



COMPETITION COMMISSION OF INDIA

Case No. 52 of 2013

In Re:

Financial Software and Systems Private Limited Informant

And

M/s ACI Worldwide Solutions Private Limited Opposite Party No. 1

M/s ACI Worldwide Incorporated, Florida, USA Opposite Party No. 2

M/s ACI Worldwide (Asia) Pvt. Limited, Singapore Opposite Party No. 3

CORAM

Mr. Ashok Chawla

Chairperson

Mr. S. L. Bunker

Member

Mr. Sudhir Mital

Member

Mr. Augustine Peter

Member

Mr. U. C. Nahta

Member



Appearances:

For the Informant: Shri Ramji Srinivasan, Sr. Advocate

Shri G.R. Bhatia, Advocate

Shri Vardhan Tulsian, Advocate

Ms. Deeksha Manchanda, Advocate

Ms. Jahnvi Mitra, Advocate

For the Opposite Parties: Shri Amitabh Kumar, Advocate

Shri Gautam Shahi, Advocate

Ms. Lagna Panda, Advocate

Ms. Ela Bali, Advocate

Final Order

1. M/s Financial Software and Systems Private Limited (hereinafter, the ‘**Informant**’/‘**FSS**’) has filed the information in the instant case, under section 19(1)(a) of the Competition Act, 2002 (hereinafter, the ‘**Act**’) against M/s ACI Worldwide Solutions Private Limited (hereinafter, the ‘**Opposite Party No. 1**’), M/s ACI Worldwide Incorporated, Florida, USA (hereinafter, the ‘**Opposite Party No. 2**’) and M/s ACI Worldwide (Asia) Pvt. Limited, Singapore (hereinafter, the ‘**Opposite Party No. 3**’) [collectively hereinafter, the ‘**Opposite Parties**’/‘**ACI**’], *inter alia*, alleging contravention of provisions of sections 3 and 4 of the Act in the matter.

2. **Facts, in Brief**

- 2.1 The Informant is stated to be a private limited company incorporated under the Companies Act, 1956 and operating in the areas of electronic payment, financial transaction processing solutions and services. It has been a technology partner, system integrator and co-innovator for several leading banks to transform their payment systems, increase operational efficiencies



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and launch new business processes. The Informant caters to the specific needs of the banks through its two business divisions *i.e.*, FSS Technologies and FSSNeT. FSS Technologies provides services to the clients including systems integration, offshore development, product sustenance, project management and implementation, upgrade and migration services, product testing and certification, application testing, onsite technical support and 24/7 global helpdesk support. FSSNeT offers payment processing services across all delivery channels including Automated Teller Machine ('ATM'), Point of Sale ('POS') terminals, internet and mobile with authorization by the banks. It provides services such as card management, merchant management, internet payment gateway, mobile banking & mobile payment, reconciliation & settlement, financial inclusion, a bouquet of value added services and ATM management services on a pay-per-use model including leasing ATM and site management.

2.2 The Opposite Party No.1 is a company incorporated under the Companies Act, 1956 and is a wholly owned subsidiary of the Opposite Party No. 2 (a NASDAQ listed public company) engaged in the business of developing 'BASE24' software for electronic payment solutions that enable card-based payment transactions. The Opposite Party No. 3 is a company incorporated under the laws of Singapore. All the Opposite Parties have been described as affiliate/ group entities. The Opposite Parties are stated to be engaged in the business of developing BASE24, a transaction processing switch software ('**Electronic Fund Transfer (EFT) Switch**'), which according to the informant enables an ATM or POS terminal to communicate with the relevant bank's core banking network.

2.3 As per the information, all banks and financial institutions which desire to provide ATM, POS, mobile banking and internet banking services require EFT Switch/ switch software and at present about 77% of ATMs and about 80% of POS terminals in India operate on BASE24 software. It is further submitted that BASE24 software (and other comparable software) requires



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modifications to enable banks to offer additional value added services through ATMs and POS devices. It is stated that the relationship between ACI and the banks which are using BASE24 software ('ACI Banks') is governed by a license agreement that provides the right to ACI Banks to use and to customize the modules of the BASE24 software.

2.4 The Informant provides software modification and customization services to ACI Banks. The Informant and ACI are stated to have had a long standing relationship, starting from FSS acting as a re-seller for ACI for BASE24 software in India in 1991, and then in 1998 becoming a distributor and service provider for BASE24 software in India through various International Distribution Agreements ('IDA'). During the currency of distribution agreement, certain disputes arose between FSS and ACI sometime in 2007-08. On 16 June 2008, ACI proposed a new arrangement whereby ACI terminated the distribution agreements with FSS; ACI license agreements between FSS and existing ACI Banks in India were to be assigned to ACI India; and ACI was to endorse FSS as a provider of services in respect of BASE24 software to ACI Banks in India and FSS would be able to directly deal with ACI Banks or *via* ACI India.

2.5 Thereafter, FSS and ACI initiated legal proceedings before the Hon'ble High Court of Madras at Chennai and the Singapore International Arbitration Centre ('SIAC'). Subsequently, the disputes were settled through negotiations leading to a Settlement and Release Agreement ('SRA') on 17th February 2010 between them whereby FSS and ACI agreed to settle all disputes; the distribution agreements between FSS and ACI stood terminated; from 01.04.2010, both ACI and FSS would have had the right to provide professional services, including implementation and customer modification services to all ACI Banks; and till 31.03.2011, FSS was to serve as ACI's 'preferred services partner' for ACI products *i.e.*, BASE24.



2.6 Pursuant to the terms of the SRA, FSS and ACI made a joint presentation to all ACI Banks whereby FSS transitioned from a distributor to a system integrator; ACI continues to provide support on the core product *i.e.*, BASE24 software through its helpdesk services and on-site documentation; FSS continues to provide support on such customization; BASE24 software and the services around the software are two different products/ services; and if a module license requires customization, then ACI Banks would have the ‘option to ask ACI or FSS to do it.

2.7 It is the case of the Informant that during the period 2010-11, ACI took the position that it would not allow FSS to continue to provide system integration/ other services in respect of the BASE24 software. However, in a meeting held on 08.06.2011, ACI Banks stressed that it was their prerogative to choose ‘the production support (on-site support) and service partner’. On 21.06.2011, in a meeting of ACI Banks and ACI, it was informed to ACI Banks that ACI would allow the banks to take ‘professional services (including implementation and customization)’ only through ACI or their authorized third party provider excluding FSS. However, ACI Banks opposed the said action stating that ACI has no capability to provide the support services and submitted that since 95% of ATMs in India are connected to BASE24 switch they cannot afford any risk to their operations.

2.8 Subsequently, on 14.07.2011, a meeting between ACI Banks, ACI and FSS was held wherein ACI agreed to give its consent to ACI Banks to use FSS or third party for customers’ specific modification to BASE24 software for a period of 6 months. Then, in August, 2011, ACI wrote to ACI Banks stating that it would provide consent to use FSS services for doing customizations on BASE24 software for a period of 24 months ending July 13, 2013.

2.9 But, in February, 2013 ACI made a presentation before ACI Banks stating that after 13.07.2013 it would not provide consent to any third party to access, modify or customize the existing BASE24 application as it had launched ACI



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enhanced support program ('ACI ESP') under which it would provide services to ACI Banks similar to those being provided by FSS. In May, 2013, ACI sent letters to each ACI Banks communicating its decision that it would not allow to banks to use FSS or any other third party to provide customizations services on BASE24 software beyond July, 2013.

2.10 Based on the above averments and allegations, the Informant has alleged that ACI has abused its dominant position under section 4 of the Act by not allowing ACI Banks to choose a service provider of their choice; imposing unfair condition in the purchase or sale of goods or services through exclusive supply arrangements with ACI Banks; directing ACI Banks not to avail the integration services of FSS, thereby restricting the provision of services of customization and modification in respect of software for electronic payment systems *i.e.*, the downstream market; using its dominance in the upstream market of software for electronic payment systems to gain entry in the downstream market of provision for services of customization and modification in respect of software for electronic payment systems; and limiting and restricting the technical or scientific development in the market.

2.11 The Informant has also alleged contravention of the provisions of section 3(4) of the Act by ACI. As per the Informant, ACI is restricting its customer banks from dealing with any third party in respect of providing services of customization and modification of ACI products amounting to refusal to deal. It is alleged that the restriction imposed by ACI causes or is likely to cause an appreciable adverse effect on competition ('AAEC') in the downstream market in India as it would lead to foreclosure of competition in the downstream market and also result in creation of entry barriers and driving existing competitors out of the downstream market. It is also alleged that ACI seeks to impose tie-in arrangements with ACI Banks by tying the upstream market of software with the downstream market of services. Hence, this arrangement by ACI causes or is likely to cause AAEC in the market.



3. After giving a thoughtful consideration to the facts of the case as given in the information, the Commission *vide* its order under section 26(1) of the Act dated 04.09.2013 stated that *prima facie* the conduct of ACI was in contravention of provisions of sections 3 and 4 of the Act and needed investigation by the Director General ('DG').
4. Further, after considering the application for interim relief, the Commission *vide* its order dated 11.02.2014, granted interim relief to the Informant under section 33 of the Act. Consequently, the Opposite Parties were restrained from implementing the condition imposed on ACI Banks that they would not take service of the Informant for customization of electronic software being supplied by the Opposite Parties, till the final disposal of the information.
5. ACI filed an appeal before Hon'ble Competition Appellate Tribunal ('COMPAT') against the said order of the Commission and the Hon'ble COMPAT *vide* its orders directed the DG to complete the investigation and the Commission to pass the order within the time periods provided by the Hon'ble COMPAT.

6. **DG's Investigation**

- 6.1 The DG submitted the investigation report to the Commission on 20.06.2014. DG has investigated the matter covering the alleged infraction of provisions of sections 3(4) and 4 of the Act in the matter. The following paragraphs briefly highlight the findings of DG.
- 6.2 Based on the analysis of the facts gathered during the course of investigation, the DG identified 'the market for Electronic Fund Transfer (EFT) switch/switch software in India (Upstream market)' and 'the market for provision of services in respect of customization and modification of EFT software (professional services) in India (Downstream market)' as the relevant markets in this case.



6.3 The DG has considered ACI Inc, ACI Asia and ACI India as a ‘group’ in terms of Explanation (b) under section 5 of the Act. Accordingly, the position of dominance of ACI in the relevant market has been examined in the DG report. Having examined the factors under section 19(4) of the Act, the DG has found ACI to be in a dominant position in the relevant market for EFT Switch/ switch software in India *i.e.*, in the upstream market.

6.4 Based on the analysis of the facts, evidences, submissions of the parties, DG found that ACI had imposed unfair and discriminatory conditions on ACI Banks in contravention of section 4(2)(a)(i) of the Act and had limited the provision of professional services in contravention of section 4(2)(b)(i) of the Act. Further, it was found that the conduct of ACI resulted in denial of market access to FSS and other third party service providers in the downstream market in violation of section 4(2)(c) of the Act. The DG also found that the alleged act of ACI making the contract subject to acceptance of supplementary conditions was in contravention of section 4(2)(d) of the Act. Further, it is reported that due to the alleged act of ACI, technical and scientific development in the downstream market is likely to be adversely affected in violation of section 4(2)(b)(ii) of the Act. The DG also reported that ACI used its dominance in the upstream relevant market to enhance its presence in the downstream relevant market amounting to a violation of section 4(2)(e) of the Act.

6.5 Based on the analysis of the provisions of License Agreement and facts gathered during the investigation, the DG found that the restrictions imposed by ACI do not satisfy the ‘reasonable restrictions test’ required to balance the conflicting interest in a business relationship. It is observed in the DG report that ACI under the garb of Intellectual Property Rights (‘IPR’) protection restricted its competitors in downstream market with the intention to reinforce its own position. The DG investigation also revealed that ACI entered into anti-competitive agreements *viz.*, ‘tie-in-arrangement’, ‘refusal to deal’ and



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‘exclusive supply’, with ACI Banks in terms of explanation (a), (b) and (d) to section 3(4) of the Act. The DG found that these agreements have AAEC in markets in India.

6.6 The DG also identified and analysed the role of the employees of ACI/ persons responsible for the said anti-competitive conduct.

7. The DG report was considered by the Commission in its ordinary meeting held on 30.07.2014 and the Commission decided to send a copy of the non-confidential version of the DG report to the Informant, the Opposite Parties and the concerned employees for filing their replies/ objections. Accordingly, the parties filed their replies/ objections to the DG report.

8. **Objections/ Replies of ACI**

8.1. ACI has submitted that the DG has erroneously concluded that the relevant product market to be the ‘market for EFT Switch’ without considering the substitutes available in the market, factors provided in section 19(7) of the Act, and universe of inter-connected electronic payment systems. While defining the relevant product market, without carrying out SSNIP test/ hypothetical monopolist test or questioning ACI Banks on substitutability, it has been reported by the DG that there are no substitutes for EFT Switch and customization thereof. Further, while defining the relevant product market DG has failed to evaluate transactions processed by National Payments Corporation of India (‘NPCI’); mobile phone/ mobile banking transactions; transactions by hosted providers such as FSSNeT, AGS, Prizm, TCPSL, C-edge, Euronet, FIS, ElectraCard, YCS, *etc.*; transactions processed by leading card issuers such as Citibank, HSBC, Standard Chartered, *etc.*; transactions processed by VISA and MasterCard; e-commerce transactions processed for emerging players such as Flipkart, Myntra, *etc.* As per ACI, the above said transactions pose sufficient competitive constraints in EFT Switch / switch software market.



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- 8.2. It has been submitted that ‘electronic retail payments system’ would be more appropriate representation of the narrowest relevant product market for conducting competition analysis in the present matter. The DG erroneously concluded that the relevant geographic market is restricted to India without considering the factors provided in section 19(6) of the Act, competition from imports, export potential, and international electronic payments. It has been submitted that although the relevant geographic market for certain elements of services, typically the ones which require physical presence of the service provider, may be limited to India; the relevant geographic market for EFT Switches, which is essentially a software product capable of electronic transmission is global.
- 8.3. Relying on the report of ‘Microeconomic Economics Consulting & Research Associates Inc’ it has been submitted by the Opposite Parties that the DG’s report does not delineate the relevant market on the basis of a benchmark method for evaluating demand substitutability. Consequently, important substitutes to EFT Switch / switch software are excluded. Rather, the narrowest anti-trust product market definition would be the ‘market for electronic retail payment systems’. Furthermore, the geographic scope of the relevant market is not limited to India since EFT Switch providers face competitive constraints from outside India.
- 8.4. The erroneous market definition and reliance on unverified data furnished by the Informant has led the DG to conclude that the Opposite Parties are dominant without considering the buyers (actual and potential) in the narrowly defined relevant market, inability of the Opposite Parties to act independent of its customers and ease of entry and switching evidenced by migration of customers from one switch to another.
- 8.5. A correct delineation of the anti-trust market necessary for assessing the alleged conduct in this case would conclusively demonstrate that ACI is not



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dominant in the market and neither has market power to act independently of competitive forces nor has the ability to adversely affect competitors or consumers or the relevant market in its favour. Even on the basis of the artificially narrow relevant market as defined by DG, ACI is not dominant if transaction volumes of other users of EFT Switch (ignored in the market share calculations by the DG) are taken into account.

8.6. It has been submitted that a correct relevant market definition would have revealed that there is no issue of dominance in EFT Switch/ switch software market as defined by the DG, given the fact that there is ongoing entry by competitors and migration to substitutable switches by customers. For example, neither the role of NPCI operating the National Financial Switch ('NFS') nor the Indian Post Office (licensing of EFT Switch from Euronet and considerable market share/ power in EFT Switch and related software) has been taken into account by the DG. In addition, it has been submitted that competition from established and viable firms/ entrants such as ElectraCard, Euronet, YCS ad FIS switches has not been analyzed by DG. The switching of ACI's customers to other switch software suppliers and new contract between some of the aforementioned switch software suppliers and different banks are but some of the developments that have/ and are continuing to take place in the market.

8.7. It has been submitted that the dynamics of competition prevailing in the market are further evidenced by the declining market share of ACI (even in terms of the over stated and incorrectly measured market shares attributed to ACI by DG). In conducting competition assessment, especially in regard to market dominance, competition authorities worldwide attach considerable significance to the changes or trends in the market shares of the firm in question. Declining market shares are generally construed as being indicative of increased competition and lack of market power.



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8.8. It has been submitted that the DG has without independent verification accepted the market analysis of the Informant. It has been further submitted that banks are not the only customers of EFT Switches, and other financial and non-financial institutions also buy EFT Switches. For example, Euronet has licensed its switch 'Arkansys' to the NPCI for operating the NFS. Further, it is submitted by ACI that the DG has failed to consider the transactions done through 'internet gateway' and 'mobile banking' while calculating its market share. The DG has relied merely on the Informant's submission to conclude that internet gateway transactions constitute 2% of the total transactions and hence, such transactions have been excluded while undertaking the analysis. It has been submitted that not only has the DG blindly placed reliance on the submissions of the Informant, but has also not given an opportunity to ACI to rebut such evidence/ data.

8.9. It has also been submitted that other segments of the payment and settlement systems such as ATM networks, card payment network, cross border money transfer, pre-paid payment instruments, white label ATM operators would also require EFT Switches and are a part of the actual/ potential customer base for EFT Switches. This has been entirely ignored by the DG resulting in gross error in calculating market shares. ACI has stated that there is no regulatory restriction on sale of EFT Switches in India hence, there is no reason for ignoring buyers of EFT Switches while analysing the market power of EFT Switch suppliers in the relevant market. By placing reliance on incorrect/ insufficient information, the DG incorrectly determined the relevant market and wrongly concluded that the Opposite Parties are dominant.

8.10. As per ACI, it has low market shares even if only few of the components of the market were to be considered. On the basis of available data, it is submitted that the market share of ACI during financial years 2011-12 to 2013-14 (upto Feb) is less than 40% and on the basis of source of spend, its market share in 2013 is less than 24%.



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8.11. ACI has claimed that it is a very small player in a broader relevant market which includes: card lifecycle management software; merchant life cycle management software; wholesale payment processing software for NEFT and RTGS payments; payments initiation software through various channels like mobile internet and phone banking; retail payments switch software (such as BASE24); Interchange software including VISA, MasterCard, NPCI; bill payments software; fraud monitoring software; and payments infrastructure monitoring software. It is stated that in the presence of giant players like VISA and MasterCard in the relevant product market, the question of ACI being dominant does not arise. Further, ACI is not dominant in terms of estimated business share in IT and switch software spends. It is submitted that transaction based market assessment is not appropriate given that license fee is bilaterally negotiated between switch owners and the customers. Banks report the number of transactions to ACI on the basis of which fee is calculated at the agreed rate per transaction. Therefore, it would be appropriate to arrive at the share of total business on the basis of revenue of the parties.

8.12. It has been submitted that assessing market power on the basis of number of banks licensed to or revenue earned by ACI is a better and accurate indicator of the market power and hence, the DG erred in considering number of transactions to undertake market power assessment. Moreover, an EFT Switch like BASE24 software is installed on the bank server and not on ATMs and POS terminals. ATMs and POS terminal operate on their own software which allows them to communicate with banks. Hence, market power of EFT Switch developer like ACI can be assessed by the number of banks which take a license for or are connected to such EFT Switches. It has been submitted that as on July, 2014, while NFS was connected to 320 banks, BASE24 was connected to only 12 banks.



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8.13. As regards the number of ATMs, it has been submitted that NFS manages more than 90% of inter-bank ATM transactions in the country and was connected to 1,55,000 ATMs as of February 2014 whereas, as per the DG report, ACI's BASE24 was connected to 98,670 ATMs by that time. The volume of transactions of banks using BASE24 software is significantly less compared to the NFS approved volume of transactions. In this context, it has been submitted that the DG has wrongly attributed 439 crore transactions to ACI for the period of 30.04.2013 to 28.02.2014 on account of the fact that not all ACI Banks used BASE24 for their POS transactions. As a matter of fact, only HDFC and ICICI use BASE24 for its POS operations.

8.14. It has been stated by ACI that the DG has failed to analyse the downstream market where the Informant enjoyed monopoly from the time it became a distributor of ACI until 2013. The entry and increased competition in the downstream market was largely facilitated by ACI so as to provide its customers greater choice of alternative service providers.

8.15. It has been submitted that the DG has ignored the fact that ACI has not been able to operate independent of competitors or consumers and wrongly concluded that banks do not have countervailing buying power.

8.16. As per the Opposite Parties, the DG has wrongly concluded that there are huge financial and technical constraints in migrating to other software. In order to arrive at this erroneous conclusion the DG has relied on the statements of few banks while he ignored the responses of Kotak Mahindra Bank, Oriental Bank of Commerce and Royal bank of Scotland.

8.17. It is submitted that the DG has ignored the nature and degree of vertical integration of competitors of ACI in the market. The Opposite Parties are the only EFT Switch suppliers who have outsourced the systems integration, customization and modification of its proprietary BASE24 EFT Switches to



the Informant whereas all the other EFT Switch suppliers perform the same services in-house.

8.18. ACI has submitted that since it is not dominant in the relevant market, even in the incorrectly narrow anti-trust market as delineated by the DG, the issue of abuse of dominant position does not arise.

8.19. On the findings of DG in regard to contravention of different provisions of sections 3(4) and 4 of the Act, it has been submitted that the DG has investigated the matter without appreciating the prevailing industry practice, the objective justification for ACI's conduct, nature of dispute with the Informant and threat to the IPRs of ACI. It is submitted that the DG has erroneously accepted the allegation that ACI tried to foreclose the downstream market. On the contrary, its intention is to open up the downstream market to other players and break the monopoly of the Informant.

8.20. As per ACI, the DG has erroneously concluded contravention of section 4(2)(a)(i) of the Act on the basis of ACI's advice to its banks to refrain from using the Informant for customization services amounts to an unfair condition. Rather, many ACI Banks have continued to use the services of the Informant for customization for a period even after expiry of the deadline. Also, the DG has erroneously concluded that ACI has abused its dominant position by limiting the access of third party service providers to downstream market by deterring new entry and thereby limiting technical and scientific development in contravention of sections 4(2)(c) and 4(2)(b)(i) of the Act. ACI has stated that DG's assessment in this regard is based on recycled arguments and untenable presumptions. The DG has failed to analyze the downstream market of the vertical integrated service suppliers. It is stated that ACI is not only entering the market itself but is also sponsoring entry of several new entrants and creating competition for the benefit of customers. The willingness for entry by Mphasis, TCS, Wipro, CTS indicates the



prospect of greater competition on part of the third party professional services' market.

8.21. It has been submitted that the DG has erroneously concluded contravention of section 4(2)(e) of the Act as ACI seeks to leverage its dominant position in the upstream market to support itself in the downstream market. Assuming the DG's finding that ACI is dominant in the upstream market is correct; the finding suffers from the lack of concrete mechanism showing how ACI could leverage position from the upstream to downstream market. The Opposite Parties have submitted that the Informant has tried to foreclose the market by carrying out customization work without adequate documentation. In the absence of complete documentation of customization, it is extremely difficult for any other entity to provide such services to the banks. In light of the aforesaid, it has been submitted that it is the Informant which is trying to foreclose the market and not the Opposite Parties.

8.22. It has been submitted that DG has erroneously concluded that ACI has contravened section 3(4) read with Section 3(1) of the Act. It is submitted that ACI is not preventing any third party (other than the Informant) from providing customization services. Further, the requirement of prior consent of the Opposite Parties for third party customization is a reasonable restraint under section 3(5)(i) of the Act and the same is *de facto* applied by other switch software suppliers in India. It has been further submitted that the DG has concluded that there is AAEC without even analyzing the factors provided in section 19(3) of the Act. This finding is not established even if it is assumed that ACI is dominant in the upstream market based on the facts considered by the DG.

8.23. The Opposite Parties have contended violation of IPRs and breach of contractual obligations by the Informant. It has been submitted that the DG has stated that the issues related to the alleged violation of IPRs does not fall within the ambit of the examination of abusive conduct under the Act.



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However, the DG, relying solely on the submissions made by Informant, concluded that the allegations of IPR violation as contended by the Opposite Parties do not stand established.

9. **Replies/ Objections of the Informant**

9.1 The Informant in its response to DG report has agreed with the findings of the DG with regard to delineation of the relevant markets as the market for the provision of EFT Switches/ switch software in India (upstream market) and the services provided in relation thereto (downstream market).

9.2 The Informant in its rejoinder to the replies of ACI has submitted that while both Interchange switch and EFT Switch are switch software, their functions vary significantly and as such cannot be considered as substitutable. It has been submitted that EFT Switch enables card-based transactions through various frontend devices (such as ATMs, POS devices, mobiles and internet payment gateways) deployed by a bank and acts as a middleware between the devices on the one side and the core banking host of the bank on the other. The customer transactions would emanate from the frontend devices deployed by the banks. When any transaction is attempted at a particular bank's device, EFT Switch relays the transaction to the core banking host of the bank to get the authorization for the transaction.

9.3 An Interchange or ATM sharing network uses a switch merely to facilitate routing of transactions between EFT Switches of two banks. However, EFT Switch of a bank facilitates a card-based transaction between a bank and its customers through the frontend devices like ATM, POS and payment gateways and it also facilitates authentication of such customer transaction. Therefore, Interchanges like, VISA, MasterCard or NFS and ATM sharing networks like Cashtree, Cashnet and BANCS only route transactions between two banks and unlike EFT Switches, Interchange switches do not authenticate the customer transactions. Thus, it is wrong to conclude that these



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Interchanges and ATM Networks exercise any competitive constraints or even operate in the same relevant market.

9.4 With respect to NFS, it has been submitted that NFS facilitates routing of ATM transactions through inter-connectivity between the banks' switches thereby enabling the bank customers to utilize any ATM of a connected bank. Thus, it is an Interchange switch which enables inter-bank ATM transaction enabling customers of one bank to use the ATM of another bank and is not the same as an EFT Switch and the same has been accepted by ACI. The Ministry of Finance, in the Report of the Key Advisory Group of the Payments Systems in India, has also recognized NFS as an Interchange switch used by banks.

9.5 The Informant has submitted that the substitutability under the Act has to be determined from the demand perspective, keeping in mind the functional relation between the product characteristics and its end use. With respect to substitutability, the Informant has relied upon the decision of the European Court of Justice ('ECJ') in the case. *Hoffman La-Roche v. Commission of European Communities*. The Informant has submitted that products that have materially different characteristics and are not functionally interchangeable, cannot be regarded as a part of the same market. The end use of the product is the most important feature to determine the interchangeability and to examine whether they form a part of the same relevant market. As per the Informant, EFT Switch performs distinct functions and has no functional interchangeability with an Interchange switch as contended by ACI.

9.6 It has been submitted that the broader product market definition being suggested by ACI viz., market for electronic retail payment systems is erroneous both in law and on facts. It is submitted that the relevant product market has to be determined from the perspective of what is regarded as interchangeable by the customer i.e., the banks in the instant case. The functions being performed by EFT Switch cannot be performed by any other electronic retail payment system. In fact, the two are completely distinct



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products which cannot be taken to constitute the same relevant market. Since the services being provided by an Interchange switch are not functionally interchangeable with an EFT Switch, the same cannot be stated to be substitutes.

9.7 The Informant has submitted that mobile phone transactions processed through EFT Switch; transactions processed by leading card issuers such as Citibank, HSBC, and Standard Chartered processed by EFT Switch of the relevant bank have been considered by the DG. Transactions through e-commerce portals (such as Flipkart, Myntra, IRCTC, *etc.*) can be discharged through a payment gateway or internet banking. As per the Informant, such transactions are either already included in the assessment provided by the DG or wholly unconnected with EFT Switches. As regards the entry of the Indian Post Office, the Informant has submitted that the entry of the Indian Post Office is merely a proposed entry and thus cannot be said to have any impact on ACI's market share during the period under investigation.

9.8 The Informant has stated that the alternate market definition *i.e.*, the market of software for electronic payment systems as provided by ACI is misplaced because different software are not substitutes, the suppliers of these different software are different and consumers do not necessarily demand these software together.

9.9 It is submitted that the submissions of ACI with respect to switching costs are grossly misplaced and counter intuitive. It has been submitted that the industry is characterized by relatively high costs for banks to migrate from one EFT Switch to the other, in addition to the risk involved in doing so.

9.10 The Informant has submitted that hosted switch software is nothing but an EFT Switch like BASE24, Postilion *etc.* and these have already been included in the definition of relevant product market as defined by the DG.



9.11 It has been submitted that the DG's findings on the dominance of ACI are based on a comprehensive analysis of the factors mentioned in section 19(4) of the Act. As per the Informant, the DG's calculations of the market share are based on the correct indicators, including the volume of transactions and the number of ATMs/ POS devices serviced by ACI.

9.12 As per the Informant, the DG has correctly noted that ACI's conduct contravened section 4(2)(a)(i) of the Act since ACI imposed unfair conditions on ACI Banks by preventing them from obtaining professional services from parties other than ACI through the conditions included in its license agreement. Further, it has been submitted that after due consideration of the evidence placed on record, the DG correctly concluded that ACI's conduct contravened section 4(2)(b)(i) of the Act by preventing the Informant and other third parties from providing professional services and thereby limiting the availability of services from parties other than ACI. As per the Informant, the DG has correctly concluded that ACI's conduct contravened section 4(2)(b)(ii) of the Act by limiting the technical or scientific development relating to services in downstream market to the prejudice of the consumers. In addition to above, the Informant is in agreement with the findings of DG report that ACI has contravened the provisions of section 4(2)(c) of the Act because it effectively denied access to the downstream market to all of its competitors through the onerous conditions imposed through its license agreements with ACI Banks. It has been submitted that the DG correctly concluded that ACI's conduct contravened section 4(2)(d) of the Act as ACI imposed supplementary obligations through the license agreements. The Informant also agreed with the findings of DG that the conduct of ACI is in contravention of the provision of section 4(2)(e) of the Act as it is leveraging its dominance in the upstream market to enter the downstream market.

9.13 As per the Informant, the DG has correctly concluded that by compelling ACI Banks using BASE24 software to necessarily procure services in relation thereto from ACI, ACI imposed a tie-in arrangement on consumers which is



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in violation of section 3(4)(a) of the Act. It has been contended that the DG rightly noted that this condition amounts to an exclusive supply agreement and thus falls within the mischief of section 3(4)(c) of the Act. As per the Informant, the DG has correctly concluded that such conduct of ACI is likely to cause AAEC in the relevant downstream market through the creation of entry barriers in the market, foreclosure of market and driving out existing competitors from the market. It has been submitted that the DG, after due consideration of the evidence provided, correctly concluded that ACI cannot avail the exemption under section 3(5) of the Act in relation to protection of its IPRs.

9.14 It has been stated by the Informant that the DG considered the prevalent industry practices on the basis of the submissions made by third parties, including ACI's competitor-suppliers of EFT Switches and also the consumers of EFT Switches and thereby defined the relevant market accordingly. The Informant has submitted that ACI has constantly attempted to hide behind the ongoing legal dispute between FSS and ACI even though the said legal dispute is purely contractual and has no bearing on the proceedings before the Commission.

9.15 The Informant has denied that the market share of ACI represents a downward trend. The analysis performed by the DG clearly demonstrates that ACI's market share has more or less remained constant, further it is also apparent that ACI has retained all its customer banks. In any event, even if there is any fluctuation in the market share of ACI, it is negligible and does not impact ACI's position in the market. It has been further submitted that the ongoing trends in the market clearly demonstrate that ACI continues to enjoy its position of strength in the market, since all its major customers, barring two banks with lesser transactions, have continued to avail services from ACI and have also upgraded their BASE24 software on a regular basis. It is stated that despite all of ACI's claims about occupying a weak position in the market, customers are entirely dependent on it as evidenced by their



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continuance with BASE24 despite the software being in its sunset phase, the increase in the price of the services being offered by ACI in the downstream market, the existence of alternative products, and ACI's callous attitude towards its customers.

9.16 The Informant has submitted that even for the sake of assumption that ACI's argument is correct, the POS terminals deployed by HDFC and ICICI alone, constitute around 52% of the total number of POS terminals deployed in India. The Informant has denied that the DG has excluded any significant customer base from its analysis.

9.17 It has been submitted that ACI has sought to mislead the Commission by stating that BASE24 software does not support internet payment gateway transactions and mobile payment transactions. The Informant has submitted that such transactions are processed through EFT Switches of the banks for authorization. For clarity, SBI's and HDFC's, internet gateway transactions and mobile payment transactions are processed through their respective BASE24 Switch for authentication. Resultantly, these transactions belonging to ACI Banks would be attributed to BASE24. Therefore, even if one includes such transactions in the market share assessment, ACI's market share would only increase since the transactions are routed through its BASE24 Switch.

9.18 It has been submitted that ACI has calculated its market share wrongly by including number of transactions conducted through Interchange switches like NPCI and MasterCard and VISA, transactions through IRCTC, internet banking transactions, mobile banking transactions, EFT/ NEFT transactions, electronic clearing services transactions, RTGS transactions, payment gateway transactions, phone banking and call centre transactions, MasterCard and VISA transactions due to IRCTC, *etc.*



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9.19 It has been submitted by the Informant that the total share of revenue spent by a customer on an EFT Switch is not a correct determinant of market share of an entity. The fee charged by different switches may vary and be based on different parameters, implying that the evaluation on the basis of the share of the revenue would fail to provide the correct picture. The Informant has submitted that the transaction based model is in fact the most appropriate method to determine the market share. Further, even if the transaction based method is not found to be appropriate the DG has also calculated the market share based on the number of ATMs and POS devices powered by ACI's BASE24 software.

9.20 The Informant has submitted that in so far as NFS and other such Interchange switches are concerned, taking them into account for the purposes of market share calculations is grossly incorrect. Hence, the alleged reduction in the market share of ACI on account of greater prominence of NFS and other such Interchange switches is without any merit and cannot be accepted.

9.21 It has been submitted that it would be incorrect to state that ACI has been attempting to inject competition in the market in as much as it has merely sub-contracted the services to other players who are in fact controlled by ACI.

9.22 In regards to switching cost, the Informant has submitted that Kotak Mahindra Bank, despite being a small-sized bank with about 961 ATMs as on March 2013 took nearly a year to successfully switch from BASE24 to Electra. Further, SBI could not successfully migrate from BASE24 to Opus successfully and thus is currently utilizing both switches. Even Punjab National Bank and Indian Bank scraped their RFPs after SBI's failure to migrate.

9.23 The Informant has submitted that ACI has provided a list of services provided by the NPCI such as the RuPay Scheme, Immediate Payment Service, Aadhar Enabled Payment System and Aadhar Payment Bridge



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System and argued that each of these services should be considered as independent transactions for the purpose of calculating the market share. The Informant has submitted that these services are not 'substitutes' of EFT Switches in any sense of the word. In addition, the Informant has submitted that IMPS transactions are inter-bank electronic instant mobile money transfer which is provided by the NPCI. It has been submitted that such transactions are processed through EFT Switch of the relevant bank itself.

9.24 The Informant has submitted that the submissions made by ACI that NFS/ IRCTC/ Flipkart and other transactions be included as EFT transactions is a deliberate attempt to mislead the Commission.

9.25 The Informant has denied that ACI has been infusing competition in the market with intent to break monopoly enjoyed by FSS. The Informant has submitted that ACI categorically admitted that it has in fact restricted FSS's access to downstream market by way of impositions on ACI Banks not to avail services from FSS. It has been submitted that ACI Banks only contracted with FSS for provision of services out of choice rather than any compulsion. The Informant has submitted that ACI outrightly prohibited ACI Banks from availing services from FSS through enforcement of consent clause in its license agreement with customer banks. It has been further submitted that ACI individually wrote to ACI Banks prohibiting them from availing any services from FSS. Additionally, ACI also threatened certain banks with termination of their license agreement for availing services from FSS. Thus, the downstream market has been fully foreclosed as far as the Informant is concerned.

9.26 The Informant has submitted that ACI's competitors, barring YCS, do not at all compel their customers to avail services only from them. ACI has misrepresented the facts by stating that Mphasis has been providing services to Bank of Baroda since 2006. It has been submitted that Mphasis is merely a sub-contractor of ACI and can hardly be considered as a competitor in the market.



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9.27 The Informant has supported the finding of the DG holding ACI in contravention of section 3(4) read with section 3(1) of the Act. The downstream market stands effectively foreclosed to all third parties other than ACI and its subcontracted partners through the consent clause which bestows ACI with enormous discretion in deciding who may provide professional service. It has been submitted that the DG correctly concluded that the restriction imposed by ACI can hardly be considered reasonable, given that it effectively ousts all competition from the downstream market. It has been contended that the unreasonableness of this restraint is particularly acute given the existence of other reasonable means to protect its IPRs, including technical measures such as SDKs and also contractual measures which vest the rights to the IPRs in ACI.

10. **Issues and Analysis**

10.1 Having given due consideration to facts of the case, the investigation report of the DG, the detailed written and oral submissions made by the Informant and ACI, the Commission observes that the following issues need to be determined in order to arrive at a conclusion in the matter:

Issue No. I: Whether ACI has contravened the provisions of section 4 of the Act?

Issue No. II: Whether ACI has contravened the provisions of section 3(4) read with section 3(1) of the Act?

Determination of Issue No. I: Whether ACI has contravened provisions of section 4 of the Act?

Determination of Issue No. I requires deliberation on the following sub-issues:

- (i) Determination of the relevant market.
- (ii) Assessment of the position of dominance of ACI in the relevant market.



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

10.2 Before discussing the specific issue at hand, it would be appropriate to briefly describe the process and technology involved in various card-based transactions. For instance, ATM card-based transactions can be classified into the following two broad categories, based on the ATM being used and the cardholder's bank.

- a) **On-Us** – When a card of the issuing bank (Bank 'A') is used on its own ATM, the EFT Switch of Bank 'A' authenticates the transaction after routing it to the core banking network of Bank 'A'.
- b) **Off-Us/ Remote-On-Us** – When a card of Bank 'A' is used on an ATM of another bank *i.e.* the acquiring bank (Bank 'B'), EFT Switch of Bank 'B' routes it to the ATM Network/ Interchange, whose EFT Switch in turn routes it to the EFT Switch of Bank 'A'. The EFT Switch of Bank 'A' authenticates the transaction after routing it to its core banking network. The transaction is then routed back by the EFT Switch of Bank 'A' to the ATM Network/ Interchange EFT Switch which routes it to the EFT Switch of Bank 'B'. In such transactions, multiple EFT Switches are activated to complete the transaction; those of the acquiring bank, ATM Network/ Interchange and of the issuing bank.

This transaction when viewed from the acquiring bank's perspective is called an **Off-Us** transaction and when viewed from the issuing bank's perspective is known as a **Remote-On-Us** transaction.

Therefore, while all such transactions utilize the core banking network of Bank 'A', in Off-Us/ Remote-On-Us transactions, the EFT Switches of Bank 'B' and the ATM Network/ Interchange are also utilized. Hence, each of these



transactions use at least one EFT Switch and desirable feature(s) of the EFT Switch/ switch software may be used based on the specific operational requirement/ stage of the transaction.

(i) Relevant Market Determination

10.3 As per section 2(r) of 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. Further, the term ‘relevant product market’ has been defined in section 2(t) of the Act as a market comprising 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 term ‘relevant geographic market’ on the other hand has been defined in section 2(s) of the Act to mean a market comprising the area in which the conditions of competition for supply or demand of goods or provision of services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas.

10.4 In order to determine the relevant product market, the Commission, in terms of the factors contained in section 19(7) of the Act, is required to give due regard to all or any of the following factors *viz.*, physical characteristics or end use of the goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products. Similarly, in order to determine the relevant geographic market, the Commission, in terms of the factors contained in section 19(6) of the Act, is required to give due regard to all or any of the following factors *viz.*, 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.



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- 10.5 The DG in its investigation report has delineated two relevant markets *viz.* ‘the market for EFT Switch/ switch software in India (upstream market)’ and ‘the market for provision of services in respect of customization and modification of EFT software (professional services) in India (downstream market)’.
- 10.6 The DG has distinguished the upstream market from the downstream market taking into account the different suppliers and different practices in these markets. The relevant geographic market in case of both the upstream and downstream markets has been defined as India.
- 10.7 ACI in its submissions has contended that the relevant product and geographic markets as defined by the DG are incorrect, stating that while defining the relevant market the DG has not considered the substitutes available in the market, the benchmark method for evaluating demand substitutability (SSNIP Test), factors provided in section 19(7) of the Act and the universe of inter-connected electronic payments.
- 10.8 ACI has argued that the DG has considered only banks as customers of EFT Switch and ignored other customers of EFT Switches such as financial institutions and other payments and settlement systems. ACI also contended that the DG failed to recognize other suppliers of EFT Switch such as Euronet (Euronet has licensed its EFT Switch *Arkansys* to NPCI which operates the NFS).
- 10.9 Further, ACI also submitted that other segments of the payment and settlement systems such as ATM networks, card payment networks, cross border money transfer, prepaid payment instruments and white label ATM operators also require EFT Switches. Also, transactions processed by NPCI; mobile phone/ phone banking transactions; transactions by hosted service provider such as FSSnet, AGS, Prizm, TCPSL, C-edge, Euronet, FIS, ElectraCard, YCS *etc.*; transactions processed by leading card issuers such as Citibank, HSBC, Standard Chartered among others; transactions processed by



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VISA and MasterCard; e-commerce transactions processed for emerging players such as Flipkart, Myntra and others are a part of the same relevant product market. Accordingly, ACI contended that *market for electronic retail payment systems* should be considered as the relevant product market in this case.

10.10 With respect to the relevant geographical market, ACI argued that the DG erroneously restricted the market to India instead of global, without considering the factors provided in section 19(6) of the Act, competition from imports, export potential and international electronic payments. Furthermore, in doing so, the DG has also erred in simultaneously analyzing both the upstream and the downstream markets and concluding that the relevant geographic market is restricted to India. ACI based its arguments on factors such as absence of regulatory trade barriers, no local specification requirements, no national procurement policy, adequate distribution facilities across the world, no transport cost, no language change in the software in different geographies, consumer preference not being related to geographical area and the fact that significant amount of after sale services can be provided online and the same do not require physical presence. ACI has given examples of its competitors, Lusion and FIS, which though located outside India, provide their software licenses to customers in India. ACI also contended that MasterCard and VISA payment systems provide services in India while their EFT Switches are based across the world and their services in India are not restricted to their switches in India, if any. Finally, ACI also argued that its own customers use their Indian switch for transactions taking place outside India.

10.11 The Informant, however, has agreed with the DG's findings on the relevant market, stating that the DG with sufficient clarity and rational justification has found that none of the services provided by ACI are interchangeable with peripheral services as such services cannot substitute an EFT Switch in terms of functionality. According to the Informant, an EFT Switch enables card-based transactions through various frontend devices (such as ATMs POS



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devices, mobiles and internet payment gateways) deployed by a bank, whether directly or indirectly, and acts as a middleware between the devices on the one side and the core banking host of the bank on the other. When any transaction is attempted at a particular bank's device, the EFT Switch relays the transaction to the core banking host of such bank to get the authorization for the transaction. Further, VISA, MasterCard, NFS and ATM sharing networks like Cashtree, Cashnet and BANCS are ATM Network/ Interchange switches which are used to route transactions between two banks and do not authenticate the customer transactions like ACI's EFT Switch.

10.12 Further, as per the Informant, services provided by an ATM Network/ Interchange switch are functionally not interchangeable with an EFT Switch and hence the same cannot be regarded as a substitute. Moreover, EFT Switches are not interchangeable with other electronic modes of payments such as internet banking, RTGS, NEFT *etc.* The customer of EFT Switches are by and large banks (mainly through ATMs and POS) and the relevant market of electronic retail payment system is taken from the perspective of end consumers' (*i.e* public in general) substitutability.

10.13 As per the Informant, mobile phone transactions and hosted services are processed through EFT Switches of the relevant bank and the same have been taken into account by the DG while defining the relevant market.

10.14 Also, on the aspect of the relevant geographic market, the Informant in agreement with the DG, refutes the contention of the Opposite Parties that the geographic spread of the market extends beyond the territory of India on the grounds that (a) the Indian regulatory framework is different than other countries; (b) banks demand EFT Switches for use in India only; and (c) the service providers have physical presence in India for installation and customization.

10.15 Having perused the findings contained in the DG report as well as the submissions of both ACI and the Informant with regard to the relevant market



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definition, the Commission's observations on this sub-issue are recorded in the following paragraphs.

10.16 The Commission notes that ACI in its submissions to the DG as well as to the Commission has contended that '*the market for electronic retail payment systems*' should be considered as the relevant product market in this matter. The DG in its findings notes that the function of an EFT Switch is to provide a communication mechanism amongst different components of an electronic fund transfer system such as ATMs, POS terminals and core banking systems. The DG considered ACI's submissions with respect to other components of the electronic payment systems such as card lifecycle management software, fraud monitoring software *etc.* and found that apart from the basic EFT Switch there are other complementary software modules used along with EFT Switch/ switch software for enabling card-based transactions. For instance, life cycle management software helps to manage all aspects of the life of a card from application to account closure; fraud monitoring software issues alerts after detecting suspicious account and transaction activity *etc.* The DG found that none of these software can replace the switch software in terms of functionality, but provide additional features and complement the functions of an EFT Switch. It was further observed by the DG that the presence of peripheral software as mentioned by ACI is not mandatory for banks to operate EFT Switch. The DG concluded that an EFT Switch performs a specific function which cannot be performed by any of the other payment software mentioned by ACI as each of them performs a distinct function and cannot be used interchangeably.

10.17 The Commission is of the view that the DG has correctly found that the other components of the electronic payment systems/ peripheral software only complement an EFT Switch and cannot substitute the same. The Commission as such rejects ACI's market definition *i.e., the market for electronic retail payment systems* as electronic payment system is an umbrella term including different modes of payment which have different characteristics and different



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costs associated to the final consumers. Therefore, the Commission is of the opinion that the market for EFT Switch/ switch software is the relevant upstream product market in this case.

10.18 Having said that, the Commission finds it imperative to point out that although the DG has correctly found *EFT Switch/ switch software* to constitute a distinct relevant product, the DG has limited the market analysis for EFT Switch/ switch software to the switch software used by banks for communicating with their core banking network alone. On this count, the Commission differs from the DG's understanding of the relevant product market (upstream).

10.19 This is also evident from its analysis of market dominance wherein the DG only investigates those competitors of ACI, which provide EFT Switch/ switch software to banks, as detailed in the later part of this order.

10.20 The Commission notes that definitional clarity on what constitutes *EFT Switch/ switch software* is critical for the correct determination and understanding of the relevant market in the present case.

10.21 The Commission is of the view that EFT Switch/ switch software, such as BASE24 software of ACI, is an interface between card-based frontend systems such as an ATM, POS terminal, online payment gateways *etc.* and the core banking network of the bank which issues the card. However, to complete card-based transactions of the Off-Us/ Remote On-Us kind described above, there are other interfaces that also use EFT Switches.

10.22 In addition to the interface between the card-based frontend systems and the core banking network, EFT Switches also interface with national ATM networks (such as NFS operated by NPCI, Cashtree, Cashnet, BANCS *etc.*) and international card networks such as VISA, MasterCard *etc.* for ATM/ POS sharing arrangements.



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10.23 From the submissions made by non-ACI banks to the DG, the Commission observes that Banks such as Barclays Bank, DBS, Deutsche Bank, HSBC and Standard Chartered Bank use *Arkansys* switch provided by Euronet. It is noted that NFS operated by NPCI also uses the *Arkansys* switch licensed by Euronet. It is evident from the above that EFT Switch/ switch software is capable of performing both (a) authenticating and (b) routing transactions. In view of the above, the Commission is of the opinion that the DG has incorrectly analyzed the market to include only EFT Switch/ switch software used by banks for communicating with their core banking network for authenticating and not those used by ATM Network/ Interchanges in the relevant market of EFT Switch/ switch software.

10.24 The Commission notes that EFT Switch/ switch software is capable of both authentication and routing and a bank/ ATM Network/ Interchange may choose to use either or both features depending on their requirements. The Commission notes EFT Switch/ switch software used by banks to process various transactions is capable of carrying out both routing (when it communicates with the ATM Network/ Interchange) and authentication (when it communicates with the core banking network of the bank).

10.25 The Informant has sought to argue that an EFT Switch facilitates electronic retail transaction of a bank through ATMs, POS terminals, mobiles and internet payment gateways and authenticates the customer transactions whereas an ATM Network/ Interchange switch uses the switch to merely facilitate routing of transactions between EFT Switches of two banks and therefore the two are not substitutable.

10.26 The Commission observes that the Informant has tried to draw a specious distinction between EFT Switches used by banks (as an interface with the core banking network and ATM and POS *etc.*) and EFT Switches used by



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ATM Network/ Interchanges based purely on the features of an EFT Switch/ switch software that they choose to use *i.e.* authenticating or routing or both.

10.27 ACI has also argued that the DG has erroneously considered only banks as its customers of EFT Switch/ switch software and ignored other customers of EFT Switch/ switch software such as financial institutions, payment and settlement systems, and other suppliers such as Euronet. ACI has submitted that the DG failed to include other segments of the payment and settlement systems would also require EFT Switches and would thereby form part of the actual/ potential customer base for EFT Switches, in the market definition of EFT Switch/ switch software.

10.28 The Commission has therefore, examined the submissions of the Parties to determine whether such components, which were not taken into consideration by the DG, should be included as part of the relevant market:

ATM networks

ACI has contended that ATM networks in India such as NFS, 'CashTree', 'BANCS' and 'Cashnet' amongst which NFS is the largest also require EFT Switches for processing transactions.

As discussed above, the Commission is of the view that the switch software employed by ATM Network/ Interchange would also be part of the said relevant market as both ATM Network/ Interchanges and banks essentially use an EFT Switch for either routing or authenticating or both. However, the relevant market analysis undertaken by the DG does not include the ATM Network/ Interchange switches.



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Cross Border Money Transfer

ACI contended that cross border transfer service is an electronic transfer of funds from one bank account to another, where the beneficiary of the funds resides outside the payee's country and therefore these transactions should also be made a part of the relevant product market.

The Commission observes that there are multiple channels *via* which cross border money transfers may take place and an EFT Switch may or may not be used in each such channel. Even if such transactions are processed through EFT Switches, such switches may reside outside India and would not be considered as part of the relevant market in the present case. ACI apart from making a bald submission has not provided any details to substantiate its claim. Therefore, the Commission is not inclined to accept this contention of the Opposite Parties.

NEFT and RTGS Transaction

The Commission accepts the submissions by the Informant that NEFT transactions are processed by the banks through the RBI settlement system which is similar to the cheque clearing mechanism. The Commission observes that NEFT and RTGS transactions do not use EFT Switch/ switch software for processing such transactions. Hence, NEFT and RTGS transactions are not relevant. Therefore, the DG has correctly excluded NEFT and RTGS transactions from the relevant market of EFT Switch/ switch software market in India.

White Label ATM Operators

The Commission notes that the RBI has permitted non-banking entities to set up, own and operate ATMs to accelerate the growth and penetration of ATMs



in the country. These ATMs would provide banking services to customers of banks in India, based on the cards issued by banks.

In view of the above, the Commission observes that in order to process the transaction white label ATMs would also require EFT switch/ switch software to route the transaction to the respective shared ATM network of the banks. However, while transactions processed through a white label ATM have been taken into account by the DG, the DG has failed to take into account the switch used by white label ATMs for routing the transactions to an issuing bank. This is due to the fact that the understanding of the DG of the relevant market is restricted only to EFT Switch/ switch software used on the core banking network for authenticating only and all routing by EFT Switches in the white label ATM Network/ Interchange have been ignored.

Mobile phone/ mobile banking

The Commission observes that these transactions are processed through EFT Switches of the concerned issuing bank only if the architecture of such banks' mobile banking system is based on the use of debit/ credit card. The Commission further observes that such transactions processed through mobile banking would form part of the relevant market. However, such transactions account for a small percentage of the total volume of transactions.

Transactions processed by leading card issuers such as Citibank, HSBC, Standard Chartered

The Commission observes that these transactions are also carried out through EFT Switches of the relevant bank and in fact, the data on all such counts has been considered by the DG.



Transactions by hosted service providers such as FSSnet, AGS, Prizm, TCP SL, Euronet, Electracard, YCS etc.

The Commission notes that these transactions also use an EFT Switch and have been taken into account by the DG.

Transactions processed by VISA and MasterCard

The Commission is of the view that these transactions are routed through EFT Switches of the banks to the international switches of VISA and MasterCard, which are deployed outside the territory of India. Therefore, the transactions on the international switches would not form part of the relevant market.

Transactions through Internet Payment Gateways

The DG in its investigation report has found that transactions through internet gateways are also processed through EFT Switches. However, such transactions account for only 2% of the total transactions served through switch software.

E-commerce transactions processed by emerging players such as Flipkart, Myntra and others

The Commission observes that these e-commerce portals are merchant establishments that do retailing on the Internet as opposed to physical merchants who have POS terminals of the banks at their establishments. Therefore, the transactions carried on these e-commerce portals are routed through payment gateways, which have already been accounted for by the DG.



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Card Payment Networks

Payment card network consists of electronic payment systems, which is used to accept, transmit, or process transactions made by payment cards (debit or credit) in order to transfer information or funds among issuers, acquirers, merchants and card users. The Commission is of the view that a card payment network is an entire ecosystem whose components have been discussed above and therefore, have already been considered in the analysis of the relevant product market.

10.29 With respect to the relevant downstream market, the DG has reported that EFT Switches need to be customized/ modified in order to suit Indian buyers and to meet specific requirement of each bank for which many specialized firms such as FSS, TCS, Cognizant, Mphasis and Wipro *etc.* are engaged. These services may be carried out either in-house by banks or could be provided by the developers of EFT Switch/ switch software themselves or by third parties. Usually, the license agreements entered into by and between EFT Switch/ switch software developers and the buyers have provisions for the licensee to outsource the aforementioned services to third parties. Such customization/ modification services are required throughout the entire life of switch software on an ongoing basis depending on the value added services sought to be provided as well as the various regulatory requirements put in place from time to time.

10.30 ACI has argued that the DG has ignored the nature and degree of vertical integration of competitors of ACI in this market. It is submitted that the Opposite Parties are the only EFT Switch suppliers who have outsourced the systems integration, customization and modification of its proprietary BASE24 EFT Switches to the Informant whereas all the other suppliers perform the same services in-house.

10.31 The Commission notes that ACI, a first mover in the upstream market, had allowed third party provisioning of customization and modification of EFT



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Switch/ switch software. Competitors of ACI such as FIS and Euronet are providing a vertically integrated product *i.e.* EFT Switch/ switch software along with the associated customization and modification due to efficiency considerations. However, as per the facts gathered during the course of the investigation and oral hearings of the parties, a significant number of players exist in the relevant downstream market. Therefore, presently, two separate markets do exist, with respect to EFT Switch/ switch software and provision of services of customization and modification of EFT Switch/ switch software.

10.32 The Commission further notes that even though EFT Switch suppliers other than ACI provide customization and modification of their software in-house, most have not restricted their buyers from procuring these customization and modification services from third parties. Therefore, in view of the above, the Commission cannot accept the contention of the Opposite Parties with respect to EFT Switch/ switch software market and the customization and modification of EFT Switch/ switch software being part of one systems market. Thus, the Commission is in consonance with the findings of the DG, that the relevant downstream product market would be ‘the provision of services with respect to customization and modification of EFT Switch/ switch software’.

10.33 On the relevant geographic market, the DG has found that the IDA entered into by between ACI and the Informant had defined the territory as India. Further, it has been observed that the pricing policy and other terms and conditions of EFT Switch/ switch software suppliers also vary across countries depending on the market conditions, currency and the regulatory environment, *etc.* Also, the entities from which the banks are licensing EFT Switch are required to provide product distribution installation, Annual Maintenance Contract (AMC) and product support services either directly or through other entities. It is also revealed from the DG report that the conditions of supply and demand for EFT Switch in India are distinct from



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those in other countries. Moreover, the market conditions for provision of professional services for switch software vary in India *vis-a-vis* other countries.

10.34 The Commission notes that the pricing policies and the terms and conditions in various licensing agreements differ from country to country. Further, ACI's competitors like Lusic, FIS are present in the Indian market and provide licenses to their customers. Therefore, the Commission cannot accept the Opposite Parties' contention that even though its competitors are located outside India, they provide their software licenses to customers in India. Owing to the distinct regulatory requirements in different countries and the other factors discussed above, the Commission agrees with the DGs findings on the relevant geographic market. In view of the above, the relevant geographic market in case of the upstream market as well as the downstream market is India.

10.35 Based on the above discussion on the relevant products and relevant geographic market, the Commission observes that the relevant markets in the instant case are as follows:

- i. The market for EFT switch/ switch software in India (relevant upstream market).
- ii. The provision of services with respect to customization and modification of EFT Switch/ switch software in India (relevant downstream market).

(ii) Assessment of the position of Dominance of ACI in the Relevant Market

10.36 The Commission having determined the relevant markets proceeds to deal with the issue of dominance. Explanation (a) to section 4(2) provides that the underlying principle in assessing dominant position of an enterprise is linked with the concept of market strength, which allows an enterprise to operate independently of competitive forces prevailing in the relevant



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market and affect the competitors or consumers or the relevant market in its favour.

10.37 While inquiring whether an enterprise enjoys a dominant position or not, the Commission is required to give due regard to all or any of the factors as provided under section 19(4) of the Act 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, entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or services 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 factor.

10.38 Considering the aforementioned factors, the DG found ACI is in a dominant position in the relevant market of EFT Switch/ switch software in India as defined in the report. As per the DG, since ACI was following a Transaction Based Pricing (TBP) for licensing of BASE24 software, under which the license fee is linked to the number of transactions projected to be processed through the BASE24 software, the volume of transactions that take place through each EFT Switch/ switch software would be the most appropriate indicator for calculating the respective market strength/ share of the supplier of BASE24 software in the relevant market. Furthermore, it was also observed by the DG that a bank with a larger network of ATMs and POS would be processing more transactions through the switch software as compared to a bank with a smaller network and accordingly the



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number of ATMs and POS that are linked to switch software would be relevant while determining the market share.

10.39 ACI has argued that the erroneous market definition, reliance on unverified data/ information as furnished by the Informant and non-inclusion of all actual and potential buyers in the relevant market has led the DG to reach the erroneous conclusion regarding ACI's position of dominance. ACI's submissions essentially rest on the contention that dominance was found by the DG owing to an artificially narrow market defined in the report.

10.40 ACI has argued that even if the Commission were to accept the DG's narrow market definition, by taking the transaction volumes of other users of EFT Switch/ switch software into account, ACI's market share would diminish. ACI has contended that the DG has not taken into account the other buyers of EFT Switch/ switch software such as NPCI (operating the NFS by licensing EFT Switch of Euronet), the Indian Post Office (licensing EFT Switch of Euronet), competition from viable firms such as ElectraCard, Euronet, YCS, FIS switches and the transactions done through the 'internet gateway' and 'mobile banking'. ACI has further contended that the DG has also failed to note the declining market share of ACI, which is an indicator of increased competition in the relevant market.

10.41 ACI has submitted that other segments of the payment and settlement systems such as ATM networks, card payment networks, cross border money transfer, pre-paid payment instruments and white label ATM operators also require EFT Switches and are part of the actual/ potential customer base for EFT Switches. However, this aspect has been ignored by the DG resulting in wrong assessment of market shares of ACI. It is contended that major components of the relevant market include card lifecycle management software; merchant life cycle management software; wholesale payment processing software for NEFT, RTGS payments; payments initiation software through various channels like mobile internet and phone banking; retail payments switch software (such as BASE24);



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ATM Network/ Interchange software including VISA, MasterCard, NPCI; bill payments software; fraud monitoring software; and payments infrastructure monitoring software.

10.42 As per ACI, in presence of giants like VISA and MasterCard in the relevant product market, the question of dominance does not arise. Further, it was submitted that ACI is not dominant in terms of estimated business share in IT and switch software.

10.43 ACI has further contended that the transaction based market assessment as adopted by the DG is not appropriate given that the license fees are bilaterally negotiated between switch owners and customers. Since, banks report the projected volume of transactions to ACI on the basis of which fee is calculated at an agreed rate per transaction, it would be appropriate to arrive at the share of total business on the basis of revenue of the parties. ACI submits that its market share during financial years 2011-12 to 2013-14 (up to February) is less than 40% and from a source of spend perspective its market share would be less than 24% in 2013. ACI has suggested that assessing the market power on the basis of number of banks licensed to or revenue earned by ACI would be a better and accurate indicator of its market power. With regard to the number of banks licensed, it was submitted that as on July 2014 NFS was connected to 320 banks whereas BASE24 was connected to only 12 banks. Therefore, it was argued that ACI would not be dominant either in terms of the revenue earned or in terms of the number of banks licensed by it.

10.44 It was also argued that ACI was not in a position to function independently of customers and competitors and that the DG has wrongly concluded that the banks do not have countervailing buying power and there are constraints for the banks to migrate to other EFT Switches. Further, it has been submitted that compared to ACI, Euronet was found to be a much larger player in the relevant market defined by the DG and a direct competitor of ACI. For instance, NPCI, runs the largest electronic fund



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transfer system in India by the name of NFS (licensed by Euronet), and is a master switch for all inter-bank ATM transactions. NFS manages more than 90% of inter-bank ATM transactions in the country and is connected to 1,55,000 ATMs as of February 2014 whereas, ACI's BASE24 was connected to 98,670 ATMs by that time. It was also contended that NFS approved 170.5 crore transactions during January 2014-July 2014 whereas the banks directly using BASE24 software have recorded substantially lesser transactions when compared to NFS approved transactions during April 2013-February 2014. ACI has argued that the DG has wrongly attributed 439 crore transactions to ACI for the period between 30.04.2013 to 28.02.2014 as not all ACI banks use BASE24 switch software for their transactions. As a matter of fact, only HDFC and ICICI use BASE24 for their POS transactions. ACI has claimed that there are numerous transactions on NPCI, which are routed through the NFS (using Euronet's *Arkansys* switch). In case, all these transactions are considered, it is submitted that Euronet/ NFS will be a larger player as compared to ACI. In addition, ACI has also argued that many banks in India use hosted EFT Switches, which are typically provided by third parties including the Informant.

10.45 On the other hand, the Informant has agreed with the findings of the DG on the issue of ACI's dominance in the upstream relevant market and has submitted that DG's calculations of market share are based on correct indicators such as volume of transactions and the number of ATM/ POS devices serviced by ACI. As per the Informant, the DG has also taken into consideration other channels such as mobile phone transactions processed through the EFT Switch of the relevant bank; hosted services that use an EFT Switch; transactions processed by leading card issuers using the EFT Switch of the relevant bank such as Citibank, HSBC and Standard Chartered; and internet payment gateway transactions. It is stated by the Informant that e-commerce portals are not part of the relevant market and the substitutes for EFT Switch/ switch software alleged by ACI are in



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nature of delivery channels, which work through EFT Switch. ATM Network/ Interchange switches such as NFS, VISA and MasterCard are in no way functionally interchangeable with EFT Switches as used by ACI Banks.

10.46 With respect to NFS, the Informant has submitted that it is an ATM Network/ Interchange switch and its role is limited to connecting inter-bank transactions. Since the transaction itself passes through the EFT Switch of the relevant bank in any case, there is no question of counting these switches again. With regard to the inclusion of other channels such as internet gateway, mobile banking and payment gateway transactions while arriving at the market share, it has been submitted that such transactions are ultimately routed through and processed by the concerned bank's EFT Switch. With reference to the Indian Post Office, it has been contended that the entry of the Indian Post Office is merely a proposed entry and thus cannot be said to have any impact on ACI's market share. It is contended by the Informant that there exists high switching cost for the banks to migrate from one EFT Switch to another EFT Switch. With respect to ACI's contention regarding its declining market share, the Informant has stated that the market share of ACI has more or less remained constant as found by the DG and its customers are entirely dependent on it.

10.47 The Informant contended that EFT Switch and the various delivery channels, which use an EFT Switch, are different. ATM Networks such as CashTree, Cashnet are similar to ATM Network/ Interchange switches, which provide ATM sharing services by interconnecting EFT Switches of different banks. It is submitted that all cross border money transfers need not necessarily be through an EFT Switch. Such transactions can also be facilitated through mobiles connected to an EFT Switch. The Informant has stated that a Pre-paid Instrument (PPI) is essentially a card with a specific economic value attached to it, which may be electronically encashed by its holder through an ATM/ POS/ payment gateway. It has to be used on any of the frontend devices of the banks such as ATM/ POS/ payment gateway



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and merely constitutes one of the delivery channels, which operates using EFT Switch. On white label ATMs, it is submitted that these are ATM devices operated by non-banking institutions. Since these ATMs are operated through third party vendors, they would need to establish technical connectivity with the existing bank network and the transaction would be facilitated through the EFT Switch of the bank whose debit card is being used. Hence, such transactions are captured in the RBI's data on ATM transaction of the relevant bank whose card is used on the white label ATM as considered by the DG while calculating market share. Moreover, as of February 2014, the number of white label ATMs in India is around 2200 as compared to 1, 50,008 ATMs and would have little impact on the dominance of ACI.

10.48 The Informant has argued that ACI has calculated its market share by wrongly expanding the relevant market by including the number of transactions being conducted through Interchange switches, IRCTC, internet banking, mobile banking, EFT/ NEFT, Electronic Clearing Services, RTGS, payment gateway, phone banking and call centres, *etc.*

10.49 The Informant has contended that the total share of revenue spent by a customer on an EFT Switch is not a correct determinant of the market share of an entity. The fee charged by different switch vendors may vary and may be based on different parameters, implying that the evaluation on the basis of the share of the revenue will fail to provide the correct picture. It is stated that the transaction-based model is in fact the most appropriate method to determine the market share.

10.50 The Commission has considered the submissions of both the Informant and ACI as well as the findings of the DG on the issue of ACI's dominance. As mentioned above, the Commission is of the view that although the DG has delineated the relevant upstream market as the market for EFT Switch/ switch software in India it has failed to take into account the presence of other buyers of EFT Switch/ switch software in the relevant market for



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different transaction operations other than for core banking transaction requirements of the issuing bank, while examining ACI's dominance in the market. The DG has assessed dominance only with respect to EFT Switch/ switch software used by banks for the purpose of authentication, which is largely the segment of the market in which ACI has a presence. Further, by narrowing the market to EFT Switches used by banks' core banking network to authenticate alone in the assessment of dominance the DG has further sliced the market and pigeonholed it to the segment of the market in which the Opposite Parties operate. The Commission is of the view that the relevant market defined is wider than EFT Switch/ switch software used by banks alone. It is the market for EFT Switch/ switch software in India irrespective of the features of the EFT Switch that are used by the customer. The Commission believes that assessing dominance in such a narrow understanding of the relevant market, would be fallacious and lead to incorrect results.

10.51 The DG's analysis of dominance in terms of the factors as provided under section 19(4) of the Act and the Commission's observations on the same are recorded in the subsequent paragraphs.

Market share of the enterprise

While assessing the dominance of ACI, the DG has looked into the market share of EFT Switch/ switch software manufacturers in the relevant upstream market. In doing so, it has relied upon the volume of transactions processed by EFT Switch/ switch software of the issuing bank as the appropriate indicator. The DG was of the opinion that the volume of transactions processed by EFT Switch/ switch software and number of ATMs, POSs linked through an EFT Switch are the correct indicators of respective market shares. The DG report observes that ACI follows the TBP for the license fee determination. In TBP license fee is linked to the number of transactions projected to be processed through BASE24



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software. Therefore, the DG concluded that the volume of transactions that take place through each switch software would be the most appropriate indicator of the respective market share. While computing the same, the DG has relied upon the volume of transactions as recorded by the RBI.

The Commission notes that the projected number of transactions that will be routed through the switch software, are utilized to determine the capacity of the switch software to be provided to the customer. It is also observed that the license fee is not determined exclusively by projected transactions to be routed through EFT Switch/ software. Further, the license fee is negotiated between ACI and ACI Banks even under the TBP model.

The Commission further observes that a significant volume of transactions constitute Off-Us card-based transactions through ATMs and POS terminals for the years 2011-12, 2012-13 and 2013-14. However, the RBI data used by the DG does not classify the card-based transactions into On-Us, Remote On-Us and Off-Us. Further, the said data also does not capture the process of routing of each transaction by the number of switches that needs to be activated to complete the transaction, all of which are EFT Switches. The Commission observes that the said data has been compiled to arrive at the volume of transactions taking place in the payment and settlement system and is not indicative of the number of times an EFT Switch is actually activated during the course of one transaction, both for authentication and for routing. This data would be an inadequate and incomplete measure of the market share and reliance on such data would lead to an erroneous assessment of ACI's dominance.

The Commission further notes that to widen the retail electronic payment system, RBI has undertaken measures to interlink the network of one bank's ATM/ POS with others and in this process has facilitated the emergence of different inter-bank ATM networks such as CashTree, Cashnet, BANCS including the creation of a master switch, NFS maintained by NPCI. As noted earlier by the Commission EFT Switch/



switch software used by banks and ATM Network/ Interchanges is a part of the same relevant market. Therefore, the use of an EFT Switch in an ATM Network/ Interchange feature *via* the aforementioned inter-bank ATM networks should also be taken into account while assessing the dominance of the Opposite Parties.

Finally, the Commission also observes that the said data only covers financial transactions and as such does not include non-financial transactions provided by the banks through their ATMs and processed through their EFT Switch such as balance enquiry, mini-statement recovery *etc.* Furthermore, these transactions might be undertaken within the card issuing bank's own network or through other banks networks (*i.e.* Off-Us/ Remote-On-Us transactions) in which case, it would necessitate the activation of inter-bank switches such as of NFS using the Euronet EFT Switch/ switch software.

Size and importance of competitors

The Commission notes that the DG in its analysis has considered ECS, BPC, FIS, Euronet and YCS as suppliers in the relevant market of EFT Switch/switch software in India apart from ACI. However, the DG has failed to recognize other competitors such as those supplying switch software to ATM Network/ Interchange *etc.*

Furthermore, although the DG has noted Euronet as ACI's competitor, it has limited Euronet's market share analysis to EFT Switch/ switch software licensed/ hosted to banks and not to other consumers such as NPCI and other ATM sharing networks.



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The economic power of the enterprise including commercial advantages over competitors

It was noted by the DG that ACI has the advantage of the first mover into the relevant market and that there are huge financial and technical constraints in migrating to other software as submitted by various ACI Banks.

The Commission, however, observes that at the point of sale of EFT Switch/ switch software there are enough competitive options such as Electra, Euronet or ACI, available to the customers of EFT Switch/ switch software. Once any of the suppliers' EFT Switch/ switch software is purchased and customized/ modified, the buyer would face some migration issues. Thus, such constraints are not peculiar to the BASE24 software and cannot by themselves be taken to give ACI a commercial advantage over its competitors. Further, it is evident from material on record that some banks have in fact changed their EFT Switch supplier.

Dependence of consumer on the enterprise

With respect to the dependence of customers of EFT Switch/ switch software on the suppliers of EFT Switch/ switch software, the Commission observes that the DG, due to its erroneous understanding of the relevant market, has limited itself to the dependence of banks on EFT Switch/ switch software suppliers and has not considered the dependence of other buyers in the market such as ATM Network/ Interchanges on their supplier.

With respect to dependence of ACI Banks on ACI, the Commission observes that although ACI Banks have been using the BASE24 software for several years and have made huge investment in this regard and do face limited constraints in migrating to other software, migration to other switch software is possible and is happening in the industry. This indicates that the



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present case involves a product which once purchased and further customised would take some planning before migration to another product. The facts have also shown that switching and migration are happening in the industry through planned obsolescence.

In this regard, it is noted that as per the replies received by the DG from ACI Banks such as Royal Bank of Scotland, Oriental Bank of Commerce (OBC), HDFC and Kotak Mahindra have stated that there are no constraints in changing from one EFT Switch to another. It is important to note that Kotak Mahindra has successfully shifted from BASE24 to Electra, Further, OBC has recently empanelled alternate vendor for providing EFT Switch, and the process of migration from existing switch has already begun. Furthermore, Bank of Maharashtra successfully migrated to FIS switching solution from a hosted solution. In such a market, it may be appropriate to consider the inter-generational nature of competition that firms in the relevant market face not only from the other players coming out with alternate products, but also from constant upgrade demands from their current installed base of customers.

Countervailing buying power

The DG noted that on account of commercial and risk considerations, most ACI Banks have minimal countervailing buying power and banks are apprehensive of shifting to alternate switch software due to commercial and risk considerations. Furthermore, the extent of bank's dependence is evident from the fact that despite having serious reservations with regard to the decision of ACI to not grant them consent to avail professional services of FSS, most of them did not migrate to other switch software.

In this regard, it is noted that ACI Banks have continued to use the Informant's services for customization in spite of ACI's requests to refrain from doing so. Further, given that changing EFT Switch suppliers is feasible, the fact that ACI Banks chose to stay with ACI may not in itself



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show the lack of countervailing buying power. Furthermore, given that ACI's current customers include some of the largest banks in the country such as SBI and ICICI it would be reasonable to expect that such customers may be able to exercise some amount countervailing power *vis-a-vis* EFT switch providers.

10.52 It is also pertinent to point out that parties have submitted that BASE24 software has been declared to be in the 'sunset phase' and that no further research and development is being conducted *vis-à-vis* the BASE24 software.

10.53 As already observed, the DG while assessing the market share of ACI has limited itself to the volume of transactions processed through an EFT Switch using frontend devices such as ATMs, POS terminals, internet payment gateways. In doing so, the DG has not taken into account the various users of EFT Switch/ switch software thereby limiting itself to a segment of the relevant market. Further, the DG has failed to recognize that in an Off-Us/ Remote-On-Us transaction, multiple switches get activated for one transaction *i.e.* of the acquiring bank, the ATM Network/ Interchange and the issuing bank. Therefore, a market share analysis based on the volume of transactions, as captured in the RBI data, would not give a true picture of the number of times a switch gets activated.

10.54 Taking cognizance of the aforesaid discussion, the Commission observes that the material on record does not sufficiently establish that ACI operates independently of competitive forces prevailing in the relevant market or can affect competitors or consumers or the relevant market in its favour. As the dominance of ACI has not been established, the issue of abuse of dominant position does not arise.

10.55 Resultantly, the Commission finds that based on the factual matrix of this case, the conduct of ACI need not be examined. Accordingly, no case of



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contravention of the provisions of section 4 of the Act is made out against ACI in the present matter.

Determination of Issue No. II: Whether ACI has contravened of the provisions of section 3 (4) of the Act?

10.56 The Informant has alleged that ACI was restricting ACI Banks from dealing with any third party in respect of providing services of customization and modification of BASE24 EFT switch which amounts to refusal to deal under section 3(4) of the Act and such arrangements cause or are likely to cause AAEC in the market for customization and modification in India as it would lead to foreclosure of competition in the market by creating barriers to entry and by driving existing competitors out of this market. It has been alleged that ACI seeks to impose tie-in arrangements with ACI Banks by tying the market of EFT switch/ switch software with the market of services. It is averred by the Informant that such an arrangement would result in definite foreclosure of the services market, ousting existing players and creating entry barriers hence causing appreciable adverse effect in the market.

10.57 In its assessment under section 3(4) of the Act, the DG has examined the agreements between ACI and its customer banks and has found that the arrangement entered by ACI with ACI Banks would not be exempt from the applicability of section 3(4) of the Act. With specific clauses of section 3(4) the DG found that:

- The combined reading of clauses of the agreement (between ACI and ACI Banks) with ACI's decision to not grant consent to third parties including FSS beyond July 2013 amounted to a refusal to deal agreement within the meaning of section 3(4)(d) of the Act.
- ACI's stipulation to its BASE24 customers to obtain professional services only from it or entities authorized by it amounted to a



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exclusive supply agreement as provided under section 3(4)(b) of the Act.

- The agreement between ACI and its customers *de facto* amounted to a tie-in arrangement since it put a condition on the licensee to avail professional services from ACI along with the license for BASE24 software and this fell within the ambit of section 3(4)(a) of the Act.

10.58 The DG found that the agreement entered by ACI with ACI Banks had AAEC under section 3(4) after taking into account the factors given under section 19(3) of the Act.

10.59 ACI has contended that the DG's conclusion in this regard is erroneous and has stated that it is not preventing any third party, other than the Informant, from providing customization services and the requirement of its prior consent for third party customization was a reasonable restraint under section 3(5)(i) of the Act. Further, such requirement for prior consent is *de facto* applied by other switch software suppliers in India. As per ACI, the Informant is not foreclosed from the market, but is active with a dominant position as a third party supplier of professional service, as a number of customer banks replied that there are no constraints felt by them with respect to discontinuation of customization services provided by Informant. Further, ACI has contended that the DG without analyzing the factors provided in section 19(3) of the Act has wrongly concluded that there will be 'appreciable adverse effect on competition'.

10.60 ACI further submitted that customization services are only one part of the services market. A restriction on customization services can cause AAEC only if customization services form substantial part of the market. It is contended that the market definition of the DG does not actually evaluate whether the services market is segmented according to the part of services supplied by vertically integrated suppliers and that by third parties. ACI urged that the DG has ignored the portion of the market supplied by



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vertically integrated switch software suppliers who *de facto* provide bulk of the customization and modification services to their customers. Further, the DG has not provided anything about the revenues of all the competitors in the services market and factual basis for not considering progress and innovation in the said market supplied by third party services as well as in-house capacity to undertake customization and modification.

10.61 The Informant on the other hand has supported the findings of the DG in this regard. The Informant submitted that ACI has categorically admitted that it foreclosed the services market to FSS and FSS is not the only party to whom the market is foreclosed. The said market stands effectively foreclosed to all third parties other than ACI and its subcontracted partners, through the consent clause which bestows ACI with enormous discretion in deciding who may provide professional service. It was further submitted that ACI is incorrect in stating that other competitors' contracts contain similar consent obligations since the response of ACI's competitors have clearly demonstrated otherwise. As per the Informant, the DG has correctly concluded that the restriction imposed by ACI can hardly be considered reasonable, given that it effectively ousts competition from the services market.

10.62 The Informant has stated that it is only being able to provide services to ACI Banks currently because of the interim order passed by the Commission which is preventing ACI from foreclosing the downstream market to FSS and other third parties. Further, the Informant has stated that there is no merit to ACI's claim that customer banks did not feel any constraints upon the discontinuation of FSS's services.

10.63 The Informant has put forth that the DG was correct to reject ACI's argument that its restriction to ACI Banks fell within the IPR exemption under section 3(5) of the Act. It is submitted that the DG carefully considered the restriction and more reasonable alternatives, including technical and contractual safeguards that were available to ACI. It was



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further submitted that the rationale offered by ACI for imposing these restrictions was the protection of BASE24 source code. However, FSS already has access to BASE24 source code through its own BASE24 license for providing FSSNet services to banks.

10.64 The Informant has contended that the DG's conclusions in relation to the AAEC caused by ACI's conduct were arrived on the basis of a well-rounded analysis of the impact of ACI's conduct. The DG took into account the various factors used to determine AAEC including the effects on the consumers, who are tied down by ACI's conduct because of the switching costs, and the effects on competitors wishing to enter the services market. It is submitted that the DG also considered the overall impact ACI's conduct was likely to have on competition in the market and also the scientific and technical progress in the market. It was also submitted that services market is not marked by vertical integration in so far as ACI's competitors are concerned. In any event, the market share assessment is limited to an analysis of the market share in the market of EFT Switch/ switch software, and not the market for services.

10.65 Having considered the opposing contentions of both the Parties to the matter as well as the findings of the DG, the Commission observes that in order to determine whether the agreement as examined by the DG between ACI and its consumer banks would fall within the ambit of section 3(4) of the Act, it would first have to analyze whether the parties to the agreement are in a vertical relationship or not.

10.66 Section 3(4) of the Act lays down that any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including- (a) tie-in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; (e) resale price maintenance, shall be an



agreement in contravention of sub-section (1) if such agreement causes or is likely to cause AAEC in India.

10.67 The Commission examines each the violations found by the DG against ACI under section 3(4) below:

- *Refusal to deal under section 3(4)(d)*: The DG has found that a combined reading of clauses of the agreement (between ACI and ACI Banks) with ACI's decision to not grant consent to third parties including FSS beyond July 2013 amounted to a refusal to deal agreement within the meaning of section 3(4)(d) of the Act.

The Commission is of the view that the DG has examined the agreement between ACI and ACI Banks wherein ACI Banks are the buyers/ consumers and would not be part of the production chain. Accordingly, this agreement does not fall within the purview of section 3(4) of the Act.

- *Exclusive supply agreement under section 3(4)(b)*: The DG has found that ACI's stipulation to its BASE24 customers to obtain professional services only from it or entities authorized by it amounted to a exclusive supply agreement as provided under section 3(4)(b) of the Act.

As noted above, since ACI Banks are the buyers/ consumers and are part not of the production chain, this agreement also does not fall within the purview of section 3(4) of the Act.

- *Tie-in arrangement under section 3(4)(a)*: The DG has found that the agreement between ACI and its customers *de facto* amounted to a tie-in arrangement since it put a condition on the licensee to avail professional services from ACI along with the license for BASE24 software and this fell within the ambit of section 3(4)(a) of the Act.



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Given that ACI Banks are the buyers/ consumers and are not part of the production chain, the Commission is of the view that this agreement also does not fall within the purview of section 3(4) of the Act.

10.68 In view of the above, the Commission finds no contravention of section 3(4) read with section 3(1) of the Act is made out against ACI in the present matter.

10.69 Accordingly, the Commission concludes that no contravention of the provisions of section 3(4) read with section 3(1) and section 4 of the Act has been established in the present case.

10.70 The Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi

Date: 13-1-2015



Dissenting Note

Per Mr. S. L. Bunker, Member

1. I have perused the final order passed by the majority of members of the Commission in this matter, holding that ACI has not contravened any of the provisions of either section 3 or section 4 of the Act on the grounds detailed in the said order.
2. While concurring with the findings of the majority order to the extent that the agreements between ACI and the customer banks may not fall within the ambit of agreements as provided in section 3(4) of the Act, I differ, for the reasons recorded in this note, with the majority decision that ACI is not dominant in the market for EFT Switch / switch software in India (upstream market) and no case of contravention of provisions of section 4 is made out.
3. As the majority order records the facts related to the information, findings of the DG investigation report and replies/ objections of the parties in response to the DG report in detail, the same are not repeated here for the sake of brevity, unless context requires otherwise.
4. In this case the following relevant markets have been delineated by the DG in this matter:
 - (i) *The market for Electronic Fund Transfer (EFT) switch/switch software in India* (relevant upstream market).
 - (ii) *The provision of services with respect to customization and modification of EFT Switch /switch software in India* (relevant downstream market).



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5. The DG has rightly considered ACI Inc, ACI Asia and ACI India as a 'group' in terms of explanation (b) under section 5 of the Act and has examined the position of dominance of ACI group in the relevant market. Having examined the factors outlined under section 19(4) of the Act, the DG has found ACI to be in a dominant position in the relevant market for EFT Switch / switch software in India i.e., in the upstream market.
6. It is further noted that having found ACI dominant in the relevant upstream market, the DG also found, after analysing the facts, evidence and submissions of the parties, that ACI had imposed certain unfair and discriminatory conditions on ACI Banks in contravention of section 4(2)(a)(i) of the Act and has limited the provision of professional services, thereby amounting to violation of section 4(2)(b)(i) of the Act. Further, it was found that the conduct of ACI resulted in denial of access to FSS and other third party service providers in the downstream market in violation of section 4(2)(c) of the Act. The DG also found that the alleged act of ACI amounts to making the contract subject to acceptance of supplementary conditions which is in contravention of section 4(2) (d) of the Act. Further, DG has concluded that due to the alleged act of ACI, 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 reported that ACI used its dominance in the upstream relevant market to enhance its presence in the downstream relevant market amounting to violation of section 4(2)(e) of the Act.
7. The majority order, disagreeing with the findings of DG, held that in the relevant upstream market *i.e.*, in the market for EFT Switch / switch software in India ACI is not a dominant player and since ACI is not in a dominant position, its conduct is not liable to be examined under the provisions of section 4 of the Act.



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8. It has been vehemently argued by ACI and agreed to in the majority order of the Commission, that Interchange Switch and EFT Switch are substitutable products and they form part of the same relevant market. This factor has been one of the key determinants in the analysis done in majority order in arriving at the conclusion that ACI is not dominant in the relevant market.

9. Keeping in mind the findings recorded by the DG and detailed submissions made by the parties in this regard, I am of the opinion that because of the reasons recorded below Interchange Switch and EFT Switch constitute distinct product markets:

9.1 The relevant product market in the instant case, as defined by the DG, is the market of EFT Switch / switch software. As borne out from the analysis of the facts and material available in the DG report, an EFT Switch is essentially central software which connects the core banking system of a bank on with various end devices or delivery channels such as ATM, POS, internet payment gateway. However, an EFT Switch is primarily used by the banks for enabling transactions through their end devices and as such the customer base remains restricted to banks.

9.2 An Interchange Switch facilitates inter-bank transaction by recognizing the issuing bank (*i.e.*, the bank which has issued the card to a customer) and routes the transactions accordingly to the issuing bank for authorization. Interchange comes into operation only where the acquiring bank or the merchant bank (*i.e.*, the Bank which has installed the POS terminal at a merchant location) and issuing bank are not the same and it enables identification of the host server. The EFT Switch on the other hand facilitates authentication and authorization of card based transactions including the transactions which are routed by the Interchanges. The EFT Switch is hence involved in all card based transactions



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and enables the ATM/ POS terminal to connect with the host server. Without the EFT Switch of a bank, the Interchange Switch does not serve any purpose. As such, the functionality of an Interchange Switch is very different from that of an EFT Switch being used by the banks.

9.3 It may be noted that an Interchange Switch has limited involvement in certain circumstances, *viz.*, where the acquiring bank/ merchant bank and issuing bank are not the same, and it would thus not be appropriate to equate it with an EFT Switch.

9.4 As regards the contention that since the same software is used in both EFT Switches and Interchange Switches, they form part of the same market it is relevant to note that:

(i). End use of the product is necessary to determine the relevant market and when the same product being put to different end uses, it would constitute separate product markets. Hence, an Interchange Switch would be in a different market than an EFT Switch.

(ii). An EFT Switch is installed by individual banks for enabling card based transactions. An Interchange Switch on the other hand is used by a independent third party entity for *e.g.*, MasterCard and VISA or governmental agency *e.g.*, NPCI or a network of banks *e.g.*, Cashtree and Cashnet. The nature of demand and supply, pricing strategies, competitive scenario, functionality as well as the end use of the software differ completely in EFT and Interchange Switches, thereby indicating that even though an EFT Switch and an Interchange Switch might operate on similar software, they constitute two different relevant markets. From the above discussion, it is clear that these



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two different kinds of consumers would constitute two different relevant markets in the instant case.

(iii). The fact that despite the existence of NFS which uses an Interchange Switch, banks require EFT Switches indicates that the two switches are not interchangeable and there exists no demand side substitutability for the two. Banks' demand for EFT Switches is clearly evidenced from the fact that banks specifically require EFT Switch/ Switch software which is compatible with Interchange interfaces. This is also evidenced from the fact that various banks are upgrading their EFT Switch software to enhance their capability to process more ATM/ POS transactions despite the presence of various Interchanges.

9.5 In the context of defining the relevant product market it may also be noted that section 2(c) of the Payment and Settlement Act, 2007 defines, 'electronic funds transfer' as:

transfer of funds which is initiated by a person by a way of an instruction, authorization or order to a bank to debit or credit an account maintained with that bank through electronic means and includes point of sale transfers, automated teller machine transactions, direct deposits or withdrawals of funds....

9.6 In view of the above, an EFT Switch is one which receives instructions through the devices (e.g. ATM, POS etc.), routes them to the core banking system of a bank, and then returns the response from the core banking systems to the devices. Hence, it performs the function of processing and authorizing transfer of funds, as directed by the end customer, through electronic means.



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9.7 An Interchange Switch merely enables identification of the host server and directs the transaction to the relevant EFT Switch. Given that it does not perform the function of transferring and authorizing funds, it is not an EFT Switch.

9.8 Further, the DG has reported that under the present regulatory framework, the EFT Switch / switch software is beneficial only to those institutions which have been licensed by RBI to deploy ATMs and POSs. Further, if such an entity is not a banking institution licensed by RBI then it needs to connect their switch to any bank's switch for the purpose of settlement.

9.9 In view of the regulatory regime, as discussed above, banks as users of EFT Switch constitute a separate class and the market strength of the suppliers of EFT Switches need to be seen keeping this distinctive feature in view. Therefore, even if it is assumed for the sake of argument (as has been stated in the majority order) that entities like NPCI and ATM sharing networks like CashTree *etc.*, are also using EFT Switches similar to those of banks, the analysis of market structure and consequently dominance of ACI as found by the DG will not be impacted in any manner.

9.10 Different licensing models are followed in licensing of EFT Switches and Interchange Switches. The fact that Interchange Switch and EFT Switch belong to two separate product markets and are different products is also evidenced by licensing models of the two switches. Euronet which has licensed its switch *Arkansys* to NPCI for the NFS, in its reply to the DG dated 23.05.2014 has stated that license fee charged for licensing the software is a one-time license fee. This is different from an EFT Switch where the license fee is usually determined on the basis of volume of transactions or number of devices. By way of illustration, ACI, OPS and FIS link their license fee to volume of transactions or



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number of devices. This clearly demonstrates that even in the industry Interchange and EFT Switch are treated as different products. In any event, since *Arkansys* operates as Interchange Switch for NPCI, it would not be correct to include it within the customer base of an EFT Switch. Therefore, market share calculations based upon inclusion of Interchange Switches in the relevant product market would provide a distorted view of the market.

9.11 ACI has contended that since NFS is connected to a large number of ATMs of banks and all inter-bank ATM transactions between these banks are routed through NFS, failure to take the same into account has led to an incorrect determination of ACI's dominance. In this regard it is relevant to note that not all banks are members of NFS and their transactions would be routed through MasterCard and/ or VISA. It is also relevant to note that NFS is involved only in ATM transactions and POS transactions are routed through MasterCard and VISA only which use BASE24.

9.12 If Interchange and EFT Switch are considered to be in the same market, the calculation of market share would proceed on a different basis. The reason for DG using the volume of transactions to indicate the market share is that the volume of transactions provides an appropriate indicator of market share for identical transactions. If Interchange and EFT Switch are considered to be a part of the same market, volume of transactions ceases to be an appropriate indicator in as much as the nature of the transaction processed by the EFT and the Interchange Switches are not identical and resultantly have differing economic values. In this situation, it would be illogical to equate the value of the two transactions. Even if Interchange Switch is involved for processing the inter-bank transactions, RBI for the purpose of assessing the transactions happening in the country, treats such transaction as a single



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transaction belonging to the bank whose card is used in the ATM/POS terminal of other bank.

9.13 In any event, there is no available data to enable market share calculations when transactions are divided in this manner. The DG adopted the volume of transactions/ number of devices connected to an EFT Switch as the appropriate indicator of market shares since the DG was considering equal and like transactions. As explained earlier, Interchange Switches are not licensed on the same model as EFT Switches. Since the licensing of Interchange Switches is not at all linked to the volume of transactions/number of connected devices, it would be inappropriate to calculate market share inclusive of Interchange Switches on this basis. ACI has failed to furnish any viable methodology to determine market shares upon inclusion of Interchange Switches in the relevant market.

9.14 If the contention of ACI that Interchange Switches belong to the same relevant product market as EFT Switch and market shares were calculated in the same manner are accepted, it would lead to an extremely unsound and imprecise market share calculation. It would lead to invariably considering the same transaction twice sometimes (for instance, an inter-bank transaction would be incorrectly attributed to both the EFT Switch and the Interchange Switch) and provide skewed market share results with double counting of significant number of transactions.

9.15 Based on above discussion it is evident, in terms of section 2(t) of the Act, that on all three counts, viz., functionality, price and intended use, the EFT Switch and Interchange Switch cannot be termed as substitutable products.

9.16 Lastly, even on the website of ACI (<http://www.aciworldwide.com>) EFT Switch and Interchange Switch are shown as different products.



While EFT Switch BASE24 is categorized as a product under the head 'payment processing', Interchange is placed under the head 'payment clearing and settlement'.

10. Accordingly, it is my view, the DG had correctly delineated the upstream relevant market and I differ with the understanding of the same as detailed in the majority order. With respect to the relevant downstream market, I agree with the decision of the majority that there exists a separate market for customisation and modification services.
11. However, I differ with the majority order in regards to the conclusion on the assessment of the position of dominance of ACI in the said upstream relevant market and the reasoning supplied thereof.
12. To assess whether an enterprise enjoys a dominant position or not in the relevant market, due regard to all or any of the factors stated under section 19(4) of the Act is to be given. Such factors include market share of the enterprise; size and resources of the enterprise; size and importance of the competitors; economic power of the enterprise including commercial advantages over competitors; vertical integration or sale or service network of the enterprise; dependence of consumers on the enterprise; 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.



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13. I have considered the rival submissions and the views expressed in the majority order on the issue of dominance of ACI in the relevant upstream market. Differing with the views expressed in the majority order, I am in agreement with the findings of the DG that ACI is a dominant player in the relevant upstream market of EFT Switch / switch software in India. In the earlier part of the note I have already held that EFT Switch and Interchange Switch are two different products and cannot be part of the same relevant market.

14. Considering the nature of the relevant market, the DG has appropriately assessed the market shares of the players on the basis of volume of transactions through each EFT Switch / switch software and the number of ATMs and POS terminals of the bank linked through each switch software. Based on the number of transactions that took place through the switch software, it is reported by the DG that the annual market share of ACI in the relevant market during financial years 2011-14 was in the range of 67% -74%. In terms of total number of ATMs and POSs that are linked through the switch software, during financial year 2011-14, the market share of ACI in the relevant market was in the range of 84% - 86%. In regards to ACI's contention that market share should be measured on the basis of number of banks licensed to EFT Switch software or revenue earned, I observed that the market share calculated on the basis of number of banks does not represent the economies of business involved and also does not account for variations in the size of banks and the underlying devices as well as consumers that BASE24 serves thus, the contention is not tenable. Further, it is observed from the DG report that ATM and POS terminals that use EFT Switch / switch software to facilitate payments through internet gateway constitutes nearly 2% of total transactions served through switch software that does not affect the market share of ACI much in the relevant market.



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15. In consonance with the DG findings, I am of the view that Interchange Switches are not functionally interchangeable with an EFT Switch and the market shares assessment by the DG are based on correct indicators such as volume of transactions and number of ATMs, POS devices serviced by ACI. The DG took into account all the transactions of users of EFT Switches. The contention of ACI that volume of transactions conducted through NFS should have been considered by the DG while considering the volume of transactions ought to be rejected. It may be noted that NFS is an Interchange Switch and the role of NFS is limited to connecting inter-bank transactions. Since such transactions pass through the EFT Switch of the relevant bank, there is no point in counting these transactions twice and internet payment gateway transactions and mobile payment transactions are ultimately routed through and processed by concerned bank's EFT Switch. Further, it is observed that submission of the Informant that the total share of revenue spent by a customer on an EFT Switch is not a correct determinant of market share of an entity is correct. The fee charged by different switches may vary and be based on different parameters, implying that the evaluation on the basis of the share of the revenue will fail to provide the correct picture. Thus, in my view the transaction based model is the most appropriate method to determine the market share.

16. While analysing the factor pertaining to size and resources of ACI, the DG has reported that ACI is a multinational company having business in various jurisdictions with nearly 2596 customers and USD 1.68 billion assets and USD 864.9 million revenue as on 31.12.2013. From the DG investigation, it is revealed that though companies such as ElectraCard, BPC Banking Technologies, Lusion Payments (Lusion), FIS, Euronet Worldwide and Yalamanchili Software Exports Limited (YCS) etc., are operating in the relevant market as competitors of ACI, their presence is insignificant compared to ACI. ACI has not been able



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to show that the above findings of the DG are not factually correct. Therefore, I am in agreement with the findings of DG in this regard.

17. As regards, the factor relating to economic power of the enterprise including commercial advantages over competitors, it is noted that ACI has the advantage of the first entrant into the relevant market and presence of high switching cost restrict the licensee banks of ACI to move to the competitors of ACI. The DG correctly noted that the licensee banks of ACI have been using the BASE24 software for many years and BASE24 software is considered as robust and reliable software.

18. I also concur with the findings of DG with regard to dependence of consumers on ACI. The licensee banks of ACI have been using the BASE24 software for several years and have made huge investment in this regard. The licensee banks of ACI had submitted before the DG that they are heavily dependent on the ACI for switch software and face technical and financial constraints in migrating to another software. The relevant extracts of the responses of some of the banks before DG may be note worthy:

(i) *“Yes, there are challenges and risk in shifting from one payment platform which is already evolved over one decade. Over one decade, payment system in India has grown in leaps and bounds. Starting with Master and VISA gateway, NFS came into existence, the Indian financial switch setup by NPCI. With launch and deployment of RuPay card and roll out of IMPS payments, all banks including us have done huge customization on BASE24 switch. A substantial investment is already made by us in creating the payment system. A change in the switch will require migration of customization to the new platform. Porting the existing customization to a new platform will involve substantial cost which is a duplication of work & avoidable expenditure. With a loaded customization, a migration will add to*



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further complexity. Further, large number of ATMs and card present (CP) and card not present transactions (CNP) happening on 24X7 basis, any scheduled or unscheduled downtime may lead to loss of transaction and reputational loss. Shifting the existing setup & products from BASE24 switch into new switch may raise Migration risk, Operation risk, cost factor & performance issue”. - Union Bank of India

(ii) *“Shifting from one switch software to switch software requires customization in the new software for all the existing functionalities which is prone to commercial and business continuity risk”. - State Bank of India*

(iii) *“Presently BASE24 switch is very critical application with a complex setup running. ATM operations on 24 hours for our domestic and 8 international territories. Shifting from BASE24 to any other switch application involves high time, efforts for migration and cost impact, risk of disruption of operations providing banking services in addition to reputation and regulatory risks”. - Bank of Baroda*

(iv) *“BASE24 is a highly reliable switch with the facility/features to handle high volumes. Other switches may not be capable of exhibiting such efficiency considering the transaction volumes. Migration of customizations onto another switch will be an elaborate and time-consuming task lasting 12-18 months which may impact banking operations considering the extent of customizations required to bring it on par with our present set up”. - ICICI Bank*

(v) *“Data migration from BASE24 is a challenge since the whole debit card data resides in the switch. This may even lead to re-issuing entire card base which would be very costly”. - Federal Bank*



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19. On countervailing buying power, it is noted that EFT business of the leading banks in India has been developed on ACI's BASE24 software. On account of the commercial and risk considerations, most of these banks are apprehensive of shifting to alternate switch software. I am also of the view that the factor of countervailing buying power is relatable to the consumers of an enterprise whose dominance is being inquired into. In this regard, I note that in the given facts and circumstances, ACI Banks do not possess sufficient countervailing buying power to support the finding of the majority.
20. According to a new release dated 24.01.2014 on the website of ACI, ACI has been recognized as *Industry Leader in Ovum's Payment Switching Vendor Assessment*. All assertions of ACI not being dominant are liable to be rejected in view of such apparent claims of dominance. (Available at: <http://investor.aciworldwide.com/releasedetail.cfm?ReleaseID=821014>)
21. Additionally, ACI's contention that Euronet is the largest player solely on the basis that it powers NFS is unsustainable. There are colossal levels of customer dependence on ACI, as established by the enormous switching costs which have made it impossible for existing ACI customers to shift to other switches due to the costs and technical complexities surrounding such a migration. Notably, Oriental Bank of Commerce which floated a Request for Proposal to migrate to a different switch specifically required the proposers to have previously effected a switch from BASE24 to its own switching software. In view of this, it would be incorrect to conclude that customers (it is vital to note that ACI serves a large chunk of customers of EFT Switches, including some of the larger banks operating in India) are able to operate independently of ACI.



22. Thus, I agree with findings of DG in regards to assessment of the position of dominance of ACI and hold that ACI is in a dominant position in the relevant upstream market *i.e.*, the market for EFT Switch / switch software in India as defined by the DG.
23. Having determined that ACI is in a dominant position in the relevant upstream market of EFT Switch / switch software in India, I now proceed to examine the alleged abusive conduct of ACI in terms of the provisions of section 4 of the Act.

Examination of the Alleged Abusive Conduct of ACI

24. As stated above in this note, the DG found that ACI had abused its dominant position in contravention of various provisions of section 4 of the Act.
25. Section 4(1) states that no enterprise shall abuse its dominant position and section 4(2), *inter alia*, states that there shall be an abuse of dominant position under sub-section (1), 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 therefore; 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.



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26. The Informant has alleged that ACI has abused its dominant position by not allowing ACI banks to choose a service provider of their choice; imposing unfair conditions in the purchase or sale of goods or services through exclusive supply arrangements with ACI banks; by directing the ACI banks not to avail the integration services of FSS. As per the Informant, ACI is restricting the provision of services of customization and modification in respect of software for electronic payment systems, using its dominance in the upstream market of software for electronic payment systems to gain entry in the downstream market of provision for services of customization and modification in respect of software for electronic payment systems, and limiting and restricting the technical or scientific development in the market. The Informant is essentially aggrieved by the decision of ACI to restrict ACI Banks from dealing with FSS or any third party with respect to customization services beyond 13.07.2013.

27. The DG found that ACI had imposed unfair and discriminatory conditions on the ACI banks in contravention of section 4(2)(a)(i) of the Act, and has limited the provisions of professional services, thereby amounting to violation of section 4(2)(b)(i) of the Act. It is also found that the conduct of ACI resulted in denial of access to FSS and other third party service providers in violation of section 4(2)(c) of the Act and the said act of ACI amounts to making the contract conditioned to acceptance of supplementary conditions in breach of section 4(2)(d) of the Act. Further, the DG has found that due to the acts of ACI, 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 ACI used its dominance in the upstream relevant market to enhance its presence in the downstream relevant market amounting to violation of section 4(2)(e) of the Act.



28. ACI controverted the above findings of the DG and argued that the DG has erroneously concluded that ACI's advice to its customer banks to refrain from using the customization services of the Informant or others amounts to an unfair condition in contravention of section 4(2)(a)(i) of the Act. As per ACI, many of its customer banks have continued to use the services of the Informant for customization even after expiry of the deadline date *i.e.*, 13.07.2013. ACI contended that it has not limited the access to third party service providers in the downstream market by deterring new entry or limited the technical and scientific development in contravention of section 4(2)(b)(i) and 4(2)(c) of the Act.

29. It is contended by ACI that they are not only entering the market themselves but are also sponsoring entry of several new entrants and creating competition for the benefit of customers. The willingness to enter the downstream market by Mphasis, TCS, Wipro, CTS and others is based on an economic evaluation that there is the prospect of greater competition for third party professional services in the downstream market. It was also urged by that the development of technology is accelerated rather than impeded and there is a greater scope for innovation, as more and more enterprises gain expertise in this domain.

30. As per ACI, the DG has erroneously concluded that ACI seeks to leverage its dominant position in the upstream market to support itself in the downstream market. It was submitted that assuming that the DG's finding that ACI is dominant in the upstream market is correct; the finding suffers from the lack of concrete mechanism showing how ACI could leverage position from the upstream to downstream market. Further, ACI has argued that it is the Informant which tried to foreclose the market by carrying out customization work without adequate documentation. In the absence of complete documentation of



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customization, it is extremely difficult for any other entity to provide such services to the banks.

31. However, the Informant has accepted the DG findings and stated that ACI's conduct is in contravention of section 4(2)(a)(i), 4(2)(b)(i), 4(2)(b)(ii), 4(2)(c), 4(2)(d) and 4(2)(e) of the Act.

32. I have perused the findings of the DG and the objections of the ACI and the Informant in this regard. Having analyzed the provisions of the license agreement relating to professional services for BASE24 software customers, it is found that prior permission from ACI is necessary on the part of customer banks to obtain professional services from third parties. It is observed that for several years till 2010-11, licensee banks of ACI were obtaining these professional services from the Informant which was also distributor of ACI. However, in 2011, ACI gave notice to all its ACI banks that it would provide consent for obtaining these professional services from the Informant only till 13.07.2013.

33. It is also noted that most of the licensee banks of ACI have been using BASE24 continuously for several years and during this time they were obtaining professional services for BASE24 software from the Informant. ACI then took the decision not to allow the Informant to continue to provide these services. From the submission of licensee banks of ACI before the DG, it is observed that these banks were aggrieved by the decision of ACI to not allow them to obtain professional services from the Informant and other third parties. On several occasions they expressed their apprehensions and concerns in this regard and the likely adverse effects.

34. From the letter dated 04.08.2011, written by ACI to its licensee banks stating that *"for upgrades, ACI would be willing to provide exceptional*



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consent, after jointly (with the bank) evaluating the possibility of undertaking these services either directly or with another third party” and presentation made by ACI to its licensee banks in February, 2013, it is revealed that ACI intended to provide modification and customization services under its program named as Enhanced Support Program (ACI ESP). Further, from the letter dated 21.05.2013 written by ACI to Andhra Bank, emails exchanged between PNB and ACI, emails exchanged between ICICI and ACI *etc.*, it is observed the intention of ACI is to undertake professional services for BASE24 services itself. Also, it is observed that ACI sought to enter into the downstream market by using the provision in the license agreement, which requires the banks to seek its consent, and to exclude any third party service provider including the Informant from the market. I am in agreement with the DG’s findings in this regard and of the opinion that the said conduct of ACI amounts to abuse of its dominant position in violation of provisions of section 4(2)(e) of the Act *i.e.*, use of its dominant position in the relevant market of EFT Switch / switch software in India to enter into and strengthen its position in the downstream market. Further, DG has found that ACI has made the license agreement for BASE24, subject to acceptance by banks of supplementary obligation of obtaining its professional services in infringement of the provisions of section 4(2)(d) of the Act. On this count too, I am in agreement with the DG report. ACI, by denying its licensee banks the option of procuring modification and customisation services from the Informant or any third parties, has compelled the said banks to avail such services from it along with the BASE24 software. This is nothing but making the conclusion of contracts of EFT Switch subject to acceptance by banks of a supplementary obligation which has no connection with the subject of the contract.

35. It is noted from the DG report that ACI has entered into independent contractor agreement with Concerto Software Systems Private Limited,



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TCS Consultancy Services Limited, Cognizant Technology Solutions and Mphasis Limited for providing the modification and customisation services to its licensee banks with different terms and conditions for each agreement. Under each of these agreements, these entities are providing services as sub-contractor of ACI for specific tasks and rates determined by ACI. It is further observed from the DG report that even though ACI allows certain sub-contractors to provide services in the downstream market, its licensee banks are left with no choice regarding selection of vendor for providing professional services in the downstream market and have to rely on ACI only. As such by denying its licensee banks of an option to avail professional services directly from the Informant or any other vendor, discriminatory conditions have been imposed by ACI leading to violation of section 4(a)(i) of the Act. I am in agreement with DG findings in this regard.

36. It is also observed from the DG report that the costs to be incurred by Banks for switching over to alternate software are very high. In such a situation, licensee banks of ACI do not have any effective choice with respect to selection of vendor for professional services and have to rely on ACI for the same. The contentions of ACI are not found to be convincing as ACI clearly communicated to ACI banks that post July, 2013, it would not allow third parties to provide these professional services. Thus, under the garb of taking responsibility it deprived its licensee banks of any alternate choice. I agree with the findings of DG that the said conduct of ACI is in contravention of section 4(2)(b)(ii) of the Act.

37. It is observed that ACI's decision to not grant consent to any third party including the Informant for provision of such services along with sub contracting arrangement entered with the providers of these services, has allowed ACI to enter and strengthen its position in the downstream market of provision of professional services. Because of the said decision of ACI, the existing players like the Informant have



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been denied market access to the downstream market. I am in agreement with the DG that the said conduct of ACI is in contravention of section 4(2)(c) of the Act. Also, the said conduct of ACI would act as a hindrance for other service providers in the downstream market to invest and innovate. Thus, the said conduct of ACI also amounts to limiting technical and scientific development relating to professional services in infringement of section 4(2)(b)(ii) of the Act.

38. In this regard, I also note that the Commission *vide* its interim order restrained ACI after being satisfied that (a) ACI was dominant in the relevant market and (b) the conduct of ACI in restricting the choice of ACI Banks for availing the services of third parties including the Informant for customization and modification of BASE24 software appeared to be in contravention of section 4 of the Act. Thereafter, the DG after conducting a detailed investigation reaffirmed the opinion of the Commission in its orders under section 26(1) and section 33 of the Act. After perusing the submissions of the parties made before the Commission, I do not find any reason or additional facts that support a different conclusion in the final order.

39. Accordingly, in agreement with the findings of DG, I am of the opinion that the ACI, through its conduct, has contravened the provisions of sections 4(2)(a)(ii), 4(2)(b)(i), 4(2)(b)(ii), 4(2)(c), 4(2)(d) and 4(2)(e) of the Act. The first issue is decided accordingly.

40. Having regard to all these factors, a penalty on ACI at the rate of 5% of



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its average turnover based on the financial statements filed by ACI
(as shown in the table below) is to be imposed.

S. No	Name of the Party	Turnover/receipts in year Ended on 31.03.2011 (Rs. in crore) (rounded off)	Turnover/receipts in year Ended on 31.03.2012 (Rs. in crore) (rounded off)	Turnover/receipts in year Ended on 31.03.2013 (Rs. in crore) (rounded off)	Average Turnover/receipts (Rs. in crore) (rounded off)	5% of Average turnover (Rs. in crore) (rounded off)
1	ACI	60.43	76.27	134.35	90.35	4.52

Sd/-

(S. L. Bunker)

Member

New Delhi

Date: 13-1-2015