LL.B. IV Term

Competition Law

Cases Selected and Edited By

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PAPER: LB - 4033 – COMPETITION LAW (New Syllabus)

Prescribed Legislations:

Competition Act, 2002

Prescribed Readings:

1. International Review of Competition Law
2. Journal of Competition Law and Economics (JCLE)
3. Competition Policy International (CPI)
4. The Competition Law Review (CompLRev)

References:

**Topic 1: Introduction**

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

**Topic 2: History and Development of Competition Law**

History and Development of Competition Law/ Antitrust Law, Liberalization and Globalization - Raghavan Committee Report, Competition Act 2002; Difference between MRTP Act and Competition Act, Salient feature of Competition Act, Important Definitions under the Competition Act, 2002.

1. Brahm Dutt v. Union of India, AIR 2005 SC 730
2. CCI v. Steel Authority of India Ltd. & Anr, (2010) 10SCC 744

**Topic 3: Anti Competitive Agreements**

Anti-Competitive Agreements, Horizontal and Vertical agreement, Rule of Perse and Reason, Appreciable Adverse Effect on Competition (AAEC) in India, Exemption, Prohibition of Anti competitive agreement/ Cartel/bid rigging.

5. All India Tyres Dealers Federation v. Tyres Manufacturers, 2013 COMP LR 92 (CCI), Main Order dated October 30, 2012 and Minority Order by Mr. R Prasad (Member, CCI) dated October 30, 2012.
6. Exclusive Motors Pvt Ltd v. Automobile Lamborghini SPA, Case No. 52/2012, CCI
7. Express Industry Council of India v. Jet Airways Ltd & Ors., Case No. 30/2013, CCI
8. Shamsher Kataria v. Honda Siel Cars India Ltd., 2014 Comp LR 1 (CCI)
**Topic 4: Regulation of Abuse of Dominant Position**

Enterprise, Relevant Market, Dominance in Relevant Market, Abuse of dominance, Predatory Pricing.

9. 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
   DLF Ltd. v. CCI, 2014 Comp LR 01 (CompAT)

10. Jagmohan Chhabra And Shalini Chhabra v. Unitech, 2011 Comp LR 31 (CCI); Main Order dated November 8, 2011 and Dissenting Order by Mr. R. Prasad (Member, CCI) dated November 8, 2011.

11. Surinder Singh v. Board of Control for Cricket in India, [2013] 113CLA579(CCI), Main Order dated February 8, 2013; Supplementary Order by Mr. R Prasad (Member, CCI) dated February 8, 2013 and Dissenting Order by Mr. M.L. Tayal dated February 8, 2013.

12. Dhanraj Pillay v. M/s Hockey India, 2013 Comp LR 543 (CCI); Main Order dated May 31, 2013 and Dissenting Order by Mr. R Prasad (Member, CCI) dated February 28, 2013.


**Topic 5: Regulation of Combinations:**


17. PVR and DT Cinemas Combination Order, CCI, Order dated May 4, 2016

**Topic 6: Enforcement Mechanisms**

Establishment and Constitution of Competition Commission of India, Powers and Functions- Jurisdiction of the CCI – adjudication and appeals, -Competition Appellate Tribunal (CompAT), Director General of Investigation (DGI)- Penalties and Enforcement.

18. Google Inc. & Ors v. Competition Commission of India & Anr., [2015] 127CLA367(Delhi)

**Topic 7: Competition Advocacy**

Competition Advocacy in India and other foreign jurisdictions

**Topic -8 Emerging Trends in Competition Law (National and International)**


**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.
Brahm Dutt 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.
Competition Commission of India v. Steel Authority of
India Ltd. & Anr.
(2010)10SCC 744

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:

“5 ...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 cessare tacitum – 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 est boni judicis ampliare justiciam, 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 remediless 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.
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 orders
termed 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) Supp1 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. Gurdyal [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 decisions
should 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 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 continuance 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.

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Amir Khan Production Private Limited v. Union of India (UOI) through Ministry of Company affairs, The Competition Commission of India through its Secretary Mr. S.L. Bunker and The Director General Competition Commission of India.

(2010)4CompLJ580(Bom)

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 revenue
sharing 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. Janak Dwarkadas 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, the only remedy available to 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 Competition 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.

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

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 do
something 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 reassessment, 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 contravention
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 matter.

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

* * * * *
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 cartelisation in the cement industry. The penalty has been imposed at the rate of 0.5 times the net profit of such manufacturers 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 membe... 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 manufactures 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 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.

* * * * *
Factual Background:
1. The present information was originally filed by the All India Tyre Dealers’ Federation (AITDF) against the tyre manufacturers before the Ministry of Corporate Affairs and the same was forwarded by the Ministry to the MRTP Commission (MRTPC). Consequent upon the repeal of the MRTP Act, the matter stood transferred to the Competition Commission of India (Commission) under section 66 (6) of the Competition Act, 2002 (‘the Act’).
2. In the said information dated 28.12.2007, AITDF alleged that the tyre manufacturers were indulging in anti-competitive activities. In the information, statements of Ministers of Finance and Corporate Affairs were quoted to indicate that the Ministers were also aware about the behaviour of the tyre manufacture
3. It was alleged that the domestic tyre industry was the best example of indulgence in the anti-competitive activities and resorting to trade mal-practices. The tyre trade has been reeling under this exploitative behaviour of these handful of domestic tyre majors. The domestic tyre industry, operating at 95%-100% capacity, on the back of almost 25% annual growth in the commercial vehicle population in last four-five years, has been working in unison and usurping the excise duty reduction contrary to the interest of tyre users.
4. The AITDF alleged that since independence, the behaviour of domestic tyre majors has been anti-competitive, anti-consumer and they have been indulging in various pricing and trade malpractices, which had direct bearing on the revenue of the state exchequer. The tyre majors are having history of restrictive trade practices and even 35 years back the MRTP Commission had passed its first ‘cease and desist’ order against the cartelization by domestic tyre industry in October 1974. Hence, domestic tyre industry has the ‘distinction’ of being indulgent in restrictive trade practices in the market and as a consequence creating chasm among the dealers creating a ‘creamy layer’ within the tyre trade and generally exploiting the tyre user by price rigging and strangulation of production and supplies. AITDF also alleged that the truck and bus operators are not the only victim of their machination, but also the vehicle manufacturers like Tata Motors have been exploited in recent past by the domestic tyre majors.
5. The AITDF submitted that they have been continuously feeding the concerned Central Ministries about the anti-trade, anti-consumer and restrictive trade practices of domestic tyre majors. The AITDF also approached the Competition Commission of
India regarding the anti-competitive behaviour of domestic tyre majors vide letter dated 09.06.2007.

6. Following the receipt of the information, the erstwhile MRTP Commission ordered an investigation into the matter. From the record, it appears that as the DG (I&R) could not complete the investigation when the MRTP Act, 1969 was repealed, the matter was transferred to the Commission.

**Prima Facie Opinion:**

7. The Commission considered the matter in its meeting and on perusal of the material on record and after giving thoughtful consideration to all the facts and circumstances of the case, passed an order dated 22.06.2010 under section 26(1) of the Act directing the Director General (‘DG’) to conduct an investigation into the matter and submit a report. The order of the Commission specifically mentioned the five major domestic tyre manufacturing companies viz. Apollo Tyres Limited, MRF Ltd., Ceat Tyre Ltd., Birla Tyre Ltd. and JK Tyre Ltd.

**Investigation and Findings of DG Report:**

8. In pursuance of the direction of the Commission, the DG conducted the investigation into the matter and submitted his investigation report to the Commission.

9. During the course of the investigation, the DG issued notices to the following tyre manufacturers to seek information and to collect data: (i) J K Tyre & Industries Ltd. (J K Tyre) (ii) Apollo Tyres Ltd. (Apollo) (iii) Birla Tyres (Unit of Kesoram Industries Ltd.) (iv) Ceat Tyre Ltd. (CEAT) (v) MRF Tyres Ltd. (MRF) (vi) Dunlop India Limited (Dunlop) (vii) Goodyear India Ltd. (Goodyear) (viii) Bridgestone India Private Limited (Bridgestone) (ix) Michelin India Tyres Pvt. Ltd. (Michelin)

10. Besides, the information was also collected from Original Equipment Manufacturers (OEMs), AITDF and Automotive Tyre Manufacturers’ Association (ATMA).

11. A brief summary of the replies/information submitted by the tyre manufacturers to the DG is noted below:

13. **J K Tyre & Industries Ltd. (‘J K Tyre’)**

J K Tyre stated that it is engaged in the manufacturing and selling of tyres produced at the factories located in different parts of the country. It also stated that it imports tyres (Bias/Radial) for the purpose of testing, product evaluation, benchmarking etc. It further stated that it sells its products in different parts of the country through dealers and it does not enter into any written agreement with the dealers and goods are supplied to dealers under invoice which contains the terms and conditions of the sale. It was averred in the reply that natural rubber is procured domestically or through imports on daily basis. It also stated that the selling price is dependent on demand &
supply, cost of production, competitive position of the company etc. It was submitted that the ex-factory price comprises of cost of production and the selling expenses. It was further stated that the OEMs are the bulk buyers and are in a position to dictate the prices based on purchase order. It was stated that the prices dictated by the OEMs are arbitrary. It was also submitted that in comparison to the replacement market prices, the tyres are sold at a loss or marginal profit to OEMs.

14. Apollo Tyres Ltd. (Apollo)
It was stated in the reply that Apollo sells tyres/tubes on a principal to principal basis to the dealers who, in turn, sell the same to the customer/end user. It was also stated that no sole selling agent/distributor/stockist is appointed for marketing the products. It was further averred that Apollo does not enter into any written agreement with the dealers and the business conditions are governed by the terms and conditions set on the reverse side of the invoice. It was also stated that the price determination depends upon the various factors, viz., desired market share, desired product positioning, strategic intent of the products, cost inputs for the products, target return on investment and financial fluctuations etc. Further, it was stated in the reply that the cost of production includes raw material cost, conversion cost, power, steam/air, direct wages, salaries, repair & maintenance, R&D, plant depreciation and other factory overheads etc. It was stated that Apollo procures natural rubber from dealers on daily basis at the prevailing market rates.

18. Birla Tyres (Unit of Kesoram Industries Ltd.)
It was stated in the reply that Birla Tyres produces truck and bus tyres, LCV and passenger car tyres by using state of the art machineries and the latest technology. It was stated that Birla Tyres is continuously increasing the capacity outlay to increase the installed capacity and its capacity utilization has improved from 93.62% in 2004-05 to 104.57% in 2009-10. It was further stated that the raw materials constitute 85% of the total cost of production. It was stated that raw material prices are directly influenced by prices of rubber and crude oil. Further, it was stated that Birla Tyres procures natural rubber from rubber dealers on daily basis as per the requirements. Prices of natural rubber are stated to be volatile. It was also stated that Birla Tyres is continuously decreasing the supplies to the export market in terms of percentage of total production. It was further submitted that the raw material constituted 85% of cost of production. Raw material prices are directly hit by prices of rubber and crude oil on which are dependent other major raw materials such as Synthetic Rubber, Carbon Black and Tyre Cord Fabric. It further submitted that it procures natural rubber from rubber dealers on daily basis based on its requirements. The prices of natural rubber are volatile and fluctuate on daily basis. With regard to the production and export, Birla
tyres submitted that it is continuously decreasing the supplies to the export market in terms of percentage of total production.

22. **CEAT Ltd. (CEAT)**

It was stated in the reply that CEAT is engaged in the manufacture of tyres, tubes and flaps. It was submitted that CEAT has established a network of sales offices across India and it sells the goods on principal to principal basis to the major customers, viz., government accounts, fleet accounts, state transport undertakings, vehicle manufacturers and to over 3000 dealers in different parts of the country who, in turn, sell the same to the consumer. It also stated that these dealers also sell the competitors’ products and CEAT does not enter into any agreement for the sale of its products with the dealers and the supplies are effected under an invoice which contains the terms and conditions. CEAT submitted that for manufacturing tyres/tubes it uses basic raw materials, viz., natural rubber, synthetic rubber etc. The raw material prices fluctuate on day to day basis with changes in crude oil prices, foreign exchange rates, international raw material prices etc. Pricing of the products was stated to depend upon raw material prices, landed price of competitive products (imported), demand & supply in the country and abroad. Natural rubber is stated to be the most important raw material required for manufacture of tyres.

26. **MRF Tyres Ltd. (MRF)**

In its reply, MRF has stated that it manufactures and sells all categories of tyres and tubes used in automobiles. It was stated in the reply that it sells its products to OEMs, STUs, the replacement market, export market etc. MRF in the reply stated that it procures natural rubber from around forty dealers on daily basis. It was also stated that MRF has no formal contract for purchase of natural rubber. Additionally, it was stated in the reply that natural rubber is imported from various countries and the price is fixed and payment is made in US dollar terms. MRF has also stated in the reply that it does not import tyres/tubes. It was admitted by MRF that it is a member of ATMA. However, it denied any discussion relating to the issue of price rise at the meetings of the association.

29. **Dunlop India Limited (Dunlop):**

In the reply, Dunlop stated that it has manufacturing facilities in West Bengal and Tamil Nadu and both these units were stated to be under the management of Chabria Group till 2005. These units were subsequently stated to be taken over by the new management i.e. Ruia Group in December, 2005, but the operations remained suspended till 2008 and thus there were no manufacturing operations in the market from 1998 to 2008 and the production and sale was negligible in comparison to the Indian tyre industry. It was also stated that Dunlop is not member of any tyre related association. Details of capacity utilization of the plants were also provided in
the reply. Further, it was stated that market share of Dunlop is negligible and the import of tyres is nil and the export was also stated to be very negligible.

30. Goodyear India Limited (Goodyear):
In the reply, it was stated that Goodyear sells its products in India on principal to principal basis. The products are stated to be sold through dealers and the business dealings are stated to be governed by the terms and conditions of the invoice. Details relating to actual production, installed capacity, utilization percentage were also supplied in the reply. Further, details of production and exports were also provided. It was stated by Goodyear that it was asked to provide details by the Competition Commission of South Africa. However, it maintained that the said action/proceeding is wholly irrelevant for its business operations in India.

31. Bridgestone India Pvt. Ltd. (Bridgestone):
It was stated in the reply that the core business of the company comprises manufacture and marketing of steel belted passenger vehicle radial tyres as also import and marketing of truck and bus radial tyres. It was stated that the company is not involved in manufacturing of truck and bus tyres (radial or bias) in India. It was further stated that the company does not manufacture any kind of truck/bus radial tyres in India but it imports the same from the Bridgestone group companies from Japan and Thailand for sale in India. It was also stated that the company is not involved in manufacturing or importing/marketing/trading of bias tyres in India and it was stated that the company is only in the business of radial tyres. The company is stated to be member of ATMA since 2007 and it was stated that during the meetings of the association various issues concerning the tyre industry viz. import license, mandatory BIS certification on tyres and tubes, availability and increase in price of natural rubber, recommendation to the Government for allowing import of natural rubber at concessional duty, reduction of import duty on natural rubber etc. were discussed. Further, it was stated that the Ministry of Finance vide its notification dated 19.02.2010 has imposed antidumping duty on the radial tyres used in buses and lorries/trucks originating in, or exported from Thailand and China. Lastly, it was stated that the investigation conducted by the South Africa Competition Commission against Bridgestone South Africa (Pty Ltd.) has no connection with Bridgestone India Pvt. Ltd. as both the companies are independent entities and carry out their business operations independently.

32. Michelin India Tyres Pvt. Ltd. (‘Michelin’):
In the reply, it was stated that the company is not engaged in the manufacture of tyres. It was stated that the company imports and sells tyres in India which are manufactured by its affiliate companies outside India. It was further stated that the company markets tyres in India through dealers. It was also stated that the company imports tyres for two wheelers, earth movers, buses and trucks. Details of the imports were also supplied by
the company.

33. All India Tyre Manufacturers’ Association (ATMA):

ATMA is stated to be an association of the domestic tyre manufacture ATMA submitted that it is registered as a Section 25 company under the Companies Act, 1956. It was stated by ATMA in the reply that it has never been associated with or interfered with the day to day operational activities and freedom of its member companies. It also stated that it was never involved in the affairs of any individual company and it has never provided its members with any platform for carrying out any activity which is unlawful or illegal or in contravention of any law for the time being in force including the Competition Act, 2002. Original Equipment Manufacturers (OEMs)

35. Information relating to import and pricing was collected by the DG from the major OEMs, viz. Tata Motors, Ashok Leyland and Eicher Motors (V E Commercial). It is noted from the information supplied that OEMs procure tyres from domestic tyre manufacturers and also import from various countries based on their requirement. The DG also noted that OEMs too are dependent on the supply of tyres from the domestic tyre manufacturers. During the course of investigation the DG analysed the data for the reference period i.e. 2005-2010 collected from the five major domestic tyre manufacturers (Apollo, MRF, J K Tyre, Birla and CEAT). At the outset, it is noted that, for the purposes of the present investigation, the DG, considering the commercial utility of truck and bus tyre segment in transportation and public importance at large, took into consideration the truck and bus tyres both cross (or bias) and radial. However, with regard to the specific and detailed study on cost of production, ex-factory price, price parallelism, etc., the Bias tyres were taken into consideration for investigation as this segment was generating major chunk of revenue.

37. Besides, the DG also made a detailed reference to the secondary documents to corroborate the above findings as these documents also reflected the conduct of the domestic tyre manufacturers. In this connection, the DG has referred to the reports (Phase-I, 1985 and Phase-II, 1988) of the studies conducted by the Bureau of Industrial Costs and Prices (BICP), Ministry of Industry; Market study on Tyre Industry conducted by the Jawaharlal Nehru University (2007); final findings dated 29.06.2007 pursuant to the anti-dumping investigation concerning imports of Bias Tyres originating in or exported from China PR and Thailand and final findings dated 01.01.2010 pursuant to the anti-dumping investigation involving import of Bus and Truck Radial Tyres, originating in or exported from China PR and Thailand of the Designated Authority, Directorate General of Anti-Dumping& Allied Duties, Department of Commerce, Ministry of Commerce & Industry, respectively. The DG also examined the conduct of Automotive Tyre Manufacturers’ Association (ATMA). The DG on examination of the minutes of the meetings held from 2005-2010 noted
that the members of the association collectively tried to resolve the common issues which were affecting the domestic tyre manufacturers adversely. It was also noted that the domestic tyre manufacturers were facing stiff competition from the importers. The members of ATMA collectively adopted the various courses of action to protect themselves in this regard viz. by filing of Anti Dumping Duty petition, by devising low cost tyre strategy, by black listing of importers, by discussing issues on export realizations and by deliberating the issue of unremunerative prices of tyres supplied to OEMs in various meetings.

Price Analysis:
39. The price data for the period of 2005-2010 of domestic tyre manufacturing companies viz. MRF, J.K. Tyre, Birla, Ceat & Apollo was analysed.
40. It was noted by the DG that the major components which affect the prices of tyres are the cost of natural rubber and the excise duty. It was noted that the excise duty over the investigation period has gone down from 16% to 10%. With respect to another component viz. natural rubber, it was noted that the tyre industry is highly dependent on it which accounts for 43% of the tyre production cost. Natural Rubber is procured by domestic tyre manufacturers on daily basis and the price of natural rubber fluctuates on daily basis. The weighted average price of the natural rubber during the reference period was noted and analyzed.
42. Based on the analysis, it was concluded by the DG that during the investigation period, excise duty has shown a downward trend and the natural rubber has increased in 2008 but has fallen in 2009 and then again increased in 2010. It was noted that during the investigation period the net dealer prices of all the domestic tyre players have continuously increased except in 2009 wherein a limited decline in prices was observed. Accordingly, the DG noted that these tyre companies have not passed on the benefit of reduction in excise duty to the consumers. To buttress the conclusion, reliance was also placed on the Tariff Commission findings on Tyre Industry.
44. To examine the price movement for the specific Lug Tyre segment of the five domestic tyre manufacturers under investigation, the DG analysed the weighted average of the net dealer price.
45. By analyzing the said data, it was concluded by the DG that the net dealer price (weighted average) of lug tyre in respect of all the companies was more or less the same with marginal difference in their price except Apollo tyre. Further, it was noted that the movement of net dealer price (weighted average) in terms of actual quantum as also % change was also found to be similar. It was also noted that the % change of net dealer price whether upward or downward was showing close correlation amongst the five tyres manufacturing companies.
47. Based on the above analysis, it was observed by the DG that price parallelism existed amongst the five major tyre manufacturing companies which is a good measure/indicator to show that some kind of information sharing in price had taken
place amongst them. Further, the DG, after finding price parallelism amongst the five tyre manufacturers, proceeded to analyze the plus factors. In this regard, the DG made elaborate analysis of data relating to production; capacity utilization; cost analysis; cost of sales/sales realization/margin; cost of production and natural price movement; net dealer price & margin and market share, the same may also be noted. Production and Net Dealer Price Analysis. The DG examined the relation between the actual production and net dealer price (weighted average) of Lug Tyres of the five domestic tyre companies.

50. On examination of the above, the DG noted that the actual production of domestic tyre companies has increased except during the year 2008-09. Further, the same was collated with the net dealer price (weighted average) change and concluded that there was a decline of 3% to 20% in actual production of the domestic tyre companies. It was, however, pointed out that the corresponding decline in net dealer price was only between 3% - 5% which implied that the companies have not reduced the net dealer price (weighted price) in proportion to the actual production. Capacity Utilization Analysis. The DG also examined the capacity utilization of all the 5 major domestic tyre manufacturing companies. It was noted by the DG that the overall capacity utilization of the tyre manufacturers has been showing a downward trend and the utilized capacity has dropped down in the case of companies viz. Apollo, Ceat and J.K.Tyre except MRF & Birla from 2005 to 2010. In the case of Birla, the variations in capacity utilization were noted as very high as it dropped from around 97% to 81% in the year 2008-09 and then drastically increased from 81% to 104% in the year 2009-10. In J.K. Tyre's case, a drastic decline in the capacity utilization was noted during the entire investigation period which reflects under-utilization of capacity. From the above analysis, it was inferred by the DG that these companies were not utilizing their capacity in full thereby resulting in limiting the supply.

Cost of Sales, Sales Realization and Margin: The DG made a detailed analysis of cost of sales, sales realization and margin. It was noted that sales include cost of production, selling and distribution cost, administrative overheads, advertisement etc. Sales realization is the amount received on sale of each unit. Margin indicates the profit or loss realized on sale of the product. The analysis was done to get an idea about the profitability or otherwise of sale of each product. Based on the analysis, it was concluded by the DG that margins for Apollo Tyres have been showing a very healthy trend and it has reached the highest in year 2009-10. In the case of JK Tyres, the margin has been improving and has gone up drastically. The margin, which was 76 during 2008-09, has gone up to 617 in year 2009-10 which is more than 8 times compared to previous year. In the case of MRF, the margins have shown significant improvement in the year 2008-09 and have further improved in 2009-10. As regards Ceat, it was noted that it has been able to reduce the negative margin from 802 to 216
in year 2009-10. Birla tyres has shown lower margin for 2009-10 compared to previous year. It was further noted that the cost of sales showed increasing trend year after year and there has been sharp increase during 2008-09 in almost all the companies which could be due to increase in the price of natural rubber. Accordingly, the DG concluded that the companies have the motive of making profit and hence have been able to earn positive margins in most of the period in the 5 year. Analysis of cost of production and natural rubber price movement.

57. The DG also conducted a detailed analysis of cost of production and natural rubber price movement. It was noted that natural rubber is one of the major components in the cost of production of tyres. Therefore, examination of the relation and corresponding movement of cost of production and natural rubber was undertaken by the DG. The weighted average of cost of production and natural rubber during the investigation period was taken for the five domestic tyre manufactures. 19

58. From the analysis of percentage change in the price of natural rubber vis-à-vis the percentage change in cost of production in respect of all five domestic tyre companies, the following findings were recorded: (i) In the case of J.K.Tyre, MRF and Birla the price change of natural rubber dropped from 2009 to 2010 showing a reduction of 10% whereas the cost of production in all these companies increased substantially, which was contrary to natural market forces. No satisfactory explanation to such increase in cost of production from 2009 to 2010 despite substantial reduction in price of Natural Rubber was available on record. In fact, in the case of Birla Tyres and MRF Tyres there is an increase of 22.8% and 41% respectively as against the decline in price by 10% in Natural Rubber. (ii) In cases of Apollo Tyres and Ceat, the rate of percentage change in the price of Natural Rubber from 2009 to 2010 does not show the corresponding rate of change in the cost of production. Thus where the percentage change of Natural Rubber price was at 10.5% these two companies have shown a decline of 3% and 3.8% respectively in their cost of production. (iii) The analysis therefore shows that the tyre companies have been inflating some miscellaneous expenses into the cost of production to reduce their net profit margins. Similarly, the analysis also explains that the change in price of natural rubber has no impact on the cost of production and therefore, it does not explain the possible reason for the increase in price of tyres by these companies. Analysis of Net Dealer Price and Margin. The DG also conducted the analysis of the Net Dealer Price (Weighted average) of Lug truck tyres vis-à-vis the margin of each of the five domestic companies under investigation which showed a significant increase in margins from 2006-2010. Thus, it was concluded that all the companies have been operating on high margins barring some exceptions as highlighted in the tabulated data. It was also noted that the margins have increased from 42.04 to 617.92 in the case of J.K. Tyre which is an increase of almost 15 times in a short span of 4 years. Similarly, in the case of Apollo Tyres the margins have almost doubled in the last four years. In view of the above analysis, the DG noted that
these domestic tyre manufacturers have been operating on large margins. It was noted by the DG that the market share of Apollo remained consistent at 27% throughout the 3 year period starting from 2005-2008 and decreased by only around 1.5% in the year 2008-09. The market share of Birla increased substantially by around 8% in the year 2006-07 and thereafter again decreased by around 6% in the year 2007-08. The market share of Birla increased drastically by 10.76% during the investigation period. No major change in market share of MRF could be noticed during the investigation period except a decline of 1.7% in 2009-10. Similar was the case with CEAT where no major change could be noticed in the market share throughout the 5 year period from 2005-2010 but it was reduced by 1% in 2009-10. In the case of J.K. Tyre, it was observed that the market share kept on decreasing throughout the 5 year period by around 1-1.5% each year. It was further noted that during the investigation period the five domestic tyre companies consistently accounted for around 95% of the market share of the total production which implied very high concentration resulting in high dependence of OEMs and the replacement market on these five companies.

**Summary of findings of the DG:**
Based on above analysis the DG returned the following findings:
(i) The tyre companies have not passed on the benefit of reduction in excise duty to the consumers
(ii) Price parallelism existed amongst the tyre companies.
(iii) The tyre companies have not reduced the Net Dealer Price (weighted price) in proportion to the actual production.
(iv) The tyre companies have not utilized their full capacity which resulted in limiting the supply.
(v) The companies have been able to earn positive margins in most of the period under investigation.
(vi) The tyre companies have been inflating some miscellaneous expenses into the cost of production to reduce the net profit margins. Similarly, the analysis also explains that the change in price of natural rubber had no impact on the cost of production and therefore, it does not explain the possible reason for the increase in price of tyres.
(vii) The tyre companies are operating on high margins and the same is not passed on to the consumers.
(viii) The five domestic tyre companies occupy about 95% of the market share of the total production. This high concentration made OEMs and the replacement market highly dependent on these companies.

**Conclusions of the DG:**
65. Based on the above findings, the DG concluded that the major domestic tyre companies acted in concert and ATMA provided the platform to the members for
exchange and sharing of information relating to price, export, import, OEMs etc. Thus, the DG concluded that ATMA and its five major domestic tyre manufacturing companies (Apollo, MRF, J K Tyre, Birla and CEAT) have acted in concert in contravention of the provisions of section 3(3)(a) and 3(3)(b) of the Act.

Replies of the Parties:
66. The Commission, after considering the investigation report submitted by the DG, decided to forward copies thereof to the various parties for filing their replies/objections thereto vide its order dated 02.06.2011. None appeared for M/s Dunlop India Ltd., Directorate General of Anti-Dumping & allied Duties, M/s Falcon Tyres Ltd. and M/s TVS Srichakra Ltd. Further, on the request of counsel for M/s Modi Tyres Company Pvt. Ltd. and M/s Bridgestone India Pvt. Ltd., the Commission vide its order dated 03.11.2011 struck off their names from the array of parties as M/s Modi Tyres was reported to be a sick company and was referred to BIFR and further M/s Modi Tyres and M/s Bridgestone India Pvt. Ltd. were stated to be not in production during the period of alleged cartelization. Moreover, no relief was prayed against them.

70. Reply of AITDF:
AITDF filed its reply to the report of the DG supporting the same. It has contended that report of the DG vindicates the consistent stand of the tyre dealers and tyre users that domestic tyre companies led by ATMA have been indulging in restrictive trade practices by increasing the tyre prices in concerted manner and by not passing on the benefits of reduction in excise duty to the end consumers. It has also contended that despite variation in economies of scales and scale of product mix for variety of tyre sizes, the tyre companies, through collective mechanism, have been staggering tyre price revisions exploiting the market. The price revisions since 2005-06 to 2010-11 and till date i.e. July 01, 2011 display the same trend i.e. when input prices have gone up, the prices of tyres and tubes have been increased by all of them within the virtual same range by varying the revisions by small differential to give an impression that they have been working in an independent manner. Similar has been the case with regard to reflection of reduction in excise duty from 32% to 10% in the last 5-6 years and the tyre companies have failed to reflect the reduction in price of tyres in a similar manner with a minor variation in percentage and timing. Hence, the price to the dealer on reduction of excise duty on each occasion has virtually remained same or with marginal change by way of cosmetic reduction in price and, consequently, the basic ex-factory price minus excise duty has been increased pro rata by all of them for all categories of tyres i.e. truck/bus, LCV, passenger car, tractor tyre, two/three wheeler tyres etc. It has submitted that while the natural rubber price during December, 2010/January, 2011 to June/July, 2011 has gone up from 205 per kg. to 240 per
kg. till the beginning of June, 2011, in the next four weeks, the natural rubber price has come down and was prevailing at 210 per kg. Yet all the tyre companies have increased the tyre prices. It has also been pointed out that while the prices of other major raw materials like synthetic rubber, carbon black, nylon tyre fabric, rubber chemicals (all driven from crude oil) have not crossed the peak average price of crude oil prevailing during the year 2008 when the tyre prices were raised on the same pretext and again in the year 2010, the tyre prices were raised on the back of record increase in natural rubber price while the Central Government reduced import duty on natural rubber by 7.5% to protect the domestic tyre industry. It is further stated that during the year 2006, the tyre prices by all the tyre companies at regular intervals went up in a concerted manner but were not reduced even after drop in raw material prices to the previous prevailing low levels. Similarly, in the year 2008 similar exercise was committed by the manufacturers in unison through several price increases till August/September, 2008. However, subsequently when natural rubber price and prices of all other crude oil based raw materials dropped to a 3-4 year low, the tyre prices were not rolled back by these non-competing tyre companies which are members of ATMA. It is also stated that again in the year 2011, the same exercise was repeated between January to July, 2011 despite ongoing investigation ordered by the Commission. Lastly, it has been submitted on behalf of AITDF that the rate of return on capital employed in the international tyre manufacturing industry is traditionally low at 1.5%-2%, but in case of Indian tyre makers, they have been having a rate of return ranging from 4% to 6% on annual basis during the last 5-6 years. The tyre industry world over makes low returns by nature of its business model as against high rate of returns in case of hospitality, travel garments, computers, white goods, FMCGs etc. This only proves that the rate of return among the domestic tyre majors, irrespective of their size, age and investment and even product mix has been high at the cost of hapless consumers and any weak performance for a quarter or so is more cosmetic and doctoring/management of financial results just to display wrong impression about their true health, which they cleverly hide in their deceptive data management.

74. Reply of ATMA:
ATMA in its reply to the report of the DG has stated that it was never named as an opposite party in the complaint filed by AITDF nor any specific information/complaint was made against it. It has stated that the DG, after requisitioning information/documents from ATMA has recorded an adverse finding against it in the investigation report. However, the DG, apart from making bland references to ATMA minutes/circulars has neither identified nor placed reliance on any specific minutes of ATMA meetings where any discussions pertaining to any alleged cartel like activity is said to have taken place. ATMA has also submitted that the prima facie order passed
by the Commission dated 22.06.2010 identified the parties against which the DG was to conduct investigation. It has been pointed out that ATMA does not figure in that list. Subsequently, the DG despite not having sought permission from the Commission to either expand the period of investigation or the scope of investigation, has recorded adverse findings against ATMA. Even assuming that the DG under the provisions of the Act has the power to expand period and scope of investigation, the investigation undertaken by the DG is fundamentally flawed and the investigation report is devoid of any merit. The conclusions set out therein are baseless and unsubstantiated in as much as the DG ought to have identified the evidence/documents on the basis of which the adverse finding against ATMA was recorded. It has further submitted that during the course of investigation, ATMA, in full compliance with the multiple requisitions, submitted all relevant documents/information including minutes of ATMA meetings. It has alleged that the DG has failed to identify any specific documents and/or place reliance on the same in the investigation report and has not annexed any such minutes/circulars to the investigation report. By way of preliminary objections, it has argued that Anti-Dumping (AD) proceedings are initiated under applicable laws/rules/regulations. The AD proceedings are pro-competitive and are aimed at preventing anti-competitive pricing practices through imports which would have an appreciable effect on the domestic industry. It is stated that India is not the only country where ADD has been imposed on Chinese/Thai tyre imports. It has further urged that AD rules require industry representation and trade associations, such as ATMA, are best suited to represent the domestic industry before the AD authority. It is stated that a significant number of cases have been filed by trade associations before the AD authority. If the findings and conclusions set out by the DG in the investigation report are adopted by the Commission, this would be contrary to the provisions of Section 62 of the Act which states that the provisions of the Act are in addition to and not in derogation of any other law for the time being in force. The AD rules are a law for the time being in force and adoption of the DG’s argument qua the AD proceedings will be contrary to the provisions of Section 62 of the Act itself. 80. It has averred that the vexatious and persistent litigation/proceedings undertaken by AITDF is nothing but a counter blast to imposition of ADD on Chinese and Tyre imports by the AD authority which directly impacts members of AITDF. This is a motivated proceeding and the DG has failed to establish the credentials of the informant. This has been stated as a critical flaw since it allowed the process of the Commission and the provisions of the Act to be abused. It has further argued that AITDF information and the DG findings essentially seek to build in the anti-trust defense doctrine into the legal system in India, which is clearly not allowed. As per ATMA, to suggest that the process of the Commission and the provisions of the Act can be deployed as a defensive measures to adverse findings under other laws (ADD in this case) would be an affront to the legislative intent. Responding to the findings of
the DG, it has been pointed out by ATMA that every tyre manufacturer offers products with identical specifications. The tyre ‘brand’ commands significant visibility when compared to almost all other components fitted on vehicles. Tyre production requires highly specialized knowledge and technology as also significant investment. Tyre producers have to compulsorily comply with a number of regulatory requirements in India e.g. BIS which is now mandatory since May, 2011. Referring to the findings based on price parallelism or information exchange, ATMA has pointed out the peculiar features of the tyre industry. It has submitted that product prices in the tyre tend to be similar or move in tandem because of market forces. Further, price parallelism in the tyre industry arises on account of the fact that the products sold are homogenous (a consumer can potentially use tyres belonging to different brands on the same vehicles so long as the specifications are the same) which makes it difficult for businesses to charge different prices to the customer. Products in the tyre industry share similar sources of inputs, which means that competitors are subject to similar cost fluctuations in setting their product prices. Prices of products in the tyre industry are highly visible, which allows businesses to collect real time market intelligence and monitor each other’s prices closely and match competitors’ price movements.

87. Reply of M/s MRF Limited:
MRF in its reply to the investigation report of the DG has submitted that the report fails to demonstrate the conditions precedent for showing the existence of a cartel. Cartelization is a serious misconduct and must be set out with particularity. The report fails to show the existence of an agreement between MRF and other tyre manufacturers to limit or control the production or sale or price of goods. It has contended that for this reason, no allegation under section 3(3)(a) and 3(3)(b) of the Act can be made and the report ought to be rejected. It has submitted that an ‘agreement’ between competitors is a condition precedent to establish an allegation of cartel. Reference has been made to a decision of the Supreme Court in the case of Union of India v. Hindustan Development 30 Corporation, (1993) 3 SCC 499 at p. 531, para 14 to contend that mere offering of a lower price by itself, though appears to be predatory, cannot be a factor for inferring formation of a cartel unless an agreement amounting to conspiracy is also proved. The investigation report fails to show that there was an ‘agreement’ between the tyre manufacturers. It has further averred that the report also fails to show the causation of appreciable adverse effect on competition in India in terms of the statutory factors laid down under section 19(3) of the Act. It has urged that this is a condition precedent for the allegation of a cartel against the tyre manufacturers which has not been taken into account and hence the report is bad in the eyes of law. It has been pointed out that the DG has adopted a theoretical approach and wrongly relied upon the economic principles of price parallelism out of context ignoring the facts and data given by MRF. The entire exercise of the DG in this regard appears to have been
based on his own prejudicial perception about tyre industry rather than on facts and data produced by MRF during the course of investigation, which have been totally overlooked. Further, it has argued that the report is wholly without jurisdiction, fraught with fallacy against the tyre industry and particularly against MRF based on mere surmises and conjectures emanating from AITDF complaint, obsolete reports and ought to be rejected on this count. The investigation has been fishing and roving enquiry in a premeditated manner without any reasonable ground or cogent data against MRF and the report which has been prepared without any basis, should be set aside on this ground alone. It has been also submitted that the report consists of and relies upon annexures of more than 400 pages. Many pages in the annexures including the Tariff Commission Reports are not legible and even otherwise annexures do not have any relevance being obsolete, unrelated to the subject of investigation and the conclusion drawn against the tyre companies and particularly against MRF. It has been contended that the report ought to be rejected on this ground also. Referring to case law, it is argued that it is settled law that price parallelism by itself cannot amount to a price cartel. In this regard, reference has been made to the decisions of the Full Bench of the Hon’ble MRTP Commission in the cases of RRTAv. ACCI Bayer, (1993) 1 CTJ 7 at para 25 as well as other decisions given in Grindwell Norton, 1984 Tax LR 2219, India Foils, 1984 Tax LR2010, Hindustan Lever TOMCO, 1983 Tax LR 2443, where it has been held that price parallelism does not amount to cartel. It is however denied that the investigation report shows price parallelism of the tyre companies including MRF.

103. MRF has contended that the DG has erroneously proceeded to target it overlooking and ignoring the conduct of the Chinese tyre manufacturers who are dumping both bias and radial tyres in India at prices which are extremely low thereby adversely impacting the domestic tyre industry as a whole. The approach of AITDF is to support the said interests. The DG in its report has totally lost sight of the interest of the domestic tyre industry and is insistent on giving a report against the MRF and other tyre manufacturers and thereby furthering and advancing the interests of the Chinese tyre manufacturers.

115. Reference has been made to the decision of the Supreme Court in the case of Competition Commission of India v. SAIL, (2010) 10 SCC 744 where certain directions were passed in para 135 of the order and the same have been quoted to the following effect: “(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 be proceeded 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.”

116. From the above, it is sought to be urged that there has been a considerable delay
on the part of the DG, the MRTP Commission and the DG, CCI in conducting and completing the investigation and submitting the investigation report. It is argued that the delay in completing the investigation and submitting the report has resulted in grave prejudice to MRF as a tyre manufacturer besides being in total and complete violation of the direction given by the Supreme Court to complete the investigation and submit the report in all cases not later than 45 days from the date of passing of direction in terms of section 26(1) of the Act.

119. In conclusion, it has been prayed that the investigation report should and ought to be rejected on account of the fact that the investigation was without jurisdiction and the scope of the transfer of the case under section 66(6) of the Act was to conclude the proceedings under the MRTP Act, 1969 and not purported to extend the scope under the Act. Finally, it has been prayed that the proceedings may be closed.

120. Reply of Apollo Tyres Limited:
Apollo has filed detailed objections to the report of the DG. At the very outset, it has contended that the DG failed to prove any specific allegation against it. It has been stated that it is an essential ingredient to prove any allegation of anti-competitive conduct to demonstrate how a particular enterprise has violated provisions of the Act i.e. how such an enterprise has entered into an agreement which is in violation of the provisions of section 3(1) read with section 3(3) of the Act. 121. It has been submitted that the findings of the DG are based purely on circumstantial evidence of parallel behavior which, according to the DG, is a violation of the provisions of the Act. It is stated that mere price parallelism cannot be considered as evidence of collusive conduct. The DG’s report is purely based on speculation and the conclusions about parallel behavior are wholly unsustainable, particularly given the complete lack of any specific or direct evidence relating to Apollo in particular or the alleged cartel generally. It has been stated that in the absence of any specific allegations being made and without backing of any cogent evidence, and even on the balance of probabilities, the DG’s report must be dismissed in its entirety. It has been pointed out that the DG has committed a fundamental error in failing to establish the timeframe in which the alleged cartel/anti-competitive activities took place, which is essential to many aspects of the case, including the period during which section 3 of the Act was not in force. Further, it is stated that the DG’s report fails to give any reason for extending the period and scope of investigation beyond 2008 without any specific direction from the Commission. It is the case of Apollo that the Commission formed its prima facie opinion only on the basis of the information and record available till 2008. There is no evidence on record which shows that the Commission collected or gathered any evidence relating to any alleged infringement after 20.05.2009 i.e. after the Act came into force but before the Commission formed its prima facie opinion. Therefore, it is urged, the investigation could not have been extended beyond the timeframe originally
alleged in the information, which relates to the period prior to 20.05. 2009. It is argued that for a cartel to survive there must be mechanisms in place for (a) coordinating the cartel agreement and ensuring the functioning of the cartel, (b) monitoring the behavior and conduct of the members of the cartel, and (c) punishing members of the cartel who do not fall in line with the decisions of the cartel. In the present case, the DG has failed to produce any evidence whatsoever that suggests that any of the above mentioned elements, which are critical to the operation and sustenance of any cartel arrangement, are present in the Indian tyre industry. It is the case of the informant that in an industry (a) which is fragmented, (b) where market shares are unstable, and (c) where there is ease of entry, collusion is highly unlikely. This has been stated as a reason to contend that the industry conditions in India are simply not conducive to cartelization in the tyre sector.

127. Objection has also been taken on the ground that the DG has made very general and unsubstantiated statements regarding the industry without any specific reference to and evidence against Apollo in relation to its alleged role in the alleged cartel. It is alleged that the intention of the DG while conducting the investigation was to reach a finding of infringement under any circumstance, whatsoever, demonstrating a significant bias against Apollo, which emphatically denied that it engaged in any anticompetitive behavior in violation of the provisions of the Act. It specifically denied that it entered into any agreement, anticompetitive or otherwise, with any other tyre producer regarding pricing, manufacturing or distribution of tyres in India.

136. Challenging the findings of the DG holding Apollo to be in contravention of the provisions of section 3(1) read with sections 3(3)(a) and 3(3)(b) of the Act, it has been contended that the DG has failed to establish the required elements to make out a sustainable case under the provisions of the Act and therefore, the Commission must set aside the findings of the DG and close the case against Apollo. Assailing the findings of the DG which suggest that the mere fact that prices for one particular T&B LUG tyre have moved in parallel is sufficient to establish an agreement for the purpose of section 3 of the Act, it has been argued that the existing jurisprudence in India, the European Union (EU) and the United State of America (US) does not in any way suggest that mere price parallelism, which is the only evidence put forth by the DG, would suffice. Further, it has been suggested that the same can never be conclusive measure of collusive behavior. The DG has also mis-stated the law which has been clearly laid down by the MRTP Commission in various cases and by other courts in the EU and the US. It is averred that the DG has relied purely on circumstantial evidence i.e. economic evidence of market behavior to suggest there is an indication of collusive behavior in the tyre industry. It is alleged that the DG failed to accurately analyze the circumstantial evidence and its analysis is not supported by strong economic principles.

139. Referring to the findings of the DG relating to price parallelism, it is argued that
price parallelism essentially means that prices for a particular product move in a similar manner. It has been highlighted that the DG in its report noted that prices of the tyre companies moved in a similar direction, and finally concluded that there exists price parallelism in the Indian tyre industry. Based on the price parallelism, the DG concluded that there is a concerted action. Challenging this finding, it is argued that the DG jumped to conclusions based on its half-hearted attempt at proving price parallelism, other than which the DG’s report adduces no evidence of the alleged cartelization. It is sought to be contended that it is well-settled globally that price parallelism, by itself, cannot amount to an evidence of collusive behavior. It is also alleged that the DG made significant computational errors in arriving at its findings on price parallelism. The DG, for reasons only known to him, has examined prices of only one specific type i.e. LUG tyre to ascertain the evidence of parallel pricing.

143. Alluding to the findings of the DG to the effect that the average capacity utilization in the Indian tyre industry dropped during 2005-2010 leading to an inference that the tyre manufacturers were not utilizing their capacity in full and therefore limited supply, it is contended that the DG has applied an incorrect measure to assess the industry-wide capacity utilization levels on the basis of installed capacity and has not considered the capacity that is actually available for production which takes into consideration various factors associated with functioning of a tyre plant such as ramp-up time, downtimes due to maintenance and/or breakdowns, age of the plant, plant lockouts etc. It is agitated that one of the key objectives of a cartel is to enhance the profits earned by the cartel members by fixing prices at levels that are close to monopoly level i.e. well above levels that would have prevailed if the producers had actively competed with each other. Prices cannot be kept at elevated levels if producers do not keep supply levels sufficiently low in relation to demand. In order to ensure that production and supply are low, it is often the case in cartels that there is very little capacity addition over time and in some cases, even a reduction of capacity. By ensuring that capacity and capacity additions are kept in check, cartelists can prevent other members of the cartel from ‘cheating’ on the rules by secretly producing more (with their unused capacity) and increasing their individual market share. This is clearly not the case here, as there have been significant industry-wide capacity additions over the last few years. It is urged that Indian tyre industry generally and Apollo in particular, have added significant capacity over last few years.

150. Grievance is also made of the fact that the DG has made general observations that tyre manufacturers have not passed on the benefits of the decreased excise duty to the customers. It is alleged that in complete contrast to the assertions/findings by the DG, Apollo has been diligently passing on the benefits of excise duty reductions in the best interests of its customers. It is also contended that the mere fact that Apollo is making profits on the sale of tyres cannot be suggestive of violation of the Act. The DG has failed to appreciate that Apollo’s profits have fallen, clearly showing that the market
conditions are volatile and competitive, which cannot support the formation or existence of a cartel either in theory or in the ‘real world’. Coming to the market share analysis of Apollo and the industry, it has been pointed out that the DG has examined market shares for the period 2005-10 for the five manufacturers using the information submitted by Birla Tyres. The DG has concluded that during the investigation period the five domestic tyre companies consistently accounted for around 95% share of the total production. This, according to the DG, implied very high dependence of OEMs and the replacement market on these five companies. In addition to that, the DG also noted the movement in the shares of the respective manufacturers for the period under investigation. Apollo has challenged the market share analysis conducted by the DG. It has been pointed out that the market shares of key players in an industry can have significant impact on their ability to arrive at an agreement. The analysis has been challenged inter alia on the grounds that the DG failed to take into consideration imports as also the fluctuations in market shares.

Apollo is also aggrieved of the fact that the DG relied upon historic data, which in some cases was more than 25 years old to substantiate his findings. Such reliance on these historic reports was completely fallacious and sought to portray an incorrect picture, which is divorced from the reality of present day demand and supply conditions faced by market participants. Further, the findings in these reports/studies cannot even be considered as circumstantial evidence since it is purely historic and in some cases is more than35 years old, and the conclusions given in the reports (especially the academic studies) is not based on complete data. There are inherent gaps in these reports. Further, these reports do not in any event suggest that there is an agreement among various tyre manufacturers in violation of provisions of the Act. The DG has sought to produce the findings of the Tariff Commission, to suggest that the tyre manufacturers were making huge profits and the market forces have been unable to bring benefits to the consumers in the form of lower price. The Tariff Commission reports, are in respect of Tariff Commission Report Phase I (1985) and Tariff Commission Report Phase II (1988) which clearly suggests that one was prepared approximately 26 years ago and the other was prepared 23 years ago. It is alleged thatthese reports are completely out of date and relate to a period which was steeped in License Raj, when there were little or no imports and are therefore completely divorced from the market realities of today. The reliance by the DG on these reports is totally misplaced and the same must be out-rightly rejected by the Commission, submits Apollo. Additionally, referring to the Anti-Dumping Duties, it has been submitted that consequences of Government action or policy cannot be attributed to the enterprises carrying on business in the industry. Government policy is not a result of an agreement amongst enterprises. Therefore, the Commission is not an appropriate forum to challenge Government policy. Antidumping measures by the Government are purely policy decisions which are out of the jurisdiction of the Commission. Apollo cannot be
held liable on account of anti-dumping duties levied as result of the policy decision of the Government of India and allegations in relation to these should be dismissed in their entirety. Further, it is averred that the anti-dumping duty has been removed with effect from August 2011 placing imported tyres in direct competition with the domestic tyre manufacturers. Lastly, grievance has been made relating to some alleged procedural errors viz. extension of investigation period by the DG; infirmity in the prima facie order; lack of reasons etc. Based on the above submissions, it has been prayed to the Commission to dismiss the findings of the DG in its entirety and to exonorate Apollo from all the allegations.

161. Reply of M/s JK Tyre & Industries Ltd.:  
J K Tyre has filed its reply to the report of the DG. It has pointed out that the report overlooks and ignores the scope of the AITDF letter dated 28.12.2007 which has been treated as information limiting the allegation to removal of anti-dumping duty and not passing on the benefit of excise duty reduction. It is stated that both the aforesaid allegations are outside the scope of the MRTP, Act, 1969 and the Competition Act, 2002. The allegations relating to the anti-dumping duty and removal thereof fall under the purview of the Customs Tariff Act, 1975 and the Customs Tariff (Identification, assessment and collection of antidumping duty on dumped articles and for determination of injury) Rules, 1995 (Anti-Dumping Rules). 162. To buttress the point, reference has been made to the decision of the Supreme Court in the case of Haridas v. All India Float Glass Manufacturers Association, (2002) 6 SCC 600 where it was held that the two statutes and regimes operate in different and distinct spheres and there is no conflict between them. Referring to para 48 of the order, it has been pointed out that the Supreme Court held that whether to allow imports or not and the terms on which an item may be imported is a matter of policy and regulated by law. In para 49, it was held that to allow a challenge to actual import will amount giving to MRTP Commission jurisdiction to adjudicate upon the legal validity of the provisions relating to imports, which jurisdiction the MRTP Commission does not have. Thus, it is contended that the rate of import duty, which is imposed, is a legislative act and is, thus, not amenable to jurisdiction of the MRTP Commission. The levy or non-levy of anti-dumping duty or other duty being a legislative act under the Customs Tariff Act is also not a matter of judicial review by the MRTP Commission. Further, it has been averred that the Customs Tariff Act, 1975 and the Customs Tariff (Identification, assessment and collection of anti-dumping duty on dumped articles and for determination of injury) Rules, 1995 (Anti-Dumping Rules) form a complete and comprehensive code. It has been submitted that allegations made by AITDF against levy of anti-dumping duty on import of truck/bus tyres (Bias) could be agitated only before the Designated Authority or the Tribunal (CESTAT) and could not be agitated before the Commission. 164. It is alleged that AITDF is guilty of suppression very
and suggestion falsified as it has suppressed material facts from the DG and the Commission. It has been pointed out that AITDF by its representation dated 28.12.2007 suppressed the fact that the Designated Authority by Final Findings dated 29.06.2007 had imposed anti-dumping duty on trucks/bus tyres (bias) imported from China and Thailand after an extensive hearing where the AITDF had also fully participated and made their submissions and the AITDF had not filed any appeal against the Final Findings of the DA. By suppressing the above facts, it is alleged that AITDF was able to abuse and misuse the judicial process by persuading the DG (I&R) and the DG, CCI to investigate the matter notwithstanding the fact that the Final Findings are final and binding qua AITDF and consequently, any grievance in this regard could not be entertained. It is further alleged that AITDF also failed to point out to the DG the Final Findings dated 26.08.2010, being a Mid-Term Review, passed by the DA enhancing the anti-dumping duty and Order dated 31.03.2011 passed by the Central Exercise and Service Tax Tribunal dismissing the appeals filed against the Final Findings dated 29.06.2007 of the DA. 165. Raising the plea of res judicata, it is argued that the same would constitute a bar to the very entertainment of the information filed by AITDF pending before the Commission seeking the relief of removal of anti-dumping duty. Reference has been made to the provisions contained in section 11 of the Code of Civil Procedure, 1908 which provides that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly or substantially in issue in a former suit between the same parties or between parties whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. The provisions relating to anti-competitive agreements came into force with effect from 20.05.2009 whereas the representation of AITDF was dated 28.12.2007 and merely refers to price increases made by tyre companies in the year 2006. AITDF did not make any allegation during the investigation before the DG (I&R), the MRTP Commission and the cause of action, if any, arose in 2006. Subsequently, the investigation was transferred to the DG, CCI in the year 2010. At the relevant time of filing of the representation dated 28.12.2007, only the MRTP Act, 1969 was in existence. The Competition Act cannot have a retrospective application in relation to price increase in the year 2006. 167. Further, it has been submitted that the report fails to allege much less establish an ‘agreement’ between J K Tyre and its competitors, which is a condition precedent for a price cartel. Reference has been made to the decision of the Supreme Court in the case of Union of India v. Hindustan Development Corporation, (1993) 3 SCC 499 at 531 para 14 to contend that a mere offering 56 of a lower price by itself, though appears to be predatory, cannot be a factor for inferring formation of a cartel unless an agreement amounting to conspiracy is also proved. It has been submitted that the report fails to show that J K Tyre had
entered into an agreement with its competitors to limit or control the production, distribution, sale or price of goods. It has also been pointed out that the representation of AITDF does not refer to the same. The economic principles of price parallelism as relied by the DG have been disputed and denied by J K Tyre. Referring to the finding in the report at page 24 holding that there is marginal difference in the net dealer price of all companies except Apollo, it is argued that the same demolishes the case of price parallelism. It is alleged that the DG appeared to be relying on surmises and conjectures and perceptions about tyre industry rather than on facts and data furnished by J K Tyre during the course of investigation. Alternatively, it is argued that the marginal difference in the net dealer price of different tyre companies and a gap with the price of Apollo Tyres would explode the myth of cartel.

169. It has been contended that an allegation of a cartel is an allegation of improper conduct or serious misconduct which cannot be made in a vague or general manner based on an impression or perception. An allegation of improper conduct has to be laid down with material facts and material particulars. There has to be clarity and certainty and accuracy about the material facts and material particulars in the information petition to show how a charge of cartel is made out. In the absence of any material facts or particulars constituting a cartel, the same cannot be regarded as a valid and proper allegation of cartel, which needs to be answered by J K Tyre. It has been strenuously contended that price parallelism by itself cannot amount to a price cartel. To support the plea, reference has been made to the decisions of the MRTP Commission in the cases of RRTA v. ACCI Bayer (1993) 1 CTJ 7 et al, where it has been held that price parallelism does not amount to cartel. Without prejudice to the above legal proposition, J K Tyre denied any allegation of price parallelism or cartel, as alleged or at all. Detailed parawise comments have also given by J K Tyre.

172. Referring to the price analysis carried by the DG, which has been further subdivided into price structure and price movement, it has been stated that the same is incomplete and it has been averred that it is incorrect to suggest that the cost of natural rubber and excise duty would constitute the major component affecting price of tyres. It has been contended that the DG has wrongly held that during the investigation period excise duty has shown a downward trend. It is argued that excise duty has, in fact, increased from 8% to 10% with effect from 01.03.2010 and therefore it is incorrect to suggest that excise duty has shown a downtrend as observed by the DG. It is the case of J K Tyre that it had passed on more than the entire reduction of excise duty from March, 2008 to March, 2009. The finding of the DG that reduction in the excise duty was not passed on by J K Tyre has been denied. It has been submitted that the aforesaid finding of the DG demonstrated a complete lack of understanding of the tyre trade. The present investigation relates to the purported information filed by AITDF purporting to act on behalf of tyre dealers. J K Tyre sells its products on a principal to principal basis to tyre dealers who in turn sell the products to the truck
owners or customers since there is no privity of contract between J K Tyre and the truck owners /customers. Moreover, J K Tyre issues a Price List which inter alia contains the Net Dealer Price (NDP) and the maximum price which is the maximum recommended price. J K Tyre is not in a position to ensure that the tyre dealers in fact pass on the benefit of reduction in excise duty to the truck owners/consumers.

175. Exception has been taken to the finding in the report that no satisfactory explanation was given to the increase in cost of production despite substantial reduction in price of natural rubber. It has been argued that the weighted average price of natural rubber furnished by J K Tyre showed that there was an increase in prices from 2009-2010. Thus, the finding itself has been described as patently wrong since the report failed to consider the data furnished by J K Tyre which demolishes the finding given in the report. Further, it has been submitted that the DG has not asked for any explanation from J K Tyre in the probe letters sent in this regard. With regards to the finding that tyre companies have been inflating some miscellaneous expenses into the cost of production to reduce their net profit margins, the same has been strongly disputed by J K Tyre. It has been pointed out that J K Tyre is a listed public limited company and its accounts are audited by Statutory Auditors who are appointed by the shareholders. The audited results are circulated to around 30,000 shareholders of J K Tyre and the same are approved in the annual general meeting. It has been pointed out by J K Tyre that it was giving discounts to its dealers during the aforesaid period and the Net Dealer Price is not the effective price at which the tyres are supplied to the dealers. It has also been added that the dealer margin which is the difference between the maximum price and 60 the selling price in respect of the tyre under investigation continues to remain very high and ranges from 10.2% to 16.2% from 01.04.2002 till date. Based on this, it is contended that it demolishes the case for any alleged grievance made by AITDF purportedly on behalf of tyre dealers relating to price increases affected by J K Tyre, which has no bearing or impact on the margin of the dealers whatsoever. 179. It has been reiterated that the price increases are based on market factors including changes in cost of production to leave a reasonable margin of profits and return on investment.

180. It has been argued that the chart in the report showing capacity utilization movement related to all tyres whereas the present investigation was confined to one particular truck tyre. It has been pointed out that the said chart fails to take into account that the domestic availability of truck tyres of J K Tyre had, in fact, increased during the period. 181. Similarly, objection has been taken to the fact that cost of sales, sales realization and the difference between the two have been taken from all truck tyres of different sizes both bias and radial whereas the investigation was confined to only one truck tyre (bias) i.e. 1000.20 16 JTK LUG Tyre. The approach of the DG in drawing a conclusion based on the profit of a single year i.e. 2009-2010 insofar as J K Tyre is concerned has also been faulted. It has been alleged that the DG failed to take into
account the profit for the previous years which was less than 1% except in 2006-2007. With reference to market share analysis, it has been pointed out that the said data is based on total production figures of truck tyres. The said data fails to take into account export figures which have to be deducted from the total production figures to show the actual domestic tyre availability and the consequent market share. It is sought to be clarified that for the year 2009-2010, there was an illegal strike in the factory of J K Tyre. It is stated that the changes in the market share figures from 2005-2010 show that there is intense competition in the tyre market. It has been conceded that share of production of top 5 companies is over 95% but it is sought to be explained by arguing that the same is the scenario globally where top 10 companies command over 80% of the market supplies. There is no restriction on the entries of new players from the domestic as well as international markets but industry has not remained very attractive due to very low return on investments. Lastly, it is urged that J K Tyre is a member of ATMA and does in fact attend meetings of ATMA held on different dates to discuss common issues faced by the tyre industry. With regard to the allegation of ‘Low Cost Tyres Strategy’ in the report, it is denied that J K Tyre as a member of ATMA adopted the alleged strategy of launching low price tyres. It has been averred that J K Tyre is following its unique marketing strategies to sell its products in a highly competitive market. Similarly, allegation of ‘collectivelyblacklisting the importers’ has been denied as wholly misconceived and incorrect.

188. Reply of Kesoram Industries Limited (Birla Tyres):
Birla Tyres has filed its reply/objection to the report of the DG and written submissions/additional affidavit in reply/objections. At the outset, it has been pointed out there is a serious jurisdictional error committed by the DG to proceed with the investigation in a transferred case under section 66(6) of the Act by applying new standard in respect of conduct and practices which happened prior to coming into effect of the Act i.e. on or before 20.05.2009, the date when the Act came on the statute book and more particularly, when there is no specific assertion/allegation in the complaint or in the term of reference order of Commission dated 22.06.2010 that there is a continuance of practice by the noticee as forbidden under the Act. Thus, the entire assumption of jurisdiction by the DG to test the conduct and/or practices of the noticee companies on the basis of the standards set by the new law for a period prior to its date of implementation is faulty and erroneous. It has been further contended that the DG’s report has proceeded on wrong, erroneous and faulty premise by limiting and restricting investigation to truck and bus tyres(bias lug tyres) of different make and specifications without clearly setting out the reasons and/or justification for doing so. It has been submitted that in order to arrive at a conclusion as to whether there is any formation of ‘cartel’ as defined under section 2(c) of the Act, there has to be a clear finding on the existence of the ‘agreement’ as defined section 2(b) of the Act.
Although, the ‘agreement’ as defined under section 2(b) is a wide and inclusive definition which not only includes formal written agreement which is enforceable in law but also informal ‘understanding’ and ‘arrangement’ in the widest possible meaning, yet no material evidence was cited by the DG in its report about the existence of any agreement as defined. Thus, it is argued that based on the material available on record, the DG has not been able to come to a conclusion or recorded any finding of the existence of any ‘agreement’ as understood under section 2(b) of the Act. It is further submitted that when the direct proof is not available about the existence of the ‘agreement’, the circumstantial evidence may form a basis of a reasonable inference about the existence of such agreement but the DG has also failed to produce any conclusive proof or establish the existence of the circumstantial factors from where the easy inference can be drawn as to existence of the agreement. It is alleged that in the present case, no evidence was produced or relied upon by the DG which points to the collusive meeting of minds of the domestic tyre manufacturers or which indicates conspiracy of any sort to restrict free flow of goods or jacking up the prices by creating artificial demands in the market to ward off competition. The entire approach of the DG on the formation of the opinion about the existence of cartelization has been described as based on mere conjectures or surmises. It has been pointed out that the DG in its report has referred to the minutes of the meetings of ATMA to hold that it acted as a platform for exchange and sharing of information related to price, export and other related issues and therefore, concluded that five major tyre manufacturing companies have ‘acted in concert’ in violation of the provisions of sections 3(3)(a) and 3(3)(b) of the Act. This conclusion has been challenged as totally faulty and erroneous because there is no minutes of ATMA produced or brought on record to support the conclusion that there is a meeting of minds of the different tyre manufacturers determining the prices of the products to be sold in the market. It has been submitted that the strategy to determine the prices of the product is all guided and governed by market forces as there is an intense competition amongst the tyre manufacturers. Mere exchange of views and opinions and share of information relating to common issues to the tyre industry cannot be termed as anti-competitive behavior until and unless a tacit understanding or concerted action is proved to be found restricting competition. In this connection, reliance was placed on the judgment of US Supreme Court in Maple Floor Manufacturers’ Association v. United States of America 268 US 563. The following passage has been quoted in this regard:

“It is not, we think open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice. Exchange of price quotations of market commodities tends to produce uniformity of prices in the markets of the world. Knowledge of the supplies of available merchandise tends to prevent over production and to avoid economic
disturbances produced by business crisis resulting from over production. But the natural effect of acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce, and its consequent effect in stabilizing production and price, can hardly be deemed as restraint of commerce, or, if so, it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful.”

(Emphasis added)

192. Further, it is averred that because of the wrong and incorrect data selection and adoption of incorrect methodology in comparing the prices of the products of different tyre manufacturers, the result arrived at by DG on price parallelism is faulty. It is stated that there is no lowest common denominator based on which the price movement was examined or changes in the price was recorded. No common platform was formulated to measure the price movement of tyre or any specific time frame was selected in comparing the price movement. Prices of the raw materials as well as the finished products rise and fall either on daily basis, monthly basis or yearly basis. In such a price movement scenario, the movement of the price cannot be examined and compared between different manufacturers of tyres without first bringing the data under one common platform. Without doing so, it always runs the risk of doing a comparison between non-comparable. There are no clear-cut measures adopted to arrive at: i) Net dealer price; and ii) Net weighted average. Each manufacturing unit has its own method of adopting the net dealer price or net weighted average. No common identifiable measure to compare the price was selected. Pattern of price changes by domestic tyre manufacturers with respect to time was not examined properly. Finding recorded to the effect that drop in the prices of rubber or the excise duty reduction, benefit of which are stated to have not been passed on to the consumers are also faulty as it has not analyzed properly taking into account the time factor, rise and fall of prices of procured prices of natural rubber both in domestic and international markets, interface between manufacturer and dealers and also the rise of input costs of other raw materials required for tyre productions as indicated by the various tyre manufacturers. All this has been done on the basis of ‘pick and choose approach’ and in perfunctory manner which only behooves of the nature of comparing oranges with apples. The entire basis of the finding on price parallelism has been described as faulty and erroneous. Refuting charges of price parallelism, it has been contended that assuming price parallelism exists then also adoption of parallel business behavior in a highly competitive market scenario does not mean anything. It may only give an indication of price stabilization in the market. Reference has been made to Alkali Manufacturers’ Association of India, in re RTPE No. 26 of 1984 Order dated 29.05.1985; Bell Atlantic Corporation v. Twomby, 550 US 544 (2207); and Wood Pulp case of EU Commission. It has been submitted that it can, at best, be considered as one of the price stabilization factor but cannot be taken to have established as an arrangement which
would require something more to justify that the anti-competitive practice exists in the market. Reference has been made to American Tobacco Co. v. US 1946, (328) USS 781. It is argued that an anti-competitive practice is a course of conduct which has or is intended to have, or is likely to have the effect of restricting, distorting or preventing competition in any market. In the present case, it is argued that the DG in its report merely indicated price parallelism as one form of business behavior to show that there is a conspiracy at work between the five domestic tyre manufacturers to fix the price at a level which is independent of market forces. The effect of price parallelism has been projected in a manner as an entry barrier from the fact of anti-dumping investigation initiated at the instance of the domestic tyre companies against foreign tyre majors which has its origin in- China and Thailand. The DG did not consider it necessary to investigate as to whether there is any entry barrier or not. In fact, Michelin and Bridgestone which are internationally renowned tyre manufactures are setting up their production plants in India with a high investment cost which was not even noticed by the DG in its investigation. Thus, ‘working in concert’ was made the only available option to attack the domestic tyre manufacturers in formation of an association to lodge an anti-dumping case against the Chinese and Thailand tyre importers. Any law which statutorily required forming an association in order to lodge a complaint under anti-dumping proceeding cannot be considered to be anti-competitive behavior.

197. Reply of M/s Ceat Limited:
Ceat in its reply stated that the investigation report dated 25.05.2011 has failed to make out even a semblance of a case of cartel against it. It has been pointed out that the report itself has clearly and categorically held that there is a gap between the net dealer price (weighted average) and the price of market leader Apollo and that of other companies thereby rebutting the charge of the cartel against the five tyre manufacturers. For this reason, it is contended that the report is liable to be rejected and the proceedings ought to be closed. Objection is also taken on the ground that the provisions of the Act cannot and does not have a retrospective application. Further, it has been submitted that an ‘agreement’ between competitors is a condition precedent to establish an allegation of cartel. Reference has been made to the decision of the Supreme Court in the case of Union of India v Hindustan Development Corporation, (1993) 3 SCC 499 at 531 para 14 to contend that a mere offering of a lower price itself, though appears to be predatory, cannot be a factor for inferring formation of a cartel unless an agreement amounting to conspiracy is also proved. The investigation report fails to show that there was an ‘agreement’ between the tyre manufacturers. Thus, it is urged that the proceedings ought to be disclosed. Once an ‘agreement’ is found amongst players in the same business thereafter the investigation shall follow to ascertain causation of appreciable adverse effect on competition in India in terms of the statutory factors laid down under section 19(3) of the Act. It is alleged that this has not
been done in the report. It is contended that the findings based on ‘price parallelism’, appear to be in an effort to somehow pin down Ceat when no action in concert was established. It has been pointed out that the DG has held that the net dealer price (weighted average) of Apollo, being the price and market leader for truck/bus tyres, was much higher than the net dealer price (weighted average) of the other four tyre companies including Ceat. Further, while disputing the methodology adopted by the DG and while affirming that even the net dealer prices (weighted average) of the other four tyre manufacturers were different and distinct from each other, the question of price parallelism much less cartel cannot and does not arise. The participation by tyre companies in meetings of ATMA is not indicative of cartel because unless the meetings and/or concerted action categorically indicates that the participating companies have decided price fixation of tyres and implemented the same in letter and spirit, the minutes of the meeting of ATMA cannot conclude triggering sections 3(3)(a) and 3(3)(b) of the Act. It is averred that the so called ‘Price Parallelism’ as highlighted by the DG in its investigation report (which is not made out) does not substantiate existence of an agreement between Ceat and other tyre manufacturers. In the absence of any particulars of facts or period for the alleged cartel in the representation, the investigation report has erroneously proceeded in the absence of a valid allegation of cartel supported by particulars and the findings contained therein are clearly contrary to law and the report ought not be entertained and the proceedings ought to be closed. Reference has been made to the contentions raised by AITDF before the DA, which include the contention that there is cut-throat competition between the domestic producers. This submission made by AITDF before the DA would demolish any allegation of cartel inferred from the representation and the question of entertaining the investigation report cannot and does not arise.

206. Ceat has also accused AITDF guilty of suppression of facts and forum shopping. It is averred that the information is made by AITDF whose credentials of having any locus standi as an apex body representing the manufacturers and consumers is a questionable one. It has been asserted that on a plain reading of the information, it is evident that the angst of AITDF is directed against the application filed by tyre companies through their association seeking imposition of anti-dumping duty by the DA. It has been further submitted that the application of the tyre companies represented by ATMA merely petitioned the DA, duly constituted under the law alleging dumping of tyres by foreign exporters against the norms spelt out under the relevant statute and the rules framed thereunder. It has been argued that the action taken by Ceat is in due process of law and the orders passed are by an authority constituted under the law. It is the case of Ceat that it has, in fact, passed on the benefit of excise duty reduction to the dealers. This is stated to be evident from the price list issued by it. Without prejudice, it is also argued that no notification or statutory directive was issued to pass on such benefits to the consumers. It has been further
averred that the DG has wrongly concluded that the price of natural rubber has increased in 2008 but has fallen in 2009 and again increased in 2010. In fact, it has been submitted that the price has increased from 2005 to 2008 and again risen sharply in 2010. It has been alleged that there are contradictory figures for prices of natural rubber (weighted average) in the investigation report. Further, the DG has failed to disclose on what basis he has arrived at the figures relating to natural rubber prices (weighted average). It is further stated that the conclusion arrived at by the DG is totally flawed as he has failed to consider the wide range of variation in the prices of natural rubber during the investigation period. Alluding to the finding of the DG that the net dealer prices (weighted average) of the tyres under comparison of the five tyre companies were more or less the same with marginal difference except Apollo tyre, it has been vehemently contended that the same is clearly erroneous. The net dealer price was arrived at on a simple average basis. Further, the net dealer price of the four tyre manufacturers is not more or less the same. It has been contended that the net dealer price of Ceat is distinct from the net dealer price of other tyre companies and consequently the finding by the DG of price parallelism is not established.

215. It has been submitted that in an allegation of cartel, the condition precedent to pin down Ceat shall have to be existence of ‘agreement including an action in concert’. In the absence of existence of an agreement among the tyre manufacturers, the other issues as highlighted by the DG in investigation report seem an academic exercise not relatable to the facts in issue. It has been submitted that the investigation report indicated discussions by Ceat and other tyre manufacturers at ATMA about OEM prices being un-remunerative. It has been further submitted that OEM market is dominated by two major companies i.e. M/s Tata Motors Ltd. and M/s Ashok Leyland Ltd. In the OEM market, which is distinct and different from the replacement market, the two OEM bulk buyers are in a position to dictate the prices to the tyre manufacturers including Ceat after floating of tender, submission of price quotations, period of price negotiations and entering into contracts. It has been pointed out that the prices in the OEM market dictated by OEM buyers are much lower than the prices prevailing in the replacement market. In the replacement market, Ceat sells the product to the tyre dealers at the net dealer price and may also offer product discounts. Since the dealers are also dealing in competing products of other tyre manufacturers, Ceat in order to meet the inter-brand competition in the tyre industry gives product discounts to the tyre dealers. Ceat has referred to the findings of the DG to the effect that the actual production of domestic tyre companies has increased except during the year 2008-09 when there was a decline of 3% - 20% in actual production of domestic tyre companies and that corresponding decline in net dealer price was only 3-5% which implied that companies have not reduced the net dealer price in proportion to actual production. Challenging the finding, Ceat has submitted that the rationale advanced by the DG of production vis-à-vis net dealer price was not understood. It is stated that
when production is reduced owing to diverse reasons, the cost of production will go up owing to the fixed cost and expenses. Hence, it is argued that lower production translates to higher cost. It has been further submitted that the net dealer price is determined by cost of production, economic factors of demand and supply, the product under consideration, the competition vis-a-vis the particular brand and acceptability in the market, tariff increases etc. Hence, the co relation between the production capacity and net dealer price is misplaced.

219. Referring to the capacity utilization analysis, it has been submitted that the concept of full capacity is an idealistic notion. The capacity utilization is determined by the market trends of demand supply and movement of the product. The products manufactured by the tyre manufacturers are easily available off the shelf. Hence, the lower capacity realization is not with the intent to lower supplies as alleged. It has been pointed out that the report categorically states that the actual production of the tyre companies had increased (except for the year 2008-09) and hence the allegation of limiting supplies is in total contradiction to the assumption of limiting supplies. Alternatively, it has been submitted that there are a number of factors which govern the capacity utilization by the tyre companies such as expansion of capacity, demand supply gap, preventive and breakdown maintenance; change of mould on account of number of SKUs (Stock Keeping Unit) produced by a tyre manufacturer etc. 221. Pointing to the findings of the DG as regards CEAT that it has been able to reduce the negative margin from Rs 802 to 216 in the year 2009-10, and that the cost of sales shows increasing trend year after year and there has been sharp increase during 2008-09 in almost all companies which could be due to increase in the price of natural rubber. The conclusion arrived at is that it implied that the companies have the motive of making profit and hence have been able to earn positive margins in most of the period in 5 years.

223. It has been further alleged that the DG has conducted the present investigation in an incomplete manner without taking into account all aspects of cost which includes the cost of other raw materials and overheads, which have to necessarily be taken into account for arriving at the cost of production. It has been stated that while natural rubber is one of the important components of a tyre manufacturing process, it accounts for around 40% to 43% only of the total cost of the tyre. The balance of 57% to 60% of the raw materials consists of synthetic rubber, carbon black, nylon fabrics, chemicals and other raw material. It has been pointed out that the base material of these raw materials is crude oil. It is averred that the cost of petro based raw materials such as synthetic rubber, carbon black, Nylon Fabrics etc. is impacted by rise in crude costs, and also the exchange rate which in turn has a direct impact on the cost of production of Ceat. It has been specifically pointed out that the additional impact which Ceat has to bear and which no other tyre company bears, is the levy of octroi duty of 2.5% to 5% on all raw material/ consumables/ semi-finished product in the State of
Maharashtra. This puts Ceat at a disadvantage in terms of its competitors. It has been submitted that the wages cost of Ceat has always been high due to location of its both the plants in the State of Maharashtra, where cost of labour is relatively higher. Additionally, it has been pointed out that the Dearness Allowance Index on an average has gone up from 3122 in 2005 to 4558 in 2010 i.e. increase of 46% over the period under investigation. The increase in DA along with the impact of long term settlement done by Ceat during 2009-10 has significantly increased the overall wages cost during the investigation period. It is the case of Ceat that it has to incur heavy repairs and maintenance cost because of the age of its two plants which are 30-35 years old. Consequently, it also has heavy burden of fixed cost on the cost of production on account of lower productivity of its said two aging plants.

228. It has been submitted that the DG wrongly presumed that Ceat has direct dealings with the end consumers and is in a position to pass on the benefit to the end consumers. During investigation period, Ceat had clearly stated that it deals with tyre dealers on a principal to principal basis and the tyre dealers in turn sell the products to the end consumers. The margin of the dealers is not known to Ceat although the dealer is at liberty to sell at a price below the MRP. The only customers that Ceat directly deals with are the OEMs and Fleet owners including the State Transport Undertakings. Referring to market share analysis, Ceat has pointed out that the DG found no major change in the market share during 2005-2010 (reduced by 1% in 2009-2010), it found five manufacturers accounting for 95% of market share showing high concentration and implying high dependence of OEMs/replacement market on five tyre manufacturers. These conclusions have been described as incorrect by Ceat. It has been pointed out that the tyre industry is a capital intensive industry. However, it has been stated that there are no barriers to the entry of new players in the market other than the investment cost. The industry has seen international companies such as Bridgestone and Michelin which have entered the market. Bridgestone has a factory in the state of Madhya Pradesh, which produces passenger car radials. Michelin is importing approximately 15-20000 TBR every month for sale. They have also announced their plans to set up a production facility in Tamil Nadu. Apart from these two global tyre majors, other leading players like Yokohama (in advanced stage of purchasing the land in the State of Gujarat for setting up a new plant), Kumho and Hankook, among others, are also selling PCR in the Indian market through distributors. They have been present in the Indian market for many years. Recently even Continental Tyres has announced its entry into the Indian market.

232. Summing up, Ceat has pointed out that the domestic tyre manufacturers have never adopted a collective strategy to produce low price tyres. Ceat has not launched any low cost truck/bus tyres. Nevertheless, it is asserted that had it been technically possible, Ceat would have been most interested to do for its business interest. Ceat filed anti-dumping petition before the DA for the protective benefit it is entitled to under the
relevant laws of the country. Ceat has not blacklisted any of the importer of Chinese tyres and it has never shared its cost data with its competitors, neither for anti-dumping petition as the same are confidential in nature and very sensitive in nature for its business. It has been clarified that the same were submitted to the lawyer directly and not through ATMA. Referring to the role played by ATMA, Ceat has submitted that ATMA does not have any role to play in managing its affairs as it has its independent marketing strategy, and is independently competing with other tyre manufacturers and takes its decisions independently including the fixation of prices. Certain common issues faced by the tyre industry are discussed at ATMA meetings, which are within the realm of the law, submits Ceat. It has been fervently submitted that the allegation of ‘close knit family’ is farfetched and is not borne by the facts adduced. Thus, Ceat argued that it has not indulged in any activity that falls within the purview of section 3(a) and/or (b) of the Act and therefore the present investigation report dated 25.05.2011 of the DG be rejected and the proceedings closed with costs on AITDF and name of Ceat be deleted from the cause title of the inquiry.

235. Reply of M/s Michelin India Tyres Pvt. Ltd.: At the outset, Michelin has pointed out that the DG has investigated only the relevant market of Truck-Bus (TB) tyres and concluded that there exists a cartel amongst the top five domestic tyre manufacturers, who are members of ATMA. The DG has limited his findings only to the criteria of pricing factor in terms of cost inputs and the fluctuation in prices of natural rubber. It has been further stated that the data relied upon by the DG clearly indicate that the five domestic manufactures have been fixing output to retain their respective market shares. It has been averred that in a period of five years from 2005-2010, the production data of the five domestic manufacturers exhibit the following trends: (a) The five domestic manufacturers have increased installed capacities during the period. (b) The percentage of capacity utilization has decreased in spite of large increase in capacity by two of the manufacturers during the period. (c) Each manufacturer’s production as a percentage of the total production by these five domestic tyre manufacturers has remained almost constant during this period. Based on the above trends, it has been contended that there can be no economic justification for such behavior. No profit maximizing firm will invest in increasing capacity which is not be fully exploited over a period of five years. This behavior is against the self-interest of the five domestic tyre manufacturers. The rationale for this behavior can only be cartelization. It is argued as follows: (a) All the five major domestic TB tyre manufacturers have added to their installed capacities over a period of five years (2005-2010) and (b) There exists a parallelism in terms of output amongst the players in question as is evident from their production numbers as well as their respective shares as against total production amongst themselves. It is urged that the maintenance of the relative position in terms of production cannot be explained by
interdependence in view of the difference in the installed capacities together with the
difference in increase in their installed capacities. This is a clear pointer of an
agreement between the manufacturers since without such a consensus, it is impossible
for players to reach production parallelism, especially when all of them have increased
their capacity every year. It has been submitted that explicit collusion occurs where
undertakings agree, collectively, to exploit their joint economic power and to improve
their profitability by raising prices, restricting output, sharing markets or rigging bids.
Successful cartels raise the joint profits of all the firms in the industry, maintain the
parties’ respective position on the market and achieve pricing stability or an increase in
prices. They, thus, enable the member firms to enjoy market power and profits over
and beyond what would otherwise result and to reproduce artificially the market
outcomes and welfare loss arising on a monopolized market. Hardcore cartel activity is
most likely to be successful in oligopolistic markets i.e. markets having only a small
number of producers or sellers. Michelin has also referred to the various economic
principles underlying the behavior of members of the cartel. Reference has also been
made to the proceedings before DA and CESTAT. As a detailed reference has already
been made to these proceedings, it is not necessary to reproduce the same herein again.
248. Referring to a study carried out by OECD, it is sought to be contended that anti-
dumping measures can be abused for protectionist purposes. It is the case of Michelin
that the way anti-dumping laws are structured, domestic producers can enlist the help
of the Government to prevent foreign competition even when there has been no
dumping. Michelin submits that the law allows producers to unethically use anti-
dumping measures to batter the competition. In view of the foregoing, Michelin contends that it can be safely assumed that domestic tyres manufacturers have
not only tried to limit the quantity by fixing outputs but also by creating hurdles on the
path of tyre importers through concerted action in initiating anti-dumping proceedings.

250. Reply of other parties:
As noted earlier, on the request of counsel for M/s Modi Tyres Company Pvt. Ltd. and
M/s Bridgestone India Pvt. Ltd., the Commission vide its order dated 03.11.2011
struck off their names from the array of parties and as such it is not necessary to record
their submissions in the order. M/s Goodyear India Limited also filed its brief reply
stating that the report of the DG did not name it as a contravening party and as such its
name should be deleted from the proceedings and the array of parties. It has been
submitted that no finding has been recorded against Goodyear by the DG in the report.
It has also been pointed out that no investigation was conducted against it by the DG
(I&R), MRTP Commission on the basis of information supplied by AITDF in the year
2008. It has also been highlighted that even the informant AITDF did not refer
Goodyear in the information. It is however admitted that Goodyear is member of
ATMA and does, in fact, attend meetings of ATMA held on different dates to discuss
common issue faced by the tyre industry. In the result, it has been prayed that the name of Goodyear be deleted and removed from the present proceedings. M/s TVS Srichakra has filed a letter stating that it is not manufacturing any truck or car tyre from the beginning and it is 84 involved in manufacturing 2-wheeler tyres and tubes and off-theroad tyres mainly for exports. None appeared on behalf of M/s Falcon Tyres Ltd. and M/s Dunlop India Ltd. No appearance was also entered on behalf of Directorate General of Anti-Dumping & Allied Duties. In view of the foregoing and in the light of findings recorded by the DG of contravention against J K Tyres, CEAT, MRF, Apollo, Birla Tyres and ATMA, the Commission deems it appropriate to examine the conduct of these parties.

Issues for determination:
256. In view of the contentions raised by the parties and the findings recorded by the DG, following issues arise for determination:
(i) Whether the Commission has the jurisdiction to proceed with the matter under the provisions of the Competition Act, 2002?
(ii) Whether the tyre manufacturers have contravened the provisions of section 3 of the Act?

Determination of Issue No.1:
257. The opposite parties have contended that present case arose before the MRTP Commission from the complaint of the AITDF dated 28.12.2007 referring to the alleged anti-competitive practices of the tyre manufacturing companies, the DG had no jurisdiction to extend the period of investigation beyond year 2007 and his report is liable to be rejected on this ground only. It is also contended that the Act has no retrospective operation and as such, the Commission does not have the jurisdiction to look into the present matter. It is true that the present inquiry was instituted with reference to the allegations made in the year 2007. However, the DG has examined the conduct of the Opposite Parties from year 2005-06 to 2009-10 and has found that alleged anticompetitive conduct of the parties which started prior to coming into force of the relevant provisions of the Competition Act continued even after the date when these provisions were notified i.e., May 20, 2009. No doubt the period of contravention of the provisions of the Competition Act, 2002 has to be reckoned only from the date of its enforcement but this does not imply that either the DG or the Commission cannot examine the conduct of parties post notification where the information/complaint was filed before the MRTP Commission. The Commission, while passing order under section 26(1) of the Act, did not specify any period for the reason that at that stage it would not be desirable to curtail the period of examination by the DG. As the proceedings before the Commission are inquisitorial in nature, it would not be appropriate to restrain the DG from fully examining the allegations of cartelization in
the tyre industry. As such, it is difficult to agree with the submissions made by the opposite parties that the proceedings are vitiated on any of the grounds so urged. Given this fact, the plea of the opposite parties that the DG had no authority to examine their conduct for a period subsequent to the alleged period of contravention has no force and is liable to be rejected. The Commission is of opinion that the preliminary objections taken by the opposite parties regarding jurisdiction of the DG and/or the Commission are contrary to the scheme of the Act and the legal position on this aspect is quite clear. In this regard, it is also noted that Hon’ble High Court of Delhi in W.P. (C) 6805/2010, *Interglobe Aviation Ltd. v. Competition Commission of India* decided on 06.10.2010 has held on similar issue that where the investigation by the DGIR, MRTPC remained incomplete and the matter did not crystallize into a ‘case’ before the MRTPC, it was not incumbent on the DGIR, MRTPC to transfer the case to the Competition Appellate Tribunal and not to the Commission. This view was reiterated by the Hon’ble High Court of Delhi in W.P. (C) 7766 / 2010, *Gujarat Guardian Ltd. v. Competition Commission of India* decided on 23.11.2010. In this case, the petitioner advanced the argument that as the matter was pending before DGIR, MRTPC the case ought to have been transferred to Competition Appellate Tribunal and not to the Commission. It was also contended that the Commission had no power to pass order under section 26(1) of the Act in such matter and that the Commission had to proceed under the provisions of the MRTP Act. The Delhi High Court rejected the arguments raised by the petitioner and held that “This Court finds that since the investigation was incomplete the matter was rightly transferred to the CCI. On further consideration of the material on record the CCI formed a prima facie opinion to proceed under Section 26(1) of the CA. This was not contrary to Section 66(6) of the Competition Act, 2002. It is possible in the course of investigation that the DG, CCI forms a prima facie opinion to proceed under the provisions of the CA, 2002 itself. There is no illegality per se in such action of the DG, CCI.” 87 261. The Commission notes that in the present matter the DGIR, MRTP Commission undertook the investigation which was still pending when the MRTP Act, 1969 was repealed vide ordinance dated 14.10.2009. As the investigation had not culminated into a ‘case’ the matter was rightly transferred to the Commission by the DGIR, MRTPC invoking the provisions of section 66(6) of the Act as the allegations involved were related to restrictive trade practices. Even a plain reading of section 66(6) of the Act clearly demonstrates that on receiving the matters where investigation was pending, the Commission may order for conduct of the investigation in the manner as it deems fit. 262. Furthermore, the Commission has not been conferred with any power to adjudicate any matter invoking the provisions of repealed MRTP, Act. This premise becomes clear when the provisions of section 66(6) are contrasted with the provisions of section 66(3) of the Act. Whereas the Competition Appellate Tribunal has been specifically conferred power to adjudicate cases pertaining to monopolistic and
restrictive trade practices pending before MRTP Commission in accordance with the provisions of repealed MRTP Act under section 66(3) of the Act, no such power has been given to the Commission under section 66(6) of the Act. In the backdrop of the provisions of the Act as analysed above, the Commission finds that there is no illegality in entertaining and examining the present case under the Competition Act, 2002 in which the investigation was pending before the DGIR, MRTPC before the MRTP Act was repealed. 263. In this connection, a reference may be made to the decision of the Hon’ble High Court of Bombay in W.P. No. 1785/ 200, Kingfisher Airlines Ltd. v. Competition Commission of India decided on 31.03.2010 where it was held that though the Act is not retrospective, it would cover all agreements covered by the Act though entered into prior to the commencement of the Act but sought to be acted upon now i.e. if the effect of the agreement continues even after 20.5.2009. Thus, even in cases where the alleged anti-competitive conduct was started before coming into force of sections 3 and 4, the Commission has the jurisdiction to look into such conduct if it continues even after the enforcement of relevant provisions of the Act. 264. In the present case, practices of the parties alleged to be anti-competitive have been found by the DG to be still continuing and there is nothing on record to contradict the same. Accordingly, the Commission is of the considered view that in the light of legal position as discussed above there is absolutely no illegality in the proceedings in the present case and the arguments and the contentions of the parties on this aspect have no force. 265. The Commission notes that in the present case, the investigations were initiated on the basis of complaint of AITDF dated 28.12.2007. As the investigations under the MRTP Act could not be completed, the matter was transferred to the Commission in terms of the provisions of section 66 of the Act. In the meantime, the provisions relating to anti-competitive agreements and abuse of dominant position of the Act were notified, the conduct of the parties has been examined by the Commission post such notification of the provisions. It may also be noted that though ATMA was not specifically mentioned in the order passed by the Commission under section 26(1) of the Act, the DG while investigating the matter has also taken into consideration the role and conduct of ATMA. The DG and the Commission have given ample opportunity to the ATMA to explain its conduct. Therefore, no prejudice can be said to have been caused to ATMA on this count. It is also pertinent to note that the DG examined the conduct of the parties in the present case spanning from year 2005 to 2010 for delineating the market construct and conducting competitive analysis of tyre industry in a holistic perspective, though as noted above for the purpose of determining the period of contravention, the conduct of the parties can only be taken for a period starting from 20.05.2009 i.e. the date on which the relevant provision of the Competition Act, 2002 were notified. As has been seen above, the Commission does not have power to adjudicate any matter invoking the provisions of the repealed MRTP Act, therefore, in the present matter the relevant period for the purposes of determining
the contravention of the parties under inquiry will commence only from the date of enforcement of section 3 of the Act. 268. In view of the aforesaid and after dealing with the jurisdictional issues, the Commission proceeds to deal with the substantive issue arising for determination in the present case.

Determination of Issue No. 2: Whether the tyre manufacturers have contravened the provisions of section 3 of the Act?
Before examining the issue, it would be appropriate to delve briefly on the evolution and background to understand market construct and structure of tyre industry. A brief glimpse of the evolution of the tyre industry presents interesting insights into the sector which has grown from a purely importing industry to domestic manufacturing capability over a century shaped by the policy regimes prevalent at different times in the country, pre and post-independent India. The form of development which evolved from foreign dominated companies to Indian companies displayed characteristics of limited players where technological and high fixed capital cost tended to restrict the number of players reflected in the prevailing structure of the industry. The evolution also shows the close links of this industry with foreign players while continuous threat of imports that have been reckoned by domestic companies reflective of the competitive constraints of a tradable commodity. The Indian tyre manufacturers have grown to produce the complete range of tyres used in automotive industry for trucks, buses, passenger cars, jeeps, light trucks, tractors, two and three wheeler vehicles in tandem with growth in and diversity of the automotive/transport sector. There are two categories of tyres viz. radial and non-radial. The non-radial category is known as bias or diagonal or cross ply tyres. The categorization is based on the load-inflation pressure relationship prescribed by the Indian Standards. Bias tyres are nowadays mostly used in buses and trucks and the passenger cars have factory fitted radial tyre. Indian tyre industry is predominantly a cross ply (or bias) segment which is now moving towards radialization. Growth of radial tyres in the car segment is enormous owing to their direct use by the Original Equipment Manufacturers (OEMs). However, in the bus and truck segment radialization is limited and is still dependent on cross ply (bias) segment. Tyre manufactures have a vast network of dealers, marketing agents etc. which enables the consumers to have easy access even at far flung areas. Tyre is used along with the tube which is then fitted over the wheel rim. A rubber flap is used between the tube and the wheel rim to prevent tube burst on account of friction. Tyre, tube and flap are sold together as well as individually. With technological advancement, nowadays tubeless tyres are being increasingly used by the automobile industry. The tyre manufactures cater to the following major customer segments either directly or indirectly through dealers/ marketing agents: (i) Original Equipment Manufacturers (OEMs) (ii) Replacement Market (aftermarket) (iii) Export Segment (iv) StateTransportUndertakings (STUs)
274. The OEMs comprise of automobile manufacturers who source their tyre requirement directly from the tyre manufactures in huge volume and hence are being dealt directly by the tyre manufacturers through negotiations. In the replacement market, tyre manufacturers sell the tyres through widespread dealer distribution network either through exclusive dealers of the companies or through multi company dealers. The tyre companies are directly supplying to Government institutions and to State Transport Undertakings (STUs) through the tender system. The demand in the replacement market depends on the level of economic activity, usage, age of the vehicle, quality of the existing road infrastructure, overloading etc. The tyre manufactures are also exporting tyres to different countries through dealers in exporting countries. Some tyre companies import tyres from foreign manufacturers or collaborators for domestic sale in Indian market. These imported tyres are then sold in Indian market along with the Indian tyres through the dealers. Having taken note of the way the tyre industry has evolved and its structure, the next step is to examine the present allegations of cartelization in tyre industry. The first step is to understand and bring out the structural factors which may be conducive for cartelization and thereafter circumstantial/direct evidences can be considered for arriving at a conclusion on the allegations. It is commonly known that even though cartelization can occur in any industry, there are some industries in which it is more likely, due to particular features of the industry or of the product involved. The Commission is of the view that the probability of cartelization gets higher if the following structural factors are present in any product market:

a) Highly Concentrated Market: It appears from the report of the DG that the five domestic tyre companies have consistently accounted for around 95% of the market share of the total production implying a very high concentration in the industry. This fact is also corroborated from the information available on the website of ATMA. As a few large players control majority of the market in India, the market becomes oligopolistic in nature. In an oligopoly (since there are not many firms), there is a high degree of interdependence among firms. Each firm’s price and output decision anticipate the probable actions of other firms at any given time. Each of the firm has to concern itself with the strategic choices of its competitor. These strategic choices can be price, quantity or quality. In a market which is oligopolistic in nature, it is more likely that each market player is aware of the actions of the other and influences each others’ decisions. No doubt, interdependence between firms is an important characteristic of such a market which would mean that each firm in such a market takes into account the likely reactions of other firms while making independent decisions particularly as regards prices and output. Though oligopolistic markets can lead to competitive outcomes, the outcomes may not always be market driven but rather the result of concerted effort or collusion. The interdependence between firms can lead to collusion—both implicit as well as explicit. Knowing that overt collusion is easily
detected, firms often collude in a manner which leads to non-competitive outcomes resulting in higher prices than warranted by pure interplay of market forces. Thus, high concentration may provide a structural reasoning for collusive action resulting in parallelism (price or output), yet it is very important to differentiate between “rational” conscious parallelism arising out of the interdependence of the firms’ strategic choices and parallelism stemming from purely concerted action. Thus, inferring of cartels would require further evidences. Economic theory has demonstrated convincingly that “conscious parallelism”, is not uncommon in homogeneous oligopolistic markets. Competing firms are bound to be conscious of one another’s activities in all phases, including marketing and pricing. Aware of such outcomes especially where there is little real difference in product the Commission is of the opinion that it is quite probable that in many such instances, conscious parallelism may be dictated solely by economic necessity. Avoidance of price wars is a common instance where this takes place.

b) Demand & Supply Conditions: A constant, predictable flow of demand from the customers also tends to increase the risk of collusion. The tyre industry is cyclical and seasonal in nature. According to an ICRA Report, nearly 42% of tyre demand is dependent on automotive production, which due to its cyclical and seasonal character is quite predictable. In the present case, the tyre manufacturers must have been aware of the fact that there would be a steady flow of demand due to the rapid growth in automobile industry particularly in the year 2009-2010 as well as in replacement market leading to some sort of predictability of demand. However, on the other hand there is a persistent threat to demand from retreaded tyres which are viewed as an important substitute for new tyres. As per ICRA Report, the price of retreaded tyres is between 30-80% lower than the price of new tyre. Around 40-50% of discarded car tyre and 60-80% discarded truck tyres are suitable for retreading. The annual retreading market is estimated at around 14-15 million. The truck and bus segment accounts for around 58% of retreading market. Thus, a flourishing retreading tyre market, in the replacement segment brings some element of unpredictability in demand. On the supply side, the Commission notes that the industry players lobbied hard for imposition of anti dumping duty to restrict supply from imports and increase their market power, by removing any threat from imports. However, what is important in this context is to see how successful have the industry players been to achieve the desired outcomes from such lobbying practices in restricting the supply of imported tyres. As per CMIE data, the imports in terms of volumes have shown an increasing trend right from 2005-06 to 2010-11. The percentage of imports to total tyre production has also been increasing throughout the period except 2009-10, when there was a marginal fall and that was also primarily due to sharp increase in tyre production. The above analysis shows how the apparent concerted efforts of the tyre manufacturers to restrict imports have not been successful as imports have shown a
a) Secular Upward Trend: The market shows a secular upward trend and imposed competitive constraints.

c) Homogeneous Product: The products manufactured by these companies are homogenous in nature and hence substitutable. This structural factor may help the manufacturers to collude rather than compete. No significant Technological changes. Over the years leading to the period under investigation there has been no significant technological change in the manufacturing of cross ply tyres used in Trucks and Buses. This factor is further reinforced from the information furnished by ATMA on its website wherein it has been shown that radialization in Truck and Bus segment is merely 15% in comparison to 98% in passenger cars. However, it needs to be pointed out that the pace of radialization in the Truck and Bus Segment has been high in the recent years, albeit from a low base. The import figures of Truck and Bus Radials (TBRs) have gone up from 50 thousand tyres in FY 2004-05 to 1127 thousand tyres in FY 2009-10. The tyre manufacturers have also lined up large investments in TBR facilities which also points to increasing radialization. The ICRA Report estimates that around 60% of Industry CAPEX amounting to 17,500 Crore would be made in TBR radialization segment in the period 2010-2013.

d) Dependence of Customers: OEMs procure tyres from domestic tyre manufacturers and also import from various countries based on their requirement. As the penetration of radial tyres in Truck and bus segment has been pretty low it can be noticed that OEMs are dependent on the supply of cross ply tyres from the domestic tyre manufacturers. However, it is noted that the OEMs exert substantial countervailing buying power also because of the fact that the OEM demand constitutes around 26% for Commercial Vehicle tyres and 44% of total demand for domestic tyre industry. This fact has been reflected in submissions of various manufacturers also. As far as the replacement market is concerned, it has already been noted that the retreading market provides an alternative to consumers and a competitive constraint on tyre manufacturers.

e) Entry Barriers: Indian tyre market is largely cross-ply oriented whereas global tyre market is radial oriented. It has been seen that despite market being highly concentrated and Truck and Bus segment constituting a major share of demand in terms of value, no new entry in the cross ply segment has taken place leaving the entire market to the existing players. However these, significant entry barriers arisedue to the high capital requirements to setup a tyre manufacturing plant. As per the ICRA Report, a plant with an annual capacity of 1 million cross ply Truck and Bus Tyres cost around 6 billion.

f) Active Trade Association: Trade associations can be used as a legitimate forum for members of a business to promote standards, innovation and competition. However, trade associations remain vulnerable to stepping beyond the limits placed by competition law because, by definition, they involve meetings, discussions and cooperation amongst various-often virtually all-competitors in a particular line of
business. The Commission examined this aspect as trade association can, as observed in other cases, be an active facilitator for cartel behaviour. Tyre manufacturing firms have an association under the name Automotive Tyre Manufacturers’ Association (ATMA) as the representative body of automotive tyre industry in India. All five large tyre companies representing over 90% of production of tyres in the country are its members. ATMA was set up in 1975, and is registered under the Companies Act. The evidence gathered by the DG has shown that they frequently meet at the platform of ATMA to discuss and perhaps even share sensitive business information. The Association also regularly publishes data on production and export of various categories of tyres. Besides, the Association prepares status notes on various subjects which are of relevance to tyre industry, such as, Tyre Retreading Industry, Regional Trade Agreements & Rules of Origin, Anti-Dumping, etc. These facts are corroborated from the information available on the website of ATMA. The information available there also proclaims that with the guidance of the Managing Committee the ATMA functions through various committees set up, consisting of different disciplines, such as, Marketing, Export, Purchase (Raw Material), Taxation, Technical etc. Thus, it is noticed that the firms have an active trade association engaged in the above activities.

291. Thus, it is seen that there are some factors which may be conducive to cartelization but they may be diluted due to other factors as has been pointed out in the above discussion. The fact that market concentration is very high with entry barriers and the product is homogenous, support cartel formation, but high bargaining powers of OEMs due to the volumes, options to replacement consumer to retread, increasing radialization, imports effectively being cheaper even in the brief period of anti dumping duty go against sustaining a cartel structure. A conclusive finding however, can only be made after considering other evidences including circumstantial evidences.

292. Whether Agreement can be inferred from circumstantial evidence?
A lot has been made by the opposite parties of the fact that the DG has failed to gather any direct evidence to support his findings. Reliance is also placed upon a decision of the Commission in the case of Neeraj Malhotra v. Deutsche Post Bank, Case No. 05 of 2009 to contend that to establish a finding of infringement under section 3(1) read with 3(3) of the Act, the agreement must be established unequivocally. 293. In view of the provisions of the Act, as highlighted below, in this respect, the Commission observes that the plea is misconceived. 294. Section 3(1) of the Act prohibits any agreement with respect to 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. Further, section 3(2) of the Act provides that any agreement in contravention of this provision shall be void. 295. The term ‘agreement’ itself is defined in section 2 (b) of the Act. For felicity of reference, the same is quoted below: Section2(b),"agreement" includes any arrangement or
understanding or action in concert, (i) whether or not, such arrangement, understanding or action is formal or in writing; or (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings; It may be noticed that the definition of the term ‘agreement’ as given in the Act includes any arrangement or understanding or action in concert whether or not formal or in writing or is intended to be enforceable by legal proceedings. Clearly, the definition which is inclusive and not exhaustive is a wide one. The agreement does not necessarily have to be in the form of a formal document executed by the parties. Thus, there is no need for an explicit agreement for existence of an ‘agreement’ within the meaning of the Act. The same can be inferred from the intention or conduct of the parties. In the cases of conspiracy or existence of any anti-competitive agreement, proof of formal agreement may not be available and the same may be established by circumstantial evidence alone. The concurrence of parties or the consensus amongst them can, therefore, be gathered from their common motive and concerted conduct.

298. The Commission observes that existence of a written agreement is not necessary to establish common understanding, common design, common motive, common intent or commonality of approach among the parties to an anti-competitive agreement. These aspects may be established from the activities carried on by them, from the objects sought to be achieved and evidence gathered from the anterior and subsequent relevant circumstances. Circumstantial evidence concerning the market and the conduct of market participants may also establish an anti-competitive agreement and suggest concerted action. Parallel behavior in price or sales is indicative of a coordinated behavior among participants in a market. No doubt the parties to such an agreement may offer their own sets of explanations behind the existence of circumstantial evidence. The firms often tend to justify the parallel behavior in prices, production, dispatch or supplies etc. by explaining the fundamentals of the market forces such as demand, increasing cost of production and other economic factors. However, it also remains a fact that parties to an anti-competitive agreement will not come out in open and reveal their identity to be punished by the competition agencies. This is also the reason that the legislature in its wisdom has made the definition of ‘agreement’ inclusive and wide enough and not restricted it only to documented and written agreement among the parties. Thus, the Commission is not impeded from using circumstantial evidences for making inquiries into act, conduct and behaviour of market participants.

301. The Commission in light of the provisions of section 2(b) of the Act as discussed above, holds that in absence of any documentary evidence of existence of an agreement, it is appropriate and logical to inquire into cases of anti-competitive agreements on the basis of existence of evidences which establish that particular set of acts and conduct of the market participants cannot be explained but for some sort of anti-competitive agreement and action in concert among them. The Commission
observes that parallel behavior in prices, dispatch, supply accompanied with some other factors indicating coordinated behaviour among the firms may become a basis for finding contravention or otherwise of the provisions relating to anti-competitive agreement of the Act. 303. The competition agencies in other jurisdictions have also taken cognizance of circumstantial evidences while inquiring and establishing contravention in cases involving anti-competitive agreements. While noting that the legal system/framework, market structure, firm/consumer behavior etc. differs from jurisdiction to jurisdiction, the Commission finds that the basic competition principles are by and large applicable across jurisdictions. Accordingly, looking at the position in other jurisdictions, it is found that circumstantial evidences have been used in the News Paper Cartel case (1999) of Brazil. Similarly, in case of High Fructose Corn Syrup Antitrust Litigation of US, Atlantic Sugar case of Canada Atl., Sugar Refineries Co. v. A.G.Can., [1980], 2 S.C.R.644, circumstantial evidences were relied upon. In Latvia-Hen’s eggs case also, infringement was found based upon circumstantial evidence.

304. It is noteworthy that OECD in its paper ‘Prosecuting Cartels without Direct Evidence of Agreement’ (February 2006) has observed as under:

“Circumstantial evidence is of no less value than direct evidence for it is the general rule that the law makes no distinction between direct and circumstantial evidence .........In order to prove the conspiracy, it is not necessary for the government to present proof of verbal or written agreement.”

305. It is no doubt true that as held by the Commission in Neeraj Malhotra case (supra), an agreement must be established unequivocally. That however is not to suggest that an agreement can be established only through direct evidence. As discussed above, circumstantial evidence is of no less value than direct evidence as the law makes no distinction between the two. The Commission is not oblivious of the fact that the anticompetitive conspiracies are often hatched in secrecy. The firms engaged in anti-competitive activities are not likely to leave any trace evidencing the same. Therefore, in absence of any direct evidence of agreement among the conspirators, circumstantial evidence is required to be looked into. If direct evidences are not present, but circumstantial evidences do indicate harm to the competition at a market place, the Commission will certainly take cognizance of the same. The Commission also observes that among set of circumstantial evidences, evidences of communication among the participants to an anti-competitive agreement may give an important clue for establishing any contravention. Communication evidences might prove that contravening parties met and communicated with each other to determine their future or present behaviour. The price data for the period of 2005-2010 of the five domestic tyre manufacturing companies viz. MRF, J.K. Tyre, Birla, Ceat & Apollo was analyzed. It was noted by the DG that the major cost components which affect the
prices of tyres are the cost of natural rubber and the excise duty. It was noted that the excise duty over the investigation period has gone down from 16% to 10%. Upon a careful examination, it appears that during the investigation period, excise duty has shown a downward trend and the natural rubber has increased in 2008 but has fallen in 2009 and then again increased in 2010. It was, however, noted by the DG, as shown below, that during the investigation period, the net dealer prices of all the domestic tyre players have continuously increased except in 2009 wherein a limited decline in prices was observed. Accordingly, the DG has come to a conclusion that these tyre companies have not passed on the benefit of reduction in excise duty to the consumers. To buttress the conclusion, reliance was also placed on the Tariff Commission findings on Tyre Industry. A grievance is made of the fact that the DG has made general observations that tyre manufacturers have not passed on the benefits of the decreased excise duty to the customers. It is alleged that in complete contrast to the assertions/findings by the DG, the parties have been passing on the benefits of excise duty reductions in the best interests of its customers.

318. The Commission on the price – cost analysis noted that major cost components are not only Natural rubber and Excise duty, but also NTC Fabric and Carbon black. In the absence of detailed analysis of changes in total cost and resulting changes in prices, the Commission does not agree with findings of DG that the benefit of decline in excise duty and price of natural rubber has not been passed on to the consumer. In fact, it is observed that the fall in prices of Natural Rubber was marginal in 2009 while the rise was substantial in 2010 and no proportionality in price changes can be linked to the same in 2009 or 2010.

319. Price Parallelism: On perusal of the above data, it was deduced by the DG that the net dealer price (weighted average) of lug tyre in respect of all the companies was more or less the same with marginal difference in their price except Apollo Tyre. Further, it was noticed that the movement of net dealer price (weighted average) in terms of actual quantum as also percentage change was similar. The percentage change of net dealer price whether upward or downward was found to show close correlation amongst the five tyres manufacturing companies. Based on the above analysis, it was observed by the DG that price parallelism existed amongst the five tyre manufacturing companies which are a good measure/indicator to show that some kind of information sharing in price had taken place amongst them. The Commission observes that differences in range of prices of different manufacturers has been more than 1000 for the period 2005-2009 and the range has come down to 600 in 2010. Considering that the product is homogeneous, the 6-12% range of difference in prices imply that the prices are dissimilar and there is no parallelism at least in absolute prices. As far as parallelism of price movement in percentage terms is concerned there are wide variations amongst various manufacturers. As far as directional changes are concerned, parallelism is observable. The parties have sought to justify the price parallelism in the
tyre industry by pointing out the peculiar features of the tyre industry. It has been highlighted that price parallelism in the tyre industry arises on account of the fact that the products sold are homogenous which makes it difficult for businesses to charge different prices to customers. It is argued that products in the tyre industry share similar sources of inputs, which means that competitors are subject to similar cost fluctuations in setting their product prices. Lastly, it has been contended that prices of products in the tyre industry are highly visible, which allows businesses to collect real time market intelligence and monitor each other’s prices closely and match competitors’ price movements. The Commission carefully perused the submissions made by the parties on this count. It may be observed that price parallelism per se may not fall foul of the provisions of the Act. However, if the same is the result of a concerted and coordinated action under the aegis of trade association, then the same stands covered within the purview of the Act. In this particular case, the parallel pricing pattern is not very sound. However, now we shall analyze if there are any plus factors to suggest that this limited price parallelism is on account of concerted action. The DG, has analyzed these plus factors. The DG made elaborate analysis of data relating to production, capacity utilization, cost analysis, cost of sales/sales realization/margin, cost of production and natural price movement, net dealer price & margin and market share, and the Commission also considered these factors.

324. Capacity Utilization Analysis: Upon persual of the findings, it was deduced by the DG that the overall capacity utilization of the tyre manufacturers have been showing a downward trend and the utilized capacity has dropped down in the case of major three companies viz. Apollo, Ceat and J.K.Tyre except MRF & Birla from 2005 to 2010. In the case of Birla, the variations in capacity utilization were noted as very high as it dropped from around 97% to 81% in the year 2008-09 and then drastically increased from 81% to 104% in the year 2009-10. In J.K. Tyre, a drastic decline in the capacity utilization was noted during the entire investigation period which reflects underutilization of capacity. On behalf of Apollo and some other parties, the concept of capacity available for production was introduced in the arguments by the opposite parties. It was argued that capacity utilization was relatable to the available capacity and this was the correct measure and not the installed capacity. Impugning the analysis of the DG relating to capacity utilization, it was pointed out that the DG erred in its report by focusing on capacity utilization and concluding the existence of a cartel based on perceived low capacity utilization levels, without analyzing the key variables that drive capacity utilization viz. capacity, demand and production etc. Moreover, technical constraints relating to operation of new capacity need to be factored in, while calculating capacity utilization in the tyre industry. 100% of the installed capacity is rarely available for production from the first year a plant is commissioned and even thereafter. This is stated to be due to various issues such as lead time (ramp-up) that is required by a plant to stabilize production, maintenance (both scheduled and un-
scheduled), labour unrests etc. It has also been alleged that the DG has further ignored
the fact that there was global economic crisis in or around 2008-2009 and the tyre
industry was also adversely affected by the same because of the reduced demand by
original equipment manufacturers i.e. automotive manufacturers and reduced demand
in the replacement segment. It is alleged that the DG has drawn generalized reference
to capacity utilization without considering specific aspects of each company and why
there are movements in relation to the capacity utilization data. It is the case of Apollo
that its capacity utilization has been consistently very high except for a short period in
2008-2009. It is alleged that the DG has completely failed to take into consideration
that the lock-outs took place during the investigating period, thereby grossly
mischaracterizing Apollo’s capacity utilization. The Commission has given thoughtful
consideration to the data on capacity utilization and plea raised by the parties. On a
closer examination of the data, the following observations are made: i) The trends are
mixed: It is noticed that the capacity utilization for some companies increase and
others decrease on a YoY basis. The fall in 2008-09 is in line with recession. Lack of
clear trend in figures suggest that variations in CU are company specific and not
necessarily due to any concerted action. ii) The capacities have increased: The decrease
in CU needs to be read along with the increase in capacities. The CESTAT order cited
by Michelin observes:

.....The capacity has increased from 26270 MTs to 37636 MTs and the
production has increased from 18622 MTs to 27364 MTs and therefore
the capacity utilization has also increased from 70.89% to 72.71%.
However, the DA has noted that despite growth in demand growth in
production has declined.

This highlights the increase in production has been muted because of increase in
capacity and not due to reduction of output leading to supply suppression. iii) The
ICRA Report estimated on the basis of Company announcements that the installed
capacity is likely to go up by 47% from 2009-10 to 2012-13. The investments
committed by the companies negate the cartel theory as it does not seem practical for
companies to maintain a high ROCE when capital is continuously increased. 327. It is
also relevant to point out the observations made by the Tribunal (CESTAT) in the
appeal filed against the findings of DA by Bridgestone, Michelin, Tata Motors Ltd. and
two Chinese companies. The Tribunal noted that during the period 2004-2008, the
sales by domestic industry increased 2.5 times. It was also noted that during the same
period, imports increased from 1361 MTs to 28386 MTs. Thus, the demand was very
high during the said period. The turnover, profits and return of capital of the domestic
industry increased but the capacity utilization was 72%. This is another testimony to
the fact that the tyre manufacturers’ willful suppression of capacity does not make any
economic sense as the only beneficiary of the same will be the importers unless it can
be established that the tyre manufacturers increased prices to such an extent that they
gained despite losing huge volumes to imports.

328. From the above analysis, the Commission concludes that the tyre companies were not in a position to profit from limiting the supply by willful underutilization of capacity.

329. Cost of Sales, Sales Realization and Margin: The DG made a detailed analysis of cost of sales, sales realization and margin. It was noted that sales include cost of production, selling and distribution cost, administrative overheads, advertisement etc. Sales realization is the amount received on sale of each unit. Margin indicates the profit or loss realized on sale of the product. The analysis was done to get an idea about the profitability or otherwise of sale of each product. It was concluded by the DG that margins for Apollo tyres have been showing a very healthy trend and it has reached the highest in year 2009-10. In the case of JK Tyres, the margin has been improving and has gone up drastically. The margin, which was 76 during 2009-10, has gone up to 617 in year 2009-10 which is more than 8 times compared to previous year. In the case of MRF, the margins have shown significant improvement in the year 2008-09 and have further improved in 2009-10.In the case of CEAT, it may be noted that in the 2009-10 the company was able to improve its margins significantly from a negative margin of 270 in the year 2008-09 to a positive margin of 111 in the year 2009-10. Birla Tyres has shown lower margin for 2009-10 compared to previous year. 331. Considering the profit margin on the sale of each tyre, it would be seen that for Apollo Tyres, the margin per tyre increased from 747/- to 1127/- in years under consideration. Similar is the story of increase in margin of JK Tyre where the margin increased from 76.56 to 607.92 per tyre. However, in case of CEAT, it was selling its tyre at a loss in the year 2008-09 and in the year 2009-10, it had a margin of 111/- per tyre, MRF margin in the year 2008-09 was 310/- in 2009-10, it was 371/-., Birla Tyre had a margin of 292/- in 2008-09 and only 14 in the year 2009-10. There is no uniformity in the rise of margins of different companies. Birla rather reduced its margin per tyre considerably and had been selling at the lowest margin of 14/- per tyre. The cost of Birla Tyre was also lowest in the year 2009-10 being 10091/-. Similarly, the margin of CEAT was only 111/- per tyre which cannot be considered as excessive or exorbitant. The margin of two companies was definitely higher than that of the other companies but if we look at the different margins, it would not give an impression of a concerted agreement among the enterprises of forming a cartel. It is also noteworthy that Birla had considerably reduced its margin from 292/- to 14/- only. While CEAT seems to have got in red in the year 2009 and started showing profit in the year 2010, JK Tyre was also working at lower margin in the years 2007-09 of 76.57 per tyre. Looking at data regarding margins does not seem to suggest meeting of minds on the part of different enterprises for fixing prices.

333. In view of the above analysis, it may be noticed that the cost of sales and sales realization have shown increasing trend year after year. Different manufacturers are
differently placed as far as Net Margins are concerned. The bigger the range between the margins of manufacturers, lower are the chances of sustaining a cartel. The companies with lower margins have no incentive to collude and will but deviate. It is recognized prices are a function of number of factors including but not limited to cost conditions, thus the Commission finds no merit in evaluating whether the changes in Sales Realization are proportionate to cost of sales or not. It cannot be concluded on the basis of the above data relating to cost of sales, sales realization and margins that there is any indication of concerted action.

334. Analysis of Net Dealer Price and Margin: The DG also conducted the analysis of the Net Dealer Price (Weighted average) of Lug truck tyres vis-à-vis the margin of each of the five domestic companies under investigation and the same may be noted below: It was noted by the DG that the analysis of the Net Dealer Price (Weighted average) of Lug truck tyres vis-à-vis the margin of each of the five domestic companies under investigation showed a significant increase in margins from 2006-2010. Thus, it was concluded that all the companies have been operating on high margins barring some exceptions. It was also noted that the margins have increased from 42.04 to 617.92 in the case of J.K. Tyre which is an increase of almost 15 times in a short span of 4 years. Similarly, in the case of Apollo Tyres the margins have almost doubled in the last four years. Though the Commission believes that deciding on margins being “excessive” is an inconclusive exercise, but in this case the data anyways does not support the assertion of “excessive” margins given that the margins in some cases are less than 1% and the highest margin is around 10%, which cannot be called as ‘high’. Also, as pointed out earlier also, these substantial differences in margins negate the possibility of a cartel as the investigation in such cases need to show the benefit to cartel members operating at such low margins. In view of the above analysis, the Commission disagrees with the findings of the DG on this count that these domestic tyre manufacturers have been operating on large margins which did not appear to be passed on to the consumers.

337. Higher Operating Profits and Return on Capital Employed (RoCE): The Commission also considered the financials of the opposite parties on all parameters during the period 2008-09 to 2009-10. The best indicators of profitability are the EBIDTA Margin as % of Sales and Cash Flows from Operating Activities. Though, there is a definite increase in operating profitability in 2009-10 for all the companies (MRF follows the October – September year for accounting and hence the trend is blurred) which suggests more than proportionate increase in prices as compared to cost of operations. Similar observations can be made from Cash flow from Operating Activities analysis. It is noticed that all the companies (except MRF) almost doubled their cash inflows in 2009-10 over 2008-09. For MRF, the trend is reflected in 2008-09 because of difference in accounting year. These cash flows again came down to their normal levels in 2010-11. The Commission noted that there is a definite blip in
profitability and cash inflows which can be read with other factors to reach some conclusions. But it is equally important to note that the blip has been very short lived, almost consistent with the period of ADD.

340. Market Share: A comparative study of the market share was undertaken for domestic tyre manufacturers. It is clear from the data that Apollo, CEAT, Goodyear and JK have lost their market share which has been gained by Birla. Birla’s market share is shown as 8.9% in 2005-06 and it has grown in 4 years to reach 19.74% in 2009-10. This is inconsistent with general cartel behavior where market shares remain consistent through the years. Also, it is against the rational business behavior to lose market share to a rival in a cartel set up. Such a trend in the market share movement is possible only in case of competitive environment.

341. Conduct of ATMA: As noted earlier, the tyre manufacturing firms have an association under the name Automotive Tyre Manufacturers’ Association (ATMA) as the representative body of automotive tyre industry in India. Eight large tyre companies including MRF, J K Tyre, Birla, CEAT and Apollo representing over 90% of production of tyres in the country are its members. The Association regularly publishes data on production and export of various categories of tyres. Besides, the Association prepares Status Notes on various subjects which are of relevance to tyre industry, such as, Tyre Retreading Industry, Regional Trade Agreements & Rules of Origin, Anti-Dumping, etc. Thus, it may be noticed that the firms have an active trade association engaged in the above activities. It was noted by the DG that ATMA which is an association of domestic tyre manufactures acted as a close knit family. On examination of the various minutes of the meetings held from 2005-2010, it was noted by the DG that the domestic tyre manufactures were facing stiff competition from the imports under the different tyre segments. On examination of the ATMA circulars and minutes of the meeting, it was noted that ATMA members have collectively adopted the various courses of action which included: i) anti-dumping petitions; ii) low cost tyres; iii) blacklisting of importers; iv) export realization and v) unremunerative prices from the supplies made to OEMs.

343. Anti-Dumping Action The DG has noted that tyre manufacturers under ATMA took various actions by agreeing to support and cooperate in filing various anti-dumping applications before the competent authority to neutralize the competition faced by them from exporters based at China and other countries. In this connection, the DG noted from the minutes of ATMA that the ATMA Committee took serious note of the rising trend in import of passenger car tyres into India, particularly large scale import of cheaper tyres and dumping of radial passenger car tyres, and advised ATMA Secretariat to proceed with the filing of an anti-dumping petition against such imports. It was brought to the attention of the Committee that full cooperation of all ATMA member companies, which manufacture passenger car tyres, was imperative for the success of the case. All the members present assured support and cooperation in filing
anti-dumping application as petitioners and by providing necessary inputs and cooperation in the said proceedings. Similarly, to thwart competition from import of Truck & Bus (Bias) tyres, the domestic tyre manufactures filed Anti-Dumping petition. It was noted by the DG from the reply of ATMA that it retained the services of a common advocate to file an Anti-Dumping petition against import of Bias Truck & Bus tyres from China. Members were informed that one round of discussions has taken place between Cost Managers of select tyre companies and the advocate. The advocate had desired Marketing, Cost and Financial data, as per format circulated through ATMA, to be completed by three member companies viz. Apollo, Ceat and JK to be forwarded directly to the advocate so that the application could be processed. In this connection, it is significant to note that the advocate inter alia advised a meeting of Cost Managers of ATMA member companies with him to ensure uniformity of data and format in which it is to be presented. Subsequently, the domestic tyre manufacturers filed an anti-dumping petition under the Bias segment. With the increase in radialization of tyres under the car and trucks/bus segment, domestic tyre manufactures again felt the heat on account of imports of radial tyres from the global market. Accordingly, in order to evade competition and protect themselves, the domestic tyre manufactures again filed antidumping petition under the radial category also so as to increase the import cost to consumers as well as OEMs. ATMA sought to clarify the above conduct by submitting that the Anti-Dumping petition involved furnishing extensive information/data in a prescribed format as per the anti-dumping rules and provisions. It was also stated that even the antidumping application performa required the petitioner to compile the information to the extent possible. It was also clarified that cost data being highly confidential in nature, were directly submitted by the concerned tyre companies to the advocate for onward submission to directorate of anti-dumping after aggregation, analysis etc. None of the tyre companies was privy to the confidential costing data submitted by the other tyre companies in such proceedings, submitted ATMA. The Commission considered the findings of DG and submissions of ATMA and concluded that the lobbying for welfare of tyre industry is the prime objective of ATMA and the same cannot be viewed as anti-competitive. The discussion and joint application for levy of anti-dumping duty also seem necessitated, given the procedure specified. Moreover since the costing data was confidential to each company the possibility of sharing such sensitive information is most unlikely.

348. Low Cost tyre strategy: As members of ATMA, domestic tyre manufacturers adopted the collective strategy of launching the lower priced tyres to effectively compete with the Chinese truck tyre imports. In this connection, ATMA stated that in view of the rising volume of dumped/low priced truck and bus tyres from China, the Indian tyre manufacturers had considered the option of introducing lower weight and hence low priced truck and bus tyres as a pro-competitive measure to meet Chinese competition on account of the ‘tyres with lower weight’ being dumped into the
The Commission noted that the strategy of introducing low weight low cost tyres to meet the competition and agrees with submissions of OP’s to that effect. The fact that the strategy was collective may again be used to infer meeting of minds but there is nothing anti-competitive in it. Collectively black-listing the Importers. Based on the analysis conducted by the DG, it may be observed that the tyre companies under the aegis of ATMA also decided to take measures resulting in collective black-listing of the importers. It may be noted that the Committee members of ATMA took note of the discussions that had earlier taken place in a meeting of Marketing Group regarding under-valued/under invoiced import of tyres, particularly in the Truck Bias, Truck Radial and Passenger Car Radial segments. The Committee advised that, as in the past, ATMA Secretariat should take up the issue with Customs Authority for Redressal. It was also stated that the angle of revenue loss to the Government should be adequately projected. It may further be noted that the Committee also advised the Marketing Group to evolve appropriate strategy so that sale of under-valued/under invoiced tyres could be checked at the retail level with the involvement of local State sales tax authorities. It was decided at the meeting that all the tyre companies should collectively co-ordinate for initiating the line of action and the following four geographical areas and tyre companies which could take lead in this direction were notified as follows: a) Delhi (Apollo) b) Mumbai (Ceat) c) Vijaywada (tyre company name to be confirmed) d) Indore (JK Tyre). The four locations were short-listed since these were understood to be focal points where sale of under invoiced/under-valued truck & bus tyres-bias and radial was rampant. Based on the effectiveness of action plan in these areas, it was decided that the same could be replicated at an all India level. Moreover, it was also decided that similar strategy could be adopted in the case of grey market imports of MNC brands in the passenger car tyre segment. Convener, Marketing Group was advised to have a meeting of Marketing representatives, immediately following the Managing Committee meeting, to evolve an appropriate strategy to check the malpractices, including black listing, by tyre companies, of importers indulging in such imports, particularly if they were having dealings with Indian tyre companies also. ATMA sought to clarify that the whole intent was to assist the concerned custom authority to track such undervalued/under invoiced imports at major trucking centres and at ports. The intent was to ensure that importers do not find ways and means of circumventing the duty imposed and to check for undervalued and under invoiced imports. The Commission noted the findings of DG and submissions of OPs. The Association’s concern for undervalued/under invoiced imports is genuine and their collective decision to assist the authorities is in the direction of ensuring fair play in markets.

356. Export Realizations: ATMA member companies have undertaken discussion on the issue of export realization. The members of ATMA collectively discussed the issue about the feasibility of increasing the average realization on exports from minimum
Freight on Board (FoB) value of US $2.25/kg to a higher level. It may be noted that ATMA Export Forum has discussed the issue of export realization. However, considering the current market conditions and intense competition from China particularly in the Radial/Bias T&B tyre category, any major increase in average export realization in some categories, especially Bias T&B tyres, was not found feasible. Unremunerative prices from the supplies made to OEMs The issue of unremunerative prices realized from the supplies made to OEMs is noted as also another area of discussion among the member companies. The domestic tyre companies have discussed the issue of OEM prices vis-à-vis. input cost. Consistent rise in input costs in recent months was a major concerns for tyre companies. Thus it may be noted that the discussions centered on unremunerative prices realized from OEMs due to absence of corresponding increase in price of end product. There was a general consensus that truck and bus tyres supplied to vehicle manufacturers were at unsustainable prices, particularly in view of hike in inputs costs. ATMA sought to justify the aforesaid discussion by arguing that the remarks in the meetings under reference were general observations made in the context of the increase in input costs and price for OEMs supplies. ATMA also pointed out that the DG in its report has failed to appreciate the critical fact that none of the actions viz. Anti-Dumping Petition, Low Cost Tyres Strategy, Blacklisting Importers, Export Realization, Supply of Tyres to OEMs undertaken by ATMA was aimed at determining the individual conduct of any of its members. It has been further submitted that the abovementioned steps/activities are in line with the roles and responsibilities of an association such as ATMA i.e. representing an industry group. It is argued that if the logic adopted by the DG in its report is accepted by the Commission, it would lead to an untenable situation where trade associations representing the interests of an industry group, will be barred from adopting any measure necessary to protect the interests of the concerned industry. Lastly, it is asserted that forming a trade association per se is not anti-competitive in any manner. The Commission carefully examined the submissions made by ATMA. The Commission agrees with ATMA that the trade associations may adopt the measures, which are necessary to protect the interests of the members. However, the decisions should not be in contravention of the Competition Act. The Commission noted that the activities of ATMA may thus be described as lobbying as far as anti-dumping duty issue is concerned. The discussions and conduct on other allegations is general and is not in contravention of the Act. This conclusion is based after a careful perusal of the minutes of the ATMA meetings. In view of the above and taking into consideration the act and conduct of the tyre companies/ATMA, it is safe to conclude that on a superficial basis the industry displays some characteristics of a cartel there has been no substantive evidence of the existence of a cartel. As a tradable the industry has always been open to competitive threats from imports. The Commission holds that the available evidence does not give
enough proof that tyre companies/ ATMA acting together have limited and controlled the production and price of tyres in the market in India.

366. **Order:** The Commission has found that there is not sufficient evidence to hold a violation by the tyre companies Apollo, MRF, J.K. Tyre, Birla, Ceat and ATMA of the provisions of section 3(3) (a) and 3(3)(b) read with section 3(1) of the Act. The Secretary is directed to communicate this order as per regulations to all the parties.

* * *
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 Gumpert Apolo. 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 placed by Mumbai dealer, were being delivered and given priority and the deliveries 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.

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Express Industry Council of India v. Jet Airways Ltd & Ors.
CCI Case No. 30/2013
Date of Order: 19.11.2015

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 Informants’ 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 depended 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. 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. 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 publically 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. 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 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. 59. 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 adverting 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.

94. 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.

99. 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.

111. 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 competitor’s price revision on FSC is received through multiple agents 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 though 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 depositions 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 Commissions 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 beside 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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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 “HMIL”), 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 aftersale
services, 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 OEM used their dominant position in the market for the supply of their spare parts to protect their dominance in the market for repair and maintenance services for their respective brands of automobiles which amounted to a violation of section 4(2)(e) of the Act. The DG's investigation also revealed that each OEM had substantially escalated the price of spare parts, for their respective brands of automobiles which showed their ability of imposing unfair prices in the sale of spare parts in terms of section 4(2)(a)(ii) of the Act. The DG has further concluded that the essential facilities doctrine is applicable to the restrictive practices adopted by the OEMs, as the OEMs have put the independent repairers at a distinct disadvantageous position and have jeopardized their ability to undertake repairs of the automobiles manufactured by the OEMs by not making spare parts and diagnostic tools available to them. The DG has also examined the agreements/letters of intent entered into between the OEMs and the OESs and found that most of such agreements/letters of intent had clauses which restricted the ability of the OESs to supply spare parts directly to third parties or in the 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)(c) of the Act. The DG has also found that the agreements/arrangements entered by Reva with the OESs, overseas suppliers and authorized dealers are in the nature of exclusive supply, exclusive distribution and refusal to deal as contained in section 3(4)(b), 3(4)(c) and 3(4)(d) of the Act.

5. Findings of the DG with respect to Premier:
5.1 Premier is promoted by M/s Doshi Holding Pvt. Ltd., holding 43.36% of the voting capital in Premier. The company is, *inter-alia*, engaged in the businesses of manufacturing CNC machines, heavy engineering and automotives. The company also sells CNC machines, components for wind mills, auto components etc. The company operates in the automotive business segment and manufactures sports utility vehicles (SUV) and light commercial vehicles (LCV). Premier's manufacturing facility is located at Chinchwad, Pune. The company has 53 automobile dealers which are located in 53 cities.

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

6. Replies of the Parties:

6.1 At the outset it may be mentioned that the Commission, after considering the investigation report submitted by the DG, decided to forward copies thereof to all the 17 Opposite Parties for filing their replies/objections thereto vide its order dated 04.09.2012. Pursuant to that, Reva and Premier had filed their objections to the DG report but did not participate in the matter thereafter as their applications dated 01.02.2013 and 21.12.2012, respectively, filed by them under Regulation 26 of the General Regulations were taken on record but were kept pending. Further, pursuant to Madras High Court's order dated 06.02.2013 granting *ex parte* interim stay in the WP No. 31808/2012 filed by Hyundai challenging the jurisdiction of the Commission, the matter could not be proceeded *qua* Hyundai. At that time, the Commission decided to pass an order with respect to the present OPs separately after passing the order with respect to the remaining 14 OEMs (OP 1 to 14 in the Main Order). In pursuance thereof, the Commission in its ordinary meeting held on 05.11.2014 directed the present Opposite Parties to appear before the Commission for oral hearing. Subsequently, in the ordinary meeting held on 12.02.2015, the present Opposite Parties were directed to file their replies/objections by way of written submissions to the DG report, if any. 6.3 The replies of the present Opposite Parties have been summarized in the following paragraphs.

6.4 Reply of Hyundai:

6.4.1 In its reply, Hyundai has submitted that the DG has drawn incorrect conclusions and erred in the application of competition law and established competition law principles, *inter alia*, 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 would also be conferred with IP protection by virtue of them being confidential information. To substantiate the claim, Hyundai cited the judgment of the Delhi High Court in *Cattle Remedies and Anr. v. Licensing Authority/Director of Ayurvedic and Unani Services*, wherein it has been observed that apart from specific statutes relating to trademark, 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
6.6.12 Further, Premier has stated that the reliance by the DG on the regulations of the European Union (EU) are erroneous since the quality control mechanism and the market realities of the Indian automobile sector and the EU automobile sector are very different and the EU regulations cannot be applied *mutatis mutandis* to the Indian scenario. Premier has also submitted that, the DG has observed that Premier is the sole supplier of the spare parts for Premier brand automobiles and hence is in a position to influence the ability of independent repairers to attend to its automobiles. However, the DG also opined that this position is untested since most of the Premier brand automobiles are still under warranty and thus are not being attended to outside the dealer network. Premier has submitted that since the DG could not make any conclusive finding as to whether Premier is abusing its alleged dominant position and in the absence of such a finding, merely a position of dominance should not be construed as a contravention of section 4 of the Act. During the course of the oral submissions, on 13.12.2012, Premier requested for striking out its name followed by a written application under Regulation 26 of the General Regulations dated 21.12.2012 on the grounds that (a) Premier has a miniscule market share (below 0.29%) in the Indian automotive market and that approximately only 2000 vehicles of a single model (Premier Rio) of Premier have been sold till date; (b) that the DG has found no evidence of contravention of the Act by Premier. It was also urged that the DG has erroneously: (i) relied upon certain statements of dealers of Premier stating that they source spare parts for Premier cars from Premier itself without analyzing that in the absence of any demand for spare parts in the aftermarket (during the course of the DG's investigation all Premier brand cars were within the warranty period) why would suppliers wish to retail Premier spare parts and (ii) relied upon a particular clause of the Premier LOI which stated that the spare parts need to be sourced from Premier or its authorized dealers, without analyzing the responses of the Premier's OESs, who have stated that they do not wish to enter the aftermarket for Premier spare parts; and (c) that based upon the DG's investigation, Premier has not abused its dominance under section 4 of the Act and further, the only conduct that can be considered as abusive under section 4(2) of the Act, are conducts that has already taken place and since Premier has not yet performed any of the abusive conducts enumerated in section 4(2) of the Act, it is not liable for abusing its dominance under the provisions of the Act.

7. Decision of the Commission:

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

7.4.1 Hyundai has raised preliminary objection on the Commission's jurisdiction to investigate and proceed against any other Opposite Party other than the three OPs, viz., Honda, Volkswagen and Fiat, named in the original information. It has been urged that the DG had no power to investigate the conduct and agreements of Hyundai as the Informant did not raise any allegations against it for any violation of the provisions of the Act. The issue of jurisdiction has been dealt with in length in the Main Order wherein the Commission rejected this plea taken by the other OPs. The Commission is a statutory body, established under the Act with the legislative mandate inter alia to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in the markets, in India. To perform the above mentioned functions, under the scheme of the Act, the Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and advisory jurisdiction. As such, the purpose of filing information before the Commission is only to set the ball rolling as per the provisions of the Act. The Commission further mentioned that the scope of inquiry is much broader and the Commission during its inquiry is not restricted to consider the material placed by the parties only. The direction under section 26(1) is an administrative direction to the DG for investigation of the contravention of the provisions of the Act, without entering upon any adjudicatory or determinative process. During the investigation, the DG may come to know that not only the parties named in the direction of the Commission but also other players in the same industry are also involved in the alleged anti-competitive conduct. In such a case to hold that the Commission cannot direct the DG to investigate the conduct of other parties would not only render the inquiry inchoate but would further deprive the Commission from delivering complete justice in the matter and also lead to multiplicity of proceedings relating to the same type of conduct, which the law always seeks to avoid. On the basis of this reasoning, the Commission in its Main Order had held that there was no irregularity in allowing the request of the DG for investigating the conduct of all the OEMs suspected to be indulging in anti-competitive activities. Challenging the jurisdiction of the Commission, Hyundai had filed a Writ Petition which was admitted in the Madras High Court on 28.11.2012. The Madras High Court, vide interim order dated 06.02.2013 allowed ex parte interim stay of proceedings against Hyundai. The Writ Petition was finally disposed off by the final order dated 04.02.2015, wherein the Madras High Court confirmed the jurisdiction of the Commission. The Madras High Court, in its order dated 04.02.2015, has observed that though DG cannot initiate an investigation suo motu, the real question is whether in the case on hand, what was done by the DG would tantamount to suo motu initiation of investigation or not. The Madras High Court answered the question in negative. While commenting on the scope of the DG’s investigation, the Madras High Court opined that the DG placed additional information before the Commission. The Commission then passed an order on 26.04.2011. Thereafter, the DG issued a notice to the writ petitioner on 04.05.2011, only in compliance of the directions issued under Section 41(1) of the Act. Citing the foregoing reasons, Madras High Court's order unequivocally held that neither the DG nor the Commission have overstepped the jurisdiction vested in them by law. Even otherwise, since all the OPs were given ample opportunity to present their case and all the OPs have submitted their detailed objections to the DG report,
presented their oral arguments and filed their written submissions before the Commission, the Commission is of the view that there has been no procedural irregularity as such in the present case. 7.4.6 In view of the aforesaid, the Commission is of the view that the contention raised by Hyundai challenging the jurisdiction of the Commission is devoid of any merit, especially in the light of the Madras High Court's order dated 04.02.2015.

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

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

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

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

8.1 Issue 1: Whether the present Opposite Parties have violated the provisions 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.

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. On
perusal 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 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 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 avai
lable 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
etituled to copyright protection, Hyundai claimed that its drawings/knowhow/specifications
would also be conferred IP-protection by virtue of being confidential information. To
Hyundai claimed 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. 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.
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, HSIIDC, Fraport AG Frankfurt Airport Services etc.

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

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

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

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

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

2.2.15 According to the informant, the unfair and deceptive attitude is reflected form the Brochure issued by OP-1 for marketing "the Belaire" when compared with the Part E of Annexure-4 to the agreement. While through the Brochure a declaration is made to the 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 allottees, 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
whereto on 13.09.2006 OP-1 issued Allotment Letter for apartment No. D-161, the Belaire,
DLF City, Gurgaon. On 30.09.2006 a Schedule of Payment for the captioned property was
sent. According to the said Schedule, the buyer was obligated upon to remit 95% of the dues
within 27 months of booking, namely, by 04.12.2008. The remaining 5% was to be paid on
receipt of Occupation Certificate. The Apartment Buyer's Agreement, however, was executed
and signed on 16.01.2007. By that date, OP-1 had already extracted from the allottee an
amount of 85 lakh (approx.) without the buyer being aware of the sweeping terms and
conditions contained in the agreement and also without having the knowledge whether the
necessary statutory approvals and clearance as also mandatory sanctions were obtained by OP-
1 from concerned Government authorities.

2.2.18 It has been submitted that because of the initial defaults of OP-1 in not applying for and
obtaining the sanction of the building plan/lay-out plan, crucial time was lost and delay of
several months had taken place. This delay was very much foreseeable but OP-1 deliberately
concealed this fact from the apartment 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 buye Before a
single brick was laid, the buyers had already paid instalments of November, 2006, January,
2007 March, 2007, June, 2007 and Sept. 2007, up to almost 33% of the total consideration.

2.2.19 According to the informant, only through the letter dated 22.10.2007, the 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 allottes. In an admission that lay-out plans/building plans were not shown to the allottes, OP-1 agreed that the same could be verified by any authorized representative of RKG. RKG, expressing its disapproval of the stand taken by the OP-1, sent a rejoinder on 27.07.2009, that Apartment Buyer's Agreement was unfair, unreasonable and unconscionable.

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

2.2.23 It has been submitted by the informant that while the discount given to the prospective buyers after the revised plan was as high as Rs 500 per sq. ft., OP-1 had offered only Rs 250 per sq. ft to the older buye The buyers of the apartments, who invested huge amount of money starting from October, 2006 in 'The Belaire' and November, 2006 in 'DLF Park Place' had been put to a disadvantageous position vis-à-vis prospective buyers in November, 2009 i.e., after a period of 3 year Against all these, on 21.12.2009, RKG raised grievance before the Ministry of Housing and Urban Poverty Alleviation showing the helplessness of the buyers who did not have any option even to opt out as the exit route was too heavily tilted in favour of OP-1 and on 28.01.2010 the Association in its detailed representation to OP-1 raised many pertinent issues pointing to the illegal acts of omission and commission of OP-1. The Association categorically registered its protest by stating that the agreement was arbitrary, lopsided and unfair, with apparent double standards with respect to the rights and 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 allottes clearly brings out the fact that either the information given to SEBI was incorrect and misleading or for reasons not known to the allottes, OP-1 scrapped the original project in October, 2007.

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

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

2.2.28 It has been submitted by the informant that the fact that the project could not be completed in the stipulated time was either within the contemplation of OP-1 or it was reasonably foreseeable by OP-1 from the very threshold stage as the statutory approvals and clearances were not obtained by OP-1. The Act of OP-1 in concealing this fact, therefore, amounts to "suppresio veri". From the very beginning it was in the knowledge of OP-1 that the project has been inordinately delayed. Yet it never informed the apartment allottes of the factor of delay till the time it extracted substantial payment from them. In the said circumstances, the action of collecting the money is absolutely fraudulent and unwarranted.
2.2.29 According to informant, acts and deeds of OP-1 are "culpa-grave" both in attracting the buyers by making promises in the colorful brochure/advertisement to enter into the contract only to be followed by gross and deliberate carelessness in performance of the contract. The informant has contended that in the present form, the agreement is heavily weighted in favour of OP-1. Taking shelter of the expression "Sole Discretion", OP-1 can act arbitrarily without assigning any reason for its inaction, delay in action, etc. and yet disowned its responsibility or liability arising there from. The informant has alleged that the various clauses of the agreement and the action of OP-1 pursuant thereto are ex-facie unfair and discriminatory attracting the provisions of Section 4(2)(a) of Competition Act, 2002 and per-se the acts and conduct of DLF are acts of abuse of dominant position by OP-1.

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

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

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

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

5.23 According to OP-1, there are many large Real Estate Companies and Builders in India, particularly in Northern India as well as in NCR and Gurgaon who offer stiff competition and give competitive offers in the relevant market of residential apartments to give a wide choice to the consumer. Even though OP-1 is a large builder, there are hundreds of other builders all over India as well as in Northern India including NCR, who offer residential apartments to prospective investor.
5.24 According to OP-1, the conditions of offer of each builder are considered by the intending investor and then he makes up his mind as to which offer suits him. The choice of residential property available in the market has never been limited and apart from the Residential properties offered by it there were a large number of residential properties available in the market for the investor to choose from.

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

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
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-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.

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 landbank 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 Laying O'Rourke (one of Europe's largest construction company) provides access to one of the best technology, processes and engineering skills. OP-1 has also undertaken joint ventures and partnerships with WSP Group to provide engineering and design consultancy and project management services for real estate plans of DLF. Acquisition of stake in Feedback Ventures to provide consulting, engineering, project management and development services for infrastructure projects in India, MoU with Nakheel to develop real estate projects in India through a 50:50 JV company, Joint venture with Prudential Insurance to undertake life insurance business in India, Joint venture with MG Group to enter into a 50:50 joint venture with MG group for real estate development, joint venture with HSIIDC for developing two SEZ projects, Memorandum of Co-operation with Fraport AG Frankfurt Airport Services to establish DLF Fraport SPV which would focus on development and management of certain airport projects in India.

5.34.7 DG has concluded that all these above establish that OP-1 has distinct economic advantage to it as compared to its 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 after
making 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 alongwith interest. The suggested modification is given in clause 1.5.

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

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

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

42. In the order, the Commission observed that clause 1.11 of the agreement was abusive. EDC is charged by Government for development of main lines of roads, drainage, sewage, water and electricity. EDC is proportional to the land area of the project and may be linked with number of dwelling units. EDC is invariably passed over by the builder to the allottees. Entire EDC charges for a complex are burdened on allottees in proportion to super area. There may be a case of State increasing EDC charges. Builder can pass on increased EDC charges to allottees only after informing the allottee about the order of the State Government enhancing EDC (with a copy of letter) and how his share of EDC has been calculated. Non-payment of EDC by an allottee can result only into a recovery action as per law. Neither the allotment can 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 inter-connected. Clause 1.13 is about power backup whenever the supply of DHBVN (State Electricity Board) is not there. Clause 1.14 envisages a situation when DHBVN fails to supply electricity to the complex. So long as Resident Welfare Association of the Complex does not take charge of services of the complex, the company is bound to provide essential services to the complex in terms of maintenance agreement, but once RWA takes over the responsibilities of the complex, it will have freedom to continue with the service providers engaged by the company or to enter into fresh contracts with some service provider or engage new service provider. Also since the Company marketed and sold Belaire Complex as govt. approved residential project and govt. charging heavy amount as EDC, providing of DHBVN connection by the state is mandatory and the company has to ensure DHBVN connection for each allottee. The relevant clauses 1.13 and 1.14 be modified as suggested in the table.

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

45. The delivery of possession of the apartment by the company is governed by clause 10 and clause 11 of the Agreement. However, clauses 11.1, 11.2, 11.3 and clause 39 provide for those circumstances under which the company may not deliver the possession in time or may abandon the project altogether without its fault and the consequences. Clause 11.1 talks of non-availability of construction, material, strike of the work force, terrorist act, enemy act, act of God, delay in grant of permissions, completion certificate etc. from the government or the property becoming subject matter of litigation in Courts or before Tribunals. Clause 11.2 provides for eventualities of delay in giving possession of apartments due to Govt. rules, orders, notifications, after the agreement and the companies' decision to challenge the same in Courts/Tribunals. Clause 11.1 provides that the company shall not be bound by the 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 5/- per sq. feet of the super area of the said apartment per month for the period of such delay beyond three years or extended period, subject to condition that apartment allottee was not in default under any term of the agreement. This compensation was also to be adjusted only at the time of giving possession the said apartment to the Allottee. Clause 12 described defaults only on the part of the allottee as if company can commit no default.
These provisions also show that there was no exit option with the allottee and the clauses were abusive and heavily loaded in favour of the company. The company had foisted these clauses on the allottee giving no option to the allottee to bargain for the exit, while the company had liberty to extend the period of delivery of possession on self serving grounds like non availability of material, non availability of work force, any govt. notifications, orders or litigations in the Court, which may even have been invited by the company itself, without any penalty on the company for such extended period of delivery. The allottee in case of delay in payment of the instalment had to pay interest to the company @ 15% within 1st 90 days and 18% thereafter. Even where the company failed to deliver the possession within the extended period, a written notice is to be given by the allottee with duly acknowledge receipt of the company whereas the company unilaterally, without any prior notice could terminate the agreement even in case of default in payment of instalment by the allottee. The abuse of dominance is self evident from the provisions of these clauses. The Commission considers that the above clauses should be modified in the manner as given in the table to make this agreement non abusive.

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

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

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

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

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

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

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

52. In view of the modified clauses/sub clauses as suggested above in the agreement, certain clauses/sub clauses of the agreement have become superfluous. The Commission has suggested deletion of these clauses. Certain clauses of the agreement, in view of the suggested modified clauses, needed small changes so as to bring them in consonance with the modified clauses. These changes are minor in nature and have been suggested wherever needed. Some clauses are closely interlinked with the abusive clauses and had to be modified so that the abuse was not perpetuated. These interlinked clauses wherever existed have been accordingly modified. The clauses which needed fine tuning with the modified clauses have also been accordingly modified and the suggested clauses have been given in the table below.

53. The terms of the agreement to be entered into with the allottee were never shown to the allottee at the time of booking of the apartment. These terms and conditions of the agreement were prepared and framed by the company unilaterally without consulting the buyer. Once the company had already received considerable amount from the applicants/buyers, this agreement was forced upon the allottees and the allottee had no option but to sign the agreement, as otherwise the agreement provided for heavy penalties and deduction from the money already deposited by the allottees with the company, which itself was an abuse of dominance. 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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Jagmohan Chhabra And Shalini Chhabra v. Unitech

2011 Comp LR 31 (CCI); Main Order dated November 8, 2011 and Dissenting Order by Mr. R. Prasad (Member, CCI) dated November 8, 2011.

ORDER UNDER SECTION 26 (1) OF THE COMPETITION ACT. 2002

As per Ft. Prasad (dissenting)

The information in this case was submitted to the Commission on 18.05.2011 by Shri Jagmohan and Mrs. Shalini Chhabra alleging contravention of Section 4(1) of the Competition Act. The information providers has also asked for interim relief under Section 33 of the Competition Act.

Facts of the case in brief are as under:-

(2.1) The informants have booked 2 apartments with Unitech in Project "ESCAPE" and have made about 72% payment with respect to one flat and 42% payment with respect to the other. As per the agreement the payments to be made were Time based and not construction linked.

(2.2) The informants sent a letter dated 30.1t.2007to Unitech mentioning about very poor progress at site. In response the, Unitech dated 19.12.2007 assuring that the possession shall be handled from 4th quarter of At 2009.

(2.3) As per the schedule. But as there was no progress on the project, the informants vide letter dated 07.06.2010 (which was personally delivered in Unitech's office) informed that because of go slow tactics of Unitech the informants are withholding further payments till the time project is completed as per the schedule. They have also highlighted about late start of the project from the inspection.

(2.4) According to the agreement Unitech have to compensate Rs. 5 per Sq ft/ per month for delay on its part, whereas if there is a delay from the customer side in making the payment he has to pay @ 18% PA compounded quarterly on late payments. it was not acceptable to the informants and they demanded that compensation on late payments from the Unitech should be same i.e. @18%/p.a. The informants also informed Unitech that the delay in the project is a part of deficiency in service, hence, they shall not be making any further payments.

(2.5) According to the informants, as the project is delayed by over 1 year and 8 months already and by its estimated new completion date, more than 2.5 years and considering that they are paying the commercial bank interest @ 15%/p.a on the home loan, further payments would only be made after the builder credits interest and on handing over of the project.
According to the informants, Unitech did not reply to the submitted letters and later on sent a letter dated 17.01.2011 stating that Tower 5 would be handed over in 2nd Quarter of 2010 and acknowledged delays, Unitech by letter dated Tower 5 and 3rd Quarter of 2011 for 11.04.2011, give another new date Quarter of 2011 for (2.7) After many reminders from the informants Unitech has sent a letter dated 02.05.2011 warning informants to pay the instalments due on Calendar basis with 18% PA interest with quarterly computing, by 17.05.2011 else the flats allotted would be cancelled.

3. Allegations raised by the informants are as under: (3.1) Unitech has used its dominant position and has diverted/misused the funds collected for the construction of project to some other destination resulting in delay of project by as much as 3 years.

(3.2) The Unitech had malafide intentions from the inception and for his very reason, provided for payments from the allottees on "calendar basis (time basis)" rather than the "construction linked basis" which is a normal practice in trade. (3.3) According to the agreement, late payments by allottees attract interest @ 18% PA compounded quarterly. On the other hand, any delay by the builder in completion of the project only entails a penalty of Rs 5 per Sq Ft/ per month which works out to be roughly 10%.

(3.4) The possession was to be delivered by the builder for both the flats in August, 2009 i.e., within 3 years of the agreement date. Despite pinpointing from the very inception about the late start of the project by letters, the builder deceitfully kept mentioning that the project was on schedule and possession shall be offered on due date to which Unitech failed.

4. Relief sought by the informants:

(4.1) To direct the Unitech to credit interest PA compounded quarterly on the payments made for the period of delay is the same Jman1er that the Unitech entitled to charge for late payments as per the agreement and not to charge any interest for the period of delay in payments due to delay attributable to it, in execution of the project.

(4.2) According to the informant, to restrain Unitech from using its dominant position in charging payments from allottees on calendar (time) basis rather than construction linked basis. According to the informants this direction would be given on a macro level in the interest of consumers in the real estate industry at large, if the Commission so feels, in larger public interest.

5. Interim relief sought by the informants: As the builder has threatened with dire consequences of cancelling flats for non payment with interest @18% PA with quarterly compounding by 17 May 2011, the informants, sought directives to the Unitech under Sec 33 of the Act restraining it from taking any coercive action against them until investigation by the
6. **Analysis:**

When the information providers wanted to purchase flats there was a wide choice as they could have gone to any of the builders who operate in Gurgaon. But probably because of the brand name of Unitech, quality of construction and the price factor, they agreed to buy the flats from Unitech Ltd. In pursuance of the intention of the purchase of flats, information providers entered into an agreement with Unitech Ltd. as well as Pioneer Urban Land and Infrastructure Ltd. on 04.08.2006. According to the terms of the agreement the allotment of flats made was provisional and information providers agreed to pay a sum of Rs. 94,17,552/- for flat no. 303, tower - 5 in the complex known as "ESCAPE" sector 50, Gurgaon. According to the terms of the agreement the amount paid was first to be adjusted against the interest and then against the purchase price. According to the terms of the agreement an amount of the money was to be paid as earnest money and if the purchaser failed to pay any instalment within 90 days from due date, Unitech had right to forfeit the entire amount of earnest money and the allotment of the apartment was to be treated as cancelled. Further, any money paid above the earnest money was to be refunded by Unitech without interest. It was also stated in the agreement that the cost of the apartment is calculated on the basis of Super Area. The builder has also the right to change the layout plan and therefore there could be a change of flat area. Even the Preferential Location area of the flat and the storey which was allotted to the buyer could be changed. Club membership was mandatory and the buyer had to pay external development charges and infrastructural development charges. As far as maintenance was concerned after construction the maintenance was to be carried out by the agency nominated by Unitech Ltd. and at the time of delivery of the flat, three years maintenance charges @Rs.1.80 per Sq.Ft. had to be paid by the flat buyers to the builder. In addition the security deposit for maintenance was to be paid by the buyers to the builder. The information providers had no right in the complex except the right of access and exit to their apartment. The delivery of the property was to be made within 36 months of the date of the agreement. If the purchasers delayed payment they had to be paid interest charges at 18% interest per annum compounded quarterly. If the builder delayed the delivery it had to pay Rs55 per sq. ft. per month of super area. After entering into an agreement the information providers in February 2008 found that hardly any construction had started. The information providers had purchased Flat no. 403 in tower 6 and Flat no. 303 in tower 5 'ESCAPE'. According to the agreement the possession should have handed over the flats before August 2009. The information providers found that till March 2010 there was hardly any construction activities in tower no.5 and 6. In fact till today the construction of the two flats has not possession has not 95 been given to the information providers. It is further seen that the installments were to be paid by the purchaser on time basis not with reference to the completion of the project. The information providers found as there has been no progress in the construction of the flats, they stopped paying instalment. As a consequence in May 2011 M/s Unitech sent a notice that the apartments allotted to them would be cancelled in accordance with the terms of the agreement.
7. On the basis of these facts, it has to be decided whether they appear to be prima facie case for investigation under section 26(1) of the Competition Act. The fact is that the information providers entered into an agreement with the Unitech. The question is whether Unitech came to a position of dominance. The next issue to be decided as to whether what would be relevant market in this particular case. In section 2(r) of the Competition Act relevant market means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. Another aspect to be considered is switching costs to buyers. In this particular case it the buyers wanted to switch from Unitech to any other developer / builder the switching costs would very high as the earnest money paid by the purchasers would be for forfeited. Therefore after entering into the agreements with the developers, the information providers became captured customers which allowed the builders to affect its consumers (i.e. the IPS) in its favour. As far as the relevant market is concerned the relevant market would be the project itself i.e. in this case "ESCAPE". Escape is conglomerate of various flats and there are a large number of buyers of flats. Therefore the relevant market in this case would be the project known as Escape. The relevant product market would be and the relevant geographic market would be an area occupied project in sector 50, Gurgaon.

As switching cannot be resorted by the information except at a cost and again to the builder the IPS are at the mercy of the builder. This is clear from the fact that instead of giving premises in 36 months of the agreement, the builder has taken more than 5 years and still more time is required. Further if the purchasers delayed payment, they had to be charged interest @18%/o PA compounded every quarter whereas if the developer delayed the project, it had to pay only Rs. 5 per sq. Ft/ per month. This is certainly unfair. it is also seen that in the terms of the agreement there is a mention of maintaining charges to be made in the advance for 3 years and that the maintenance would be carried out by the developer or its nominee. This appears to be case of tie-in arrangement.

8. On the perusal of this facts a view of the provisions of section 19(4)(g) of the Competition Act as well as clause a, b, c, d, f and Section 19(4) of the Competition Act there appears to be case of abuse of dominance. Further there is case of tie-in arrangement which is anticompetitive under section 3(4) of the Act and can be considered as one of the factors under Section 19(4)(m) of the Act.

9. As there appears to be prima facie violation under Section 4 of the Act as Unitech in this case is a dominant position in the relevant market, the Director General is directed to investigate this case with reference to Section 26(1) of the Act.
Sh. Surinder Singh Barmi v. Board for Control of Cricket in India (BCCI)
[2013]113 CLA579 (CCI), 2013CompLR297(CCI), [2013]118SCL226(CCI)

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

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

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

(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.
The linkages with ICC and the Mandate/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 make it very clear that the team is Indian National team and that BCCI is the National Sports Federation.

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 junior. It has three categories of Members viz. Full Members, Associate Members and Affiliate Member

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 byelaws 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 competitors. 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.

* * * * *
Dhanraj Pillay v. M/s Hockey India

2013 Comp LR 543 (CCI); Main Order dated May 31, 2013 Dissenting Order by Mr. R Prasad (Member, CCI) dated February 28, 2013.

The Competition Commission of India (“CCI”) by way of its order dated May 5, 2013 in the Case No. 73/2011 (Dhanraj Pillay and Ors. v. M/s Hockey India) has exonerated Hockey India (“HI”) from the charges of indulging into anti-competitive practices and abuse of dominance under Section 3 and 4 of the Competition Act, 2002 (“Act”) respectively.

Parties Involved

The Informant: The information was filed by six former Olympian and National Hockey Players (collectively referred as “Informants”) alleging that HI is abusing its dominant position and indulged in various anticompetitive practices relating to the organization of World Series Hockey League (“WSH”). Hockey India (HI): HI is the national sports authority for hockey in India affiliated by the Indian Olympic Association ("IOA"), Asian Hockey Federation ("AFH") and International Hockey Federation ("FIH"). Indian Hockey Federation (IHF): IHF is a National Sports Federation for the sport of Hockey affiliated to Indian Olympic Association, but it is not affiliated to FIH or AHF. IHF is the co-organizer of World Series Hockey (WSH) League along with Nimbus Sport (Nimbus).

Facts of the Case

In December 2010, IHF and Nimbus announced the WSH followed by organizers entering into negotiations with players and signing them for the league. FIH notified regulations relating to sanctioned and unsanctioned events and communicated the same to all National Associations. HI adopted the regulations relating to unsanctioned events and accordingly modified its Code of Conduct (CoC) Agreement with players to include the clauses related to disciplinary action such as disqualification from Indian National Team for any participation in unsanctioned events. The HI along with the FIH also announced the intention to introduce their league in 2013.

Allegations by Informant

• HI is misusing its regulatory powers by promoting its own Hockey League at exclusion of WSH, resulting in denial of market access to rivals in contravention to Section 4 (2)(c) of the Act.
• HI is abusing its dominant position in conducting international events in India to enter into the market of conducting a domestic event in India, in contravention of Section 4(2)(e) of the Act.
The CoC Agreement entered by HI with the players is an exclusive supply agreement and the restrictive conditions included there under, constitute a violation of Section 3(4) of the Act. CCI after finding a prima facie view in the case directed Director General (“DG”) to investigate the case. The Informant also filed an application under Section 33 of the Act for interim relief, which in turn was dismissed by CCI. Director General’s (Investigation) Report

The DG after conducting an in-depth investigation of various allegations made in the information and relying on international jurisprudence on the issue at hand, concluded that:

- Conduct of actions of HI constitute practices leading to denial of market access to new sport organizers, players, sponsors and broadcasters in contravention of Section 4(2)(c) of the Act.
- CoC Agreement entered by HI with the players is in contravention of Section 3(4) (b) of the Act as the agreement causes appreciable adverse effect on competition in India as it creates barriers to entry for new players into the relevant market and drives existing competitors out of the market with no benefits accruing to the players as a result of such restrictive conditions.

Issues and finding of the Commission

Issue 1:

Whether CCI has jurisdiction over HI and FIH? The Commission noted that the Act focuses on the functional aspects of an entity rather than institutional aspects. The scope of the definition on the institutional front has been kept broad enough to include virtually all the entities as it includes “person” as well as departments of the government. The nature of activity decides whether the entity is an enterprise for the purpose of the Act or not. The activities of “organizing events” are definitely economic activities as there is a revenue dimension to the organizational activities of sports federations. After relying on the international jurisprudence, the provisions of the Act and a holistic consideration of all relevant factors, CCI held that the National Sports Federations do not have any immunity under the Act. CCI observed that FIH is Switzerland. However, given the scope of definition of jurisdiction of the CCI under Section 32 of the Act, it has jurisdiction over FIH.

Issue 2:

What is the relevant market (RM) in the present case? CCI disagreed with the RM defined by DG. CCI observed that governing activities cannot be a part of market definition, but governing powers can be a source of dominance. CCI considered delineation of relevant market for analysis of allegations pertaining to foreclosure of market for hockey events to rival leagues from the viewpoint of the spectator i.e. the ultimate viewer of sport in accordance with the criteria laid down under the Act of characteristics, intended use and price. Considering the characteristics of hockey events, CCI observed that every sport has unique characteristics that lead to development of fan following, the end consumers of the event. The approach of defining RM narrowed to sports events within a particular sport finds support from international cases decided on similar issues.

CCI concluded that the relevant product market, as regards the allegation of foreclosure of
rival leagues is “the market for organization of private professional hockey leagues in India”. CCI also observed that it is appropriate to define a RM in the context of the specific allegation more so where there are multitude of consumers as in the case of sports as pointed out earlier.

**Issue 3:** Whether HI holds a dominant position in the relevant market?

CCI observed that the most significant source of dominance is the regulatory powers of HI. HI has right to sanction/approve hockey events in India. HI regulatory role empowers it, along with FIH to create entry barriers for other leagues in the form of requiring rival leagues to obtain sanctions for their tournament and requiring players to obtain No Objection Certificate (NOC) from HI to participate in rival tournaments. CCI after considering the European case laws on the issue at hand and other factors under the Act observed that the HI is in a dominant position since it assumes the role of a regulator in the RM.

**Issue 4:** Whether HI has abused its dominant position?

CCI observed that WSH was a domestic event as per definition contained in FIH bye laws, but it was very clear that the sanction was to be given by the respective Continental Federations and FIH. Since, HI was not the sanctioning authority for such an event and hence cannot be faulted for refusing the sanction which was neither to be granted by HI nor asked to be granted from HI. CCI hold that the evidences are insufficient to conclude that HI has indeed acted against the players who participated in WSH and hence the allegation against HI/FIH for causing denial of market access under Section 4(2)(c) of the Act is not substantiated.

On the issue of restrictions on free movement of players through the CoC Agreement, CCI observed that the relationship between HI and the players tantamount to a vertical relationship where HI and the players are at different stages of the production chain. The restrictive conditions in CoC agreement are inherent and proportionate to the objectives of HI and cannot be fouled on per se basis till there is any instance where these are applied in a disproportionate manner, for which there is no evidence at present.

**Final Order**

CCI after considering all the aspects relating to the case concluded that there is no contravention of Section 3(3) (b), 3(4), 4(2) (a), 4(2) (c) and 4(2) (e) of the Act. However, CCI observed that, HI economic power is enormous as a regulator. Virtually, there is no other competitor of HI. Therefore, it would be appropriate if HI were to put in place an effective internal control system to ensure that its regulatory powers are not used in any way in the process of considering and deciding on any matters relating to its commercial activities; and also set up a streamlined fair and transparent system of issuing NOCs to the players for participating in events organized by foreign teams/clubs.
Comment:

In this case though CCI found HI to be dominant in the relevant market but did not find its conduct as abusive. While arriving at this decision, CCI relied heavily on the inherence proportionality test postulated in the Mecca Medina judgment of the ECJ. This test is found to be the appropriate approach to address competition issues in the sports sector.
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 OP2 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 organize. 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)(c) 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 important national and international 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 benefitting 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 visito 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 organizers. 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 rescheduling 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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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……

3. 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……

8. 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 PSJC, as a part of the acquisition of 24% equity stake, is so drafted such that the parties through their proposed strategic alliance1 can extract the potential of a wider airline network. It is in this background that the competition assessment of this deal has been undertaken.

**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-

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1Alliances 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.
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 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 overlapping 7 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-Abu Dhabi 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 restraint 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 restraint 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 restraint 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 restraint 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.

36. 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.

37. 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 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.
38. The six of the seven above mentioned routes, where Jet and Etihad have an indirect overlap and the market share is greater than 50 percent consist of Brussels (BRU) and six Indian cities (BRU-AMD, BLR-BRU, BOM-BRU, BRU-COK, BRU-HYD and BRU-TRV) as O&D pairs. 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 constrain 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 %. The low current combined market share and the open skies policy between India and US does not raise any potential competition concern.

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 city pairs. 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. Passengers 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, Thiruvananthpuram, 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.12 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 undersub-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).
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 mamalian 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, as
Ranbaxy 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 28.10 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, contraindications, 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 market. 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>2.</td>
<td>ROSUVASTATIN + EZETIMIBE C10G6</td>
<td>55-60</td>
<td>30-35</td>
<td>Lupin (5-10)</td>
<td>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.</td>
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3. LEUPRORELIN, H1C6  

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<tbody>
<tr>
<td>45-50</td>
<td>35-40</td>
<td>Bharat Serums (5-10)</td>
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</table>

The combined market share of the Parties is [85-90] per cent. 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.

4. TERLIPRESSIN, H4D7  

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<tr>
<td>5-10</td>
<td>55-60</td>
<td>Alembic (20-25)</td>
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The combined market share of the Parties is [65-70] per cent. It is noted that effectively there are only three players in this market and as a result of the proposed combination, the number of significant players will be reduced from three to two. Ranbaxy has recently entered this market and therefore, the proposed combination will eliminate a significant competitor and is likely to have an appreciable
<table>
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<tr>
<th>5.</th>
<th>OLANzapine FLUoxetINE, N5A6</th>
<th>+</th>
<th>20-25</th>
<th>40-45</th>
<th>Intas (30-35)</th>
</tr>
</thead>
<tbody>
<tr>
<td></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>
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<tr>
<th>6.</th>
<th>LEVOSULPirIDe +ESOMePRAZOLE, A3F49</th>
<th>5-10</th>
<th>50-55</th>
<th>Torrent (35-40)</th>
</tr>
</thead>
<tbody>
<tr>
<td></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>
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<tr>
<th>7.</th>
<th>OLMESARTAN+ AMLODIPINE+ HYDROCLORTHIAZIDE, C9E22</th>
<th>5-10</th>
<th>30-35</th>
<th>Macleods (15-20), Micro Labs (10-15)</th>
</tr>
</thead>
</table>
|    | 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.

**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>
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<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.</td>
</tr>
</tbody>
</table>
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.

| 2. | CLOPIDOGREL, B1C5 | 0-5 | 25-30 | The combined market share of the Parties is [30-35] 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. Thus, the proposed combination is not likely to have an appreciable adverse effect on competition in this relevant market. |
| 3. | ATORVASTATIN, C10A1 | 10-15 | 10-15 | 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. |
| 4. | LOSARTAN, C9D3 | 5-10 | 15-20 | 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. |
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. 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 + Tolerodine
   ii. Rosuvastatin + Ezetimibe
   iii. Leuprolelin
   iv. Terlipressin
   v. Olanzapine + Fluoxetine
   vi. Levosulpiride + 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 subsection (3) of Section 31 of the Act. The Commission proposed that:
   a. Sun Pharma shall Divest:
      i. All products containing Tamsulosin + Tolerodine which are currently marketed and supplied under the Tamlet brand name.
      ii. All products containing Leuprolelin 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 Levosulpiride + Esomeprazole which are currently marketed and supplied under the Raciper L brand name.
      v. All products containing Olmesartan + Amlodipine + Hydroclorthiazide 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 Leuprolelin, the Commission may consider Divestiture of products containing Leuprolelin currently marketed and supplied by Ranbaxy under the brand name Eligard instead of divestiture of products containing Leuprolelin 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 Leuprolelin, i.e., Ranbaxy shall Divest its products containing Leuprolelin 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 Leuprolelin 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 + Tolterodine which are currently marketed and supplied under the Tamlet brand name.

38. Ranbaxy shall Divest:
   i. All products containing Leuprolelin 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 Leuprolelin currently marketed and supplied under Sun Pharma’s brand name Lupride.
   ii. All products containing Terlipressinl 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 hours.
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.
Google Inc. and Others v. Competition Commission of India and Anr
(2015)127CLA367(Delhi).

1. The intra-court appeal being LPA No. 733/2014 was preferred against the order dated 15th October, 2014 of the learned Single Judge of this Court of, though vide the said order issuing notice for 9th March, 2015 of W.P. (C) No. 7084/2014 preferred by the appellants but on the application of the appellants for interim relief merely directing that any information marked as confidential submitted by the appellants to the respondent No. 1 Competition Commission of India (CCI) as well as to the Director-General, CCI (DG, CCI) shall not be disclosed to any party and shall be kept strictly confidential and not granting ad-interim stay of the investigation commenced by the DG, CCI in Case No. 06/2014 of the CCI against the appellants. The said appeal came up before us first on 10th November, 2014 when the counsel for the respondent No. 1 CCI appeared on advance notice; after hearing the counsel to some extent, it was felt that the writ petition itself could be decided along with this appeal; accordingly, with the consent of the counsel, we requisitioned the writ petition from the board of the learned Single Judge and listed the appeal as well as the writ petition for hearing on 20th November, 2014. Since the respondent No. 2 Vishal Gupta, on whose complaint under Section 19 of the Competition Act, 2002, Case No. 06/2014 aforesaid against the appellants had been registered, did not appear in spite of advance copy stated to have been given, notice was also directed to be served on him.

2. On 20th November, 2014, the counsel stated that since the matter involves pure question of law, counter affidavits in the writ petition would not be necessary. The counsel for the respondent No. 1 CCI on that date also assured that in the meanwhile investigation would not be concluded nor any precipitative steps be taken. The counsel were heard on 25th November, 2014, 12th January, 2015, 13th January, 2015 and 10th February, 2015 when judgment was reserved giving liberty to the appellants to file written submissions; the same have been filed by the appellants/writ petitioner

3. The appeal in the circumstances, is now infructuous and is disposed of. We will thus take up the writ petition for adjudication though will be referring to the parties by their nomenclature in the appeal.

4. The three appellants i.e. i) Google Inc., California, United States of America (USA), ii) Google Ireland Ltd., Dublin 4, Ireland, and, iii) Google India Pvt. Ltd., Bangalore, filed the writ petition impugning, a) the order dated 15th April, 2014 of the respondent No. 1 CCI under Section 26(1) of the Competition Act directing investigation by DG, CCI into the Case No. 06/2014 filed by the respondent No. 2, b) order dated 31st July, 2014 of the respondent No. 1 CCI dismissing the application filed by the appellants for recall of the order dated 15th April, 2014 as not maintainable, and c) for restraining the respondent No. 1 CCI from carrying out any further proceedings against the appellants pursuant to the order dated 15th April, 2014.

5. It was the contention of the senior counsel for the appellants on 10th November, 2014 when the appeal had come up first before us that the investigation against the appellants ordered by the respondent No. 1 CCI in all probability would be concluded by 9th March, 2015
for which date notice of the writ petition had been issued by the learned Single Judge, making the writ petition infructuous. It was further his contention that since the order dated 15th April, 2014 of the CCI ordering investigation against the appellants had been passed without hearing the appellants, the appellants were justified in applying to the CCI for recall of the said order and the CCI had erred in, instead of considering the said application for recall of the said order on the ground of the actions of the appellants complained against being beyond the territorial jurisdiction of the CCI, holding the application to be not maintainable. It was contended that the CCI had thus failed to exercise the jurisdiction vested in it and the only question for adjudication in the writ petition was whether such an application for recall of an order under Section 26(1) of the Competition Act is maintainable or not inasmuch as if this Court were to hold that such an application is maintainable, the matter would have to be remanded back to the CCI to decide the said application on merits.

6. We had however on that date enquired from the senior counsel for the appellants whether not holding such an application for recall of an order under Section 26(1) of the Competition Act to be maintainable would tantamount to conferring a right of hearing to the person/entity complained against or reference against whom had reached the stage of Section 26(1) of the Act and which right the Supreme Court in Competition Commission of India Vs. Steel Authority of India Ltd. MANU/SC/0690/2010 : (2010) 10 SCC 744 has held does not exist.

7. The counsel for the respondent No. 1 CCI, on that date, while opposing the said contention had drawn our attention to Section 37 of the Competition Act which Section prior to its repeal by the Competition (Amendment) Act, 2007 with effect from 12th October, 2007 conferred a power on the CCI to review its order. It was his contention that the application filed by the appellants for recall was nothing but an application for review of the order dated 15th April, 2014 under Section 26(1) of the Act and the power of review though earlier conferred on the CCI having, expressly by repeal, been taken away, CCI was right in holding in the order dated 31st July, 2014 that the application filed by the appellants for recall of the order dated 15th April, 2014 was not maintainable.

8. We had however on 10th November, 2014 enquired from the counsels, that the Supreme Court in SAIL (supra) having held the power exercised by the CCI at the stage of Section 26(1) of the Act to be administrative in nature, whether not an authority/body exercising administrative power has an inherent right to review/recall its order, even in the absence of a specific power of review being conferred on it. It was prima facie felt by us on that date that it is only a person/body exercising judicial/quasi-judicial power who/which in the absence of the power of review being expressly conferred, is disentitled from exercising the said power.

9. It was for this reason only that it was felt as aforesaid that only this aspect needs to be adjudicated in these proceedings and for which reason, no counter affidavits were filed. The arguments thereafter also proceeded on this limited question only i.e. whether CCI has the power to recall/review an order passed by it of directing/causing investigation in exercise of powers under Section 26(1) of the Act.

10. Though in the light of the legal question aforesaid for adjudication, facts become irrelevant but still for the sake of completeness and to give a flavour of the grounds on which
the appellants had sought recall of the order dated 15th April, 2014, we may record that it was the case of the appellants in the application for recall that the respondent No. 2 complainant had procured the said order of investigation against the appellants by concealment and non disclosure of material facts that the advertisements run by and the services offered by the website (and which website had been suspended by the appellants) owned by a company namely M/s. Audney incorporated in Delaware, USA, claimed to be controlled by the respondent No. 2 complainant (based in India), were targeted to consumers in USA and Canada and were displayed only on domains with target users in USA and Canada and that users in India even if try to access these domains were automatically redirected to other domains targeted to users in USA and Canada and CCI thus lacked territorial jurisdiction. It was further the case of the appellants in the said recall application that there was no connection between the suspension of M/s. Audney's account by the appellants and the territory of India and the respondent No. 2 complainant had failed to demonstrate effect thereof on competition in the relevant market in India.

11. The respondent No. 1 CCI vide order dated 31st July, 2014 (supra) dismissed the said application of the appellants for recall as not maintainable observing, i) that the application is misconceived, ii) that the CCI vide order dated 15th April, 2014 had only prima facie formed a view after taking into consideration the material available on record, iii) when the investigations are pending before the DG, it would not be appropriate to deal with the issues raised by the appellants which can be effectively examined after the investigations are completed; iv) to accede to the prayers made in the application for recall would tantamount to review of the order dated 15th April, 2014 and which power had not been conferred upon the CCI, and, v) the appellants had failed to point out any provision of the Competition Act whereby such an application could be maintained before the CCI.

12. The contention of the senior counsel for the appellants in his opening arguments was:

(i) that the judgment of the Supreme Court in SAIL (supra) is not a bar to entertaining an application for recall of the order under Section 26(1) of the Act inasmuch as the Supreme Court itself in Para 31(2) of the said judgment has held as under:

"However, the Commission, being a statutory body exercising, inter alia, regulatory jurisdiction, even at that stage, in its discretion and in appropriate cases may call upon the party(s) concerned to render required assistance or produce requisite information, as per its directive. The Commission is expected to form such prima facie view without entering upon any adjudicatory or determinative process. The Commission is entitled to form its opinion without any assistance from any quarter or even with assistance of experts or otherwise. The Commission has the power in terms of Regulation 17 (2) of the Regulations (CCI (General) Regulations, 2009) to invite not only the information provider but even "such other person" which would include all persons, even the affected parties, as it may deem necessary. In that event it shall be "preliminary conference", for whose conduct of business the Commission is entitled to evolve its own procedure."

(ii) that a power to recall is different from a power of review and merely because by deletion of Section 37 of the Act, the power of review has been taken away does not mean that the power to recall the order also has been taken away;
(iii) that the power of recall exists irrespective of whether the jurisdiction being exercised is judicial, quasi-judicial or administrative;

(iv) Reliance was placed on:

(a) Calcutta Discount Company Ltd. Vs. Income-Tax Officer MANU/SC/0113/1960 : AIR 1961 SC 372 where it was held in the majority judgment that though a writ of prohibition or certiorari will not issue against an executive authority (in that case Income Tax Officer) but the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction.

It was reasoned that where such action of the executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts will issue appropriate orders or directions to prevent such consequences.

(b) Arun Kumar Vs. Union of India (2007) 1 SCC 732 laying down that the existence of a jurisdictional fact is sine qua non or condition precedent for the exercise of power by a Court of limited jurisdiction.

(c) Judgment dated 13th April, 2012 of the Division Bench of this Court in W.P. (C) No. 4489/1995 titled Samir Kohli Vs. Union of India where it was held that sans a statutory empowerment, a statutory or quasi judicial Tribunal cannot review or alter its decision but since the powers exercised by the Central Government under Section 41 of the Delhi Development Act, 1957 are not judicial or quasi judicial in nature but supervisory over the DDA and akin to a regulatory power, the same are not spent or exhausted with the passing of an order and lack of an express power in the Act to review does not bar the Central Government from doing so if the circumstances so warrant (We may notice that SLP(C) No. 15378/2012 preferred thereagainst is found to have been entertained with an ad-interim order of "status quo").

(d) Budhia Swain Vs. Gopinath Deb MANU/SC/0932/1999 : (1999) 4 SCC 396 reiterating that the Courts have inherent power to recall and set aside an order inter alia obtained by fraud practiced upon the Court or when the Court is misled by a party or when the Court itself commits a mistake which prejudices a party.

(e) M. Satyanandam Vs. Deputy Secretary to Government of A.P. MANU/SC/0530/1987 : (1987) 3 SCC 574 negativing/rejecting the contention that the Government cannot review its own order (in that case order rejecting release of premises was reviewed on ground of bona fide need under the Andhra Pradesh rent legislation).

(f) Reserve Bank of India Vs. Union Of India MANU/DE/2450/2005 : 128 (2006) DLT 41 where the question (before a Single Judge of this Court) was whether the Central Government exercising power as an appellate authority under the Banking Regulation Act, 1949 has power of review. Reliance on Section 21 of the General Clauses Act, 1897 (providing that where by any Central Act or Regulations, a power to issue notifications orders, rules, or bye-laws is conferred, then that power includes a power to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued) was rejected by relying on Indian National Congress (I) Vs. Institute of Social Welfare MANU/SC/0451/2002 : (2002) 5 SCC 685 holding that the
same was not applicable to quasi judicial authorities and Election Commission discharged quasi judicial power. It was held that in the absence of a rule authorizing Government to do so, reopening of closed proceedings was ultra vires and bad in law. It was however observed that the principle that the power to review must be conferred either specifically or by necessary implication is not applicable to decisions purely of an administrative nature as the Government must be free to alter its policy or its decision in administrative matters and cannot be hidebound by the rules and restrictions of judicial procedure though of course they are bound to obey all statutory requirements and also observe the principles of natural justice where rights of parties may be affected.

(g) R.R. Verma Vs. Union of India MANU/SC/0514/1980 : (1980) 3 SCC 402 also holding that the principle that the power to review must be conferred by statute either specifically or by necessary implication is not applicable to decisions purely of an administrative nature.

(h) S. Nagaraj Vs. State of Karnataka MANU/SC/0797/1993 : 1993 Supp (4) SCC 595 laying down that the power to rectify an order stems from the fundamental principle that justice is above all and is to be exercised to remove the error and not for disturbing finality and that even when there is no statutory provision in this regard such power is to be exercised to avoid abuse of process or miscarriage of justice.

(i) State of Uttar Pradesh Vs. Maharaja Dharmander Prasad Singh MANU/SC/0563/1989 : (1989) 2 SCC 505 holding that the Development Authority had competence to initiate proceedings to revoke the permission on the ground that permission had been obtained by misrepresentation and fraud and that the view that in the absence of authorization, the authority could not revoke or cancel the permission once granted is erroneous.

(j) Syngenta India Ltd. Vs. Union of India MANU/DE/0891/2009 : 161 (2009) DLT 413 laying down that administrative or statutory powers in aid of administrative functions imply flexibility and the need to review decisions taken and that unlike Courts, administrators and administrative bodies have to take decisions on the basis of broad, general policy considerations and that review as is understood in the functioning of the Courts is an entirely different concept. It was further held that importing elements from such concepts in administrative functioning would inject an avoidable rigidity in administrative process. It was yet further held that administrators and administrative bodies have power to make or change decisions, as the circumstances warrant, having regard to the nature of the power and the purpose for which it is granted.

(k) Union of India Vs. Narendra Singh MANU/SC/8204/2007 : (2008) 2 SCC 750 where the mistake of a department in promoting a person though he was not eligible and qualified was held to be correctable and it was observed that mistakes are mistakes and they can always be corrected by following due process of law and that employer cannot be prevented from applying the rules rightly and in correcting the mistake.

(l) United India Insurance Co. Ltd. Vs. Rajendra Singh MANU/SC/0180/2000 : (2000) 3 SCC 581 where it was held that the remedy of moving the Motor Accident Claims Tribunal for recalling the order on the basis of newly discovered facts amounting to fraud of high degree,
cannot be foreclosed in such a situation--no Court or Tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim.

13. The counsel for the respondent No. 1 CCI:

(a) contended that though earlier CCI had been conferred a power to review its order but the said power has been taken away with effect from 12th October, 2007;

(b) invited attention to our judgment in South Asia LPG Company Private Limited Vs. Competition Commission of India MANU/DE/2053/2014 : (it was informed that till then no appeal thereagainst had been preferred to the Supreme Court) holding that reasons given by the Supreme Court in SAIL (supra) for holding that no notice or hearing is required to be given to the person/enterprise informed/referred against before forming a prima facie opinion and directing investigation under Section 26(1) of the Act apply also to the stage under Section 26(7) of the Act which is also an initial stage and is not determinative in nature and substance and on the basis thereof contended that since investigation is but an initial stage and is not determinative in nature and substance, the appellants will not suffer any prejudice;

(c) contended the appellants in the guise of an application for recall are wanting a complete hearing at the stage of Section 26(1) of the Act and which is impermissible;

(d) contended that whatever the appellants are contending in their application for recall can be contended at a subsequent stage also;

(e) contended that the appellants in the recall application have not taken any plea of fraud but only of suppression of facts by the respondent No. 2 complainant;

(f) contended that the application for recall is in substance an application for review;

(g) invited attention to Kapra Mazdoor Ekta Union Vs. Birla Cotton Spinning and Weaving Mills Ltd. MANU/SC/0208/2005 : (2005) 13 SCC 777, in the context of a Court or a quasi judicial authority having jurisdiction to adjudicate on merits, laying down that its judgment or order can be reviewed on merit only if the Court or the quasi-judicial authority is vested with the power of review by express provision or by necessary implication and it is only procedural illegality which goes to the root of the matter and invalidates the proceeding itself and consequently the order passed, which can be reviewed; on the basis thereof it was contended that a perusal of the application of the appellants for recall showed that the appellants were not seeking any procedural review but a review on merits;

(h) invited attention to para Nos. 13 to 22 of one of the two opinions in the order dated 15th April, 2014 and to para Nos. 13 to 29 of the other opinion in the order dated 15th April, 2014 and on the basis thereof contended that it is not as if the CCI at that stage was oblivious of the aspect of territorial jurisdiction over the appellants and further contended that from a perusal of the said paragraphs, it is evident that CCI formed a prima facie opinion that it had territorial jurisdiction and has in the said orders dealt elaborately with the aspect of territorial jurisdiction;
(i) contended that the question whether the appellants had violated any of the provisions of the Competition Act or not is different from the question whether CCI has territorial jurisdiction over the appellants or not;

(j) contended that the issue of jurisdiction is a mixed question of law and fact;

(k) contended that the prejudice if any to the enterprise from being investigated against has to necessarily yield to larger public good;

(l) invited attention to Section 38 of the Competition Act conferring the CCI with the power to rectify any mistake apparent from the record in the orders passed by it, stipulating that while rectifying the mistakes, the order shall not amend any substantial part of the order and therefrom contended that it follows that the power of substantial review is expressly prohibited;

(m) to controvert the contention of the appellants that recall is different from review, placed reliance on:

(i) Asit Kumar Kar Vs. State of West Bengal MANU/SC/0062/2009 : (2009) 2 SCC 703 laying down that there is a distinction between a review petition and a recall petition; while in review petition the Court considers on merits where there is an error apparent on the face of the record; in a recall petition, the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to the affected party;

(ii) Rajeev Hitendra Pathak Vs. Achyut Kashinath Karekar MANU/SC/0969/2011 : (2011) 9 SCC 541 laying down in the context of Consumer Protection Act, 1986 that Tribunals are creatures of the statute and derive their power from the express provisions of the statute and that the District Forums and the State Commissions have not been given any power to set aside ex parte orders and the power of review and the powers which have not been expressly given by the statute cannot be exercised;

(iii) Haryana State Industrial Development Corporation Ltd. Vs. Mawasi MANU/SC/0511/2012 : (2012) 7 SCC 200 laying down that a power of review is a creature of the statute and no Court or quasi-judicial body or administrative authority can review its judgment or order or decision unless it is legally empowered to do so (we may however note that the Supreme Court in the said case was concerned with power of review of High Courts and the Supreme Court and which in civil cases is confined to grounds specified in Order 47 Rule 1 of the CPC);


(n) contended that since the Supreme Court in SAIL (supra) has held that the person/enterprise informed/complained/referred against has no right of hearing at the stage of Section 26(1) of the Act, the question of the appellants being denied the right of hearing at that stage or seeking review on that ground does not arise;

(o) placed reliance on the judgment of the Full Bench of the High Court of Punjab and Haryana in Deep Chand Vs. Additional Director, Consolidation of Holdings
MANU/PH/0572/1963 : laying down that an application for recall of an order is only another name for the power to review and a power to recall cannot be claimed as separate and distinct jurisdiction;

(p) made reference to the judgment of the Division Bench of the High Court of Bombay in Aamir Khan Productions Private Limited Vs. Union of India MANU/MH/1025/2010 : where in the context of challenge under Article 226 of the Constitution of India to the notices issued by CCI under Section 26(8) of the Act, it was held that the question whether CCI has jurisdiction to initiate proceedings in the facts and situation is a mixed question of law and fact which CCI is competent to decide and that the matter being still at the stage of further inquiry and CCI yet to take a decision in the matter, there was no reason to interfere; on the basis thereof contended that same is the position here;

(q) placed reliance on Ramesh B. Desai Vs. Bipin Vadilal Mehta MANU/SC/2996/2006 : (2006) 5 SCC 638 to contend that a mixed question of law and fact cannot form a preliminary objection and on D.P. Maheshwari Vs. Delhi Administration MANU/SC/0236/1983 : (1983) 4 SCC 293 to contend that the Supreme Court had deprecated the practice of entertaining challenge under Article 226 of the Constitution of India on preliminary objections and held that all questions should be allowed to be decided first;

(r) contended that investigation under Section 26(1) of the Act has been ordered against the appellants in as many as three other cases and the appellants have not assailed the said orders and there is no reason for the appellants to in the subject complaint case raise objection;

(s) invited attention to the definition of "consumer" in Section 2(f) of the Competition Act to contend that the respondent No. 2 is a consumer of the appellants and the situs of the customers of the respondent No. 2 is irrelevant;

(t) invited attention to Section 2(h) defining "enterprise" and to Section 32 of the Act to contend that the acts in violation of the provisions of the Act even if committed outside India have effect in India, the CCI would have territorial jurisdiction.

14. The counsel for the respondent No. 2 complainant, besides contending that the CCI has rightly exercised territorial jurisdiction, has contended:

(aa) that there is a distinction between exercise of administrative power and exercise of statutory power, even if administrative in nature;

(bb) that the judgments cited by the senior counsel for the appellants, on decisions taken in exercise of administrative power being reviewable by the decision making authority even in the absence of any specific power, would not be applicable to exercise of statutory power inasmuch as the power of the authorities exercising statutory power is controlled by the statute itself;

(cc) that the scheme of the Competition Act does not permit any review/recall;

(dd) that the scheme of the Competition Act does not permit any interference in the investigation once set in motion pursuant to an order under Section 26(1) thereof, not even by the CCI itself;

(ee) placed reliance on:
(i) Lal Singh Vs. State of Punjab MANU/PH/0266/1981 : 1981 CriLJ 1069 where the question for consideration before the Full Bench of the Punjab and Haryana High Court was whether State Government can review or recall its decision under Section 378 of the Code of Criminal Procedure (Cr.P.C.), 1973 to prefer an appeal against an order of acquittal, before its actual presentation in the High Court. It was held:

(A) that the power is administrative in nature and not quasi-judicial.

(B) that there is a distinction between decisions of the State Government which are purely administrative in nature, passed under the umbrella of executive power vested in it by Article 162 of the Constitution of India, and the exercise of power though administrative in nature but conferred by a specific provision of the statute itself.

(C) while the decisions in exercise of power of the former category are purely and inherently administrative and involve no sanctity or finality and are thus reviewable and recallable but a decision in exercise of power of the second category cannot be recalled or reviewed except in accordance with the provisions of the statute from which they derive their source-if such a provision provides expressly or by necessary intendment for a review and recall, then alone and in accordance therewith can the earlier exercise of the statutory power be reconsidered-in the absence of such a provision, there is no inherent power to repeatedly review or recall such a statutory administrative order or decision as the power once exercised exhausts itself.

(D) exercise of statutory power must be necessarily governed by the provisions of the statute itself and must carry with it a degree of finality;

(ii) State of Madras Vs. C.P. Sarathy MANU/SC/0054/1952 : AIR 1953 SC 53 and State of Bihar Vs. D.N. Ganguly MANU/SC/0111/1958 : AIR 1958 SC 1018 laying down that the power of the Government under Section 10 of the Industrial Disputes Act, 1947 (I.D. Act) is administrative in nature and since the said Act does not expressly confer any power on the Government to cancel or supersede a reference, no such power exists. It was further held that Section 21 of the General Clauses Act cannot be attracted and on a perusal of the provisions of the I.D. Act it was held that once a reference had been made, it is the Labour Court/Industrial Tribunal only which can exercise jurisdiction over the dispute referred.

(iii) Neelima Misra Vs. Harinder Kaur Paintal MANU/SC/0276/1990 : (1990) 2 SCC 746 laying down that an administrative function is called quasi-judicial when there is an obligation to adopt the judicial approach and to comply with the basic requirements of justice; where there is no such obligation, the decision is called purely administrative.

(iv) Kazi Lhendup Dorji Vs. Central Bureau of Investigation MANU/SC/0989/1994 : 1994 Supp (2) SCC 116 where the question for consideration was whether it is permissible to withdraw the consent given by the State Government under Section 6 of the Delhi Special Police Establishment Act, 1946. It was held that even if Section 21 of the General Clauses Act was held to be applicable, the same did not enable issuance of an order having retrospective operation and the revocation of consent could be prospective in operation only and would not affect matters in which action had been initiated prior to the revocation. It was further held that the investigation which was commenced by Central Bureau of Investigation (CBI) prior to
withdrawal of consent had to be completed and it was not affected by the said withdrawal of
the consent order and that the CBI was competent to complete the investigation and submit the
report under Section 173 Cr.P.C. in the competent Court. On the basis of this judgment, it was
contended that the investigation by the DG, CCI once ordered, has necessarily to be completed.

(v) Barpeta District Drug Dealers Association Vs. Union of India MANU/GH/1052/2012 : where a Single Judge of the Gauhati High Court was also concerned with the order of CCI of
dismissal of applications for recall of the notices issued by the DG, CCI pursuant to the order
under Section 26(1) of investigation, but on the ground of the CCI having not found any merit
in the said applications; the writ petitions were dismissed in view of the dicta of the Supreme
Court in SAIL (supra).

SCC 576 laying down that when an order is passed under Section 156(3) Cr.P.C., an
investigation must be carried out and interference in the exercise by the police of statutory
power of investigation, by the Magistrate, far less direction for withdrawal of any investigation
which is sought to be carried out, is not envisaged under the Cr.P.C.; the Magistrate's power in
this regard is limited and he has no power to recall his order.

holding that the power under Section 21 of the General Clauses Act cannot permit replacement
or reconstitution of a Commission under the Commissions of Inquiry Act, 1952;

(ff) that prior to the amendment with effect from 12th October, 2007 creating the
Competition Appellate Tribunal (CompAT), the powers exercised by CCI were judicial;
however with the creation of the CompAT, the powers exercised by CCI are purely
administrative; hence the legislature did not deem it necessary to vest a power of review in the
CCI exercising administrative powers only; reference in this regard is made to Brahm Dutt Vs.

(gg) that provisions in the form of Sections 43A, 44 and 45 exist in the Competition Act
for penalizing the complainant/informant for making a misleading/false statement;

(hh) that once investigation has been ordered in exercise of power under Section 26(1) and
till the submission of the report by the DG, CCI under Section 26(3) of the Act, there is no
power with the CCI to interfere with the investigation;

(ii) S. Nagraj (supra), Budhia Swain (supra) and United India Insurance Co. Ltd. (supra)
relied upon by the appellants have no application as the same were concerned with exercise of
adjudicatory and not purely administrative powers as under Section 26(1) of the Competition
Act.

We may record that the compilation of judgments handed over by the counsel for
respondent No. 2/complainant also contains copies of judgments in (i) New Central Jute Mills
Co. Ltd. Vs. Deputy Secretary, Ministry of Defence MANU/WB/0042/1966 : AIR 1966
325; (iii) Emperor Vs. Khwaja Nazir Ahmad MANU/PR/0007/1944 : AIR (32) 1945 PC 18;
(iv) Clariant International Ltd. Vs. Securities & Exchange Board of India
MANU/SC/0694/2004 : (2004) 8 SCC 524; (v) T.N. Seshan, Chief Election Commissioner of
India Vs. Union of India MANU/SC/2271/1995 : (1995) 4 SCC 611; (vi) Indian Bank Vs. Satyam Fibres (India) Pvt. Ltd. MANU/SC/0657/1996 : (1996) 5 SCC 550; and (vii) Shaikh Mohammedbhikhan Hussainbhai Vs. The Manager, Chandrabhanu Cinema MANU/GJ/0055/1986 : AIR 1986 Gujarat 209 but neither was any reference thereto made during the hearing nor is any reference thereto found in the written synopsis filed and it is not clear as to in what context these have been included. We thus do not feel the need to go into the same.

15. The counsel for the respondent No. 1 CCI added that Section 26(1) of the Competition Act is a unique provision and order whereunder has not even been made appealable and is merely a preparatory stage and the Supreme Court in SAIL (supra) has held that there is no right of hearing also to the person/enterprise complained/referred against at that stage. It was further contended that none of the judgments cited by the senior counsel for the appellants was concerned with such a statutory provision.

16. The senior counsel for the appellants in rejoinder contended:

(i) that in some other petitions under Article 226 of the Constitution of India particularly by Indian Oil Corporation Ltd. (IOCL) and by the Delhi Development Authority (DDA) against the orders under Section 26(1) of the Act, the learned Single Judge has granted stay of investigation.

(ii) that the Government, upon exercise of power of reference of dispute under Section 10 of the I.D. Act, becomes functus officio; the same is not the position under the Competition Act, where the CCI remains seized of the dispute even during investigation.

(iii) that the judgment of the Full Bench of the Punjab High Court in Lal Singh (supra) is contrary to the judgment of the Division Bench of this Court in Samir Kohli (supra).

(iv) that a statutory administrative power remains administrative in nature and cannot take a different hue.

17. We have weighed the position in law in the light of contentions aforesaid and particularly in the light of the judgment of the Supreme Court in SAIL (supra). The position which emerges may be thus crystallized.

(A) In the light of the judgment of the Supreme Court in SAIL (supra), the power exercised by CCI under Section 26(1) is administrative.

(B) A decision taken in exercise of administrative powers can be reviewed/recalled by the person/authority taking the said decision even in the absence of any specific power in that regard.

The only question is, whether the said rule is not applicable to decisions taken, though in exercise of administrative power, but conferred under a statute.

The ancillary question is, whether there is anything in the statute which indicates that an order under Section 26(1) ought not to be reviewed/recalled.
18. We, for the following reasons conclude that order of the CCI/direction to the DG, CCI in exercise of power under Section 26(1) of the Act, to cause investigation, is capable of review/recall:

(A) The CCI, before it passes an order under Section 26(1) of the Act directing the DG to cause an investigation to be made into the matter, is required to, on the basis of the reference received from the Central or the State Government or a statutory authority or on the basis of the information/complaint under Section 19 or on the basis of its own knowledge, form an opinion that there exists a prima facie case of contravention of Section 3(1) or Section 4(1) of the Act. Without forming such an opinion, no investigation by the DG can be ordered to be made. However, while forming such an opinion, as per SAIL (supra), CCI is not mandated to hear the person/enterprise referred/informed against.

(B) The statute does not provide any remedy to a person/enterprise, who/which without being afforded any opportunity, has by an order/direction under Section 26(1) been ordered/directed to be investigated against/into. Though ComPAT has been created as an appellate forum against the orders of CCI but its appellate jurisdiction is circumscribed by Section 53A of the Competition Act and no appeal is prescribed against the order of CCI under Section 26(1) of the Act. The said person/enterprise, in the absence of any remedy, has but to allow itself to be subjected to and participate in the investigation.

(C) The DG, during the course of such investigation, by virtue of Section 41(2) read with Section 36(2) of the Act has the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit in respect of, (i) summoning and enforcing the attendance of any person and examining him on oath, (ii) requiring the discovery and production of documents, (iii) receiving evidence on affidavit, (iv) issuing commissions for the examination of witnesses and documents, and (v) requisitioning public records or documents from any public office. The DG is further empowered by Section 41(3) read with Sections 240 and 240A of the Companies Act, 1956 to keep in its custody any books and papers of the person/enterprise investigated against/into for a period of six months and to examine any person on oath relating to the affairs of the person/enterprise being investigated against/into and all officers, employees and agents of such person/enterprise are also obliged to preserve all books and papers which are in their custody and power.

(D) Failure to comply, without reasonable cause, with any direction of the DG, under Section 43 of the Act has been made punishable with fine extending to rupees one lakh for each day of failure, subject to a maximum of rupees one crore.

(E) It would thus be seen that the powers of the DG during such investigation are far more sweeping and wider than the power of investigation conferred on the Police under the Code of Criminal Procedure. While the Police has no power to record evidence on oath, DG has been vested with such a power. Our experience of dealing with the matters under the Competition Act has shown that not only statement on oath of witnesses summoned during the course of investigation is being recorded but the said witnesses are being also permitted to be cross-examined including by the informant/claimant and which evidence as part of the report of the DG forms the basis of further proceedings before the CCI. Thus while in investigation by
Police under the Cr.P.C., the rule of audi alteram partem does not apply, there is no such embargo on the DG, CCI.

(F) Thus, investigation by DG, CCI tantamount to commencement of trial/inquiry on the basis of an ex parte prima facie opinion. Though the Supreme Court in Para 116 of SAIL (supra) has held that inquiry by CCI commences after the DG, CCI has submitted report of investigation but, in the facts of that case, had no occasion to consider that the DG, CCI in the course of investigation has powers far wider than of the Police of investigation. Para 29 of the judgment also notices that the counsels had addressed arguments on issues not strictly arising for adjudication in the facts of that case; however since it was felt that the said questions were bound to arise in future, the Supreme Court proceeded to deal with the said contentions also.

(G) The investigation by the DG ordered by the CCI thus stands on a different pedestal from a show cause notice, the scope of judicial review thereof, though lies, is very limited and from investigation/inquiry pursuant to an FIR by the Police which in some cases has been held to be not causing any prejudice and thus furnishing no cause of action for a challenge thereeto.

(H) Before registration of an FIR the concerned Police Officer is not to embark upon an inquiry and is statutorily obliged (under Section 154(1) of the Cr.P.C.) to register a case and then, if has reason to suspect (within the meaning of Section 157(1) Cr.P.C.) to proceed with the investigation against such person. Per contra, as noticed above, investigation by the DG under the Competition Act commences not merely on the receipt of reference/information but only after CCI has formed a prima facie opinion of violation of the provisions of the Act having been committed.

(I) In the absence of any statutory remedy against investigation commenced on the basis of a mere reason to suspect in the mind of the Police, writ petition under Article 226 of the Constitution of India for quashing of FIR has been held to be maintainable albeit on limited grounds. Reference in this regard may be made to State of Haryana Vs. Bhajan Lal MANU/SC/0012/1992 : 1992 Supp (1) SCC 335 arising from a writ petition for quashing of the entire criminal proceedings including the registration of the FIR. It was held, (i) that the Police do not have an unfettered discretion to commence investigation and their right of inquiry is conditioned by reason to suspect and which in turn cannot reasonably exist unless the FIR discloses the commission of such offence; (ii) that serious consequences flow when there is non-observance of procedure by the Police while exercising their unfettered authority; (iii) in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 of the Constitution under which, if the High Court is convinced that the power of investigation has been exercised by a Police Officer mala fide, the High Court can always issue a writ of mandamus restraining the Police Officer; (iv) the fact that the Cr.P.C. does not contain any provision giving power to a Magistrate to stop investigation by the Police, cannot be a ground for holding that such power cannot be exercised under Article 226; (v) the gravity of the evil to the community resulting from antisocial activities can never furnish an adequate reason for invading the personal liberty of a citizen except in accordance with the procedure established by the Constitution and the laws-the history of personal liberty is largely the history of insistence on observance of procedure-observance of procedure has been the bastion against wanton assaults on personal liberty over
the years under our Constitution, the only guarantee of personal liberty for a person is that he shall not be deprived of it except in accordance with the procedure established by law; (vi) that though investigation of an offence is the field exclusively reserved for the Police, whose powers in that field are unfettered so long as the power to investigate into the offences is legitimately exercised in strict compliance with the provisions falling under Chapter XII of the Code of Criminal Procedure and the Courts are not justified in obliterating the track of investigation when the investigating agency is well within its legal bounds; though a Magistrate is not authorized to interfere with the investigation or to direct the Police how that investigation is to be conducted but if the Police transgresses the circumscribed limits and improperly and illegally exercises investigatory powers in breach of any statutory provision causing serious prejudice to the personal liberty and also property of a citizen, then the Court on being approached has to consider the nature and extent of the breach and pass appropriate orders without leaving the citizens to the mercy of Police since human dignity is a dear value of our Constitution; (vii) no one can demand absolute immunity even if he is wrong and claim unquestionable right and unlimited powers exercisable up to unfathomable cosmos—any recognition of such power will be tantamount to recognition of divine power which no authority on earth can enjoy; (viii) if the FIR discloses no cognizable offence or the allegations in the FIR even if accepted in entirety do not constitute the offence alleged, the Police would have no authority to undertake an investigation and it would be manifestly unjust to allow the process of the criminal Court to be issued against the accused person and in such an eventuality the investigation can be quashed; (ix) in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 and if the High Court is convinced that the power of investigation has been exercised by the Police mala fide, the High Court can always issue a writ; (x) the High Court can quash proceedings if there is no legal evidence or if there is any impediment to the institution or continuance of proceedings but the High Court does not ordinarily inquire as to whether the evidence is reliable or not; (xi) if no offence is disclosed, an investigation cannot be permitted as any investigation, in the absence of offence being disclosed, will result in unnecessary harassment to a party whose liberty and property may be put to jeopardy for nothing; (xii) where there is an express legal bar engrafted in any of the provisions of the Cr.P.C. or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Cr.P.C. or the concerned Act, providing efficacious redress for the grievance of the aggrieved party, power under Article 226 could be exercised to prevent abuse of the process of any Court or otherwise to secure the ends of justice; (xiii) Similarly, where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, power under Article 226 of the Constitution of India can be exercised; (xiv) whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case; (xv) however, the power of quashing should be exercised sparingly and with circumspection.
(J) Supreme Court, in Para 87 of SAIL (supra) has held that the function discharged by CCI while forming a prima facie opinion under Section 26(1) is inquisitorial/regulatory in nature.

(K) We are of the opinion that once petitions under Article 226 for quashing of investigation under the Cr.P.C. have been held to be maintainable, on the same parity a petition under Article 226 would also be maintainable against an order/direction of the CCI of investigation under Section 26(1) of the Competition Act particularly when the powers of the DG, CCI of investigation are far wider than the powers of Police of investigation under the Cr.P.C.

(L) However, a petition under Article 226 of the Constitution of India against an order under Section 26(1) of the Act would lie on the same parameters as prescribed by the Supreme Court in Bhajan Lal (supra) i.e. where treating the allegations in the reference/information/complaint to be correct, still no case of contravention of Section 3(1) or Section 4(1) of the Act would be made out or where the said allegations are absurd and inherently improbable or where there is an express legal bar to the institution and continuance of the investigation or where the information/reference/complaint is manifestly attended with mala fide and has been made/filed with ulterior motive or the like.

(M) Just like an investigation by the Police has been held in Bhajan Lal (supra) to be affecting the rights of the person being investigated against and not immune from interference, similarly an investigation by the DG, CCI, if falling in any of the aforesaid categories, cannot be permitted and it is no answer that no prejudice would be caused to the person/enterprise being investigated into/against or that such person/enterprise, in the event of the report of investigation being against him/it, will have an opportunity to defend.

(N) The Supreme Court, in Rohtas Industries (supra) and the Calcutta High Court in New Central Jute Mills Co. Ltd. (supra), cited by the counsel for the respondent No. 2/complainant, also has held that an investigation against a public company tends to shake its credit and adversely affects its competitive position in the business world even though in the end it may be completely exonerated and given a character certificate and that the very appointment of Inspector (in that case under Section 237(b) of the Companies Act to investigate the Company's affairs) is likely to receive much press publicity as a result of which the reputation and prospects of the Company may be adversely affected.

(O) When the effect of, an order of investigation under Section 26(1) of the Competition Act can be so drastic, in our view, availability of an opportunity during the course of proceedings before the CCI after the report of the DG, to defend itself cannot always be a ground to deny the remedy under Article 226 of the Constitution of India against the order of investigation. Though we do not intend to delve deep into it but are reminded of the principle that in cases of violation of fundamental rights, the argument of the same causing no prejudice is not available (see A.R. Antulay Vs. R.S. Nayak (MANU/SC/0002/1988 : 1988) 2 SCC 602).

(P) Though the Supreme Court in Para 30 of SAIL (supra) has observed that an order of investigation does not entail civil consequences for any but had no occasion to consider the
effect of such an order or the aspect of challenge under Article 226 of the Constitution to an order under Section 26(1) of the Competition Act.

(Q) The reason which prevailed in SAIL (supra) for holding that a person/enterprise sought to be investigated into has no right to be heard at the stage of Section 26(1) of the Competition Act as is evident from paras 92 and 125 of the judgment, was that an order of investigation when called for is required to be passed expeditiously and without spending undue time. The view which we are taking, does not impinge on the said reasoning of the Supreme Court. Moreover, if there is found to be a right to approach the High Court under Article 226, the said right cannot be defeated on the ground of the same causing delay; human failings cannot be a ground for defeating substantive rights. The Supreme Court in Madhu Limaye Vs. State of Maharashtra MANU/SC/0103/1977 : (1977) 4 SCC 551 held that the bar introduced by sub-section (2) of Section 397 of the Cr.P.C. limiting the revisional power of the High Court, to bring about expeditious disposal of the cases finally would not be a bar to the exercise of the inherent power under Section 482 of the Cr.P.C. by the High Court. The same principle was reiterated in B.S. Joshi Vs. State of Haryana MANU/SC/0230/2003 : (2003) 4 SCC 675, though subsequently in Manoj Sharma Vs. State MANU/SC/8122/2008 : (2008) 16 SCC 1 it was stated that the same is permissible in rare and exceptional cases.

(R) Again, as aforesaid, CCI can order/direct investigation only if forms a prima facie opinion of violation of provisions of the Act having been committed. Our Constitutional values and judicial principles by no stretch of imagination would permit an investigation where say CCI orders/directs investigation without forming and expressing a prima facie opinion or where the prima facie opinion though purportedly is formed and expressed is palpably unsustainable. The remedy of Article 226 would definitely be available in such case.

(S) Even otherwise, the remedy under Article 226 of the Constitution of India has been held to be a part of the basic structure of our constitution. Reference if any required in this regard can be made to L. Chandra Kumar Vs. Union of India MANU/SC/0261/1997 : (1997) 3 SCC 261, Nivedita Sharma Vs. Cellular Operators Association of India MANU/SC/1538/2011 : (2011) 14 SCC 337 and Madras Bar Association Vs. Union of India MANU/SC/0875/2014 : (2014) 10 SCC 1. The rule of availability of alternative remedy being a ground for not entertaining a petition under Article 226 is not an absolute one and a petition under Article 226 can still be entertained where the order under challenge is wholly without jurisdiction or the like.

(T) A Division Bench of the Madras High Court also recently in The Tamil Nadu Film Exhibitors Association Vs. Competition Commission of India MANU/TN/0689/2015 : held that the bar in Section 61 of the Competition Act to the jurisdiction of Civil Courts in respect of any matter which the CCI or CompAT is empowered to determine does not apply to the jurisdiction of the High Court under Article 226 of the Constitution and which has been held to be part of the basic structure.

(U) We find a Division Bench of the Bombay High Court also, in Kingfisher Airlines Limited Vs. Competition Commission of India MANU/MH/1167/2010 : , to have held a writ petition under Article 226 of the Constitution of India to be maintainable against an order/direction for investigation under the Competition Act albeit for compelling reason or
when the reference/information/complaint does not disclose any contravention of Section 3(1) or Section 4(1) of the Act. However in the facts of that case no case for quashing of the order/direction for investigation was found to have been made out. We may notice that SLP(C) No. 16877/2010 preferred by Kingfisher Airlines Limited was dismissed as withdrawn on 24th September, 2010 in view of the judgment in SAIL (supra).

(V) A Single Judge of this Court in Asahi Glass India Vs. Director General of Investigation MANU/DE/2568/2009 : held a writ petition under Article 226 to be maintainable against an order/direction for investigation by the DG under the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) (which the Competition Act repeals vide Section 66 thereof), of course in cases of inherent lack of jurisdiction or abuse of process of law or jurisdictional issues.

(W) One of the modes in which an inquiry under Section 19 read with Section 26 can be set in to motion is on receipt of reference from the Central Government or State Government or a statutory authority. Under Section 31 of the erstwhile MRTP Act also the Government was empowered to make a reference to the MRTP Commission. A Division Bench of this Court in Colgate Palmolive India (P) Ltd. Vs. Union of India MANU/DE/0181/1979 : though held that the Government before making such a reference was not required to give an opportunity of hearing to the party against whom reference was made but also held that it did not mean that reference could be made on any whimsical ground and will be immune from challenge. It was held that if it can be shown that there was no material before the Government on the basis of which it could appear that a monopolistic trade practice was being practiced, the order of reference would be bad.

(X) We may notice that the Division Bench of the High Court of Bombay also in Aamir Khan Productions Private Limited supra cited by the counsel for the CCI did not hold a petition under Article 226 against the notices of CCI under Section 26(8) to be not maintainable and only in the facts of the case found no reason to interfere. Moreover, the said Division Bench also relied on Kingfisher Airlines Limited supra.

(Y) We are of the opinion that rather than this Court in exercise of jurisdiction under Article 226 of the Constitution of India in the first instance investigating whether an ex parte order under Section 26(1) of investigation can be sustained or not, without any findings of the CCI in this respect in the absence of the person/enterprise complained/referred against being present before the CCI at the time of making of the order under Section 26(1), it would be better if the said exercise is undertaken in the first instance by the CCI and this Court even if approached under Article 226, having the views of CCI before it.

(Z) Reference in this regard may be made to Vinod Kumar Vs. State of Haryana MANU/SC/1097/2013 : (2013) 16 SCC 293 where it was held that if a wrong and illegal administrative act can in the exercise of powers of judicial review be set aside by the Courts, the same mischief can be undone by the administrative authority by reviewing such an order if found to be ultra vires and that it is open to the administrative authority to take corrective measure by annulling the palpably illegal order.
(ZA) Deletion of Section 37 of the Competition Act as it stood prior to the amendment with effect from 12th October, 2007 cannot be a conclusive indication of the legislature having intended to divest the CCI of the power of review or an argument to contend that the power of review if found to be existing in the CCI de hors Section 37 has been taken away by deletion of Section 37. It is well nigh possible that the legislature deleted Section 37 finding the same to be superfluous in view of the inherent power of the CCI to review/recall its order. The Supreme Court in K.K. Velusamy Vs. N. Palanisamy MANU/SC/0267/2011 : (2011) 11 SCC 275 negatived such a contention in the context of deletion from the Civil Procedure Code of Order XVIII Rule 17A for production of evidence not previously known or evidence which could not be produced despite due diligence. It was held that the deletion of the said provision does not mean that no evidence can be received at all after a party closes evidence and that it only means that the amended Civil Procedure Code found no need for such a provision.

(ZB) The counsels for the respondents have not been able to controvert that an order/direction issued in the exercise of administrative powers (as the order of CCI under Section 26(1) has in SAIL (supra) been held to be) is inherently reviewable/recallable and have not brought to our notice/argued that there exists any specific bar in the Act or the Regulations framed thereunder to preclude the invocation of the inherent power to recall/review.

(ZC) The judgment of the Full Bench of the Punjab and Haryana High Court in Lal Singh (supra) carving out a distinction between administrative powers conferred by a statute and administrative powers conferred by Article 162 of the Constitution of India is indeed contrary to the judgment of the Division Bench of this Court in Samir Kohli (supra).

(ZD) The said judgment of the Full Bench of the Punjab and Haryana High Court is with reference to Section 378 of the Cr.P.C. and which is akin to Section 10 of the I.D. Act. The Government after taking the decision to prefer an appeal has nothing further to do in the matter. It is for this reason that it was held that the power of the Government under Section 378 exhausts itself upon a decision being taken. It is not so under Section 26(1) of the Competition Act. While the decision of the Government under Section 378 of the Cr.P.C. is final, the decision of the CCI under Section 26(1) to order investigation is on a prima facie view of the matter and on which CCI is yet to take a final decision. Thus the chief reason which prevailed with the Full Bench of the Punjab and Haryana High Court for holding that the competent authority in the Government after taking the decision having exhausted the power does not apply to Section 26(1) of the Competition Act. The same was the position in Ajay Singh (supra) cited by the counsel for the respondent No. 2 complainant.

(ZE) Moreover the political backdrop of the judgment of the Punjab and Haryana High Court cannot be lost sight of; there, a political party in power had taken a decision to prefer an appeal against the order of acquittal of a leader of the opposite political party and which came in power and sought to recall the said decision. The Court stepped in to prevent such change in decision for political considerations; however legal reasons were given.

(ZF) We have however considered whether even in the case of a decision under Section 378 of the Cr.P.C., converse would be true i.e. whether a decision not to prefer an appeal even if erroneous can attain finality. We shudder to think the consequences of holding so. The same
would lead to a push and pull for having such a decision taken and thereby preventing the right
minded in the Government from reversing the same.

(ZG) Per contra, the Division Bench of this Court in Samir Kohli (supra) was directly
concerned with the power of the Central Government to review an order/decision in exercise of
powers under Section 41(3) of the Delhi Development Act, 1957 in the absence of any
 provision thereof in the said statute. One of the contentions there also was that once such
power had been exercised, the Central Government could not invoke it again and had been
rendered functus officio and ceased to have jurisdiction to deal with the matter or to arrive at a
different conclusion and that DDA being a subordinate authority to the Central Government
could not question the decision of the Central Government or refuse to obey it. It was however
held:

(i) that the power of the Central Government under the said provision was a supervisory
one and not quasi-judicial in the sense traditionally understood.

(ii) there can be no doubt that whatever be the character of the order, it would be
reviewable under Article 226 of the Constitution of India.

(iii) that the Supreme Court in U.P. Power Corporation Ltd. Vs. National Thermal Power
Corporation Ltd. MANU/SC/0346/2009 : (2009) 6 SCC 235 had held that the power of
regulation conferred upon an authority with the obligations and functions that go with it and
are incidental to it are not spent or exhausted with the grant of permission.

(iv) reliance was placed on R.R. Verma and Maharaja Dharmander Prasad Singh (supra).

(v) reference was made to Section 21 of the General Clauses Act which empowers every
authority clothed with any statutory power to issue orders rescinding, varying or altering
previous orders or notifications.

(vi) that lack of an express mention in the statute to review or modify a previous order
under Section 41(3) does not bar the Central Government from doing so if the circumstances
so warrant.

(ZH) We have no reason to disagree with the judgment of the Coordinate Bench of this
Court and qua which no argument also was made and hence are unable to accept the view of
the Full Bench of the High Court of Punjab and Haryana.

(ZI) there is nothing in the scheme of the Competition Act to suggest that the CCI, after
ordering investigation is functus officio; on the contrary as aforesaid the order of investigation
is on a prima facie one sided view of the matter and even if report of the investigation finds
contravention of provisions of the Act, the CCI under Section 26(8) of the Act is to give an
opportunity of hearing to the person/enterprise against whom such report has been made and to
at that stage conduct a two sided inquiry.

(ZJ) The report of the DG, CCI is not binding on the CCI. The decision whether there is
contravention or not is admittedly to be taken after notice and it is well nigh possible that the
CCI may finally reject the report of the DG, CCI.
(ZK) The DG, CCI under Section 16 of the Competition Act, is only investigative arm of the CCI with the decision, whether there is any contravention of the provisions of the Act being required to be taken under Section 27 of the Act by the CCI.

(ZL) It is also not as if the investigative powers of the DG are unlimited. The DG, CCI in conducting the investigation is bound by the confines of investigation set out in the order of the CCI under Section 26(1) of the Act and is not empowered to conduct a roving and fishing inquiry. This is also evident from Section 26(7) of the Act empowering the CCI to direct the Director-General to cause further investigation into the matter and from Regulation 20(6) of the Competition Commission of India (General) Regulations, 2009, empowering CCI to direct DG to make further investigation. It is thus not as if once an order under Section 26(1) of the Act of investigation has been made, the investigation goes outside the domain of CCI.

(ZM) SAIL (supra) is a judgment only on the right of hearing of the person/enterprise complained/referred against at the stage of Section 26(1) of the Act. What it lays down is that CCI at that stage is not required to issue notice to such a person/enterprise. The question whether CCI is entitled to recall/review the order so made did not arise for consideration therein. It is settled principle of law (see Bhavnagar University Vs. Palitana Sugar Mill P. Ltd. MANU/SC/1092/2002 : (2003) 2 SCC 11, Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate MANU/SC/0043/2005 : (2005) 2 SCC 489, Inderpreet Singh Kahlon Vs. State of Punjab MANU/SC/2433/2006 : AIR 2006 SC 2571) that a judgment is a precedent on what falls for adjudication and not what can be logically deduced or inferred therefrom.

(ZN) The fact that said judgment holds that CCI is not required to hear the person complained/referred against before ordering investigation cannot lead to an inference that such a person even if approaches the CCI for recall/review of such an order is not to be heard.

(ZO) The senior counsel for the appellant is correct in his contention that the Supreme Court also in the said judgment has recognized the jurisdiction of the CCI to if so deems necessary give notice to the person/enterprise complained/referred against and hear him also before ordering investigation. It is thus not as if there is any lack of power or jurisdiction in the CCI to hear the person/enterprise complained/referred against at the stage of Section 26(1) of the Act.

(ZP) Mention in this regard may also be made of Section 29 of the Act providing procedure for investigation of combinations and which requires the CCI to before causing investigation by the DG, issue a notice to show cause to the parties to the combination as to why investigation should not be conducted. We have not been able to fathom any difference in the violations of Section 3(1) or 4(1) for inquiring into which procedure is provided under Section 26 and violations under Section 5 for inquiring into which procedure of inquiry under Section 29 is provided or to understand as to why a notice to show cause before investigation has been provided in Section 29 and not even an opportunity of hearing before investigation has been interpreted in Section 26. Unfortunately Section 29 remained to be noticed in this context in SAIL (supra).

(ZQ) Just like it is in the discretion of the CCI to hear or not to hear the person/enterprise complained/referred against at the stage of Section 26(1) of the Act, CCI cannot be held to be without jurisdiction to recall/review the order.
Notice in this regard may also be taken of Section 36 which empowers the CCI to in the discharge of its functions regulate its own procedure. The same also permits CCI, even if were to be held to be inspite of exercising administrative power under Section 26(1) having no inherent power of review/recall, to if so deems it necessary, entertain an application for review/recall.

CCI having dismissed the application of the appellants for review/recall under the assumption that the same was not maintainable, we refuse to go into the question, whether while doing so it also made some observations on the merits of the grounds urged for review/recall. It is now for the CCI to consider whether the application of the appellants discloses any grounds to, without requiring any investigation dislodge the prima facie opinion earlier formed by the CCI, while ordering investigation.

In our view, a mere filing of an application for review/recall would not stall the investigation by the DG, CCI already ordered. Ordinarily, the said application should be disposed of on the very first date when it is taken up for consideration, without calling even for a reply and without elaborate hearing inasmuch as the grounds on which the application for recall/review is permissible as aforesaid are limited and have to be apparent on the face of the material before the CCI. Even if CCI is of the opinion that the application for recall/review requires reply/further hearing, it is for the CCI to, depending upon the facts order whether the investigation by the DG, CCI, is to in the interregnum proceed or not.

In the light of the view which we have taken, the judgment cited by the counsel for CCI carving out a distinction between review and recall are of no avail.

The existence of a provision in the Competition Act for penalizing the complainant/informant for making a misdealing/false statement leading to investigation being ordered cannot take away the right of the person/enterprise ordered to be investigated against/into to apply for review/recall of the order of investigation, if in law found to be entitled thereto.

However having said that, we are not to be understood as conveying that in every case in which CCI has ordered investigation without hearing the person/enterprise complained/referred against, such person/enterprise would have a right to apply for review/recall of that order. Such a power though found to exist has to be sparingly exercised and ensuring that the reasons which prevailed with the Supreme Court in SAIL (supra) for negating a right of hearing to a person are not subverted.

Such a power has to be exercised on the well recognized parameters of the power of review/recall and without lengthy arguments and without the investigation already ordered being stalled indefinitely. In fact, it is up to the CCI to also upon being so called upon to recall/review its order under Section 26(1) of the Act to decide whether to, pending the said decision, stall the investigation or not, as observed hereinabove also. The jurisdiction of review/recall would be exercised only if without entering into any factual controversy, CCI finds no merit in the complaint/reference on which investigation had been ordered. The application for review/recall of the order under Section 26(1) of the Act is not to become the Section 26(8) stage of the Act.
21. We therefore answer the question framed hereinabove for adjudication in affirmative and hold that respondent No. 1 CCI has the power to recall/review the order under Section 26(1) of the Act but within the parameters and subject to the restrictions discussed above.

22. The respondent No. 1 CCI in the present case dismissed the application of the appellants for review/recall being of the opinion that it is not vested with such a power. The matter has thus to be remanded to the respondent No. 1 CCI for consideration of the application of the appellants for review/recall afresh.

23. We have considered whether during the said time, the investigation already ordered should remain stayed. We intend to direct the respondent No. 1 CCI to dispose of the said application within a definite time schedule and since during the pendency of these proceedings, the respondent No. 1 CCI had assured that in the meanwhile investigation would not be concluded and no precipitative steps would be taken, we deem it appropriate that the said arrangement continues till the fresh decision of the said application for review/recall by the respondent No. 1 CCI.

24. We accordingly dispose of the appeal and the writ petition by directing the respondent No. 1 CCI to consider the application of the appellants for review/recall afresh, however within two months hereof. The parties to appear before the Secretary, CCI on 12th May, 2015 at 1100 hours for fixing a date of hearing of the said application for recall/review.

No costs.

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

1. The present information has been filed by M/s Best IT World (India) Private Limited (hereinafter, the ‘Informant’) under section 19(1)(a) of the Competition Act, 2002 (hereinafter, the ‘Act’) against M/s Telefonaktiebolaget L M Ericsson (Publ) (hereinafter, the ‘Opposite Party No. 1’) and M/s Ericsson India Private Limited (hereinafter, the ‘Opposite Party No. 2’) [collectively hereinafter, the ‘Opposite Parties’/ ‘Ericsson’] alleging, inter alia, contravention of the provisions of the section 4 of the Act in the matter.

2. The Informant is stated to be an Indian IT & Electronics company incorporated under the Companies Act, 1956 and is engaged in the business of import and distribution of computer peripherals, mobile handsets, tablets etc. The Informant started its business operations as a computer accessories supplier in 2001 under the brand name “iBall” and entered into the mobile phone market in November 2010 and currently provides a wide assortment of mobile phones. The Opposite Party No. 1 is a company incorporated under the laws of Sweden and it offers services, software and infrastructure in „Information and Communication Technology” for telecom operators and other industries including licensing of intellectual property (“IP”) as well as networking equipments, mobile and fixed broadband, operations and business support solutions, cable TV, internet protocol television, video systems etc. The Opposite Party No. 2 is a 100% subsidiary of the Opposite Party No. 1 and is engaged in the business of manufacturing and sale of telecom equipment, network equipment, software and other services in India.

3. As per the Informant, the Opposite Party No. 1 is one of the world’s largest telecommunication companies with a global market share of 38% and also one of the largest holders of Standard Essential Patents (“SEPs”) in the mobile phone and wireless industries with approximately 33,000 granted patents as of 2012, out of which 400 were granted in India.

4. It is submitted that in November 2011 Ericsson issued a letter to the Informant, stating that they have reviewed the Informant’s product portfolio and it believes that patents of Ericsson have been infringed, which were directly relevant to the Informant’s past, present and future GSM (Global System for Mobile Communications) and/or WCDMA (Wideband Code Division Multiple Access) compliant products and requested for a meeting to discuss the issue. However, Ericsson did not specify any patents which were directly relevant to the Informant’s products that were infringed. During the meeting, it was communicated to the Informant that some of its handset models were violating the patents of Ericsson and the Informant should enter into a global patent licensing arrangement (“GPLA”) for all the patents of Ericsson. The
Informant expressed its willingness to enter into GPLA if Ericsson could identify the patents which were alleged to have been infringed, such patents were valid and enforceable in India and the terms of such arrangement were reasonable and not onerous. Ericsson informed the Informant that a non-disclosure agreement ("NDA") would have to be entered into before proceeding further in the matter. The Informant has stated that Ericsson refused to share any information about the patent infringements until it executes the NDA.

5. It is submitted that an email was sent by Ericsson to the Informant on 29.11.2011 along with a draft NDA for further discussion. As per the Informant, Ericsson, through NDA, imposed very strict terms such as ten years confidentiality in relation to disclosure of any information by either party, confidential information is to be shared only with an affiliated company and all disputes are to be settled by way of arbitration in Stockholm, Sweden. The Informant had raised several concerns regarding the above said terms and conditions of the NDA and further highlighted that it is willing to enter into a license agreement with Ericsson as per FRAND (fair, reasonable, and non-discriminatory) terms and within the jurisdiction of Indian courts. In July 2012, it was communicated to the Informant by Ericsson that the proposed license would cover not only its future sales but also previous sales. The Informant has alleged that despite repeated requests for adopting lenient terms and conditions in the NDA and to provide details about alleged patent violations on the part of the Informant, Ericsson did not address these issues.

6. The Informant has highlighted that refusal by Ericsson to identify the standard essential patents so infringed by the Informant; threat of patent infringement proceedings; coaxing the Informant to enter into one sided and onerous NDA; tying and bundling of patents irrelevant to the Informant’s products by way of GPLA; demanding unreasonably high royalties by way of a certain percentage value of handset as opposed to the cost of actual patent technology used etc are violative of the provisions of section 4 of the Act. It has been alleged that the conduct of the Opposite Parties is in contravention of the provisions of section 4 of the Act. Accordingly, the Informant has prayed before the Commission to conduct, inter alia, necessary investigation on the abuse of dominant position by the Opposite Parties.

7. The Commission considered all the material available on record and heard the arguments advanced by the advocates appearing on behalf of the Informant.

8. The Commission observes that Ericsson is a member of a Standard Setting Organisation namely, European Telecommunications Standards Institute ("ETSI"), a non-profit organization with more than 700 member organizations spread across 62 countries from 5 continents and is officially recognized by the European Union as a European Standards Organization. ETSI produces globally applicable standards for Information and Communication Technologies i.e., fixed, mobile, radio, converged, broadcast and internet technologies, some of which are covered by patents held by ETSI or ETSI members like Ericsson. Standardisation is a voluntary process wherein a number of market players reach a consensus for setting „common technology standards” under the support of a Standard Setting Organisation, which in the present case is ETSI. In simple terms, standardisation is the process
of developing and implementing technical standards. Such technological standards are termed as SEP. Once a patent is declared as SEP, it faces no competition from other patents until that patent becomes obsolete due to new technology/inventions.

9. As per clause 6 of ETSI IPR policy, an IPR owner is required to give irrevocable written undertaking that it is prepared to grant irrevocable licences on FRAND terms to be applied fairly and uniformly to similarly placed players. The patent owner has to grant irrevocable license to: 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.

10. FRAND license are primarily intended to prevent Patent Hold-up and Royalty Stacking. The usefulness of complex products and services often depends on the interoperability of components and products of different firms. To enhance the value of these complex products, competing manufacturers, customers and suppliers participate in standard-setting practices to set technological standards for use in designing products or services. When such standard technologies are protected by patent rights, there is a possibility for “hold-up” by the patent owner which means a demand for higher royalties or more costly or burdensome licensing terms than could have been obtained before the patent was so declared as a SEP. Hold-up can undermine the competitive process of choosing among technologies and undermine the integrity of standard-setting activities. Ultimately, the high costs of such patents get transferred to the final consumer. Similarly, royalty-stacking occurs when a single product uses many patents of same or different licenses. As such, from the perspective of a firm manufacturing the product, all the different claims for royalties need to be added or “stacked” together to determine the total burden of royalty to be borne by the manufacturer.

11. It is noted that Ericsson has declared to ETSI that it has patents over 2G, 3G and EDGE technology and these patents are SEPs. As per its undertakings, Ericsson is required to offer and conclude licenses with patent seekers on FRAND terms. Ericsson's patents have also been accepted by Department of Telecommunication, India (‘DoT’) and every telecom service provider in India is required to enter into a Unified Access Service License Agreement with DoT. As per letter dated 03.10.2008, DoT has directed that all GSM/CDMA network equipments imported into India should also meet the standards of international telecommunication technology as set by International Telecommunication Union, Telecommunication Engineering Center and International Standardization bodies such as 3GPP, 3GPP-2, ETSI, IETF, ANSI, EIA, TIA, IS.

12. In view of the foregoing, the Commission is of the view that SEPs owned by Ericsson are in respect of the 2G, 3G and 4G patents used in smart phones, tablets etc., which fall under GSM technology therefore, *prima facie*, the relevant product market to be considered in the instant case appears to be the market of “Standard Essential Patents for 2G, 3G and 4G technologies in GSM standard compliant mobile communication devices”. Considering the nature of the relevant product and pan India presence of Ericsson, the relevant geographic market in this case appears to be the territory of India. Accordingly, the relevant market to be
considered in the instant case has to be the market of “Standard Essential Patents for 2G, 3G and 4G technologies in GSM standard compliant mobile communication devices in India”.

13. From the perusal of the Information and the documents filed by the Informant it is apparent that Ericsson has 33,000 patents to its credit, with 400 of these patents granted in India. Ericsson is also the largest holder of SEPs used in mobile communications like 2G, 3G and 4G patents used for smart phones, tablets etc. Further, since there is no other alternate technology available in the market in India, Ericsson enjoys a complete dominance over its present and prospective licensees in the relevant market. Thus Ericsson, prima facie, appears to be dominant in the relevant market.

14. The allegations made in the information concerning royalty rates make it clear that the practices adopted by Ericsson appear to be discriminatory as well as contrary to FRAND terms. The royalty rate being charged by Ericsson has no linkage to the functionality of the patented product rather it has linkage to the final price of the manufactured product in which the patent is being used. Ericsson seems to be acting contrary to the FRAND terms by imposing royalties linked with the cost of manufacturing product. Charging of two different license fees per phone for use of the same technology, prima facie, appears to be discriminatory. Further, the terms of the NDA is contrary to the spirit of applying FRAND terms fairly and uniformly to similarly placed playe. The Commission observes that forcing a party to execute NDA and imposing excessive and unfair royalty rates, prima facie, amount to abuse of dominance in violation of section 4 of the Act. Also, imposing a jurisdiction clause debarring the Informant from getting the disputes adjudicated in the country where both the parties are engaged in doing business and vesting the jurisdiction in a foreign land, prima facie, appears to be unfair.

15. Moreover, the allegations brought forward by the Informant are similar to the previous cases i.e., Case No. 50 of 2013 [Micromax Informatics Limited V. Telefonaktiebolaget LM Ericsson (Publ)] and Case No. 76 of 2013 [Intex Technologies (India) Limited V. Telefonaktiebolaget LM Ericsson (Publ)] wherein the Commission was of the prima facie view that the conduct of Ericsson amounts to violation of the provisions of section 4 of the Act and had directed the Director General („DG“) to conduct an investigation.

16. In the light of the above analysis, the Commission finds that a prima facie case of contravention of the provisions of section 4 of the Act is made out against the Opposite Parties and it is a fit case to be investigated by the DG. Accordingly, the Commission directs the DG to cause an investigation into the matter and to complete the investigation within a period of 60 days from receipt of this order.

17. The Commission, however, makes it clear that nothing stated herein shall tantamount to an expression of opinion on the merits of the case and the DG shall conduct the investigation without being influenced by any observation made herein. In case the DG finds the conduct of the Opposite Parties in violation of the Act, the DG shall also investigate the role of the persons who were responsible for the conduct of the Opposite Parties so as to fix the
responsibility of such persons under section 48 of the Act.

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

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