BEFORE THE

COMPETITION COMMISSION OF INDIA

Case No. 19 of 2010

Information filed on 05.05.2010

Date of Order: 12.8.2011

Informant : Belaire Owner's Association

Through : M.L. Lahoty, Advocate

Opposite Parties: DLF Limited

Haryana Urban Development Authority

Department of Town and Country Planning, State of Haryana

Through : Rajan Narain and Ashok Desai, Advocates.

Order

1. Background

The case under consideration concerns competition issues and consumer interests in the residential real estate market in India.

1.1 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.

1.2 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.

1.3 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 urbanisation, 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.

1.4 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 players. 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.

1.5 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.

Profile of Parties in the Case

1.6 Before going into the details of allegations, response of different respondents and proceedings before the office of DG and Commission, a brief profile of different parties involved in the case is discussed first.

A) The Informant

1.6.1 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 allotees in the complex.

B) Respondents

<u>DLF Limited</u>:

1.6.2 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.

1.6.3 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.

1.6.4 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.

1.6.5 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 Cybercity', 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.

1.6.6 DLF in course of expansion of its business has entered into JV with Laing 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.

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

Haryana Urban Development Authority

1.6.8 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, inter-alia, 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.

Department of Town and Country Planning Haryana

1.6.9 The Department of Town & Country Planning, Haryana is the nodal department to enable regulated urban development in the State of Haryana. The policies of the department aim at encouraging a healthy competition amongst various private developers and public sector entities for integrated planned urban development. The department also renders advisory services to various Departments / Corporations / Boards such as HUDA, Housing Board, Haryana State Industrial and Infrastructure Development Corporation (HSIIDC), Marketing Board. Major functions of the department are given as under:-

i) Prevention of unauthorized and haphazard construction and regulation of planned urban development under the provision of Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated development Act, 1963 by declaring controlled areas around towns and public institutions preparation of their development plans and sectoral plans for planned urban development.

ii) To regulate the development of colonies in order to prevent ill-planned and haphazard urbanization in or around the towns under the provision of the Haryana Development and Regulation of Urban Areas Act, 1975.

iii) Prevention of unauthorized constructions and regulation of planned urban development under the provision of the Punjab New

Capital Periphery (Control) (Haryana Amendment) Act, 1971 applicable around Chandigarh in Panchkula District.

1.6.10 The Department of Town and Country Planning, Haryana is responsible to regulate the development and also to check the haphazard development in and around towns in accordance with the provisions of following statutes:-

a) The Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963.

b) The Haryana Development and Regulation of Urban Areas Act, 1975.

c) The Punjab New (Capital) Periphery Control Act, 1952.

1.6.11 In order to involve the private sector in the process of urban development, the Department grants licences to the private colonizers for development of Residential, Commercial, Industrial and IT Park/Cyber Park Colonies in accordance with the provisions of the Haryana Development and Regulation of Urban Areas Act, 1975 and rules framed thereunder.

1.6.12 Directorate of Town & Country Planning Haryana headed by Director is a part of Department of Town and Country Planning.

2. Information

2.1 The information in the instant case was filed under Section 19 (1) (a) of the Competition Act, 2002 (herein after referred to as Act) by Belaire Owners' Association against the three respondents DLF Limited (OP-1), HUDA(OP-2) and Department of Town and Country Planning (DTCP), Haryana (OP-3). It has been alleged in the information that by abusing its dominant position, OP-1 has imposed highly arbitrary, unfair and unreasonable conditions on the apartment allottees of the Housing Complex 'the Belaire', which has serious adverse effects and ramifications on the rights of the allottees. It has also been alleged that OP-2 and DTCP OP-3 have approved and permitted OP-1 to act in illegal, unfair and irrational manner as they 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.

2.2 The informant has submitted that OP-1 has used its position of strength in dictating the terms by which while on the one hand it has excluded itself from any obligations and liabilities, on the other hand it has put the apartment allottees in extremely disadvantageous conditions. The allegations of the informant are summarized in the paragraphs below.

2.2.1 OP-1 announced a Group Housing Complex, named as 'The Belaire' consisting of 5 multi-storied residential buildings to be constructed on the land earmarked in Zone 8, Phase-V in DLF City, Gurgaon, Haryana. As per the advertisement of OP-1, each of the five multi-storied buildings was to consist of 19 floors and the total number of apartments to be built therein was to be 368 and the construction was to be completed within a period of 36 months. However, in place of 19 floors with 368 apartments, which was the basis of the apartment allottees booking their respective apartments, now 29 floors have been constructed. Consequently, not only the areas and facilities originally earmarked for the apartment allottees are substantially compressed, but the project has also been abnormally delayed. The fall-out of the delay is that the hundreds of apartment allottees have to bear huge financial losses, as while on one hand, their hard-earned money is blocked, on the other hand, they have to wait indefinitely for occupation of their respective apartments.

2.2.2 The informant has submitted that as the Apartment Buyer's Agreements were signed months after the booking of the apartment and by that time the allottees having already paid substantial amount, they hardly had any option but to adhere to the dictates of OP-1. In this case, OP-1 had devised a standard form of printed "Apartment Buyer's Agreement" for booking the apartments and a person desirous of booking the apartment was required to accept it in 'toto' and give his assent to the agreement by signing on the dotted lines, even when clauses of the agreement were onerous and one-sided.

2.2.3 The informant has stated that agreement stipulates that OP-1 has the absolute right to reject and refuse to execute any Apartment Buyer's Agreement without assigning any reason, cause or explanation to the intending allottee. Thus, there is neither any scope of discussion, nor variation in the terms of the agreement. Page 3 of the agreement containing the Representations "B" and "C" shows that the OP-1 neither on the date of announcing the Scheme

"The Belaire", nor while executing the Apartment Buyer's Agreement had got the Layout Plan of Phase-V approved by OP-3. The decision of OP-1 to announce the Scheme, execute the agreement and carry out the construction without the approved Layout Plan has serious irreparable fall-outs for which the entire liability in normal course would have been on it, but the consequences have been shifted to the allottees. Further, the agreement, stifles the voice of the buyers by inserting the waiver clause in the agreement clause that no consent of the apartment allottee is at all required, if any change or condition is imposed by OP-3 while approving the Layout Plan.

2.2.4 The informant has further submitted that the action of OP-1 in advertising the project and issuing Allotment letter without preparing and submitting the building plans/lay-out plans of the project to the Town Planner is in defiance of decision rendered in a case involving OP-1 by the National Consumer Disputes Redressal Commission, New Delhi. By inserting Representation "E", OP-1 reserves to itself the exclusive and sole discretion not only to change the number of zones but also their earmarked uses from residential to commercial etc. Further, as per representation "F", the land of 6.67 acres earmarked for the multi-storied apartments could even be reduced unilaterally by OP-1 pursuant to the approval/sanction of the Layout Plan by the OP-3.

2.2.5 According to informant, OP-1 has inserted clauses “J” and “K” to the effect that the apartment allottee would not even be permitted to carry out any investigation and would not be entitled to raise any objection to the competency of OP-1. Vide clause 1.1, the apartment allotee is to pay sale price for the Super Area of the apartment and for undivided proportionate share in the land underneath the building on which the apartment is located. Out of the total payment made by the apartment allottee, OP-1 has authorized itself vide clauses 3 and 4 that it will retain 10% of the sale price as earnest money for the entire duration of the apartment on the pretext that the apartment allottee complies with the terms of the agreement.

2.2.6 The informant has stated that the agreement does not contain the proportionate liability clause to fasten commensurate penalty/damages on OP-1 for breach in discharge of its obligations. Since the apartments are sold without the approval of the Layout/Building Plan, clause 1.5 stipulates that due to the change in Layout Building Plan, if any amount was to be returned to the apartment allottee, OP-1 would not refund the said amount, but would retain and adjust this amount in the last instalment payable by the apartment allottee. Further, the apartment allottee would not be entitled to any interest on the said amount either. Similarly, if there is a change in the super area at the time of completion of building and issuance of occupation certificate, although the total price shall be recalculated but the amount, if any is required to be returned, the apartment allottee would not get the refund and rather OP-1 would retain this amount, with the right to adjust this refund amount against the final instalment as well. The apartment allottee also in the process has to forego the interest thereon.

2.2.7 It has been submitted by the informant that as per clause 1.7, against the total price paid by the apartment allottee, he is promised the ownership right of his apartment as also prorate ownership right of land beneath the building. Apart from the said right, the apartment allottee has paid and accordingly, has pro-rata right of common areas and facilities within the Belaire and proportionate share of club and other common facilities outside the Belaire as also the common facilities which may be located anywhere in the said complex. Although the apartment allottee has paid for the proportionate share in the ownership of the said land, OP-1 has reserved to itself the sole discretion to modify the ratio with the purpose of complying with Haryana Apartment Ownership Act, 1983.

2.2.8 According to informant, clause 8 also indicates arbitrary and one-sided stipulations of the agreement. While time has been made essence with respect to apartment allottee's obligations to pay the price and perform all other obligations under the agreement, OP-1 has conveniently relieved itself by not making time as essence for completion in fulfilling its obligations, more particularly, handing over the physical possession of the apartment to the apartment allottee. The arbitrariness and unreasonableness of the Apartment Buyer's Agreement is also seen in clause 10.1 where under it is provided that OP-1 would complete the construction within a period of three years but the exception to this clause have been kept wide open to keep apartment allottee totally at the mercy of OP-1.

2.2.9 The informant has submitted that as per clause 9.1, in future the apartment allottee shall be at the mercy of OP-1 who has reserved to itself the right not only to alter/delete/modify building plan, floor plan, but even to the extent of increasing the number of floors and /or number of apartments. While the common areas and facilities might stand largely compressed on account of increased number of floors, the said clause has absolutely debarred the apartment allottees from claiming any reduction in price occasioned by reduction in the area. The only right given to the apartment allottee vide clause 9.2 is that it would receive a mere formal intimation. In case the apartment allottee refuses to give consent, OP-1 has the discretion to cancel his agreement and to refund the payment made by the apartment allottee that too with the interest @ 9% per annum, which is wholly arbitrary as in case of default by the apartment allottees, the rate of interest/penal interest is as high as 18%.

2.2.10 The informant has further submitted that clause 10.1 prescribes a period of three years from the date of execution of the agreement. However, while OP-1 starts collecting the payment from the allottees w.e.f the date of allotment, it is not at all bothered that its collection of money must be commensurate with the stage-wise completion of the project.

2.2.11 The informant has also submitted that another arbitrary and unconscionable clause 11.3 stipulates that in the event of OP-1 failing to deliver the possession, the apartment allottee shall give notice to OP-1 for terminating the agreement. OP-1 thereafter has no obligation to refund the amount to the apartment allottee, but would have right to sell the apartment and only thereafter repay the amount. In the process, OP-1 is neither required to account for the sale proceeds nor even has any obligation to pay interest to the apartment allottee and the apartment allottee has to depend solely on the mercy of OP-1. The quantum of compensation has been unilaterally fixed by OP-1 at the rate of Rs. 5/- per sq. ft. (or even Rs. 10/- per sq. ft.) of the super area which is mere pittance.

2.2.12 According to the informant, the terms of the agreement are one sided as can further be seen from clause 11.1 in so much so that non-availability of steel, cement and other building materials has also been given the colour of force-majeure. Clause 22 is also inequitable as it not only gives exclusive discretion to OP-1 to put up additional structures upon the said building but also makes the additional structure the sole property of the OP-1 although the land beneath the building is owned by the apartment allottee. Further, clauses 23 and 24 make serious encroachment on rights of the apartment allottees as although both the land beneath the building and the super areas of the building have been paid by the apartment allottees and for all practical purposes these areas belong to the apartment allottees, yet OP-1 unilaterally has reserved to itself the right to mortgage/create lien and thereby raise finance/loan. In an event of OP-1 DLF not able to repay or liquidate the finance/ loan, the apartment allottee may be direct sufferer, a clause which is not reconcilable to the provisions of Section 9 of the Haryana Apartment Ownership Act, 1983 as well.

2.2.13 According to informant, under clause 32 of the agreement, OP-1 can abrogate all that has been promised to the apartment allottee as in exercise of the power under that clause it is permitted to unilaterally amend or change annexures to the agreement. The annexure appended to the agreement describe the apartment area, super area, common areas and facilities, club, etc. as also the nature of equipments, fittings, which the DLF has contractually committed to provide to the Apartment Allottee.

2.2.14 It has further been submitted by the informant that clause 35 brings to the fore the arbitrary mis-match between the buyer and seller, whereby the apartment allottee has been foist with the liability to pay exorbitant rate of interest in case the allottee fails to pay the instalment in due time i.e. 15% for the first 90 days and 18% after 90 days. When this lop-sided provision is compared to clause 11.4 the unfairness of the agreement is amply demonstrated as OP-1 would pay only Rs. 5/- sq. ft. to the allottee for per month delay, i.e. 1% per annum.

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 Rs. 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 theallottee an amount of Rs. 85 lakh (approx.) without the buyer being aware of the sweeping terms and conditions contained in the agreement and also without having the knowledge whether the necessary statutory approvals and clearance as also mandatory sanctions were obtained by OP-1 from concerned Government authorities.

2.2.18 It has been submitted that because of the initial defaults of OP-1 in not applying for and obtaining the sanction of the building plan/lay-out plan, crucial time was lost and delay of several months had taken place. This delay was very much foreseeable but OP-1 deliberately concealed this fact from the apartment allottees. After keeping the buyers in dark for more than 13 months, OP-1 intimated the buyers on 22.10.2007 that there was delay in approvals and that even the construction could not take off in time. By that time, OP-1 had enriched itself by hundreds of crore of rupees by collecting its timely instalments from scores of buyers. Before a single brick was laid, the buyers had already paid instalments of November, 2006, January, 2007 March, 2007, June, 2007 and Sept. 2007, up to almost 33% of the total consideration.

2.2.19 According to the informant, only through the letter dated 22.10.2007, theallottees 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 @ Rs. 5 per sq. ft. per month was already stipulated to meet the plight of the allottees. In an admission that lay-out plans/building plans were not shown to the allottees, OP-1 agreed that the same could be verified by any authorized representative of RKG. RKG, expressing its disapproval of the stand taken by the OP-1, sent a rejoinder on 27.07.2009, that Apartment Buyer's Agreement was unfair, unreasonable and unconscionable.

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

2.2.23 It has been submitted by the informant that while the discount given to the prospective buyers after the revised plan was as high as Rs 500 per sq. ft., OP-1 had offered only Rs 250 per sq. ft to the older buyers. 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 years. 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 investors. 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 Rs.51 lac, notwithstanding the fact that Mr. Mohindroo has adhered and fulfilled his obligation of making regular payments of all the installments totalling over Rs.1.29 crore, while OP-1 has defaulted in all its obligations including the targeted date of completion and physical handing over the possession.

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

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

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

2.2.26 It has been submitted by the informant that the OP-2 has framed Haryana Urban Development Authority (Execution of Building) Regulation, 1979 which inter-alia 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 ITTs, 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 upto 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 upto 29 floors while the foundation laid out underneath the building is suited only to sustain the load of 19 floors.

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 allottees of the factum 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 colourful 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, inter-alia 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.

4. Order under Section 33 of the Act

4.1 The informant also filed an application for interim order under Section 33 of the Act on 06.07.2010. Additional information/submissions were also filed on 19.08.2010, 06.09.2010, 09.09.2010 and 14.09.2010. In the application under Section 33, the informant prayed following to restrain OP-1 from;

(i) taking any action, which prejudices the allottees and thereby secure the substantial investments already made by the allottees:

(ii) taking any coercive actions, including cancellation of allotment, levying of penalty/interest etc. and from raising the demand towards the installments;

(iii) diverting/utilizing the funds collected from the allottees of “the Belaire” to any other Project;

(iv) creating third party rights by selling, alienating, or transferring in any manner whatsoever the apartments and common areas and facilities.

(v) to direct OP-1 to create an “Escrow Account” depositing the money collected from the allottees against 564 apartments.

4.2 It had also been stated in the application under section 33 that faced with the investigation by the Commission,OP-1 had started issuing letters to the allottees threatening to cancel the allotment and to impose penal interest etc.

4.3 The OP-1 filed written submissions on 30.07.2010, 17.08.2010, 03.09.2010, 08.09.2010,13.09.2010 in response to the application under Section 33 filed by the informant.

4.4 The Commission after considering the submissions made before it passed following order under Section 33 in the instant case on 20.09.2010.

(i) OP-1 is restrained from cancelling allotment of 'apartment allottees' of Belaire Residential Complex located in Phase-V in DLF City Gurgaon, Haryana without leave of the Commission;

(ii) OP-1 is further restrained from creating third party rights by selling, alienating or transferring in any manner whatsoever the apartments and the common areas and facilities relatable to any cancellation of allotments so far, without leave of the Commission.

5. Report by Director General

5.1 The DG conducted an in-depth investigation of various allegations made in the information. While conducting investigation, details from OP-1 and the informants were obtained. The DG also collected materials from different sources in order to assess various issues involved in the case. Additionally, the dynamics of real estate market alongwith state of regulations in real estate sector in India and some other jurisdictions were also examined. Various issues examined by DG are discussed in the following paras.

Issue of Jurisdiction

5.2 It was argued by OP-1 before DG that the basic terms and conditions agreed to between OP-1 and allottees, were set out initially as terms and conditions of the booking application, submitted by the allottes in the year 2006 and subsequently in the Apartment Buyers' Agreement executed in the year December 2006/ 2007. All these terms and conditions were agreed to, prior to the coming in to force of Section 4 of the Competition Act (20.05.2009). Thus, it cannot be suggested that any condition was "imposed" by the company after 20.05.2009, so as to attract Section 4 of the Act.

5.3 The DG has stated that although the agreements with some of the apartment–allottees of the Complex-Belaire referred to in the context of alleged imposition of conditions belong to period prior to May 20, 2009, since the effects of the agreement are given in the year 2009-10 they can be examined under the Act. In this context, DG has relied upon the Judgment of Hon'eble Mumbai High Court in case of Kingfisher Airlines Limited. The DG has also stated that alleged imposition of unfair conditions have taken place in the year 2009-10 when they were given effect to in terms of cancellation of apartment units and forfeiture of amounts by invoking the terms of agreements and thus they can be examined under the provisions of the Section 4 of the Competition Act, 2002.

5.4 Further, DG has also brought out that even after May 20, 2009, apartment units have been sold and agreements have been executed with apartment allottees and advertisements were still coming in the newspapers and web site of the company that apartment units were up for sale as on date of investigation and possession will be given within 12 months from September 2010 i.e. by September –October 2011.

5.5 The DG has thus established that the facts of the case are squarely covered in the jurisdiction of the Competition Act, 2002.

Assessment of Relevant Market

5.6 OP-1 in its submissions has stated that there can be abuse within the meaning of provisions of Section 4(2) (a) of the Act only when an enterprise or group directly or indirectly imposes, unfair or discriminatory condition in purchase or sale of goods or service. It has been contended that the present agreement relates to "sale of an apartment" and not for "purchase of service". Further, no apartment owner can be described as "Consumer" under Sec. 2(f)(ii) of the Act as the present agreement does not relate to hiring or availing of any service.

5.7 As regards the question of provision of services, DG in his report has stated that it would be worthwhile to discuss the definition of service within the meaning of Section 2(u) of the Act, which states as under;

"..."service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, ***real estate****, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging,*

entertainment, amusement, construction, repair, conveying of news or information and advertising;"

5.8 Thus, according to DG, under the provisions of the Act, the service has been defined as service of any description and it includes the provision of services in connection with business of any industrial or commercial matters such as real estate. The intent of the legislature is therefore to include service of any description including for real estate as clearly provided in the Section. DG has also stated that in the context of Service Tax, in the Finance Act, 2010, an *Explanation* has been added w.e.f. 1.7.2010, to the definition of 'commercial or industrial construction' and 'construction of residential complex', as follows -

Explanation.— For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law *for the time being in force) shall be deemed to be service provided by the builder to the buyer.*

5.9 As per Section 65(105)(zzzzu) of Finance Act, 1994 (inserted w.e.f. 1-7-2010), any service provided or to be provided, to a buyer, by a builder of a residential complex, or a commercial complex, or any other person authorised by such builder, for providing preferential location or development of such complex but does not include services covered under sub-clauses (zzg), (zzq), (zzzh) and in relation to parking place, is a 'taxable service'. *Explanation*.— For the purposes of this sub-clause, ''preferential location'' means any location having extra advantage which attracts extra payment over and above the basic sale price.

5.10 In this context, relevant portion of Notification dated 1st July 2010 **D.O.F.No.334/03/2010-TRU Dated : 01/07/2010 issued by** Ministry of Finance, Department of Revenue, Tax Research Unit has also been quoted by DG.

5.11 Keeping in view the provisions of Section 2(u) of the Competition Act, 2002 and the legislative developments as above, DG has stated that the case is covered under the Act.

5.12 As far as contention of OP-1 on the issue of consumer is concerned, DG has brought out that as per Section 2(f) (ii) the consumer has been defined as under;

“ (f) "consumer" means any person who—

(i)..

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use;”

5.13 Thus, according to DG, if any person avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment (like in this particular case), he is covered within the meaning of Section 2(f) (ii) of the Act.

5.14 Further, DG has also contended that as per preamble, the Act is to ensure that the interests of the consumers are protected and there should be free and fair competition in the market.

5.15 Taking into account all the above factors, DG has submitted that the instant case falls within the ambit of the Act.

5.16 As regards relevant product market for the purposes of Section 4 of the Act, DG has contended that the industrial classification, 2008 prepared by Central Statistical Organisation, Ministry of Statistical and Programme Implementation has classified the construction of buildings under Section F – Division 41, Group 410 and Class 4100. The activity of construction of buildings, therefore, falls under a separate head. It has also been considered that the residential units which are being considered in the instant case are not smaller low priced dwelling units. The houses in the case are of the range of around Rs. 2 – 3 crore (considering basic cost and additional costs over and above the basic cost). The DG has stated it is not that if the prices of apartments which value between Rs. 2 –3 crore are increased by say, 10% around Rs. 20 lakh, the customers will settle for a house of Rs. 20 Lakh or even Rs. 50 Lakh. Therefore, construction of residential buildings, particularly of Rs 2-3 crores would constitute a distinct class.

5.17 The DG has brought out that the qualitative assessments of the characteristics of the products were analysed in case of Wanadoo, COMP/38.223 [2005] 5CMLR 120, in which the European Commission defined the relevant market as the market for high speed internet access for residential customers. The European Commission in that case examined the differences in performance between high and low speed internet access and concluded that the differences were clearly perceived by the consumers and that an analysis of price differences between them showed that consumers were prepared to pay a premium for the extra performance and convenience of high speed. Keeping in view these, the DG has stated out that the relevant product market would be services provided by the developers for providing high end apartments to the customers.

5.18 As far as relevant geographic market is concerned, OP-1 has contended that its dominance needs to be looked into taking into account entire Northern India since the informant has stated that it is a leading developer in Northern India. OP-1 has also contended that in any case the geographical market should be entire NCR and not only Gurgaon.

5.19 The DG has submitted that the Relevant Geographic Market in the case is the territory of Gurgaon of National Capital Territory of Delhi in which the builders/developers including OP-1 are developing and selling residential houses. It has been stated in the report of DG that a person who wants to reside in Gurgaon for various reasons like offices, work place, schools, colleges and will like to settle in Gurgaon will ask a builder to develop and build a house for himself in Gurgaon only. The buildings cannot be transported from one area/ region to another.

5.20 According to DG, the geographic limit of real estate is determined with reference to its locations. The geographic market is defined in case of services towards real estate once the determination is being considered of competition or lack of it in a particular area or place. There is no doubt that builders–developers not only from Gurgaon but from National Capital Territory of Delhi and all over India can provide their services to the consumers of

Gurgaon for developing and constructing a house. However, that is a question of entry in the market. Thus, the relevant geographic market in this case, according to DG, has to be Gurgaon.

5.21 Based upon exhaustive analysis, DG has stated that the relevant market in terms of relevant product and relevant geographic market in this case would be services provided by developers/builders for construction of high end residential buildings carried out in Gurgaon.

Assessment of Dominance

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 consumers. 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 investors.

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 Position" of any enterprise, there is an impediment for new entrants or that the "Dominant Position" of any enterprise results in “entry barriers for new entrants.

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

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

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

5.31.2 DG has stated that as per Draft Red Herring Prospectus filed before SEBI, dated 25.05.2007 , OP-1 in its own admission has stated that *"We are the largest real estate development company in India in terms of the area of our completed residential and commercial developments. In one of the speeches given by K.P.Singh, while he was conferred the degree of doctorate in April, 2008, he stated, " I am acutely aware that -- my company DLF is today regarded as the largest real estate developer in the world and has a pan-India presence with over 50 million square feet under construction---." The Annual Report of the Company for the year 2009, states, that " DLF's dominant position in Indian homes segment is established due to its trusted brand with superior execution track record, pioneered townships and group housing in India, complete offering of super luxury, luxury and mid-income homes, 195 m.s.f. of plots and 21 m.s.f. of group housing developed, 290 m.s.f. of development potential, 16 m.s.f. under construction."*

5.31.3 DG has stated that OP-1 has pointed out certain studies and reports and has submitted reports by Jones Lang Lassalle to establish that its share in terms of number of units developed/ under active stock is much less compared to other real estate player either in Gurgaon or in the entire NCR. However, since market share in terms of sales was not provided by OP-1, **different** sources were tapped in by DG in order to ascertain its market share and other companies engaged in real estate (residential) business. DG on the basis of report from Centre for Monitoring Indian Economy for the month of April 2010 has brought out that the market share of OP-1 together with its subsidiary company – DLF Home Developers Limited is the highest in India among all the listed companies engaged in housing construction during the year 2007-08 and 2008-09. In the year 2007-08 it reached 40.46% and in the year 2008-09 it was 32.65%.

5.31.4 DG has also brought out that in the data of CMIE, sales of DLF New Gurgaon Developers Limited to the extent of Rs.300.24 crore for the year 2008-09 have not been considered. If that is also taken into account, the market share of OP-1 would go up further. DG has also brought out that the market share calculated on the basis of data from CMIE applies to all companies operating all over India and the data of CMIE establishes that OP-1 has the highest share (considerably higher than the nearest competitor) among all the housing construction companies in India.

5.31.5 DG in his report has also brought out that the market share of the OP-1 among all companies (for housing construction) in the relevant market of Gurgaon during the period 2007-08 and 2008-09 shall be around 70% and 65% respectively. DG has stated that even a margin of 5% -10% is given on account of other players, data and sampling error, the market share of OP-1 among the companies operating in Gurgaon exceeds 55%.

5.31.6 DG has also stated that an analysis of total sales figure of 82 companies taken from CMIE, who are engaged in real estate (residential) business and are not only operating in Gurgaon but also outside Gurgaon and all over India, also establish the superior market share of OP-1 at about 44%. For the year 2009-10 also, DG has shown the market share of OP-1 in relevant market to be about 50%.

5.31.7 DG based on details of sales, operating profit, PAT, Market capitalisation, enterprise value, of a larger sample of different real estate players taken and analysed in Outlook profit (issue dated October 2010) has also stated that OP-1 is a market leader in India in almost all respect also in quarter ending June 2010. DG has shown that the share of the second large real estate company is almost 1/3rd of OP-1. DG has also brought out that as far as companies operating in Gurgaon are concerned on the basis of their all India sales during Quarter ending June 2010, market share of OP-1 is about 45% as compared to second largest company i.e. Unitech , about 19%. If sales figure only for relevant market of Gurgaon is taken (such figures are not available in public domain), the market share of OP-1 may be much more than the above figures since it is mainly concentrated in Guragon.

5.31.8 DG has stated that figures from different sources have been taken since OP-1 on its own did not give any figure in terms of sales as regards its market share even though specifically asked.

5.31.9 As regards market share, DG has finally concluded that it is having the highest market share among all the companies operating in the relevant market over a period of three years 2007-08, 2008-09, 2009-10 and also for the quarter ending June 2010, which establishes that its position as market leader remains undisputed over last three-four years. DG has stated that it cannot be said that any other player enjoys similar or near to similar market share than that of OP-1. In their annual reports and various literature, OP-1 have stated that Unitech is one of their close competitors, however, market share of OP-1 is more than double of the market share of Unitech its nearest competitor as on date.

5.31.10 DG has stated that OP-1 in their submissions have stated that the relevant market may not be limited to Gurgaon in the case. If the scope of relevant geographic market is also widened and is taken to include the areas other than Gurgaon as well and even all over India, the market share of OP-1 in relevant product market far exceeds its rivals and may not be in any case less than 32%-40% as per reports of CMIE and other reported figures illustrated above.

5.31.11 Citing case laws from other jurisdictions like EU, DG has stated since OP-1 has market share twice that of the largest competitor i.e. Unitech, it may be considered dominant. It has also been stated by DG that in case where the market is fragmented, even market share between 25-40% has been considered to be sufficient for establishing dominance in jurisdictions like EU. DG has brought out that the market share of the nearest competitor is much less than OP-1, and therefore there is limited competitive constraint. In totality, it can be said that market share of OP-1 as determined is indicative of its dominance in the relevant market.

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 Size and resources of the enterprise: DG has done analysis of about 118 companies based upon CMIE data base in real estate sectors in India to show that OP-1 together with its group concerns is having superior fixed assets and capital employed as compared to other players in the market and it has a sizable presence across several key cities (Delhi NCR, Mumbai, Bangalore, Chennai, Kolkata, Chandigarh etc) and clear market leadership position in commercial, retail, and lifestyle/premium apartments. Out of 118 companies analysed based upon CMIE reports, DG has found that OP-1 has about 69% of gross fixed assets and 45% of capital employed which shows its size and resources are far greater than other real estate concerns.

5.33.1 DG has also stated that OP-1 has huge resources at their disposal. As part of their business expansion strategy, they have also diversifed into other real estate related businesses such as the development of SEZs, 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, totalling over 574 million square feet. It has taken up two big real estate projects in Mumbai recently. **It** has also entered into a joint venture with Hilton, a leading US- headquartered global hospitality company, to set up a chain of hotels and serviced apartments in India. It is proposing to set up 20,000 business hotel rooms in the next 5 years in partnership with Hilton. OP-1 had also engaged itself in the buy-out of Aman Resorts business.

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

5.33.4 On the basis of the above details, DG has stated that OP-1 is the biggest real estate player in terms of its size and resources. The report of DG brings out that the quarter ending March 2010 has seen an increase of 202.6% of income and 1308.2% of sales of OP-1 further boosting their position.

5.33.5 DG has also pointed out following to bring out that OP-1 is far ahead than other players in the market as far as size and resources is concerned:

a) In the list of Forbes published in the year 2010, OP-1 is the only real estate company that appears in the global 2000 occupying a significant position of 923.

b) Further, its promoter KP Singh has been ranked 5th in India's Top 10 billionaires in the year 2008, 6th in the year 2009 and 8th in the year 2010, above Sunil Mittal of Airtel and Kumar Birla. There is no developer from the real estate sector who is in top 10. Mr. Singh's net worth is estimated to be $9.2 billion against Mr. Ramesh Chandra, promoter of Unitech, the nearest competitor, whose networth has been estimated at $1.86 Billion.

c) Further, among 100 companies ranked by Business Today in May 2009, OP-1 was positioned at 14th position during the year 2008-09 (in 2007-08 the position was 15th) as far as overall visibility is concerned. There was no real estate company in the list.

5.34 Size and importance of the competitors: DG has also established that OP-1 is having clear edge over the competitors as far as market shares, size and resources are concerned. In terms of Income and Profit after Tax, also DLF has distinct advantage over other real estate players. DG after analyzing Net Income and PAT of 113 companies for 2008-09 has shown that OP-1 has about 41% share as far as net income is concerned and about 78% as far as PAT is concerned.

5.34.1 After taking into account, figures of market capitalisation of Top 100 companies, taken as on 17.09.2010 from rediff.com of Top 100 companies in India, DG has shown that while OP-1 with market capitalisation of 59,782.43 crore holds 23rd position, Unitech holds 68th position with market capitalisation of 22,106.70 crore, way behind OP-1. There is no other real sector company that appears in the list. In April 2009 also, OP-1 stood at 24th rank in terms of market capitalisation. At that point of time Unitech Limited was positioned at 92nd position. DG has also brought out following to establish that OP-1 is far ahead than the competitors in size and resources;

a) OP-1 is the only company in India in the real estate sector to have been awarded ' Superbrand' ranking.

b) If position of OP-1 is compared with that of Unitech, its nearest competitor, it has been found by DG that OP-1 emerges as clear front runner in terms of sales, Net Income, PAT, Gross Fixed Assets and Capital Employed.

c) Similarly, OP-1 also emerges leader when financial position of other big players like Emmar, Parshvnath and Omaxe group are compared.

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 competitors. Further, it also has enormous cash profits and Net profit as compared to its competitors. The position of Cash profits and Networth (figures taken from CMIE) shows that OP-1 is far ahead on these accounts also as compared to its competitors. 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 networth 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 Rs 1,750 crore in Haryana for developing a recreation and leisure project. It has vast Land bank and familiarity with the area which gives it distinct advantage. The Annual Reports of OP-1 for the year 2009 also states that, it is a having a dominant position in Indian offices segment too, "due to the fact that it is founder and pioneer of Grade A office leasing market, it has locational advantages and deep customer relationships having occupancy levels of 98%, more than two-third of client base belonging to Fortune 500 list…….”.

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

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

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

5.34.6 It has further been pointed out by DG that in terms of execution, OP-1 is better positioned, due to vast experience in the industry, larger area developed till date and joint ventures with strategic partners. The JV with Laing 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.

5.34.6 DG has concluded that all these above establish that OP-1 has distinct economic advantage to it as compared to its competitors. 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.

5.37 **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:** DG has pointed out that entry barriers exist in the sector in the form of high cost of land, established brand value of DLF and the fact that DLF has been in this business since 1946 unlike other players who have commenced business in Gurgaon recently. DG has also stated that DLF has developed economies of scale as in their own admissions in their prospectus filed before SEBI, they have stated, "Our *size allows us to benefit from economies of scale. We are able to purchase large plots of land from multiple sellers, thus enabling us to aggregate land at lower prices. We believe that we enjoy greater credibility with sellers of land as well as buyers of our properties as a result of our reputation and our scale of operations. We are able to undertake large scale projects in multiple phases, which provides us with the* *opportunity to monitor market acceptance and modify our projects in accordance with customer needs. We are able to integrate our residential, commercial and retail capabilities, allowing us to achieve greater value for our projects, as demonstrated by DLF City. The large scale of our developments within a business line creates demand for our other business lines. Additionally, we are able to use our bulk purchasing capabilities for the acquisition of raw materials such as cement and steel, the use of better construction technology such as pre-casting, as well as high cost equipment such as shuttering machines and tower cranes. Further, the extent and quality of our assets enable us to finance the active acquisition of land, adjust the scale of our projects and provide us with the flexibility of retaining rather than selling our developments in the event of an economic downturn. We were one of the first developers to anticipate the need for townships on the outskirts of fast growing cities and are generally credited with the growth of Gurgaon. We were one of the early developers to focus on theme-based projects such as The Magnolias development in DLF City, which includes a golf course. We are one of the few developers in India to provide commercial space with floor plates of over 100,000 square feet. We were an early developer of large shopping malls with integrated entertainment facilities. We continually offer our customers new designs and* *concepts. For example, in some of our super luxury developments, we allow purchasers to customize the layout of their new homes. Our developments typically integrate construction and safety standards which exceed nationally prescribed minimum levels and we provide management services for properties in all our business lines."*

5.37.1 According to DG, the above shows that OP-1 is having economies of scale which cannot be matched by its competitors. The sheer size of operations gives OP-1 the advantage of economies of scale, right from raw material sourcing to higher utilisation of assets. This is evidenced by its ratio of Profit Before Depreciation, Interest and Taxes (PBDIT) over Income of about 76 % and Profit After Tax (PAT) over income of 25%. OP-1 has the highest ratio of Profit Before Interest and Taxes (PBIT) over income among the top real estate developers of India, far ahead of Unitech its nearest rival. DG quoting from the judgements from EU **has stated that** particular barriers to competitors entering the market are..... economies of scale from which newcomers to the market cannot derive any immediate benefit. OP-1 is also having the benefit of prior entry and access to bigger capital which makes its position quite formidable. Further, OP-1 has an experienced, highly qualified and dedicated management team, many of whom have over 20 years of experience in their respective fields. Because of their established brand name and reputation for project execution, they have been able to recruit high calibre management and employees.

5.38 **Countervailing buying power:** DG has further stated that there is a huge housing shortage and buyers cannot influence the business decisions of OP-1 since the residential units are in shortage. The consumers are dependent on OP-1 in Guragon because of its huge land reserves and projects under construction. The demand is huge while the supply is less. Thus, there is no case of countervailing buyer power in this case which has any sobering impact upon the dominance and market power of OP-1.

5.39 **Social obligations and Social costs**: DG has submitted that in case of developing buildings by private developers, the motive is profit making more so in the case of high end builders like OP-1 which is providing housing for richer segment of the society. Thus, there is no social obligation and social costs cast upon OP-1 which will justify its conduct of abuse, if any, arising out of its position of being market leader.

5.40 Relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition: Finally, DG has also brought out that the advantageous position of OP-1 in terms of commercial advantage may be traced back to its operations which go back to the year 1946. Founded in 1946, OP-1 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 inception, the company has developed about 224m sq ft, including 22 urban colonies as well as an integrated 3,000-acre township in Gurgaon by the name of DLF City. This gives the company an edge over its competitors. DLF Group over the years, as above, has acquired the status of India's largest real estate company in terms of revenues, earnings, market capitalization and developable area. The web site of OP-1 also displays the fact that it is the largest real estate player. It is significant that the promoters of OP-1 - KP Singh and his family stood at the 9th position in an analysis done by Business World (Super Rich 2010 of India) behind just only Tatas, Ambanis, Aziz Premji, Sterlite group, Sunil Mittal group, Jindals and Adanis. The worth of promoters was Rs. 41,232. 07crore as on March 2010.

5.41 Based upon above analysis of factors mentioned in Section 19(4) of the Act, DG has stated that OP-1 is not only enjoying the highest market share, but is also enjoying clear advantage over other players as far as size and resources and economic power is concerned. Its economies of scale, resources, and the fact of it being in business since last sixty years in the relevant market is also giving it a distinct advantage over the other players in the market.

5.42 DG has brought out that dominance in law implies that a firm because of its position of economic strength has a high degree of immunity from the normal disciplining forces of rivals' competitive reactions and consumer behaviour. DG has brought out that in Hoffmann-La Roche, *the Court of justice while defining a position of economic strength, stated, that the position of strength or presence of dominance does not preclude any competition but enables the undertaking...if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment. Thus, the argument of OP-*

1 that there is large number of players in the market and therefore, OP-1 cannot enjoy a position of dominance does not hold good.

5.43 Since OP-1 has developed integrated townships in Gurgaon over huge piece of land acquired on early occasion, if the consumers want to have residential units in Gurgaon or in the township developed by OP-1, they have to largely be dependent upon it , more so when because of its superior size, resources, market share, it has built a brand over the years, which affects the consumers in its favour. OP-1 stands at a position No. 47 in a survey of 100 most valuable Brands of India conducted by Indian Council of Market Research and 4Ps (Business and Marketing). There is no other real estate player in the list of Top 100 Brands. The value of Brand of OP-1 makes it capable of affecting the competitors in its favour and due to that OP-1 stands uniquely positioned to operate independently without having disciplining forces of rivals' competitive reactions. Due to its position of strength, it can operate independently of the other players in the relevant market. The consumers would also be affected in its favour because of sheer size, sheer resources, its economies of scale, its brand value, which is far superior to any other existing real estate developer as on date and also due to its superior economic power over its competitors.

5.44 Summing up his findings on the question of dominance, DG has concluded that **it is due to its sheer size and resources, market share and economic advantage over its competitors that OP-1 is not sufficiently constrained by other players operating on the market and has got a significant position of strength by virtue of which it can operate independently of competitive forces (restraints) and can also influence consumers in its favour in the relevant market in terms of explanation to Section 4 of the Act.** Based upon all the above factors, DG has concluded that it may be said that OP-1 is enjoying a position of dominance in terms of Section 4 of the Act.

6. Abuse of Dominance

6.1 The DG has examined the alleged abusive behavior of OP-1 by taking into account various allegations mentioned in the information and four representative cases of apartment allottees of the association apart from the cases mentioned in the information.

6.2 DG after examining the allegations in the information has concluded the following:

A) Commencement of project without Sanction/Approval of the projects

i) DG has stated that it is a fact that OP-1 announced a Group Housing Complex, named as 'The Belaire' to be constructed on the land earmarked in Zone 8, Phase-V in DLF City, Gurgaon, Haryana. Certain customers booked an apartment unit in Belaire by paying initial amount of Rs. 20,00,000/- in August –November 2006. However, application for approval of building plans was submitted only in December 2006 by OP-1. Against the application dated 20.12.2006 and subsequent letter dated 03.04.2007 of OP-1, Director, Town and Country Planning, Govt. of Haryana accorded approval for the project only in April 2007 vide letter dated 18.04.2007.

ii) Permission was granted for the construction of the project - subject to the provisions of Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963 with certain other stipulations. From the details of approvals and building plans dated 30.11.2006, it is noted that while in each of the Blocks A to C, total number of floors were to be 19, in Blocks D to E, the number of floors were to be 18 each. Total number of apartments to be built therein was to be 368. The Allotment letters were issued in the year 2006 and apartment buyers' agreements were signed even before the approval for the plan was accorded by Town Planner.

iii) The Apartment Buyer's agreements were signed much after the allotment letter and before that amounts were collected from the allottees. In the application for allotment which was made in the year 2006 in the above cases also it was mentioned that, *" I/we are making this application with the full knowledge that the building plan for the building in which the apartment applied for is located are not yet sanctioned by the competent authority."*

Thus, the apartment buyers agreement also bring out that even when the agreements were executed the approvals were not in place. *P*age 3 of the Representations "B" and "C" shows that OP-1 neither on the date of announcing the Scheme "The Belaire", nor while executing the Apartment Buyer's Agreement had approved Layout Plan of Phase-V by the Director, Town & Country Planning, Haryana, Chandigarh.

iv) Clearance from Airport Authority of India for the original project was also given only on 31.01.2007 for the project.

v) Based upon above, DG has concluded that there is no dispute on this score that the applications for allotment were invited, agreements were signed and considerable amount of consideration was collected even when the plans were not approved by the competent authority and clearances were not obtained from other authorities. In October 2007, OP-1 intimated to the allottees that there was delay in approvals and that even the construction could not take off in time. By that time, the buyers had already paid almost 1/3rd of the total consideration. DG has concluded that facts on record also reveal that a revised plan was submitted vide letter dated 30.12.2008 enhancing the number of floors from 19 to 29 and number of apartments from 368 to 544. The revised plan for 29th floor was approved only on 06.08.2009.

vi) Thus, DG has established that before the approval was obtained, DLF had already commenced the structural work for all 29th floors. According to DG, it is a moot question when the competent authority had clearly in sanction letter dated 18.04.2007 stipulated that any further construction without approval or deviation would not be permissible and that sanction will be void ab-initio, if any of the condition mentioned in the sanction letter were not complied with, how OP-1 proceeded with the construction of 29th floor. Further, it is also noted that OP-1 had started construction activities as early in December 2006 and they also intimated the allottees about the same as is clear from the letter dated 26.12.2006 issued to Amit Jain, one of the allottees. However, the approval even for 19 floors (initial approval) was accorded only on 18th of April 2007.

B) Increase in number of floors mid-way

i) DG has brought out that it is not disputed that the originally the project was conceived with 19 floors. This is clear from the red herring prosecutes of May 2007, filed with the SEBI which states;

“ The Belaire is expected to be completed in fiscal 2010 and consisting of 364 residential units with approximately 1.3 million square feet of saleable space in five blocks of 19 to 20 floors each.”

It was revised mid-way and the consumers were not told about this till October- December 2007 and when this issue was raised, only a hint of possible increase in floors was given as is clear from the correspondence with Akhil Sambhar, one of the allottees**.** It could be because the approval from Airport authority was obtained on 21.01.2009 and revised plan for 29th floor was approved only on 06.08.2009 by the competent authority.

ii) According to DG, the consumers who had applied in the year 2006 thinking that the project is of 19 floors were told in October 2007 that the project was being revised, even when the application for approval was moved in December 2008 and the approval for the revised plan was given in August 2009.

C) Issue of Floor Area Ratio and Density Per Acre

i) DG has also submitted that while booking the apartment units, the allottees were not told about the fact that there will be revision in the number of floors from 19 to 29. This has the effect of increasing the FAR and density of population occupying the apartments. While the number of floors has increased, the area remains the same. It is not that new floors are being constructed on additional space. In fact the number of floors has gone up from 19 to 29 utilising the same area space. The increase in floors certainly acts against the interest of the applicants-allottees since the allottees will now have to contend with additional floors than what they might have thought while making applications for allotment. According to DG, once there has been change in density per acre and FAR, the buildings complex is bound to suffer from some other infirmities in terms of structural strength, other amenities, facilities including common area than conceived originally.

D) Time Schedule for completion and possession

i) According to DG, it is an admitted position of OP-1 that there has been delay in construction. As per apartment Buyers agreement, the construction was contemplated to be completed within three years of the agreement. The word ‘contemplation’ leaves wide scope for the deliveries. However, from the letter dated 22.10.2007 to the allottees it had been confirmed that the deliveries will be affected within the stipulated time. The letter gives impression that the brickwork would be completed by 15th of May 2009 and the rest of the work would be completed very soon thereafter. In letter dated 19.02.2007 to Mr. Pankaj Mohindroo, one of the allottees it was mentioned that the project was to be completed within 3 years of the date of agreement. **A letter written to RKG Hospitalities Limited, one of the allotees, on 07.07.2009 by OP-1 states that the date of delivery has been indicated as March 2010. However, on 24.11.2009 OP-1 wrote a** letter to Mr. Sanjay Bhasin, President of the informant association intimating that the final possession will be given in first quarter of 2011 Further, in September 2010 advertisement have come in newspapers stated that possession would be given in 12 months and one can still book an apartment in the scheme. Thus, expected possession is by September-October 2011 now. This shows that the project have been delayed badly. According to DG, the whole sequence of events gives an impression of misrepresentation.

E) Forfeiture of Amounts

i) DG has noted that the allottees of the Belaire project raised several issues with OP-1 and there were exchange of letters and finally during the year 2009-2010, allotments in case of certain allotees stand cancelled after forfeiting amounts on account of Earnest Money, Brokerage charges and delayed payments. The project was conceived for 19 floors and now a project of 29 floor is put in place. When the allottees raised issues seeking clarifications, OP-1 kept on reminding them of the clauses of the agreement, asking them to pay the installments and finally cancelled the allotment of the apartments. At the time of cancellation, huge amounts which were paid by the allottees all through have been forfeited as has been brought out above. In turn, OP-1 has gained; once by forfeiting keeping the amount of earnest money, by charging interest on delayed payments and brokerage etc. For example, in case of Mr. Amit Jain, an amount of about Rs.50 lakh has been forfeited out of his total payment of Rs. 95 lakh. Thus, while allottees have lost money and paid for interest and brokerage, OP-1 has gained.

6.3 DG has also stated that OP-1 has taken shelter of the agreements executed with the allotees, terms and conditions of which are loaded heavily in favour of OP-1 and by virtue of which it has been able to impose unfair conditions by abusing its dominant position. These agreements, according to DG, are unfair on many counts as under:

i) After analysing Representation J and Representation K of the agreement, DG has submitted that through the above clauses the right of the apartment allottee to carry out any investigation regarding legality of land, construction etc. has been taken away. The allottee is not even entitled to raise any objection to the competency of OP-1 and documents relating to its title and the representation.

ii) The representation E of the agreement gives entire discretion to OP-1 to change the zoning plans, usage patterns etc. Thus, the allottees will not come to know about the plans till OP-1 chooses to inform the allottees about the same.

iii) **Representation F** gives OP-1 rights to reduce the land unilaterally pursuant to the approval/sanction of the Layout Plan.

iv) Based on analysis of Clause 1.1, 1.5 , 1.6, 1.7 of the agreement, DG has concluded that the consumers are not made known the final carpet area, built up area and super area of the apartment units and final price which he is expected to pay which gives rise to complete information asymmetry. As regards payment of Preferential Location Charges, the allottees are completely dependent upon OP-1. In case, there is change in location, the PLC would be refunded/adjusted but only at the time of last installment. No interest is payable by OP-1 on such refund of PLC even when the money will be utilized by the company. These clauses also give OP-1 sole discretion to alter the structure.

v) Clause 3 and clause 4 of the agreement have given enough discretion to OP-1 to retain earnest money in case a person wants to come out of the agreement. Thus, the agreement provides for a costly exit option.

vi) DG has noted from clause 9.1 of the agreement that even the payment plans, alterations, are subject to change at the sole option and discretion of OP-1 and apartment allottee would have no say on this. Under Clause 9.2, no right has been given to the applicants-allottees to raise any objection towards alterations/modifications.

vii) DG has concluded that there is no firm commitment for handing over possession of apartment since the clause 10.1 only mentions that OP-1 contemplates to complete construction of the said Building/said apartment within a period of three (03) years from the date of execution of this agreement. This has given OP-1 ample scope to modify the time schedule in accordance with its own discretion and this is the reason that the project has got delayed considerably.

viii) DG has noted that through Clause 11.3 the consumer has been deprived the right of claiming any refund of his amount. Rather OP-1 reserves all the rights and only after the property is sold that the allotees are expected to get their money back. This makes the agreement completely in favour of OP-1. Further, under clause 20 of the agreement, OP-1 is free to make any alterations in buildings even when the apartment allottees might object and under clause 22 of the agreement, absolute right has been to OP-1 to make any addition or alteration not making clear as to what extent such addition or alteration can be made. A person seeking an allotment therefore is not aware as to what kind of structure finally is going to be there in place finally at the site.

ix) Clause 23 and 24 provides for right of OP-1 to raise finance and agreement subordinate to mortgage by it. These clauses are unfair to the extent that even if the entire payment is made by the consumers they are subject to mortgages at the will of the company for the finances raised by it for its own purpose. Further, under clause 32 of the agreement OP-1 has reserved for itself all the right to correct, modify, amend or change all the annexure attached to the agreement at its sole discretion.

x) DG has submitted that along with favourable clause in respect of delivery, OP-1 has covered delay on account of conditions like inability to procure labour, equipment, facilities, materials or supplies also under the force majeure clause under clause 11.3 so that the delays in deliveries may be adequately covered taking these pleas.

xi) DG has stated that while agreement was executed, there was an apprehension that there could be delay (or even abandonment of the project) on account of some adverse order by the Government (since there was no approval for construction of higher floor although was already under consideration of the company) and therefore, OP-1 has covered itself adequately through clause 11.2 of the agreement which shifts all the liability on the consumer as if it was their fault if the approval from the Government are not received. DG has stated that if this clause is read with the other clauses of the agreement, it gives an impression that fully aware of the fact that there was no approval from the competent authority, the scheme was launched, the money was collected toward services of developing and selling an apartment unit and in eventuality of not getting approval shifting the entire burden on to the consumer to the extent of utilising their money for fighting cases in the court.

xii) According to DG, in case there is a delay, the agreement is again heavily loaded in favour of OP-1. While as per clause 11.4 the liability is limited to payment of compensation @ Rs.5 per sq.ft. of the super area per month for the period of delay beyond three years; the apartment allottee have been subjected to payment of interest @ 15% per annum for the first 90 days and additional penal interest @ 3 % per annum for a period exceeding 90 days as per clause 35 of the agreement. The interest chargeable to the allottees in case of delay in making payments is much more than delay on account of construction and handing over the possession to the allottees. Since OP-1 has covered itself on many accounts to save itself from liability in case of delay on delivery, there are possibilities of not paying anything to the consumer, while in case of delay in making payment by the consumer there is no escape from making payment of 18% interest per annum.

xiii) DG has further brought out that the dispute resolution by arbitration as per clause 51 of the agreement shows that the arbitration proceedings are supposed to be held within DLF city and even employees or advocate of OP-1 can be arbitrator to which the allottees would not have any disagreement at a later stage and all decisions of such arbitrator decision shall be final and binding upon the Parties.

6.4 DG has concluded that the unfair conditions as mentioned above have been imposed on account of the market power/dominance which OP-1 enjoys in the market. As per scheme of the Competition Act, 2002, once determination of dominance in relevant market is done, then the acts mentioned in Section 4 (2) are to be looked into. In case the enterprises are found to be acting in violations of the acts mentioned in Section 4 (2), the abuse of dominance is established. According to DG, here, the actions are to be proved and not that the actions also caused AAEC, since once violations mentioned in Section 4 are established; the abuse is also established not requiring further determination of AAEC (appreciable adverse effect on competition) in the market.

6.5 DG has concluded that OP-1 in exercise of its market power and dominance has imposed unfair conditions of sale on consumers in violation of Section 4(2)(a) of the Act.

6.6 DG based upon analysis of the factors as mentioned in Section 19(4) of the Act has stated that in addition to large market share, significant size and resources and superlative high economic power in the relevant market, OP-1 in the case has also derived market power from imperfect or asymmetric information. Relying upon the judgement in the case of Kodak, DG has concluded that market power can also arise from information that is imperfect or overly complicated which may change the choices that would be offered to consumers by way of functioning of the free market competition.

6.7 According to DG, the covert promise of handing over possession within a given time acted as barriers to the customers to go to any other developer given the brand name and brand value of OP-1. A costly exit scheme as in this case restricted competition in the market since the customers could not opt to exit for some other schemes looking at the costly proposition it involved. Switching costs in the case have also created a barrier for consumers to act efficiently since in case the consumers wanted to exit from the scheme of OP-1, the fear of forfeiture of huge amounts already paid have acted as significant barriers, impacting the overall competition in the market. Further, the mis-declaration about the project not only affected consumers in the favour of the project and OP-1 but also acted as impediment towards free and fair competition; because many consumers who might have opted for other projects ultimately opted for booking in 'Belaire'.

6.8 DG has submitted that if the consumers regard a branded product as unqiue; it is likely that they will not shift to other products. This explains the behaviour of the applicants in this case in opting for OP-1 as 'brand'. Even if other players in the market are and were present, OP-1 as brand had great impacting influence on the applicants-allottees in the case. As regards question of relatively low barriers and ease of entry in the market raised by OP-1, DG has stated that even in markets with little entry barriers; sometimes irrational factors do dissuade entry. This is so because a potential entrant will prefer to secure gains, on its existing market, rather than to enter a new market, where gains may be potentially higher, but unknown and irregular.

6.9 The DG has submitted that the exploitation of dominance and market power by OP-1 could be because of asymmetry in the information available not only for the buyers but also for the sellers in the relevant market. OP-1 has more information than other sellers giving it an edge and significant market power in the relevant market because of the historical factors and due to the fact that it has been in this market for decades.

6.10 According to DG, pricing of the apartment, charges for preferential location, other charges hidden in the agreement are not easily discernable. Thus, by making pricing strategies complicated and by making the deliverables unknown beforehand, OP-1 may be said to have engaged in shrouding practices creating a bias in its favour.

6.11 DG has brought out that to make markets work well, consumers must be able to assess, access and act on information. Simply providing more information (as OP-1 has argued in course of proceedings that the agreements have been made so elaborate and the applicants should have known about all clauses beforehand) may not be a good solution when consumers have problems assessing and interpreting such information.

6.12 According to DG, markets work well when there are efficient interface on both the demand (consumer) side and the supply (firm) side. On the demand side, informed consumers help in inducing competition by rewarding those firms which best satisfy their needs. On the supply side, competition provides firms with incentives to deliver what consumers want as efficiently as possible. While active and rational consumers and vigorous competition work together to deliver consumer benefits, the failure of the either side can harm the markets.

6.13 DG has submitted that if competition among firms is diminished then consumers do not get what they want. However, apart from supply side, demand side is also crucial since if consumers are less engaged in the buying process, then there would be lesser incentive among firms to deliver better quality products through innovation. As a result, overall competition at the market place will be reduced and consequently lesser consumer welfare will be delivered by the market.

6.14 DG has pointed out that in this case, along with market power and asymmetries in information between consumers and firms, behavioural biases have also played a role in market failure. According to DG, in order for consumers to drive competition, they ideally need to **access** information about the various offers available in the market, **assess** these offers in a well-reasoned way and **act** on the information by purchasing the good or service that offers the best value to the customer. In this case, according to DG, existence of thick apartment buyers' agreement and complicated set of conditions therein worked as significant barrier in optimal accessing, assessing and acting on information causing market failure and giving rise to market power to OP-1.

6.15 According to DG, the key role of search costs in obstructing consumers' ability to access information, and the impact this has on competition, has been shown by various scholars like P. Diamond in his famous paradox in which one finds many firms charging monopoly prices. Thus, according to DG, the argument that there are a number of players in the market and this has prevented OP-1 from exercising any market power does not hold good.

6.16 According to DG, consumer biases had a bearing on behavior of OP-1. In the instant case, OP-1 made it difficult for consumers to perform optimal search by providing them inadequate information. The pricings conditions mentioned in the applications/agreements in the case are complex making it difficult for the consumers to perform optimal search impacting competition. According to DG, while OP-1 made it more difficult for consumers to act to get the best deals, consumers also have displayed inertia due to overconfidence in their capacity to assess deals. OP-1 knowing this inertia, has increased switching costs.

6.17 DG has stated that the static competition has got affected in the case due to the failure of consumers to access, assess, and act on information because of complicated sets of agreement set in by OP-1, since such types of inaction provide little constraints on firms**.** Further, reductions in substitutability have the propensity to reduction in the intensity of competition resulting into poor delivery, higher prices and little choice for the consumers. Along with static competition, it has been stated by the DG that dynamic competition has also been affected within the market. One of the key benefits of competition is the role it has in ensuring that those firms that provide the best value continue in the market, while other perish. This role of competition gets considerably reduced when consumers reward only those that best play on their biases. The fact of product and process innovation also has got affected since OP-1 has not found enough incentive to come out with efficient and innovative products to win customers.

6.18 DG has concluded that in the case of OP-1, not only the market share, size and resources of the company, its economic power but also its practices which have given it a superlative market power over all its competitors. This has helped it in affecting consumers in its favour and act without being restrained or constrained by the competitors. Exploitation of consumer biases, asymmetry of information, costly exit option, one sided agreement and unfair conditions imposed on the consumers affected the consumers as well as competition (both static and dynamic) at the market place.

6.19 In response to the notice of DG, response from OP-2 and OP-3 was not submitted. However, later on when investigation report was submitted, OP-3 (DTCP) submitted their response which was forwarded to the Commission by DG separately. The response of OP-2 and OP-3 on the allegations filed by the informant is discussed later in the order.

7. Forwarding of Investigation Report

7.1 The Commission considered the investigation report submitted by the DG and passed an order dated 02.12.2010 to send a copy of the report to the opposite parties for filing their reply /objections.

7.2 After the submission of investigation report, informants filed another application under Section 33 of the Act for interim orders of the Commission on the following;

i) to freeze 20.87 acres of land based upon calculation of FAR and restrain OP-1 from alienating or utilizing the said land for the purpose other than for "the Belaire'"

ii) to constitute an "Overseeing Committee" for supervising the completion of the project within a strict time frame

iii) to restrain OP-1 from collecting any amount on account of service tax

iv) to restrain OP-1 from levying and collecting the parking charges

v) to recalculate the consideration amount taking the super area maximum of 18%.

7.2 It is pertinent to bring out here that OP-1 had filed an appeal under Section 53 B of the Act before Competition Appellate Tribunal against the interim order of the Commission dated 20.09.2010 in which various issues including the issues of jurisdiction were again raised. The Tribunal vide order dated 17.02.2010 disposed off the appeal by stating that they are not interfering in the matter since the matter has been fixed for the final disposal shortly by the Commission.

7.3 In course of hearings before the Commission, the parties concerned were given several opportunities to make oral and written submissions. The parties were represented by their advocates. Mr. M.L.Lahoty and Mr. Paban Kumar Sharma represented the informant, while Mr. R. Narain along with Ashok Desai represented OP-1. Ms. Poonam, ATP (E&P) represented OP-2 while OP-3 was represented by Mr. Shivendra Dwivedi and Mr. Rajat Bhardawaj. OP-1 filed their submissions dated 14.02.2011, 04.03.2011, 15.03.2011, 06.04.2011, 07.04.2011, 27.04.2011, 12.05.2011, 19.05.2011, 06.06.2011, OP-2 and OP-3 filed their submissions on 08.11.2011 and 18.10.2010 respectively. The informant filed written submissions dated 27.04.2011, 11.05.2011, 12.05.2011, 20.05.2011 and 06.06.2011. Parties were heard on various dates viz; 06.01.2011, 17.02.2011, 04.03.2011, 15.03.2011, 24.03.2011, 06.04.2011, 07.04.2011, 27.04.2011, 11.05.2011, 12.05.2011, 23.05.2011 and 06.06.2011.

8. **Submissions of DLF Limited (OP-1)**

8.1 OP-1 upon receipt of DG's report initially raised a point that all materials relied upon in the report of DG have not been supplied and till inspection of investigation records is granted, it may not be in a position to file its objections on the report of DG. It was also contended that the investigation report is incomplete in terms of Regulation 20(4) and Regulation 21(1) of General Regulations of the Commission which stipulate that DG shall submit complete records of investigation to the Commission. To this end, a writ petition was also filed in Hon'ble Delhi High Court with a request to quash the investigation report and also to issue directions to grant inspections. The writ petition was decided by Hon'ble High Court in which plea of quashing of investigation report was not allowed although upon the assurance given to the Court by the advocates of Commission and DG, directions were given to the effect that inspection be granted of the investigation records. Accordingly, OP-I on various dates, inspected the investigation records of the DG.

8.2 The Commission passed an order dated 09.02.2011 on the applications dated 06.01.2011 and 07.01.2011 of OP-1, rejecting its contention that since report of DG is incomplete, it cannot be acted upon. While passing this order, the Commission took cognizance of the fact that OP-1 had inspected the records of the Commission on various dates and also taken copies thereof after paying fees as per regulations.

8.3 OP-1 in its replies on various dates denying all allegations have submitted the following contentions, many of which were submitted before the DG and have also been brought out in the preceding paras of this order.

Issue of Jurisdiction

8.4 That the basic terms and conditions agreed to between the company; and allottees, were set out initially as terms and conditions of the booking application, submitted by the Allottes in the year 2006 and subsequently in the Apartment Buyers' Agreement executed in the year December 2006/ 2007. All these terms and conditions were agreed to, prior to the coming in to force of Section 4 of the Competition Act (20.05.2009). The said Act is prospective and not retrospective. It cannot be even suggested that any condition was "imposed" by the company after 20.05.2009, so as to attract Section 4 of the Act. Further, prior to 20.05.2009, there was no legally recognized concept of a company having a "dominant position". This concept is introduced by Section 4 as defined in Explanation (a) thereof. As such, even if a company can be said to have a dominant position, such position would only be on or after 20.05.2009.

8.5 The conditions included in the agreement are "usual conditions' as per industry practice and thus cannot be said to have been imposed by abuse of dominant position. Since the clauses of the agreement objected to are usual clauses as per industry practice and adopted by other competitors also in their respective agreements to meet competition it is necessary to incorporate such clauses in order to remain competitive. Such agreement is fully protected under the explanation to subsection 2(a) of Section 4 of the Act.

Determination of Relevant Market

8.6 As regards, determination of relevant product market and relevant geographic market, OP-1 has stated that it has been done by DG on assumptions. The OP-1 has stated that alleged relevant market is not confined to purchase for "own residence" but also for investment for value appreciation and earning rental. OP-1 has contended that while making a decision to purchase residential properties including apartments, most purchasers who are "investors" consider different locations for investment where they estimate the appreciation in value to be higher and accordingly, the customers decide whether they should invest in Delhi or NCR or in any part of NCR including Gurgaon, NOIDA, Greater NOIDA, Faridabad, Ghaziabad etc. DG has ignored that the major consideration for a customer is to consider the alternative locations to compare which location would give him best appreciation in value and on that basis the location is decided. In this regard to support its contention, OP-1 has also submitted an affidavit from a broker to buttress its arguments.

8.7 OP-1 have also re-iterated its submissions before DG that there can be abuse within the meaning of provisions of Section 4(2) (a) of the Act only when an enterprise or group directly or indirectly imposes, unfair or discriminatory condition in purchase or sale of goods or service. It has been contended that the present agreement relates to "sale of an apartment" and not for "purchase of service". It has also been stated that no apartment owner can be described as “Consumer” under Sec. 2(f)(ii) of the Act as the present agreement does not relate to hiring or availing of any service.

8.8 As regards applicability of service tax as mentioned by DG , OP-1 has stated that service tax is levied with effect from 01.07.2010 on account of deeming provision brought out by Finance Act, 2010, and there is no deeming provision in relation to ‘service ‘ under the Competition Act.

Determination of Dominance

8.9 OP-1 has stated that for determination of dominance, the term ‘Enterprise’ alone is used and the term ‘group’ is irrelevant. Further, mere mention in reports that a company is a leading company or that it enjoys a ‘Dominant Position” does not by itself prove that the enterprise enjoys a dominant position in the alleged relevant market.

8.10 OP-1 has further stated that since there are a large number of players in Gurgaon, there is intense competition in the market and therefore no one enterprise can be said to enjoy a dominant position within the meaning of Explanation (a) to Section 4.

8.11 Relying upon the reports submitted by Jones Lange Lassle, a research body, OP-1 has submitted that the market share determined therein based upon number of apartments as well as on the basis of the values thereof offered by the respective developers in NCR and Gurgaon is correct basis for determining the market share. OP-1 has also stated that sales figure of different developers is not available and also might not be relevant for determining the market share. According to OP-1, determination of market share by DG for Gurgaon by deriving market share based upon the All India Sales Figure is not correct.

8.12 OP-1 has also pointed out that in determination of market share for All India as well for Gurgaon, DG has not considered a large number of companies. Further, data of CMIE based upon which DG has computed market share is unreliable as a number of companies have been omitted, it is based upon annual reports which contain sales figures of not only residential properties but also sales from other businesses also. Further, in several cases, only the 'stand alone' sales figures have been considered ignoring sales figure of the group companies. Moreover, sales figure can be misleading because they are not reflected usually in the account books in the same year in which the properties are booked for sale. The sales figure recorded in the books of various developers would not represent the sales figure in the relevant year when bookings are done. As such, no reliable analysis of market share can be made on the basis of sales figure.

8.13 OP-1 has also argued that market share determined by DG based upon a research report of E.Partibhan taking into consideration market capitalization is not permissible. OP-1 has refuted that it has more than the double the market share of Unitech and has also submitted that the comparison does not relate to the alleged relevant market of Gurgaon. It has been stated that in presence of a large number of other competing developers who have a market share in NCR as well as in Gurgaon, there can be no case to consider OP-1 to be in dominant position so as to act independently of competition. To buttress its arguments, OP-1 has also submitted that a look at licences given to various developers between 2002 and 2010, would show that the licences granted to OP-1 is only about 8% of the Group Housing Projects.

8.14 As regards factors other than the market share mentioned in 19(4) of the Competition Act, 2002, OP-1 has also contended they need not be discussed since the assumption that the market share of DLF is the highest itself has no basis and thereafter consideration of the further factor becomes irrelevant. It has also been argued that the data based upon which factors mentioned in 19(4) of the Act have been analysed are incomplete and incorrect.

8.15 OP-1 has stated that in the CMIE report relied upon by DG, Herfindahl Index indicated therein shows that the market is less concentrated and in such a market there can be no case for monopoly or dominant position.

8.16 OP-1 has submitted that in order to determine the alleged contravention of Section 4 , it is necessary to establish with evidence that it enjoys "Dominant Position" within the meaning of

Explanation (a) to Section 4. It is not alleged in the 'Information' as to which part of Explanation (a) to Section 4, which defines "Dominant Position", is sought to be invoked. There is not even an allegation as to whether clause (i) or (ii), or which part thereof is sought to be invoked to allege that OP-1 has a "Dominant Position" in the relevant market within the meaning of Explanation (a). Further, even with regard to "abuse of dominant position" it is not even alleged in the 'Information' as to which part of clause (a) of sub section (2) of Section 4, is sought to be invoked. No specific allegation or material is placed in support thereof and such 'Information' cannot be acted upon.

8.17 It has been stated by OP-1 that it does not enjoy "dominant position" within the meaning of explanation (a). In order to find out whether OP-1 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).

8.18 OP-1 has further submitted that in a case like the present one, where no particulars are given in the ‘Information’ as to how the OP-1 has a “Dominant Position as defined in Explanation (a) to Section 4”, no “satisfaction” can be arrived at to hold that the OP-1 has a “Dominant Position”. The burden of proof in this behalf is on the “Informant”, which has not been discharged.

8.19 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 to give a wide choice to the consumers. In such a situation the condition prescribed in Explanation (a) to Section 4, cannot be satisfied, by a mere bald statement made in the Information.

8.20 OP-1 has stated that since the allegations in the present case relate to purchase of residential apartments, the relevant property market would be the market relating to purchase and sale of "Residential Properties". In that sense, the factual data and material placed on record establishes that OP-1 does not have a dominant position in respect of Residential property in Northern India or any other market.

8.21 It has been contended by OP-1 that there are a large number of competitors and market is highly competitive. 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 investors. This is so as competing products are available in abundance at different locations even in Northern India.

8.22 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. An intending investor may either buy a readymade apartment on original sale or resale or an apartment under construction or even a residential plot on which he may construct according to his own requirements. 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 other residential properties available in the market for the investor to choose from.

8.23 OP-1 has submitted that one of the leading and renowned international property consultant Jones La Salle Meghraj (JLLM) has given data, based on the number of apartments launched in the last two and half years by 150 real estate developers in the NCR region relating to NOIDA, Greater NOIDA, Ghaziabad, Faridabad, Gurgaon(NH8, Sohna Road, Golf Course Road, MG Road and Manesar) which shows that sales in units by it are far less as compared to total new sales in the years 2008 , 2009 and 2010.

8.24 It has also been submitted by OP-1 that in ICICI Direct Analyst Report dated 5.11.2007, it has been mentioned that it has supplied projects worth 6.7 million sq.ft. as against 16.8 million sq.ft. by Unitech and 10.7 million sq.ft.by Parsvnath. There are several other builders who had offered properties in NCR and other locations in Northern India. For the year ending March 2009, Parsvanath, one of the larger builders had a turnover of Rs. 762 crore and its stated land reserve is 4,224 acres. Unitech has a stated land reserve of 11,179 acre. Its turnover in the year ending March 2009 was Rs.3,316 crore. The stated land reserve of Ansal API is 9,335 acres and that of Omaxe is 4,500 acres. Further, as per RBS (The Royal Bank of Scotland) Analyst Report dated 18.1.2010, produced and issued by ABN AMRO Bank NV India Branch, relating to Indiabulls Real Estate, which is a large developer, its land bank in NCR is stated to be 6.3 million sq.ft. These figures show that there are several competitors of a very large size and there are many more large size builders.

8.25 It was also stated by OP-1 that as per the report published by Knight Frank who are well known reputed International real estate consultants, in Gurgaon itself, residential apartments available during the period 2009-2011 is estimated to be 58.23 million sq. ft. As against the total availability of residential apartments in Gurgaon, OP-1 had only two existing properties being 'The Belaire' and 'Park Place', in which apartments could be offered by it for sale. The total availability of residential apartments in these two projects from March 2009 onwards was only about 2.7 million sq.ft. Besides the sale of apartments in the aforesaid two existing projects, no other residential project has been launched by it in Gurgaon from 2009 onwards.

8.26 OP-1 has further stated that as per Prop Equity, Goldman Sachs Research dated October 2009, details of new launches in Gurgaon show that there are a number of projects that were launched in Gurgaon during 2009. However, no new project was launched by OP-1. Further, a list of 83 members of CREDAI NCR obtained from their Website and a list of developers in NCR as per National Real Estate Development Council (NAREDCO) 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.

8.27 Based upon above, it has been stated that the residential space offered by OP-1 does not constitute any substantial portion of the total residential space offered by various developers.

8.28 OP-1 has also contended when a consumer desires to buy an apartment, he has a free choice from various offers for investment and then to decide for himself, which offer is suitable to him keeping into consideration the terms offered. In such a situation, it cannot be said that a builder who may be large or leading, is in a position to operate independently of competitive forces or is in a position to affect competitors, consumers or the relevant market, in its favour 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.

8.29 In support of the submissions that OP-1 is not a dominant player, residential Market Research report prepared by Jones Lang LaSalle (JLLS) was submitted by it based upon which it has been stated that in respect of residential properties, it cannot be considered to have a larger share of the market either in NCR or even in Gurgaon. It has further been stated that while maintaining that there is no separate identifiable and definable segment as luxury, and the market share is to be determined on the basis of the total Residential Properties, as per the criteria of Luxury residential segment adopted in the report prepared by Jones Lang LaSalle

(JLLS) shows that there are other competitors who have a much larger market share in NCR as well as Gurgaon.

8.30 OP-1 has contended that the above materials have not been considered and dealt with by the DG while arriving at his findings in the investigation report. DG has rejected the market share reports of JLL stating that they are not based upon sales figure without appreciating that in order to determine competition, it is significant to consider the competing offers made by various developers and for that purpose it is appropriate to consider the number of apartments offered by the competing developers.

8.31 In course of proceedings before the Commission, OP-1 has also submitted a report by G:ENESIS to establish that it is not a dominant player. Further, orders of the Commission passed in the case of M/s BPTP and M/s Parshvnath Developers P.Ltd. also have been relied upon to state that it does not enjoy position of dominance. Besides, the judgment of EU in case of Gottrupp –Klim (1994 ECJ CELEX LEXIS 55, 1994 ECR I-5641) has also been relied upon to establish that it is not a dominant player.

8.32 OP-1 has argued that DG has referred to the factors mentioned in Section 19(4) of the Act to determine dominance. However, these factors are only indicative and relevance of each factor has to be considered in the light of overall facts and market conditions in each case. The case of OP-1 is that keeping in view features of the present industry and the facts of the case in respect of which overwhelming material has been placed on record , it cannot even be suggested that any of the factors referred to in Section 19(4) would even indicate much less establish, that OP-1 enjoys a dominant position within the meaning of Explanation (a) to Section 4. Further, the data relied upon belongs to a date prior to 20.05.2009. OP-1 has suggested that any data prior to 20.05.2009 as relied upon by DG is not relevant since the question of dominance could be examined taking into account events and facts that have occurred after that date.

8.33 OP-I has also contended that the data relied upon by DG for determining dominance while analyzing factors mentioned in Section 19(4) are incomplete, not authentic and therefore not reliable. No conclusion can be drawn based upon such data.

Contentions on Abuse of Dominance

8.34 On the issue of abuse of dominance, OP-1 has stated that merely alleging abuse is not relevant, unless it is established that the alleged unfair/discriminatory conditions are imposed by abuse of dominant position. The conditions in the agreement were usual clauses introduced as per industry practice and cannot be said to be “imposed” by abuse of dominant position.

8.35 OP-1 has stated that while dealing with the conduct of OP-1, DG has not considered the large number of benefits given voluntarily by OP-1 to the allottees. OP-1 has cited Timely Payment Rebates, Advance Payment Rebates, upgradation of specifications of the buildings without any extra charges as some of the benefits extended to the allottees. It has also been brought out that after revision of plan by increasing the number of floors from 19 to 29, rate of compensation was doubled from Rs.5/- per sq. ft. to Rs.10/- per sq. ft. Additionally, OP-1 has also brought out that prices agreed to with the apartment allottees were “escalation free” and any increase in costs of material and labour charges etc. on account of delay in construction was to be entirely borne by OP-1.

8.36 It has also been brought out by OP-1 that cancellation of allotment was done only in cases of default in payments of dues and was done in accordance with the terms of the agreement. As regards, delay in possession, it has been submitted that there is no delay in handing over possession in terms of the agreement and finishing work is in progress and possession would be given immediately upon receipt of the occupation certificate. Relying upon the judgment of Supreme Court in case of Bangalore Development Authority vs. Syndicate Bank (2007) 6 SC 711, OP-1 has submitted that in contract involving construction , time is not the essence of the contract unless specified. It has also been brought out that in terms of judgment of Supreme Court in case of DLF Universal Limited vs. Ekta Seth – (2008) 7 SCC 585, no delay will accrue upon the appellant due to delay in handing the possession. Having not exercised specific right to cancel the agreement, no grievance can be made by the allottees on account of delay in handing over possession.

8.37 OP-1 has further stated that all approvals and clearances are in place for the project. It has also been argued that there is no impediment in law that a project cannot be launched without submitting the building plans/lay out plans of the project. OP-1 has also stated that with regard to increase in number of floors, in view of the specific provision contained in the terms and conditions of the application for booking as well as in the agreement, the allottees not only had intimation that the number of floors /height may be increased but had also specifically recorded their consent therein.

8.38 On the issue of violations of FAR and Density Per Acre, it has been contended that the conclusions drawn by DG are incorrect since correct basis for determining the same has not been followed. FAR and Density Per Acre needs to be calculated on the basis of approved Zoning Plan of Phase-V, Gurgaon and both FAR and Zoning Plan are within the permissible limits. It has further been contended that alleged violations of Section 6(2) and Section 13 of Haryana Apartment Ownership Act, 1982 are incorrect and misconceived since declarations under the Act are yet to be filed.

8.39 OP-1 has also submitted that since it was contemplated that number of floors/height may be increased in future, the structural designs and foundation agreement were made at the initial stages on that basis only and there is no infirmity in terms of structural strength. Further, OP-1 has also argued that consideration of these matters in the present proceedings is irrelevant for the purpose of the alleged contravention of Section 4 of the Act.

8.40 OP-1 has also given replies on the different clauses of the agreement referred to in the DG's report. As regards, representation J&K, it has been argued that the applicants have satisfied themselves regarding the title of the property and therefore no investigation in this behalf would be done by him. Further, there is no question of changing the zone plan, usage pattern etc., when the land use of the building has been declared as residential.

8.41 As regards representation– F of the agreement, it has been contended that there is no issue of reduction in the land area since the construction of the building has already been put up. As regards charges like PLC, it has been contended that the allottees were fully aware of all the charges at the time of making payments of instalments. Similarly, as regards super area, it has been stated that it is tentative and as per agreement it is to be decided at the time of completion of the project.

8.42 On the issue of exit option, OP-1 has contended that DG has proceeded on assumption that whenever an apartment is booked, an exit option must be provided, although there is neither any such requirement of law nor is it the industry practice.

8.43 OP-1 has also stated that findings on different clauses of agreement mentioned in the report of DG as unfair and discriminatory are erroneous. It has been stated that the basic terms and conditions in the agreement are similar to the terms and conditions contained in the agreements of other competitors and they are as per industry practice. Further, the terms and conditions agreed to between the parties are binding as held in the case of Bharathi Knitting vs. DHL Courier World Wide Express Courier (1996 4 SCC 704). Such terms of agreement could not have been described as incorporated by "abuse of dominant position".

Reply filed by Department of Town Country and Planning, Govt. of Haryana – OP-2

8.44 OP-2 has stated vide response dated 08.11.2010 that the permissions to OP-1 in the case have been granted as per the statutes applicable. The issues involved in the case are generally bilateral between the two parties. It has also been stated that no violation of Haryana Apartment Ownership Act, 1983 has come to the notice of the Department. It has also been submitted that under

Punjab Schedule Roads and Controlled Areas Restriction of Unregulated Development Act, 1963 only compoundable violations are considered.

8.45 Regarding common areas, it has been stated that the proportionate share in the ownership of the property is governed by the provisions of the Haryana Apartment Ownership Act, 1983 and is not the sole discretion of the colonizer. Further, the licensee is bound by any conditions imposed by Department of Town Country and Planning. OP-2 has also denied that any building plans have been approved in violation of permissible FAR and density per acre.

Reply filed by Haryana Urban Development Authority – OP-3

8.46 OP-3 filed its replies on 18.10.2010 to the Commission. According to OP-3, it is neither a necessary party nor a proper party to the present proceedings. It has been stated that in case of residential colonies and group housing complexes developed by private colonizers, land is purchased by the colonizer itself from the land owners and then request for grant of License is made to Director, Town & Country Planning Department, Haryana, which is granted on fulfilling all the terms and conditions of the Town & Country Planning Department. It has no role to play in this whole process. OP-3 only provides master services like, water supply, sewerage system, drainage system and master roads for which external development charges are charged from the colonizer at the time of issuance of license and the same are deposited in HUDA account. It is not involved in any decision making process towards the grant of sanction/ approval of the Building Plans/ Layouts of OP-1 as alleged by the informant.

8.47 All sanctions of building plans and other related approvals are obtained by the colonizer directly from OP-2 as per the provisions of The Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act 1963, its rules and zoning plan framed there under and not as per HUDA (Erection of Buildings) Regulations 1979.

9. Arguments of the informant

9.1 The Informant submitted a detailed response on 12.05.2011 with reference to DLF's note submitted to Commission on 04.03.2011 and Jones Lang Lasalle (JLL) Report and Genesis Report submitted by DLF. The informant also submitted a report from QuBREX in support of its contentions. The gist of the informant's contentions is given below:

Comments on submission of DLF

9.2 The informant contended that sales figures are the best way to calculate market share. It was pointed out that the DG as well as the Genesis Report submitted by DLF admits this assertion. The informant argued that what is important in the case is to establish how DLF compares to its nearest competitors. It was contended that it is quite clear from various data sources that there is no developer that comes close to DLF particularly in the geographic market of Gurgaon and in product market of high-end residential units.

9.3 It was submitted that the DG has done a detailed analysis to establish DLF's market share using publically available sources. DLF was given ample opportunity to provide their view of the market share. They declined to submit market share based on sales figures and instead provided JLL report estimating market share based on non-standard metric of active stock.

Comments on JLL report

9.4 The informant contended that the Genesis and JLL model use a proxy called 'active stock' for calculating market share. It was argued that this questionable artefact from the JLL model based on active projects is a flawed parameter. The informant pointed out that active stock has been given at least 3 different definitions between the JLL and Genesis Report and in some cases this definition may actually be contradictory to what it is purporting to measure.

9.5 It was further argued that not only the calculations by JLL in its reports do not represent reality; they are based on data unavailable for further discussions or scrutiny. It is simply not possible for the Commission to accept these numbers as sacrosanct when the source of data and the analysis is not open to scrutiny.

Comments on Genesis Report

9.6 It was submitted that the Genesis Report is a paid study commissioned by DLF. It was averred that Genesis is no expert in real estate business and hence is relying on data provided to it by DLF and JLL and it therefore a biased report.

9.7 The informant claimed that there is a general theme of non-cooperation throughout the report. It was contended that DLF has made several public statements in statutory documents such as Red Herring Prospectus, its annual reports, quarterly presentations to financial analysts etc. These public statements are completely contrary to what has been said in the Genesis Report. It was argued that DLF is trying to change its publicly stated position in legal documents. It was strongly argued that based on DLF's public statements in its Red Herring Prospectus and annual reports, DLF is a dominant player in the relevant market. Moreover, DLF's market share estimates based on active stock concept need to be rejected as it is not a standard metric for calculating market share.

9.8 According to the informant, DLF's track record, brand and preferential locations make it the most attractive builder in the relevant market segment. New builders that are just entering the market are no substitute for DLF's offerings in the market. DLF's combined strength in both commercial as well as residential segments gives it added advantage.

9.10 The informant stated that leveraging its dominant market position and its control over the marketing channels, DLF traps the customers into buying what appears to be an excellent product. It then forces them to pay money without securing any government approval. Under the protective cover of a completely one-sided contract, locked customers who have already invested a lot of money and have no way out, it then manipulates the entire process to its own advantage. This hurts consumers such as the petitioners.

9.11 It was also argued that DLF is certainly operating independent of its competitors when it claims that it does not know or care about its competitor's market share. Also, DLF sets the agenda for rest of the market. It has established the practice of offering contracts with several abusive clauses to the customers and of marketing and collecting money without having all the Government approvals.

9.12 The informant claimed that instead of leading the industry to more balanced, customer-supplier relationship because of its market leader position, DLF has chosen to establish a number of abusive industry practices which it now claims it is forced to comply with.

9.13 Further, the informant alleged that if anyone dares to challenge its abusive ways in any of the court, DLF fights aggressively and frustrates the buyer who either runs out of money, time (he dies) or patience.

9.14 It was contended that rest of the industry merely treads the trail blazed by DLF while the consumers have largely given up and have come to accept that “that all the developers are the same”.

Gist of the report of QuBREX-QuBit Real Estate eXchange dated 08.05.2011 submitted by the informant:

9.15 The Genesis and JLL model use a proxy called ‘active stock’ for calculating market share. This questionable artifact from the JLL model based on active projects is a flawed parameter. The active stock has at least 3 different definitions between the JLL and Genesis Report and in some cases this definition may actually be contradictory to what it is purporting to measure.

9.16 The approaches taken by JLL and Genesis in their reports of March 2011 are erroneous and misleading. Neither the data of JLL nor the methodology of JLL and Genesis can be relied upon.

9.17 The reports of JLL and Genesis present a completely wrong and misleading concept of market share by basing their analysis on the 'Active Project' and 'Active Stock' notion.

9.18 The data on which 'Active Stock' calculations are done for market share is suspicious, and is presented with a façade of accuracy that is not possible because of the very opaque nature of the property market, and the inherent difficulty of collecting the 'Active Stock' data accurately. The fact that the underlying data provided by JLL has not been audited or verified, nor shared by JLL with anyone, even Genesis, gives the impression that the data has been fabricated and contrived.

9.19 The model of taking arbitrary 'market share' snapshots on a yearly basis without regard to the long and multi-year process by which apartments are marketed, booked, constructed, completed, and possession handed over, is erroneous. Also, the arbitrary snapshots in time are limited views, without context of the past and future of the market place. Further, by narrowly defining 'market share' as newly 'launched projects' from year-to-year, and ignoring the 'completed projects' market share over the years, JLL & Genesis give a partisan picture of the market share.

9.20 Most importantly, the models of JLL and Genesis bias the study by ignoring the importance commercial property has in influencing the purchase decision of a residential property. This is done by asking the wrong rhetorical question about 'substitutability' of commercial vs. residential properties and then summarily ignoring the commercial market by glibly concluding that commercial property is not substitutable with residential property. This wrong way of looking at the commercial property and residential property relationship leads both JLL and Genesis to conveniently ignore the role commercial property plays in the decision of buying residential property, and consequently leads them to underplay the importance of Gurgaon being the Relevant Geographic Market.

9.21 A large part success of DLF in the residential market is due to its almost absolute dominance in the commercial sector. This is an outcome of DLF's "*walk to work*" concept which, as DLF says on its website, it pioneered. By building world class office spaces that it does not sell but leases to top companies, it creates a magnet in its land banks, in and around which people desire to own a residential property - whether for self or for investment. The proximity of over 3000 acres of its lands to the Delhi boarder is a plus. Combined with office spaces on that land that draw companies out of Delhi into Gurgaon, it creates a chain effect of drawing the employees of the companies to DLF houses in Gurgaon. This is of relevance under section 19(6)(b) of the Act that requires looking at local specification requirements.

9.22 The location, the proximity to the commercial offices and retail spaces, social infrastructure like the DLF Golf course, and with its own rapid Metros, own flyovers, even its own roads, DLF is heading to solidify its hold on Gurgaon.

9.23 DLF has pioneered many aspects of the real estate business in Gurgaon which indicate its strength and ability to almost act independently of what the competitor may or may not do. Some of business practices pioneered by DLF that can be considered by the Commission under Section 19(4)(m) are delay penalty, early payment discount, timely payment discount, investor locking in terms of buyers agreements, one PAN one FLAT, selling by invitation only etc.

9.24 The Informant's have further filed a clarification dated 06.06.2011 on factual errors in submission of DLF regarding violation of FAR, super area, charges for parking lot, alleged delay of 24 months for 19 floor plan, extra floors, cancellation and forfeiture of money and service tax.

10. Oral arguments of Informants

10.1 Shri M.L. Lahoty, Advocate appeared for the informants before the Commission on 10.05.2011 and made oral submissions. Shri Lahoty argued that after the admission, proclamation and declaration of DLF in its annual general meetings, red herring prospectus read with Section 62 of the Companies Act, 1956 there is nothing left to prove about dominant position of DLF. He submitted that in terms of Section 18 read with preamble of the Act it is the duty of the Commission to protect the interest of consumers as the interest of consumers is being affected adversely by the acts of DLF. He drew the attention of the Commission towards the judgment of Hon'ble Supreme Court in the matter of *Competition Commission of India Vs. Steel Authority of India Limited & Another* (specifically para 9 and 29 of the judgment). He submitted that the DLF cannot take excuse regarding its unfair practices on the ground that the same are prevalent in the entire market. He also submitted that if such practices are prevalent across the market, the Commission may take action against other players also, but it does not lessen the liability of DLF with respect to its own unfair practices.

10.2 With respect to factors given in section 19(4) of the Act, Shri Lahoty submitted that the factors given in the section are not a limitation on the powers of the Commission for determining dominant position of an enterprise. He invited the attention of the Commission towards the phrase "have due regard to" and submitted that the phrase has been used by the law makers intentionally to empower the Commission to take into consideration other factors also. With the same intention, clause (m) has been provided empowering the Commission to consider any other factor considered relevant for the enquiry. He emphasized that a combined reading of the statement of objects and reasons on Competition Bill, 2002, Section 18 and preamble of the Act shows that the Commission has been given ample powers to protect the interests of the consumers. He gave further emphasis to para 9 and 25 of the judgment of Hon'ble Supreme Court in *Jindal vs. SAIL* wherein the Hon'ble Supreme Court has mentioned the vast and wide powers of the Commission.

10.3 He invited the attention of the Commission towards the judgment of Hon'ble Supreme Court in *Shri Sitaram Sugar Company Ltd. and another Vs. Union of India and Others {(1990) 3 SCC 223}* wherein in para 29 Justice Sabyasachi Mukherjee has explained the phrase *"having regard to"* and held that the Government can consider any other matter/ factor as there is a difference between *"having regard to"* and *"having regard only to"*. *"Having regard to"* empowers and does not restrict the authorities concerned from taking into consideration any other relevant factor. He submitted that the 5 judges bench of Hon'ble Supreme Court headed by Hon'ble Chief Justice Shri Sabyasachi Mukherjee at para 77 in the *PTC India Ltd. Vs. Central Electricity Regulatory Commission {(2010) 4 SCC 603}* case has affirmed and confirmed the position of *Sitaram Sugar* case by holding that the authorities can take other matters in consideration. He submitted that the mention of words *"or otherwise"* in Section 4(g) of the Act clearly intends that anything left can be covered by the residue. On the basis of the foregoing arguments he emphasized that factor mentioned in Section 19(4)(a) of the act is not the sole repository for determining the dominant position.

10.4 He further submitted that clauses of the agreement with the apartment buyers reveal the dominant position of the DLF. He argued that if a party to the agreement in a signed document excludes itself from the obligations and liabilities and puts it heavily on the apartment allottees, as is the case with DLF, it is only because of its dominant position. He submitted that DLF in its own declaration and proclamation in red herring prospectus etc. claims itself to be largest in terms of revenue, earnings and market capitalization. It further claims to have leadership position in India, being one of the top 5 companies of the world and the largest real estate developer in the world. He also submitted that the DLF in its letters to the informants also mentions that it is developing the largest township of the Asia.

10.5 With regard to the obligation of those who issue prospectuses inviting application for shares he referred to Palmer to mention that

> *"Those who issue a prospectus, holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and ...."* (Palmer's Company Law 24th Edition, page 332).

10.6 To establish the dominant position of DLF, Shri Lahoty further relied upon observations of the Court of Justice of the European Communities in the matter of *AKZO Chemie BV Vs. E.C.*

Commission wherein the court has observed that once AKZO itself admitted that it has the most highly developed marketing organization, both commercially and technically, and wider knowledge than that of its competitors the pleas put forward by AKZO in order to deny that it had a dominant position within the organic peroxides market as a whole must be rejected. He contended that after its own admission, proclamation and declaration the DLF now cannot argue that the statements made by it were general in nature. He, on the basis of various annual reports of the DLF, red herring prospectus and statement of DLF's Chairman in its Annual General Meetings, emphasized that the same are sufficient to prove the dominant position of DLF.

10.7 He further submitted that the DLF has committed a fraud on allottees as after entering into agreement with the apartment allottees the entire structure of the building was changed. He claimed that the apartment allottees are still not aware as to when the project is to be completed and after investing huge money they are suffering for no fault of their own. He submitted that the clauses of the apartment buyer's agreement regarding abandonment of project, tripartite agreement regarding maintenance, arbitration clauses etc. deprive the rights of the apartment buyers. He further submitted that any alteration in the agreement is not allowed and the allottees have to sign their agreement as a “captured customer”

10.8 He further submitted that for imposing such unfair conditions upon apartment allottees the DLF cannot take the plea that the allottees have signed the agreement and that the practices adopted by DLF are the general industry practices. He invited the attention of the Commission towards the judgment of Hon’ble Supreme Court in *Central Inland Water Transport Corporation Ltd. and another Vs. Brojo Nath Ganguly {(1986) 3 SCC 156} and another* and argued that parties to the agreement should be on equal footing and with same bargaining power. He submitted that the Hon’ble Supreme Court at para 79 of its judgment has quoted Chitty that freedom of contract is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed. He argued that if one party to the agreement has no choice the other party cannot take advantage only because there is a signed agreement between the parties.

10.9 He further contended that even if the practices adopted by DLF are industry practices then it should be taken into consideration as to who is following whom. In view of the facts admitted, proclaimed and declared by DLF itself, it is the DLF which, being the market leader is responsible for such practices. He submitted that the DLF has been the first mover and market leader and it is an observed phenomenon that the market players follow what the leader does. He further submitted that if the practices are prevalent throughout the industry the Commission is empowered to take action against all of them but that never absolves DLF from its liabilities.

10.10 He further dealt with the contentions of DLF regarding the agreements having been executed prior to 20.05.2009 i.e. the date of enforcement of the Act and that the DLF is not providing any service to the apartment buyers. He submitted that on the date of enforcement of the provisions of Section 3 & 4 of the Act the project was under process, the payments were incomplete and thus the DLF's contention regarding the enforceability of the provisions of the Act in the matter does not hold good.

10.11 With respect to the question of "service" he invited the attention of the Commission towards para 5.4.13 of the DG's investigation report and emphasized that DLF Ltd. and its group entities are providing service to the consumers while developing and selling apartments to them. He also invited the attention of the Commission towards the wrong statement of DLF regarding sanction of the projects and argued that DLF has committed a fraud on the apartment buyers.

10.12 With regard to the concept of "active stock" as coined by DLF Shri Lahoty submitted that the basis of "active stock" taken by DLF is erroneous as the "active stock" cannot be the inventory. As per him the "active stock" should always be finished goods and not inventory. He further submitted that the definition of "active stock" is different in the 3 reports submitted by DLF. He further attacked the Genesis Report and submitted that DLF's income is not comparable with Unitech (as given in Genesis Report) and that the DLF's size and resources give it advantage over its competitors. With respect to dependence of consumers upon DLF, he submitted that even in a situation where all the developers are adopting abusive clauses, one would go to DLF and not to some small developer, in view of its monopoly in the real estate market.

10.13 In conclusion, Shri Lahoty forcefully contended that DLF Ltd. was dominant in terms of section 4 of the Act and had abused its dominant position in contravention of the provisions of the Act.

11. Oral arguments of DLF

11.1 Shri Ravinder Narayan, Advocate appeared for DLF and submitted a written argument dated 23.05.2011. He also made submissions during his oral argument before the Commission as under:

11.2 The data adopted in the QuBREX report is incorrect and the authenticity of the data is doubtful and not acceptable. Further, the methodology adopted for determining the market share of the respective developers is untenable and is liable to be rejected.

11.3 The market share can only be determined with reference to a particular point in time and as such it is determined on an annual basis. This is so, as market share may fluctuate. A particular developer may have a larger market share in one year and may not have the same market share in the other years. As such, market share is required to be determined on an annual basis.

11.4 The methodology adopted in the QuBREX report is not to determine market share on annual basis for each year under consideration, but to determine market share on a cumulative basis by including all projects from the very beginning for 15 to 20 years. If such a methodology is adopted, then a developer, who may be commanding a large market share in the last say 3 years, would have a very insignificantly low market share since he had no project in the years prior to say 2007. Another developer who had a large market share 15 years earlier but does not have any significant market share in the last 3 years or so, would still be considered as having a large market share. This methodology of determining market share for a period ranging from 15 to 20 years completely distorts the market share relevant for any particular year.

11.5 The fallacy in adopting the above methodology is apparent from taking a hypothetical situation where a developer may have launched a number of projects over a period of several years, say from 1991 upto 2006, but did not launch any project in the year 2007 and may even exit from the business. On the basis of the methodology of cumulative determination of market share based on all the past years, such a developer who has launched no project or has exited from the business, may still be considered to have a high market share in the year 2007 based on the launches of the earlier years. Such a developer may launch a few projects in subsequent years while there are other developers who enter the market and on any yearly basis, launch a much larger number of projects. Since such new developers would have no launches for the earlier 15 to 20 years, their market share for the relevant year would be insignificant as compared to the developer who has been in the market for a number of years but has not launched substantial projects in the subsequent years.

11.6 Apart from the above fallacy, for the purpose of categorizing the apartments, on the basis of capital value thereof, as well as for the purpose of determining the market share on the basis of such capital value (again on cumulative basis for the entire past years), the value of all apartments is taken as in March 2011, even though the apartments may have been launched 15 to 20 years ago. Any calculation or share determined on the basis of the alleged capital value of March 2011, would necessarily lead to absurd results.

11.7 When a customer invests in residential apartment, he not only looks at the new launches which are offered, but also the comparable apartments which are available in the secondary market, which are substitutable properties.

11.8 The apartments in the secondary market may be those which are still under construction (since many apartments are sold while still at booking stage) or those which are completed. In fact, if a completed apartment is available for sale in the secondary market, a customer may prefer that to avoid the risk involved in booking an apartment which may take a few years for completion, though the price of the completed apartment may be higher than the apartment which is yet to be constructed.

11.9 The most important factor to show that no enterprise enjoys a "Dominant Position" in the relevant market is to consider whether there is a barrier to new entrants on account of the alleged "Dominant Position" of the enterprise. Where several new entrants have in fact entered the market and as a new entrant IREO has captured the largest share of the market, there can be no case whatsoever for alleging any developer as enjoying a "Dominant Position". This important aspect which has been considered in the JLL and Genesis reports has been totally ignored by QuBREX.

11.10 It was argued that reference has been made to certain statements made in the Annual Reports, draft red herring prospectus and speech of the Chairman of DLF etc., on the basis of which it is alleged that DLF had admitted that it enjoyed a "Dominant Position" and that, on the basis of these admissions it should be held that DLF enjoyed "Dominant Position" within the meaning of explanation (a) to section 4 of the Act. In support of this argument reference was made to clause (g) of section 19(4) of the Act, which provides that one of the factors for determining the "Dominant Position" under explanation

(a) to section 4 is that the enterprise has acquired a “Dominant Position” “otherwise”.

11.11 It is significant that a special meaning is assigned to the term “Dominant Position”, only for the purpose of section 4, which is defined in explanation (a) to Section 4. This is so as the Explanation itself states that the definition set out therein is only “for the purpose of this section”. As such, unless the conditions specified under Explanation (a) to Section 4 are satisfied, the enterprise would not be treated as enjoying a “Dominant Position” so as to invoke Section 4. This definition does not apply to the term “Dominant Position” appearing in other parts of the Act. As such, the term “Dominant Position” as used in clause (g) of Section 19(4) does not have the same meaning as in Section 4.

11.12 The aforesaid statements allegedly admitting the “Dominant Position” of DLF cannot be considered as an admission of “Dominant Position” as defined in Explanation (a) to Section 4. In order to hold that an enterprise enjoys a “Dominant Position” within the meaning of Section 4, the conditions as set out in Explanation (a) to Section 4 must be satisfied.

11.13 Moreover "Dominant Position" within the meaning of Explanation (a) to Section 4 is to be determined specifically with reference to the 'relevant market', which in the present case is alleged to be luxury apartments in Gurgaon. The so called admission on the basis of which dominance is sought to be proved, relates to statements made in respect of the all India operations of DLF and not with reference to the aforesaid relevant market. Moreover it cannot be said that these general statements relate to residential properties being the 'relevant product market'. As such, on the basis of the alleged statements it cannot be said that DLF enjoys a position of strength in the 'relevant market' of 'High end luxury apartments in Gurgaon'.

11.14 Oral arguments were made in continuation of the submission dated 06.04.2011 regarding jurisdictional objection. It was inter-alia contended that there is a distinction between the transaction of sale of an apartment, wherein as per the agreement for sale/ purchase of apartment, the right, title and interest in the apartment is transferred only after the completion of construction and obtaining occupation certificate. Till then, the ownership and title in the property is retained by DLF. The construction is not done for and on behalf of the allottee, but for DLF itself. Even if the agreement for sale/ purchase of the apartment is executed prior to or during construction, the title and ownership of the property is retained by DLF. In such a case there is no “Service” rendered.

11.15 The distinction between an agreement for ‘sale apartment’ and for rendering ‘service’ is clearly brought out by case law. Reference may be made to one such judgment of the Gauhati High Court in the case of *Magus Constructions pvt. Ltd. Vs. UOI (200*) 15 VST 17*. It was argued that the facts of the present case are identical to the facts dealt within the above judgment.

11.16 In order to contend that certain conditions of the contract were unfair, reliance was placed by the informant on the decision in the case of *Central Inland Water Transport Corporation Ltd. & Anr. Vs. Brojo Nath Ganguli & Anr. (1986) 3 SCC 15*.

11.17 The said decision related to imposition of a condition by a Rule in respect of the terms relating to termination of services of an employee. The principles laid down in the aforesaid case has no relevance to the present case which relates to an agreement between two private parties in a commercial transaction.

11.18 The aforesaid decision was considered by the Delhi High Court in the case of *Classic Motors Ltd. Vs. Maruti Udyog Ltd. (Manu/ DE/0586/1996 equivalent to – 65(1997) DLT 166).* The aforesaid decision of the Delhi High Court distinguished the decision in the case of *Central Inland Water Vs. Brojo Nath Ganguli* and after dealing with the relevant principles applicable to commercial contracts between private parties upheld the agreement.

11.19 The same principles in relation to a commercial contract between private parties are also laid down by the Delhi High Court in the case of *M/s. Unikol Bottlers Ltd. Vs. M/s. Dhillon Kool Drinks and Anr. (Manu/DE 0008/1995 Equivalent to-1994 28 DRJ 483).* In para 31 it is held that when a plea of duress/ coercion and unequal bargaining power is raised, the question of “free will” arises. In such cases it is significant to consider the following factors – (i) Did the Plaintiff protest before or soon after the agreement? (ii) Did the Plaintiff take any steps to avoid the contract? (iii) Did the Plaintiff have any alternative course of action or remedy? If so, did the plaintiff pursue or attempt to pursue the same? (iv) Did the Plaintiff convey benefit of independent advise?

11.20 Applying the above principle, it may be seen that in the present case the agreements were executed in the year 2007, containing the terms and conditions, in respect of which objections are now sought to be taken by “Information” filed in May 2010. If such a contract could be considered as a contract of coercion, containing unfair terms, it was open to the allottees to challenge the agreement soon after they were executed. However, the allottees advisedly continued with the agreement since they were aware that the value of the apartment would appreciably increase, notwithstanding the conditions of the agreement which are now sought to be termed as ‘unfair’. The Plaintiff could challenge the validity of the agreement on the same grounds in a court of law, but chose not to do so. This alternative course of action or remedy was not taken and no attempt was made in that behalf. The allottees are well placed persons with adequate means who could invest amounts in excess of Rs.1.5 to 2.5 crores. Some allottees have booked more than one apartment and one such allottee has booked 7 apartments. Such allottees had benefit of independent advise, but chose not to contest the agreement keeping in view the likely high appreciation in value. It is evident that on account of the unforeseen recession in 2008-09 that some of the allottees faced difficulty in making timely payment and committed default, resulting in cancellation of the agreement. In these circumstances, after a lapse of about 2 ½ to 3 years, attempt is being made to challenge the agreement. It is also significant that a large majority of allottees have not contested the agreements and are satisfied with the appreciation in value, which is further likely to increase in due course. These factors are important to consider the objections relating to such agreements so belatedly.

11.21 In respect of agreements executed long before the enforcement on Section 4, it cannot be said that the conditions contained therein were 'imposed' by 'abuse of dominant position', prior to 20.05.2009. In the alternative and without prejudice to the aforesaid jurisdictional objection, it is submitted that even if Section 4 is sought to be applied on the ground that the agreements executed in 2007 continue to be in force after 20.05.2009, only such conditions can be looked into, if at all, on the basis of which action is taken after 20.05.2009. Conditions like increase in the number of floors are already acted upon earlier. The objections regarding approval etc. also relate to prior period. The defaults in making payments by defaulting allottees have also taken place earlier. The structure of the building having been completed earlier, objections relating to change into specification for construction can also not be considered. Various other objections which are now sought to be taken relate to the earlier period. Even though termination of agreement may have taken place subsequently, the ground for termination i.e. defaults in payment, had already arisen earlier.

11.22 Under these circumstances, in any event no action can be taken in respect of the agreements executed prior to 20.05.2009.

11.23 No developer can be said to have a "Dominant Position" in terms of Explanation (a) to Section 4, unless his market share in the relevant market is established to be very high in the range of 50%

or above. In this context Gottrup-Klim-Judgment of the European Court was referred to. No reliable proof is given to suggest high market share of DLF.

11.24 The particulars placed on record show that about 85-90% transactions for sale of apartments is done through brokers. When customers approach brokers, various alternative properties are offered to them and the brokers apprise the customers of the pros and cons of the respective investments. Moreover the customers also approach more than one broker to obtain information for proposed investment. As such, the customers obtain adequate information and knowledge before making investments. In these circumstances, the customer is not affected by any alleged position of strength enjoyed by a developer, in its favour, in the relevant market. The customers have ample choice of apartments offered by respective developers and the competition is intense.

11.25 For determining market share, apart from the primary market, it is important to consider 'substitutable properties' like re-sales in the secondary market and other properties. This would substantially bring down the market share of DLF to less than half of what has been determined in JLL and Genesis Reports.

11.26 In the DG's report it is admitted at pages 67 and 74 that no data of sales figures in the relevant market is available in public domain. This is also stated in JLL Report as well as in the report of Genesis. This position is also affirmed in the report of QuBREX filed by the Informant. Since QuBREX had no sales data, the figures of cumulative value of all the completed apartments for the entire past period are taken at the value of March 2011. The fallacy in the methodology adopted by QuBBREX is already pointed out. The fallacy in the methodology adopted by DG in determining the market share for Gurgaon is already set out in the written submissions. In the absence of any reliable proof of high market share of DLF, there can be no finding of "Dominant Position" within the meaning of Explanation (a) to Section 4.

11.27 In the absence of sales figures, the alternative method adopted in JLL reports and the Genesis report, relating to 'apartments offered' to the customers (active stock) clearly show that

DLF's market share was low and there were other developers whose marker share was higher. Further, there were several developers having market share in similar range as DLF. There was no barrier to new entrants. Even new entrants like IREO ad acquired a market share higher than DLF.

11.28 Further, there was intense competition in the relevant market and there were a large number of properties offered by competitors in the relevant market.

11.29 For these and other reasons already placed on record, DLF cannot be said to have a "Dominant Position" in the relevant market as per Explanation (a) to Section 4.

11.30 DLF submitted its response dated 11.05.2011 regarding land stock available with DLF in Gurgaon in terms of direction of the Commission dated 24.03.2011. The gist of submission of DLF is as under:

11.31 Information regarding the area of land stock of DLF in Gurgaon is of no relevance unless the information regarding land stock of other developers in Gurgaon is also obtained and made available. In the absence of the information regarding the land stock in Gurgaon of other competing developers, no comparison can be made to determine the alleged dominant position of any particular enterprise. It may however be stated that the land stock of DLF in Gurgaon is insignificant considering the total land stock covered by the master plan of Gurgaon. It submitted that the total area of land covered by the Gurgaon Master Plan excluding town and village *Abadi* is about 36000 hectares i.e. 893000 acres. Out of the above land the total land already developed as noted in the master plan is about 9000 hectares i.e. 24,400 acres. As such the balance land is approximately 26,300 hectates i.e. 64,900 acres. Out of the available land, certain areas are earmarked for transport, public utilities, open spaces and defence land etc. The total land under these categories which is not developable is 8,000 hectares i.e. 19,900 acres. As such after excluding above area the balance developable area under the Gurgaon master plan is 18,200 hectares i.e. 45,000 acres. As the land stock held by the DLF is about 1,650 acres, DLF constitutes only about 3.67% of the developable land in Gurgaon as per the Master Plan.

11.32 DLF also filed its response dated 03.06.2011 to the compilation of documents filed by the Informant on 19.05.2011 and also further response to the report of QuBREX filed by the Informant.

12. Issues

12.1 The Commission has given due consideration to the allegations made in the Information dated 06.06.2010, the investigation report of the DG dated 13.10.2010, all the written and oral submissions made by the parties concerned along with opinions and analysis of experts relied upon by the Informant and the OPs. The relevant material available on record and the facts and circumstances of the case throw up the following issues for determination in this case:

Issue 1: *Do the provisions of Competition Act, 2002 apply to the facts and circumstances of the instant case?*

Issue 2: *What is the relevant market, in the context of section 4 read with section 2 (r), section 19 (5), section 19(6) and section 19(7) of the Competition Act, 2002?*

Issue 3: *Is DLF Ltd. dominant in the above relevant market, in the context of section 4 read with section 19 (4) of the Competition Act?*

Issue 4: *In case DLF Ltd. is found to be dominant, is there any abuse of its dominant position in the relevant market by the above party?*

Issue 1

Do the provisions of Competition Act, 2002 apply to the facts and circumstances of the instant case?

12.2 It has been contended by the DLF that as 'sale of an apartment' can neither be termed as sale of goods nor sale of service, section 4(2)(a)(ii) is not relevant and applicable in the present case because it can be invoked only when there is purchase or sale of either goods or service. In support of this contention reliance has been placed by DLF on the judgment of Hon'ble Supreme Court in *Bangalore Development Authority vs. Syndicate Bank (2007) 6 SCC 711 in para 20.*

12.3 It has also been contended by the DLF that the terms and conditions of the agreement mentioned in the information related to agreements executed in December, 2006/2007. None of the impugned conditions can be said to have been imposed after 20.05.2009 when Section 4 came into force. Therefore, it cannot be held that any condition which was agreed to earlier is imposed by the DLF after 20.05.2009, so as to attract section 4 of the Act. It has been further contended that the action of DLF in cancelling the allotment in pursuance of the terms and conditions of a validly executed and binding agreement on account of defaults committed prior to 20.05.2009 cannot be examined under section 4 of the Act.

12.4 It has been also urged that prior to 20.05.2009, there was no legally recognized concept of an enterprise having a dominant position. Therefore, the dominance of an enterprise can be seen only on or after 20.05.2009 in terms of section 4 of the Act and it is only thereafter the question of contravention of section 4 would arise, if any unfair or discriminatory condition is imposed.

12.5 DLF has also taken a stand that the alleged conditions which have been taken as abusive are in fact usual conditions included in the agreements in accordance with “industry practice” and, therefore, it cannot be said that such conditions are imposed by abuse of dominant position. Further, since the impugned clauses of the agreement are adopted by other competitors also it became necessary for the DLF to incorporate such clauses in order to meet competition and remain competitive. On the basis of this contention it has been submitted that such practice is exempted under the explanation to section 4(2)(a) of the Act.

12.6 In *Bhim Sen vs. Delhi Development Authority, MANU/MR/0012/2003* while dealing with the allegation of unfair trade practice on part of DDA, the MRTP Commission held that a misrepresentation or false representation to the complainant that a flat would be allotted to him followed by failure to offer the allotment was a failure on the part of DDA that was tantamount to deficiency in service. It was also held that the definition of service under section 2(r) of the MRTP Act envisages dealings in real estate.

12.7 Similarly, in *Jaina Properties Pvt. Ltd., MANU/MR/0003/1991* the Jaina Properties issued an advertisement to the effect that shops of an area of 16 sq. ft. were available for Rs.32,800/- but later on the area of shop was enhanced from 16 sq. ft. to 23 sq. ft. and complainant was required to pay Rs.15,000/- more for the extra space. The allegation of the complainant was that in spite of his paying full amount he was allotted a space measuring 12 sq. ft. only. The Jaina Properties raised a preliminary objection that MRTP Act does not extend to matters involving immovable property as the company does not render any service within the meaning of MRTP Act. That contention was rejected by the MRTP Commission in view of the explanation added in section 2(r) of the MRTP Act which declared that any dealings in real estate shall be included and shall be deemed always to have been included within the definition of service.

12.8 In a catena of cases the Supreme Court has time and again held that housing activities undertaken by development authorities are service and are covered within the definition of service given in section 2(o) of the Consumer Protection Act. It has been further held that the purchaser of flats or houses or plots are covered under the definition of consumer.

12.9 In *Lucknow Development Authority Vs. M.K.Gupta, MANU/SC/0178/1994* the Apex Court while dealing with the issue whether statutory authorities such as Lucknow Development Authority or Delhi Development Authority or Bangalore Development Authority are amenable to Consumer Protection Act, 1986 for any act or omission relating to housing activity such as delay in delivery of possession of the houses to the allottees, non-completion of the flats within the stipulated time, or defective or faulty construction etc. also elaborately and succinctly construed the meaning of 'service' and 'consumer' as provided in the Consumer Protection Act.

12.10 The Supreme Court negated the contention raised on behalf of development authorities that the housing activities undertaken by them are not covered under the ambit of term 'service'. The Supreme Court emphatically held that,

> "*Construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of*

a builder or a contractor. The latter being for consideration is service as defined in the Act. Similarly when a statutory authority develops land or allots a site or constructs a house for the benefit of common man it is as much service as by a builder or a contractor. The one is contractual service and other is statutory service. If the service is defective or it is not what was represented then it would be unfair trade practice as defined in the Act. Any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such disputes or claims are not in respect of Immovable property as argued but deficiency in rendering of service of particular standard, quality or grade".

12.11 The Apex Court further held that a person who applies for a allotment of a building site or for a flat constructed by a development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered under the definition of 'service of any description'. Housing activity is a service covered in the definition of term 'service'.

12.12 The case law cited by the DLF has not overruled the decision of the Apex Court in *M.K.Gupta case (Supra)* and on the other hand the ratio propounded by the Supreme Court in the above case was followed by the Supreme Court in *Chandigarh Housing Board Vs. Avtar Singh and Ors, MANU/SC/0749/2010.*

12.13 The rationale given be the Supreme Court in the above referred cases applies with full force in the present matter, more so when considering the fact that the definitions of 'consumer' given in section 2(f) and 'service' in section 2 (u) of the Competition Act, 2002 are wider than the definition of these terms provided in the Consumer Protection Act, 1986. It is thus seen that dealings in real estate or housing construction has always been taken as service whether it be MRTP Act or Consumer Protection Act or Finance Act.

12.14 Even without taking the support of the decisions of Supreme Court in the cases referred above, a plain reading of section 2(u) of the Act makes it abundantly clear that the activities of DLF in context of the present matter squarely fall within the ambit of term 'service'. The relevant clause (u) reads as under:

“service means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising”.

12.15 It is clear that the meaning of ‘service’ as envisaged under the Act is of very wide magnitude and is not exhaustive in application. It is not disputed that DLF undertakes to construct apartment intended for sale to the potential consumers after developing the land. Therefore, it is explicit that this kind of activity is a provision of service in connection with business of commercial matters such as real estate or construction. Hence, the contention raised on behalf of the DLF that sale of an apartment is not covered under the definition of service is wholly misplaced and is devoid of any substance.

12.16 The other contention of the DLF that since the apartment buyers' agreements were executed before section 4 of the Act came into force i.e. on 20.05.2009 therefore its provisions were not attracted in the present matter has also no merit and deserves to be rejected. Though it is true that all acts done in pursuance of any agreement executed before the section 4 of the Act came into being cannot be examined after the date of enforcement but if any enterprise invokes the provisions of such agreement after the date of enforcement and that action is now prohibited by the Act then that action could certainly be seen through the lens of Competition Act.

12.17 In the present case the agreements, although entered between DLF and the allottees before 20.05.2009 when section 4 of the Act came into being, remained in operation even after the said date and DLF proceeded with the cancellation of various allotments under the clauses of the agreement. Therefore, if the DLF acts under the clauses of the agreement, which are now prohibited by the Act, such action can certainly be examined under the relevant provisions of the Act.

12.18 This position has been clarified by the Bombay High Court in the case of *Kingfisher Airline Ltd. & Anr. Vs. CCI & Ors.* It has been held that,

> *"The question here is whether this agreement, which was valid until coming into force of the Act, would continue to be so valid even after the operation of the law. The parties as on today certainly propose to act upon that agreement. All acts done in pursuance of the agreement before the Act came into force would be valid and cannot be questioned. But if the parties went to perform certain things in pursuance of the agreement, which are now prohibited by law, would certainly be an illegality and such an agreement by its nature, therefore, would, from that time, be opposed to the public policy. We would say that the Act could have been treated as operating retrospectively, had the act rendered the agreement void ab initio and would render anything done pursuant to it as invalid. The Act does not say so. It is because the parties still want to act upon the agreement even after coming into force of the Act that difficulty arises. If the parties treat the agreement as still continuing and subsisting even after coming into force of the Act, which prohibits an agreement of such nature, such an agreement*

cannot be said to be valid from the date of the coming into force of the Act. If the law cannot be applied to the existing agreement, the very purpose of the implementation of the public policy would be defeated. Any and every person may set up an agreement said to be entered into prior to the coming into force of the Act and then claim immunity from the application of the Act, such thing would be absurd, illogical and illegal. The moment the Act comes into force, it brings into its sweep all existing agreements."

12.19 In view of this decision it is clear that the Act applies to all the existing agreements and covers those also which though entered into prior to the coming into force of section 4 but sought to be acted upon now. In addition to that, in the present matter, the documents filed by the informant show that indeed in some cases the agreement was entered into between DLF and the allottees after the date of commencement of section 4 of the Act.

12.20 The contention of the DLF that the impugned clauses existing in the agreement entered between DLF and the allottees are usual conditions as per industry practice and they cannot be termed abuse is liable to be rejected because in terms of the section 4 the responsibility of the dominant player has been made more onerous and if such practices are also adopted by a non-dominant player it may not fall within the ambit of section 4. On same ground the contention that DLF has incorporated impugned conditions to meet the competition is also not acceptable.

Issue 2

What is the relevant market, in the context of section 4 read with section 2 (r), section 19 (5), section 19(6) and section 19(7) of the Competition Act, 2002?

12.21 A "relevant market" is delineated on the basis of a distinct product or service market and a distinct geographic market. These terms have been defined in section 2(r) of the Act read with sub sections (s) and (t) of section 2. Furthermore, while examining facts of a particular case, the Commission must give due regard to all or any factors mentioned in section 19 (6) with respect to "relevant geographic market" and section 19(7) with respect to "relevant product market". The Commission has, therefore, kept the above provisions of the Act in mind in the ensuing discussion on delineation of the relevant market in this case.

12.22 It is observed that the instant information involves dynamics in a market where the informant and the Opposite Parties are participants either in capacity of a consumer, a seller or as regulatory bodies that influence the market environment. The informant, Belaire Owner's Association obviously represents the consumers in this market, while DLF Ltd. is selling or supplying some product or service.

12.23 Haryana Urban Development Authority (HUDA) is a statutory authority and Department of Town and Country Planning (DTCP), State of Haryana is a government department, both of which provide the regulatory or policy environment in the market under consideration.

12.24 It has been established earlier that DLF Ltd. is providing services of a developer/builder within the meaning of "service" given under section 2(u) of the Act. Consequently, the informant is the "consumer" of this service, within the definition given under section 2(f). The next point to be determined is whether these services, provided by DLF Ltd. to the informant, are of a distinct nature *"by reason of characteristics ... their prices and intended use"* as stipulated in section 2(t) of the Act. While examining the characteristics, this Commission also relies on factors of determination given in section 19(7), such as end-use, price and consumer preferences.

12.25 The Commission notes that the DG, in his report has described the nature of service being provided by DLF Ltd. in the context of the instant case as services of developer / builder in respect of "high-end" residential building in Gurgaon. Thus, there are 2 important components of service definition made by the DG with regard to characteristics of the underlying physical asset that require interpretation, viz. "high-end" and "residential". The third component, viz. "Gurgaon" relates to "geographic market" and shall be discussed at an appropriate place later.

12.26 Broadly speaking, services of development or building can be provided in relation to residential properties and non-residential properties. "Non-residential" properties may include a wide array of properties such as office space, retail shops, commercial space, hotels, storage space, industrial space, infrastructure, sports or amusement spaces etc. Residential properties are buildings where people live, such as stand-alone houses, builder-floors, apartments, row-houses, condominiums or studio-apartments. Despite some element of consumer preferences, these categories may be interchangeable or substitutable to some extent, within a certain price range. Therefore, the most important determinant is the price of the dwelling unit within a specific geographical area. It is in this context that it becomes important to ascertain whether a "high-end" residential unit constitutes a distinct category.

12.27 Terms like "high-end" or "affordable" are relatively subjective and would need to be determined in any case. At the same time, it can be safely concluded that a palace cannot be a substitute for a studio apartment or even a row-house and vice versa. Therefore, in this case, it is felt necessary to establish a clear and logical interpretation of the term "high-end".

12.28 Relying on the JLLS report DLF Ltd. has raised a question mark on the term "high-end" used by the DG and argued, *"There is no justification or basis and no evidence is placed on record to show that an apartment having a value of Rs. 2 – 2.5 crores would be relevant to determine a category to be described as Gurgaon (high-end) ... There is no such criteria or bench mark."* The said JLLS report further states, *"While some claim luxury on the basis of size of apartments, other claim it on basis of location or even as a marketing aid."*

12.29 This Commission agrees that there can be no hard and fast criteria for determining concepts like "luxury" or "high-end" but believes that just because no specific distinguishing criteria exist, it does not mean that there is no distinction between "high-end" and "economy" or "low-end" residential units. This distinction has to be made in the context of facts of a case. Further, "high-end" is not a function of size alone. It is a complex mix of factors such as size, reputation of the location, characteristics of neighbours, quality of construction etc. that go into considering a dwelling unit as "high-end" or otherwise. However, the most significant characteristic of a "high-end" has to be the characteristics of its actual customers and amongst all objective differentiators of a customer's characteristics is his or her capacity to pay because in economics, demand is desire backed by the ability to pay.

12.30 Residential accommodation for Lower Income Group (LIG), Middle Income Group (MIG) and Higher Income Group (HIG) are standard descriptions adopted by several public sector builders such as Delhi Development Authority (DDA), Ghaziabad Development Authority (GDA) etc. Apart from the physical attributes, these categorizations also take into account the income or expenditure levels of the customer base. Together, these factors create a distinctly identifiable residential unit that is not substitutable in an economic sense. In other words, a small but significant non-transitional increase in price of a unit in one category [termed SSNIP test often applied in abuse of dominance cases] would not make the customer shift to another category. A 5% increase in the price of a villa would not make the intending customer choose a multi-storey apartment. The purchase may be deferred briefly or the choice may shift to a slightly less comfortable villa but a person who has made a final consumer choice of preferring a villa for the reasons of family size, need for privacy, demonstration effect etc. would not switch to an apartment for a small increase in price.

12.31 It is a well accepted fact that residential accommodation constructed by public sector builders like DDA, GDA etc. is neither meant to be, nor is treated as a ‘high end’ or ‘luxury’ accommodation. This fact is in keeping with the charter and mandate of such authorities. Users / buyers of ‘high-end’ accommodation demand quality and ambience of a distinctly higher level, and are willing to pay significantly higher prices to meet their requirements. Taking into account the current prices of HIG accommodation provided by these development authorities, as also the ‘demands and paying capacity of the growing upper middle and rich classes in the society, from the cost perspective it is quite logical to accept an apartment costing Rs. 2 – 2.5 crores (20 – 25 million) as “high-end” in the Indian socio-economic reality. If “luxury” is something that the majority of population cannot afford, then apartments like Belaire are “high-end” apartments. Residential units that do not have similar attributes will not be substitutes because the buyers are looking for “luxury” and not just a roof on their heads. That is why they are willing to pay a high-end price.

12.32 Coming to the features of properties such as DLF’s Belaire, it is noted that the promotional brochures of the property talked about innumerable additional facilities, like, schools, shops and commercial spaces within the complex, club, dispensary, health centre, sports and recreational facilities, etc. There is ample information in public domain in terms of newspaper ads, websites of property dealers etc. that indicate that such an array of facilities is not a common feature for residential properties in general. These features, along with the cost-range mentioned earlier, may be broadly considered to define the characteristics of ‘high-end’ residential accommodation.

12.33 This Commission has given due consideration to the JLLS and GENESIS reports submitted by DLF Ltd. and to the QuBREX report submitted by the informant. The former two suggested taking Rs. 4000 per square feet as the floor price for “luxury” apartments whereas the latter favoured Rs. 7000 per square feet. We do not think any such quantification is necessary, particularly when DLF itself advertised the said apartments as “Luxury Homes at DLF Golf Links”.

12.34 An attempt has been made to raise a point of distinction between a purchase for “own residence” as against for “investment”. We find that such a distinction is not applicable in the present case.

A working person may buy a residence with a view to "invest" in a property that would give him or her good returns for purchasing a property post retirement at some other place. On the other hand, , circumstances may force a person to move into a property originally intended as just an "investment". Similarly, a person may "invest" in a property to be used as residence by his or her children. The decision to purchase a residential property is always from the point of view of a resident – regardless of whether the person immediately or actually lives in it. Therefore, the demand for a "high-end" or "luxury" apartment would be based on the same set of criteria and backed by the same ability and willingness to pay, whether it is being purchased for self-residence or for "investment".

12.35 Similarly, the argument that apartments are also sold by initial allottees and that there is a thriving "secondary" market, also does not carry weight in the relevant market under consideration. Every asset, including real estate, has a value which either erodes or appreciates with time. Depending upon the preference and the circumstances, the owner may like to retain it or dispose of at an opportune time. While 'secondary market' may have some bearing on the demand and supply variables, it certainly cannot form a part of the relevant market for the simple reason that the primary market is a market for ‘service’ while the secondary market is a market for immoveable property. Moreover, while building an apartment, a builder performs numerous development activities like landscaping, providing common facilities, apart from obtaining statutory licenses while a sale in secondary market merely transfers the ownership rights. An individual who is selling an apartment he or she has purchased cannot be considered as a competitor of DLF Ltd. or any other builder / developer. Nor is he or she providing the service of building / developing. The dynamics of such sale or purchase are completely different from those existing in the relevant market under consideration. The value added or the value reduced due to usage or otherwise does not even leave the apartment as the same one as had been built or developed by the builder / developer. Therefore, this argument also deserves to be rejected.

12.36 Having settled the question on categorization of “high-end” residential buildings, we would now examine the relevant geographic market. In terms of section 2(s) of the Act, “*condition of competition*” for the services provided by competitors should be “*distinctly homogeneous and can be distinguished from the conditions prevailing in neighbouring areas*”. The Commission also takes into consideration factors such as local specification requirements and consumer preferences given as determining factors in section 19(6) of the Act. Based on the facts of the case, Gurgaon is seen to be the relevant geographic market. A decision to purchase a high-end apartment in Gurgaon is not easily substitutable by a decision to purchase a similar apartment in any other geographical location. Gurgaon is known to posses certain unique geographical characteristics such as its proximity to Delhi, proximity to Airports and a distinct brand image as a destination for upwardly mobile families.

12.37 The decision to take residence, however temporarily or permanently, depends on several factors such as occupation, children's education or location, family, friends, surroundings, amenities, quality of life and affordability, amongst others. Since a residential property is by nature immovable, its geographical location is amongst the foremost factors for consideration. A person working in Chennai, belonging to Tamil Nadu, with children living or studying in Chennai or aged parents living in a nearby village is most unlikely to even look at a property in Gurgaon in Haryana, let alone purchase it. Almost equally unlikely is for someone working in Greater NOIDA to buy a luxury apartment in Haryana if he or she never intends to settle there. There are sufficient "investment" opportunities available in Greater NOIDA of similar apartments.

12.38 In the end, the "investment" or "own residence" decision centres on locational preference of the purchaser and this preference is not interchangeable or substitutable. A better apartment for lesser price may be available in, say, Surat in Gujarat but that apartment would have no value for the average purchaser who has decided to buy a house in Gurgaon for whatever reason.

12.39 In the instant case, we are not looking at concerns of speculators considering various places in the country in search of good deals that would be profitable, but of average citizens buying a residential property out of their hard earned money or by taking housing loans. A small, 5 % increase in the price of an apartment in Gurgaon would not make the person shift his preference to Ghaziabad, Bahadurgarh or Faridabad on the peripheries of Delhi or even to Delhi in a vast majority of cases.

12.40 In conclusion, on this issue, this Commission is of the view that the relevant market is the market for services of

developer / builder in respect of high-end residential accommodation in Gurgaon.

Issue 3

Is DLF Ltd. dominant in the above relevant market, in the context of section 4 read with section 19 (4) of the Competition Act?

12.41 Having delineated the relevant market above, it is now to be examined whether DLF Ltd. is in a “dominant position” in the relevant market in the context of section 4 read with section 19(4) of the Act.

12.42 The Explanation (a) to section 4 very clearly defines “dominant position” as “a position of strength”. This strength should enable the enterprise to *“operate independently of competitive forces prevailing in the relevant market”* or to *“affect its competitors or consumers or the relevant market in its favour.”*

12.43 The evaluation of this “strength” is to be done not merely on the basis of the market share of the enterprise in the relevant market but on the basis of a host of stipulated factors such as size and importance of competitors, economic power of the enterprise, entry barriers etc. as mentioned in Section 19 (4) of the Act. This wide spectrum of factors provided in the section indicates that the Commission is required to take a very holistic and pragmatic approach while inquiring whether an enterprise enjoys a dominant position before arriving at a conclusion based upon such inquiry. It is conceivable that the "dominant position" may be acquired due to several factors even outside the "relevant market" but, "for the purpose of" section 4, this "position of strength" must give the enterprise ability to operate independently of competitive forces" in the relevant market or ability to "affect its competitors or consumers or the relevant market in its favour". Thus, strengths derived from even other markets, if they give an enterprise such abilities as mentioned above, would render the enterprise as "dominant" in the relevant market.

12.44 It is important to understand each of the terms that together constitute the framework for determining dominant position. Therefore, first we look at the phrase, *"operate independently of competitive forces prevailing in the relevant market"*.

12.45 Characteristic of a market is defined by the interplay of market forces of demand and supply, which in turn are affected by several forces including government policy or regulations, demographic factors and natural conditions of land availability etc.

12.46 The preamble of the Competition Act and section 18 mandates the Commission to “protect the interest of consumers” and it is important to ensure that consumers’ surplus is not adversely impacted. The competitive forces that a seller may face are challenges from existing competitors, entry of newer competitors, or from newer rival products. Healthy competition among the sellers promotes productive and allocative efficiencies and optimises consumer surplus. However, there is cause for concern when the measures taken by a seller include conscious actions intended to create entry barriers, drive out existing rivals, control output or price, impose restrictive and supplementary obligations on captive consumers, impose unfair or discriminatory conditions or prices to the disadvantage of consumers or rival firms or leverage strengths in one market to enter or protect another market. To avoid the challenges from newer, more efficient and innovative products, sellers may also take measures to thwart technical or scientific development in a market. Such conduct is considered anti-competitive and comes under the scanner of competition laws. Therefore, for the purpose of Explanation (a) (i) to section 4, it is important to examine the ability of an enterprise to operate independently of competitive forces generated by its rivals.

12.47 Another aspect of dominance given in Explanation (a) (ii) to section 4 relates to the ability of an enterprise to *"affect its competitors or consumers or the relevant market in its favour."* For example, an enterprise may have the capability to not only operate independently of competitive forces but may actually be in a position to influence its competitors or consumers in the relevant market or the relevant market in its favour. In a sense, this is a higher degree of strength where an enterprise may be freely able to adopt price or non-price strategy to overcome downward pressures on its profit from its competitors, or to capture or bind consumers or to create a market environment that would deter newer competition, both in terms of competing enterprises or rival products.

12.48 The facts of this case have been examined keeping in view the provisions relating to dominant position given in the Act. While doing so, the Commission has given due consideration to the findings of the DG and submissions made by the parties concerned including various reports relied upon by them such as analysis reports from Jones La Salle Meghraj (JLLM) , ICICI Direct Analyst, RBS (The Royal Bank of Scotland) Analyst, Knight Frank, Goldman Sachs, Prop Equity and QuBREX. The essential assertions or contentions have been mentioned in great detail in these reports and hence are only briefly referred to in this section of the order, where required.

12.49 The facts that have emerged during the proceedings before the Commission have to be examined to ascertain whether DLF Limited has the position of strength in the relevant market in the light of the discussion on this concept in the previous paras. Each of the main contentions of the OP-1 is discussed below.

12.50 The DLF Ltd. has firstly contended that 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 consumers. The

Commission feels that the relevant point here is whether DLF Ltd. along with its subsidiaries has a position of strength in comparison to its competitors. The Act lays down factors for determining this position of strength under section 19 (4). These are discussed later in the order.

12.51 OP-1 has argued that the market share determined by JLLM report based upon number of apartments as well as on the basis of the values thereof offered by the respective developers in NCR and Gurgaon is the correct basis for determining market share. OP-1 has also stated that sales figure of different developers is not available and also might not be relevant for determining the market share. Moreover, determination of market share for Gurgaon derived from market shares based on the all India sales figure is not appropriate. As regards factors other than the market share mentioned in 19(4) of the Competition Act, 2002, OP-1 has also contended they need not be discussed since the assumption that the market share of DLF is the highest itself has no basis and thereafter consideration of the further factors becomes irrelevant.

12.52 Furthermore, it was contended that factors mentioned in section 19 (4) are only indicative and relevance of each factor has to be considered in the light of overall facts and market conditions in each case. Nevertheless, DLF Ltd. has contested several findings of the DG. With specific reference to clauses (b) & (c) of Section 19(4), it was argued that its total size and turnover considered by the DG is based on figures that relates to commercial as well as retail business, which is admittedly larger. Moreover, the figures are not confined only to the aforesaid relevant market. 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. With reference to the factor mentioned in clause (h) of 19(4) it has been stated that during the period from 2007 onwards, 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. 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. Further, Herfindahl Index indicated therein shows that the market is less concentrated and in such a market there can be no case for monopoly or dominant position.

12.53 In this context, the foremost and basic question is deciding whether the data and comments made in Jones La Salle Meghraj (JLLM) report and other market reports relied upon by DLF are more authentic / reliable than the CMIE and other market reports relied upon by the DG w.r.t. establishing market power (and hence dominance) of DLF. The biggest weakness of the data used by DLF is that it is based on current turnover and “active stock”. Active stock signifies current trading stock and reveals nothing about volumes already sold in recent past. There is nothing to indicate why DLF should be given more weightage over the objective and unbiased data used by DG. DLF Ltd. primarily relies on JLLM report that it commissioned while DG relies on CMIE data (and others) that are objective and taken from public domain. CMIE is an independent economic research and analysis organization considerable part of whose database and analysis is available in public domain. CMIE data is extensively used by many corporate and some Government agencies for analytical purposes. The Commission is disinclined to accept the data of JLL. It is also noteworthy that despite being asked by the Commission, OP-1 did not submit sales data in relation to relevant market. Consequently, any claim that DLF Ltd. does not have a position of strength in terms of market share remained unsubstantiated.

12.54 The Commission has considered the issues relating to market share, which is one of the important parameters for determining dominance. However, as is evident from the provisions of Section 19(4), it need not necessarily be the single predominant factor and often a host of other factors have to be considered. Further, if sufficient and undisputed data is not available to determine market share in a credible manner, it becomes even more important to draw on other corroborating data and analyse the other factors in even greater depth to off-set the difficulties in working out sharply specified market shares on account of data constraints, and / or to complement the market share when margins between competitors are not wide enough in determining the strength of the enterprise in terms of affecting market forces as set out in the explanation (a) to Sec 4.

12.55 Within the above constraint, market share can be used as the initial starting point for establishing dominance of an enterprise. Two commonly used measures for defining market share in the real estate business are a) sales figures (value terms) and b) active stock (volume terms), although, both are sensitive to the quality of data. Data available in the public domain pertaining to this sector is constrained by limited coverage both in space and time dimensions. DG has used sales figures for measuring dominance while OP-1 prefers to rely on active stock. The Commission has given due consideration to the conclusions of the DG in this regard, the contentions of the OP-1 regarding those findings as well as submissions of the informant on the contentions of OP-1. These have been mentioned in detail earlier in this order.

12.56 Despite the data constraint, it may be appropriate to recollect the evidences of market power of DLF estimated by DG who has brought out that the market share calculated on the basis of data from CMIE applies to all companies operating all over India and the data establishes that OP-1 has the highest share (considerably higher than the nearest competitor) among all the housing construction companies in India. On basis of very rational and reasonable logic, the DG report shows that even after granting a margin of 5% - 10% on account of other, minor players not covered in CMIE data, data and sampling error etc., the market share of OP-1 among the companies operating in Gurgaon exceeds 55%. DG has analysed total sales figure of 82 companies from CMIE database, who are engaged in real estate residential business and who are not only operating in Gurgaon but also in other places in India. On basis of this analysis, the DG report establishes the superior market share of OP-1 at about 44%. For the year 2009-10 also, DG has shown the market share of OP-1 in relevant market to be about 50%.

12.57 DG has also stated that it cannot be said that any other player enjoys similar or near to similar market share than that of OP-1. In their annual reports and various literature, OP-1 have repeatedly stated that Unitech is one of their close competitors, however, it is observed that the market share of OP-1 is more than double of the market share of Unitech, its nearest competitor, as on date. In conclusion, the DG has clearly shown that the market share of the nearest competitor is much less than OP-1, and therefore there is limited competitive constraint. In totality, it can be said that market share of OP-1 as determined by DG on basis of very detailed analysis is indicative of its dominance in the relevant market.

12.58 On the other hand, DLF, citing JLL study using active stock concept as against sales figures from annual accounts, has preferred the use of the concept of active stock in a broader product and geographic market. The Commission has noted that the sales data.used by DLF in this context is unauthenticated, and that DLF' s approach does not provide a robust alternative measure, which could enable the Commission to take this into account meaningfully for determination of the issue.

12.59 In their response DLF have also argued that there are errors in the data collated by Centre for Monitoring Indian Economy (CMIE). They have contended that the CMIE data used by DG, in regard to sales figures suffers from certain deficiencies in terms of coverage and accuracy. The Commission finds that market shares worked out with reference to sales can be different, depending on whether the sales of a company are computed in volume terms or value terms. Further the use of different systems of accounting could also lead to different results. These issues actually arise from the data limitations, which are inevitable in the real estate business, as there exist no official sectoral statistical estimates applicable for the entire country. In view of CMIE data being the most reliable available data, the Commission finds no reason to reject the analysis of DG regarding the dominant position of DLF Ltd. in the relevant market. Thus in terms of section 19 (4)(a) Commission finds force in the conclusion of dominance arrived at by DG.

12.60 The argument advanced by OP-1 that other factors of dominance given in section 19 (4) are only indicative is contrary to the legal position as seen from the provisions of the Act. Section 19 (4) says in no ambiguous terms that "*The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors ...*" Thus, it is clear that the Act does not envisage that market share alone should be considered by the Commission while determining dominant position of the enterprise. To do so would be to go against the wording and intent of the Act. In fact, a proper reading of section 19 (4) clearly show that the law makers intended to assess dominant position in a very holistic manner, by triangulating several aspects of the relevant market as well as of the overall wider market where an enterprise operates and comparing relative cumulative strengths and weaknesses of the players within the relevant market. At the same time, several other factors like overall economic development, social obligations and regulatory environment also need to be considered. Most importantly, clause (m) of section 19 (4) also explicitly empowers the Commission to consider "*any other factor*" relevant for assessment of dominance. Therefore, to argue that only market share in the relevant market is a valid determinant of dominance is against the very spirit of the Act.

12.61 It is important to note that to evaluate the relative position of strength in terms of the parameters of size and resources of the enterprise and size and importance of the competitors given under section 19 (4) (b) and (c) of the Act, it is not necessary to confine the evaluation only to the relevant market. Indeed, to do that would defeat the very purpose of these parameters. It is the overall size and resources of an enterprise or the overall importance of a competitor that has to be compared to see comparative position of strength and not the limited manifestation of that strength in a particular product or geographic market.

12.62 In this context, it is noted that DLF Limited also has 82.7% stake in DLF Home Developers Limited and 100% stake in

DLF New Gurgaon Home Developers Private Ltd. as per their annual report. While examining the dominant position of enterprise under Section 4, it is pertinent to refer to the definition of "enterprise" given in Section 2(h) of the Act wherein the activity of the enterprise in the relevant market includes direct or indirect activity through *"one or more of its units or divisions or subsidiaries..."* Similar assessment of combined strength is inferred from the use of the term "group" in Section 4.

12.63 The investigation report analysed CMIE Data Base in respect of about 118 real estate companies across India and has found that DLF Ltd. group has about 69% of gross fixed assets and 45% of capital employed. As per the draft Red Hearing Prospectus filed by DLF Ltd. In 2007, the group had a total land bank of 10,225 acres out of which 49% was located in Gurgaon alone.

12.64 The Forbes' list of global 2000 companies published for the year 2010 includes DLF Ltd. which is the only Indian real estate company to feature amongst the top 2000 at a significant position of 923. Business Today in its May, 2009 issue ranked DLF Ltd. at 14th position among top 100 companies of India and there was no other real estate company in the list.

12.65 In terms of income and profit after tax, also DLF has distinct advantage over other real estate players. DG after analyzing Net Income and PAT of 113 companies for 2008-09 has shown that OP-1 has about 41% share as far as net income is concerned and about 78% as far as PAT is concerned. In terms of market capitalization, the investigation report has examined data in public domain which shows DLF Ltd. holds 23rd position as against its nearest competitor in the relevant market viz. Unitech which holds 68th position. A similar differential exists in terms of net income, profit after tax (PAT), gross fixed assets, cash profits, net worth and capital employed.

12.66 The DG report shows, with the help of cogent reasoning and supporting data that if the position of OP-1 is compared with that of Unitech, its nearest competitor, it emerges as clear front runner in terms of sales, Net Income, PAT, Gross Fixed Assets and Capital Employed. Similarly, OP-1 also emerges leader when financial position of other big players like Emmar, Parshvanath and Omaxe group are compared.

12.67 On the other hand, it has been submitted by OP-1 that in 2007, it has supplied projects worth 6.7 million sq. ft. as against 16.8 million sq. ft. by Unitech and 10.7 million sq.ft.by Parshvanath. For the year ending March 2009, Parshvanath, one of the larger builders had a turnover of Rs. 762 crore and its stated land reserve is 4,224 acres. Unitech has a stated land reserve of 11,179 acre. Its turnover in the year ending March 2009 was Rs.3,316 crore. The stated land reserve of Ansal API is 9,335 acres and that of Omaxe is 4,500 acres. Further, as per RBS (The Royal Bank of Scotland) Analyst Report dated 18.1.2010, its land bank in NCR is stated to be 6.3 million sq. ft. These figures show that there are several competitors of a very large size and there are many more large size builders. As an argument, OP-1 has also stated that it has not launched any new project in the recent past and it has been stated that the residential space offered by OP-1 does not constitute any substantial portion of the total residential space offered by various developers.

12.68 The Commission notes some incontrovertible facts that have been given in the investigation report of the DG. These have not been contradicted by the OP-1. These include facts such as 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. This far exceeds the land bank of Unitech, the nearest competitor of OP-1. The turnover of OP-1 for 2009 was Rs. 10, 035.39 crores. This is almost 300% higher than that of Unitech and nearly 700% higher than that of Parshvanath. The "supply" of projects in a snapshot of a single year would give a completely erroneous picture of the comparative strengths of OP-1 and its competitors. A straight look at the undisputed comparative figures given here takes all the force out of the arguments of the OP-1.

12.69 The report of the DG creates a very lucid picture of relative strengths of OP-1 as compared to its nearest competitors. The OP-1 has not brought on record any substantive fact that may besmirch that picture. Therefore, this Commission is of the view that DLF Ltd. has significant advantages over competitors in size and resources. Thus, the dominant position of the OP-1 in terms of clauses (b) and (c) of section 19 (4) is amply established.

12.70 In addition to the discussion above in respect of clauses (a), (b) and (c) to section 19 (4) other relevant facts are also discussed below to arrive at the finding in respect of the position of strength of OP-1 in this case. These facts are relatable to factors given under clauses (d) to (m) of section 19 (4).

12.71 The investigation report states that DLF Ltd. has a clear early mover's advantage since it has been in the business since 1946 and apart from residential sector; it has leadership position in commercial, retail and office space sectors. This position has been propagated by DLF itself and is evident from the wordings of the draft Red Hearing prospectus filed before SEBI and public statements of its Executive Chairman that, *"DLF's dominant position in Indian Homes segment is established..."*

12.72 DLF has developed more than 22 urban colonies spread across over 32 cities and has about 300 subsidiaries. These constitute a redoubtable sales net work and provide incomparable services of integrated township in Gurgaon with a wide array of commercial properties, retail space, recreation facilities etc. This level of vertical integration of sale or service network has not been achieved by other competitors particularly in Gurgaon.

12.73 A consumer looking for residential accommodation is influenced by several factors such as proximity of work place, schools, recreation centres, shopping centres etc. Due to the high level of vertical integration of services in the integrated township of DLF in Gurgaon, there is very high dependence of consumers on DLF in that area. A person working in one of the offices situated within the DLF township or doing business from one of the commercial properties is bound to be heavily inclined to buying a residential property in the DLF township and would have more than normal resistance to shifting to another area outside township.

12.74 Real estate is a high cost sector with natural entry barriers due to high cost of land and brand value of incumbent market leaders such as DLF.

12.75 In a market such as the instant relevant market, the consumers have very little or no countervailing buying powers. There are few developers/builders of luxury, high-end apartments and thousands of prospective buyers. These conditions would ensure that consumers will be the price takers and would have little option but to accept any conditions that may be laid down by the seller. In such a market, any seller in a position of strength would have no need to sacrifice its producer's surplus to meet competition. In fact, the market followers would find it advantageous to adopt similar price and non-price strategies as the market leader since in such a market the consumer does not possess much market power.

12.76 As can be seen from the discussion above from every logical angle, DLF Ltd. and its subsidiaries have a considerably higher position of strength in the relevant market in comparison with its competitors due to several factors which have been elaborated upon. Its competitors may be large but do not compare to the strength of DLF. In context of the historical presence of DLF in the market, its superior level of vertical integration, its presence in non-residential segment of real estate, its financial strength etc., there can be no doubt that DLF Ltd. is way ahead of its competitors in terms of its ability to operate independently of competitive forces or affect its competitors or consumers or the relevant market in its favour.

12.77 On the contrary, it can be seen that though over the past few years several new developers / builders have entered the relevant market, despite this development there has been little dilution of the position of strength of DLF Ltd. in the market. The fact that there has been no move to improve the framework of buyers' agreement to make it more attractive to consumers, also supports this conclusion. DLF Ltd. is impervious to the level of competition currently being provided by other players and there is no perception of threat from any quarter. Under a more competitive scenario, where there are increased numbers of players capable of supplying equally good rival products or services, the incumbent player would display a strong tendency to meet the competition and this would be reflected in improved customer interface, amongst other things. There is no evidence to show this has happened.

12.78 The market structure in this case is such that there is low level of concentration. However, in such a market firms which are market leaders and possess around 50% market share have far greater dominance than in a relatively concentrated but more equally divided market. In the relevant market, DLF Ltd. faces negligible threat from its rivals, including the new ones, particularly, since it has a strong presence in almost all related real estate sectors. All these factors indicate that DLF Ltd. is fully capable of operating independently of competitive forces in the relevant market. Thus, conditions laid down in Explanation (a) (i) to section 4 are satisfied.

12.79 DLF Ltd. has at one stage argued that the clauses in its agreement with buyers are normal industry practices. We have already observed that industry practices emanate from market leaders and are followed by the rest. Such a market leader is not constrained to adopt practices initiated by minor players. Under the facts and circumstances of the case, if DLF Ltd. were to modify the format of its agreement and make it more buyer friendly, it would be able to assert sufficient pressure on its competitors to follow suit.

12.80 Similarly, by offering a few value added services, DLF would be able to exert a multiplier effect on non-price competition, which would sway the consumers in its favour. A live example of such market power is the project of Belaire itself where bookings were made despite the awareness that all necessary clearances were not in place. Due to the real and perceived position of strength that DLF Ltd. enjoys in the eyes of the consumers, it was able to attract buyers despite the uncertainty regarding the project.

12.81 If an enterprise has the ability to influence its competitors or the consumers in a relevant market, as demonstrated above, there could be little doubt in its ability to influence the market itself in its favour. An announcement of several large projects by DLF Ltd. at one go could make its competitors react by holding some of their own projects to avoid market saturation. Similarly, prospective consumers may defer their demand in expectation of availability of projects to be offered by the market leader. Thus, DLF Ltd. would be able to influence both the supply and demand of projects in the relevant market. These possibilities indicate that DLF Ltd. has a position of strength as envisaged in Explanation (a)(ii) to section 4 of the Act.

12.82 It should be noted that dominance is neither acquired nor asserted in a transient moment in time. It takes years for an enterprise to acquire a position of strength and its conduct has to be examined over a period of time in most cases to ascertain whether it constituted abuse. Use of snapshot data of market shares or market presence based on current active stock figures would give a false picture that, if applied in the context of the Act, may even cause avoidable harm to the market. Therefore, our assessment of dominant position is by looking at the profile, presence and achievements of DLF Ltd. over the years as well as its conduct, particularly in relation to consumers, over a period of time.

12.83 In this context, and having earlier examined the facts of the case in the light of many other factors mentioned in Section 19 (4), the Commission thought it appropriate to consider whether DLF Can be said to be a market leader in real estate sector, and whether this would also be a relevant factor under Section 19 (4) (m) for determination regarding 'dominance' of DLF.

12.84 In the context, apart from the earlier information regarding DLF, the following statements of DLF may be quoted from its website:- *"We and our predecessors have been steadily building our real estate business since 1946. Historically, our business has had a particular focus on real estate development in the NCR, which includes Delhi and adjacent areas such as Gurgaon……we developed some of the first residential colonies in Delhi such as Krishna Nagar in East Delhi, which was completed in 1949. Since then we have been responsible for the development of many of Delhi's other well known urban colonies, including South Extension, Greater Kailash, Kailash Colony and Hauz Khas."*

"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. We therefore commenced acquiring land at relatively low cost outside the area controlled by the DDA, particularly in the district of Gurgaon in the adjacent state of Haryana. This led to our first development, DLF Qutab Enclave, which has evolved into DLF City, our landmark project. DLF City is spread over 3,000 acres in Gurgaon and is an integrated township which includes residential, commercial and retail properties in a modern city infrastructure with

schools, hospitals, hotels, shopping malls and a leading gold and country club. DLF City incorporates Cybercity, our leading commercial development which when completed is expected to have developed area of approximately 20 million square feet."

12.85 The following statement of Chairman of DLF may also be quoted from the website. *"I am acutely aware that ....my company DLF is today regarded as the largest real estate developer in the world and has a pan-Indian presence with over 50 million sq. feet under construction....."*

12.86 The Commission has noted that this provides a historical perspective of the activities, growth and stature of DLF in the real estate sector. This information, though mostly relating to the period before the Act come into force, is still relevant since present day market leadership in any product / service is the consequence of historical development of that sector and firms operating therein. In conformity with information dealt with earlier, this makes it evident that as of today DLF is a market leader in real estate sector.

12.87 A market leader, by definition, enjoys a unique position in the market. A unique interplay of, and casual relationships between, the various factors which give the firm a leadership position also give it the ability to act independently of its competitor. It has the ability to influence many of the factors which determine the market and its characteristics themselves. It can often lay down the rules of the game, which power / strength it could naturally tend to exercise in its favour to the potential detriment of the competitors and consumers' interests. A market leader would, therefore, normally have dominance in the market, and could be considered on this basis itself, to be a dominant firm in the relevant market in terms of provisions of Section 4 of the Act. The Commission is of the view that DLF enjoys the position of market leader in the real estate sector in general, and in the relevant market in particular, and this is a relevant factor under Section 19 (4) (m) for holding that it has a dominant position in the relevant market.

12.88 The reference to orders of this Commission passed in the case of BPTP and M/s, Parshvanath Developers India Ltd. is out of context as in both cases, it was merely a prima-facie assessment of dominant position and neither of the two enterprises enjoyed the wide spectrum of strengths as do DLF Ltd. and its subsidiaries in the relevant market. Moreover, the relevant market under consideration in both the cases was different from the relevant market in this case and, therefore, the cases are differentiated on facts.

12.89 In view of the above, this Commission concludes that DLF Ltd. is in a dominant position in the relevant market in the context of Section 4 read with Section 19(4) of the Act.

Issue 4

In case DLF Ltd. is found to be dominant, is there any abuse of its dominant position in the relevant market by the above party?

12.90 The Commission has gone through the entire Apartment Buyers Agreement (referred to as Agreement hereinafter) very carefully for the purpose of determination of this issue, considered the impact of conditions imposed and specifically noted a number of terms therein, including the following:-

i. *Unilateral changes in agreement and supersession of terms by DLF without any right to the allottees:*

"...the Company has acquired some lands........such lands as and when licensed and approved by the competent authority (IES), shall be deemed to be a part of the approved layout plan of Phase-V.....this Agreement shall automatically stand superseded and be substituted by such subsequently approved layout plan(s) of Phase-V and shall be deemed to form a part of this Agreement." (Ref.: representation B of the Agreement).

ii. DLF's right to change the layout plan without consent of allottees :

"...the apartment Allottee hereby agrees that it shall not be necessary on the part of the Company to seek consent of the Apartment Allottee for the purpose of making any changes in order to comply with such directions/conditions/changes and that the layout plan of Phase-V as may be amended and approved form time to time" (Ref. : representation C of the Agreement)

iii. *Discretion of DLF to change inter se areas for different uses like residential, commercial etc. without even informing allottees*:

"...with each zone as may be earmarked for residential, commercial or other uses, provided however, the total number of zones and their earmarked uses may be changed as per the directions of the competent authority(ies) or at the sole discretion of the Company" (Ref.: representation E of the Agreement)

iv. *Preferential location charges paid up-front, but when the allottee does not get the location, he only gets the refund/adjustment of amount at the time of last instalment, that too without any interest:*

"The Apartment Allottee hereby agrees to pay additionally as preferential location charges... the apartment Allottee has specifically agreed that due to any change in layout/building plan, the said apartment ceases to be in preferential location, the Company shall be liable to refund only the amount of preferential location charges without any interest...in the last installment as stated in schedule of payment..." (Ref.: clause 1.5 of the Agreement)

v. *DLF enjoys unilateral right to increase / decrease super area at its sole discretion without consulting allottees who nevertheless are bound to pay additional amount or accept reduction in area* :

"...the Apartment Allottee agrees and undertakes to pay for the increase in super area immediately on demand by the Company as and when such demand is intimated to the Apartment Allottee by the Company irrespective of receipt of the Occupation Certificate and if there shall be a reduction in the super area, then the refundable amount due to the Apartment Allottee shall be adjusted by the Company from the final installment as set forth in the Schedule of Payments in Annexure III" (Ref.: clause 1.6 of the Agreement)

vi. *Proportion of land on which apartment is situated on which allottees would have ownership rights shall be decided by DLF at its sole discretion (evidently with no commitment to follow the established principles in this regard)*: "It is made clear by the Company and specifically understood by the Apartment Allottee that the Company may at its sole discretion and for the purpose of complying with the provisions of Haryana Apartment Ownership Act, 1983 or any other applicable laws substitute the method of calculating the proportionate share in the ownership of the land beneath the building and / or common areas and facilities as may be described by the Company in its sole discretion in any declaration by calculating the same in the ratio of his/ her apartment's value to the total value of the said building (s)/ project/ scheme, as the case may be, and that the Apartment Allottee agrees not to raise any objections in this regard" (Ref.: clause 1.7(iii) of the Agreement)

vii. *DLF continues to enjoy full rights on the community buildings / sites / recreational and sporting activities including maintenance, with the allottees having no rights in this regard*:

"…the Company has made it specifically clear to the apartment allottee… that the Company is free to deal with community buildings / sites / recreational and sporting activities …in any manner as the Company may deem fit." (Ref.: clause 1.7 (viii) of the Agreement).

viii. *DLF has sole discretion to link one project to other projects, with consequent impact on ambience and quality of living, with the allottees having no right to object*:

"It is further clarified by the Company and agreed to by the Apartment Allottee that the Company may at its sole discretion make The Belaire project a part of any other adjacent project that has already come into existence or may be constructed in future at any time or keep it separate as an independent estate and the Apartment Allottee shall not raise may objection for such formation" (Ref.: clause 1.9 of the Agreement)

ix. *Allottees liable to pay external development charges, without there being disclosed in advance and even if these are enhanced.*:

"It is made clear by the Company and agreed by Apartment Allottee that the payment of External Development Charges shall always be solely to the account of Apartment Allottee to be borne and paid by all the Apartment allottees… In the event of such charges remaining unpaid, the Apartment Allottee shall have no right, title and interest left in the apartment thereafter. The Apartment Allottee further agrees that he/ she would not be competent to challenge such action of resumption of the said apartment by the Company due to default of non-payment of such enhanced external development charges on the part of the Apartment Allottee" (Ref.: clause 1.11(a) of the Agreement)

x. *Total discretion of DLF regarding arrangement for power supply and rates levied for the same*:

"…the Company or its agents may at their sole discretion…enter into the arrangement of generating and / or supplying power…… Allottee…….gives complete consent to such an arrangement including it being an exclusive source of power supply…… and has noted the possibility of its being to the exclusion of power supply from DHBVN / State Electricity Boards….. It is further agreed and confirmed by the Apartment Allottee that the Company or its agents shall have the right to charge tariff for providing/ supplying the power at the rate as may be fixed from time to time by the Company which may or may not be limited to the rate then charged by the DHBVN/ State Electricity Boards… (Ref.: see clause 1.14 of the Agreement)

xi. *Arbitrary forfeiture of amounts paid by the allottees in many situations*:

"The Apartment Allottee hereby authorizes the Company to forfeit out of the amounts paid/ payable by him/her, the earnest money as aforementioned together with any interest paid, due or payable along with and any other amount of a non-refundable nature including brokerage paid by the Company to the brokers in case of booking is done through a broker… …in the event of the failure of the Apartment Allottee to perform his/ her obligations or fulfill all the terms and conditions set out in the application and / or this Agreement executed by the Apartment or in the event or failure of the Apartment Allottee to sign and return this Agreement in its original form to the Company within thirty (30) days of its dispatch by the Company." (Ref.: clause 4 of the Agreement)

xii. *Allottees have no exit option except when DLF fails to deliver possession within agreed time, but even in that event he gets his money refunded without interest only after sale of said apartment by DLF to someone else*:

"...the Company shall be unable to or fails to deliver possession of the said Apartment to the Apartment Allottee within three years...the Apartment Allottee shall be entitled to give notice to the Company...in that event the Company shall be at liberty to sell and / or dispose of the said Apartment and the allotted parking space to any other party...without accounting for the sale proceeds thereof to the Apartment Allottee....the Company shall within 90 days from the date of full realization of the sale price after sale of said apartment and the parking space refund to the Apartment Allottee, without any interest, the amount paid by him/her in respect of the said Apartment and the parking space..." (Ref.: Clause 11.3 of the Agreement)

xiii. *DLF's exit clause gives them full discretion, including abandoning the project, without any penalty*:- "The Apartment Allottee agrees that in consequence of the Company abandoning the Scheme or becoming unable to give possession within three (03) years from the date of execution of this Agreement...the Company shall be entitled to terminate this Agreement whereupon the Company's liability shall be limited to refund of the amounts paid by the Apartment Allottee with a simple interest @9% per annum for the period such amounts were lying with the Company and to pay no other compensation whatsoever.... the Company may, at its sole option and discretion... agrees to pay... compensation @Rs. 5/- per sq. ft. of the super area of the said Apartment per month for the period of such delay beyond three (03) years or such extended periods..." (Ref.: clause 11.4 of the Agreement)

xiv. *DLF has sole authority to make additions / alterations in the buildings, with all the benefits flowing to DLF, with the allottees having no say in this regard* **:**

The Company shall have right, without any approval from any Apartment Allottee in the said Building to make any alterations, additions, improvements or repairs whether structural or non-structural, interior or exterior, ordinary or extra ordinary in relation to any unsold apartment(s) within the said Building and the Apartment Allottee agrees not to raise objections or make any claims on this account..... The Apartment Allottee agrees and authorizes the Company to make additions to or put up additional structures in/ upon the said Building or Additional Apartment Building(s) and/ or structures anywhere in the said Complex/ Said Portion of Land as may be permitted by competent authorities and such additional Apartment Building(s) structures shall be the sole property of the Company which the Company will be entitled to dispose of in any way it choose without any interference on the part of the Apartment Allottee(s)" (Ref.: clauses 20 & 22 of the Agreement)

xv**.** *Third party rights created without allottees consent, to the detriment of allottees' interests***:**

The Apartment Allottee hereby authorizes and permits the Company to raise finance/ loan from any Financial Institution/ Bank by way of mortgage/ Charge/ securitization of receivables or in any other mode or manner by charge/ mortgage of the said Apartment/ said Building/ said Complex/ said Portion of Land subject to the condition that the said Apartment shall be free from all encumbrances at the time of execution of conveyance deed. The Company/ Financial Institution/ Bank shall always have the first lien/ charge on the said Apartment for all their dues and other sums payable by the Apartment Allottee or in in respect of any loan granted to the Company for the purpose of the construction of the said Building/ said Complex. (Ref.: clause 23 of the Agreement)

xvi. *Punitive penalty for default by allottees, insignificant penalty for DLF's default:*

"The Company may, at its sole option and discretion... waive the breach by the Apartment Allottee in not making payments as per the

Schedule of Payments given in Annexure III but on the condition that the Apartment Allottee shall pay the Company interest which shall be charged for the first ninety (90) days after the due date @ 15% per annum and for all periods of delay exceeding the first ninety (90) days after the due date an additional penal interest @3% per annum (total interest 18% per annum only)... (Ref.: clause 35 of the Agreement)

12.91 It is further evident that the conditions of the Agreement are imposed on the buyers/allottee through "important instructions to intending allotees" printed on the Agreement. The said instructions read:

"If the intending Allotee(s)... to execute and deliver to the Company the Apartment Buyer's Agreement in its original form duly signed within thirty (30) days from the date of dispatch....The Company shall reject and refuse to execute any Apartment Buyer's Agreement wherein the Intending Allottee has made any corrections/ cancellations/alterations/modifications. The Company reserves the right to reject to reject any Apartment Buyer's Agreement executed by any Intending Allottee without any cause or explanation or without assigning any reasons therefor and to refuse to execute the

Apartment Buyer's Agreement... the decision of the company shall be final and binding."

12.92 Thus even when DLF sent the said agreement for signing by the allottees, they had absolutely no right to suggest / make any alteration / modification whatsoever in the said agreement; and if they refuse to sign the agreement at that point of time the money deposited earlier stood forfeited. In other words even before the Agreement, including the above illustrative clauses, was signed by the apartment allottees, once they had deposited the earnest money, had no option to exit except at a considerable financial loss. In other words, having deposited the earnest money, the allottees options to change his choice for any reason, including not agreeing with the terms of the Agreement, stood foreclosed, even without having entered into any Agreement till that stage.

12.93 It may be noted that the informant had alleged that earnest money and certain other payments had to be made even before signing of the Apartment Buyer Agreement with DLF. It has been brought to the notice of the Commission that the extent of abuse is so gross that the buyer/allottee has to pay almost 95% of the consideration amount within 27 months of booking, and a bulk of this is often paid to DLF even before entering into the Agreement. It is also noted that though DLF provides a stringent time-line for payment of agreed amount, there is no time-line specified for delivery of possession by DLF. Further, Agreement is often sent by DLF for signing much after initial payment by the buyer. In such cases the buyer who could have made a choice to go to other real estate service providers, gets locked in with DLF having paid a substantial amount, with no free exit option, without even being aware of the sweeping terms and conditions being imposed through the Agreement. The high switching cost not only destroys the choice, it also reduces mobility in the market. Information asymmetry created by such lock-in, in absence of the knowledge of terms and conditions of the Agreement is having distortionary effect not only on the competition in the market but also on consumer welfare.

12.94 Thus, the allottees become captured consumers who are subject to abuse by DLF through imposition of unfair conditions contained in the Agreement. Such abuse is not a one-time abuse by DLF, rather it continues throughout the span of the period of construction, and allottees are subjected, or there is a scope to subject them time and again, to newer conditions aggravating the existing abusive conduct of DLF.

12.95 The investigation report of the DG has comprehensively examined various aspects of the conduct of DLF Ltd. in the case in context of the information filed. Briefly, these are recapitulated below:

i. Commencement of project without sanction/approval of the projects

ii. Increase in number of floors mid-way

iii. Increasing of Floor Area Ratio (FAR) and Density Per Acre (DPA)

iv. Inordinate delay in completion and possession

v. Forfeiture of amounts

vi. Clauses of agreement are heavily biased in favour of DLF Ltd. and against the consumers

12.96 DLF Ltd. challenged the above conclusions of abusive conduct cited by the DG in its submissions before the Commission. Apart from arguments in respect of the above conduct, DLF Ltd. also contended that they had voluntarily given a large number of benefits to the allottees. In this regard, the view of the Commission is that one unfair condition cannot be counter balanced and wiped out by another seemingly fair or propitiating act.

12.97 DLF Ltd. has given justifications for cancellation of allotment and stated that it was done only in cases of defaults and was in terms of the Buyers' Agreement. It has also contended that there was no delay in possession in terms of the said agreement. It has also contended that all approvals and clearances are in place and that there has been no violation of FAR or DPA norms. It was also argued that applicants had the opportunity to read the clauses of the agreement and therefore DLF Ltd. cannot be faulted if the applicants later found any issues in the clauses.

12.98 The Commission has given due consideration to the detailed submissions made by DLF Ltd. in this regard. There are a few facts that reveal a certain picture of the way the bookings and allotments took place that is relevant to at this point. Certain bookings were made as far back as August 2006 and substantial amounts running in several hundred thousands was taken by DLF Ltd. At that point in time necessary approvals from agencies like the Airport Authority of India, HUDA and DTCP had not been obtained by the developer. Moreover, the building was to be of 19 floors only. The application for approval was moved in December 2008 and the approval for the revised plan came only in August 2009 – full 3 years after the first bookings were made. The revised plan did not increase the number of floors by a couple of stories but by 10 floors, that is almost by 50% more. The buyers' agreement gave an impression that the project would be completed in 3 years however, the dates of possession kept shifting forward and even as on date, the possession is supposed to be given around October 2011.

12.99 Furthermore, it is only understandable that applicants who had paid substantial sums of advance deposits for the booking would get concerned due to inordinate project delays as was the case here. But their genuine anxiety was met with utter disregard and insensitivity by DLF Ltd. When out of sheer desperation some allottees stopped payment to create pressure on DLF Ltd. their allotments were cancelled and huge deposits were forfeited. For those who succumbed to these unilateral and retaliatory conduct, DLF Ltd. charged heavy interests on delayed payments.

12.100 Another feature of this far from healthy relationship between the service provider and its clients is the draconian and one-sided clauses in the buyers' agreement. The DG's report has mentioned these in detail and some extracts have been given earlier in this order also therefore it is not necessary to repeat all of them here. However, reference of just a few of those clauses would reveal the texture of relationship DLF Ltd. has sought to develop with its consumers.

12.101 There are clauses that give DLF Ltd. sole discretion in respect of change of zoning plans, usage patterns, carpet area, alteration of structure etc. In case of change in location of the apartment, PLC is determined at the discretion of the builder and if a refund is due, no interest is paid. No rights have been given to the buyers for raising any objections. Further, even if the buyer has paid the full amount, the builder can raise subordinate mortgage on the property for finances raised for its own purpose and the consumers are subjected to this mortgage. Despite knowing that necessary approvals were pending at the time of collection of deposits, DLF Ltd. inserted clauses that made exit next to impossible for the buyers. Similarly, in event of delay, the builder would pay compensation at Rs

5 per square foot per month for delays beyond 3 years. In sharp contrast, if there is a delay on part of the buyer, the interest charged is 15 % per annum for the first 90 days, increasing by another 3% after that.

12.102 These are some of the clauses that show how heavily loaded the buyers' agreement is in favour of DLF Ltd. and against the buyer. Under normal market scenario, a seller would be wary of including such one-sided and biased clauses in its agreements with consumers. The impunity with which these clauses have been imposed, the brutal disregard to consumer right that has been displayed in its action of cancelling allotments and forfeiting deposits and the deliberate strategy of obfuscating the terms and keeping buyers in the dark about the eventual shape, size, location etc. of the apartment cannot be termed as fair. The course the progress of the project has taken again indicate that DLF Ltd. beguiled and entrapped buyers through false solicitations and promises.

12.103 The point under contention is not whether such one-sided clauses favouring DLF Ltd. and putting the allottees in a position of distinct disadvantage were part of an “agreement” and hence contractual obligation, as argued by the OP-1. The moot point in this case and indeed the competition concern is that a dominant builder / developer is in a position to impose such blatantly unfair conditions in its “agreement” with its customers and bind them in such one-sided contractual obligation. In a competitive scenario, where the enterprise indulges in such anti-consumer conduct, there is sufficient competition in the market to provide easy alternatives for the consumer. The competitive forces would ensure that the builder / developer would soon face loss of customers, which would force it to become more consumer-friendly. However, only when a dominant enterprise indulges in such conduct is there little hope for the consumers because not only that enterprise indulges in such behaviour with impunity but smaller competitors would want to enjoy as much advantage by following the leader. Since a weaker competitor is not in a position to take on the competitive might of the dominant enterprise, it would rather emulate the dominant enterprise and take similar advantage of the consumers.

12.104 It is noted that the Competition Act only requires this Commission to ascertain if some conduct is “unfair” in terms of section 4 of the Act and is being carried on by a dominant enterprise. This Commission has no doubt that the nature of clauses and conduct as indicated in earlier paras are blatantly unfair, even exploitative. The dominant position of DLF Ltd. has already been established. Therefore, we find no force in the arguments of the OP-1 in this regard.

12.105 As regards legality of actions like violations of FAR or increasing density per acre are concerned, per se, these are not competition issues and have to be looked into by the competent authorities. However, this Commission is of the view that both these factors have gone against the interests of the consumers. The person who chooses a particular apartment does so after considering factors such as FAR, availability of bigger common areas, common facilities etc. If the number of apartments in a project is substantially increased, as in this case, there is considerable reduction of consumer welfare. For example, if a hundred residents are supposed to share one swimming pool, their satisfaction from that common pool would be far less if suddenly the builder tells them they have to share the pool with 200 residents. In economics, “value” is based on the perceived utility of any product or service. Consumers pay according to this perception. If something is done that drastically or substantially reduces that perceived value, it can only be termed as an unfair conduct by the seller. Under Competition Act, such unfair conduct by a dominant enterprise is contravention of the provisions of the Act.

12.106 An argument has been extended that in the agreement, the clauses which allegedly amount to abuse of dominance are as per "industry practice." DLF has also given certain comparative tabular statements in support of this argument. The material available on record in regard to the comparative picture of such clauses has been considered by the Commission. It has been noted that the agreements of other service providers and competitors submitted by DLF, though not identical, have certain similarities and common points. The question arises whether this can be treated as an industry practice and, if so, whether this can be a defence for DLF in this case keeping in view the provisions of the Act, including the reference to "practices" in section 3 (3).

12.107 It is evident from material on record that DLF is by far the oldest real estate service provider in the country. The extracts from DLF websites quoted in paras earlier substantiate this conclusion.

The information / data considered in this order earlier in regard to size and resources of DLF while determining issue No.3, and the speech of Chairman, DLF Group quoted earlier also clearly highlight the dominant position of DLF in the country as a whole, as also in Gurgaon.

12.108 It is evident that a company of this size, which has been operating at a big scale much before any competitor came on the scene, would automatically be a trendsetter in the sector in which it operates. All the material and evidence on record confirms that DLF has been, and continues to be, a market leader as a real estate service provider. As such, it is DLF which would have initiated and developed the practices which would have been followed by the later entrants, and over a period of time could be considered as “industry practices”. Therefore, , even without taking into account the fact that being an industry practice cannot be a defence for anti-competitive practices / conduct, DLF for one certainly cannot claim the defence of having adopted an industry practice for practices which are found to be anti-competitive and / or abusive.

12.109 In view of the foregoing discussion, this Commission finds DLF Ltd. in contravention of section 4 (2) (a) (i) of the Act.

Other Concerns

12.110 During the course of dealing with this case, the Commission has come across a number of facts which could impinge adversely on the consumers' interests, and indicate some aspects of the modus operandi of DLF which may need to be looked into by the appropriate authorities. Even though these are not issues which fall within the ambit of anti-competitive conduct, keeping in view the mandate in the Preamble and Section 18 of the Act "to protect the interests of consumers" the Commission considers it appropriate to note / illustrate some of these facts in the order.

12.111 The examination of this case has brought forth several areas of concern pertaining to the housing sector in India. The Commission feels that although there is a plethora of laws, there is no proper regulation of the real estate sector, particularly the housing sector. In order to promote overall consumer welfare, to ensure free and fair competition in real estate residential market and to set standards of conduct of enterprises engaged in similar nature of trade, the Commission therefore makes a strong recommendation to the Central Government and all State Governments to come out with real estate regulations at the earliest for ensuring overall consumer welfare and to discourage unfair trade practices that seem prevalent in the sector.

12.112 The Commission has, inter alia, noted the following facts about the conduct of DLF, which apparently is followed by other service providers also:-

i. They issue advertisements for launching projects without the land in question being actually purchased, registered in their name and possession taken and without taking prior approval of competent authorities.

ii. They do not specify the total area of the plot/flat/house indicating clearly the carpet area and utility area.

iii. They do not specify the date of delivery and consequential remedies available to the consumer in case of delay.

iv. The amount collected from the allottees against a particular project is not deposited in a designated escrow account and utilized only for the construction of the concerned building.

v. The information relating to the progress of works and status of account of each allottee is not made available to buyers in a transparent manner.

vi. They build in hidden costs other than the initial set price.

vii. They do not post all the relevant information on internet and make them available in public domain. There is no transparent and participatory mechanism put in place to deal with escalation in price, if any.

viii. There is often inordinate delay in execution of the project and if the project is delayed without previously agreed valid reasons, there is no provision that would entail pre-determined amount of penalties on total project to be paid to the consumers.

ix. There is no fair, participatory and transparent mechanism to tackle any substantive and major changes in the project mid-way, before taking approval of the authorities for the revised scheme and commencing construction thereon. Changes in FAR or density per acre, exclusion of some common facilities or substantive changes in design and layout are not included in the category of substantive or major changes. The description of substantive or major changes as well as the mechanism for decision making is not clearly given in the Buyers' Agreement.

12.113 It appears from the above and other facts that DLF, at times, goes ahead with planning and execution of projects without first obtaining the necessary regulatory approvals from development and other authorities. Further, the deployment and use of funds, as also pricing of these products, also does not seem to be based on transparent principles or basis. Money deposited by allottees of one project may well be being used for other projects / purposes, since there is no system of keeping separate accounts or keeping the money in escrow accounts. Indeed, it appears that various deposits by allottees become part of a large pool of funds, which may be deployed for any purpose at the discretion of DLF, without necessarily having a linkage with the purose for which the money was deposited. This fact assumes much greater significance in view of the huge land bank with DLF, and the large number of projects it takes across the country. The ability of DLF to launch projects without prior approvals, and make major changes midway through the projects, also raises a host of issues. It is not clear as to what is the basis of

DLF's confidence, and what gives them the risk-taking ability, to go ahead at will in anticipation of necessary approvals, and it would not be correct for the Commission to speculate on the reasons for this or take into account any unverified explanations in this regard. But it is appropriate that the concerned authorities give due consideration to these issues.

12.114 Be as it may, the Commission hopes that all these, and similar / related other factors impinging adversely on the consumers' interests, would be taken note of by concerned authorities for effective remedial action. The responsibility of such authorities assumes even greater importance in view of the fact that these consumers are normally not in a position to organize or act meaningfully for redressal of their grievances, or the protection of their interests, even though often their life-savings may be at stake. The absence of any single sectoral regulator to regulate the real estate sector in totality, so as to ensure adoption of transparent & ethical business practices and protect the consumers, has only made the situation in the real estate sector worse.

13. Decision under section 27 of the Competition Act, 2002

13.1 In the preceding discussion, this Commission has concluded that the instant case is within the jurisdiction of the Competition Act, 2002. Therefore, in accordance with provisions of the Act it has delineated the relevant market as the market for services of developer / builder in respect of high-end residential properties in Gurgaon. In the relevant market, OP-1, DLF Ltd. has a dominant position within the meaning of the term as per Explanation (a) to section 4, read with section 19 (4). Finally, the Commission has concluded that DLF Ltd. is in contravention of section 4 (2) (a) (i) by imposing unfair conditions on the sale of its services to consumers.

13.2 In the facts and circumstances of the case, the Commission has examined the role of Opposite Parties 2 and 3, viz. HUDA and DTCP of Government of Haryana. It is seen that these are agencies or authorities of the State Government whose role is limited to granting various approvals to builders / developers. They are not providing any services of a commercial nature of the kind provided by the DLF group or its competitors. Thus their conduct does not come within the ambit of section 4 of the Act.

13.3 In paras 12.90 and 12.95 supra, this order lists conditions imposed by DLF Ltd. and its group companies on its consumers / buyers in detail. These conditions have been held to be unfair in terms of section 4 (2) (a) (i) of the Act and hence in contravention of section 4. In view of the above, and in exercise of powers under section 27 (a) of the Act, the Commission directs DLF Ltd. and its group companies offering services of building / developing:-

i. to cease and desist from formulating and imposing such unfair conditions in its agreements with buyers in Gurgaon.

ii. to suitably modify unfair conditions imposed on its buyers as referred to above, within 3 months of the date of receipt of this order.

13.4 The abuse of dominant position in this case is in respect of the basic necessity of housing. The earlier deliberation on the elements and extent of abuse make it clear that DLF has been grossly abusing its dominant position, and that too against a vulnerable section of consumers, who have little ability to act or organize against such abuse. The penalty, therefore, has to be commensurate with the severity of the violation through such blatant abuse of dominance.

13.5 There appear to be no mitigating factors for taking a lenient view as the abusive practices referred to above have been carried with the object of undue economic gains and business profits. On the other hand, the consistent practice of executing unfair conditions and holding out false representations and exploiting the dominant position has come on record which are certainly aggravating factors. In the view of the Commission, the conduct of the OP -1 in abusing its dominant position requires to be taken very seriously and thus, the Commission is required to adopt a deterrent approach so that recurrence of such conduct is stopped.

13.6 The facts of this case and the conduct of the OP-1, as discussed above, particularly the size and resources of OP -1 and the duration during which this abuse has continued to the advantage of DLF Ltd. and to the disadvantage of consumers, warrant imposition of a heavy penalty. Keeping, in view the totality of the facts and circumstances of the case, the Commission considers it appropriate to impose penalty at the rate of 7% of the average of the turnover for the last three preceding financial years on OP-1. Therefore, in exercise of powers under section 27 (b) of the Act, the Commission imposes penalty on DLF Ltd. as computed below:

Turnover for year ended 31.03.2009 Rs 10,035.39 crores

Turnover for year ended 31.03.2010	**Rs 7,422.87 crores**
Turnover for year ended 31.03.2011	**Rs 9,560.57 crores**
Total	**Rs 27,018.83 crores**
Average (Total ÷ 3)	**Rs 9006.27 crores**
7 % of average	**Rs 630.43 crores**
Penalty rounded off to nearest number	**Rs 630 crores (or Rs 6.3 billion)**

14. The Secretary is directed to convey this order to the concerned parties. In view of the observations of the Commission at paras 12.110 to 12.114 above, the Secretary is also directed to convey the same to the concerned Central Government and State Government authorities with a request for consideration and suitable action on their part.

Sd/-
Member (R)

Sd/-
Member (GS)

Sd/-
Member (AG)

Sd/-
Member (CT)

Sd/-
Chairperson

Certified True Copy
16/8/2011
(S.P. GAHLAUT)
Assistant Director
Competition Commission of India
Govt. of India,
New Delhi