011, has been continued for a further period of 5 years.
Press Release

Competition Commission of India (CCI) amends the Combination Regulations vide notification dated 9th October 2018

The provisions of the Competition Act, 2002 (“Act”) relating to the regulation of combinations as well as the Combination Regulations have been in force with effect from 1st June 2011.

The Competition Commission of India (CCI), in continuation of its efforts towards simplifying and providing greater clarity on the application of the combination provisions of the Act and the Combination Regulations, has further amended the Combination Regulations on 09th October 2018. This amendment inter alia provide certainty & transparency and expedites faster disposal of combination cases before CCI.

A key change brought about by the present amendments is that the parties to combinations can now submit remedies voluntarily in response to the notice issued under Section 29(1) of the Act. If such remedies are considered sufficient to address the perceived competition harm, the combination can be approved. This amendment is expected to expedite disposal of such combination cases.

In another significant amendment, where the notice is found to exhibit significant information gaps, parties to combinations are allowed to withdraw the notice and refile the same. With this amendment, the parties could address the deficiencies without facing an invalidation by CCI. Further, fee already paid in respect of such notice shall be adjusted against the fee payable irrespective of new notice, if the re-filing is done within a period of 3 months.

Apart from these, certain consequential and other clarificatory changes have also been made in the Combination Regulations.

A copy of the amendment is available on the website of the Commission: www.cci.gov.in

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