COMPETITION COMMISSION OF INDIA

Case Nos. 36 & 82 of 2014

<u>Case No. 36 of 2014</u>

<u>In Re</u>:

Fx Enterprise Solutions India Pvt. Ltd. **Informant**

<u>And</u>

Hyundai Motor India Limited **Opposite Party**

<u>WITH</u>

<u>Case No. 82 of 2014</u>

<u>In Re:</u>

St. Antony's Cars Pvt. Ltd. **Informant**

<u>And</u>

Hyundai Motor India Limited **Opposite Party**

<u>CORAM</u>

Mr. Devender Kumar Sikri
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. Justice G. P. Mittal
Member

Appearances: Shri Saraswat Mohpatra, Advocate with Shri G. L. Goyal, Manager for Fx Enterprise Solutions India Pvt. Ltd.

Shri K. K. Sharma with Shri Bunmeet Singh Grover, Advocates for St. Antony's Cars Pvt. Ltd.

Shri Karan Singh Chandhiok, Shri Vikram Sobti, Shri Aroon Menon and Shri Mathew George, Advocates alongwith Shri Aditya Sharma, Senior Manager (Legal) and Shri Sukomal Satyen, Assistant Manager (Legal) for Hyundai Motor India Ltd.

Order under Section 27 of the Competition Act, 2002

1. The information in Case No. 36 of 2014 was filed by Fx Enterprise Solutions India Pvt. Ltd. ('Informant No. 1'/ Informant-1/ FX) against Hyundai Motor India Limited ('the Opposite Party'/ HMIL/ OP) alleging contravention of the provisions of Section 3 of the Act.

2. The information in Case No. 82 of 2014 was filed by St. Antony's Cars Pvt. Ltd. ('Informant No. 2'/ Informant-2) against HMIL alleging *inter alia* contravention of the provisions of Section 3 of the Act.

Facts

3. The facts and allegations, in brief, as gathered from Information - 1 and Information - 2 filed by the Informants with the Commission, may be briefly noted:
4. HMIL was incorporated under the provisions of the erstwhile Companies Act, 1956, on 06.05.1996, at Irrungattukottai, Sriperumbudur Taluk, Kancheepuram District, Tamil Nadu, India, pursuant to the approval granted to Hyundai Motor Company (HMC) by the Foreign Investment Promotion Board on 11.03.1996, for setting up a wholly owned

subsidiary in India. HMIL is engaged in the sale and distribution of motor vehicles and its parts in India. HMIL is a 100% owned subsidiary company of HMC. HMC was incorporated in 1967 under the laws of Republic of Korea. It manufactures and distributes motor vehicles and their parts. The shares of HMC have been listed on the Korea Stock Exchange since 1974, and its global depositary receipts have been listed on the London Stock Exchange and Luxembourg Stock Exchange.

5. HMIL has an installed capacity of 6,30,000 cars *per annum* and an annual turnover of about INR 27,000 Crores, as on 31.03.2015.It has approximately 14,000 direct and indirect employees and its car manufacturing factory is located at Sriperumbudur, Tamil Nadu.

6. Informant-1 or FX, is a company incorporated on 11.02.1997, having its registered office at 403, Nipun Tower, Plot No. 15, Karkardooma Community Centre, Karkardooma, Delhi- 110092. FX had a Hyundai dealership for sale and service of Hyundai cars (being cars manufactured by the OP from May 2006 to May 2014). Shri Ankit Agrawal is the Managing Director of FX. Pursuant to HMIL's advertisement calling for applications for Hyundai dealership in Faridabad territory in 2005, Informant-1 responded to the advertisement and submitted its application. Further in multiple meetings held with the officers of HMIL, Informant-1 purchased a plot in Faridabad to meet the standards required by HMIL and commenced a dealership for sales and services of spare parts of Hyundai cars from May 2006. Informant-1 submitted a notice of termination of dealership to HMIL on 25.04.2014.

7. It is alleged in Information - 1 that the OP enters into exclusive dealership arrangements with its dealers, and dealers are required to obtain prior consent of the OP before taking up dealerships of another brand. It is further alleged that HMIL's dealers are bound to procure spare parts, accessories and all other requirements, either directly from OP or through vendors approved by the OP. It is further alleged that the

OP also imposes a "Discount Control Mechanism" through which dealers are only permitted to provide a maximum permissible discount and the dealers are not authorised to give discount which is above the recommended range. This is alleged to amount to "resale price maintenance" in contravention of Section 3(4)(e) of the Act. It is also alleged that HMIL is responsible for price collusion amongst competitors through a series of "hub - and - spoke" arrangements. Informant-1 has alleged that HMIL perpetuates hub and spokes arrangement, wherein bilateral vertical agreements between supplier and dealers and horizontal agreements between dealers through the role played by a common supplier, results in price collusion. Finally, it is alleged that HMIL has control over the sources of supply for the dealer's products and ties the purchase of desired cars to the sale of high-priced and unwanted cars to its dealers and HMIL designates sources of supply for complementary goods for dealers as well as, which result in a "tie-in" arrangement in violation of Section 3(4)(a) of the Act.

8. St. Antony or Informant-2 is a private limited company involved in, *inter alia*, distribution of passenger cars, having its registered address at XII/268, Mundakkal, S. N. College Junction, Kollam Main Post Office, Kollam, Kerala -69100. Informant-2 had entered into a dealership agreement dated 24.08.2009 with the OP. Under the terms of the said agreement, Informant-2 was appointed as a non-exclusive dealer of HMIL in the territory of Kollam, Trivandrum. The term of the Dealership Agreement (Dealership Agreement) was for a period of three years from the date of execution. It is stated that Clause 5(iii) of the agreement prohibited the dealer from investing in any other business, particularly in dealerships with competitors of the OP. It has been further submitted that, pursuant to the said clause, the dealers of the OP could not take dealerships of competitors of the OP, even if the dealership was a completely separate entity from the dealership of the OP. It has been alleged that Clause 5(iii) of the Dealership Agreement amounts to "refusal to deal" in contravention of the provisions Section 3(4)(d) of the

Act.

9. Based on the above averments and allegations, the Informants have filed the instant informations before the Commission.

Directions to the DG

10. In Case No. 36 of 2014 filed by Informant-1, after considering the information and material available on record, the Commission *vide* its order dated 12.09.2014 passed under Section 26(1) of the Act (First *Prima Facie* Order), held that *prima facie* a case of contravention of the provisions of Section 3 of the Act is made out against the OP and directed the Director General (DG) to cause an investigation to be made into the matter and submit a report.

11. In Case No. 82 of 2014 filed by Informant-2, after considering the information and material available on record, the Commission *vide* its order dated 20.11.2014 passed under Section 26(1) of the Act ("Second Prima Facie Order"), also held that *prima facie*, a case of contravention of the provisions of Section 3(4) read with Section 3(1) of the Act is made out against the OP and directed the DG to cause an investigation to be made into the matter and submit a report. The Commission further ordered that Case No. 36 of 2014 be clubbed with Case No. 82 of 2014, as both cases involved similar allegations against the same OP.

12. The DG, after receiving directions from the Commission, investigated the matter and after seeking due extensions, submitted a common investigation report in both the cases on 21.04.2016.

Investigation by the DG

13. The DG has observed that passenger cars manufactured and sold by different players are interchangeable and substitutable by consumers in

view of their utility and therefore, defined a broad relevant market as "Sale of Passenger Cars in India". The DG further sub-divided this relevant market and defined separate relevant market(s) for each of the contraventions identified:

(i) *Refusal to Deal*: For analysing Clause 5(iii) of the Dealership Agreement concerning refusal to deal contravention, the DG defined the relevant market as "*Inter-Brand Sale of Passenger cars in India*";

(ii) *Resale Price Maintenance* (RPM): For the purposes of analysing whether the OP imposes a (maximum) resale price, the DG defined the relevant market as "*Intra Brand Sale of Hyundai Brand of Cars in Delhi and NCR*";

(iii) *Tie-in arrangements*:

a) In determining whether the OP imposes a tie-in arrangement with respect to the sale of CNG kits, the DG defined the relevant market as "*Sale of CNG Kits for Hyundai Brand of Cars in Delhi and NCR*";

b) For determining whether the OP imposes a tie- in arrangement for lubricants, the DG defined the relevant market as "*Sale of Lubricants for Hyundai Brand of Cars in India*"; and

c) To analyse whether the OP imposes a tie-in arrangement in relation to obtaining car insurance, the DG defined the relevant market as "*Insurance for Hyundai Brand of Cars in India*".

(iv) Finally, relying upon the Commission's decision in *Shri Shamsher Kataria* v. *Honda Siel Cars India Limited & Ors.* (Case No. 03 of 2011), the DG stated that the Commission has defined 3 segments of the automobile market, *viz.*: (a) the primary market consisting of manufacturing and sale of passenger vehicles; (b) the secondary market or aftermarket for each brand of spare parts; and (c) an aftermarket for each brand of repair services. As the issue of tie-in arrangement of the OP with regard to the sale of CNG Kits, lubricants and insurance policies and services also falls within the scope of aftermarket services, the DG defined the product aftermarket as "*after sales services of Hyundai Brand of Cars*". However, for this relevant product market, the DG defined two different relevant geographic markets:

a) *For CNG Kit*: Geographic market is defined as "*Delhi & NCR*", as such Kits are primarily used in Delhi & NCR; and

b) *For lubricant and insurance policy*: Geographic market is defined as "*entire territory of India*", as the arrangement has pan-India ramifications.

14. The DG then found that the OP is 100% dominant in the aftermarket for after sale services of Hyundai brand of cars.

15. The DG noted that Clause 5(iii) of the Dealership Agreement and arrangements incidental thereto, require the OP's dealers to seek 'prior permission' from the OP for investing into any business other than Hyundai dealership. This has been held by the DG to amount to an 'exclusive supply arrangement' in contravention of Section 3(4)(b) of the Act and 'refusal to deal' in contravention of Section 3(4)(d) read with Section 3(1) of the Act.

16. The DG further found that strict discount control mechanism imposed by OP on the cars sold through its dealers is an arrangement of implementing resale price maintenance. The DG found that the OP penalizes dealers who have breached the discount control mechanism

and rewards dealers that participate in the same. Such resale price maintenance practised by the OP has been found by the DG to contravene Section 3(4)(e) read with Section 3(1) of the Act.

17. The DG also found that the OP has entered into tie-in arrangements with regard to sale of cars and: (a) supply and retrofitting of CNG kits; (b) sale and supply of lube oils; and (b) sale of insurance policies and services incidental thereto. The DG found that these tie-in arrangements amount to exclusive supply agreement and refusal to deal and therefore, it found the OP to have violated the provisions of Sections 3(4)(b) and 3(4)(d), respectively, read with Section 3(1) of the Act.

18. In addition to the finding that the OP has tied the manufacture and sale of cars to supply and retrofitting of CNG kits, supply of lube oils, and provision of insurance policies, the DG found that these actions also amount to abuse of dominance, in contravention of Section 4 of the Act. The DG found that the OP is dominant in the aftermarket for service of its cars and has:

   (i) imposed unfair and discriminatory conditions in the sale of CNG kits and prefixed the prices of CNG Kits and retrofitting thereof at discriminatory higher prices and also indulged in practices resulting in denial of market access to other duly approved CNG kits suppliers, in contravention of Sections 4(2)(a)(i), 4(2)(a)(ii) and 4(2)(c) of Act, respectively; and

   (ii) imposed unfair and discriminatory conditions in the sale and supply of lubricants and also indulged in practices resulting in denial of market access to other oil companies dealing with recommended grade of lube oils, in contravention of Sections 4(2)(a)(i) and 4(2)(c) of Act, respectively.

19. The DG, however, did not find any contravention of the provisions of Section 3(4)(a) of the Act in respect of the allegations that HMIL was mandating purchase of high-end cars as a condition for purchase of fast moving cars by the dealers.

20. Based on the evidences/material/statements of parties discussed in the DG Report, it was concluded by the DG that the OP has violated the provisions of Sections 3(4)(a), 3(4)(b), 3(4)(d) and 3(4)(e) read with Section 3(1) of the Act, and Sections 4(2)(a)(i), 4(2)(a)(ii) and 4(2)(c) of the Act.

Consideration of the DG report by the Commission

21. The Commission in its ordinary meeting held on 07.06.2016 considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their respective replies/ objections thereto. Thereafter, the Commission heard the arguments of the parties on 01.02.2017 and 02.02.2017 and decided to pass an appropriate order in due course after conclusion of the arguments.

Replies/ Objections/ Submissions of the Parties

22. The parties filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions.

Replies/ objections/ submissions of the Informants

23. The Informant in C. No. 82 of 2014 supported the findings of the DG Report. The Informant in C. No. 36 of 2014 did not file any reply to the DG Report.

Replies/ objections/ submissions of the OP (HMIL)

24. At the outset, HMIL raised various preliminary objections. It was argued that the DG unilaterally expanded the scope of investigation by making

findings with respect to contravention of Section 4 of the Act and the DG does not have *suo moto* powers to investigate. The DG cannot embark on an investigation that is beyond the *prima facie* determination made by the Commission and therefore, the mandate of the DG would be limited to investigation *qua* the allegations made in respect of contravention of Section 3 of the Act and any investigation in respect of contravention of Section 4 of the Act would plainly be *ultra vires* besides being in violation of the principles of natural justice.

25. It was also alleged that the DG did not inform and seek comments from HMIL about the delineation of relevant market in relation to Section 3 of the Act. Besides, relying upon the evidence and oral statements of the witnesses without providing HMIL the opportunity to rebut the same, has rendered the DG report inadmissible in law.

26. It was also argued that the issues raised in the present cases have already been decided by the Commission in favour of HMIL. It was submitted that the Commission has previously dealt with identical issues in the case of *K. Rajarajan* v. *Mahindra and Mahindra & Ors.* (Case No. 20 of 2015) and *Nanawati Wheels Pvt. Ltd.* v. *HMIL* (Case No. 67 of 2013). More specifically, it has been held by the Commission that Clause 5 (iii) of the Dealership Agreement is in compliance with the Act. This decision of the Commission has achieved finality and therefore should not be interfered with.

27. Objection was also taken to reliance on e-mails provided by the Informants without annexing the mandatory certificate under Section 65B of the Evidence Act, 1872.

28. Further, it was argued that order of the Commission in *Shamsher Kataria* v. *Honda Siel & Ors.*, Case No. 03 of 2011 cannot be relied upon as the matter is *sub judice.* It was prayed that any observations made on relevant market or specific conduct based on the above case

must not colour the mind of the Commission in the present cases.

29. It was alleged that the Informants have not approached the Commission with clean hands as they have not produced the communications between the Informants and HMIL which clearly shows *mala fide* conduct of the Informants.

30. It was contended that the issues raised in the present cases are contractual in nature and the remedy, if any, for the Informants lies under the provisions of the Indian Contract Act, 1872. Further, it was pointed out that the Dealership Agreement entails a provision for arbitration and as such, the proper course for remedying the grievance of the Informants shall be by appointment of an arbitrator under the agreement.

31. Adverting to the merits of the DG findings, it was submitted that the DG report configured several independent relevant markets in a constricted manner which is contradictory to the prevailing economic conditions and consumer behaviour patterns. Important factors like substitutability and interchangeability have not been considered by the DG.

32. On the DG's finding that Clause 5(iii) of the Standard Provisions of the Dealership Agreement between HMIL and its dealers are in the nature of '*Exclusive supply agreement*' and '*refusal to deal*' in terms of Section 3(4)(b) and Section 3(4)(d) of the Act respectively, it was submitted that it is merely a case of consensual agreement and the Informants were not put under compulsion at any time. HMIL dealers are already running dealerships of competing manufacturers. There is no evidence adduced by either of the Informants showing that HMIL was restricting either of them from acquiring the dealership of a competing manufacturer. It was pointed out that over 100 dealers of HMIL are engaged in such activities and many of them have not even informed HMIL about the same. HMIL has not taken any action against them.

33. It was further argued that HMIL dealers operate dealerships of competing manufacturers and that the statement of the representative of Federation of Automobile Dealers Associations (FADA) relied upon by the DG imputing the existence of an unwritten rule that car manufacturers (OEMs) do not allow an existing dealer of their brand to take dealerships of competing brands, is unsubstantiated and devoid of merit.

34. The purpose of Clause 5(iii) in multi fold such as - to keep HMIL updated as to the financial health of the dealer and also to check and prevent the dealership from diverting and investing in other businesses using the financial resources provided by HMIL meant for HMIL dealership.

35. On the DG's finding that HMIL operates a Discount Control Policy on its dealers which amounts to retail price maintenance in contravention of Section 3(4) of the Act, it was submitted that maintaining the financial health of the dealers is an extremely important factor to ensure a robust and healthy dealership network for HMIL, so that the dealers have the ability to invest in sales, services, and promotion of new and existing products and also to avoid providing discounts of a predatory nature which are detrimental to their finances. As a result, HMIL often monitors discounts provided by the dealers to keep any predatory practice by dealers in check.

36. It was argued that the financial health of various HMIL dealers was being jeopardised in the NCR of Delhi due to unscrupulous activities of some selective dealers. To remedy such issues, HMIL considered it necessary to place a mechanism which dissuaded the dealers from offering predatory discounts. Because of the above, mystery shopping agencies were appointed to conduct unannounced visits to the dealers' showrooms. The entire amount collected by the mystery shopping agencies was distributed amongst all non-violating dealers in equal

proportion. Sometimes, such penalty amounts were also utilised to pay for the dealers' share of advertisement expenditure.

37. With regard to CNG Kit, it was submitted that HMIL did not mandate customers to fit HMIL approved CNG kits. It was argued that HMIL only recommended purchase of CNG kit from a specified high quality vendor, keeping in mind safety and performance of the cars. The warranty on HMIL cars was also impacted only to a limited extent on purchase of those parts affected by non-approved CNG kits *i.e.* engine related parts.

38. In respect of lubricant oils, it was argued that HMIL did not mandate its customers to use lubricant oil of any specified vendor. HMIL merely recommended certain lubricant oils as they had been tested on HMIL vehicles. The grade of lubricant oil is set out in the owner's manual. There is no recommendation on brand in the owner's manual. HMIL had an agreement with two suppliers so as to ensure adequate and uninterrupted supplies to HMIL Dealers. HMIL Dealers could negotiate on prices with the vendors of the lubricant oil.

39. On insurance services, it was pointed out that HMIL did not mandate its customers to buy insurance through Aditya Birla Insurance Brokers Limited (ABIBL). It is evident from the data provided by HMIL that almost 50 percent of all HMIL cars sold pan-India have non-ABIBL insurance and one third of all HMIL cars sold in Delhi/ NCR have non-ABIBL insurance. HMIL merely offered insurance services as additional services keeping up with current market offerings and environment. HMIL is not offering insurance policies, hence services like cashless facilities are not dictated by HMIL. HMIL Dealers were beneficiaries of this arrangement more than HMIL, having their own relationships with such insurance companies.

40. Lastly, it was pointed out that the DG Report did not find any contravention in the alleged tying arrangements pertaining to premium/low demand cars with non-premium/high demand cars. As such, HMIL agrees with the DG's finding that such an arrangement had no appreciable adverse effect on competition.

ANALYSIS

41. The Commission has heard the respective learned counsels appearing for the parties besides perusing the material available on record.

42. At the outset, it may be noted that the DG has investigated the OP for contravention of Sections 3(4) read with Section 3(1), which pertains to anti-competitive vertical agreements and Section 4, which pertains to abuse of dominance under the Act.

43. In this regard, the First *Prima Facie* Order of the Commission states "*… prima facie a case of contravention of the provisions of section 3 of the Act, as detailed above, is made out against the opposite party and the Director General (DG) is directed to cause an investigation to be made into the matter*" (emphasis added). Similarly, the Second Prima Facie Order of the Commission states "… *the Commission opines that prima facie the Opposite Party has contravened the provisions of section 3(4) read with section 3(1) of the Act … Accordingly, the DG is directed to cause an investigation into the matter*" (emphasis added). Thus, it is observed that the Commission had not directed the DG to investigate whether the OP has abused its dominant position in contravention of Section 4 of the Act. Further, both Information - 1 and Information - 2 filed by the Informants, only allege contravention of Section 3(4) read with Section 3(1) of the Act. No allegations of abuse of dominance have been put forth by the Informants.

44. In this regard, it may be observed that the Hon'ble Supreme Court of India in *Competition Commission of India* v. *Steel Authority of India & Ors.*, Civil Appeal No. 7779 of 2010 decided on 09.09.2010 has held that "[t]*he 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*". The Hon'ble Court has further held that the Commission's *prima facie* 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. Thus, in absence of any information stating that the OP has contravened the provisions of Section 4 and in the absence of the Commission's *prima facie* finding and direction to the DG to investigate the OP for any violation of Section 4 of the Act, the Commission is of considered opinion that the DG Report, in so far as it relates to an investigation of whether the OP has contravened Section 4 of the Act, is *ex facie* void.

45. Accordingly, the Commission is of the view that the DG's investigation of contravention of Section 4 of the Act by the OP, being *dehors* the directions given to the DG, is *ultra vires* the scope of investigation deserves to be disregarded.

46. The Commission, however, finds no merit in the contention of HMIL that principles of natural justice were violated in not affording it an opportunity to cross-examine the witnesses. As is borne out from the order of the Commission dated 15.09.2016, the learned counsel appearing on behalf of HMIL withdrew the application dated 01.08.2016 seeking cross-examination. In these circumstances, the plea raised by the OP is found to be misconceived. Similarly, with reference to the objection raised by OP that the DG relied on e-mails provided by the Informants without annexing the mandatory certificate under Section 65

of the Evidence Act, 1872, suffice it is to note that the Commission is not taking into consideration any such e-mails in its analysis.

47. Having disposed of the preliminary and jurisdictional issues urged by the learned counsel Shri Karan Singh Chandhiok appearing on behalf of HMIL, the Commission may now proceed to deal with the competition issues on merits. To analyze the alleged abusive conduct, the Commission is of the opinion that any assessment of competition has to be made in the context of markets and therefore, the Commission would use the terms upstream and downstream markets while analysing the alleged anti-competitive vertical restraints in the present cases.

48. With this caveat, the Commission notes that the DG has considered separate market(s) for each contravention of Section 3(4) of the Act:

(i) **Exclusive Supply Agreement/ Refusal to Deal**: Market for "*Inter-Brand Sale of Passenger cars in India*";

(ii) **Resale Price Maintenance (RPM)**: Market for "*Intra Brand Sale of Hyundai Brand of Cars in Delhi and NCR*";

(iii) **Tie-in arrangement for CNG kits**: Market for "*Sale of CNG Kits for Hyundai Brand of Cars in Delhi and NCR*";

(iv) **Tie-in arrangement for lubricants**: Market for "*Sale of Lubricants for Hyundai Brand of Cars in India*"; and

(v) **Tie-in arrangement for car insurance**: Market for "*Insurance for Hyundai Brand of Cars in India*".

49. To analyse the vertical restraint allegations, it would be first appropriate to define the upstream and downstream markets.

Upstream Market

50. It may be noted that the DG's approach in considering the product market is based on the contraventions alleged – *i.e.*, a different product market is defined for each type of contravention. For example, in assessing the exclusivity obligation alleged to be imposed on the OP dealers, the product market is defined as "*Inter-Brand Sale of Passenger cars in India*", as the harm would be caused to inter-brand competition for the sale of all cars, whereas in assessing the RPM allegation, the product market is defined as "*Intra Brand Sale of Hyundai Brand of Cars in Delhi and NCR*", as harm to competition would be caused with respect to the prices of Hyundai cars.

51. Thus, the DG has not considered the market(s) according to the characteristics of the products and services under investigation or the demand-side substitutability of the product/service from the point of view of the customer. Instead, the DG has taken each market according to the area of perceived competitive harm caused by each alleged infringement. For example, in a resale price maintenance case, suppliers control or restrict the price at which their distributors/dealers can sell the product or service to the final consumers. Thus, different distributors/dealers of a supplier are prevented from competing on price of the same goods, causing harm to *intra-brand* competition. For the RPM allegation, the DG has defined the market as "*Intra Brand Sale of Hyundai Brand of Cars in Delhi and NCR*".

52. It is observed that the main purpose of market delineation is to identify in a systematic way the competitive constraints that the enterprises involved face and the objective of defining a market (in both its product and geographic dimensions) is to identify the actual competitors (to the enterprise involved) that are capable of constraining an enterprise's behaviour. Defining a market according to the harm caused to competition would not result in identifying the set of products/services

that (exercise a competitive constraint on) compete with the product/service under investigation – which is the primary purpose of market definition.

53. This case pertains to the vertical agreements entered into by the OP with its dealers/ distributors. Vertical agreements are those agreements which entered into between two or more enterprises operating at different levels of production. Accordingly, the OP operates at vertically upstream level of manufacture of passenger cars, whereas its dealers operate at vertically downstream level of distribution and sale of Hyundai passenger cars to end consumers. The relevant product concerning the OP is therefore manufacture of passenger cars.

54. In *Shamsher Kataria* v. *Honda Siel & Ors.*, (*supra*) the Commission did not address the primary market for the manufacture and sale of cars, as the issues under consideration in that case pertained to the aftermarket prices/ behaviour of the Opposite Parties. The Commission held that "*even if the primary market is subdivided into various segments the competitive constraints or effective competitive pressure in the aftermarket remains unchanged … In this context* [*i.e.*, for assessing aftermarket practices], *it is irrelevant whether the primary market is considered to be a single monolith relevant market for a particular brand of car or is divided in separate relevant markets depending upon characteristics of a particular model of a brand of car, its price or its intended use*".

55. Similar to *Shamsher Kataria* case, it must be noted that the alleged anti-competitive behaviour pertains to the dealership and distribution of the OP's motor vehicles. In this regard, it is noted that the OP is present in multiple segments of the passenger car market. Further, OP's dealers also stock and sell various segments of the OP's cars.

56. Accordingly, the Commission is of the view that the upstream product market is the market for all passenger cars.

57. On the issue of geographic dimension, the DG has defined the geographic market, for exclusivity obligation/ refusal to deal and tie-in for car insurance, as India, and for RPM and tie-in arrangements for CNG kits and lubricants as Delhi-NCR.

58. In this regard, it is observed that passenger cars can be purchased across the country, though different state-level road taxes and registrations may be applicable. Further, dealerships and distributions of all passenger cars are prevalent across the territory of India. Accordingly, the upstream geographic market consists of the entire territory of India.

Downstream Market

59. This case pertains to the vertical agreements entered into by the OP with its dealers and distributors. As stated above, vertical agreements are those agreements which are entered into between two or more enterprises operating at different levels. Accordingly, while Hyundai operates at the upstream level of manufacture of passenger cars, its dealers operate vertically downstream, *i.e.*, at the downstream level of distribution and sale of Hyundai passenger cars to end consumers.

60. For the purposes of determining demand-side substitutability, if a consumer wishes to purchase a Hyundai car, the consumer would visit a Hyundai dealership. While a customer may consider different brands for one segment of cars as substitutable (for example, a Maruti Swift, Honda Brio or Hyundai i20), a consumer would visit a Hyundai dealer to test drive and purchase only a Hyundai car – as new Hyundai cars can only be purchased at a Hyundai showroom. Further, a majority of Hyundai's dealerships (and majority of all car dealers in India) do not stock or sell vehicles of competing brands (though the same family or company may

own dealerships of multiple brands). In India, there are only an insignificant number of multi-brand dealerships. Accordingly, the product market would be the market for the dealership and distribution of Hyundai cars.

61. The downstream geographic market may be taken as the territory of India, as the conditions of competition for the distribution and dealership of Hyundai cars are uniform across the country. Though there may be price differences in terms of road tax and registration, Hyundai has distributorships and dealerships across the country and its cars are sold across the territory of India. Accordingly, the relevant (downstream) geographic market may be defined as territory of India.

Anti-competitive Vertical Agreements

62. The DG has identified the following three types of anti-competitive vertical agreements:
   (i) Exclusive Supply Agreement & Refusal to Deal;
   (ii) Resale Price Maintenance;
   (iii) Tie-in arrangements for the sale of :
      a. CNG kits;
      b. Lubricants; and
      c. Car Insurance.

63. Each of these is dealt in *seriatim* below.

Refusal to Deal [Section 3(4)(d)]

64. The DG has found that the OP, through Clause 5(iii) of the Dealership Agreement, imposes an exclusive supply obligation and refusal to deal upon its dealers/ distributors, in contravention of Sections 3(4)(b) and 3(4)(d) of the Act respectively read with Section 3(1) of the Act.

65. Clause 5(iii) of the Dealership Agreement provides that "*except with prior written permission, the dealer shall not invest in any new or existing business not relating to Hyundai dealership*". Both the Informants, during deposition, stated that the Dealership Agreement is a standard agreement and that no opportunity was given to them to raise any objection thereto and such agreement was entered into only as a formality as the business started only on issue of Letter of Intent (LOI). The OP, through its circular dated 30.04.2010 sent to its dealers / distributors, raised serious concerns that its dealerships were accepting LOI of competitors, directly or indirectly, in breach of the terms of its Dealership Agreement. The said circular stated that all dealers, who have accepted competitor dealership/LOI or are in the process of accepting such LOI must submit an explanation to the OP within 7 days, failing which the action of stoppage of supply of all future upcoming Hyundai models, disallowing network expansion and serious review of future business relationship would be taken.

66. The DG has noted that, during deposition, the OP stated that the Dealership Agreement is a standard agreement and Clause 5(iii) is a standard clause which only requires prior permission of the OP before undertaking of dealership of any competing brand by the dealers. The rationale given for such a clause is to protect the business and the customers of the OP so that the resources of dealers dedicated for HMIL are not diverted. The OP further submitted a list of various dealers who have dealership of competing brands. The DG has noted that these dealers which acquiring competing dealership did not seek the prior permission of the OP. The DG has noted that such multi-brand dealerships are in the name of separate companies and in other premises, and the staff and the management of these are different, even though the shareholders and directors are common in such cases. The DG has therefore, held that though two dealerships have common shareholders and directors, they are not a single economic entity.

67. The DG has further noted that in an Agreement dated 23.03.1999 entered into between the OP and Hans Hyundai, the corresponding clause 5 was different and there was no such stipulation equivalent to stipulation provided under Clause 5(iii) of the standard Dealership Agreement and that the said clause was added subsequently. The DG has therefore, found that the contention of the OP that 120 dealers operate competing dealerships of multiple brands is not true. The Dealership Agreements entered into prior to 2009 did not contain any specific clause comparable to the current Clause 5(iii), in which the dealers are under a specific obligation to seek prior permission of OP for acquiring a competing brands dealership.

68. Finally, the DG has stated that the OP has submitted that none of its dealers has sought permission and the OP has also not granted any permission to any of its dealers for having multiple competing dealerships, even though certain dealers (the list of which was provided by the OP) also have multiple dealerships.

69. The Commission notes that Explanation (b) to Section 3(4) of the Act defines an "exclusive supply" agreement as including "*any agreement restricting in any manner the purchaser in the course of his trade from acquiring or* otherwise *dealing in any goods other than those of the seller or any other person*". Further, Explanation (d) to Section 3(4) of the Act defines "refusal to deal" as including "*any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought*".

70. Clause 5 of the Dealership Agreement states that without the prior written permission of the OP, a dealer shall not "*(iii) Invest in any new or existing business not relating to Hyundai dealership; or (iv) Amalgamate with any business entity or absorb/be absorbed by any business entity or enter into* compromise *or arrangements with any business entity*". Thus, Clause 5 does not strictly set out an exclusivity

obligation or prevent a dealer from dealing with competing dealerships or other businesses; it only requires the prior written permission of the OP in order for the dealers to do so. Thus, Clause 5 does not provide for *de jure* exclusivity. However, if OP does not, in practice, provide such permission to its dealers to operate competing dealerships or other businesses, Clause 5 may result in imposition of *de facto* exclusivity.

71. In this regard, it is observed that the OP has submitted a list of over 100 Hyundai dealerships that operate dealerships of competing brands. Further, it is noted that upon examination on oath of Hans Hyundai, Capital Hyundai and Koncept Hyundai dealerships (which, along with dealership of the OP's cars, operate dealerships of other car companies), that each has stated that the OP has not raised any objection to them operating a competing dealership. Accordingly, it is observed that Clause 5(iii) of the Dealership Agreement does not result in imposition of *de facto* exclusivity. The DG has stated that the OP has never granted permission to its dealers to operate competing dealerships; but it is pertinent to note that, equally, none of the OP's dealers has made such a request. Further, the circular dated 30.04.2010 sent by the OP to its dealers/ distributors requires them to adhere to the provisions of the Dealership Agreement and of intimation to and obtaining prior permission of HMIL before commencing a competing dealership. The circular does not instruct the OP's dealers/distributors to cease from taking up dealership of competing manufacturers *in toto*.

72. Accordingly, it cannot be concluded that the OP imposes an exclusive supply obligation or refusal to deal on its dealers.

73. Importantly, it must be noted that both the dealerships of both the Informants, *i.e.*, Informant-1 and Informant-2, stand terminated. St. Antony/ Informant-2 was issued a show cause notice twice, once in 2012 and then in 2013, on account of high customer complaints, poor Customer Satisfaction Index, Sales Satisfaction Index, instances of

cheque bouncing and opening of unauthorised sales outlets *etc*. The dealership was terminated by Hyundai in August 2013. In case of FX / Informant-1, the dealer was issued show cause notice, *inter-alia*, on grounds of poor Customer Satisfaction Index / Sales Satisfaction Index, lack of adequate man power, serious deficiencies in operations of workshops and low involvement in business by the dealer-principal. FX submitted its voluntary resignation from HMIL business on 25.04.2014. Further, pursuant to the statements made under examination on oath of the Informants, neither Informant-1 nor Informant-2 had requested the OP for operating a competing dealership and were never prevented by the OP from doing so, under Clause 5(iii) of the Dealership Agreement.

74. As stated above, it is noted that Clause 5(iii) of the Dealership Agreement does not mandate exclusivity but only requires the prior permission of the OP in order for dealers to operate competing dealerships.

75. In sum, the Commission is of considered opinion that Clause 5(iii) of the Dealership Agreement has not restricted, in form or in practice, any dealer in any manner from operating other OEM dealerships. The avowed objective of the clause appears to ensure that HMIL dealers do not free ride on facilities and services provided by HMIL. Further, such stipulation ensures that HMIL is kept posted with the financial and investment activities of its dealers to ensure that funds meant for functioning of the dealership business are not diverted elsewhere. No evidence has been adduced by the parties to demonstrate that HMIL restricted its dealers from acquiring dealerships of competing manufacturers. The Commission is further of the opinion that the impugned clause keeps OEMs empowered to ensure that their dealers remain financially viable. From the record, it appears that over 100 dealers of HMIL are engaged in dealership business of competing manufacturers. Even otherwise, OP has not enforced the said clause despite knowledge of parallel dealerships acquired by its dealers of

competing OEMs without even informing, much less seeking permission, HMIL.

76. In light of the above, the Commission is of the opinion that Clause 5(iii) does not impose an exclusive supply obligation in contravention of Section 3(4)(b) or a refusal to deal in contravention of Section 3(4)(d) read with Section 3(1) of the Act.

Resale Price Maintenance [Section 3(4)(e)]

77. The DG has found that the OP has entered into agreements/arrangements through which it perpetuates resale price maintenance or RPM on its dealers, in contravention of Section 3(4)(e) read with Section 3(1) of the Act.

78. The DG has noted that the ex-showroom price of the cars sold by the OP to its dealers and by the dealers to the consumers, is fixed by the OP. The dealer's margin is included in the ex-showroom price, which is also fixed by the OP. However, dealers are permitted to grant discounts to consumers also. Thus, while the maximum price at which a car can be sold is fixed by the OP from time to time, the dealer is permitted to charge a price lesser than the maximum selling price so fixed.

79. The DG has found that the OP has established an admitted "Discount Control Mechanism", by which the maximum discount which a dealer can offer to its end consumers is maintained. Accordingly, by fixing the maximum resale price as well as the maximum amount of discount that can be granted to customers, the OP has been effectively found to have fixed the minimum resale price. The DG has found that the OP itself maintains certain schemes through which various discounts are offered to the customers (such as on Diwali or schemes for teachers). It has been found that the maximum discount which can be offered by a dealer to the end-customer during the operation of the schemes launched by the OP from time to time is also fixed by the OP.

80. The OP has admitted to have engaged various mystery shopping agencies for policing its dealers and monitoring the abovementioned arrangements. These mystery shopping agencies submit their reports to the OP, highlight the various violations committed by the dealers (in dealings with customers, test drives, *etc.*) and in particular, highlight the extra discount granted by the dealers to the customers. Where a dealer is found to be deviating from OP's Discount Control Mechanism, the OP imposes a penalty on the dealer in terms of a minimum penalty per violation of INR 2 lakh, upto a maximum of INR 80 lakh for the sixth violation. The DG has found that the quantum of penalty has been set to such a high level, that it works as a deterrent to ensure that no dealer would provide an extra discount beyond the maximum permissible amount recommended by the OP. Where penalties were to be levied, the OP directed the violating dealers to deposit the penalties in the name of an advertising agency (VIBGYOR). Such penalties could also include stoppage of supply of Hyundai cars - for example, if any dealer is caught violating two times in two months, apart from the penalty, the supplies for diesel cars would be stopped for one full month.

81. The DG has further noted that the OP meets its dealers on monthly basis where prices charged by dealers and discounts offered by dealers to the end customers are frequently discussed.

82. The DG has therefore, found that the OP, through its Discount Control Mechanism, maintains the resale price of Hyundai cars, which does not result in accrual of any consumer benefits. The DG has found these arrangements perpetuated by the OP restricting intra-brand competition amongst Hyundai dealers, as the same impairs their ability to compete in price competition in the sale and distribution of Hyundai cars.

83. The Commission notes that "Resale price maintenance" is defined under Explanation (e) to Section 3(4) of the Act as including "*any agreement to sell goods on condition that the prices to be charged on the resale by*

the purchaser shall *be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged*".

84. It is noted that Clause 8 of the Dealership Agreements provides that the OP shall, from time to time, advise the Dealer, margin on Hyundai products and the maximum selling price defined in the Standard Provisions enclosed to the agreement shall be inclusive of such margin. The margin may be revised at the sole discretion of HMIL taking into consideration the market situation, competition, dealers' viability, *etc*.

85. The OP has admitted to maintaining a Discount Control Mechanism. It is observed that through this scheme, the OP monitors that the maximum permissible discount level is adhered to by its dealers. The dealers are not authorised to give a discount which is above the recommended range and different levels of discount are determined by the OP which varies for different models of the vehicles. Further, the OP has admitted to appointing a 'mystery shopping agency' that collects, *inter alia*, data on the levels of discounts offered by different Hyundai dealers all over the NCR. This agency then reports its findings to the OP which in turn shares this information with the dealers in a group email thread. Pursuant to the findings of the agency, various types of penalties are levied on the dealers to prevent them from providing any further discounts to the customers.

86. The OP, in its submissions to the DG, has admitted that such a scheme was conducted, but it has denied that the said Discount Control Mechanism was strictly followed. The OP has stated that there are distributors who have been repeatedly providing discounts well above the recommended limit and that notwithstanding the Discount Control Mechanism, dealers still continue to provide discounts of their own accord. It is stated that the scheme is recommendatory in nature and is therefore, not mandatory on the dealers of the OP.

87. In this regard, it is observed that an agreement that has as its direct or indirect object the establishment of a fixed or minimum resale price level, may restrict competition. This would include fixing the distribution margin or the maximum level of discount, making the grant of rebates or the sharing of promotional costs conditional on adhering to a given price level, linking a resale price to the resale prices of competitors, or using threats, intimidation, warnings, penalties, delay or suspension of deliveries as a means of fixing the prices charged by the buyer (*i.e.*, retailer).

88. RPM can prevent effective competition both at the intra-brand level as well as at the inter-brand level. When a minimum resale price maintenance is imposed by the manufacturer of a particular brand, distributors are prevented from decreasing the sale prices. In other words, the mechanism does not allow the dealers to compete effectively on price. The stifling of intra-brand competition results in higher prices for consumers. In the instant case, the imposition of upper limits on discounts that dealers may offer to final consumers through the discount control mechanism of the OP, leads to loss of intra-brand price competition.

89. In the present case, the OP and certain dealers of the OP have contended that discount mechanism was implemented at the behest of the distributors. Even if that was the case, the implementation of the Discount Control Mechanism through the appointment of mystery shopping agency and imposition of penalty on erring dealers is not conducive to competition in the market. Undoubtedly, once RPM is enforced, it leads to reduced intra-brand competition and overall higher prices for consumers.

90. RPM, when enforced at the instance of the distributors/dealers, is particularly problematic since it helps maintain collective interest of the downstream players, *i.e.* the distributors, to maintain higher resale prices, causing consumer harm. In this case, the OP has stated that the

discount control mechanism was put in place at the behest of the dealers themselves to safeguard the financial health of the entire dealership network. Evidently, the discount control policy was an instrument to maintain a collusive outcome at the level of the distributors.

91. RPM can decrease the pricing pressure on competing manufacturers when a significant player such as the OP (Hyundai) imposes minimum selling price restrictions in the form of maximum discount that can be offered by the dealers who are in interlocking relationship with multiple manufacturers.

92. It is known that RPM as a practice by multiple manufacturers is conducive for effective monitoring of cartel. Higher prices under RPM can exist, even when a single manufacturer imposes minimum RPM. This is more likely in case of multi-brand dealers who have significant bargaining power because of their ability to substitute one brand with another. Further, this leads to another likely anti-competitive effect of higher prices across all brands even if there is no upstream or downstream conspiracy, because preventing price competition on a popular brand would result in higher prices of competing brands as well, including those that have not adopted RPM. Thus, minimum retail price RPM has the effect of reducing inter-brand price competition in addition to reducing intra-brand competition.

93. Before concluding discussion on this aspect, the Commission notes that the DG has conducted an analysis of appreciable adverse effect on competition arising out of the afore-discussed arrangement of HMIL, which results in RPM in light of the factors enumerated in Section 19(3) of the Act. It may be noted that the impugned agreements/ arrangements did not result into accrual of any consumer benefits; rather, the same resulted into denial of due benefits to the consumers as they were made to pay high prices. Further, the said arrangements and agreements are not resulting into any improvements in production or distribution of goods or provision of services. The arrangements perpetuated by the OP caused

hindrance in the distribution of goods and provision of services in relation to new cars. The arrangements put in place by the OP also resulted in creation of barriers to the new entrants in the market as they also took into consideration the restrictions on their ability to compete in price competition in the intra-brand competition of Hyundai brand of cars. Hence, the arrangement perpetuated by the OP in fixing the resale price of Hyundai brand of cars in the manner, as explained above, foreclosed the intra-brand price competition for its dealers.

94. In view of the above discussion, the Commission is of the view that the OP has sought to impose an arrangement that results in RPM, which includes monitoring of the maximum permissible discount level through a "Discount Control Mechanism" and a penalty punishment mechanism upon non-compliance of the discount scheme. The level of discount was determined by the OP for each model and variant of the passenger cars and the OP had also appointed a Mystery Shopping Agency to collect data from dealers for such monitoring and reporting to the OP. Based on the above, the Commission is of the opinion that the OP has contravened the provisions of Section 3(4)(e), read with Section 3(1) of the Act.

Tie-in arrangement [Section 3(4)(a)]

95. The DG has found that the OP designates sources of supply for the complementary goods of CNG Kits, Lubricants and Oils, and Insurance Services, for its dealers and distributors. The DG has found that the OP has tied the sale of its passenger cars to its dealers with the purchase of:
    a. CNG kits;
    b. Lubricants and Oils; and
    c. Car Insurance;

which result in "*tie-in*" arrangement in violation of Section 3(4)(a) read with Section 3(1) of the Act.

96. The DG, however, did not find any contravention of the provisions of Section 3(4)(a) of the Act in HMIL having the arrangement of selling both segments (premium and non-premium) cars.

97. The Commission observes that Explanation (a) to Section 3(4) of the Act defines a "tie-in arrangement" as including "*any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods*".

98. In *Sonam Sharma* v. *Apple & Ors.*, C. No. 24 of 2011, the Commission held that "*a tying arrangement occurs when, through a contractual or technological requirement, a seller conditions the sale or lease of one product or service on the customer's agreement to take a second product or service. In other words, a firm selling products X and Y makes the purchase of product X conditional to the purchase* of *product Y. Product Y can be purchased freely on the market, but product X can only be purchased together with product Y. The product that a buyer is required to purchase in order to get the product the buyer actually wants is called the tied product. The product that the buyer wants to purchase is called the tying product*".

99. The Commission further set out the following ingredients to be satisfied for a tie-in arrangement:

(i) <u>Presence of two separate products or services capable of being tied:</u> In order to have a tying arrangement, there must be two products that the seller can tie together. Further, there must be a sale or an agreement to sell one product or service on the condition that the buyer purchases the other product or service (or the buyer agrees not to purchase the product or service from another supplier). In other words, the requirement is that purchase of a commodity is conditioned upon the purchase of another commodity;

(ii) The seller must have sufficient market power with respect to the tying product to appreciably restrain free competition in the market for the tied product:

An important and crucial consideration for analysing tying violation is the requirement of market power. The seller must have sufficient economic power in the tying market to leverage into the market for the tied product. That is, the seller has to have such power in the market for the tying product that it can force the buyer to purchase the tied product; and

(iii) The tying arrangement must affect a "not insubstantial" amount of commerce:

Tying arrangements are generally not perceived as being anti-competitive when substantial portion of market is not affected.

CNG Kits

100. The DG has found that the cars originally manufactured by the OP are manufactured to run on Petrol but it is advertised that they can also run on CNG as an alternate fuel. However, in order to have a CNG Kit fitted in the Hyundai Cars in Delhi NCR, the OP has nominated CEV Engineering Private Limited. CEV is an Indian company having registered office at New Delhi, and is a subsidiary of KNC Inc. KNC Inc. is a Korean company holding approx. 97% of the equity shares of CEV. The remainder of CEV's shares are held by 3 Directors of KNC Inc. CEV exclusively fits CNG kits in Hyundai cars in India.

101. All the agencies/ enterprises dealing in CNG kits and their retro- fitting are approved by the State Government based on the guidelines uniformly applicable to all of them and, in Delhi, there are various such agencies approved by the Delhi Government. The DG has found that there are no significant differences in the CNG kits fitted by CEV and other enterprises/agencies, except for a mere descriptive statement by the OP

that CEV kits are better in quality. The DG has concluded that the CNG kits supplied by CEV are neither distinct from the kits of other agencies nor is the fact denied that the kits supplied by other agencies can also be fitted in Hyundai cars. CEV's CNG kits are price approx. 80% more than the price of competing CNG Kits. The DG has observed that the OP's dealers and consumers are coerced into obtaining CNG Kits from CEV as they are denied warranty services if CNG kit are purchased and installed from any agency other than CEV. Further, where dealers sell Hyundai vehicles which are not fitted with CEV kits, the dealers are separately penalised. Accordingly, the DG has found that the OP has tied the purchase of its cars to the purchase of CNG kits from CEV.

102. In its response to the DG report, the OP has stated that one of the core elements for a tie-in is that the purchasers are forced to buy the tied product along with the tying product, but in this case, HMIL passenger cars are sold without CNG kits. Since it is possible to purchase an HMIL passenger car and install a CNG kit from a vendor other than the approved vendor, the OP has submitted that the same does not amount to a tie-in arrangement. However, the consequence of not obtaining a CNG Kit from the OP is that the OP will not provide a warranty.

103. In this case, it is observed that the CNG kits made by CEV are for Hyundai's purposes alone. CEV CNG kits are specifically designed for Hyundai approved car models and no alteration in any of the parts is required at the time of fitting. Further, CEV supplies kits to Hyundai alone. The representative of CEV, during deposition, has stated that CNG kits by CEV are much better in quality being made separately for each model of Hyundai cars. The running of Hyundai cars with CEV CNG kits are much smoother in comparison to the cars fitted with CNG kits of other agencies.

104. On careful perusal of the matter, the Commission is of the considered opinion that in cases where warranty is cancelled for use of non-CEV

CNG kits, the same may be objectively justified. The OP may also have a legitimate interest in ensuring that alternative brands of CNG Kits are not used, as the OP would be bearing the costs of warranty. Accordingly, cancellation of warranty upon use of non-CEV CNG kits does not, as a general rule, amount to a contravention of Section 3(4)(a), read with Section 3(1) of the Act.

Lubricants & Oils

105. The DG has found that the OP has designated vendors for engines of its vehicles and mandates its dealers to purchase engine oil only from two designated vendors: Indian Oil Corporation Limited (IOCL) and Shell Oil Company (Shell). This limits the choice of the dealer to choose another engine oil supplier. A circular has been issued by the OP to all its dealers with a price list for engine oils. Both Shell and IOCL, on deposition, have stated that certain oil grades are marked as genuine oils which are specifically designed for Hyundai engines to meet the needs of Hyundai vehicles and the same are designed in consultation with Hyundai itself according to its requirements. Thus, these oils are custom made for various variants Hyundai Cars. The OP has stated that it only recommends engine oils of certain specifications to be used in its vehicles and that IOCL and Shell are its preferred suppliers.

106. It is noted that requiring certain parts to be procured from a specific producer is likely to foreclose alternative channels for spare parts' distribution. However, a vehicle manufacturer may legitimately refuse to honour warranties on the ground that the situation leading to the claim in question is causally linked to a failure of a specific spare part provided by an alternative supplier. In this case, the OP has stated that it merely recommends the brands/ types of lubricants and oils that are to be used. From the oral depositions of various Hyundai dealers, it is further noted that customers do avail other supplies, and typically warranty is not cancelled when other brands of lubricants/ oils are used. In terms of the

OP's dealers, they use the recommended oils/ lubricants of Shell/ IOCL further to OP's circulars stating the same. It is noted that both Shell and IOCL make certain royalty payments to the OP. However, such royalty could be paid for the use of Hyundai trademark; as both IOCL and Shell manufacture certain "Hyundai genuine oils". Further, such conduct causes or is likely to cause appreciable adverse effect on competition in light of the factors enumerated in Section 19(3) of the Act.

107. The DG conducted a competition assessment in this regard in the investigation report. The Commission notes that the practice/ arrangements followed by the OP to get the lubricants supplied by IOCL and Shell only and that too at pre-fixed price resulting in price discrimination is not accruing any benefit to the dealers as well as the consumers/ purchasers of the cars. The practice and arrangements followed by the OP are causing hindrance in the improvement of production or distribution of goods and provision of services in relation to supply and use of lubricants in the cars particularly when other oil companies are manufacturing and marketing same grade of lubricants. The practice and arrangements followed by the OP also result into creation of barriers to the new entrants in the market with regard to the supply and marketing of lubricants for use in the cars manufactured by the OP. The practice and arrangement followed by the OP in charging royalty from the two oil companies and threatening termination of dealership by invoking the terms and conditions of the dealership agreement is foreclosing competition for other vendors/ manufacturers of lubricants. Such arrangements are also against the consumer welfare as the consumers are made to pay comparably higher price and are also denied freedom to make fair choices.

108. Accordingly, in so far as the OP mandates its dealers to use particular oil/ lubricants and penalises its dealers where non recommended oils are used, it would amount to "tie-in arrangement" in contravention of Section 3(4)(a), read with Section 3(1) of the Act. However, for the

reasons given in the context of CNG kits (objective justification and legitimate business interest), cancellation of warranty upon use of non-recommended oils/ lubricants does not amount to contravention of Section 3(4)(a), read with Section 3(1) of the Act.

Car Insurance Services

109. Informant-1 has alleged that the OP has entered into an arrangement with ABIBL which in turn has an agreement with six insurance companies namely ICICI Lombard, HDFC ERGO, New India, Future Generally, Bharti Axa and Bajaj Allianz for selling of insurance policies and services incidental thereto for Hyundai cars. Informant-1 has further alleged that due to this arrangement, the dealer can offer insurance services of only these selected companies to the end-consumers. ABIBL is an Insurance Broker which provides insurance advisory and broking services to the buyers of cars manufactured and sold by the OP. ABIBL is a registered insurance broker under the IRDA (Insurance Brokers) Regulations, 2002.

110. The DG is of the view that the OP has entered into MOU with ABIBL purely for its economic interests. Nothing stopped the insurance broker to directly approach the customers and dealers to present its services in the spirit of fair competition. On the other hand, OP has entered into this MOU which is bilateral in nature but thrusts upon the dealers by issuing of bulletins and circulars by the OP. The OP is well aware of its position of strength as the dealers are locked in with the OP and the fear of termination of agency looms large on their minds. The discriminatory conditions of providing cashless option in case of insurance services only when the insurance is availed from an approved insurance provider puts extra strength to the arrangement and so it is skewed in favour of ABIBL. The facility provided to ABIBL also creates an impression on the customers that ABIBL is the only approved insurance provider. The circulars and bulletins issued by the OP are used by the dealers to give

extra confidence to the customers regarding "approval" status of ABIBL as if it is backed by some statutory recognition. However, the fact remains that no statute authorises the OP to approve any insurance vendor. In addition, there are facts on record that the OP is actively participating and organizing meetings with dealers to see that insurance of its cars remains through ABIBL only. This gives ample credence to the allegation that all these arrangements are schematic in nature to mandate tie-in arrangement of selling insurance through ABIBL only along with sale of Hyundai cars. The OP has provided data to show that there are insurance policies sold which are non-ABIBL. However, the fact remains that the OP has succeeded in mandating insurance through ABIBL from about 5% of the total number of policies sold in 2011 to close to 70% in 2013 and 2014. Thus, it is concluded that the OP has imposed such tie-in arrangement.

111. The DG states that the OP has devised an arrangement mandating the purchaser of cars sold by its dealers to purchase insurance policies through ABIBL with whom it has entered into an arrangement for economic interests. Such insurance products (policies) are otherwise substitutable products separately available for sale in the open market from insurance companies or through their brokers duly registered with IRDA. Such an arrangement falls within the definition of tie-in arrangement as defined in explanation (a) to Section 3(4) of the Act.

112. To address the issue, the Commission first notes that the allegation of Informant-1 is that due to the OP's arrangement with ABIBL, the dealer is restricted in its offering of insurance services to the end-consumer to only the select companies of ABIBL. This leaves the end-consumer with limited options for procuring insurance. The option of cashless accidental repair services is not extended in case a consumer chooses another vendor.

113. The issue which needs to be addressed here is that whether the vertical restraint imposed by the OP on its dealers is causing appreciable adverse effect on competition in the market. It is clear that an MoU was executed between ABIBL and the OP and that the OP issue circulars from time to time to its dealers with a list of preferred insurance companies and insists that its dealers work closely with each other. However, it may be noted that there is no such clause in the agreement that dictates that the Informants could take up dealership only on the condition that they deal only with the list of empanelled insurance companies. There is no record to show that any dealership has been cancelled because the dealer failed to get the customers to take up insurance from the listed companies of the OP.

114. Also, the issue that consumers are left with only limited choice due to such insistence from the OP holds no ground simply because of the fact that it is not mandatory for customers to take insurance from the list of companies given by the OP. From the statements given by third parties such as Hans Hyundai, Capital Hyundai and Koncept Hyundai, it is gathered that though it is acknowledged that the OP provides a list of preferred insurance companies, the customers are free to get any insurance from any company or through any other broker without any compulsion. Incentives are given if customers take insurance through dealers from the list provided by the OP, but the same is not mandatory and the customer will not be refused any other services if it opts for other insurance companies. Having a tie-up or arrangements with insurance companies is the usual business norm. For instance, representatives of Honda Cars India Ltd. and Maruti Suzuki India Ltd. have also stated that they have also executed agreements with insurance brokers or companies and customers have taken insurance from other companies not provided in their list. Their service levels remain the same for all customers and in no way they are prejudiced against such customers. Therefore, mere recommendation that the dealers consider/ suggest the insurance companies partnered with the OP will not amount to tie-in arrangement.

It is opined that the OP has not violated Section 3(4)(a) of the Act with respect to the allegation that the OP has tied the sale of its cars with selected insurance vendors only.

Tying the sale of premium vehicles to non-premium

115. The DG, did not find contravention of the provisions of Section 3(4)(a) of the Act by HMIL having any arrangement of selling both segment (premium and non-premium) cars. The Commission is in agreement with the conclusion of the DG on this count as the Informants could not adduce any credible evidence to support this allegation.

Conclusion

116. In view of the above discussion, the Commission is of the considered view that HMIL has contravened the provisions of Section 3(4)(e) read with Section 3(1) of the Act through arrangements which resulted into Resale Price Maintenance. Such arrangements also included monitoring of the maximum permissible discount levels through a Discount Control Mechanism. Further, HMIL has contravened the provisions of Section 3(4)(a) read with Section 3(1) of the Act in mandating its dealers to use recommended lubricants/ oils and penalising them for use of non-recommended lubricants and oils.

117. Accordingly, HMIL is directed to cease and desist from indulging in conduct that has been found to be in contravention of the provisions of the Act, as noted above.

118. So far as imposition of monetary penalty is concerned, the Commission notes the submissions made on behalf of HMIL on the issue of quantum

of penalty. It was argued that penalty should be proportionate to the contravention established. It was pointed out that the automobile sector currently witnesses robust competition and does not warrant intervention. No supra-normal profits have been made by HMIL during this period. It was also canvassed that the principle of relevant turnover while penalising is to be considered. Lastly, it was highlighted that HMIL already has put in place a competition law compliance program and HMIL is a first time offender with no previous valid orders against it.

119. In this connection, it would be apposite to refer to a recent decision of the Hon'ble Supreme Court of India in *Excel Crop Care Limited* v. *Competition Commission of India & Anr.*, Civil Appeal No. 2480 of 2014 decided on 08.05.2017. One of the issues which fell for consideration before the Hon'ble Supreme Court in this case was as to whether penalty under Section 27(b) of the Act should be imposed on total/ entire turnover of the offending company or only on "relevant turnover" *i.e.* relating to the product in question?

120. After referring to the statutory scheme as engrafted in Section 27 of the Act and analysing the case law at length, the Hon'ble Supreme Court opined that adopting the criteria of 'relevant turnover' for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties. While reaching this conclusion, the Hon'ble Supreme Court recorded the following reasons:

> *When* the *agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section 3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the 'maximum penalty' imposed*

in all cases be prescribed on the basis of 'all the products' and the 'total turnover' of the enterprise. It would be more so when total turnover of an enterprise may involve activities besides production and sale of products, like rendering of services etc. It, therefore, leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of 'relevant turnover'.

121. Thus, the starting point of determination of appropriate penalty should be to determine relevant turnover and thereafter, to calculate appropriate percentage of penalty based on facts and circumstances of the case.

122. Viewed in the aforesaid backdrop, the Commission notes that in the above-cited case, the allegations pertained to bid rigging by the suppliers in respect of a tender floated by the Food Corporation of India for procurement of Aluminum Phosphide Tablets (APT) of 3 gms. It was alleged that four manufacturers of APT formed a cartel by entering into an anti-competitive agreement and submitted their bids by quoting identical rates in various tenders. The Commission, while holding the parties in contravention of the provisions of Section 3 of the Act, imposed penalties upon the parties @ 9% of average three years' of the total turnover under Section 27 (b) of the Act. On appeal**,** the Hon'ble Competition Appellate Tribunal, while upholding the order of the Commission, reduced the penalty taking only the revenue generated from the relevant product as total turnover of the ALP Tablets including all domestic and export sales. This is clearly borne out from the judgment of the Hon'ble Appellate Tribunal which is excerpted below:

…On the basis of the figures supplied to us, it is seen that the total turnover of the ALP Tablets including all domestic and export sales, the average of three years comes to Rs.77.14/- crores. Therefore, their penalty @ 9% of this figure would come to Rs.6,94,26,000/-. That will be a penalty against M/s. United

Phosphorous Limited.

123. An appeal preferred against the above-said order of the Hon'ble Competition Appellate Tribunal was dismissed by the Hon'ble Supreme Court of India *vide* its order dated 08.05.2017 in *Excel Crop* case (*supra*).

124. Coming to the facts of the present case, the Commission notes that the infringing anti-competitive conduct of HMIL in the instant case included putting in place arrangements, which resulted into Resale Price Maintenance by way of monitoring of maximum permissible discount level through a Discount Control Mechanism and a penalty mechanism for non-compliance of the discount scheme. Such conduct pertains to and emanates out of sale of motor vehicles. Hence, for the purposes of determining the relevant turnover for this infringement, revenue from sale of motor vehicles alone has to be taken into account.

125. Having determined the relevant turnover, the Commission now proceeds to calculate appropriate percentage of penalty.

126. It may be noted that the twin objectives behind imposition of penalties are: (a) to 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 is also guided by the judgment of the Hon'ble Supreme Court of India in *Excel Crop* case (*supra*) which enunciates the principle of proportionality. Proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act on the other.

127. In the aforesaid backdrop, while quantifying the penalty in the instant case, the Commission has duly considered the pleas advanced by HMIL in mitigation *viz*. proportionality, no supra-normal profits, putting competition law compliance programme and first time offender with no previous valid order.

128. The Commission is however, also cognizant of the fact that HMIL has been penalised earlier also by the Commission in *Shamsher Kataria* v. *Honda Siel Limited & Ors*., Case No. 03 of 2011. In that case also, the Commission examined the practices prevalent in the automotive aftermarket and the investigation conducted by the DG therein covered general practices prevalent in the sector some of which were also raised in the instant case as well.

129. On a careful consideration of the nature of the contraventions made and the points urged by HMIL for mitigation, the Commission decides to impose penalty on HMIL at the rate of 0.3 % of its average relevant turnover of the last three financial years. The total amount of penalty is worked out as follows:

(Rs.) (In crore)

S. No.	Name of the parties	Relevant Turnover for 2013-14	Relevant Turnover for 2014-15	Relevant Turnover for 2015-16	Average Relevant Turnover for Three Years	@ 0.3% of average Relevant Turnover
1.	**HMIL**	25963.10	27428.41	34174.41	29188.64	87 (rounded off)

130. Accordingly, the Commission imposes a penalty of Rs. 87 crore on HMIL for the impugned conduct in contravention of the provisions of Section 3(1) read with Section 3(4) of the Act, as detailed in the order.

131. The Commission directs HMIL to deposit the penalty amount within 60 days of receipt of this order.

132. It is ordered accordingly.

133. The Secretary is directed to communicate to the parties.

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

Sd/-
(Justice G. P. Mittal)
Member

New Delhi
Date: 14/06/2017