



सत्यमेव जयते



Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 13/2013

In Re:

**M/s Three D Integrated Solutions Ltd.
609-611, 6th Floor, JMD Pacific Square,
NH-8, Gurgaon, Haryana**

Informant

And

**M/s VeriFone India Sales Pvt. Ltd.
25/38 West Patel Nagar, New Delhi**

Opposite Party

CORAM

**Mr. Ashok Chawla
Chairperson**

**Mr. S. L. Bunker
Member**

**Mr. Sudhir Mital
Member**

**Mr. Augustine Peter
Member**

**Mr. U. C. Nahta
Member**



सत्यमेव जयते



Appearances:

For the Informant: Shri Amitabh Kumar, Advocate and Shri Gautam Shahi,
Advocate

For the Opposite Party: Shri Ramji Srinivasan, Sr. Advocate and Shri Naval
Chopra, Advocate

ORDER

1. The information in the instant case has been filed by M/s Three D Integrated Solutions Ltd. (hereinafter, the '**Informant**') under section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') against M/s Verifone India Sales Pvt. Ltd. (hereinafter, the '**Opposite Party**'), *inter alia*, alleging contravention of provisions of sections 3 and 4 of the Act.
2. Brief facts of the case, as gathered from the information, are as under:
 - 2.1 The Informant is a company registered under the Companies Act, 1956 and is engaged in the business of video broadcasting, audio broadcasting, *etc.* The Opposite Party is a wholly-owned subsidiary of M/s Verifone System Inc., headquartered in USA and has been engaged in the business of manufacturing, development and selling of hardware and software solutions such as mobile Electronic Ticketing Machines (hereinafter, '**ETMs**'), Point of Sale (hereinafter, '**POS**') terminals, and related services and expertise that enable electronic payment transactions at POS terminals.
 - 2.2 As per the information, Ministry of Urban Development (hereinafter, '**MoUD**'), Government of India launched a National Programme for Standardised Automatic Fare Collection System (hereinafter, '**AFCS**') in eighty cities with a National Common Mobility Card (hereinafter, '**NCMC**')



सत्यमेव जयते



for passengers. The MoUD awarded the project for launching an all India common mobility card along with AFCS to UTI Infrastructure Technology Services Ltd. (hereinafter, 'UTIITSL') and its consortium partner across India. UTIITSL floated a Request for Proposal (hereinafter, 'RFP') for implementation of Integrated Transport Management System (hereinafter, 'ITMS') with a NCMC for Jaipur City Transport Services Ltd. (hereinafter, 'JCTSL') in Jaipur. The said bid was awarded to M/s Efkon India Private limited (hereinafter, 'M/s Efkon') who in turn sub-contracted to the Informant for supply, installation and maintenance of handheld payment device for mobile use with wireless connectivity, security certifications, *etc.* to be used in buses for the aforesaid project.

2.3 The Informant had placed a purchase order dated 05.04.2012 for Rs. 45,00,342/- with the Opposite Party for the supply of 275 Nos. of Vx680 fully functional mobile ETMs for ITMS project in the city of Jaipur. As per the purchase order, the Opposite Party was required to supply fully functional ETMs and relevant accessories on which the Informant was supposed to load independent application software and operate from its infrastructure. It is the case of the Informant that the Opposite Party was well aware of the requirements, methodology, end use and the project plan for which ETMs were procured but did not communicate to the Informant about any restrictive conditions in its offer.

2.4 After securing and accepting the purchase order dated 05.04.2012, the Opposite Party informed the Informant regarding the restrictive use of the ETMs *i.e.*, requirement of a Software Development Kit (hereinafter, 'SDK') to achieve full functionality of ETMs. The Informant alleged that the Opposite Party, a major player in the hardware market for ETMs, wanted to attain a similar position in the market for software loaded in the ETMs. The Informant alleged that such conduct of the Opposite Party clearly indicates its malicious intent and motive to circumvent the Informant's business and sets the grounds for its monopolistic opportunity in the nascent transportation automation



sector. The Informant averred that the Opposite Party was under legal and moral obligation to disclose the complete material information regarding the device including the fact that the device cannot work without purchasing its proprietary SDK before selling the same to the Informant. Having no choice left, the Informant purchased the SDK from the Opposite Party for Rs. 3, 65, 615/-.

2.5 It is alleged that the Opposite Party asked the Informant to sign a very restrictive agreement with regards to the use of its SDK. Further, the Opposite Party, with an ulterior motive, set aside the internationally accepted norms for SDK agreements and, in the garb of IPR protection, created an agreement with an absolute restriction on the Informant's independence to conduct business. Since the Informant was already running behind schedule and was under the threat of penalties and even cancellation of order, it had no choice but to sign the agreement with highly restrictive clauses. It is also alleged that the Opposite Party did not sign and return the copy of the said agreement to the Informant.

2.6 It is averred that the SDK which was delivered by the Opposite Party on 30.06.12 was locked by a security key *i.e.*, File Signing Tools (hereinafter, 'FST') which was an integral part of SDK and that the Opposite Party illegally withheld the security key. Further, the said SDK was an incompatible version and not appropriate for ETMs delivered and also some of the critical components were also not supplied. It is stated that due to short supply and incompatible SDK, the supplied ETMs became useless for the Informant and it was fully dependent on the Opposite Party for functioning of ETMs. This caused delay in the development process and the Informant had to suffer not only in terms of monetary loss but also in terms of reputation in the market.

2.7 The Informant submitted that by not delivering the FST on time, the Opposite Party restricted it from making use of ETMs. It is alleged that the intention of the Opposite Party was to delay the project so that the end users are frustrated



सत्यमेव जयते



thereby projecting the Informant in bad light. Further, to achieve its malafide intention, the Opposite Party made flimsy excuses of protection of IPR for the SDKs and also illegally started to inspect the software submitted by the Informant to pilfer the business model of the Informant.

2.8 It is averred that the Opposite Party even approached the end user itself *i.e.*, M/s Efkon on 17.08.2012, bypassing the Informant and made a commercial offer on the basis of knowledge gained from pilferage of the Informant's software given to the Opposite Party for trial. The Informant submitted that such conduct fully confirmed the hidden motive, unfair trade practices and desire of the Opposite Party in creating step by step restrictions and delays leading to the circumvention of the Informant and setting the grounds for its monopolistic control.

2.9 It is stated that the Informant had served two legal notices to the Opposite Party on 21.08.2012 and 29.09.2012 for its alleged wrong doings. However, the Opposite Party gave an evasive reply stating that the contentions in the notices were frivolous, wrong, incorrect, mischievous and baseless.

2.10 The Informant also alleged that the Opposite Party took undue advantage of its dominant position in the market in view of the fact that the consumers were completely dependent upon it and there was no choice with the consumers. It is averred that the Opposite Party has entered into an anti-competitive agreement *i.e.*, the exclusive supply agreement which has appreciable adverse effect on competition in India and has the effect of restricting the dealing in any goods other than those of the Opposite Party and therefore, amounts to violation of section 3 of the Act.

2.11 Aggrieved by the said abusive conduct of the Opposite Party, the Informant, *inter alia*, prayed before the Commission to cause an inquiry against the Opposite Party for the alleged contravention of sections 3 and 4 of the Act,



सत्यमेव जयते



and direct the Opposite Party to cease and desist from abuse of its dominant position and to comply with its purchase order dated 05.04.2012.

3. The Commission after considering the material available on record, *vide* its order dated 31.05.2013 opined that, *prima facie*, the conduct of Opposite Party was in contravention of provisions of section 4 of the Act and the matter required investigation by the Director General (hereinafter, ‘DG’). Accordingly, the DG was directed under section 26(1) of the Act to conduct an investigation into the matter. The DG, after having received the directions from the Commission investigated the matter and submitted the investigation report on 30.05.2014.

4. **DG’s Investigation**

- 4.1 Taking into consideration the factors under section 19(7) of the Act, the DG defined the relevant product market in the instant matter as “*the market for POS terminals*”. It is revealed from DG investigation that POS terminals with Europay, Mastercard and Visa (hereinafter, ‘EMV’) and Payment Card Industry (hereinafter, ‘PCI’) certification are of a different category and cannot be substituted with ordinary ETM devices. The DG defined the relevant geographic market as the territory of India. Accordingly, “*the market for POS terminals in India*” has been considered as the relevant market in the DG report.
- 4.2 The DG on the basis of analysis of facts, data gathered during the course of investigation and factors under section 19(4) of the Act has concluded that the Opposite Party has a position of strength in the relevant market which enabled it to operate independently of competitive forces and affect the market in its favour. As per the DG report, the Opposite Party has wide presence and share in the relevant market an account of POS terminals installed in the Indian market and these factors make its position very strong. Moreover, by virtue of its huge asset base it is able to affect the relevant market and act independent



सत्यमेव जयते



of other players in the relevant market. Based on above the DG has concluded that Opposite Party holds dominant position in the relevant market.

4.3 It has been reported by the DG that by imposing restrictive clauses through SDK license agreement the Opposite Party has violated the provisions of section 4(2)(a)(i), 4(2)(b)(ii) and 4(2)(e) of the Act. It is also revealed from the DG investigation that the Opposite Party did not allow the Informant to use the applications developed by Delhi Integrated Multi-model Transport System Ltd. (hereinafter, 'DIMTS') - a joint venture of the Govt. of NCT of Delhi (GNCTD) and IDFC Foundation. As per the DG report, through the said act the Opposite Party intended to leverage its dominant position in the POS terminals market to enter into and protect the downstream market of VAS in violation of the provisions of section 4(2)(e) of the Act. Further, the conduct of the Opposite Party was found to be limiting and restricting the technical or scientific development relating to services to the prejudice of consumers in violation of provisions of section 4(2)(b)(ii) of the Act.

4.4 The DG investigation has also revealed that the conduct of the Opposite Party in withholding the production key and FST for having control over the POS terminals is unfair, in violation of the provisions of section 4(2)(a)(i) of the Act. Further, the conditions imposed by the Opposite Party are not only unfair but also discriminatory in violation of the provisions of section 4(2)(a)(i) of the Act. After establishing the infringement of provisions of section 4 of the Act by the Opposite Party, the DG also identified three key officials of the Opposite Party who were found to be responsible for the said conduct of the Opposite Party.

5. **Replies/Objections of the Opposite Party in response to the DG Report**

5.1 The Opposite Party has submitted that the DG has erred in assessment of relevant market; its dominant position in any market relevant to this case; its conduct in imposition of unfair terms and conditions in the SDK license



सत्यमेव जयते



agreement; its conduct in refusal to allow a third party or DIMTS to develop the application on behalf of the Informant and analysis regarding allegation of maintenance of control of security keys of the SDK.

- 5.2 The Opposite Party has submitted that the DG has wrongly delineated the relevant product market as the market for POS terminals whereas it should be 'the market for ETMs'. It is submitted that the RFP for Jaipur project was for supply of ETMs, *etc.*, not POS terminals. It is stated that the DG has failed to take note of the fact that ETMs and POS terminals are not substitutable owing to significant differences in their characteristics, consumer preference and end-use. According to the Opposite Party, these two products are distinct and therefore, cannot fall under the same relevant product market.
- 5.3 It is further submitted that there are different customers of ETMs and POS terminals. The customers like banks and third party processors demand POS terminals whereas the customers like the Informant, M/s Efkon India Pvt. Limited and UTIITSL demand ETMs from the Opposite Party. It indicates that two products are different and despite using the same hardware, manufacturers of ticketing machines are not in a position to offer secure electronic payment solutions to the customers like banks. It is also submitted that the difference between ETMs and POS terminals are varied in terms of processing capabilities, memory, storage, input, output, card reader, software and EMV certification.
- 5.4 The Opposite Party has contended that although the bill raised by it was for an ETM and POS terminal, this factor cannot determine the relevant product market in the matter. It is submitted that its billing approach cannot be the conclusive factor for determining a relevant market when the intended use and characteristics of an ETM and POS terminal clearly demonstrate that both are two distinct products.



सत्यमेव जयते



- 5.5 In regards to similarity of SDKs provided for a POS terminal and an ETM, the Opposite Party submitted that the SDK and the SDK license agreements for ETMs and POS terminals were the same. It submitted that this is unique to the Opposite Party as it uses the same hardware (but not software) to service both sets of consumer demands (*i.e.*, consumers of payment solution and consumers of ticketing solution). Thus, even though the SDK and the SDK license agreements are same, concluding that POS terminals and ETMs form part of the same relevant market is incorrect.
- 5.6 On the DG's conclusion regarding dominant position, the Opposite Party submitted that the accurate assessment of market shares will demonstrate that the Opposite Party holds a miniscule market share in the ETM market and by any stretch of imagination it is not in a dominant position. Citing a report by M/s Pricewaterhouse Coopers (hereinafter, 'PwC') on Electronic Payment Market in India, the Opposite Party has submitted that the ETM market in India is dominated by Powercraft Electronics Ltd. In 2013, Powercraft was the market leader with 69% market share followed by Analogics with 22% market share whereas, the share of the Opposite Party was less than 1%. It is submitted that the Opposite Party sold only 1206 ETMs during FY 2010-2013 out of approximately 65,270 ETMs which are in operation.
- 5.7 As per the Opposite Party, the PwC report also provides that the competitors of the Opposite Party have higher market share even in the POS terminals market. It is submitted that Ingenico, a competitor of Opposite Party in the POS terminal market, holds a higher market share compared to it. While Ingenico had a market share of 57% during the period of alleged contravention (FY 12-13), the Opposite Party had a market share of only 40% in the narrow POS terminals market in India during that period and its share is further declining. Further, the Nilson Report (a leading publication covering payment system worldwide which provides up-to-date information on companies, products, and services from all areas of the payments industry infrastructure)



सत्यमेव जयते



on POS terminal shipments in 2011 estimates Ingenico as the largest player in POS terminals market in the world as well as in the Asia-Pacific region.

5.8 The Opposite Party has submitted that the DG has inaccurately determined its market share as 45% by not comparing 'like-for-like' data. The Opposite Party's market shares, in the period under investigation, was 40% which cannot confer a dominant position to the Opposite Party given the fact that Ingenico has a market share of 57% in the same period. It is also submitted that even the market share of 45% as determined by DG does not necessarily confer a dominant position to the Opposite Party. In regards to the market share of Opposite Party in the broader market of "ETMs and POS terminal", it is submitted that the Opposite Party has a market share of merely 30% during the period of investigation. Such market shares are not indicative of the dominant position of the Opposite Party either in India or in any foreign jurisdiction.

5.9 As per the Opposite Party, the DG has analysed the clauses of the draft SDK agreement in a previous case with the Commission *i.e.*, Case No. 56/2012 (*M/s Atos Worldline India Pvt. Ltd. vs M/s Verifone India Sales Pvt. Ltd. and M/s Verifone System Inc.*) to arrive at certain conclusions on its alleged abusive conduct in the present case. However, the DG has failed to examine that a substantial number of findings on the Opposite Party's alleged abuse of dominance in the said case will not be applicable in this case.

5.10 It has been submitted that the DG has arrived at a conclusion without taking into account the limited nature of the information that is required to be disclosed under 'Exhibit C' of the 2012 Draft SDK License Agreement. It is submitted that 'Exhibit C' does not require any confidential, commercially sensitive information or IPR of the developer. The only information required under 'Exhibit C' is disclosure on terminal numbers, name of the customers and name of the VAS.



सत्यमेव जयते



5.11 The DG found that Opposite Party restricted VAS providers from developing their own software, but has completely failed to appreciate that technological barriers prevent the usage of VAS developed on a particular range of POS terminals on another range of POS terminals of the same brand. This is because SDK provided for POS terminals of one brand cannot be used for POS terminals of another brand.

5.12 It has been submitted that the DG has failed to demonstrate how the VAS applications market is a distinct relevant market. It has submitted that the Opposite Party, in its regular course of business, does not develop VAS, it merely develops certain applications for select customers at their behest and earns insignificant revenue from it on a per man-day basis, as opposed to the per application, per terminal basis (which is standard across VAS developers) that generates recurring revenues for VAS developers. It is, therefore, absent in the secondary VAS market. It is submitted that if the Opposite Party indeed tried to leverage its position of strength from the POS terminal market into the VAS market, then evidence on record must demonstrate that it refused to supply or deal with DIMTS and reserved the VAS market for itself. Rather, the Opposite Party has never withheld supply of SDK to DIMTS.

6. **Replies/submissions of the Informant in response to the DG Report**

6.1 The Informant has submitted that the DG has correctly defined the relevant market as the market for POS terminals in India. Apart from the reasons mentioned in the DG report for considering the market for POS terminals as the relevant market, the Informant has submitted following reasons in support of the relevant market definition provided by the DG: (i) the Opposite Party manufactures only POS terminals; (ii) high-end specifications in the request for proposal such as EMV certification (minimum EMV certification level 1), PCI/PED standards (PCI/PED 2.0 certification) & GPRS modem to suit Indian frequency band/Bluetooth GSM/GPRS on 850/900/1800/1900 MHz; and (iii) long battery life.



सत्यमेव जयते



- 6.2 The Informant has submitted that the averment made by the Opposite Party that the POS terminal is a separate relevant product as it cannot perform the function of payment is factually incorrect. It is submitted that the range of POS terminals that are listed on the Opposite Party's website are all PCI standards compliant and are capable of performing the function of payment.
- 6.3 The Informant has submitted that the Opposite Party has incorrectly defined the relevant product market ignoring the provisions of the Act. Section 2(t) of the Act defines the relevant product market in terms of consumer demand and substitutability and the Informant, as a consumer, has demanded POS terminals. The Informant has submitted that a POS terminal can be a simple machine like an ETM which is used for taking cash and printing a ticket or a more complex machine like the one purchased by the Informant which is GPRS enabled and can process electronic payment transactions.
- 6.4 The Informant has submitted that the use of nomenclatures in the RFP should not confuse the Commission. As per the RFP, the demand was for a device like an ETM, however, the specifications required for the same were such that only a POS terminal could fulfil those requirements. Hence, the product described in the RFP as an ETM is actually an advanced POS terminal. The POS terminals supplied to the Informant are capable of carrying out electronic payment transactions.
- 6.5 The Informant has stated that EMV certification level I is the minimum requirement that an ETM should possess and hence anything over and above EMV certification level I including an EMV certification level II can also be adopted as one of the specification requirements. It is submitted that the argument that an ETM is not capable of carrying out a payment function is misplaced on the ground that the product (VX680) supplied by the Opposite Party to the Informant is an electronics payment device.



सत्यमेव जयते



- 6.6 Regarding the PwC report on the Electronic Payment Market, the Informant has stated that it is not an independent report and has been prepared at the instance of the Opposite Party's counsel.
- 6.7 The Informant has submitted that UTIITSL to whom MoUD awarded the project of launching NCMC in Jaipur has received a license from the RBI under the Payment and Settlement Systems Act, 2007 for allowing it to set up a prepaid wallet system. It is for the same project that the Informant approached the Opposite Party for purchase of POS terminals. The rationale behind launching the NCMC was that it could not only be used for transport services being provided by UTI but could be used as a generic card for payment of services across merchants.
- 6.8 The Informant has agreed with the DG's findings with respect to dominance of the Opposite Party in the relevant market and its analysis of the factors under section 19(4) of the Act. It has submitted that Opposite Party is also a dominant player in its home country, U.S.A in the POS terminal industry where the only other significant competitor is Ingenico, much like the market in India.
- 6.9 The Informant has submitted that dominant position of an enterprise must be tested on the cornerstone of its ability to either operate independently of competitive forces or affect its competitors or consumers or the relevant market in its favour. The conduct of the Opposite Party in imposing abusive terms in its license agreements with its consumers shows that it is operating independent of market forces. Thus, it is evident that the Opposite Party is in a dominant position in the relevant market.
- 6.10 The Informant has submitted that the conduct of the Opposite Party in non-disclosure of the terms and conditions of SDK agreement at the time of the purchase of POS terminals, restriction on licensee from selling or otherwise transferring any software that licensee develops, not allowing the use of



सत्यमेव जयते



applications developed by DIMTS or any other third party, requirement to share the details of the applications developed by the Informant, keeping control of the sold POS terminals by not providing security keys thereby rendering the supplies inoperable, and approaching M/s. Efkon for providing similar services with the intent to leverage its dominant position in the POS terminal market to enter and protect the downstream market of VAS application is abusive in terms of various provisions of section 4 of the Act.

7. **Issues and Analysis**

7.1 Having given due consideration to facts of the case, the investigation report of DG, the detailed written and oral submissions made by the Informant and the Opposite Party, the Commission feels that in order to arrive at a conclusion in the matter, it is to be determined whether the Opposite Party has contravened the provisions of section 4 of the Act?

7.2 Determination of the said issue requires:

(i) Determination of the relevant market.

(ii) Assessment of the position of dominance of the Opposite Party in the relevant market.

(iii) Examination of the conduct of the Opposite Party in terms of section 4 of the Act, in case it is found to be in a dominant position in the relevant market.

(i) **Relevant Market Determination**

7.3 As per the Act, 'relevant market' means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. The



सत्यमेव जयते



‘relevant product market’ comprises all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. The ‘relevant geographic market’ refers to a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas. All or any of the factors such as physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products are to be considered while determining the relevant product market. Further, all or any of the factors such as regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after sales services are to be considered for determination of relevant geographic market.

- 7.4 The DG after taking into consideration the factors stated above defined the relevant product market as “*market for POS terminals*”. It is revealed from the DG investigation that ETM machines with EMV/PCI certifications are basically POS terminals with specific features like EMV and PCI compliance certifications, GPRS system, battery etc. The DG also noted that the ETMs used earlier were for limited purpose of providing printing record of payment transactions and those ETMs without EMV/PCI certification were not equipped with a fund transfer system through cards and were meant for providing only billing and ticketing solutions. Further, these are primarily portable devices for data processing and ticketing in buses and do not provide electronic payment solutions. Accordingly, the DG found that POS terminals used as ETMs with EMV and PCI certification are of a different category and cannot be substituted with ordinary ETMs. The DG defined the relevant geographic market as the entire territory of India as the conditions for procurement of POS terminals and ETMs with electronic payment system



सत्यमेव जयते



throughout India were found to be similar. Moreover, there are no distinctions in the conditions relating to supply and usage in the entire territory of India. Accordingly, the DG considered the relevant market as the 'market for POS terminals in India'.

7.5 However, contrary to the relevant market definition given by the DG, the Opposite Party has contended that the RFP itself distinguished between an ETM and a POS terminal by providing for separate specification requirements for ETMs and POS terminals. Further, ETMs are required to be Level 1 certified while POS terminals have to be Level 2 certified. While EMV Level 1 certification relates to certification of hardware, EMV Level 2 certification relates to certification of software. It is contended that Level 1 certified device cannot process secure electronic payment transactions. It is contended that POS terminals and ETMs are two distinct products. One is a payment solution and the other is a ticketing solution. In terms of characteristics and specifications as well as in terms of software and intended use both the products are different. Moreover, it is submitted that the players operating in the ETMs market and the POS terminals market are different. The main players in this category of ETMs are Balaji (Powercraft), MicroFx, Analogics, Quantum etc. whereas, the market for POS terminals largely consists of players such as Ingenico, PAX, Linkwell and Geodesic Ltd.

7.6 Contrary to the stand of the Opposite Party, the Informant has submitted that the DG has correctly defined the relevant market as the market for POS terminals and accepted the analysis done by DG in this regard. As per the Informant the POS terminal can be a simple machine like an ETM which is used for taking cash and printing a ticket or a more complex machine which is GPRS enabled and can process electronic payment transaction. It is stated that though the said RFP was for a device like an ETM, the specifications required were such that only a POS terminal could fulfil those requirements.



7.7 The Commission has considered the rival submissions and the findings of the DG on the relevant market definition. Given the facts and circumstances of the matter, the Commission feels that in order to determine the relevant product market in this case, it is to be ascertained whether in the present case an ETM machine and a POS terminal are substitutable so as to form part of a single relevant product market.

7.8 To address the said question it is useful to highlight the requirements of UTIITSL as stated in the tender No-UTIITSL/CMC-AFC/2011-12/12 issued in April, 2012. It is observed that through the said tender UTIITSL had invited proposal for empanelment of agencies for supply and maintenance of ETM, integrated console unit, on-board validator, POS terminal, passenger information system and close circuit television on rate contract basis for NCMC project. Clause 4 of the said RFP may be noted below:

“UTIITSL on behalf of its NCMC Project Consortium Partner intends to Empanelment of agencies for supply and maintenance of the product listed below on rate contract basis (special pricing) for the NCMC Project:

- 1) Electronic Ticketing Machines (ETM)*
- 2) Integrated Control Unit (ICU) with Vehicle Tracking System*
- 3) On-board Validator*
- 4) Point of Sale Terminal*
- 5) Passenger Information System*
- 6) Close Circuit Television*

This bid is in six parts and each part shall include fixed tenure of after sales warranty and annual maintenance supports. The bidder may choose to bid either in part or full.”



सत्यमेव जयते



7.9 Though it appears from the above that separate bids have been called for ETMs and POS terminals as well as for other products, it is observed that the specifications required for ETMs were such that only a POS terminal could fulfil those requirements. Specification requirements for ETM, as per the said RFP, such as minimum EMV certification level 1, PCI/PED 2.0 certification, GPRS modem to suit Indian frequency band/Bluetooth GSM/GPRS on 850/900/1800/1900 MHz, and long battery life are the same as that of a POS terminal. The Commission observes that a POS terminal can be a simple machine like an ETM which is used for taking cash and printing a ticket or a more complex machine like the one purchased by the Informant which is GPRS enabled and can process electronic payment transaction. Further, from the DG investigation, it is noted that the machines sold by the Opposite Party to the Informant are actually the machines which are capable of providing electronic payment through credit and debit cards and not meant for limited use of providing an electronic record and electronic or printed receipt of a transaction/ payment. It may also be noted that the range of POS terminals that are listed on the Opposite Party's website are all PCI standards compliant and are capable of performing the function of payment.

7.10 Further, from the submission of Ingenico before the DG, it is observed that POS terminals can be converted to ETMs without the knowledge of seller and there is no difference in the hardware of both the devices. The only difference between a POS terminal and an ETM machine is that the ETMs have to be portable with GPRS and have a good battery life. The other features like billing, printing etc. are part of every POS terminal. Also, from the purchase order of the Informant, it is revealed that the Informant ordered for VX680 machine which has the features/ specifications of a payment device *i.e.*, a POS terminal. The Commission finds substance in the submission of the Informant that EMV certification level I is the minimum requirement that an ETM should possess and hence anything over and above EMV certification level I including an EMV certification level II can also be adopted as one of the specification requirements. Thus, the contention of the Opposite Party that



ETM requires level I EMV certification and POS requires level II EMV certification has no substance.

7.11 Moreover, the Commission observes that the said machines were required for the purpose of implementing AFCS project of MoUD with a NCMC for passengers in the Jaipur city and to set up a prepaid wallet system based on a license from the RBI under the Payment and Settlement Systems Act, 2007. The rationale behind launching the NCMC project was that it could not only be used for transport services being provided by UTIITSL but could also be used as a generic card for payment of services across merchants. The product in question relates to card swiping based electronic payment where payment is accepted through cards. The machine in question is not only for limited use of providing an electronic record and electronic receipt of transactions but also for electronic payments. It may be noted that only a POS terminal which is capable of processing electronic payment transaction can be useful for the said project, and not an ordinary ETM machine.

7.12 The Commission observes that the physical characteristics and end use of ETMs which do not have electronic payment system are entirely different from the product in question in this case. The Commission also notes that use of such POS terminals as ETMs began in India with the launch of the integrated public transport system and DIMTS was the first agency to install such POS terminals as ETMs for Delhi buses. Further, the players in the ETMs used earlier for the limited purpose of printing record of payment/ transactions are different from the players in POS terminals market. While Powercraft, Analogic, quantam *etc.* are engaged in the supply of ETMs, the players in POS terminals are Verifone, Ingenico and Pax. As has been seen above, the competitor of the Opposite Party *viz.*, Ingenico has categorically stated before the DG that it sells POS terminals to its customers with no specific distinction with ETMs. The product demanded by the Informant in this case was also POS terminal as can be seen from the purchase order. The



Commission also notes that the Opposite Party is not engaged in the market of ETMs which do not support electronic payment system.

7.13 Based on the above analysis, the Commission, in consonance with the DG report, determines the relevant product market in this case as the ‘market for POS Terminals’.

7.14 As regards the delineation of relevant geographic market, the DG has defined the relevant geographic market in the present case as India, as there is no distinction in the conditions of supply and usage in the entire territory of India. The Commission agrees with the findings with respect to the relevant geographic market reached by the DG. Further, parameters like regulatory barriers, logistic facilities, consumer’s preferences, currency etc. are also identical in the entire country. Thus, the Commission is of the view that relevant geographic market would be the entire territory of India.

7.15 Based on the determination of relevant product market and relevant geographic market as above, the Commission defines the relevant market to be considered in this case as the ‘market for POS terminals in India’.

(ii) **Assessment of the position of dominance of the Opposite Party in the Relevant Market**

7.16 Having determined the relevant market, the next issue is to determine whether the Opposite Party is in a dominant position in the said relevant market. Explanation (a) to section 4(2) provides that a dominant position means a position of strength, enjoyed by an enterprise in the relevant market to: (a) operate independently of competitive forces or (b) affect its competitors or consumers or the relevant market in its favor. The underlying principle in assessing dominant position of an enterprise is linked with the concept of market power which allows an enterprise to act independently of competitive



forces and affect the relevant market in its favour to the detriment of its competitors and consumers.

7.17 To determine whether an enterprise is in a dominant position or not in a relevant market, the Commission is required to have due regard to all or any of the factors such as market share of the enterprise; its size and resources; size and importance of its competitors; its economic power including commercial advantages over competitors; vertical integration of the enterprise or sale or service network of such enterprise; dependence of consumers; whether monopoly or dominant position acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; market structure and size of market; social obligations and social costs; relative advantage, by way of contribution to the economic development, by the enterprise enjoying a dominant position; and any other factors which the Commission may consider relevant for the inquiry.

7.18 The DG has analysed the factors as stated above and concluded that the Opposite Party is in a dominant position in the relevant market of POS terminals in India. From the DG investigation it is revealed that the Opposite Party holds 80% of market share as on 31.03.2012 if the POS sold by the acquired companies of the Opposite Party such as Gemalto, Lipmart and Hypermart are included. In the market of POS terminals, Ingenico is the nearest competitor of the Opposite Party. The DG reports further states that in terms of the size, resources and economic power, the Opposite Party is in an advantageous position and consumers are dependent on it and the position of strength the Opposite Party enjoys in the POS terminal market enables it to operate independently of competitive forces and affect the market in its favour.



7.19 As in the present case the DG defined the market as “market for POS terminals in India” it has also taken into account the RBI data related to installed/ active POS terminals in India which it analyzed in case No. 56 of 2012 filed against the same Opposite Party wherein the same relevant market as above was determined and examined. As per the DG report, total number of installed POS terminals in India were 6.47 lakhs as on 31.03.2012 and 7.99 lakhs as on 31.12.2012 whereas the Opposite Party and its acquired entities had sold more than 5 lakhs POS terminals by 31.03.2012 and 5.8 lakhs POS terminals by 31.12.2012 while Ingenico has sold only 2.2 lakhs units by 31.12.2012. Further, it is reported by DG that upto 2013 the Opposite Party sold a total of 1327 POS terminals used as ETM in India whereas Ingenico sold only 460 of such POS terminals. The DG therefore, came to the conclusion that the market share of the Opposite Party remains unchanged even when the number of POS terminals used as ETMs is taken into consideration.

7.20 The Opposite Party has submitted that in the present case in the market for ETMs in India it has less than 1% share compared to 69% market share of Powercraft Electronics Ltd (as per the PwC report). It has contended that the Opposite Party sold only 1206 ETMs between FY 2010-2013 out of approximately 65,270 ETMs which are in operation. Citing the PwC report, the Opposite Party has submitted that in the POS terminal market, Ingenico holds a higher market share of 57% during FY 2012-2013 compared to its 40% market share. Further, Opposite Party has cited the Nilson report stating that Ingenico is the largest player in the world as well as in the Asia-Pacific region. The Opposite Party has contended even in the broader market *i.e.*, the market for ETMs and POS terminal in India, its market share is merely 30% which is not indicative of its dominant position. It is contended that, given the global presence, size and importance of its competitors, it cannot be said to hold a dominant position in the POS terminal market in India.



सत्यमेव जयते



7.21 The Informant on the other hand endorsed the DG's conclusion in regard to the position of dominance of the Opposite Party in the relevant market and stated that the DG has correctly analysed the factors of section 19(4) of the Act to determine the position of dominance of the Opposite Party in the POS terminals market in India. With huge market share and other advantageous position of the Opposite Party as analysed by the DG, the Informant stated that the Opposite Party is in a dominant position in the relevant market of POS terminals in India. It has contended that the conduct of the Opposite Party in imposing abusive terms indicate that it is operating independent of market forces and can affect the relevant market in its favour.

7.22 Having considered the contentions of the Informant and the Opposite Party and the findings of the DG report in this regard, the Commission concurs with the findings of the DG that the Opposite Party was in a dominant position in the relevant market of POS terminals in India during the relevant period.

7.23 From the DG investigation the Commission observes that during the relevant period there are two major players operating in the relevant market, one is the Opposite Party and the other is Ingenico. The Commission further observes that the market share of these entities has been estimated by the DG on various parameters. It is seen from the DG report that as per RBI data the number of installed POS terminals as on 31.03.2012 was 6.47 lacs out of which the POS terminals base of Verifone was 80% and out of 7.99 lacs POS terminals installed as on 31.12.2012 Verifone had a base of 72% translating into approximately 5.85 lacs POS terminals. Against this Ingenico had sold only 2.2 lacs machines by 31.12.2012. It is also borne out from the DG report that HDFC, ICICI and Axis banks are the leading buyers of the POS terminals in India amounting to 80% of the total POS terminals installed by 31.12.2012 and as per data furnished by these banks they have purchased only approximately 50,000/- POS terminals from Ingenico and rest of them have been purchased from Verifone only. These hard facts leave no doubt that the Opposite Party commands 70-80% market share in the POS terminals market



सत्यमेव जयते



in India. The contention of the Opposite Party, citing the PWC report, that during financial year 2012-2013 Ingenico held a higher market share of 57% compare to 40% market share the Opposite Party enjoyed is totally misplaced. In this regard the Commission notes that at the time of alleged abuse Ingenico had not acquired significant market presence in India. Therefore, even if the market share of Ingenico is presumed to have increased post the alleged abusive conduct, the same will have no bearing on the assessment of the market power of the Opposite Party in the present case. Further, as certain services like upgrading the software and Kernel, SDK etc. can only be provided by the POS vendors the buyer remains dependent on the vendor throughout the life of POS terminals which has been estimated to be around 4-6 years. It is also evident from the replies of purchasers like DIMTS that once a buyer has developed some VAS application on a particular brand of POS terminals which has been found working successfully the buyer prefers to procure the same brand to maintain continuity and also to avoid further wastage of time and money on development of another VAS application. Therefore, the consumers who have purchased POS terminals of the Opposite Party and have already developed software/ applications on those terminals would usually prefer to continue with the devices of the Opposite Party. The DG has also analyzed the size, resource and economic power of the Opposite Party including commercial advantage over competitors and found that the Opposite Party is present in India since 1996 whereas Ingenico made its entry in the year 2009. Further, during the period 2006-2011 the Opposite Party acquired its competitors, viz., Gemalto, Lipmart and Hypermart which made Verifone much larger in terms of size and resources. It has also come out from the reply furnished by Verifone before the DG that it is also engaged in downstream software/ application development services which makes it a vertically integrated entity. On the other hand Ingenicio has stated that it is not engaged in the downstream market of software/ application development services. Based on the above, the Commission is of the opinion that there is no reason to deviate from the conclusion drawn by the DG with regard to the position of dominance of the Opposite Party in the relevant market.



Accordingly, the Commission holds that the Opposite Party is in a dominant position in the market of POS terminals in India.

(iii) Examination of the alleged abusive conduct of the Opposite Party in terms of Section 4 of the Act

7.24 Before proceeding to examine the alleged abusive conduct of the Opposite Party, the Commission notes the following relevant provisions of the Act in this regard.

7.25 As per section 4(1) of the Act, no enterprise shall abuse its dominant position. Section 4(2), *inter alia*, provides that there shall be an abuse of dominant position under sub-section (1) of section 4, if an enterprise: (a) directly or indirectly, imposes unfair or discriminatory- (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service; or (b) limits or restricts- (i) production of goods or provision of services or market thereof; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or (c) indulges in practice or practices resulting in denial of market access in any manner; or (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

7.26 The thrust of the arguments of the Informant is that the Opposite Party, *inter alia*, by not disclosing the conditions of the SDK agreement, restricting the licensee from transferring any software it develops; not allowing the use of applications developed by third party; keeping control of the sold POS terminals; and leveraging its dominant position in the POS terminal market to enter and protect the downstream VAS market has infringed the provisions of section 4 of the Act.



7.27 DG has reported that the allegations in the present case are almost identical to the case no. 56 of 2012 against the same Opposite Party. The allegations pertain to the restrictions imposed by the Opposite Party in the SDK license agreement on development and use of VAS developed in POS terminals. The period of alleged contravention in both the cases is also similar *i.e.*, between January 2012 to August 2012. Having examined the SDK license agreement, the DG has concluded that some of the clauses are unfair and restrictive in breach of the provisions of section 4 of the Act. As per the DG, by imposing such conditions in the SDK license agreement, the Opposite Party has imposed unfair and discriminatory conditions on the Informant in contravention of section 4(2)(a)(i) of the Act, and limited the provisions of professional services thereby amounting to violation of section 4(2)(b)(i) of the Act. Also, due to the said conduct of the Opposite Party, the technical and scientific development in the downstream market is likely to be adversely affected leading to infringement of section 4(2)(b)(ii) of the Act. The DG also found that the Opposite Party used its dominance in the upstream market of POS terminals to enhance its presence in the downstream relevant market in violation of section 4(2)(e) of the Act.

7.28 The Opposite Party has sought to repel the above findings of DG and has submitted that the DG has wrongly analyzed the clauses of the draft SDK agreement in case no. 56 of 2012 to arrive at certain conclusions in the present case as many findings in the said case are not applicable to the present case. As per the Opposite Party, it has not imposed any restrictive conditions on VAS providers from exploiting their own software in the market, rather it is the technological barriers that prevent the usage of VAS developed on a particular range of POS terminals on another range of POS terminals of the same brand. It is contended that the Opposite Party, in its regular course of business, does not develop VAS, it merely develops certain applications for select customers at their behest and earns insignificant revenue from it and is, therefore absent in the secondary VAS market.



7.29 Contrary to the contentions of the Opposite Party, the Informant has accepted the DG findings that the Opposite Party has imposed unfair conditions through the SDK license agreement, restricted scientific and technical development in the downstream market and used its dominance in the POS terminal market to protect its VAS market in contravention of the provisions of section 4 of the Act.

7.30 The Commission has perused the findings of DG and the rival submissions in regards to the alleged abusive conduct of the Opposite Party. It is observed that the core issue in this case relates to supply of SDK for development of software on the POS terminals. From the DG investigation it is revealed that no other POS terminal vendor in India or outside India has been found to be imposing restrictions on development of applications or putting restrictive clauses similar to those found present in the SDK agreement of the Opposite Party. The intent of the Opposite Party seems to be to exploit the VAS players by either restricting them or sharing their revenue because VAS market is highly profitable. Being in a dominant position in the relevant market, the Opposite Party appears to enhance its position in the downstream market by imposing restrictive clause in the SDK agreement and by refusing the VAS providers' access to development tools like SDK on reasonable terms and conditions.

7.31 The Commission also perused the clauses of SDK license agreement *vis-a-vis* the provisions of section 4(2) of the Act. It is observed that through the 'Purpose Clause' in the SDK license agreement, which provides that there is a restriction on the licensee to use any third party for development of application, the Opposite Party imposes restrictions that development of VAS to be used only on the POS terminals that licensee has purchased directly from the Opposite Party. Even though the Opposite Party contended that it does not restrict the VAS providers but the clauses of SDK agreement do not support this version. The Commission observes that the purpose clause relating to allow licensee to develop the value added software and use the same on only



सत्यमेव जयते



those of the licensor's products that licensee has purchased directly from the licensor mentioned in Exhibit A of the SDK agreement is clearly restrictive and anti-competitive.

7.32 Further, the license restriction clause to “not use the licensed software to develop any payment software that directly or indirectly interacts with any acquiring bank” seems to be unfair and restrictive. The SDK license agreement of the Opposite Party does not allow a third party to write a payment application in India which is contrary to the practice followed by the Opposite Party elsewhere across the globe as is evidenced from the statement made in its website *i.e.*, “*Verifone offers a selection of developer tools and drivers to help programmers design and develop efficient, professional payment applications that complement our payment systems*”. Further, by restricting the development of payment softwares for any payment association and not disclosing the said clause to the large buyers in India who would require customized payment softwares to run on the POS terminals bought by them, the Opposite Party has restricted the availability of substitutable payment solutions thereby restricting the choice for the buyers. Thus, the restrictions imposed by the Opposite Party on development of payment software by the third parties appear to be anti-competitive.

7.33 The Commission observes that the clause relating to not license, sell or otherwise transfer any software that the Opposite Party develops using the licensed software to any third party of SDK license agreements appears to be unfair, limits/ controls the provision of VAS services and limits/ restricts the technical and scientific development of VAS services used in POS terminals in India.

7.34 It is further observed that the license restriction clause relating to disclosure mentioned in the SDK license agreement imposes three different disclosure requirements namely; a) disclose to licensor from time to time the activities relating to licensed software; b) what value added software it has created; and



सत्यमेव जयते



c) what licensee intends to create using the licensed software. It may be noted that the Opposite Party is a POS terminal manufacturer and is also engaged in the development of VAS applications. It appears that by way of this restriction, the Opposite Party was trying to get access to confidential commercial information from the VAS providers and to exploit the lucrative VAS market. The requirement of prior disclosure to the Opposite Party about the VAS developed by the Informant amounts to imposition of unfair condition on the Informant as well as limits the provision of VAS service. Further, seeking information on the VAS services which the Informant intends to develop is likely to prejudice the business activities of the Informant as the Opposite Party is developing into a major competitor for the Informant in the VAS/ TPP market in India. Such restriction appears to restrict technical or scientific development relating to VAS services for POS terminals in India. Since the Opposite Party is large player (in terms of market share of POS terminals managed by banks in India) and it itself is a manufacturer of POS terminals, its conduct with respect to seeking disclosure of sensitive business information from its customers in the downstream market with a view to protect/ enhance its presence in the downstream market of VAS services is abusive in terms of section 4 of the Act.

7.35 Based on the above analysis, the Commission, in agreement with the DG findings, comes to the conclusion that the conduct of the Opposite Party is abusive in terms of section 4 of the Act. The Commission is of the considered opinion that through the SDK agreement, the Opposite Party has imposed unfair conditions on the Informant which are in contravention of section 4(2)(a)(i) of the Act; restricted the provision of VAS services as well as limited/restricted the technical and scientific development of VAS services used in POS terminals in India which is in contravention of 4(2)(b)(i) and (ii) of the Act. Also, the conduct of the Opposite Party with respect to seeking disclosure of sensitive business information from its customers in the downstream market in order to enable it to protect the downstream market of



सत्यमेव जयते



VAS services is in contravention of the provisions of section 4(2)(e) of the Act.

7.36 In view of the above findings the Commission directs the Opposite Party to cease and desist from indulging in the activities which have been found to be anti-competitive in terms of the provisions of section 4 of the Act.

7.37 As per section 27 (b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse. On imposition of penalty on the Opposite Party for its above said anti-competitive conduct, it is observed that in an earlier case (Case No. 56 of 2012) the Commission has already imposed a penalty of Rs. 4, 48, 40, 236 (Rupees Four Crore Forty Eight Lakh Forty Thousand Two Hundred Thirty Six) on the same Opposite Party at the rate of 5% of its average turnover for the financial years 2010-2011, 2011-2012 and 2012-2013 for the similar conduct during the same period. Since, the Opposite Party has already been penalized for the similar anti-competitive conduct during the same period in the case cited *supra*, the Commission, in the instant case, decides not to impose any penalty on the Opposite Party.

7.38 So far as the individual liability of the officials of the Opposite Party in terms of the provisions of section 48 of the Act is concerned, the DG has identified three officials of the Opposite Party *viz.* Mr. Pran Mehra, Mr. Albert Yun Quan Liu and Mr. Marc Evan Rothman who are responsible for the conduct of business of Opposite Party when the alleged act of contravention was committed. The Commission, on consideration of the DG's investigation report, forwarded the copies of the DG report to the parties including the above said persons for filing their respective reply/ objections. The Commission also directed them to file their income statements/ Income Tax Returns of the last 3 financial years. The Commission decides to pass an order



separately in this regard, after the proceedings are completed in respect of the individuals so identified.

7.39 The Secretary is directed to send a copy of this order to the parties accordingly.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi

Date: 10/04/2015