



COMPETITION COMMISSION OF INDIA

Case No. 06 of 2020

In Re:

Star Imaging and Path Lab Pvt. Ltd.
4B/4, Tilak Nagar, New Delhi-110018

Informant No. 1

Janta X-Ray Clinic Pvt. Ltd.
4A/16, Tilak Nagar, New Delhi-110018

Informant No. 2

And

M/s Siemens Ltd.
Birla Aurora, Level 21, Plot No. 1080
Dr. Annie Beasant Road,
Worli, Mumbai-400030

Opposite Party No. 1

M/s Siemens Aktiengesellschaft (Siemens AG)
Wittelsbacherpl 1,
80333 Munchen, Germany

Opposite Party No. 2

M/s Siemens Healthcare Pvt. Ltd.
Unit No. 9A, 9th Floor, North Tower,
Godrej One, Pirojshanagar,
Eastern Express Highway, Vikhroli (E)
Mumbai-400079

Opposite Party No. 3

CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Order under Section 26(2) of the Competition Act, 2002

1. The present information has been filed by Star Imaging and Path Lab Pvt. Ltd. ('IP-1')



and Janta X-Ray Clinic Pvt. Ltd (**'IP-2'**) (collectively referred to as **'Informants'**/**'IPs'**) under Section 19(1)(a) of the Competition Act, 2002 (**'Act'**) against Siemens Ltd. (**'OP-1'**), Siemens Aktiengesellschaft (**'OP-2'**) and Siemens Healthcare Pvt. Ltd. (**'OP-3'**) (collectively referred to as **'OPs'**/**'OP Group'**) alleging contravention of the provisions of Section 3(4) and 4 of the Act.

FACTS, IN BRIEF, AS STATED IN THE INFORMATION

2. The IPs are in the business of providing diagnostics and pathology lab services to patients in Delhi/NCR for the past several decades which are helpful to them in their treatment and monitoring their health at affordable cost. The IPs are customers of the OPs. IP-1 has installed Somatom Scope CT Machine, Magnetom Espree 1.5 T MRI System and Verio MRI Machine, and IP-2 has installed an Espree MRI Machine purchased from the OPs.
3. OP-1 is a company incorporated in India and manufactures steam turbines, turbo compressors, high-voltage switchgear, switchboards, remote monitoring systems (RMS), fire detectors and suppression systems, motors and generators, relays and Smart Grid systems, transformers and advanced medical imaging equipment. It has 22 factories located across the country, eight centres of competence, 11 R&D centres and a nationwide sales and service network.
4. OP-2, headquartered in Germany, was stated to be a world leader in the fiscal year 2018 and generated revenues of €83.0 billion and a profit after tax of €6.1 billion. OP-2 is positioned along the value chain of electrification from the transformation, distribution and application of energy to medical imaging and laboratory diagnostics. OP-2 has office buildings, warehouses, research facilities and sales offices in almost every country/region in the world.



5. OP-3 is a company incorporated in India and is a global provider of healthcare solutions and services, with activities in numerous countries around the world.
6. OPs are part of Siemens Group, wherein OP-1 and OP-3 are subsidiaries of OP-2. Thus, it has been stated that OP-1, OP-2 and OP-3 are a group for the purpose of the Act.
7. IP-1 had purchased a Magnetom Espree 1.5 T MRI System, Verio MRI Machine and a SOMATOM Scope CT Scan machine from OP-1 in the year 2009, 2011 and 2016, respectively. As per the information, the approximate purchase price of the CT Machine, Espree MRI Machine and Vero MRI Machine was ₹ 1.5 Crores, ₹ 5 Crores, and ₹ 7.22 Crores, respectively which is a huge barrier for customers and thus, makes the purchaser of such machines a locked-in customers of the OPs, with no other option but to follow and abide by the dictates of the OPs.
8. The CT Machine and both MRI machines are protected by an encryption code, *i.e.*, a password, which the OPs/OP-3 do not share with IPs. Hence the IPs are unable to get the machine serviced from outside. IPs have also stated that, upon taking up this issue, the OPs stated, *vide* email dated 08.08.2019 that the passwords can be provided in special cases and for a price against the Service License User Agreement.
9. OPs compelled the IPs to take Comprehensive Maintenance Contract (CMC) by resorting to various means like overcharging for spare parts, not sharing passwords /encryption codes, *etc.*, which are alleged to be in contravention of the provisions of the Act. It is also alleged that OPs forced the IPs to sign on the dotted lines of the one-sided CMC agreement (in favour of OPs) without any negotiations or alterations.
10. The IPs have submitted that for a small item like a 10 meter optic fiber cable, of which the OPs are not even the manufacturers, OPs demanded ₹ 1,10,000/- (One lakh ten thousand only), while the cable is available in the market for a maximum of ₹ 4,000/-



to 5,000/-. IP-1 had inquired several times as to why OPs were charging excessive price for the 10 metre optic fibre cable, for which IP-1 never received satisfactory response. IPs stated that they were not able to procure this optic fibre cable from the market because, in order to replace it, they required service passwords, which only OPs can provide and which they didn't.

11. Further, as alleged, at the time of the purchase of the CT Machine, OPs told IP-1 that the life of the CT Tube is at least 7 years, with approximately 8.5 lakh scan seconds. In order to reduce the operating cost, the OPs also convinced IP-1 to enter into Annual Maintenance Contract (AMC) in the 2nd and 3rd year at a price of ₹ 2.5 lakh (plus taxes) per annum.
12. However, it is stated that contrary to the above assurance, the first CT Tube failed within 7 months, at approx. 1.28 lakh scan seconds and was then replaced. The second CT Tube also failed within 7-8 months at approx. 1.30 lakh scan seconds. Thereafter, OPs sent the quotation dated 08.06.2018 for the CT Tube for ₹ 32,72,468/- and after multiple requests by IP-1 it was brought down to ₹ 22.40 lakhs.
13. Thereafter, the OPs made an offer to IP-1 to enter into CMC at the rate of ₹ 15 lakhs with a 5% escalation every year (plus taxes). As per the IPs, only labour services are covered for the machine under AMC, whereas, under CMC, both labour and spare parts are covered.
14. It is alleged that IP-1 had to pay for the AMC for the period from 26.08.2017 till 25.08.2018 (₹ 2.95 lakhs), CT Tube (₹ 22.40 lakhs), and Insurance of the machine (₹ 1.39 Lakhs). The total expenditure, based on the advice and assurance of OPs, came out to be more than ₹ 26.74 lakhs, however, this cost ought not to have been more than ₹ 17.70 lakhs (*i.e.*, Cost of CMC entered for period from 22.07.2019- 21.07.2020) for one year under all circumstances. Thus, the cost became more than 1.5 times.



15. Further, it is stated that, for the CMC starting on 22.07.2019, the OPs forced IP-1 to make a 100% advance which the OPs used to charge on quarterly basis until then.
16. The IPs have alleged that OP Group is charging different customers different prices (e.g., Orbit Imaging and Path Lab Pvt. Ltd., House of Diagnostics (HOD) LLP etc.) for the same CMC, AMC, spares and service of the machines, which is an abusive conduct in violation of the provisions of the Act.
17. IP-2 had also purchased an Espree MRI Machine from the OPs. As submitted, OPs as per their own discretion and whims and fancies declared that the life of the Espree MRI Machine has come to an end, and now IP-2 has to get it upgraded from the OPs at significant additional cost of ₹ 38 lakhs only. IP-2 submitted that this machine has been under CMC for the past 9 years and the OPs provide this upgrade free of cost to customers whose machine were in CMC for 3 years continuously as the upgrade covers only computer hardware and the upgrade of basic software version. However, in case of the IPs, OPs are not providing a free upgrade and are claiming that there is a new contract for this service that IP's contract does not cover. IPs have also submitted that this fact was never informed to them during these 9 years of CMC. Moreover, OPs, vide email dated 16.07.2019, demanded that the CMC price of the Espree MRI Machine after upgradation will be ₹ 35 lakhs with a 5% escalation on year on year basis.
18. The upgrade was not affordable for the IPs owing to the huge cost of ₹ 38 lakhs, and the IPs also had no option to get it done from anywhere else. Similarly OPs unilaterally declared during discussions that due to end of life, the Verio MRI Machine would require the same upgrade after 2 years and consequently demanded the exorbitant amount of ₹ 40 lakhs to upgrade the Verio MRI Machine.
19. Further, the IPs have alleged that OPs are indulging in unjust enrichment by back-



dating the CMC to charge higher amount from a back date. The CMC of the Espree MRI Machine was taken on 05.08.2019, however it was made effective from 01.04.2019 *i.e.* back-dated by 4 months in order to charge extra money. The back dated CMC for the Espree MRI Machine was later made effective from 05.08.2019, by the OP Group. However, as the upgrade was not taken by IP-2, the CMC was offered only for one year. The IPs have also submitted that the same OPs were ready to enter into CMC for 10 years for the Espree MRI Machine if IP-2 would have got the upgrade done from OPs at the exorbitant cost of ₹ 38 Lakhs.

20. IPs have submitted that based on the facts of the instant case, there are two separate relevant markets. In consideration of the end-use of goods, price of goods or service, consumer preference, existence of specialised producers, *etc*, the Relevant Markets have been defined as:
- i. Manufacturing and supply of CT Scan Machines and MRI Machines in India (Relevant Market 1/ Primary Market); and
 - ii. Market for sale of spare parts and repair service of CT Scan Machines and MRI Machines in India (Relevant Market 2/ Secondary Market).
21. IPs have submitted that the OPs are the market leader in the primary market and is the only player in secondary market by virtue of the IPs being locked-in customers. It is also stated that at the time of purchase of respective machines, the OPs were the first and only manufacturer and supplier of the particular machine. OPs are the only enterprise who being the manufacturer of the Relevant Product, is in possession of all the software, know-how, spare parts *etc* and they are not authorising any other person for the service and repair of the machines. Thus, OPs enjoy dominance in primary market with 100 % market share in secondary market.
22. IPs have made allegations of the abuse of dominant position by OPs, with respect to the diagnostic machine equipment purchased and installed at the former's premises and



subsequent unfair and discriminatory conditions being imposed by the OPs to exploit the locked-in consumer status of the IPs. Such acts, *inter alia*, include the encrypted protection of the machinery/equipment, which restricts the choice of after-sales provider as OP group, excessive pricing charged for the spare parts and option of upgrading the equipment by charging exorbitant prices which are in contravention of Section 4(2)(a), Section 4(2)(b)(i), Section 4(2)(b)(ii), Section 4(2)(c), Section 4(2)(d) and Section 4(2)(e) of the Act.

23. Additionally, IPs have alleged that such conduct of non-sharing of encryption key/password is also in violation of Section 3(4) of the Act as non-provision of adequate know-how and spare parts by OP group results into 'Refusal to deal'. Such conduct has led to an appreciable adverse effect on the competition (AAEC), consumers, market and society.
24. The Commission considered the Information on 11.03.2020, and directed both the IPs and OPs to file certain additional information/clarification. In response, the IPs submitted additional information on 23.06.2020 and 04.08.2020, respectively after obtaining due extension of time to file the same. Whereas, OPs filed their responses in the matter on 06.11.2020, both a confidential as well as non-confidential version, after obtaining due extension of time from the Commission.
25. The Commission considered the response filed by OPs and directed the non-confidential version of the same to be forwarded to IPs to file their further response/comments to the information submitted by OPs. IPs submitted their response on 28.01.2021. The Commission having perused the same, *vide* order dated 24.02.2021, directed the IPs to file certain clarifications/information for better appreciation of the allegations in the present matter. Accordingly, the IPs gave their further submission, *vide* email dated 15.03.2021. The Commission considered the Information, the additional Information filed by the IPs as well as the response of the



OPs on 01.06.2021, and decided to pass an appropriate order in due course.

Additional Information submitted by IPs

26. IPs in their additional information dated 23.06.2020 submitted that OPs do not provide detailed and clear agreement to the consumers and are not willing to negotiate on the terms of the agreement stating that agreement is a standard format used for every customer. IPs have placed reliance on Comprehensive Annual Maintenance Contract (CAMC) entered between IPs and OP-3, to refer to the clauses, in which abuse is alleged. IPs have referred various clauses of CAMC and have submitted that these clauses, which have been imposed by OPs, are abusive and one sided.

Submission of OP-1 and OP-2

27. Pursuant to the directions of the Commission given *vide* its order dated 11.03.2020, OP-1 and OP-2 submitted their separate response on 06.11.2020. OP-1 and OP-2 in their submission stated that they are no longer engaged in the healthcare business and/or supply of CT Scan and MRI equipment to hospitals, nursing homes and diagnostic laboratories in India. A transfer of healthcare medical equipment segment of the business from OP-1 to OP-3 was made on 01.07.2016, and OP-1 has not been engaged in the business from the date of such transfer.
28. It is further stated that OP-1, *vide* letter dated 20.06.2016, had duly informed IP-1 of the transfer of all contracts and orders pertaining to healthcare business to OP-3. Further, all contracts pertaining to healthcare equipment of OP-3 used by IP-2 are in the name of IP-1. It was stated that communication dated 20.06.2016 is also extended to IP-2 and a separate communication in this regard to IP-2 was not required.
29. OP-1 submitted that IP-1 had knowledge of the transfer of business and has suppressed



this material fact in its information dated 05.02.2020 and, in the process has breached the provisions of Section 45 of the Act. It is stated that even though OP-1 and OP-2 have been made OP in the present matter, no specific relief against them has been sought for by the IPs. Accordingly, in terms of Regulation 26 of the Competition Commission of India (General) Regulations, 2009 (General Regulations, 2009), OP-1 and OP-2 stated that its name is liable to be struck off from the array of OPs.

Submission of OP-3

30. Upon a query raised by the Commission *vide* order dated 11.03.2020 as to how OP's machines in question are different from other similar machines in the market, OP-3 submitted that there may be minor differences in different models of CT scan and MRI machines with respect to image acquisition speed, image quality, features of diagnosis, options *etc.*, however the basic purpose and functioning remains the same, and different models are substitutable with each other.
31. OP-3 further submitted that all CT scan machines are substitutable on account of their similar physical characteristics, the virtually same end-use of all kinds and models of machines, similar price range of different models of CT scan machines, and consumer indifference to different models of CT scan machines. Similarly, for the MRI Machines, based on the same reasoning, OP-3 has submitted that all models of MRI Machines are substitutable.
32. Further, OP-3 submitted that the Commission, in Case No. 09/2016 (*House of Diagnostics LLP v. Esaote S.p.A. and Another*), *inter alia* dealt with similar allegations of abuse of dominant position by a manufacturer of a standing type MRI machine in relation to after sales service of that standing type MRI machine, and did not separately define the market for after sale services. Accordingly, OP-3 submitted that in the present case also, the relevant markets should be the "*market for sale and service of*



all CT scan machines” (“Relevant Market No. 1”) and “*the market for sale and service of all MRI machines*” (“Relevant Market No. 2”).

33. Further, OP-3 has stated that it agrees with IPs on the delineation of the relevant geographical market for CT scan and MRI machine as being the territory of India. Accordingly, OP-3 has stated the relevant market as: Relevant Market No. 1: “*market for sale and services of all CT scan machines in India*” and Relevant Market No. 2: “*market for sale and services of all MRI machines in India*”.
34. Further, OP-3 submitted that there is no basis to define a separate relevant market for after sales parts/service in the present case, as there exists no lock-in or exit barrier in the after sales market. The spare parts and after sales services are available in the market and can be bought from various Independent Service Operators (ISOs) including large Original Equipment Manufacturers (OEMs) such as Philips Healthcare, providing aftersales services. Therefore, OP-3 is not the only player in the aftersales market even for its own CT scan and MRI machines.
35. According to OP-3, the reliance placed by the IPs on Case No. 3 of 2011 (*Shamsher Kataria v. Honda Siel Cars and Others*) (*Shamsher Kataria*), is baseless and misleading. The Commission in the said case had stated that the inability to conduct the whole life costing of a product is an essential factor for having separate markets, but that inability is not present in the current scenario. On the contrary, just like the Commission’s order in Case No. 100 of 2014 (*Shri Amitabh v. M/s Kent RO Systems*), the IPs in the present case had the ability to undertake the whole life cost analysis before buying both the CT scan machines as well as the MRI machines. IPs were informed of AMC/CAMC charges at the time of purchase, which is indicative of the whole life costing of the product. Further, unlike the *Shamsher Kataria* case, spare parts and after sales services are available in the market and can be bought from various ISOs including large OEMs providing aftersales services like Philips Healthcare. Accordingly, OP-3 submitted that only a unified systems market can be defined in the



present matter.

36. OP-3 has submitted that GE Healthcare, Philips, Canon, Hitachi, Fujifilm *etc.* manufacture and sell CT scan machines and MRI machines in India. These machines compete with and are substitutable with OP-3's SOMATOM Scope CT Scan Machine, MAGNETOM Espree MRI Machine and MAGNETOM Verio MRI Machine. Further, OP-3 has submitted that the market shares of OP-3 and its competitors are widely fluctuating, which indicates that OP-3 is not dominant in the market and both the relevant markets are fiercely competitive.
37. As regards its dominance in secondary market, OP-3 submitted that the presence of ISOs and large OEMs like Philips in the aftersales market is conclusive evidence that OP-3 is not dominant in the aftersales market for CT scan machines and MRI machines. OP-3 has cited the Commission's order in Case no. 65 of 2013 (*M/s Magnus Graphics v Nilpeter India Pvt Ltd and Others*) and stated that the presence of several ISOs, shows that OP-3 cannot be stated to be dominant even in the narrower market for the repairs and aftersales services of its CT Scan and MRI machines.
38. OP-3 also submitted that it will be facing more competition in India in the future in view of the recent schemes launched by the Government of India such as Scheme for Promotion of Medical Device Parks, Pradhan Mantri Jan Arogya Yojana *etc.*, which will result in an influx of a large number of domestic medical equipment manufacturers.
39. OP-3 stated that password protection/encryption is a common industry practice for sophisticated healthcare machines and is considered essential to prevent unauthorised and under-qualified persons from working on the equipment, as the same can result in serious safety risk to the equipment, users or patients. Further, the password is also a legitimate means to protect the intellectual property rights of OP-3 which would



otherwise be susceptible to hacking and reverse engineering. It is also submitted that GE and Philips machines are password protected either through software service key or hardware (dongle protected service software) service key. Moreover, OP-3 submitted that it provides the password against payment of a reasonable license fee. The procedure to obtain the password was informed to IPs, however, they did not take any further steps to obtain the password.

40. It was further stated that OP-3 allows its customers complete freedom to avail aftersales services from third-parties. OP-3 has submitted certain email communications between its officials and IPs to indicate that it does not force any of its customers to sign aftersales contracts without negotiations.
41. OP-3 also provides its customers great flexibility in negotiating and finalising its maintenance contracts including, but not limited to, duration, period and type of such contracts (labour only or comprehensive) who choose to opt for after sales services from OP-3. The bilateral contractual agreement between the IPs and OP-3 with respect to the purchase and sale of all medical devices has an express “termination clause” between parties. Additionally, the customers, including IPs, have complete freedom to avail aftersales services of ISOs as well as OEMs such as Philips, which provides multi-vendor services contracts.
42. With respect to the allegation that OP-3 is not providing a price list of spare parts, it submitted that there is no published price list due to the continuously fluctuating price of spares because of factors such as exchange rate, customs duty, remote service fee *etc.* However, on customer’s request, OP-3 provides current pricelist of certain critical spare parts at point of sale which are valid only for a limited period.
43. On the allegation of excessive pricing for replacement of optical fibre cable, OP-3 stated that it has not charged an excessive price for the 10-meter optic fibre cable and



price of authentic and quality-checked cable cannot be compared to ones available in the local market. It is further stated that no password is required to replace the fibre cable, and the IPs could have procured a cable from local markets if they were not satisfied with the price and could be convinced that the cables available in the local markets were safe.

44. OP-3 submitted that IP-1 opted for an AMC and did not opt for a CAMC in the initial years. OP-3 further submitted that the CAMC clearly states that any defective equipment must be repaired at the customer's cost before a CAMC becomes operational. Therefore, OP-3 charged for a CT Tube from IP-1 which was in poor condition before entering into the CAMC. OP-3 submitted that it has not overcharged for the CT Tube and, in fact, reduced the price offer by more than ₹ 10,00,000/- in order to support IPs in an easier entry into the CAMC by reducing costs. In this regard, OP-3 also submitted that the IPs have falsely claimed the life of the CT tube to be 7 years. OP-3 also denied that it charged for the CT tube before entering into the CAMC. OP-3 also submitted that there is a rationale for charging for the CT tube before entering into CAMC.
45. On allegation that OPs forced IP-1 to make a 100% advance for the CMC contract for which OPs used to charge on a quarterly basis until then, OP-3 submitted that the terms in the CAMC stated that a 100% advance payment be made and hence, the same was required. However, terms of payment were negotiable and could be changed. OP-3 has many customers paying on a monthly and quarterly basis. It was submitted that the maintenance contracts for the MRI machines provided to the IPs were never on 100% advance payment basis. OP-3 also enclosed a document to indicate that CAMC payment terms with IPs were negotiated.
46. With reference to allegation that OPs unilaterally declare end of life of MRI machines, OP-3 stated that it did not declare end of life for the MRI machines. In this regard OP-



3 stated that an End of Support, *i.e.*, the stopping of manufacture of certain equipment, was declared by a third-party OEM (*i.e.*, Fujitsu) only for the towers for the Espree MRI Machine after a period of 10 years, and not for either of the MRI machines themselves.

47. As regards software upgrade, OP-3 submitted that the hardware and software upgrades offered by it were not part of the original equipment that was supplied. OP-3 submitted that Clause 1.3 of the “General Terms and Conditions” of the CAMC agreements provides that such upgrades will not be covered by the agreement. Further, OP-3 submitted that it has not overcharged for the upgrade and that the price is commensurate with industry standards and benefits. Since third party towers were discontinued by the original equipment manufacturer to ensure functional continuity of the Espree MRI machine even after 10 years of installation, the upgrade of software and its related hardware was recommended by OP-3.
48. Further, OP-3 submitted that a commercial contract between a buyer and a seller is governed by the Indian Contract Act, 1872 and the sale and purchase agreement between the IPs and OP-3 is also a commercial contract. However, there is no mention in the entire information that the buyer-seller relationship between OP-3 and IPs were entered into under duress, coercion *etc.* Hence, raising an issue under the Act appears an afterthought and must be dismissed with costs.
49. OP-3 has also submitted that it has not engaged in any form of discriminatory pricing. Any difference in pricing for maintenance contracts and services is based on technical reasons like the configuration of equipment, scope of contract, age and condition of equipment, *etc.*, as well as economic reasons like point of sale, negotiated price, degree of install base, changing prices *etc.* By referring to the order of the Hon’ble COMPAT in *Schott Glass India Pvt Ltd v CCI and others*, OP-3 submitted that different pricing by a dominant enterprise on only equivalent transactions is discriminatory. If the transactions are not equivalent, different prices may be charged. Since there are



technical and economical differences in OP-3's agreements with different parties, the transactions cannot be said to be equivalent, and hence differential pricing cannot be said to be discriminatory. OP-3 has also referred to the Commission's order in *M/s. ESYS Information Technologies Pvt Ltd v Intel Corporation & Ors* and submitted that different prices were justified due to cost differences. In this case as well, the pricing is stated to be different due to changing costs and initial prices.

50. On the allegation of back-dating of CAMC contract, OP-3 submitted that back-dated CAMC was offered in order to ensure the continuity of contract and save costs of the IPs by covering any damages or defects caused in the machine during the period when the contract was not in place, as entering into a CAMC requires any previous damage to be repaired at the cost of the customer. OP-3 also stated that, on the request of the IPs, the date of contract was promptly changed as requested by the IPs and the CAMC was made effective from that date. Further, payment was also received only for the correct period and not the four months when the CAMC was not in effect.

Response filed by IPs to submission of OPs

51. IPs have submitted that the relevant markets defined by the OP Group are incorrect and wrong. The OP Group is trying to mislead the Commission by providing the list of other CT Scan and MRI machines in the market and calling them all substitutable. IPs submitted that the factors to be taken into account while determining the Relevant Product Market also includes physical characteristics or end-use of goods and consumer preferences. These are important factors that differentiate the products falling under the same category but are not substitutable. Just because other machines are available which are capable of carrying out CT scans or MRI scans does not make them all highly substitutable. Tests to determine the substitutability of these machines have to be viewed under the light of various factors like characteristics, features, cost effectiveness, Tesla power/rating, quality of images, number of slices, accuracy, *etc.*



Accordingly, IPs requested the Commission to reject the submissions of the OPs and define Relevant Market on the lines of submission made by the IPs.

52. IPs asserted that the finding of the Commission in Shamsher Kataria case is most relevant and more relatable to the instant case. However, OP-3 has merely stated that the instant case is baseless and misleading without giving any reasons and/or basis for its claim. IPs stated that in their response OP-3 has submitted that the IPs have not claimed that the practice is present across the sector. To support its contention, OP-3 stated that, in the Shamsher Kataria case the Commission has examined the entire automobile manufacturing sector. IPs submitted that OP-3 has overlooked the fact that the Shamsher Kataria case was filed by one Sh. Shamsher Kataria against M/s Honda Siel Cars India Ltd., M/s Volkswagen India Pvt Ltd and M/s Fiat India Automobiles Ltd only, and other Opposite Parties were included by the Commission at the request of the Director General.
53. IPs have also denied the submission of OP-3 with respect to order in Kent RO Systems case, mentioning that it has been wrongly cited, which is in favour of the IPs. CT scan machine costs close ₹1.5 crores, which is 1,50,000% higher than cost of a RO Water purifier and MRI machines costs more than ₹5 crores which is 5,00,000% higher than cost of a RO Water purifier. Thus, there is no comparison between these two products in terms of the pricing/cost. Here, the consumer has to incur substantial costs for switching the product, thus making it locked-in.
54. On the issue of dominance, IPs submitted that they reserve their right to comment on the response by OP-3 as the relevant Annexure to it has been kept confidential by the OP-3. IPs also requested the Commission to provide the relevant Annexure of the response filed by OP-3 in order to enable them to provide their submission to it.
55. IPs also stated that OP-3 has wrongly cited *M/s Magnus Graphics v. Nilpeter India Pvt.*



Ltd. and others case. The facts of this case are different and there was no issue of password/encryption protection to get the machine serviced from any third-party/ISO, which is one of the core contentions in the instant case. Thus, it was reiterated that, even in the second relevant market, the OP Group is not only dominant but is also abusing it. Thus, citing this case in the instant case is highly irrelevant and baseless. Similarly, IPs stated that facts of Case no. 24 of 2011 (*Sh. Sonam Sharma v. Apple Inc and other*) are considerably different and thus, the ratio of this case does not hold good in the instant case.

56. IPs also submitted that OP-3 is forcing its customers to avail their services in the aftersales market and are using various methods for the same. The most prominent of all methods is not providing the password/encryption key to the customers. It was stated that IPs have sought the password several times, yet, OP-3 never provided any procedure to obtain the password. OP-3 only stated “*Service password can be provided in special cases at a Price against Service License User Agreement between User and Siemens Healthineers*”.
57. IPs stated that, in their submission to the Commission, OP-3 has falsely claimed that it has informed the procedure to obtain the password. If OPs would have ever provided the password to any of its customers and/or any ISO, it would surely have provided details of the same to the Commission.
58. The evidence (*i.e.*, email communication between IPs and OPs during April - May 2020) submitted by OPs to show that they provide their customer complete freedom to avail aftersales service from third parties relates to emails post filing of the Information. IPs submitted that OPs have created an environment wherein the IPs are locked-in and helpless. IPs are willing to opt out of the maintenance services provided by the OPs, however, they are not able to opt at ease on account of OPs’ conduct.



59. IPs further submitted that they had been asking for the service password of the machines so that they could get their machines serviced from outside. However, the OP-3 has vaguely replied, *vide* its email dated 15.05.2020, that “*Service Passwords required for the maintenance of the equipment are to be used by authorized service personnel. Its use by unauthorized/ untrained people can have serious Safety risks to the Equipment, User or Patients. However, Service password can be provided in special cases at a Price against Service License User Agreement between User and Siemens Healthineers.*”
60. Further, it has been stated by IPs that OP-3 has only provided the names of ISOs and not the list of authorized ISOs that are trained to service these highly sophisticated machines manufactured by the OP Group. After the claim by OP-3, the IPs enquired with Philips, *vide* email dated 26.01.2021, for maintenance services and their costs for the three machines in question. Philips, *vide* email dated 27.01.2021, stated that they are not involved in multi-vendor services in India and do not possess the resources to provide for the systems as enquired by the IPs.
61. As regards OP-3’s submission that they provide its customer with flexibility in negotiating maintenance contract, IPs submitted that *vide* emails dated 27.07.2019 and 29.07.2019, they requested OPs for the Word file of the CMC of Somatom Scope CT Scan Machine so that IPs could make some changes to which the OPs, *vide* email dated 30.07.2019, declined to make any changes by terming it a standard format.
62. According to IPs, OP-3 also claimed in their response that they allowed IPs to make corrections in terms of contract, however, these corrections were made by the offices of the OPs on realising some mistake on their part. The correction was on account of a clerical error and was not a result of any negotiations in the terms and conditions of the CMC.
63. On the issue of excessive charging for 10 metre optic fibre cable, OP-3 claimed that it



recommends to use only authentic and quality-checked spares to avoid operational hazards and risk to patient safety, and function quality. However, IPs stated that OP-3 is merely acting as a commission agent wherein it is procuring from the OEMs and selling it to consumers at a higher cost leading to further abuse.

64. IPs stated that, though OP-3 claimed that the price charged for authentic and quality-checked cable cannot be compared to ones available in the local market, and also stated that it amounts to a different product, however, on the other hand, the OPs have claimed in many parts of their response that there are spares parts available in the open market and there are many ISOs too. Thus, OPs have made self-contradicting statements.
65. With regard to the assertion of OP-3 that it has reduced the price of the CT tube by more than 10 lakhs to support the IPs in an easier entry into the CAMC, it proves beyond all doubt that the margin of OP group in CT tube is so high that they were able to give discount of ₹ 10 lakhs. This further supports the contention of the IPs of charging higher prices for the spare parts as per whims and fancies of OP group.
66. As regards OPs' submission that IPs were not coerced to pay 100% advance payment, IPs submitted that only after they raised the concern of 100% advance payment, it was brought down to 50% advance, then a quarterly payment from IPs on account of the pandemic and long business relations. Further, IPs have mentioned that this transaction relates to the period subsequent to filing of the information (*i.e.*, after more than 6 months of filing the Information). According to IPs, this makes it clear that OP-3 demands 100% payment without any justification for the same.
67. IPs stated that the submission of OP-3 with regard to AMC/CAMC, inability to conduct whole life costing, negotiations, high pricing, *etc.*, are self-contradictory. On the one hand OP-3 claimed that IPs have not adduced any cogent evidence to show or corroborate that they were not able to ascertain the lifetime cost of the machines at the



time of purchase, and, on the other hand, OP-3 itself is not able to provide the price list of the spares of the machines on account of various reasons like continuous fluctuations and the sheer number of spare parts.

68. With respect to declaring end of support of the MRI machine, it has been submitted by IPs that OP-3 is now introducing new facts before the Commission which were never revealed to IPs. OP-3 is putting the onus of its abusive dominant behaviour on a third-party OEM, *i.e.*, Fujitsu. Fujitsu (third party) was not part of any agreement between OP-3 and IPs. In such a scenario, it is not clear as to how OP-3 can place the burden of withdrawal of support by any third party on IPs. Further, it has been stated by IPs that if OP-3 is sourcing spares from OEM namely Fujitsu, then why are the OPs charging unreasonably high prices for towers and upgrades. This act of OPs demonstrate that OPs were not providing service passwords to IPs.
69. IPs also submitted that if end of the support was for towers only, of which the total cost is not more than ₹ 2 lakhs, it is shocking as to how the machine costing ₹ 5 crores (approx.) could become obsolete, as claimed by OPs in their submission. According to IPs, such behaviour of OPs is a trick to exploit customers.
70. As regards OPs' submission that the three OPs are not working together and they are not a Group company, IPs submitted that they do work together, as many email conversations were made by and/or replied to and/or replied by various officers of the OP-1 and OP-2 in addition to OP-3. Further, IPs submitted that, even if it is accepted that OP-1 transferred the healthcare medical equipment segment of the business to OP-3 on 01.07.2016 and is no longer engaged in the healthcare business and/or supply and service of CT-scan and MRI equipment in India, it is pertinent to note that, at the time of carrying out the transactions with IPs, all the OPs were party to the transactions and were responsible for their acts and thus, liable under the Act.



Analysis of the Commission:

71. At the outset, the Commission notes that IPs are stated to be dealing with Siemens brand from the year 1970 onwards. Further, the machines in respect of which the information has been filed were purchased in 2009, 2011 and 2016, respectively, and at least two such machines in reasonable likelihood would have covered a substantial part of their working life till the instances of abuse as alleged, *i.e.*, during 2017- 2019. After perusing the submissions made by the parties, it appears that, from 1970 till 2017, IPs have not faced any issue dealing with OPs for machines purchased from them. The Commission further notes that the IPs, being well entrenched in the business of diagnostic services, would have weighed the alternatives of taking a CAMC or AMC, bearing in mind their commercial interests.
72. OPs have filed their separate responses, wherein OP-1 and OP-2 submitted that they were no longer engaged in the healthcare business and/or supply of CT-Scan and MRI equipment to hospitals, nursing homes and diagnostic laboratories in India. OP-1 and OP-2 carved out their healthcare business, effective from 01.05.2015, and now, OP-3 is carrying on the economic activities relating to the supply of healthcare machines and equipment in India. Accordingly, OP-1 and OP-2 have also requested that, in terms of Regulation 26 of General Regulations 2009, their name is liable to be struck-off from the Memo of OPs.
73. OP-3, in its separate response, has submitted that it has been carrying on the economic activities relating to supply of healthcare machines and equipment in India with effect from 01.07.2016. OP-3 also stated that OP-1 and OP-2 had transferred the business of healthcare in favour of OP-3 and thus OP-1 and OP-2 cannot be said to constitute a ‘group’ with OP-3 in terms of the Explanation to Section 5 of the Act.
74. Further, OP-3 also submitted an application dated 06.11.2020, under Regulation 35(2)



of the General Regulations 2009 read with Section 57 of the Act, seeking confidentiality on certain portions of the response as well as certain annexures, which shall be disposed off *vide* separate order.

75. The Commission has considered the information and the responses of the parties and notes that IPs in the present case have made allegation of abuse of dominant position by OPs, in respect of the diagnostic machine equipment purchased and installed at the former's premises and the subsequent unfair and discriminatory conditions being imposed by OPs for its effective use. The IPs have also stated that OPs used various tactics to exploit the allegedly locked-in consumer status of IPs. According to IPs, such acts, *inter alia*, include the encrypted protection of the machinery/equipment, which restricts the choice of aftersales provider, excessive pricing charged for the spare parts and option of upgrading the equipment by charging exorbitant prices.
76. For an analysis of the case under Section 4 of the Act, the first requirement is to delineate the relevant market as per Section 2(r) of the Act. The next step is to assess the dominance of OPs in the defined relevant market as per the factors enumerated under Section 19(4) of the Act. Once the dominance of OPs is established, the final step is to analyse the allegations pertaining to abuse of dominance.
77. The Commission notes that IPs have defined two separate relevant markets *i.e.* primary market and secondary market in the present matter. The IPs submit that the secondary relevant market derives its existence from the primary market, because of the high initial cost, encryption/passwords, specialised know-how, and spare-parts required to service and repair the machines being available only with the OPs.
78. OP-3, in its response, has submitted that different models of CT scan machine are highly substitutable with each other, as the basic purpose and functioning of all models of CT scan machines are the same. Similarly, OP-3 has submitted that MAGNETOM



Espreo and MAGNETOM Verio are not different from other MRI machines available in the Indian market such as those manufactured by GE Healthcare, Philips Healthcare, Hitachi, Fujifilm, Canon, *etc.* OP-3 has also stated that IP- 1 is itself using another MRI machine of Philips brand in its diagnostic labs.

79. The Commission notes that IPs, in their further response, have countered the aforesaid assertion of OP-3 and stated that the availability of other machines which are capable of carrying out CT Scan or MRI scan do not make them all highly substitutable, as the substitutability of these machines depend on various factors such as characteristics, features, cost effectiveness, Tesla power/rating, quality of images, number of slices, accuracy *etc.* Further, IPs have stated that the time period of purchase of these machines have to be taken into account while applying these factors to determine substitutability.
80. The Commission notes that OP-3 has denied the argument of IPs, stating that it is not sufficient to merely point out differences in characteristics or intended use of products, rather, it should also be analysed whether products are substitutes. While procuring diagnostic imaging equipment, main consideration of the customers *i.e.*, path lab/clinic/hospital, would be whether the health parameters of the patients would be effectively measured/diagnosed so that hospitals/clinics can manage and treat patients properly. According to OP-3, for customers, Vero or Espreo MRI Machine is only one of the potentially different options of MRI Machines available in the market. Similarly, Somatom Scope is only one of the potentially different options of CT Scan Machine.
81. On the issue of delineation of two separate relevant markets (*i.e.*, primary market and secondary market), OP-3 has submitted that IPs were informed of AMC/CAMC charges at the time of purchase, which is indicative of whole life costing of the product. OP-3 referred to the decision in the *Shamsher Kataria* case, where the Commission had stated that the inability to conduct whole life costing of a product as an essential factor for separating the market, however, as submitted by OP-3, that inability is not present in the current case. On the contrary, based on the facts involved in *Shri Amitabh*



v. *M/s Kent RO Systems (Kent RO Case)*, the IPs in the present case had the ability to undertake the whole life cost analysis of buying both the CT scan machines as well as the MRI machines before and at the time of purchase. Accordingly, only a unified systems market needs to be defined in the present matter.

82. The Commission in previously decided cases has clearly laid down that the factors such as the ability of a consumer to undertake a whole-life cost analysis of the product/service and availability of independent aftersales service providers are crucial factors in determining the bifurcation of relevant market into primary (manufacture and sale) and secondary (spare parts and after-sales services) markets.
83. The consumer's ability to analyse the life-cycle cost of a product at the time of purchasing it depends on customers' anticipation about the future costs of ownership of the primary product by taking into account the probable expenditure on after-market products. As submitted by OP-3, in the present case, the IPs had access to the prices of CT scan machines and MRI machines as well as prices of AMC and CAMCs, as these contracts are often negotiated at the time of the sales offer. OP-3 has also submitted documentary evidence that IPs were informed about AMC/CAMC charges at the time of purchase. The access to the prices of the primary product and terms of aftermarket supply contracts would enable consumers to estimate the life-cycle costs of the original equipment. Therefore, the Commission observes that the IPs were in a position to have made an informed choice while purchasing the machines from OPs.
84. Moreover, the Commission notes that, since these machines were bought for commercial use over a long period of time, entailing considerable financial investment, coupled with the fact that IPs are in this business for several years, in all reasonable likelihood IPs were in a position to estimate the life cycle cost in order to generate returns from the investment made while charging from patients who avail their diagnostic services. Thus, the Commission observes that there is no basis for concluding on the existence of any separate market of aftersales as contended by IPs.



85. In view of the discussions in above paras, the Commission observes that in the facts and circumstances of the present case, there is no requirement of defining precise relevant markets. Suffice to say that the Commission tends to agree broadly with the submission of OP-3 that within the kind of CT Scan machine involved in this case, there appears to be substitutability with other machines of similar types. So appears to be the case with MRI Machines too. There is nothing as observed by the IPs, which warrants taking a narrow approach *qua* the machines, in view of similar products being offered by manufacturers as discussed above.
86. On the aspect of dominance, the Commission notes from OP-3's submission that in addition to it, there are big players like GE and Philips that have a strong presence in the market of CT scan machines and MRI machines and some domestic medical equipment manufactures like Tata Group have also entered in this primary market. Further, IPs have neither been able to demonstrate at the time of purchase of respective machines (being the subject of the present information) nor at the time of alleged abusive conduct of OPs that there were no alternatives available from other manufacturers. Rather, it is observed that IPs were having MRI and CT scan machines of other manufacturers, which they had employed in their path lab for use in diagnostic services.
87. Another aspect that is relevant is that, at the time of alleged abuse and later at the time of filing information, from a switching point of view at least some of the machines had already been put to use for considerable years and may practically have reached end of life stage. Further, spare parts and after sales services are stated to be available in the open market and can be bought from various ISOs. Thus, customers of OP-3, including IPs, have the option to avail aftersales services of ISOs, which has not been refuted with any material by IPs.
88. With respect to the allegation of abuse of dominance, given that the Commission has



observed in the foregoing paras a lack of dominance of OPs/OP-3, a separate finding on the instances of abuse may not be required. Nonetheless, the Commission observes having regard to the respective submission by parties, that password protection of machines by OP-3, as claimed by IPs, may not have existed as OP-3 has claimed that the password can be shared with IPs for a price. The IPs have also not brought out any fact/evidence to show whether OP-3 has created any hurdles even upon due willingness of IPs for obtaining such password after payment of fees. The allegation of refusal to deal made by the IPs under Section 3(4) of the Act is also without merit, in view of the above.

89. On the allegation of overcharging for an optic fibre cable, the Commission notes the submission of OP-3 that no password was required to replace the fibre cable, and the IPs could have procured a cable from the local markets if they were not satisfied with the price and convinced that the cables available in the local markets were safe.
90. As regards other allegations relating to various abusive clauses of the CAMC agreement, back-dating the CAMC and overcharging of spare parts, the Commission notes the justification provided by OP-3 with respect to each of these issues in its submission explained in the foregoing paras. The Commission also notes from the submission of OP-3 that IPs had an opportunity to negotiate agreements. Further, it is also observed that the bilateral contractual agreement between IPs and OP-3 in respect of purchase and sale of all medical devices has a termination clause between parties. Thus, customers of OP-3 including IPs have the freedom to enter into an agreement with other ISOs for availing aftersales services.
91. In view of the foregoing, the Commission is of the opinion that there exists no *prima facie* case under Section 3(4) and Section 4 of the Act, and the information filed is closed herewith under Section 26(2) of the Act. Accordingly, it would not be germane to undertake an assessment whether OP-1 and OP-2 can be said to constitute a 'group' in terms of the Explanation to Section 5 of the Act, and further, to consider the



application of OPs filed under Regulation 26 of the General Regulations, 2009, seeking deletion of their names.

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

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi
Date: 13.08.2021