

# **[INV014 - Investigation into the supply of Automatic Electronic Ignition Keys and related synchronising services]**

## **Final Report**

*[19/11/2013]*





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## I. Executive Summary

1.1 On the 30<sup>th</sup> January 2012, the Executive Director of the Competition Commission ('CCM') launched an investigation ('INV014' – 'the investigation') under section 51 (1) of the Competition Act 2007('The Act'), into an alleged abuse of monopoly situation by several new car distributors in Mauritius, in relation to the supply of replacement Automatic Electronic Ignition Keys ('AEIKs') and related installation and synchronising services.

1.2 The Executive Director ('ED') has now completed the investigation and as prescribed under section 51(2) of the Act, the ED produces a Final Report ('this Report') which contains the findings and recommendations regarding the alleged conducts of the main parties<sup>1</sup> namely; ABC Motors Co Ltd ('ABC Motors'), Leal and Co Ltd ('Leal') and Iframac Limited ('Iframac').

1.3 The main focus of the investigation was to examine whether the main parties are in a monopoly situation as per Section 46 of the Act in the aftermarkets for replacement AEIKs and for the related installation and synchronising services for the respective makes of cars they distribute. The two concerns of the CCM are whether the main parties have engaged or are engaging in -

- exclusionary conduct contrary to section 46(2)(a) of the Act by impeding access to the multiple markets by withholding the 'codes' required for synchronising/installation of replacement AEIKs - thereby resulting in the elimination of major competitive constraint by way of market foreclosure and/or
- exploitative conduct by charging excessive prices to consumers contrary to section 46(2)(b) of the Act.

1.4 The relevant market definition established in this investigation is the aftermarkets for replacement AEIKs and related installation and synchronising services for each make of cars in Mauritius. The relevant market is defined as brand-specific multiple markets.

1.5 After reviewing the market, the ED's finding is that all three main parties are individually in a monopoly situation as prescribed under section 46 (1)(a) of the Act in each of the brand-specific aftermarkets for the supply of AEIKs for the respective makes of car they distribute.

1.6 Regarding the excessive pricing concern and after analysing the prices and cost information of the main parties, the finding of the ED is that a case of excessive pricing in

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<sup>1</sup> "main party" means the party who is subject of an investigation - Rule 2 of the Competition Commission Rules of Procedure 2009

the supply of AEIKs and related installation and synchronising services cannot be sustained against the main parties. There is no breach of section 46(2) (b) of the Act, the main parties have not committed any exploitative abuse in the form of excessive pricing for replacement AEIKS and related synchronising services.

1.7 Regarding the foreclosure concern, the CCM understands that the main parties are not the owners of the codes. The finding is that the non-disclosure of codes and information related to synchronisation process of AEIKs does not have the object or effect of preventing, restricting or distorting competition. After analysing the market and other factors, the final finding is that there is no exclusionary behaviour by the main parties in the aftermarket for the supply of replacement AEIKs and no breach of section 46 2 (a) of the Act is committed.

1.8 Although the main parties are each in a monopoly situation, they have not abused of their position of dominance, as such no recommendation in terms of remedial actions is required.

## 2. Background

### (A) The Investigation

2.1 This Report is issued in line with rule 15 of the Competition Commission Rules of Procedure 2009 ('Rules of Procedure').

2.2 The investigation follows an 'enquiry' that was carried under rule 5 of the Rules of Procedure, upon which the Executive Director decided that he had reasonable grounds to believe that a restrictive business practice has occurred or is occurring or about to occur in the supply of spare Automatic Electronic Ignition Keys (AEIKs) and related installation and synchronising services.

2.3 The Executive Director drew up an administrative timetable for the investigation as per rule 9 of the Rules of Procedure. The administrative timetable was issued on 3<sup>rd</sup> February 2012. The timetable was subsequently revised and published on two occasions - on 4<sup>th</sup> July 2012 and on 19<sup>th</sup> March 2013 and on each occasion the main parties were notified of the revised timetables in accordance with rule 9(6) of the Rules of Procedure. The timetable was accordingly published on the CCM's website.

2.4 The CCM carried procedural and factual meetings on various occasions with the main parties as well as auxiliary parties.<sup>2</sup> The information gathering process continued through factual meetings and the issue of Information Request Notices under section 52 (1) of the Act.

2.5 Statements of Issues ('SOI') were communicated to the main parties on 31<sup>st</sup> August 2012. Individual Preliminary Reports containing the ED's Provisional Findings ('PF') were made under rule 14 of the Rules of Procedure and were notified to ABC Motors and Leal on the 27<sup>th</sup> September 2013 and to Iframac on the 24<sup>th</sup> October 2013. The main parties were given the opportunity to comment on both the SOI and the PF. Their responses were taken into consideration by the ED in the finalisation of this Report.

2.6 Pursuant to Rule 14 (1) (b) (ii) of the Competition Commission Rules of Procedure 2009, the main parties were invited '*to provide the Executive Director with reasons in writing as to why such provisional findings should not become final*' and/or more generally, to submit comments, if any, on the contents of the Preliminary Report within 21 days from the date of notification of the PF. The main parties responded<sup>3</sup> to the notification but did not manifest any intention to the effect that the Provisional Findings of the ED should not become final.

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<sup>2</sup> "auxiliary party" means a party who has an interest in the matter and has provided evidence to the Commission or to the Executive Director and includes a complainant- Rule 2 of the Competition Commission Rules of Procedure 2009

<sup>3</sup> Annex 1 contains the responses of the main parties to the PF as annexure 1A, 1B and 1C

## **(B) Automatic Electronic Ignition Keys and the Transponder Technology**

2.7 The investigation is into the supply of AEIKs and the related services; namely the installation and /or synchronising. For the purposes of the investigation, an AEIK is an ignition key that is wholly or partly an electronic device based on the ‘transponder technology’. The transponder is an electronic system of wireless communication between a ‘transmitter’ device and a corresponding ‘responder’ device and hence, the name ‘transponder’.

2.8 The main functions of an AEIK are in essence similar to a ‘traditional mechanical metal blade key’ that is the unlocking of the doors and steering wheel and the ignition of the engine. However, an AEIK operates these main functions by communicating electronically with the car’s electronic systems that controls door locks, steering wheel lock and the engine immobiliser.

2.9 AEIKs are found in cars that are fitted with Electronic Control Unit (ECU) - the technical name for on-board computer system - that includes an engine immobiliser device. The ECU is a generic term for electronic component that controls one or more functions in a motor vehicle, the ECU is the technical term used for the on board computer system. The majority of features and functions in modern cars and especially security features are controlled by different sets of ECUs such as ‘Airbag Control Unit’ (ACU), ‘Electric Power Steering Control Unit’ (PSCU), and ‘Engine Control Unit’ (ECU) — not to be confused with generic term Electronic Control Unit or the Engine Management System (EMS).

### **(i) Types of AEIKs - The ‘microchip key’ & The ‘Smart Key’**

2.10 There are two types of AEIKs and they are referred to as (i) the ‘microchip key’ and the ‘Smart Key’.

2.11 In the first type of AEIK - the ‘microchip key’- the transponder technology is utilised by embedding a microchip with the metal blade key, the microchip is normally placed in the plastic part of the key. Such AEIK looks like a traditional mechanical key with a metal blade but it provides both the traditional mechanical security and an additional electronic security.



Figure 1 – A microchip transponder key  
(source : <http://www.armstrong.co.nz/What-Are-Transponder-Keys.php>)

2.12 The microchip in the key holds a unique code that is also stored into the vehicles on board computer. In order for the car to start, the code in the microchip key must match the code stored in the car's ECU. When the microchip key is inserted into the ignition switch, it triggers the ECU to generate an electromagnetic field which in turn powers the microchip in the key. The microchip uses the power generated from the electromagnetic field to emit the unique code stored in its memory to the car's ECU/EMS. If the transmitted code matches, the Immobiliser will be deactivated enabling the engine to start. If the correct signals are not detected the immobiliser will remain activated so that the engine will not start.

2.13 Although an AEIK with the microchip has a normal blade, cutting a new blade at the locksmith is useless unless the right microchip is embedded in the key and it is paired (synchronised) with the car's corresponding ECUs. The corresponding ECUs can only be triggered into operation by the specific AEIK; a traditional bladed key cannot be used for that purpose the more so as some models of cars that are equipped with smart keys do not have any key hole.

2.14 The second type of AEIK - the 'Smart key' - may not have a key blade but it can generate billions of codes to match with the codes stored in the car's ECU and each time it communicates with the car a new code is used and hence it provides enhanced security. Smart keys have additional functions such as keyless entry feature and push button engine start. Such type of key is often fitted in high-end cars but the technology may also be found in the latest basic models.

## **(C) The Main Parties**

### **(i) ABC Motors Co Ltd (Nissan Authorised Distributor)**

2.15 ABC Motors Co. Ltd was established in 1985 and it has been the exclusive authorised distributor of NISSAN motor vehicles (passenger and commercial vehicles) and spare parts since on or about 1987.

2.16 The range of automotive services offered by ABC Motors includes after sales services such as repair and maintenance as well as the distribution of original spare parts for Nissan cars.

2.17 The Nissan cars are fitted with (i) Non-intelligent Immobiliser NATS Keys and (ii) Intelligent NATS Keys. The 'NATS' technology which means 'Nissan Anti-Theft System' was introduced initially around 1995 and the transponder technology were subsequently introduced into the NATS.

2.18 ABC Motors is deemed to be *enterprise* for the purposes of Section 2 (1) of the Act<sup>4</sup> as its commercial activities in the supply of AEIKs and related installation and synchronizing services for Nissan cars fall within the scope of Part III of the Act and it is therefore subject to the investigation.

### **(ii) Leal and Co Ltd (Authorised Distributor for BMW and Renault)**

2.19 Leal and Co Ltd ('Leal') was incorporated in 1976 as a private company with liability limited by shares and it was subsequently changed to a public company with liability limited by shares in 1981.

2.20 The Company is and importer and distributor of new cars such as BMW, MINI, Renault and Rolls Royce. United Motors Limited (UML) is a fully owned subsidiary of Leal & Co. Ltd and it markets the GWM brand passenger cars and Pick-ups. As from the 1<sup>st</sup> January 2011, UML is also the sole distributor of KIA Motors in Mauritius

2.21 The range of automotive services offered by Leal includes after sales services such as repair and maintenance as well as the distribution of original spare parts for the makes of cars it distributes.

2.22 The transponder technology is used in the keys for the new cars supplied by Leal and its subsidiary. Thus, Leal does operate in the market for the supply of AEIKs and

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<sup>4</sup> "enterprise" means any person, firm, partnership, corporation, company, association or other juridical person, engaged in commercial activities for gain or reward, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them

related installation and synchronizing services for the makes of cars it distributes in Mauritius.

2.23 Leal is deemed to be *enterprise* for the purposes of Section 2 (1) of the Act and its commercial activities in the supply of replacement AEIK and related synchronising services fall within the scope of Part III of the Act and it is therefore subject to the investigation.

**(iii) Iframac Limited (Authorised Distributor for Mercedes-Benz, Peugeot and Mitsubishi)**

2.24 Iframac Limited's ('Iframac') presence in the automobile sector spans over a period of 35 years and the company has been part of the British American Investment Group since June 2004.

2.25 The company is the authorised product representative of Mercedes-Benz, Peugeot, Mitsubishi, Chrysler, Dodge and Jeep. Iframac provide passenger cars and repair and maintenance services as well as distributing spare parts for the makes of cars it distributes.

2.26 During the investigation it was represented to the CCM that Mercedes, Jeep, Chrysler, Mitsubishi and Peugeot cars are equipped with transponder technology in their respective ignition keys. Thus, Iframac does operate in the market for the supply of AEIKs and related installation and synchronizing services for the makes of cars it distributes in Mauritius.

2.27 Iframac is deemed to be *enterprise* for the purposes of Section 2 (1) of the Act<sup>5</sup> as its commercial activities in the supply of replacement AEIK and related synchronising services fall within the scope of Part III of the Act and it is therefore subject to the investigation.

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<sup>5</sup> "enterprise" means any person, firm, partnership, corporation, company, association or other juridical person, engaged in commercial activities for gain or reward, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them

### 3. Legal Background Competition Act and CCM Guidelines

3.1 This chapter of the Report sets out the legal background of the investigation.

3.2 Sub-Part III of Part III of the Act deals with monopoly situations. Section 46 (1) of the Act stipulates the criteria for existence of a monopoly situation and Section 46(2) of the Act describes the types of conduct of an enterprise in a monopoly situation that may be subject to review.

3.3 The CCM Guidelines relating to monopoly situation are:

- *CCM2 Guidelines - Market Definition and the Calculation of Market Shares*
- *CCM4 Guidelines - Monopoly Situations and Non-Collusive Agreements*
- *CCM7 Guidelines - General Provision*

3.4 At the very outset it should be noted that the guidelines are not exhaustive, and conduct which is not covered by, or referred to in, the above guidelines should not be construed to be beyond the scope of Section 46 (2) of the Act.

3.5 Section 2.1 of CCM4 Guidelines on monopoly situations and non-collusive agreements sets out some considerations the CCM will take into account, when deciding whether to investigate and whether to take action regarding monopoly situations:

*(a) There must be a monopoly situation, as defined within the Act by reference to market shares. The CCM can only take action when market shares exceed these thresholds – below them is a ‘safe harbour’ within which no conduct can be investigated under the monopoly provisions. This does not imply that market shares above these thresholds are necessarily problematic.*

*(b) To take action, the CCM must find that the conduct of an enterprise in a monopoly situation restricts, prevents or distorts competition or otherwise exploits the monopoly situation. We refer to such conduct as ‘abuse of monopoly’.*

*(c) Within an investigation, the CCM will also consider whether the enterprise(s) has (have) a position of dominance. Dominance means the enterprise(s) have some market power, that by virtue of their position in the market they can act to some extent free of the constraints that competition would normally be expected to provide.”*

*(d) The CCM will take into account whether the conduct has or is likely to have “an adverse effect on the efficiency, adaptability and competitiveness of the*

*economy of Mauritius, or are likely to be detrimental to the interests of consumers”.*

## **(A) Existence of Monopoly Situation (Section 46 & 50)**

3.6 Section 46 (1) of the Act defines a monopoly situation, by reference to market shares as follows:

### **Section 46 Existence of monopoly situation**

*(1) A monopoly situation shall exist in relation to the supply of goods or services of any description where –*

- (a) 30 per cent or more of those goods or services are supplied, or acquired on the market, by one enterprise; or*
- (b) 70 per cent or more of those goods or services are supplied, or acquired on the market, by 3 or fewer enterprises.*

### **(i) Market definition**

3.7 From the above it is clear that the Act creates threshold market shares above which enterprises are considered to be in a monopoly situation and that the existence of a monopoly situation is a direct result of an enterprise’s market share. Hence, evaluation of market share is a legal requirement and the assessment of market *“will depend on market definition and cannot be pre-judged.”*<sup>6</sup>

3.8 *“To calculate a market share, therefore, the ‘relevant market’ needs to be defined, essentially by determining what constitutes ‘similar,’ or ‘substitutable,’ products.”*<sup>7</sup> This process is called market definition and it is considered to be a legal requirement of ‘essential significance’<sup>8</sup> in the assessment of the existence of monopoly situation.

3.9 Market definition is the well-established process adopted by competition authorities worldwide to determine the ‘relevant market’ so as to assess the market share for the purpose of determining whether an enterprise is in a monopoly situation. The term relevant market (the terms ‘market’ or ‘economic market’ are also used) has a precise meaning in competition policy. *“It is a defined set of products, and a defined geographic area, within which competition occurs. Relevant markets could be defined narrowly or widely, in either of these dimensions. The narrower the market definition, the higher is likely to be any given enterprise’s product’s share of that market.”*<sup>9</sup>

<sup>6</sup> Section 1.2, CCM4 Guidelines on monopoly situations and non-collusive agreements

<sup>7</sup> Section 1.2, CCM2 Guidelines on market definition and calculation of market shares

<sup>8</sup> Case 6-72 Europemballage Corporation and Continental Can Company Inc. v Commission of the EC- 21 February 1973

<sup>9</sup> Section 2.1, CCM2 Guidelines on market definition and the calculation of market shares

3.10 The market definition will define a set of products (the product market), and it will also define a geographic area (the geographic market), within which competition occurs.<sup>10</sup>

3.11 *“Very similar goods sold in the same place are very likely to be in the same ‘relevant market’ defined this way because they are very likely to be good substitutes. Completely dissimilar goods are certain to be in different markets. ...The degree of substitution is what matters.”*<sup>11</sup>

3.12 *“The choice between these different market definitions is not arbitrary, but will be the result of analysis of the market carried out by the CCM, in each case it investigates.”*<sup>12</sup>

3.13 *“Like other competition authorities, the CCM’s approach to defining the relevant market is to consider (and, where feasible, to measure) what happens when relative prices change. Economists define two products as substitutes if an increased price for one causes increased demand for the other. If products are sufficiently close substitutes, they will be considered to be in the same relevant market.”*<sup>13</sup>

3.14 *“In addition, the CCM will consider whether substitution can occur on the supply side. If the price of a product increases, are other sellers likely quickly to switch production into that market to take advantage of this situation?”*<sup>14</sup>

3.15 The process of market definition requires careful analysis of available data and qualitative evidence. *“The process of market definition is a structured sequence of economic analysis based on available data. The CCM will always bear in mind the basic principle of market definition, and will take a pragmatic approach to this task, preferring to find a workable, sensible and simple market definition to use as a tool to assess market power rather than to expend a lot of effort and time refining the market definition, or dealing with too much abstruse economic analysis or legal precedent. In general, the CCM will follow international practice and apply the ‘hypothetical monopolist’ test to define markets.”*<sup>15</sup>

3.16 *“The CCM may also take into account reasoned decisions of other authorities on market definition. Where competition authorities overseas have defined markets using similar principles to those defined here, the CCM may have regard to those conclusions and the analysis supporting them.”*<sup>16</sup>

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<sup>10</sup> *Id.*, Section 2.6

<sup>11</sup> *Id.*, Section 2.3

<sup>12</sup> *Id.*, Section 1.2

<sup>13</sup> *Id.*, Section 2.2

<sup>14</sup> *Id.*, Section 2.4

<sup>15</sup> *Id.*, Section 2.13

<sup>16</sup> Section 2.37, CCM2 Guidelines on market definition and the calculation of market shares

**(ii) Dominance**

3.17 The assessment of whether the enterprise(s) under investigation has or have a position of dominance is an important part of a monopoly investigation. This is set out in section 46 (3) of the Act as follows:

In reviewing a monopoly situation, the Commission shall take into account -

(a) the extent to which an enterprise enjoys or a group of enterprises enjoy, such a position of dominance in the market as to make it possible for that enterprise or those enterprises to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors;

(b) the availability or non-availability of substitutable goods or services to consumers in the short term;

(c) the availability or non-availability of nearby competitors to whom consumers could turn in the short term; and

(d) evidence of actions or behavior by an enterprise that is, or a group of enterprises that are, a party to the monopoly situation where such actions or behavior that have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are or are likely to be detrimental to the interests of consumers.

3.18 In the Act, the term dominance has the broader meaning as set out in part (a) above, describing enterprises with some freedom from competitive constraints, market share thresholds having been set out separately.

3.19 *“Parts (b) and (c) describe the two main considerations that the CCM shall take into account in making the assessment in (a), namely whether substitute products already exist in the market and whether there are competitors able to enter the market to supply such substitute products. This assessment is aimed at understanding the competitive constraints – if any – on the monopoly enterprise(s). It is not an assessment of whether there are ‘enough’ products for consumers to get a good deal.”<sup>17</sup>*

3.20 The Guidelines on monopoly situations and non-collusive agreements stipulates that the *“assessment of the number of suppliers, market shares and related indices of concentration is not determinative. In some cases, an enterprise with a high market share might not be dominant and in others enterprises even with relatively low shares of a broadly-defined market might be dominant at least in part of that market. For example, in an industry in which customers can very easily switch to essentially identical products from alternative suppliers, and those suppliers can easily meet that increased*

<sup>17</sup> Section 2.18, CCM 4 Guidelines on monopoly situations and non-collusive agreements

*demand, even a small number of competitors might be enough to prevent an enterprise being dominant and an enterprise holding a large market share in such an industry might have little or no market power. Similarly, in an industry experiencing rapid change, such as one with rapid technological progress, an enterprise might temporarily possess a high market share but no sustained market power. At the other extreme, when products are quite differentiated (e.g. branded goods), the possessor of one such product may be dominant, even if there are other, similar, goods.”<sup>18</sup>*

3.21 *“The test of dominance is the ability to profitably adjust prices or output, acting to some degree independently of competitive constraints. It is not simply an exercise in assessing market shares.”<sup>19</sup>*

3.22 Although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares may in themselves evidence the existence of a position of dominance. This view was upheld in Hoffmann-La Roche on the basis that *“the market shares which ... are so large that they are in themselves evidence of a dominant position.”<sup>20</sup>*

3.23 *“If there are few, or no, competing products within the relevant market as defined through that exercise, then by definition there will be few or no substitute goods within the meaning of part (b). Other things being equal, an enterprise is more likely to be dominant, the fewer rivals it has in the relevant market. An enterprise in possession of a high market share may be considered more likely to be dominant than one with a smaller share.”<sup>21</sup>*

3.24 *“In assessing Section 46 (3) (c) of the Act, the CCM will consider whether competitive forces arising from possible entry are so effective as to prevent the emergence of market power in the relevant market. In markets where entry is easy, no enterprise can be found to be dominant. ‘Easy entry’ does not merely require there are no legal or other impediments to entering the market: the CCM must expect that entry would occur rapidly in the event of any enterprise seeking to exercise its dominance to raise prices, and thereby defeat that price rise.”<sup>22</sup>*

3.25 The requirements of Section 46 (3) (d) of the Act, implies the assessment of whether the conduct of an enterprise has anti-competitive exclusionary or exploitative effect. These are reviewed under Chapters 5 & 6 and *“if the CCM believes that the conduct does not, and is not expected to, result in any of the adverse effects specified in*

<sup>18</sup> Section 2.20, CCM 4 Guidelines on monopoly situations and non-collusive agreements

<sup>19</sup> *Id.* Section 2.22

<sup>20</sup> Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461, at paragraphs 56 and 60

<sup>21</sup> Section 2.19, CCM 4 Guidelines on monopoly situations and non-collusive agreements

<sup>22</sup> *Id.* Section 2.23

Section 46, it will not normally take action against the conduct, even if the conduct does adversely affect an enterprise's competitors."<sup>23</sup>

## **(B) Abuse of Monopoly situation**

3.26 Where it is found that the main parties, hold more than 30% of the market share and they have market dominance the CCM will proceed with the assessment of the theories of harm, or competitive concerns that may arise.

3.27 Section 46 (2) of the Act list the types of conduct of an enterprise in a monopoly situation, that may be reviewed by the commission.

### **Section 46 Review by the Commission**

- (2) A monopoly situation shall be subject to review by the Commission where the Commission has reasonable grounds to believe that an enterprise in the monopoly situation is engaging in conduct that –
- (a) has the object or effect of preventing, restricting or distorting competition; or
  - (b) in any other way constitutes exploitation of the monopoly situation.

3.28 The two forms of abuse under Section 46(2) are rather different. *“Part (a) refers to the prevention, restriction or distortion of competition, while part (b) refers to ‘exploitation’. The CCM, following international precedent, refers to the former as ‘exclusive’ conduct and the latter as ‘exploitative’ conduct. The CCM’s approach to assessing these forms of abuse is set out in Sections 3 and 4 of these Guidelines, respectively.”*<sup>24</sup>

3.29 The aim of the investigation is to ascertain if there is abuse of the monopoly situation as mentioned under 1.3 above. In line with the start of investigation letters and the SOI issued to the main parties, the CCM carried out assessments into the pricing practices under section 46 (2) (b) of the Act and into the practices of non-disclosure of information and codes under section 46 (2) (a) of the Act.

<sup>23</sup> Section 2.27, CCM 4 Guidelines on monopoly situations and non-collusive agreements

<sup>24</sup> *Id.* Section 2.12

## (C) Excessive Pricing

3.30 Excessive pricing is a form of ‘exploitative abuse’ and although it is not mentioned in the Act, excessive pricing is captured by section 46 (2) (b) of the Act. Exploitative abuse is a monopolist benefitting from an absence of effective competition, whether or not that monopolist’s own conduct created it.<sup>25</sup>

3.31 The CCM4 Guidelines stipulates that there are two broad categories of exploitative abuse, namely, unilateral market power and coordinated effects (or ‘tacit collusion’).<sup>26</sup> The guidelines states:

*“4.5 Enterprises in a dominant position face an economic incentive to exploit their customers. This will normally manifest itself in excessive prices, although it may also appear as reduced quality, choice or service – poor product offerings that may reduce costs or managerial effort, in a way that would not be possible for an enterprise facing competition. In the discussion that follows, ‘excessive pricing’ should be understood as shorthand for a poor value offering to customers more generally.*

*4.6 It can be very difficult for competition agencies to distinguish between normal and excessive pricing. Attempts simply to relate prices to costs can be misleading, if they fail to take account of different categories of cost, risk, the need for seasonal or other variations in prices. Furthermore, high prices can themselves stimulate competition to remove the monopolist’s advantage.*

*4.7 The CCM is not a price regulator, and the Competition Act does not require or empower it to examine all prices to test whether they are cost-related or, more broadly, fair. However, in a small and isolated economy, strong monopolies can persist without any specifically exclusionary behavior to create or preserve that position on the part of the monopolists. In situations of substantial market power which are not expected to be eroded by entry or expansion by rivals, persistent pricing substantially in excess of cost may be considered exploitative.*

*4.8 In comparing prices to costs, the CCM will normally consider the returns that the enterprise is making on an asset base, valued appropriately at replacement cost, including if appropriate intangible assets such as intellectual property rights. This valuation might differ substantially from the valuation in the enterprise’s own accounts, or from that using general accepted accounting principles. Assessed against this asset base, returns persistently and substantially in excess of the cost of capital could be considered excessive profits, pointing to exploitation of a persistent monopoly.*

<sup>25</sup> Section 4.2, CCM 4 Guidelines on monopoly situations and non-collusive agreements

<sup>26</sup> *Id.* Section 4.4

4.9 Where appropriate, the CCM will also conduct price comparisons. If prices are persistently and significantly lower in other markets, where costs should be similar, that might indicate that in the market under investigation, they are excessive. If prices have risen from a stable level to a higher level, without any equivalent movement in costs, that might also indicate excessive pricing. Even such a price spike, however, can indicate an effective competitive response to sudden changes in demand or supply conditions.”

### (i) Case Precedents

3.32 Excessive pricing has been recognised as a form of abuse of a position of dominance in a number of cases.

In **General Motors** the Court acknowledged, “... an abuse might lie, *inter alia*, in the imposition of a price which is excessive in relation to the economic value of the service provided...”<sup>27</sup>

In **United Brands** the Court of Justice held that “charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied”<sup>28</sup> is an abuse provided the supplier “has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.”<sup>29</sup> The Court further held that “the questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive...”<sup>30</sup>

In **British Leyland** the court held that “an undertaking abuses its dominant position where it has an administrative monopoly and charges for its services fees which are disproportionate to the economic value of the service provided.”<sup>31</sup> The Court also stated, “the commission was entitled to conclude that the fee was fixed at a level which was clearly disproportionate to the economic value of the service provided and that that practice constituted an abuse...”<sup>32</sup>

In **Bodson v Pompes funèbres des régions libérées**<sup>33</sup>, the Court referred to a comparison between the prices charged in circumstances where there was

<sup>27</sup> Case 26/75 General Motors Continental NV v Commission [1975] ECR 1367, at paragraph 12

<sup>28</sup> Case 27/76 United Brands Company and United Brands Continentaal BV v Commission- Chiquita Bananas [1978] ECR 207, at paragraph 250

<sup>29</sup> *Id.* paragraph 249

<sup>30</sup> *Id.* paragraph 252

<sup>31</sup> Case 226/84 British Leyland Public Limited Company v Commission [1986] ECR 3263, at paragraph 27

<sup>32</sup> *Id.* at paragraph 30

<sup>33</sup> Case 30/87 Corinne Bodson v Pompes funèbres des régions libérées [1988] ECR 2479, at paragraph 31

competition, and those charged where there was a local monopoly, as one way of determining whether prices were excessive.

In **Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading**<sup>34</sup> the Competition Commission Appeal Tribunal held at paragraph 442 of the judgement *“that Napp has abused its dominant position in the supply of tablets and capsules of oral sustained release morphine in the United Kingdom by charging excessive prices to customers in the community segment of that market...”*

## **(D) Exclusionary conduct - Foreclosure**

3.33 This theory of harm describes a form ‘exclusionary abuse’ which has the economic effect of impeding effective competition on the relevant market either by forcing out or marginalising existing competitors and/or raising barriers to entry for potential new competitors.

3.34 The emphasis of the CCM's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process and ensuring that enterprises which hold a monopoly position do not exclude their competitors by other means than competing on the merits of the products or services they provide.

3.35 Market foreclosure occurs as a result of exclusionary conduct, it is strategic behaviour by an enterprise or group of enterprises to restrict market access possibilities of potential competitors either upstream or downstream. Foreclosure can take different forms, from absolute refusal to deal to more subtle forms of discrimination such as the degradation of the quality of access. An enterprise may, for example, pre-empt important sources of raw material supply and/or distribution channels through exclusivity contracts, thereby causing a foreclosure of competitors.

3.36 *“‘Anticompetitive foreclosure’ is said to occur when the conduct of a monopoly enterprise restricts or eliminates the effective access of actual or potential competitors to customers or to supplies, to the detriment of consumers or the economy in general. Foreclosure may be of supplies: for example when an upstream supplier refuses to sell or increases prices, to a specific downstream enterprise. It may be of customers: for example when a downstream enterprise refuses to buy from an upstream supplier. It need not involve exclusive dealing, as in these examples, but could include conduct which has the effect of foreclosure – such as incentives for customers not to buy from rivals.”*<sup>35</sup>

3.37 However, section 3.6 of the CCM4 Guidelines states clearly that *“[a]nticompetitive foreclosure will only be held to occur if consumers or the economy more generally are harmed as a result of the effect on competition – not simply because*

<sup>34</sup> Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (No 5) [2002] 4 All ER 376

<sup>35</sup> Section 3.5, CCM 4 Guidelines on monopoly situations and non-collusive agreements

competitors are harmed. In the remainder of this document ‘foreclosure’ should be read to mean ‘exclusion of competitors in a manner that damages consumers or the economy in general’, not simply ‘exclusion of competitors.’ Nonetheless, the exclusion of an actual competitor is a possible tell-tale sign of the effects of market foreclosure.

### (i) Case Precedents

3.38 **United States v Griffith**, the Supreme Court held that “*the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, ... is unlawful*”<sup>36</sup>

3.39 The principle under section 3.6 of the CCM4 guidelines was applied in **Spanish Broad. Sys.**<sup>37</sup> case where it was held that exclusionary or anticompetitive conduct is conduct that injures “*competition in the market as a hole,*” not conducts that simply harms individual competitors. The plaintiff, Spanish Broadcasting System (SBS), an owner of fourteen Spanish-language radio stations, sued the Hispanic Broadcasting Company (HBC), an owner of fifty-five Spanish-language radio stations, alleging that it had attempted to limit SBS' ability to compete and to drive it out of business. Affirming the dismissal of SBS' attempted monopolization claim, the court concluded that HBO's alleged efforts to obtain preferential treatment from auditors and investors, discourage analysts and investors from dealing with SBS, misrepresent SBS' finances to adversely affect its stock price and initiate a bidding war over the acquisition of another radio station, although injurious to SBS as a competitor, did not amount to harm to competition.

### (ii) Foreclosure by locking in customers

3.40 By ousting actual and/or potential competitors of substitutes, a dominant enterprise is in effect locking in customers. Lock-in provides a commercial temptation to exploit (e.g. excessive pricing) those who have already purchased the durable product. Customers requiring complementary products will have no alternative other than to purchase from the original manufacturer, at whatever price and on whatever terms the original monopolist manufacturer sees fit. Where the lifespan of the durable product is long, lock-in may result in a long-term guaranteed ‘exploitative’ business.

<sup>36</sup> United States v Griffith 334 U.S. 100 1948 at 107-08

<sup>37</sup> Spanish Broad. Sys. v. Clear Channel Communications, Inc., 376 F.3d 1065, 1074 (11<sup>th</sup> Cir. 2004)

**(iii) Factors to determine conduct having the object or effect of foreclosure**

3.41 The following lists some factors that are taken into consideration in the assessment of anti-competitive foreclosure<sup>38</sup>:

**(a) the position of the dominant undertaking:** in general, the stronger the dominance, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure,

**(b) the extent of the allegedly abusive conduct:** in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect,

**(c) the position of the customers:** this may include consideration of the possible selectivity of the conduct in question. The dominant undertaking may apply the practice only to selected customers who may be of particular importance for the entry or expansion of competitors, thereby enhancing the likelihood of anti-competitive foreclosure. In the case of customers, they may, for example, be the ones most likely to respond to offers from alternative suppliers, they may represent a particular means of distributing the product that would be suitable for a new entrant, they may be situated in a geographic area well suited to new entry or they may be likely to influence the behaviour of other customers,

**(d) possible evidence of actual foreclosure:** if the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking and its competitors may provide direct evidence of anti-competitive foreclosure. For reasons attributable to the allegedly abusive conduct, the market share of the dominant undertaking may have risen or a decline in market share may have been slowed. For similar reasons, actual competitors may have been marginalised or may have exited, or potential competitors may have tried to enter and failed,

**(e) evidence of any exclusionary strategy:** this includes internal documents which contain direct evidence of a strategy to exclude competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of exclusionary action. Such direct evidence may be helpful in interpreting the dominant undertaking's conduct.

**(f) the position of the dominant undertaking's competitors:** this includes the importance of competitors for the maintenance of effective competition. A specific

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<sup>38</sup> Report on Single Branding/Exclusive Dealing – 7<sup>th</sup> Annual Conference of the ICN (International Competition Network) Kyoto, April 2008, at page 12

competitor may play a significant competitive role even if it only holds a small market share compared to other competitors. It may, for example, be the closest competitor to the dominant undertaking, be a particularly innovative competitor, or have the reputation of systematically cutting prices. This assessment also includes the conditions of entry and expansion, such as the existence of economies of scale and/or scope, network effects and other barriers. Economies of scale mean that competitors are less likely to enter or stay in the market if the dominant enterprise forecloses a significant part of the relevant market.

3.42 The CCM assessed whether the availability of the codes may enable existing alternative suppliers of AEIKs to assert more influence in the market and whether the availability of the codes might prompt existing suppliers to expand their activity or potential suppliers to enter the market so that car owners looking for a replacement AEIK may benefit.

3.43 Without the codes alternative suppliers of AEIKs may be unable to synchronise an AEIK for the makes of cars distributed by the main parties and thus they would not be able to compete with the main parties. Rivals may be foreclosed from the market altogether or, more commonly, forced to use higher cost, or less effective, methods to bring their products to market and this may put off customers and force down demand.

## 4. Market definition & Market share

### **(A) The Relevant Product Market**

4.1 The main purpose of market definition is to identify the competitive constraints that the enterprises involved face. The market definition will define a set of products (the product market), and a defined geographic area (the geographic market), within which competition occurs so as to enable the assessment of the existence of a monopoly situation.

4.2 Thus, market definition is a tool to identify and define the boundaries of competition between enterprises. It establishes the framework within which the Commission applies the competition policy principles adopted under the Competition Act.

4.3 Defining a 'relevant product market' means identifying all the close substitutes for AEIKs and the related installation and synchronising services (the relevant product under investigation). Hence, all goods or services which are interchangeable will fall within the same product market. The key principle used to define the relevant market is the level of substitution between the products.

#### **(i) Enhanced security aspect of AEIK v/s the traditional mechanical metal blade key**

4.4 The main security feature of the AEIK is the way the car responds to a command for starting the engine and to drive off the car. The transponder technology works in tandem with the Immobiliser system fitted in the car. An electronic immobiliser is part of the ECU, and prevents the car from being started unless it recognises signals from a transponder in the key. The engine will only start if the designated AEIK communicates effectively with the car's ECU which will then disarm/deactivate the Immobiliser so that the engine can start.

4.5 Replacing the AEIK with a traditional ignition key can be very costly in the sense that without it, most of the electronics in the car would have to be replaced and the electronic safety features would be lost. Such modifications, if possible, are very complicated and would be very costly but above all it would result in a significant drop in the market value of the car. The AEIK offers much more in terms of security and several other convenient features.

4.6 The traditional key and the AEIK are not interchangeable once the manufacturer has designed and installed the ignition system for a model of car. As stated in chapter 2 (B) above, although their primary function is to start the engine and operate a vehicle, the traditional key and the AEIK are different in the way they operate. Consequently, an AEIK has features that differentiate it completely from a traditional metal blade key.

4.7 It is safe to assume that an AEIK is not substitutable by a traditional mechanical metal blade key for the reasons mentioned. AEIKs are completely different product when compared to traditional metal blade keys. From the perspective of a consumer the two are not interchangeable and cannot be used as substitute for each other.

4.8 Replacing an AEIK with a generic metal blade key is not a rational decision from a consumer perspective, so that the hypothetical monopolist test (SSNIP test) would show that there is no substitution between an AEIK and a traditional metal blade key.

**(ii) Synchronisation and initialisation of AEIKs**

4.9 The enhanced security afforded by the AEIK is also apparent from the fact that duplicating an AEIK or providing a replacement AEIK is more complicated as opposed to the duplication and replacement of a traditional metal blade key. The replacement of an AEIK is also a more complex task than the replacement of other parts of a vehicle. This mitigates the risk of duplication of the key by car thieves.

4.10 This is because the replacement of an AEIK will require a special process so that its installation is complete and it can work with the various systems in the car. This additional process has interchangeable appellation namely synchronisation or programming or initialisation.

4.11 Just like a blank metal blade key has to be cut to fit the key barrel, it may be said that synchronisation is the process of making the blank AEIK fit with the various systems of the car including the security systems such as engine Immobiliser and remote door locks.

4.12 In case a customer has lost only one of his two existing two keys for a vehicle, the synchronisation of the replacement AEIK is always followed by the reprogramming and synchronisation of the existing key, otherwise the latter will no longer function to start the vehicle. In more recent models, the synchronisation of the key also includes synchronisation in relation to the car entertainment system, which may not operate as required if not synchronised with the new key.

4.13 However, the process of synchronisation/initialisation adds to the cost of the replacement of an AEIK, as it is a service offered which forms part of repair and maintenance needs. The need for synchronisation is another clear indication that an AEIK is a completely different product to a traditional metal blade ignition key.

4.14 The AEIK installed in different makes and models of car have different physical attributes; the software embedded in the AEIK system being often different as well.

4.15 The AEIK of one brand of car is not a compatible substitute for the AEIK of another brand although both would perform similar function in each car.

**(iii) Synchronisation and Initialisation by ABC Motors**

4.16 ✂

4.17 ✂

**(iv) Synchronisation and Initialisation by Leal**

4.18 ✂

4.19 ✂

**(vi) Synchronisation and Initialisation by Iframac Limited**

4.20 ✂

4.21 ✂

**(B) The Primary Market and Aftermarket**

4.22 The aftermarket which may also be termed as ‘derivatives market’ or ‘after-sales market’ is defined by the Office of Fair Trading (OFT) as *“a market for secondary product, that is, a product which is purchased only as a result of buying a primary product.”*<sup>39</sup>

4.23 Aftermarket represents the after-sale purchases that are required for the full long-term utilisation of the durable goods throughout its economic life. Thus, aftermarkets arise where consumers purchase durable goods (the primary product – the car) that would require the purchase of some complementary goods (the secondary product – the AEIK) at a later date to enable the full utilisation (enjoyment) of the durable goods. The demand to own a car is at the origin of the existence of the *“fore market”* or to the *“primary market”* i.e. the market for cars. Users would not demand maintenance service or spare parts before owning a car in the first place.

4.24 The aftermarket industry provides the products and services required to keep vehicles functional, this industry provides- customers the choice of where they want their vehicles serviced, maintained or customized. The demand for aftersales services such as maintenance, repair and others is a derived demand which is met by the aftermarkets. In this vein, goods and services supplied in the aftermarkets are complementary to the goods bought in the ‘Primary market’ or the ‘Fore market’.

4.25 Economic operators in the aftermarkets include manufacturer/OEM owned dealers, manufacturer-authorized dealers and independent enterprises.

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<sup>39</sup> Section 6, Market Definition – Understanding Competition Law (2004) Office of Fair Trading

4.26 The peculiar competitive feature of these types of industry lies in the interaction between the primary durable product and the aftermarket for associated complementary products or services.<sup>40</sup>

4.27 The car is an example of a durable good for which there exist aftermarkets that supply accessories, spare parts, tools, consumables and other goods and services associated with the use and maintenance of the vehicle.

4.28 The aftermarket should not be confused with the related but different, setting which consists of second hand markets where the initial product may be resold.

**(i) Competition issues in aftermarkets**

4.29 Application of traditional market definition tools, such as the SSNIP test, shows that on most occasions the aftermarket consists of goods and services provided by the very firm who manufactures and/or supplies the 'primary' product. Competition issues in the aftermarkets usually emerge in cases where the firm - the supplier of the primary product - often holds the Intellectual Property Rights ('IPRs') or the know-how of the goods subject to the aftermarket and thus it is also able to control the after-sales markets.<sup>41</sup> The relevant firm produces after-sale goods and services under its own brand, or administers an original equipment manufacturer (OEM) which produces the product in accordance with the given specifications.

4.30 The need for interoperability is a feature of many markets. This is especially so in the high technology industries such as car anti-theft and security systems. The hardware and software companies can use IPRs to lock out their competitors' products by preventing interoperation. Aftermarkets lend themselves to this kind of control. For the purposes of competition law, a critical preliminary issue is to decide whether there is one market, which includes a durable piece of equipment (the car) and complementary spare parts and service (replacement AEIKs), or whether there are multiple markets, consisting of a 'primary' market, for the durable piece of equipment (market for cars) and a number of complementary or 'secondary' markets (aftermarkets for spare parts, e.g., AEIKs) in which the manufacturer of the primary product competes with alternative suppliers. Motor vehicle manufacturers may have an advantage because they are generally vertically integrated, supplying in both the primary and secondary markets.

4.31 Harm to competition is possible in those aftermarkets where secondary products can be used with only one brand of primary product (e.g. the brand specific AEIKs) but not with another brand although the primary products may be substitutable. The

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<sup>40</sup> The printer-toner example in one of many instances of industries characterised by a basic market that is complemented by one or several aftermarkets. Typically, the basic market corresponds to a durable good, whereas the aftermarkets correspond to non-durable products or services. Other than printers, examples include cameras and film, photocopiers and repair service, videogame consoles and games

<sup>41</sup> EU Commission, "Discussion Paper on Application of Article 82 to Exclusionary Abuses", Dec 2005, at page 68

supplier of the primary product may reserve the secondary product for itself by excluding competitors, for example through tying or a refusal to deal (e.g. to supply necessary information, licenses, IPRs or spare parts).

4.32 The common allegation of competition infringements in such markets is that the producer and/or the authorized distributors of durable goods prevents other aftermarket firms from offering complementary goods or services, thereby abusing its dominant position in the aftermarket.<sup>42</sup>

4.33 This creates a position of dominance and is a cause for concern in terms of possible exclusionary abuses as well as exploitative abuses.

## (ii) *Types of Aftermarkets*

4.34 There are three possible types of market definition as regards aftermarkets, namely:

- **A system market:** a unified market for the primary and the secondary product (e.g. a market for all cars and replacement parts). System markets are more likely to exist when consumers identify the total cost of ownership, including secondary products (i.e. whole life cost) when acquiring the primary product.
- **multiple markets:** a market for primary products and separate markets for the secondary product(s) associated with each primary product (e.g. one market for all cars, individual markets for each type of replacement part), and
- **dual markets:** a market for the primary product and a separate market for the secondary product (e.g. one market for all cars, a separate market for all replacement parts).<sup>43</sup>

4.35 The main issue regarding aftermarkets is therefore, whether a relevant market consists of separate markets for primary and secondary products, or whether it is a market for "systems" consisting of both primary and secondary products.

4.36 The appropriate market definition will therefore, depend on the facts of the case. A system market may be appropriate either (a) where customers engage in 'whole life costing' or (b) where reputation effects mean that setting a supra competitive price for the secondary product (AEIKs) would significantly harm a supplier's profits on future sales of its primary product (new cars). Where none of these two conditions applies, a multiple markets or a dual markets definition is appropriate.

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<sup>42</sup> Carlton, D. W. & M. Waldman, "Competition, Monopoly and Aftermarkets", NBER Working Paper: 8086, 2001, page1

<sup>43</sup> Section 6.2, 'Market Definition for after markets' – Market Definition – Understanding Competition Law, OFT 2004

4.37 A multiple market is likely where, having purchased a primary product, customers are locked-in to using only a restricted number of secondary products that are compatible with the primary product.

4.38 A dual markets definition is appropriate where secondary products are compatible with all primary products and perceived to be so by customers.

### (iii) Case Precedents

4.39 In the landmark **Kodak**<sup>44</sup> case, the US Supreme Court explicitly used the term '*aftermarket*' to refer to the sale of parts and services associated with the use of Kodak copying machines and which takes place at a point in time after the purchase of the primary product, i.e. the Kodak copying machines.

4.40 In **Hugin**<sup>45</sup> the Court of Justice of the European Communities demarcated between primary and aftermarket and held that Swedish company Hugin Kassaregister AB and its British subsidiary, Hugin Cash Registers Pty Ltd (jointly 'Hugin'), occupied a dominant position in the aftermarket for the supply of replacement parts for their cash registers, because these parts were not interchangeable with parts from other brands and could not otherwise be economically reproduced.

4.41 In determining the existence of multiple product market, it was held in the Australian case of **Regents v Subaru**<sup>46</sup> that '*spare parts not readily interchangeable for those of other machines may lead to the finding of the existence of such a market.*'

## (C) The Primary Market

4.42 In this investigation, the Primary market is the market for the sale of cars. The car is the durable goods; it is the primary product and forms the Primary market. The aftermarkets are the markets for the supply of products or services needed for or in connection with the use of the car.

4.43 It is clear from the landmark US Supreme Court's ruling in **Kodak**<sup>47</sup> that, even if an enterprise had no market power in the primary market for new units, it could still be guilty of having abused its monopoly situation in the aftermarket for maintenance associated with its own products.

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<sup>44</sup> Eastman Kodak Company v. Image Technical Services, Inc., 504 U.S. 451 (1992)

<sup>45</sup> Case C-22/78, Hugin Kassaregister AB v Commission of the European Communities [1979] ECR 1869

<sup>46</sup> Regents Pty Ltd v Subaru (Aust) Pty Ltd [1998] FCA 730 (24 June 1998), at paragraph 9

<sup>47</sup> Eastman Kodak Company v. Image Technical Services, Inc., 504 U.S. 451 (1992)

4.44 In the Privy Council decision in **Canon v Green**<sup>48</sup> their Lordships commenting on the British Leyland<sup>49</sup> case stated that “*competition in the market for the cars themselves would not therefore prevent anticompetitive practices in the aftermarket.*”<sup>50</sup>

4.45 Competition in the primary market does not mean that the secondary market is also competitive nor does it preclude anti-competitive practices in the secondary market. For the purpose of market definition, this proves that the primary market and secondary market can be isolated markets without any interlaced economic dynamics.

4.46 For these reasons and as will be explained in the next chapter, no assessment of the economics of primary market was carried out as it is immaterial to the definition of the relevant market for replacement AEIKs and related synchronising services.

## **(D) The Aftermarket**

### **(i) System market or separate aftermarkets**

4.47 The car aftermarket is defined as the secondary market and encompasses all products and services purchased for and in relation to the car after its purchase. The car is the original equipment, it is the durable goods. The purchase of the car also entails the purchase of several after-sale products throughout its economic life such as replacement parts, upgrade parts, accessories, lubricants, appearance products, tires, repair and maintenance services as well as the tools and equipment necessary to make the repair and maintenance, and the need for other products such as insurance.

4.48 Here the starting point is in the observation of the US Supreme Court in **Kodak** to the effect that lack of information could prevent “unsophisticated” consumers from factoring the higher aftermarket prices into their original purchasing decisions.<sup>51</sup>

4.49 Evidence gathered in meetings with the main parties indicate that when gathering information to purchase a new car, the customers do not enquire on the cost of replacement AEIKs and related installation and synchronising services although generally customers do enquire about the costs of general maintenance and service. The lack of information in relation to the cost of replacement AEIKs and synchronisation services and the non-existence of whole life costing are further evidenced by the fact that Mauritian car owners do purchase cars from distributors of imported second hand cars (reconditioned). ✂

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<sup>48</sup> Canon Kabushiki Kaisha v Green Cartridge Co. (Hong Kong) Ltd [1997] UKPC 19 (30 April, 1997)

<sup>49</sup> British Leyland Motor Corporation Ltd. v. Armstrong Patents Co. Ltd. [1986] A.C. 577

<sup>50</sup> *Supra.*48, at paragraph 23

<sup>51</sup> Eastman Kodak Company v. Image Technical Services, Inc., 504 U.S. 451 (1992), at paragraph 477

4.50 Thus, based on the information gathered it can be seen that, in Mauritius the decisions of customers to purchase a car are not sophisticated enough to include an assessment of 'whole life' costs in relation to replacement AEIK at the time of purchase of the car and they also do not seek access to sufficient information to make such assessment.

4.51 The above shows that:

- (a) consumers are not able to make an informed choice including life-cycle pricing in terms of replacement of AEIK; and
- (b) as such customers would not alter their purchasing behaviour in the primary market for cars in the event of an apparent policy of exploitation in the aftermarket for AEIKs.

4.52 The inability to make an informed choice based on the cost of replacement AEIK can be explained by the fact that customers do not view the AEIK as forming part of the 'group of items' that will usually need to be replaced during the lifetime of the car. This group of items will include all items<sup>52</sup> that normally need to be replaced because the part has broken down or are damaged by wear and tear.

4.53 On the other hand, the main causes for purchasing a replacement AEIKs are because the owner has lost his key or he has damaged the key in situations unrelated to the use of the car.<sup>53</sup> Thus, car owners would not anticipate the replacement of a lost or a damaged AEIK, as these are unforeseeable circumstances.

4.54 The fact that consumers may not be engaging in 'whole life costing' indicates that customers opting to purchase the primary product i.e. a car are price insensitive with regard to the aftermarket product i.e. replacement AEIKs and related installation and synchronising services. Customers do not engage in whole life costing in assessing the relative attractiveness of rival makes of cars as regards to the cost of replacement AEIKs. It is therefore reasonable to assume that a moderate increase in the aftermarket prices for AEIKs does not affect customers' choices in the primary market for cars. There is no reputational risk to the supplier in the primary market.

4.55 This shows the primary market for the distribution of cars (the primary product) and the aftermarket for replacement AEIKs (the secondary product) do not form part of a single market for 'systems'. The primary market for the sale of cars and the secondary market for the sale of replacement AEIKs and related installation and synchronising services are separate markets.

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<sup>52</sup> Normally service items such as brake pads, clutch kits, tyres, filters etc...

<sup>53</sup> E.g. Such as getting into the swimming pool with the AEIK or misplacing the AEIK in a running washing machine.

**(ii) Dual or Multiple Market**

4.56 The next step is to determine if the replacement AEIKs form part of dual markets or multiple markets.

4.57 The issue as to whether there is a single market for spare parts of all makes of cars (dual market) or whether there are numerous separate brand-specific spare parts markets, depends primarily on the existence of a sufficient degree of substitutability of the spare parts supplied by the various producers/dealers (suppliers on the market).<sup>54</sup>

4.58 EU and US<sup>55</sup> case law views on the matter is that a brand specific aftermarket consisting of the secondary products or services of only one brand of a primary product (e.g. BMW or Mercedes or Nissan), would be a relevant 'multiple product market' if:

- (a) switching to secondary products of other producers is not possible; and
- (b) there are high switching costs in the market for the primary product.

- **Switching to secondary products**

4.59 Based on the fact that each car manufacturer develops and equips bespoke 'versions' of the transponder technology in the cars they produce, it is clear that switching to secondary products of other manufacturers of cars is impossible. This is because the AEIK fitted in one car cannot be interchanged to work with a car of a different make and vice versa. There is no inter-brand substitution. Thus, replacements AEIKs for each make of car distributed by the main parties do not form part of a single market for all replacement AEIKs.

4.60 ✂ This is another aspect which further leads to customer lock-in, as distributors of new cars including the main parties, are not able to supply replacement AEIKs for the makes of cars which they do not distribute. The main parties are unable to synchronise an AEIK for a make of car which they do not distribute as they do not have access to the equipment and the data required.

4.61 However, the customers in Mauritius are not strictly restricted to only one source of supply. It may be possible to obtain a replacement AEIK from alternative local suppliers of AEIKs. Although, the alternate suppliers cannot provide customers with original AEIKs they may provide replicas or imitations of the original AEIK. Nonetheless, customers are locked-in to buy a replacement AEIK which is compatible with their respective makes of cars. They are locked-in either to buy an original AEIK from the authorised distributor (i.e. the main parties) or to source a replica or an imitation from alternative local suppliers.

<sup>54</sup> Case T-427/08 CEHR v Commission, judgment of 15 December 2010, at paragraph 84

<sup>55</sup> Eastman Kodak Co v Image Technical Services Inc., 504 US 451 (1992)

4.62 The Finding of the investigation is that switching to AEIKs (secondary products) of other makes of car is not possible due to lack of interoperability.

- **Switching cost in Primary market**

4.63 Here the issue is whether, in the case of a sale of the car on the second-hand market, the difference between the price received for the car and the price paid for another car – and thus the loss incurred by the consumer as a result of changing car – is less than the amount which could be saved by avoiding a moderate price increase for the brand-specific replacement AEIK.

4.64 Selling the car without a working AEIK is not a cost effective solution, the more so as it will be more difficult to find a purchaser for the car thereby resulting in further decrease in the commercial value of a car. In any event the price for the replacement AEIK is borne by the original car owner or the new purchaser. Therefore, the theory that the consumer may avoid paying the price for a replacement AEIK by selling his car on the second-hand market and buying another make of car would be implausible because of high switching costs.

4.65 The CCM is of the view that the cost of a replacement AEIK would be less than the loss incurred by selling the car making it difficult for customers to switch to another car (the primary product). This has the effect of isolating the primary market for cars and the secondary aftermarket for replacement AEIKs.

- **Lock-in effect**

4.66 The fact that switching to AEIKs of another make of car is not feasible and that switching in the primary market is cost prohibitive results in a "lock-in" effect. In economics, proprietary lock-in or customer lock-in makes a customer dependent on a designated supplier for products and services. The customer is unable to use another supplier without substantial switching costs. Technical differences between the various primary products will result in limited choice for compatible secondary products.

4.67 Hence, once the Nissan or BMW or Mercedes car (primary product) has been purchased, the car owner's choice is confined only to corresponding Nissan or BMW or Mercedes AEIK and related synchronising services (the aftermarkets products). Only the corresponding brand of AEIK can enable customers to attain full utilisation of their cars.

4.68 Taking the above into consideration, the CCM defines the relevant market as multiple markets which include several aftermarkets for brand-specific replacement AEIKs. The term brand-specific is used in this investigation to mean all replacement AEIK that are compatible replacements for a particular brand of car.

4.69 Such reasoning was affirmed by the ECJ in Hugin<sup>56</sup> where the relevant market was defined to include solely the supply of replacement parts for Hugin typewriters as there was no interbrand-substitution available even though Hugin had only 12 per cent of the market for cash registers within the European Common market. Indeed, the CCM4 Guidelines on monopoly situations and non-collusive agreements specifies that a monopoly situation might exist for a small relevant market, as defined through market definition.<sup>57</sup>

4.70 Based on the information gathered and the above analyses, the relevant market in terms of the product market is defined as multiple markets (individual markets) for replacement AEIKs and related installation and synchronising services for each makes of cars including the cars distributed by the main parties. There are several brand-specific separate aftermarkets for AEIKs for each make of cars.

### **(E) Demand Side Substitution**

4.71 From an economic point of view and for the definition of the relevant market, demand-side and supply-side substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions<sup>58</sup>, hence, the most effective assessment criterion.

4.72 Products that have materially different characteristics and/or are not functionally interchangeable do not create any competitive constraint, the simple reason being that they do not form part of the same economic market.

4.73 Thus, in *France Télécom v Commission* [2007]<sup>59</sup> the Court of First Instance restated the explanation provided in *Hoffman-La Roche* to the effect that “[t]he concept of the relevant market implies that there can be effective competition between the products or services which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products or services forming part of the same market in so far as a specific use of such products or services is concerned.”<sup>60</sup>

4.74 The CCM set out a number of alternative or ‘candidate’ product market definitions and, starting with the narrowest, assess whether each is a relevant market as defined above.

4.75 Factors such as the technical and financial reliability of the alternative suppliers/local locksmiths are taken into consideration. As per section 2.18 of the CCM2 Guidelines on market definition and the calculation of market shares, when assessing

<sup>56</sup> Case C-22/78, *Hugin Kassaregister AB v Commission of the European Communities* [1979] ECR 1869, at paragraph 8

<sup>57</sup> Section 2.7, CCM4 Guidelines on monopoly situations and non-collusive agreements

<sup>58</sup> Case T-177/04 *easyJet Airline Co. Ltd v Commission of the EC, C.F.I (Second Chamber)*, 4 July 2006, at paragraph 6

<sup>59</sup> Case T-340/03 *France Télécom v Commission* [2007] ECR II-107, at paragraph 80

<sup>60</sup> Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, at paragraph 28

market definition “...the CCM will normally consider whether sufficient substitution would happen within a year to render a price increase unprofitable.”

4.76 Thus, as was held in *Michelin*,<sup>61</sup> the interchangeability or substitutability is not assessed solely in relation to the objective characteristics of the products and services at issue, but the competitive conditions and the structure of supply and demand on the market will also be taken into consideration.

4.77 The main source of supply for AEIKs is the respective authorised distributors which provide customers with genuine spare parts including replacement AEIKs for the respective makes they distribute.

- ABC Motors is the authorised distributor and it supplies replacement AEIKs and relates synchronisation services for Nissan cars.
- Leal is the authorised distributor for BMW and Renault cars and it supplies replacement AEIKs and relates synchronisation services for BMW and Renault cars; and
- Iframac is the authorised distributor for Mercedes, Peugeot and Mitsubishi and it supplies replacement AEIKs and relates synchronisation services for these cars.

4.78 However, the authorised distributors may not be the only suppliers of AEIKs in the relevant aftermarkets. Compatible ‘replicas, imitations or non-original copies of AEIK’ which is a substitute to the original AEIK may be available from other sources (‘alternative suppliers’), e.g. local locksmiths and car repairers. The compatible ‘replicas, imitations or copies’ of AEIK are candidate product in the relevant brand-specific aftermarkets.

4.79 In case owners of the makes of cars distributed by the main parties are willing to source replacement AEIKs for their cars in the form of the replicas or non-original parts from alternative suppliers, then the relevant market is likely to be the aftermarkets for all replacement AEIKs and the related installation and synchronizing service. This would include original parts and non-original parts that are compatible as replacement AEIK for the particular make of car.

4.80 ✂

4.81 ✂

4.82 Hence, the relevant market is likely to depend on the make of the car. Furthermore, technical progress implies that initialization equipment changes regularly in order to match more sophisticated AEIKs. Thus, the recurrent change of equipment will

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<sup>61</sup> Case 322/81 *Michelin v Commission* [1983] ECR 3461, at paragraph 37

lead to substantial fixed costs that are likely to be sunk,<sup>62</sup> this cost prohibition prevents the alternative suppliers from supplying substitutes on the aftermarkets for the replacement of AEIKs for all the makes and models of cars distributed by the main parties.

4.83 ✂

4.84 The investigation however, showed that substitute replacement AEIKs for some of the cars distributed the main parties is available. The alternative suppliers have stated that the authorised distributors, including the main parties are indeed competitors and that the replacement AEIKs they provide, performs the same functions and shares the same features as the AEIKs supplied by the authorised distributors.

4.85 The alternative suppliers have also mentioned that many customers who purchased replacement AEIKs from them have stated that they checked the price of the AEIK from the authorised distributor before finalising their order with the alternative suppliers.

**(i) Demand Side Substitution for Nissan (ABC Motors)**

4.86 Taking the above into consideration, the CCM is of the view that the replacement AEIKs for Nissan provided by the alternative suppliers is a substitute product and forms part of the aftermarkets for replacement AEIKs and related synchronising services for Nissan.

4.87 The table below shows the number of Nissan replacement AEIKs sold by alternative suppliers over the period 2010 to 2012.

Table 1 Nissan AEIKs – Sales by Alternative Suppliers



**(ii) Demand Side Substitution for BMW and Renault (Leal)**

4.88 Taking the above into consideration, the CCM is of the view that the replacement AEIKs for Renault provided by the alternative suppliers is a substitute product and forms part of the aftermarkets for replacement AEIKs and related synchronising services for Renault.

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<sup>62</sup> Sunk costs are past expenditures that cannot be recovered. In competition economics, it is the prospect of high sunk costs that constitute a barrier to entry. See pages 60-61., Bishop, S and Walker, M, “*The Economics of EC Competition Law: Concepts, Application and Measurement*”, 2002.

4.89 The table below shows the number of BMW and Renault replacement AEIKs sold by alternative suppliers over the period starting January 2010 to the end of 2012.

Table 2 BMW and Renault AEIKs – Sales by Alternative Suppliers



### (iii) Demand Side Substitution for Mercedes, Peugeot and Mitsubishi (Iframac)

4.90 Taking the above into consideration, the CCM is of the view that the replacement AEIKs for Peugeot and Mitsubishi provided by the alternative suppliers are substitute products and form part of the aftermarkets for replacement AEIKs and related synchronising services for Peugeot and Mitsubishi.

4.91 The table below shows the number of Mercedes, Peugeot and Mitsubishi replacement AEIKs sold by alternative suppliers over the period starting January 2010 to the end of 2012.

Table 3 Mercedes, Mitsubishi and Peugeot AEIKs – Sales by Alternative Suppliers



## (F) Supply Side Substitution

4.92 Section 2.34 of CCM2 Guidelines states that *“Some evidence on supply-side substitution might be available from considering costs and technology. For example, if it could be demonstrated that an alternative source of production could and would rapidly switch into the market, in response to a small price change, then it might be appropriate to widen the market to include that source. It might be appropriate to consider the capacity of the alternative production facility and any costs, including opportunity costs, involved in switching. Again, it is important to draw a distinction between whether other suppliers could switch into the market and whether they would do so quickly in response to a relatively small price change.”*<sup>63</sup>

4.93 This will in essence establish suppliers’ willingness to switch to supplying AEIKs and related services in response to a hypothetical increase in the price of the AEIKs and the related installation and synchronisation services from the respective authorized new car distributors.

4.94 If supply side substitution is not sufficiently direct and immediate over a short term period of one year then the suppliers will be deemed to be outside the relevant market for replacement AEIKs and related installation and synchronizing services.

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<sup>63</sup> Section 2.34, CCM2 Guidelines on market definition and the calculation of market shares

Alternative suppliers must also be able to switch production without incurring significant additional costs or risks.

4.95 The investigation assessed whether other businesses such as the general key replacement business segment and the electronic safety/protection devices business segment are ready to substitute and cater for new markets (AEIKs) in a rather timely manner.

4.96 The methodology that will be used for the assessment of supply side substitution is the 'hypothetical monopolist' or SSNIP<sup>64</sup> test. The concept of supply-side substitution will be applied with reference to European Union cases such as Michelin<sup>65</sup> and Continental Can<sup>66</sup>. The analysis will also take into consideration any possible barriers to expansion and entry that might negate supply-side substitution.

4.97 The existence of supply-side substitution indicate the possibility that suppliers from other sectors of the market to switch, or begin, production or supply of replacement AEIKs and related synchronising services for the cars distributed by the main parties. Supply-side substitution would exist to influence the market definition, when and if its effects are sufficiently direct and immediate.

4.98 During the investigation and after meetings with the alternative suppliers the CCM has gathered that a hypothetical price increase in the range of 5 to 10 % may not stimulate operators' in other sectors to switch or expand to supplying AEIKs and related services within a one year period.

4.99 The operators will find it to be cost prohibitive to invest in the equipment and software required mainly because they cannot forecast with certainty the volume of sale they would need to achieve to render the venture profitable. There is a risk of high cost of exit. ✂

4.100 Moreover, unlike the authorised distributors which only invest in the equipment required for the cars they distribute, the alternative suppliers believe that an effective business project would require them to provide replacement AEIKs for more than just one make of car, thus the cost of investment is further increased.

4.101 There is cost prohibition especially due to lack of economies of scale. ✂

4.102 Another aspect of the business of supplying AEIKs is the fact that it requires training. These training courses are not available locally and they span over a period of more than 12 months ✂

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<sup>64</sup> Small but significant non-transitory increase in price

<sup>65</sup> Case 322/81 Michelin v Commission of the EC [1983] ECR 3461, 1985 1 CMLR 282

<sup>66</sup> Case 6/72 Europemballage Corporation and Continental Can Company Inc. v Commission of the EC [1973] ECR215

4.103 Thus, supply-side substitution appears to be impeded by some barriers to expansion and entry such as heavy investment costs, high technical aspect of the market, as well as the lead time required to advertise the new business and infrequent demand which deter suppliers to enter the market in the short-term period of one year. The cost of exit is a deterrent and is a barrier to expansion or entry.

4.104 Supply-side substitution is also impeded by the fact that the codes required for the purposes of installation and synchronisation are not available. During the investigation it came to our knowledge that car owners are not given access to the codes. The unavailability of this essential information means that the alternative suppliers are not able to readily provide a replacement AEIK.

4.105 ✂ A low demand respond is indeed an effective barrier to entry negating the competitive constraints from the supply-side.

4.106 Supply-side substitution from other existing markets for other products is not available in the relevant aftermarkets for the supply of AEIKs and related services because the apparent barriers to entry appear to negate supply-side substitution within a one year period, thus, its effects are not sufficiently direct and immediate.

4.107 The relevant market is, therefore, defined as brand-specific multiple markets for AEIKs and synchronising services supplied by the authorised distributors (including the main parties) and by the alternative suppliers.

## **(G) The Relevant Geographic Market**

4.108 The geographic market refers to the area over which consumers can substitute the product (AEIK) under consideration and the area over which sellers can competitively sell the relevant products.

4.109 The geographic extent of some markets will be very local because products sold in one location are not regarded by customers as good substitutes for products sold in another. This exercise assessed whether the *“markets can be wider than ‘national’, if it is relatively easy to obtain new sources of supply from overseas.”*<sup>67</sup>

4.110 Evidence obtained during the investigation suggests that car manufacturers appear to restrict supply of replacement AEIK and the related synchronising service only to its authorised distributors. The CCM understands that each authorised distributor is the sole supplier<sup>68</sup> of original replacement AEIKs and manufacturer approved related installation and synchronising services for Mauritian customers.

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<sup>67</sup> Section 2.9, CCM2 Guidelines on market definition and the calculation of market shares

<sup>68</sup> Supplier as an ongoing commercial activity

4.111 Another material aspect in relation to the geographic market is the fact that replacement AEIK requires synchronisation. In some instances and depending on the make of the car, synchronisation is effected at the supplier's workshop and this process involves the customer bringing the car at the supplier's workshop. ✂

4.112 In other instances the replacement AEIKs require to be 'pre-set' or 'pre-programmed' by the manufacturer overseas and manufacturers of such types of AEIKs require that any order for replacement AEIK be made exclusively through its authorised distributor(s) in the territory in which the car is present. ✂

4.113 Thus, it would not be feasible for car owners in Mauritius to source a replacement AEIK with any related service from overseas due to the above-mentioned restraints imposed by car manufacturers. Therefore, the relevant geographic market is defined as the market for the supply of AEIKs and related installation and synchronising services in Mauritius - comprising the makes distributed by the main parties.

## **(H) Market Share**

4.114 Defining the relevant market (the product and geographic market) is only the means to determine if an enterprise is in a monopoly situation as prescribed under section 46 (1) (a) or (b) of the Act. The ends of the investigation under section 46 is the assessment of the enterprises' (the main parties) share of the market in terms of the threshold of 30% by one enterprise or 70% by 3 or fewer enterprises.

4.115 The guidelines state that *"An enterprise's market share is its own sales in a market divided by total sales in that market."*<sup>69</sup>

4.116 *"Although market shares based on revenues are usually appropriate, if the CCM believes that volume-related measures of sales better capture the competitive positions of enterprises within the relevant market than do revenue measures, it will use volume-related measures."*<sup>70</sup>

4.117 The CCM believes that volume-related measures of sales better capture the competitive positions of enterprises within the relevant market than do revenue measures. This is mainly because the competition concern in the present investigation is that the prices of AEIKs and related installation and synchronising services set by Ifracam are excessive. Market share based on revenue would take the alleged inflated (excessive) prices into consideration and may dilute the share of the alternative suppliers (locksmiths etc.) resulting into an incorrect account of the market

<sup>69</sup> Section 1.2, CCM2 Guidelines on market definition and the calculation of market shares

<sup>70</sup> *Id.* Section 3.4

4.118 A volume related share would show a more accurate market dynamics between competitors in the multiple markets for AEIKs and related installation and synchronising services. Market share is calculated by dividing the volume of sales achieved by each main party - in the respective aftermarkets for the cars they distribute - by the total number of sales in the corresponding aftermarket for replacement AEIKs.

**(i) ABC Motor's Market Share**

4.119 The market share for ABC Motors is calculated by dividing the volume of sales it achieved - in the Nissan aftermarket - by the total number of sales in the corresponding aftermarket for replacement AEIKs for Nissan.

4.120 The market shares of ABC Motors Ltd and other providers of replacement Nissan AEIKs were calculated for the years 2010 and 2011 by compiling the number of AEIK products listed in sales invoices and information provided by the parties. (See table 4 below)

Table 4 Nissan AEIKs – Sales and Market share



4.121 ✂

4.122 ✂

4.123 ✂

4.124 The Findings of this investigation is that ABC Motors is in a monopoly situation in the aftermarket for the supply of replacement AEIKs and synchronising services for Nissan cars with market share above the threshold of 30% stipulated under section 42 (1) (a) of the Act.

**(ii) Leal's Market Share**

4.125 The market share for Leal is calculated by dividing the volume of sales it achieved - in the respective BMW and Renault aftermarkets - by the total number of sales in the corresponding BMW and Renault aftermarkets for replacement AEIKs.

4.126 The market shares of Leal and other providers of replacement BMW and Renault AEIKs were calculated for the years 2010, 2011 and 2012 by compiling the number of AEIK products listed in sales invoices and information provided by the parties. (See table 5 & table 6 below)

Table 5 BMW AEIKs – Sales and Market share



Table 6 Renault AEIKs – Sales and Market share



4.127 ✂

4.128 ✂

4.129 ✂

4.130 The Findings of this investigation is that Leal is in a monopoly situation the two aftermarkets for the supply of replacement AEIKs and synchronising services for BMW and Renault cars with market shares above the threshold of 30% stipulated under section 42 (1) (a) of the Act.

**(iii) Iframac's Market Share**

4.131 The market share for Iframac is calculated by dividing the volume of sales it achieved - in the respective Mercedes, Mitsubishi and Peugeot aftermarkets - by the total number of sales in the corresponding Mercedes, Mitsubishi and Peugeot aftermarkets for replacement AEIKs.

4.132 The market shares of Iframac and other providers of AEIKs replica were calculated for the years 2010, 2011 and 2012 by compiling the number of AEIK products listed in sales invoices and information provided by the parties. (See table 7, table 8 and table 9 below)

Table 7 Mercedes AEIKs – Sales and Market share



Table 8 Mitsubishi AEIKs – Sales and Market share



Table 9 Peugeot AEIKs – Sales and Market share



4.133 ✂

4.134 ✂

4.135 ✂

4.136 ✂

4.137 ✂

4.138 The Findings of this investigation is that Iframac is in a monopoly situation in the supply of replacement AEIKs and synchronising services for Mercedes, Mitsubishi and Peugeot cars with market shares above the threshold of 30% stipulated under section 42 (1) (a) of the Act.

## **(I) Dominance**

4.139 As per the decision in Hoffmann-La Roche, a position of dominance simply enables the relevant enterprise *“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.”*<sup>71</sup>

4.140 The investigation assessed whether the main parties are individually in a position of dominance in the aftermarkets for the supply of replacement AEIKs and related services for the cars they distribute.

### **(i) Section 46 (3) (b) - Demand Side Substitution**

4.141 The assessment stipulated under section 46 (3) (b) of the Act has been carried out in the market definition exercise above, under chapter 4 (E) of this report.

4.142 Based on the view that very large market shares may in themselves evidence the existence of a position of dominance, the CCM finds that the very high market share of the main parties and the fact that they also have few competitors in the aftermarkets show that the main parties are faced with few competitive constraints. The finding of the investigation that the main parties are each in a position of dominance falling within the ambit of section 46 (3) (b) of the Act.

### **(ii) Section 46 (3) (b) - Supply Side Substitution**

4.143 The assessment stipulated under section 46 (3) (c) of the Act which is essentially about competitive constraint from the supply-side has been carried out in the market definition exercise above, under chapter 4 (F) of this report.

4.144 The barriers to expansion and entry and high cost of exit due to the fact that a break-even cannot be calculated with certainty due to apparent low response from demand indicate that the main parties do not endure competitive constraint from the supply-side and thus they are able to behave in an appreciable extent independently of potential competitors from the supply-side.

4.145 The very high market share together with few alternative suppliers and the lack of competition from the supply side show that the main parties are each in a position of dominance, as defined under section 46 (3) of the Act, in the respective aftermarkets for replacement AEIKs for the makes of cars they distribute.

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<sup>71</sup> Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461, at paragraph 39

## 5. The Competition Concerns – Excessive pricing

### (A) Excessive Pricing

#### (i) Economic Value

5.1 According to Bellamy and Child, “charging a price that is excessive in relation to the economic value of the product is prima facie abusive conduct.”<sup>72</sup>

5.2 The concept of economic value can be derived from economic theories, thoughts and concepts, from the stance adopted by competition agencies and from case precedents in various jurisdictions.

5.3 In this investigation, an excessive price is a price which has little or no reasonable relation to the ‘economic value’ of the product or service and is designed to achieve for the dominant enterprise larger profits than it would earn in a more competitive market.

5.4 There are various ways of looking at this concept of economic value and different jurisdictions have been applying different methods of looking at/estimating the economic value.

5.5 The approach adopted - to determine if there is a case of excessive pricing - by the Commission in **Napp**<sup>73</sup> and then upheld by the Competition Commission Appeal Tribunal is summarized as follows at paragraphs 57 and 58 of the decision -

*57. According to the Director, Napp’s prices can be shown to be above the competitive level, first, by assessing “whether the difference between costs actually incurred and the price actually charged is excessive”: Case 27/76 United Brands v Commission [1978] ECR 207 (“United Brands”). In the Decision, the Director has sought to do this by showing the profit margins Napp earns on community sales and comparing these with the margins Napp earns on sales of other products, and on sales of MST to other markets (paragraph 204).*

*58. The second approach, according to the Director, is to establish what the competitive price of MST is likely to be and then compare this with the actual price. In the Decision the Director has sought to find a proxy for the competitive price of MST by looking at the prices of competitors, and the prices Napp charges elsewhere, and seeing whether those prices would enable Napp to earn a reasonable profit (paragraph 205).*

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<sup>72</sup> Bellamy and Child, *European Community of Law of Competition*, 6<sup>th</sup> Edition, Oxford University Press 2008, at page 985

<sup>73</sup> *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (No 5) [2002] 4 All ER 376*

**(ii) The Cost and Price Comparison**

5.6 It can be very difficult for competition agencies to distinguish between normal and excessive pricing. Attempts simply to relate prices to costs can be misleading, if they fail to take account of different categories of cost, risks, the need for seasonal or other variations in prices. Furthermore, high prices can themselves stimulate competition to remove the monopolist's advantage.

5.7 The above concerns are observed in the Judgements of the Court of Justice and Decisions of the EC Commission. Thus, in *United Brands*<sup>74</sup> it was held that the price cost comparison would have to include an examination of the costs of the supplier so that the 'economic value' of the product is assessed properly.

5.8 However, the cost calculation is notoriously difficult. Even the ECJ has acknowledged "*the considerable and at times very great difficulties in working out production costs which may sometimes include a discretionary apportionment of indirect costs and general expenditure and which may vary significantly according to the size of the undertaking, its object, the complex nature of its set up, its territorial area of operations, whether it manufactures one or several products, the number of its subsidiaries and their relationship with each other....*"<sup>75</sup>

5.9 Similarly, in the **Port of Helsingborg Commission decision**<sup>76</sup>, the argument that the 'economic value' of a product or service should be calculated by adding to the cost incurred in providing it, a reasonable profit which would be a percentage of the production cost was rejected as being too simplistic.

5.10 A comparison of prices and costs, which reveals the profit margin, may serve as a first step in the analysis but it cannot in itself be conclusive. According to the Commission of the EC<sup>77</sup>, the costs to be taken into account are not limited to those which were reflected in the supplier's audited accounts. The cost may include the allocation of sunk cost and some cost elements which are intangible such as opportunity costs and the financing of future capital expenditures of replacing existing assets. The fact that these costs were based on assumptions shows the difficulties that may be encountered in the calculation of costs.

5.11 "[I]n comparing prices to costs, the CCM will normally consider the returns that the enterprise is making on an asset base, valued appropriately at replacement cost, including if appropriate intangible assets such as intellectual property rights. This valuation might differ substantially from the valuation in the enterprise's own accounts,

<sup>74</sup> Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission- Chiquita Bananas* [1978] ECR 207

<sup>75</sup> *Id.* at paragraph 254

<sup>76</sup> COMP/36.568 and 36.570 *Scandlines v Port Of Helsingborg, Sundbusserne v Port of Helsingborg*, [2006] 4CMLR 1224

<sup>77</sup> *Id.* at paragraphs 209 and 210

*or from that using general accepted accounting principles. Assessed against this asset base, returns persistently and substantially in excess of the cost of capital could be considered excessive profits, pointing to exploitation of a persistent monopoly.”<sup>78</sup>*

5.12 The above is also reflected in the OFT’s approach to assess excessive pricing.<sup>79</sup> In the case of an enterprise operating in several markets, the OFT would focus on the profits generated by the specific business line under investigation. This would imply identifying the common costs that are allocated into the specific business line. Depending on the context, the OFT proposes to use the stand alone cost, which is the cost that the firm would incur if it was only involved in the business under investigation.

5.13 *“The assessment of whether high prices breach the competition rules typically requires an analysis of the actual price and profit, benchmarked against the likely outcome under competitive conditions. Simple price or margin comparisons may, however, be problematic. If the necessary data is available, profitability analysis based on an assessment of the rate of return on capital invested is considered a more accurate and reliable method to measure excessiveness.”<sup>80</sup>*

5.14 There is a need to take the dynamic aspect of the market into account. For instance, firms may charge high prices because there has been an innovation and they want to take benefit of that. Prices may be high simply because supply cannot match demand.

5.15 Furthermore, there is the risk of miscalculation when evaluating cost, especially for multi-product firms like car distributors. The allocation of common costs is complex and requires analysing a substantial amount of information.

5.16 In light of the inherent methodological difficulties the OECD suggests that *“it may be prudent for competition authorities to apply several different tests and proceed on the basis of a ‘predominance of evidence’.”<sup>81</sup>*

5.17 Conducting price cost comparisons and deriving margins would require accurate measures of the enterprise’s cost structure. Distributors of new cars are involved in multiple businesses such as car sales, repair and maintenance as well as spare parts, including the replacement of keys business. Analysing these undertakings’ costing would require complex calculation to allocate common costs among the several activities especially allocating the right amount of overhead (indirect) costs to the AEIKs business line.

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<sup>78</sup> Section 4.8, CCM 4 Guidelines on monopoly situations and non-collusive agreements

<sup>79</sup> Section 2 on Excessive Prices in OFT Draft competition law guideline on Assessment of conduct (2004)

<sup>80</sup> OECD Roundtable – Excessive Pricing, DAF/COMP(2011)18, at page 11

<sup>81</sup> *Id.*

5.18 The difficulty in determining the cost of the businesses of the main parties for the supply of AEIKs and related installation and synchronising services spawns further problems in the second major exercise in the determination of excessive pricing which is the benchmarking. The main idea is to find a benchmark competitive business model with which to compare the business of the main parties. Without a settled cost structure for the businesses of the main parties in the supply of AEIKs and related services any comparison will be very difficult and even futile.

**(iii) The framework adopted for determination of Excessive Pricing**

5.19 Given the weaknesses of price and margin comparisons, the CCM assessed price cost ratios instead of price cost margins. Ratios would be computed for the several car spare parts and comparisons will be conducted between these ratios. The idea is to make robust comparisons between the product under investigation and products facing competition espousing the approach in Napp case. Ratios are given by the following formula:  $p/c$  where  $p$  is the selling price and  $c$  is the direct cost excluding overheads.

5.20 Using ratios instead of margins avoids the need to calculate allocations of overhead costs which can lead to mistakes and substantial time consumption. Thus the CCM will consider ex-store cost, which includes direct costs such as the Fee on Board (FOB) and freight. This would enable comparisons on robust ground.

5.21 The CCM believes that comparison of the prices must be made on a consistent basis. This notably implies that:

- the products/services provided must be comparable; and
- the charging systems must allow a meaningful comparison.

5.22 An appropriate charging system would entail, on the cost side, information on FOB, freight and cost of service and information on the respective selling prices on the price side. If the price cost ratio for AEIKs is higher than the ratio for other spare parts or categories of spare parts which form part of a competitive market, this would imply either that the price is too high relative to its cost or that the cost is too low relative to the price. In this case the CCM will conclude that the price is excessive.

5.23 The CCM will include the cost of service in these ratios, which encompasses the initialization cost and all labour related cost of replacing AEIKs. Studying cost and price related to services prove to be relevant in the analysis as from the invoices it appears that initialization price is considerable. Hence the CCM would be able to measure whether the price of service is excessive or not.

5.24 Thus, the benchmarking exercise to determine if there is abuse in the form of excessive pricing will include :

(a) *the dominant enterprise's competitors' prices in the same relevant market;*

*and*

(b) *the dominant enterprise's prices of related products in other markets.*

## **(B) Factors affecting the pricing of AEIKs and other spare parts**

5.25 There are several product and market characteristics which may explain why the prices of AEIKs and other automotive spare parts are perceived to be high. Incidentally, some of those characteristics may act as barriers to entry in the event of an increase in prices by a monopolist and the threat of new entry may not be high enough to act as check on the monopolist's prices.

5.26 The purpose of the assessment is to determine if the main parties are taking advantage of those specific characteristics to charge excessive prices.

### **(i) Multi-product setting**

5.27 Based on information gathered during the course of the investigation and in line with the SOI and comments thereof it has been assessed that the allegation of excessive pricing would be best assessed in a multi-product setting i.e. by recognising that each main party is not only a distributor of AEIKs alone but also of several spare parts for the makes of car they distribute.

5.28 Thus, it is important to make a clear distinction between direct and indirect costs as well as fixed and variable costs. This is essential in order to properly determine the costs which may be directly attributed to the provision of AEIKs and to assess the pricing structure for the product.

5.29 Another implication is that it would not be appropriate to rely solely on the simplest form of benchmarking i.e. a benchmark against competing products. This is mainly due to the difference in the nature and complexity of firms (the main parties and alternative suppliers) operating in the relevant aftermarkets for replacement AEIKs but also due to the scarcity of competing products in the market(s).

5.30 In a multi-product setting, it may also be argued that a distributor is more likely to price different parts similarly based on factors such as the costs associated with the distribution of the parts, the intensity of competition and the customer's willingness to pay rather than on the function of the product itself. It is therefore important to determine the characteristics of a product which may impact on those factors and which would help to categorise the part along with other products. This approach is adopted in order to identify other spare parts supplied by the main parties and which may be benchmarked against the corresponding brand of AEIKs.

5.31 An AIEK is different from other automotive spare parts and accessories from the perspective of a manufacturer as the manufacturing process differs and from the perspective of a customer as each part and accessory perform a specific function in the car. However, from the perspective of a distributor or dealer of automotive spare parts, an AIEK is similar to other parts and accessories in the sense that it is one among several aftersales products it distributes and the same distribution process may apply for AIEKs and several other spare parts.

5.32 Therefore, the pricing of different spare parts and accessories supplied by a dealer or distributor is to some extent determined by the same cost elements. The characteristics of each product will impact the costs of distribution. As such, businesses would impose similar mark-ups for products having similar costs depending on the 'characteristics of the aftersales market'. The CCM understands that ultimately, the distributor will price the parts and accessories based on the following factors namely; the costs associated with the distribution of the products, the intensity of competition and the customer willingness to pay.

5.33 In the case of ABC Motors other spare parts for Nissan supplied by ABC Motors will be identified and their cost and price ratios are benchmarked against the cost and price ratios of the Nissan AIEKs.

5.34 In the case of Leal other spare parts for BMW and Renault supplied by Leal will be identified and their cost and price are benchmarked against the corresponding cost and price ratios of BMW and Renault AIEKs.

5.35 In the case of Ifracmac other spare parts for Mercedes, Peugeot and Mitsubishi supplied by Ifracmac will be identified and their cost and price ratios are benchmarked against the cost and price ratios of the corresponding Mercedes, Peugeot, and Mitsubishi AIEKs.

## **(ii) Factors affecting the pricing spare parts**

5.36 This chapter considers the factors which may explain variations into the pricing structure of different automotive spare parts and accessories.

5.37 Based on information gathered during the course of this investigation, the following factors have been identified as the main determinants of the pricing of spare parts and accessories:

### **(a) The cost of importing the product**

From a dealer or distributor perspective, the first component of the cost structure of a product is the cost of importing the part or the accessory. This usually consists mainly of

the FOB (Free-On-Board), freight charges, custom duties and other related costs<sup>82</sup> incurred until the product is delivered to the business. This is more precisely known as the landed cost.

This cost will vary depending on whether the part is imported by sea or by air. Certain parts being needed more urgently by a customer may have to be ordered by air and therefore imported at a higher cost. Moreover, a part which is urgently required by a customer and which is imported alone will have a higher average import cost than if it imported with other parts.

#### **(b) Goods or Stock movement**

The goods movement or stock movement will depend on the demand for the product. A fast moving part is a relatively highly demanded product and is sold relatively quickly and frequently. As such the stock turnover is usually high and the business must build stocks for the part on a regular basis. In contrast, a slow moving part has a lower demand and may remain in stock for a relatively longer period.

Generally fast moving goods have relatively lower mark-ups than slow moving goods as the costs incurred in the supply of the product may be spread and recovered over the larger number of units sold.

A part may be classified as fast moving or slow moving part depending on the volume or frequency of sales.

✂

✂

✂

There are also some parts that are not ordered on a regular basis and the main parties do not necessarily keep stocks for such items. These include parts that may be tailor made or coded in relation to the vehicle of a customer and these are ordered only following a request from the customer to repair his vehicle by replacing the part. These 'non-stock items' are on average more expensive to import than stock items as they are imported on a one-off basis and may require air freight and may not share its import cost with other products.

#### **(c) Size of the product**

The size of the product may also influence the cost of a product. For instance, a relatively bulky product may generally be more expensive to import and to stock. This may be the case for body parts whereby the cost may be even higher due to the fact that the product may stay in stock for longer period of time.

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<sup>82</sup> Such as insurance costs, delivery cost, fuel surcharge, etc.

**(d) The proportion of the cost of the spare part with respect to the price of the primary product**

In the event that the cost of a spare part or a vehicle component, represents a high proportion of the price of the vehicle, for instance an engine, the business will generally put a relatively lesser mark-up than on other less costly parts. A 50% mark-up on a part costing MUR 5000 is less significantly than a 50% mark-up on a part costing MUR 250,000 in absolute terms. Therefore, a business will usually charge a lower mark-up and/or may offer substantial discounts when pricing exceptionally costly parts.



**(e) Complexity of the spare part and/or of the repair or replacement process**

Some spare parts may be more complex and sophisticated than other parts and therefore the repair or the replacement process may be more technical in nature. The repair or the replacement of some parts may require the use of some more advanced equipment and/or software. As such the business will have to invest in the purchase of specific equipment and software and in the training of staff in relation to the provision of certain range of spare parts. This may apply to sophisticated parts such as electronic devices but also for complex diagnostic and repair processes.

These costs are not directly charged to the customer. However, it may be expected that a part of the mark-up on each spare part accounts for a return on investment made.

**(f) Availability of substitutes**

The availability of substitutes in the market for a particular part determines the intensity of competition faced by the distributor for the provision of the said part. In Mauritius, there is only one authorised distributor for the spare parts of a particular car make. The main parties are the authorised distributors of genuine branded spare parts for the makes of cars they distribute. The main parties face competition from suppliers of OEM (Original Equipment Manufacturer) parts. OEM parts are compatible replacement parts but without the brand name of the car manufacturer. Examples of OEM parts are filters, brake pads, belts etc.

For certain original spare parts supplied by the authorised dealer, customers may perceive its counterparts imitations, replica, and counterfeit parts as being viable alternatives to the original parts. ✂

**(g) Willingness to pay by customers**

The willingness to pay by customers will be affected to a great extent by the availability of substitutes. A customer is less willing to pay high prices if there is the possibility of finding a cheaper alternative to the product. However, genuine spare parts are normally

associated with higher/superior quality by the consumer, hence the willingness to pay a higher price.

Assuming a hypothetical monopolist for a product, the willingness to pay will also depend on the perceived necessity of the product. The customer is more likely to pay a relatively high price if the part is essential to the use of the vehicle and if switching to another car is not a viable option. This may apply to parts which are essential for driving the car or which the driver is legally required to own or repair.

**(iii) Factors affecting the pricing of AEIKs**

5.38 This chapter considers if there are any specific characteristics of an AEIK which demarcates it from the other spare parts and accessories supplied by the main parties in a way that it would significantly affect its cost and pricing structure.

**(iv) Factors affecting the pricing of AEIKs – ABC Motors**

5.39 This report, therefore, lists the characteristics of AEIKs supplied by ABC Motors which may help identify similar products to be used for benchmarking purposes. Most importantly, it identifies the product and market characteristics specific to AEIKs for Nissan cars which may potentially be at the origin of any anticompetitive behaviour.

5.40 Based on information gathered, AEIKs supplied by the ABC Motors present the following main characteristics, which in turn, affect its pricing:



**(v) Factors affecting the pricing of AEIKs – Leal**

5.41 This report, therefore, lists the characteristics of AEIK supplied by Leal which may help identify similar products to be used for benchmarking purposes. Most importantly, it identifies the product and market characteristics specific to AEIKs for BMW and Renault cars which may potentially be at the origin of any anticompetitive behaviour.

5.42 Based on information gathered, AEIKs supplied by Leal present the following main characteristics, which in turn, affect its pricing:



**(vi) Factors affecting the pricing of AEIKs – Ifracac**

5.43 This report, therefore, lists the characteristics of AEIK supplied by Ifracac which may help identify similar products to be used for benchmarking purposes. Most importantly, it identifies the product and market characteristics specific to AEIKs for

Mercedes, Mitsubishi and Peugeot cars which may potentially be at the origin of any anticompetitive behaviour.

5.44 Based on information gathered, AEIKs supplied by Ifracmac present the following main characteristics, which in turn, affect its pricing:



5.45 Due to its technology and the fact that it is coded specifically to each car - an AEIK cannot be imported on a regular basis and in large volumes - it is likely that supplying AEIKs is relatively more costly for a distributor than a unit of other spare parts of similar size. Moreover, due to the irregularity of demand the cost of import is therefore on average potentially higher than for fast moving parts. These factors impact on the cost of distributing an AEIK and when reflected in the selling price, explain to an extent why the price of AEIKs may actually be perceived as high by the customer. However, it is the fact that the main parties are the only one authorised to import and synchronise an AEIK coded by the manufacturer for the makes of cars they distribute. This may act as significant barrier to entry thereby increasing the potential for excessive pricing.

## **(C) Price-to-cost ratio**

5.46 As stated under chapter 5 (A) (iii) of this report, the assessment of excessive pricing involves the calculation of price-to-cost ratios (p/c) for AEIKs and other products which are subsequently used in the benchmarking process.

### **(i) The cost**

5.47 For the purposes of this investigation, it is important to make the difference between direct and indirect costs. Direct costs refer to the costs which are directly attributable to the supply of a product while indirect costs are incurred in the provision of several spare parts and cannot be readily attributed to a specific product. A direct cost may be a variable cost or a fixed cost. Variable costs vary with the number of units of a product supplied while fixed costs typically remain constant irrespective of the quantity of a product supplied.

5.48 The price-to-cost ratio has been calculated using the final selling price (exclusive of Value Added Tax), the direct variable costs which are used to determine the costs incurred by a business which can be directly attributed to the provision of the product under review. Examples of direct variable cost include the cost of importing a product or direct labour expenses. There are few or no fixed costs which can be directly attributed to the provision of AEIKs.

5.49 For instance, equipment necessary for the synchronisation of AEIKs may be used for the provision of services related to other spare parts. Moreover, it is likely that the cost of equipment is allocated to a cost centre such as the workshop or the parts department rather than exclusively to AEIKs or a group of products.

5.50 However, the assessment of price-to-cost ratios will take into account the direct fixed costs incurred by the business as far as possible. The assessment also considers the fact that, in a multi-product setting, the final cost of a product distributed by a large and complex business entity may include a discretionary apportionment of indirect costs and general expenditure.

5.51 The investigation has taken into consideration that some of these costs such as transport costs or freight charges, are to some extent indirect costs in the sense that several parts may be imported or transported altogether and therefore the costs cannot be directly attributed to a specific part. Those costs have been accepted as direct variable costs provided that the method of cost apportionment employed yielded a satisfactory estimate of the direct cost for each part.

5.52 The investigation has also taken into account that some costs may be semi-variable i.e. the expense may involve a fixed component and a variable component. For

instance, based on the weight, the freight charges when importing one AEIK and ten AEIKs may be the same.

5.53 In order to assess the allegation of excessive pricing, a first step is to identify the factors which determine the pricing of AEIKs and of other automotive spare parts distributed by the main parties and to determine if any of those factors may give a business the possibility and the incentive to engage in anticompetitive behaviour. In turn, this is useful to the benchmarking process which consists in comparing the price-to-cost ratios of AEIKs distributed by the main parties to the price-to-cost ratios of any substitutes supplied in the relevant market and to the price-to-cost ratios of comparable products supplied by the main parties.

5.54 The objectives of the price-to-cost ratio assessment are as follows:

- To benchmark AEIKS supplied by the main parties with substitutes supplied by its competitors in the relevant market in order to determine if Leal is charging excessive prices with respect to the cost of supplying AEIKs;
- To benchmark AEIKs with other automotive spare parts supplied by Leal in order to determine if Leal is taking advantage of product and market characteristics specific to AEIKs and abusing its monopoly power by charging excessive prices.

## **(ii) Analysis of price-to-cost ratios – ABC Motors**

5.55 Information on the costs and prices of Nissan AEIKs supplied by ABC Motors was extracted from the costing sheets, purchase documents, sales invoices submitted by ABC Motors.

5.56 ✂

5.57 ✂

5.58 The Table 10 below has been compiled based on information compiled on direct costs and prices for 2010 and 2011.

Table 10 Price to Cost ratios for Nissan AEIKs distributed by ABC Motors

✂

5.59 ✂

5.60 ✂

5.61 ✂

5.62 Using the average direct cost and the average net price, the price to cost ratios are estimated for both years.

5.63 ✂

5.64 ✂

5.65 ✂

**(iii) Analysis of price-to-cost ratios – Leal**

5.66 Information on the costs and prices of BMW and Renault AEIKs supplied Leal was extracted from the costing sheets, purchase documents, and sales invoices submitted by Leal.

5.67 ✂

5.68 The tables below (Table 11 & 12) have been compiled based on information on direct costs, indirect costs and prices for 2011 and 2012.

Table 11 Price to Cost ratios for BMW AEIKs distributed by Leal



Table 12 Price to Cost ratios for Renault AEIKs distributed by Leal



5.69 ✂

5.70 ✂

5.71 ✂

5.72 ✂

5.73 ✂

5.74 ✂

5.75 ✂

**(iv) Analysis of price-to-cost ratios – Ifracmac**

5.76 Information on the costs and prices of Mercedes, Mitsubishi and Peugeot AEIKs was extracted from the costing sheets, purchase documents, and sales invoices submitted by Ifracmac.

5.77 ✂

5.78 The tables below (Table 13, 14 & 15) have been compiled based on information on direct costs and prices for 2010, 2011 and 2012.

Table 13 Price to Cost ratios for Mercedes AEIKs distributed by Ifracmac

✂

Table 14 Price to Cost ratios for Mitsubishi AEIKs distributed by Ifracmac

✂

Table 15 Price to Cost ratios for Peugeot AEIKs distributed by Ifracmac

✂

5.79 ✂

5.80 ✂

5.81 ✂

5.82 Using the average direct cost of supplying an AEIK and the average net selling price, the price to cost ratios was calculated for the years 2010, 2011 and 2012.

5.83 ✂

5.84 ✂

5.85 ✂

5.86 ✂

5.87 ✂

5.88 ✂

5.89 ✂

5.90 ✂

5.91 ✂

## (D) Price/ Cost Benchmarking

5.92 The CCM is not a price regulator, and the Competition Act does not require or empower it to examine all prices to test whether they are cost-related or, more broadly, fair. However, in a small and isolated economy, strong monopolies can persist without any specifically exclusionary behaviour to create or preserve that position on the part of monopolists. In situations of substantial market power which are not expected to be eroded by entry or expansion by rivals, persistent pricing substantially in excess of cost may be considered exploitative.<sup>83</sup>

5.93 Where appropriate, the CCM will conduct price comparisons. The difficulty is to assure that the comparison is valid and that the result of the comparison is meaningful. It must be ensured that the figures which are compared are really comparable.

5.94 The conditions under which such a comparison is made are therefore of the utmost importance. If it were possible to find a substitutable product or service provided by competitors on the same relevant market, the price of such a product/service on this market could serve as a reference for the price of the product/service in question (to be compared with the contested price).

5.95 If prices are persistently and significantly lower in other markets, where costs should be similar, that might indicate that in the market under investigation, they are excessive. If prices have risen from a stable level to a higher level, without any equivalent movement in costs, that might also indicate excessive pricing. Even such a price spike can, however, indicate an effective competitive response to sudden changes in demand or supply conditions.

5.96 In the case of *Bodson*<sup>84</sup> the Court referred to the possibility, in order to determine whether the prices charged by concession holders are excessive, to make a comparison between those *prices offered on a market which is not competitive* and *prices charged on a market which is not covered by the public concession and which is therefore open to competition*.<sup>85</sup>

5.97 Thus, in the SOI several types of benchmarking were proposed namely:

### *a. the dominant enterprise's past price for the same product*

This appears to be the most self-evident benchmark because a price increase should in general be in line with the cost increase. However, the fact that the main parties appear to have always been in monopoly situations for the supply of AEIKs for the respective

<sup>83</sup> Section 4.7, CCM 4 Guidelines on monopoly situations and non-collusive agreements

<sup>84</sup> Case 30/87 *Bodson v Pompes funèbres libérées* [1988] ECR 2479, at paragraph 31

<sup>85</sup> A similar price comparison approach was also adopted in the case of *François Lucazeau and others v SACEM and others* Joint cases 110/88, 241/88 and 242/88, [1989] ECR 2811, at paragraphs 29-30

makes of cars they distribute renders this type of benchmarking futile as past prices would not be from a market where the main parties faced competitive constraints. This benchmark is not applied in this investigation.

*b. the dominant enterprise's prices of the same relevant products in other geographic markets;*

This type of benchmarking is not possible since during the period investigated, the main parties operated in only one geographical market that is the market for Mauritius. This benchmark is not applied in this investigation.

*c. the dominant enterprise's current price for other products in the same relevant market;*

This type of benchmarking would not be compatible with the market definition and hence, this benchmark not applied in this investigation.

*d. the dominant enterprise's competitors' prices in the same relevant market;*

This benchmark is applied in the investigation by comparing the price of the main parties and the price of alternative suppliers (e.g. local locksmiths and other electronic safety business) operating in any of the multiple markets for AEIKs distributed by the main parties.

It should be noted that the products offered by the alternative suppliers may not be genuine spare parts. In *Parke* the ECJ indicated that “a higher price for the patented product as compared with the unpatented product does not necessarily constitute an abuse.”<sup>86</sup> This is mainly because the cost structure of the two competitors may be completely different.

*e. The prices in other geographic/foreign markets*

Benchmarking margins from other competitive markets is a complex exercise. It is difficult to assess the degree of competition in foreign markets as well as analysing accounting sheets and making appropriate overhead costs allocation if comparators are multiproduct firms. Multiproduct car dealers abroad may in addition benefit from economies of scope, thereby reducing the cost of providing AEIKs while charging a higher price as a result of their markets' specificities (i.e. higher consumer willingness to pay). This benchmark is not applied in this investigation.

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<sup>86</sup> Case 24/67, *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECR 55, at page 72

*f. the dominant enterprise's prices of comparable products in other markets;*

The fact that the Leal and Iframac distribute more than one make of car means that the supply of replacement AEIKs and related installation and synchronising for the various makes distributed by these main parties can be regarded as comparable products. Thus, the demand-side aspects of those products may in principle be equivalent and non-cost related factors would be insignificant for the purpose of comparison.

*g. the dominant enterprise's prices of related products in other markets;*

This benchmarking compares the price at issue with those of other related products provided by the same company. Related products are not products in the same relevant product market, but ones sharing a considerable amount of common costs. Via this benchmarking, the burdensome calculation of cost and overheads may be avoided.

This strategy was employed by the Commission in Deutsche Post<sup>87</sup> where two services were priced identically by Deutsche Post. Because Deutsche Post could not explain why it priced the two services the same even though there was a considerable difference in costs, the Commission concluded that it was an excessive price within the meaning of Article 102. The CCM applied this benchmark in the investigation.

The CCM applied this benchmark in the investigation by comparing the price to cost ratio of AEIKs for the different makes of cars distributed by the main parties (✂).

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<sup>87</sup> COMP/C-1/36.915 *Deutsche Post AG*—Interception of cross-border mail, [2001] OJ L331/40, at paragraph 166-167

## **(E) Price/Cost Benchmarking – ABC Motors**

### **(i) Benchmark - competitors' prices in the same relevant market**

5.98 This benchmark is about comparing the price to cost ratio of ABC Motors in the supply of Nissan AEIKs with its nearest substitute in the relevant aftermarket for Nissan replacement AEIKs. The aim is to assess if the price to cost ratios of AEIKs of alternative suppliers are significantly different. In the event that the price to cost ratios of ABC Motors are significantly larger than those of alternative suppliers, this would tend to demonstrate that ABC Motors is engaging in excessive pricing for replacement Nissan AEIKs.

5.99 In using this form of benchmark, it is important to consider the following when benchmarking original Nissan AEIKs distributed by ABC Motors with replacement AEIKs supplied by the alternative suppliers:

- Being an authorised dealer for Nissan implies that ABC Motors has to meet all standards set by Nissan. This implies that ABC Motors has to purchase the components for the AEIKs from Nissan or an authorised international distributor.
- ABC Motors also has to invest in the purchase and regular upgrade of equipment and software approved by Nissan for the provision of replacement AEIKs. The staff also needs to be trained in line with any requirements set by Nissan.
- ABC Motors is a more complex and larger entity than its rivals (alternative suppliers) in the aftermarket for replacement Nissan AEIKs. This may imply that the final cost of the product may include a discrete apportionment of indirect costs such as administration expenses.

5.100 ✂

5.101 The cost and price of the replica Nissan AEIK supplied by alternative supplier (✂) in 2012 is shown below in Table 16:

Table 16 Benchmark with competing products – ABC Motors



5.102 ✂

5.103 ✂

5.104 ✂ This is consistent with the conclusion of the ECJ in *Parke* that “a higher price for the patented product as compared with the unpatented product does not necessarily constitute an abuse”<sup>88</sup> but may be attributed to differences in the cost structure.

5.105 Due to the reasons exposed above, the application of this benchmark does not show that ABC Motors has engaged in excessive pricing in the supply of AEIKs.

**(ii) Benchmark - prices of comparable products in other markets**

5.106 This benchmark compares Nissan AEIKs distributed by ABC Motors with other similar products distributed by ABC Motors itself. This exercise aims at assessing the pricing policy of ABC Motors with regards to AEIKs in a multi-product setting. It would determine whether ABC Motors is charging excessive prices by comparing its price to cost ratios for Nissan AEIKs against the price to cost ratio for other ‘comparable products’ in markets where ABC Motors faces competitive constraints such as higher threat of entry.

5.107 In finding appropriate products for benchmarking purposes, restrictions were imposed on the volume of sales and the price range in order to find products comparable to AEIKs in terms of demand and costing structure. These restrictions excluded fast moving goods or goods which are exceptionally costly to supply from the products considered for the benchmark. The benchmark uses products which have a similar volume of sales as AEIK and are in similar price range. While a low volume of sales possibly due to low demand may act as a deterrent for firms to enter the market for AEIKs and invest into the product, it does not constitute a barrier to entry in the event that the price increases or excessive prices are being charged.

5.108 The investigation sought to identify the characteristics of AEIKs which are likely to act as barriers to entry in the market in the event that the main party is charging excessive prices. The first factor is that the device needs to be coded and synchronised.

5.109 ✂

5.110 All these characteristics place AEIKs in a category of spare parts for which it is more difficult to import and supply substitutes i.e. OEM parts or counterfeit or replica products, in contrast with other categories of parts. For a part presenting the above characteristics, due to the relatively limited threat of entry in the market, a business may have an incentive to abuse its monopoly power and exploit customers by (i) putting a higher mark-up and transferring a higher proportion of costs on customers than for similar products without those characteristics or (ii) by diverting a significantly higher proportion of indirect costs to the product when compared to other similar products without those characteristics. This is explained by the fact that the markets for a part

<sup>88</sup> Case 24/67, *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECR 55, at page 72

without one or all of those characteristics face a higher threat of entry which constrains the ability of the business to charge excessive prices.

5.111 Therefore typical products in different categories of parts presenting some, all or none of the above characteristics are used for benchmarking purposes as shown in Table 17 at 5.115 below.

5.112 The price-to-cost ratios have been calculated for typical parts in four main categories-

(a) **Category A** consist of parts which are coded and/or synchronised and are not stock item. They are ordered specifically for a particular vehicle. They also require the use of same equipment, tools, software and databases, and the intervention of the same category of staff as for the provision of AEIKs.

In essence, they are the most similar parts to AEIKs while not performing the same functions.

(b) **Category B** refers to parts which are not coded or synchronised but are not stock items and are ordered only when required by a customer. This would include parts which are ordered specifically for a particular model for which there are very few units in the Mauritian market. This would exclude parts which need to be replaced over regular intervals for models more widely available in the market.

(c) **Category C and Category D** refer to parts which are neither coded and/or synchronised nor are not stock items, but respectively have the same volume of sales as Category A and B. The parts in Category C and D are comparable to AEIKs based on the volume of sales or movement but are situated in markets which face a higher threat of entry than Category A and B. The market for category B products has a higher threat of entry than category A products in the sense that business would be able to import and supply a substitute OEM part, counterfeit part or replica more easily as it would not require coding from the manufacturer or synchronising using specific equipment, tools or database.

5.113 In essence, if ABC Motors was determining its prices based on the threat of entry, intensity of competition and customer willingness to pay rather than on the cost of providing the product to the customer, the price to cost ratios of parts in Category A would significantly lower than for parts in other categories.

5.114 Then, in the event that ABC Motors is charging excessive prices for AEIKs by taking advantage of the low threat of entry and high willingness to pay, the price to cost ratios of AEIKs would be lower or similar to products in Category A and would be significantly lower than the price to cost ratios for other categories.

5.115 Table 17 below, shows the price-to-cost ratios for typical products under different categories.

Table 17 Benchmark with comparable products from ABC Motors



5.116 ✂

5.117 ✂

5.118 ✂

5.119 ✂

5.120 When contrasting the price to cost ratios of AEIKs with typical parts in the different categories, it transpires that the main party is not taking advantage of product and market characteristics specific to AEIKs to exploit customers by charging excessive prices.

5.121 The price to cost ratios of AEIKs, may also suggest that ABC Motors positions AEIKs more as a service to customers in its primary market rather than a product in itself.

**(iii) Benchmark - prices of related products in other markets**

5.122 This benchmark does not apply for ABC Motors Co Ltd.

**(iv) Findings concerning excessive pricing by ABC Motors**

5.123 The body of evidence gathered and the outcome of the application of the above economic analyses is not enough to weigh on the balance of probabilities in favour of a finding of abuse of monopoly situation in the form of excessive pricing for replacement AEIKs for Nissan cars by ABC Motors. The finding of the ED is that the allegation of excessive pricing cannot be sustained against ABC Motors.

## **(F) Price/Cost Benchmarking – Leal**

### **(i) Benchmark - competitors' prices in the same relevant market**

5.124 This benchmark is about comparing the price to cost ratio of Leal in the supply of Renault and BMW AEIKs with their nearest substitute in the relevant aftermarkets. The aim is to assess if the price to cost ratios of AEIKs of alternative suppliers are significantly different. In the event that the price to cost ratios of Leal are significantly larger than those of alternative suppliers, this would tend to demonstrate that Leal is engaging in excessive pricing for replacement Renault and BMW AEIKs and related services.

5.125 In using this form of benchmark, it is important to consider the following when benchmarking original Renault and BMW AEIKs distributed by Leal with replacement AEIKs supplied by the alternative suppliers:

- Being an authorised dealer for Renault and BMW implies that Leal has to meet all standards set by Renault and BMW. This implies that Leal has to purchase the components for the AEIKs from Renault and BMW or from authorised international distributors.
- Leal also has to invest in the purchase and regular upgrade of equipment and software approved by both Renault and BMW for the provision of replacement AEIKs. The staffs also need to be trained in line with any requirements set by Renault and BMW.
- Leal is a more complex and larger entity than its rivals (alternative suppliers) in the aftermarkets for replacement AEIKs for Renault and BMW. This may imply that the final cost of the product may include a discrete apportionment of indirect costs such as administration expenses.

5.126 ✂

5.127 The cost and price of the replica BMW AEIK supplied by alternative suppliers (✂) and (✂) in 2012 is shown below in Table 18:

Table 18 Benchmark with competing products of BMW AEIKs



5.128 ✂

5.129 ✂

5.130 ✂

5.131 The cost and price of the replacement Renault AEIK supplied by alternative suppliers - (✂) for 2011 and 2012 is shown below in Table 19:

Table 19 Benchmark with competing products of Renault AEIKs



5.132 ✂

5.133 ✂

5.134 ✂ From this perspective, it would be unreasonable to conclude that Leal is engaging in the excessive pricing of Renault AEIKs.

5.135 Due to the reasons exposed above, the application of this benchmark does not show that Leal has engaged in excessive pricing in the supply of replacement AEIKs for Renault and BMW.

**(ii) Benchmark - prices of comparable products in other markets**

5.136 This benchmark compares AEIKs distributed by Leal with other similar products distributed by Leal itself. This exercise aims at assessing the pricing policy of Leal with regards to AEIKs in a multi-product setting. It would determine whether Leal is charging excessive prices by comparing its price to cost ratios for Renault and BMW AEIKs against the price to cost ratio for other Renault and BMW ‘comparable products’ in markets where Leal faces competitive constraints such as higher threat of entry.

5.137 In finding appropriate products for benchmarking purposes, restrictions were imposed on the volume of sales and the price range in order to find products comparable to AEIKs in terms of demand and costing structure. These restrictions excluded fast moving goods or goods which are exceptionally costly to supply from the products considered for the benchmark. The benchmark uses products which have a similar volume of sales as the AEIK and are in similar price range. While a low volume of sales possibly due to low demand may act as a deterrent for firms to enter the market for AEIKs and invest into the product, it does not constitute a barrier to entry in the event that the price increases or excessive prices are being charged.

5.138 The investigation sought to identify the characteristics of AEIKs which are likely to act as barriers to entry in the market in the event that the main party is charging excessive prices. The first factor is that the device needs to be coded and synchronised.

✂

5.139 All these characteristics place AEIKs in a category of spare parts for which it is more difficult to import and supply substitutes i.e. OEM parts or counterfeit or replica products, in contrast with other categories of parts. For a part presenting the above

characteristics, due to the relatively limited threat of entry in the market, a business may have an incentive to abuse its monopoly power and exploit customers by (i) putting a higher mark-up and transferring a higher proportion of costs on customers than for similar products without those characteristics or (ii) by diverting a significantly higher proportion of indirect costs to the product when compared to other similar products without those characteristics. This is explained by the fact that the markets for a part without one or all of those characteristics face a higher threat of entry which constrains the ability of the business to charge excessive prices.

5.140 Therefore typical products in different categories of parts presenting some, all or none of the above characteristics are used for benchmarking purposes as shown in Table 20 at 5.144 below.

5.141 The price-to-cost ratios have been calculated for typical parts in four main categories-

(a) **Category A** consist of parts which are coded and/or synchronised and are not stock item. They are ordered specifically for a particular vehicle. They also require the use of same equipment, tools, software and databases, and the intervention of the same category of staff as for the provision of AEIKs. In essence, they are the most similar parts to AEIKs while not performing the same functions.

(b) **Category B** refers to parts which are not coded or synchronised but are not stock items and are ordered only when required by a customer. This would include parts which are ordered specifically for a particular model for which there are very few units in the Mauritian market. This would exclude parts which need to be replaced over regular intervals for models more widely available in the market.

(c) **Category C and Category D** refer to parts which are neither coded and/or synchronised nor are not stock items, but respectively have the same volume of sales as Category A and B. The parts in Category C and D are comparable to AEIKs based on the volume of sales or movement but are situated in markets which face a higher threat of entry than Category A and B. The market for category B products has a higher threat of entry than category A products in the sense that business would be able to import and supply a substitute OEM part, counterfeit part or replica more easily as it would not require coding from the manufacturer or synchronising using specific equipment, tools or database.

5.142 In essence, if Leal was determining its prices based on the threat of entry, intensity of competition and customer willingness to pay rather than on the cost of providing the product to the customer, the price to cost ratios of parts in Category A would be significantly lower than for parts in other categories.

5.143 Then, in the event that Leal is charging excessive prices for AEIKs by taking advantage of the low threat of entry and high willingness to pay, the price to cost ratios of AEIKs would be lower or similar to products in Category A and would be significantly lower than the price to cost ratios of parts in other categories.

5.144 Table 20 below, shows the price-to-cost ratios for typical products under different categories.

Table 20 Benchmark with comparable products from Leal



5.145 ✂

5.146 ✂

5.147 ✂

5.148 ✂

5.149 When contrasting the price to cost ratios of BMW and Renault AEIKs with typical parts in the different categories, it transpires that Leal is not taking advantage of product and market characteristics specific to AEIKs to exploit customers by charging excessive prices.

5.150 The price to cost ratios of AEIKs, may also suggest that Leal positions AEIKs more as a service to customers in its primary market rather than a product in itself.

**(iii) Benchmark - prices of related products in other markets**

5.151 The CCM applied this benchmark in the investigation by comparing Leal's price to cost ratios of replacement AEIKs for Renault and BMW with each other.

5.152 The assessment made shows that the price to cost ratio of Leal in the market for Renault and BMW AEIKs are in the same range ✂ respectively. This information does not indicate that Leal's pricing is exploitative in any of the two aftermarkets.

**(iv) Findings concerning excessive pricing by Leal**

5.153 The body of evidence gathered and the outcome of the application of the above economic analyses is not enough to weigh on the balance of probabilities in favour of a finding of abuse of monopoly situation in the form of excessive pricing for replacement AEIKs for BMW and Renault cars by Leal. The finding of the ED is that the allegation of excessive pricing cannot be sustained against Leal.

## **(G) Price/Cost Benchmarking – Ifracmac**

### **(i) Benchmark - competitors' prices in the same relevant market**

5.154 This benchmark is about comparing the price to cost ratio of Ifracmac in the supply of replacement AEIKs for Mercedes, Mitsubishi and Peugeot with their nearest substitute in the relevant aftermarkets. The aim is to assess if the price to cost ratios (of replacement AEIKs for Mercedes, Mitsubishi and Peugeot) of alternative suppliers are significantly different. In the event that the price to cost ratios of Ifracmac are significantly larger than those of alternative suppliers, this would tend to demonstrate that Ifracmac is engaging in excessive pricing for replacement Mercedes, Mitsubishi and Peugeot AEIKs and related services.

5.155 In using this form of benchmark, it is important to consider the following when benchmarking original Mercedes, Mitsubishi and Peugeot AEIKs distributed by the Ifracmac with replacement AEIKs supplied by the alternative suppliers:

- Being an authorised distributor for Mercedes, Mitsubishi and Peugeot implies that Ifracmac has to meet all standards set by the respective manufacturers of Mercedes, Mitsubishi and Peugeot. This implies that Ifracmac has to purchase the components for the replacement AEIKs from the manufacturers or from authorised international distributors.
- Ifracmac also has to invest in the purchase and regular upgrade of equipment and software approved by the manufacturers for the provision of AEIKs. The staff also needs to be trained in line with any requirements set by the manufacturers.
- Ifracmac is a more complex and larger entity than its rivals (alternative suppliers) in these aftermarkets. This may imply that the final cost of the product may include a discrete apportionment of indirect costs such as administration expenses.

5.156 Unfortunately, several complications arise in the use of the benchmark against competing products. ✂

5.157 ✂

5.158 The cost and price of the replica Mitsubishi AEIK supplied by alternative supplier (✂) in 2012 are shown below (Table 21):

Table 21 Benchmark with competing products of Mitsubishi AEIKs

✂

5.159 ✂

5.160 ✂

5.161 ✂

5.162 The cost and price of the replica Peugeot AEIK supplied by alternative suppliers - (✂) for 2011 and 2012 are shown below in Table 22:

Table 22 Benchmark with competing products of Peugeot AEIKs

✂

5.163 ✂

5.164 ✂

5.165 ✂

5.166 ✂

5.167 Due to the reasons exposed above, the application of this benchmark does not show that Iframac has engaged in excessive pricing in the supply of replacement AEIKs for the makes of car it distributes.

**(ii) Benchmark - prices of comparable products in other markets**

5.168 This benchmark compares AEIKs distributed by Iframac with other similar products distributed by Iframac itself. This exercise aims at assessing the pricing policy of Iframac with regards to AEIKs in a multi-product setting. It would determine whether Iframac is charging excessive prices by comparing its price to cost ratios for Mercedes, Mitsubishi and Peugeot replacement AEIKs against the price to cost ratio for other Mercedes, Mitsubishi and Peugeot 'comparable products' in markets where Iframac faces competitive constraints such as higher threat of entry.

5.169 In finding appropriate products for benchmarking purposes, restrictions were imposed on the volume of sales and the price range in order to find products comparable to AEIKs in terms of demand and costing structure. These restrictions excluded fast moving goods or goods which are exceptionally costly to supply from the products considered for the benchmark.

5.170 The benchmark uses products which have a similar volume of sales as the AEIK and are in similar price range. While a low volume of sales possibly due to low demand may act as a deterrent for firms to enter the market for AEIKs and invest into the product, it does not constitute a barrier to entry in the event that the price increases or excessive prices are being charged.

5.171 The investigation sought to identify the characteristics of AEIKs which are likely to act as barriers to entry in the market in the event that Iframac is charging excessive prices. The first factor is that the device needs to be coded and synchronised. Another

factor is that an AEIK is not a stock item and the components are ordered specifically for a particular Mercedes, Mitsubishi or Peugeot vehicle.

5.172 All these characteristics place AEIKs in a category of spare parts for which it is more difficult to import and supply substitutes i.e. OEM parts or counterfeit or replica products, in contrast with other categories of parts. For a part presenting the above characteristics, due to the relatively limited threat of entry in the market, a business may have an incentive to abuse its monopoly power and exploit customers by (i) putting a higher mark-up and transferring a higher proportion of costs on customers than for similar products without those characteristics or (ii) by diverting a significantly higher proportion of indirect costs to the product when compared to other similar products without those characteristics. This is explained by the fact that the markets for a part without one or all of those characteristics face a higher threat of entry which constrains the ability of the business to charge excessive prices.

5.173 Therefore typical products in different categories of parts presenting some, all or none of the above characteristics are used for benchmarking purposes as shown in Table 23 at 5.178 below.

5.174 The price-to-cost ratios have been calculated for typical parts in four main categories-

(a) **Category A** consists of parts which are coded and/or synchronised and are not stock item. They are ordered specifically for a particular vehicle. They also require the use of same equipment, tools, software and databases, and the intervention of the same category of staff as for the provision of AEIKs. In essence, they are the most similar parts to AEIKs while not performing the same functions.

(b) **Category B** refers to parts which are not coded or synchronised but are not stock items and are ordered only when required by a customer. This would include parts which are ordered specifically for a particular model for which there are very few units in the Mauritian market. This would exclude parts which need to be replaced over regular intervals for models more widely available in the market.

(c) **Category C and Category D** refer to parts which are neither coded and/or synchronised nor are not stock items, but respectively have the same volume of sales as Category A and B. The parts in Category C and D are comparable to AEIKs based on the volume of sales or movement but are situated in markets which face a higher threat of entry than Category A and B. The market for category B products has a higher threat of entry than category A products in the sense that business would be able to import and supply a substitute OEM part, counterfeit

part or replica more easily as it would not require coding from the manufacturer or synchronising using specific equipment, tools or database.

5.175 In essence, if Ifracmac was determining its prices based on the threat of entry, intensity of competition and customer willingness to pay rather than on the cost of providing the product to the customer, the price to cost ratios of parts in Category A would be significantly lower than for parts in other categories.

5.176 Then, in the event that Ifracmac is charging excessive prices for AEIKs by taking advantage of the low threat of entry and high willingness to pay, the price to cost ratios of AEIKs would be lower or similar to products in Category A and would be significantly lower than the price to cost ratios of parts in other categories.

5.177 Based on the sample of cost information provided by Ifracmac, it appears that it has included the cost of importing the parts and the related labour cost in its calculation of direct variable costs. Therefore, the price-to-cost ratios of Mercedes, Mitsubishi and Peugeot AEIKs are principally assessed in relation to the ratios of related parts.

5.178 Table 23 below, shows the price-to-cost ratios for typical products related to Mercedes AEIKs under different categories.

Table 23 Benchmark with comparable products of Mercedes AEIKs from Ifracmac



5.179 ✂

5.180 ✂

5.181 ✂

5.182 When contrasting the price to cost ratios of Mercedes AEIKs with typical parts in the different categories, it transpires that Ifracmac is not taking advantage of the product and market characteristics specific to AEIKs to exploit customers by charging excessive prices.

5.183 Table 24 below, shows the price-to-cost ratios for typical Mitsubishi related products under different categories. The same information is presented below whereby the direct variable costs are expressed as a percentage of the final selling price.

Table 24 Benchmark with comparable products of Mitsubishi AEIKs from Ifracmac



5.184 ✂

5.185 ✂

5.186 ✂

5.187 When comparing the price to cost ratios of Mitsubishi AEIKs with typical parts in the different categories, it transpires that Iframac is not taking advantage of product and market characteristics specific to AEIKs to exploit customers by charging excessive prices.

5.188 Table 25 below, shows the price-to-cost ratios for typical Peugeot related products under different categories. The same information is presented below whereby the direct variable costs are expressed as a percentage of the final selling price.

Table 25 Benchmark with comparable products of Peugeot AEIKs from Iframac



5.189 ✂

5.190 ✂

5.191 ✂

5.192 When comparing the price to cost ratios of Peugeot AEIKs with typical parts in the different categories, it transpires that Iframac is not taking advantage of product and market characteristics specific to AEIKs to exploit customers by charging excessive prices.

5.193 The price to cost ratios of AEIKs, may also suggest that Iframac positions AEIKs more as a service to customers in its primary market rather than a product in itself.

### **(iii) Benchmark - prices of related products in other markets**

5.194 The CCM applied this benchmark in the investigation by comparing Iframac's price to cost ratios of replacement AEIKs for Mercedes, Peugeot and Mitsubishi with each other.

5.195 The assessment made shows that in 2010 to 2012, the price to cost ratios of Iframac in the market for Mercedes, Peugeot and Mitsubishi AEIKs are within a small range, ✂

5.196 This benchmark does not indicate that Iframac's pricing is exploitative in any of the three aftermarkets.

### **(iv) Findings concerning excessive pricing by Iframac**

5.197 The body of evidence gathered and the outcome of the application of the above economic analyses is not enough to weigh on the balance of probabilities in favour of a finding of abuse of monopoly situation in the form of excessive pricing for replacement AEIKs for Mercedes, Mitsubishi and Peugeot cars by Iframac. The finding of the ED is that the allegation of excessive pricing cannot be sustained against Iframac.

## 6. The Competition Concerns – Foreclosure

6.1 The assessment of this theory of harm is whether the individual conduct of the main parties is in breach of section 46 (2) (a) of the Act and has the object or effect of preventing, restricting or distorting competition. This theory of harm was described - in the Letters informing the main parties of the start of the investigation - as an abuse of *“the monopoly situation by way of market foreclosure via its conduct of withholding from the owners of cars the AEIK passwords for the cars so that the availability of substitute products and substitute synchronising services are restricted on the market.”*<sup>89</sup>

6.2 This theory of harm is assessed only in relation to the supply of replacement AEIKs for the makes of car distributed by the main parties.

### (A) Alternative suppliers and the availability of codes

6.3 The CCM assessed whether the non-disclosure of the codes required for synchronisation process for replacement AEIKs by the main parties acts as a barrier to entry and expansion thereby foreclosing access to the relevant AEIKs aftermarket and has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

6.4 The main question is whether the non-availability of the codes does in fact restrict the ability of suppliers other than the main parties (i.e. alternative suppliers) to provide replacement AEIKs and whether this practice results in car owners being ‘locked-in’ to source their need for replacement AEIKs exclusively from the main parties.

6.5 The alternative suppliers are able to import replica/imitations of most types of AEIKs from various countries such as China, Italy and Spain amongst others and they do not face any impediments, legal or otherwise.

6.6 In the case of cars distributed by ABC Motors, the alternative suppliers claim that they are capable of providing replacement AEIKs and synchronising services for Nissan.

6.7 In the case of cars distributed by Leal, the alternative suppliers claim that they are capable of providing replacement AEIKs and synchronising services for Renault. However, the alternative suppliers stated that they are unable in most cases to provide replacement AEIKs for BMW. ✂

6.8 In the case of cars distributed the alternative suppliers claim that they are capable of providing replacement AEIKs and synchronising services for Mitsubishi and Peugeot cars. However, the alternative suppliers stated that they are not able to provide replacement AEIKs for Mercedes ✂

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<sup>89</sup> Letters dated 31<sup>st</sup> January 2012

6.9 As explained above - under chapter 4 (F) on supply side substitution ✂ the alternative suppliers are not able to provide all replacement AEIKs because of:

- a) the lack of information i.e. the code needed to synchronise a blank AEIK irrespective of whether it is a genuine part or imitation or replica; and
- b) because they do not have all equipment, software ✂ to perform the service required in the supply of the product.

6.10 Thus, alternative suppliers also claim that the availability of the codes would make it straight forward for them to provide replacement AEIKs and synchronising services for the makes of car distributed by the main parties.

6.11 On the other hand, the availability of the codes does not mean that the consumers<sup>90</sup> will automatically benefit. This is because the alternative suppliers will have to invest in more equipment and software as well as in the training of staff. ✂

### ***(B) Non-disclosure by Manufacturers***

6.12 The main reason why car manufacturers<sup>91</sup> do not disclose the codes or information related to the AEIK and related to their transponder based security systems fitted in their respective cars - is the need to protect the integrity of the overall security systems in the car. The manufacturers of the makes of car distributed by the main parties set defined parameters with the view to monitor closely the use of the information and intervention related to the security systems and the AEIK. By controlling the access to the information and also the intervention in relation to an AEIK, the aim of the manufacturers is to assure that any intervention is done within defined parameters to safeguard the interest of the car owner and provide enhanced security to guard against theft.

6.13 The next sections will assess the factors to determine if the individual conduct of the main parties is indeed foreclosing access to the aftermarket for replacement AEIKs.

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<sup>90</sup> This refers to owners of the makes of car distributed by the main parties

<sup>91</sup> Including the manufacturers of the makes of car distributed by the main parties

### **(C) Factors to determine foreclosure - ABC Motors**

6.14 This chapter includes the assessment of the factors to determine whether the conduct of ABC Motors has the object or effect of foreclosure.

#### **(i) *The position of the dominant enterprise***

6.15 Given that ABC Motors is in a dominant position, there is a high likelihood that non-disclosure of the codes has the effect of protecting that position and lead to anti-competitive foreclosure. However, it should be noted again that the decision not to disclose the codes and information required for synchronisation of Nissan AEIKs stems from the car manufacturer.

#### **(ii) *The extent of the allegedly abusive conduct:***

6.16 ✂ Moreover, the practice of non-disclosure of codes has been applied regularly over a long a period of time extending over the period covered by the investigation. This may indicate a likely foreclosure effect.

#### **(iii) *The position of the customers***

6.17 This investigation did not uncover any possible selectivity of the conduct by ABC Motors when charging customers for replacement AEIKs with the view to foreclose the replacement AEIKs aftermarket.

6.18 As was explained earlier under chapter 4 (D) (ii) of this report, a car owner is locked - in due to the lack of inter-brand substitution for AEIKs. ✂

#### **(iv) *Possible evidence of actual foreclosure***

6.19 None of the current alternative suppliers have indicated that they intend to exit the market because of the unavailability of the codes and as explained above the alternative suppliers have indeed been investing in training courses and investment in new equipment is also possible.

#### **(v) *Evidence of any exclusionary strategy***

6.20 The non-disclosure of the codes is imposed on ABC Motors as a matter of policy by the manufacturer which is also the Intellectual Property Rights holder.

6.21 The non-disclosure imposition forms part of the dealership agreement. Thus, it is not a unilateral decision by ABC Motors not to disclose the codes to its customers with the view to foreclose the market. ABC Motors stated that it is not the owner of the codes required for synchronisation and ✂. ABC Motors follows directions from the

manufacturer in terms of the technical training it is required to provide its staff and also in terms of the equipment it is required to invest in so as to provide replacement AEIKs.

6.22 From the above it appears that the non-disclosure of the codes is not part of a strategy by ABC Motors to foreclose the aftermarket for compatible replacement AEIKs for Nissan cars. ABC Motors has not manifested any intention to preclude the existing or potential suppliers from the aftermarket, the latter are able to import and supply compatible replacement AEIKs for Nissan. During the investigation, no alternative supplier has manifested an intention to ask the manufacturer of Nissan to disclose information and make available equipment required in the provision of replacement AEIKs for the cars.

6.23 No evidence of exclusionary strategy was uncovered in this investigation the more so as the investigation could not show that the pricing of AEIKs by ABC Motors is excessive and is an exploitative abuse of monopoly situation. Thus, there is no anti-competitive strategy to exclude competitors in order to reap monopoly profits to the detriment of its customers.

**(vi) *The position of the dominant undertaking's competitors***

6.24 This aspect of the assessment is viewed as crucial especially in terms of the business model and mode of operation of alternative suppliers and the impact on the market.

(a) ✂

(b) It is costly for the alternative suppliers to import and stock the required microchip and/or the replica or imitation AEIK blank mainly because these are sold in bulk. The alternative suppliers have mentioned that purchasing in bulk may not make business sense due to the limited size of the market and the dominance of ABC Motors. Sometimes the alternative supplier may have a compatible blank AEIK but the required microchip is unavailable so that the alternative supplier cannot provide the customer with a solution.

(c) However, it has also been observed that there have effectively been new entrants on the markets (✂) and they have invested in training and another alternative supplier is currently training staff in the field. The alternative suppliers have also indicated that various types of equipment and software required for the supply of AEIKs are available on the market. ✂

(d) The distribution of codes or information required for the supply of AEIKs, to alternative suppliers will be conditional upon the latter's ability to meet the

standards and regulations set by the manufacturer with regards to infrastructure<sup>92</sup>, equipment, software, procedure sets, training of staff and quality of service because the alternative supplier will be associated with the Nissan brand. Matching those standards and abiding by those regulations may require significant investment in new infrastructure, equipment, software and in the training of staff.

Existing alternative suppliers have already invested in equipment, some of which may not be brand specific unlike those used by suppliers of original AEIKs. Alternative suppliers also use different processes from the main party in the absence of the codes. The availability of the codes and the conditions that may be imposed by the manufacturer would require a change in the current business model of the existing alternative suppliers. The disclosure of the codes may possibly facilitate the entry of a new type of alternative suppliers which have the capacity to conform to any requirements of the manufacturer and which are willing to invest accordingly.

However, alternative suppliers may be unwilling to make such investment given (i) the relatively smaller size of their businesses in contrast with ABC Motors and (ii) the low volume of sales for AEIKs.

6.25 From the above the CCM gathered that there are competitors of ABC Motors operating in the market. ✂

#### ***(D) Factors to determine foreclosure - Leal***

6.26 This chapter includes the assessment of the factors to determine whether the conduct of Leal has the object or effect of foreclosure.

##### ***(i) The position of the dominant enterprise***

6.27 Given that Leal is in a dominant position, there is a high likelihood that non-disclosure of the codes has the effect of protecting that position and lead to anti-competitive foreclosure. However, it should be noted again that the decision not to disclose the codes and information required for synchronisation of BMW and Renault AEIKs stems from the respective car manufacturers.

##### ***(ii) The extent of the allegedly abusive conduct:***

6.28 ✂ Moreover, the practice of non-disclosure of codes has been applied regularly over a long a period of time extending over the period covered by the investigation. This may indicate a likely foreclosure effect.

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<sup>92</sup> Workshop, store, etc.

**(iii) The position of the customers**

6.29 The investigation did not uncover any possible selectivity of the conduct by Leal when charging customers for replacement AEIKs with the view to foreclose the replacement AEIKs aftermarket.

6.30 As was explained earlier under chapter 4 (D) (ii) of this report, a car owner is 'locked – in' due to the lack of inter-brand substitution for AEIKs. ✂

**(iv) Possible evidence of actual foreclosure**

6.31 None of the current alternative suppliers have indicated that they intend to exit the market because of the unavailability of the codes and as explained above the alternative suppliers have indeed been investing in training courses and investment in new equipment is also possible.

**(v) Evidence of any exclusionary strategy**

6.32 The non-disclosure of the codes is imposed on Leal as a matter of policy by the manufacturers of BMW and Renault which are also the Intellectual Property Rights holders.

6.33 The non-disclosure imposition forms part of the dealership agreement. Thus, it is not a unilateral decision by Leal not to disclose the codes to its customers with the view to foreclose the market. Leal stated that it is not the owner of the codes required for synchronisation and ✂. Leal follows directions from the manufacturers (BMW and Renault) in terms of the technical training it is required to provide its staff and also in terms of the equipment it is required to invest in so as to provide replacement AEIKs.

6.34 From the above it appears that the non-disclosure of the codes is not part of a strategy by Leal to foreclose the aftermarket for compatible replacement AEIKs for BMW and Renault cars. Leal has not manifested any intention to preclude the existing or potential suppliers from the aftermarket, the latter are able to import and supply compatible replacement AEIKs for BMW and Renault. During the investigation, no alternative supplier has manifested an intention to ask the manufacturers of BMW or Renault to disclose information and make available equipment required in the provision of replacement AEIKs for the cars.

6.35 No evidence of exclusionary strategy was uncovered in this investigation the more so as the investigation could not show that the pricing of AEIKs by Leal is excessive and is an exploitative abuse of monopoly situation. Thus, there is no anti-competitive strategy to exclude competitors in order to reap monopoly profits to the detriment of its customers.

**(vi) The position of the dominant undertaking's competitors**

6.36 This aspect of the assessment is viewed as crucial especially in terms of the business model and mode of operation of alternative suppliers and the impact on the market.

(a) ✂

(b) It is costly for the alternative suppliers to import and stock the required microchip and/or the replica or imitation AEIK blank mainly because these are sold in bulk. The alternative suppliers have mentioned that purchasing in bulk may not make business sense due to the limited size of the aftermarkets and the dominance of Leal therein. Sometimes the alternative supplier may have a compatible blank AEIK but the required microchip is unavailable so that the alternative supplier cannot provide the customer with a solution.

(c) However, it has also been observed that there have effectively been new entrants on the markets (✂) and they have invested in training and another alternative supplier is currently training staff in the field. The alternative suppliers have also indicated that the equipment and software needed for the supply of AEIKs are available on the market. ✂

(d) The distribution of codes or information required for the supply of AEIKs to local alternative supplier will be conditional upon the latter's ability to meet the standards and regulations set by the manufacturer with regards to infrastructure<sup>93</sup>, equipment, software, processes, training of staff and quality of service as the distributor will be associated with their brand reputation (BMW and Renault). Matching those standards and abiding by those regulations may require significant investment in new infrastructure, equipment, software and in the training of staff.

Existing alternative suppliers have already invested in equipment, some of which may not be brand specific unlike those used by suppliers of original AEIKs. Alternative suppliers also use different processes from the main party in the absence of the codes. The availability of the codes and the conditions that may be imposed by the manufacturer would require a change in the current business model of the existing alternative suppliers. The disclosure of the codes may possibly facilitate the entry of a new type of alternative suppliers which have the capacity to conform to any requirements of the manufacturer and which are willing to invest accordingly.

However, alternative suppliers may be unwilling to make such investment given (i) the relatively smaller size of their businesses in contrast with Leal and (ii) the low volume of sales for AEIKs.

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<sup>93</sup> Workshop, store, etc.

6.37 From the above the CCM gathered that there are competitors of Leal operating in the market. ✂

### **(E) Factors to determine foreclosure - Iframac**

6.38 This chapter includes the assessment of the factors to determine whether the conduct of Iframac has the object or effect of foreclosure.

#### **(i) *The position of the dominant enterprise***

6.39 Given that Iframac is in a dominant position, there is a high likelihood that non-disclosure of the codes has the effect of protecting that position and lead to anti-competitive foreclosure. However, it should be noted again that the decision not to disclose the codes and information required for synchronisation of Mercedes, Mitsubishi and Peugeot AEIKs stems from the respective car manufacturers.

#### **(ii) *The extent of the allegedly abusive conduct***

6.40 ✂ Moreover, the practice of non-disclosure of codes has been applied regularly over a long a period of time extending over the period covered by the investigation. This may indicate a likely foreclosure effect.

#### **(iii) *The position of the customers***

6.41 This investigation did not uncover any possible selectivity of the conduct by Iframac when charging customers for replacement AEIKs with the view to foreclose the replacement AEIKs aftermarkets.

6.42 As was explained earlier under chapter 4 (D) (ii) of this report, a car owner is 'locked – in' due to the lack of inter-brand substitution for AEIKs. ✂

#### **(iv) *Possible evidence of actual foreclosure***

6.43 None of the current alternative suppliers have indicated that they intend to exit the market because of the unavailability of the codes and as explained above the alternative suppliers have indeed been investing in training courses and investment in new equipment is also possible.

#### **(v) *Evidence of any exclusionary strategy***

6.44 The non-disclosure of the codes is imposed on Iframac as a matter of policy by the manufacturers of Mercedes, Mitsubishi and Peugeot which are also the Intellectual Property Rights holders. Regarding Peugeot and Mitsubishi, Iframac is communicated with codes and other information related with AEIKs only after having ordered the AEIK

from the manufacturer and any such order is made only after a customer confirms his intention to purchase a replacement AEIK from Ifracmac.

6.45 The non-disclosure imposition forms part of the dealership agreement. Thus, it is not a unilateral decision by Ifracmac not to disclose the codes to its customers with the view to foreclose the market. Ifracmac is not the owner of the codes required for synchronisation ✂. Ifracmac only follows directions from the manufacturers in terms of the technical training it is required to provide its staff and also in terms of the equipment it is required to invest in so as to provide replacement AEIKs.

6.46 From the above it appears that the non-disclosure of the codes is not part of a strategy by Ifracmac to foreclose the aftermarket for compatible replacement AEIKs for Mercedes, Mitsubishi and Peugeot cars. Ifracmac has not manifested any intention to preclude the existing or potential suppliers from the aftermarket, the latter are able to import and supply compatible replacement AEIKs for Mercedes, Mitsubishi and Peugeot. However, during the investigation, no alternative supplier has manifested an intention to ask the manufacturers of Mercedes, Mitsubishi or Peugeot to disclose information and make available equipment required in the provision of replacement AEIKs.

6.47 No evidence of exclusionary strategy was uncovered in this investigation the more so as the investigation could not show that the pricing of AEIKs by Ifracmac is excessive and is an exploitative abuse of monopoly situation. Thus, there is no anti-competitive strategy to exclude competitors in order to reap monopoly profits to the detriment of its customers.

**(vi) The position of the dominant undertaking's competitors**

6.48 This aspect of the assessment is viewed as crucial especially in terms of the business model and mode of operation of alternative suppliers and the impact on the market.

(a) As evidenced by sales figures of AEIKs for Mercedes, the alternative suppliers ✂

(b) It is costly for the alternative suppliers to import and stock the required microchip and/or the replica or imitation AEIK blank mainly because these are sold in bulk. The alternative suppliers have mentioned that purchasing in bulk may not make business sense due to the limited size of the aftermarkets and the dominance of Ifracmac therein. Sometimes the alternative supplier may have a compatible blank AEIK but the required microchip is unavailable so that the alternative supplier cannot provide the customer with a solution.

(c) However, it has also been observed that there have effectively been new entrants on the markets (✂) and they have invested in training and another

alternative supplier is currently training staff in the field. The alternative suppliers have also indicated that the equipment and software needed for the supply of AEIKs are available on the market. ✂

**(d)** The distribution of codes or information - required for the supply of AEIKs - to local alternative suppliers will be conditional upon the latter's ability to meet the standards and regulations set by the manufacturer with regards to infrastructure<sup>94</sup>, equipment, software, processes, training of staff and quality of service as the distributor will be associated with their brand reputation (Mercedes, Mitsubishi and Peugeot). Matching those standards and abiding by those regulations may require significant investment in new infrastructure, equipment, software and in the training of staff.

Existing alternative suppliers have already invested in equipment, some of which may not be brand specific unlike those used by suppliers of original AEIKs. Alternative suppliers also use different processes from the main party in the absence of the codes. The availability of the codes and the conditions that may be imposed by the manufacturer would require a change in the current business model of the existing alternative suppliers. The disclosure of the codes may possibly facilitate the entry of a new type of alternative suppliers which have the capacity to conform to any requirements of the manufacturer and which are willing to invest accordingly.

However, alternative suppliers may be unwilling to make such investment given (i) the relatively smaller size of their businesses in contrast with Ifracmac and (ii) the low volume of sales for AEIKs.

6.49 From the above the CCM gathered that there are competitors of Ifracmac operating in the market. They use different methods to synchronise a replacement AEIK in order to operate in the aftermarkets for AEIKs and synchronising services. ✂

## **(F) Damage to consumers or the economy in general**

6.50 Section 3.5 of CCM 4 Guidelines on monopoly situations and non-collusive agreements states that *“[a]nticompetitive foreclosure’ is said to occur when the conduct of a monopoly enterprise restricts or eliminates the effective access of actual or potential competitors to customers or to supplies, to the detriment of consumers or the economy in general.”*

6.51 In the course of this investigation, it has been determined that the unavailability of codes does not prevent the supply of replacement AEIKs by alternative suppliers in the relevant aftermarkets. Alternative suppliers are indeed operating within their own

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<sup>94</sup> Workshop, store, etc.

business models in those markets. One alternative supplier ~~3~~ appear to have restructured his business to focus more on the supply of AEIKs and another is currently investing in training. The view of the CCM is that alternative suppliers have the potential to capture additional market share.

6.52 The decision of manufacturers - of cars distributed by the main parties - not to provide the AEIK codes and other related information to suppliers other than their respective authorised distributors may potentially limit the number of suppliers of AEIKs in Mauritius. However, in the absence of any proven exploitative abuse by the main parties, it cannot be concluded that the unavailability of codes is harming the customers and/or the economy in general the more so as a case excessive is not proved.

6.53 The Mauritian car owners can purchase a replacement AEIKs from a source of his own choice. The car owner may purchase a compatible AEIK from alternative suppliers or the authorised distributor.

### **(G) Conclusion on Foreclosure**

6.54 The body of evidence gathered and the application of the above analyses are not enough to weigh on the balance of probabilities in favour of a finding of abuse of monopoly situation in the form of anticompetitive foreclosure for replacement AEIKs. The finding is that the allegation of anticompetitive foreclosure cannot be sustained against the main parties.

## 7. The Findings and recommendation

### **(A) The Executive Director's Findings**

7.1 The Findings of the investigation are summarised as follows:

#### **(i) The relevant product market**

7.2 The AEIK is not substitutable with normal metal blade key and the AEIK of one brand of car is not substitutable with the AEIK of another brand although both would perform similar function in each car. The relevant focal product is therefore determined as the 'brand-specific replacement AEIK' including the makes of cars distributed by the main parties.

7.3 This product forms part of the aftermarket and since customers do not engage in whole-life costing of replacement AEIKs, the primary market for the sale of cars and the secondary market (aftermarket) for AEIKs are separate markets. Moreover, the that fact switching to AEIKs (secondary products) of other makes of car is not possible due to lack of interoperability between the different makes and the fact that customers face high switching cost in the primary market resulting in a lock-in effect show that the relevant market is the multiple markets (individual markets) for replacement AEIKs and related installation and synchronising services for each makes of car including the makes distributed by the main parties.

#### **(ii) The relevant geographic market**

7.4 The investigation shows that the geographic market is for the supply of AEIKs and related installation and synchronising services in Mauritius. The market has a national dimension to it.

#### **(iii) Market share and Dominance**

7.5 ✂

7.6 Therefore, each main party to the investigation are found to be in a monopoly situation as per section 46 (1) of the Act with market share above the statutory threshold of 30%. Thus, the very high market share together with few alternative suppliers and the lack of competition from the supply side shows that the main parties are individually in a position of dominance, as defined under section 46 (3) of the Act, in the aftermarkets for replacement AEIKs for the respective makes of car they distribute.

**(iv) Excessive Pricing**

7.7 The CCM evaluated the price to cost ratios of the main parties and of alternative suppliers in each of the brand-specific aftermarkets for AEIKs. The ratios of the main parties were benchmarked against the ratios of their respective competitors. The CCM assessed the pricing policy of the main parties with regards to replacement AEIKs in a multi-product setting. The CCM compared the price to cost ratios for AEIKs of the main parties against their own price to cost ratios of other 'comparable products' in markets where they face competitive constraints such as higher threat of entry. Finally, an intra-firm analysis of the price to cost ratios for each make of car distributed by each main party were benchmarked against one another.

7.8 The body of evidence gathered and the outcome of the application of the above-mentioned economic analyses is not enough to weigh on the balance of probabilities in favour of finding an abuse of monopoly situation in the form of excessive pricing of replacement AEIKs by the main parties.

7.9 The finding of the investigation is that the allegation of excessive pricing cannot be sustained; the main parties have not breached Section 46 (2) (b) of the Competition Act 2007.

**(v) Foreclosure**

7.10 Analyses of the factors to determine whether the conduct of the main parties have the object or effect of foreclosing the aftermarkets for replacement AEIKs indicate the following, *inter alia*:

- there are alternative suppliers as competitors to the main parties operating in the aftermarkets;
- the alternative suppliers are able use different methods to synchronise a replacement AEIK in order to operate in the aftermarkets;
- no evidence of exclusionary strategy was uncovered in this investigation;
- the pricing of AEIKs by the main parties is not exploitative and thus not part of an anti-competitive strategy to exclude competitors in order to reap monopoly profits to the detriment of its customers.

7.11 The CCM determines that entry and expansion is possible in the aftermarkets for AEIKs in that access to the code or other information from the manufacturer is not imperative. The above factors coupled with the fact that the non-disclosure of codes and information is imposed on the main parties by car manufacturers lead to the conclusion that the main parties have not engaged in conduct that has the object or effect of

preventing, restricting or distorting competition in the brand-specific aftermarkets for replacement AEIKs and related synchronizing services.

7.12 The finding of the investigation is that the main parties have not breached section 46 (2) (a) of the Competition Act 2007.

### ***(B) ED's recommendation to the Commission***

7.13 Although the main parties are in monopoly situation, they have not abused their position of dominance; as such no recommendation in terms of remedial actions is required.

7.14 The Report provides the basis on which the Commission may determine whether a restrictive business practice is occurring or has occurred on this matter.

7.15 The Executive Director therefore recommends the Commission to take the findings of the investigation into consideration when exercising its decision making function stipulated under section 5 (b) of the Act and to determine that the main parties have not breached section 46 of the Competition Act 2007.

## Annex I

### *Annexure I A –ABC Motors’ response to PF*



***Annexure I B – Leal’s response to PF***



## ***Annexure I C – Iframac’s response to PF***





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