



COMPETITION COMMISSION OF INDIA

Case No. 65 of 2013

In Re:

**M/s Magnus Graphics
Bhopa Road, Muzaffar Nagar, U.P.**

Informant

And

- 1. M/s Nilpeter India Pvt. Ltd.
Medavakkam Road, Shollinganallur,
Chennai** **Opposite Party No. 1**
- 2. Mr. Alan Barretto
Managing Director, Nilpeter India Pvt. Ltd.** **Opposite Party No. 2**
- 3. Mr. Manish Kapoor
Sales Manager, Nilpeter India Pvt. Ltd.** **Opposite Party No. 3**
- 4. M/s SaiCom Codes Flexo Print Pvt. Ltd.
Plot No. 771, HSIIDC,
Industrial Estate Rai, Sonipat, Haryana** **Opposite Party No. 4**

CORAM

**Mr. Ashok Chawla
Chairperson**

Mr. S. L. Bunker



Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Appearances: Shri Keshav Singh Saini, Advocate for the Informant alongwith Shri Ashok Kumar Goel, Proprietor of the Informant.

Shri K. K. Sharma, Advocate for the Opposite Party Nos. 1 to 4 alongwith the Opposite Party No. 3 in-person and Shri Harish Gupta, Director of the Opposite Party No. 4.

Order

1. The information in the present case was filed by M/s Magnus Graphics ('**the Informant**') under section 19(1) (a) of the Competition Act, 2002 ('**the Act**') against M/s Nilpeter India Pvt. Ltd. ('**the Opposite Party No. 1**'), Mr. Alan Barretto, Managing Director of Nilpeter India Pvt. Ltd. ('**the Opposite Party No. 2**'), Mr. Manish Kapoor, Sales Manager of Nilpeter India Pvt. Ltd. ('**the Opposite Party No. 3**') and M/s SaiCom Codes Flexo Print Pvt. Ltd. ('**the Opposite Party No. 4**') alleging, *inter alia*, contravention of the provisions of sections 3 and 4 of the Act in the matter.

2. **Facts**

Facts, as gathered from the information, may be briefly noted:



2.1 As per the information, the Informant is a proprietorship firm engaged in the business of label printing at Muzaffarnagar, Uttar Pradesh. The Opposite Party No. 1 is engaged in the business of manufacturing, distribution, marketing, installation, and after sales services including training of operators of the Nilpeter brand of label printing machines in India. It is one of the subsidiaries/sister concern companies of Nilpeter, a Denmark based company engaged in manufacturing of premium quality label printing machines under the brand name 'Nilpeter' and considered as a world leader in manufacturing of the said machines.

2.2 The Opposite Party No. 2 and the Opposite Party No. 3 are the Managing Director and the Sales Manager of the Opposite Party No. 1 respectively. The Opposite Party No. 4 is one of the competitors of the Informant and a customer of the Opposite Party No. 1 like the Informant.

2.3 It is stated in the information that after continuous persuasion of the Opposite Party Nos. 2 and 3, the Informant had placed an order with the Opposite Party No.1 for purchase of a Nilpeter brand of label printing machine FB-3300 Servo Flexo Printing Machine. The total cost of the said machine was Rs. 2, 41, 11,148/-. At the time of placing order for the said machine, the Informant made an advance payment of Rs. 20, 00,000/- in cash to the Opposite Party No. 1 on 20.03.2012. Subsequently, the Informant paid Rs. 1, 60, 11,148/- on 03.05.2012 and Rs. 3, 50,000/- on 25.05.2012 through RTGS (Real Time Gross Settlement) after getting a loan from the Punjab National Bank. Thereafter, on 15.05.2012 the said machine was installed at the premises of the Informant.

2.4 The Informant has stated that till December 2012, the maintenance services and the spare parts of the said machine were provided to the Informant with a delay of 2 to 3 days, to which the Informant had not strongly objected. It is stated that the said machine started giving problem from the initial stage of installation



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which is demonstrated from the mails exchanged between the service engineer of the Opposite Party No. 1 and the Informant.

2.5 The Informant has alleged that the following conducts of the Opposite Party Nos. 1 to 3 amount to abuse of their dominant position in contravention of the provisions of the Act:

- (i) The Informant is to bear the expenses of travel and lodging of the service engineers/technicians for after sales services.
- (ii) In spite of the agreement of the Informant to employ a trained operator of the Opposite Party No. 1 for operation of the said machine, the Opposite Party No. 2 refused to provide the same to the Informant.
- (iii) The Opposite Party No. 1 refused to provide the service engineer/spare parts to the Informant on many occasions citing the reason that the Informant has started working for 'Patanjali' which is a big customer of the Opposite Party No. 4.
- (iv) The Opposite Party No. 1 without informing the Informant locked the said machine by an undisclosed password stating that the machine has been locked by the Nilpeter, Denmark and the said machine would be unlocked when the Informant would make the balance payment of Rs. 50, 00,000/- towards the total cost of the said machine. However, on payment of the said balance amount, the Opposite Party No. 1 has issued the permanent password of the said machine to the Informant on 22.01.2013.
- (v) The Opposite Party No. 1 has not issued the invoice for the payments made to the Informant for the said machine.
- (vi) In spite of issue of a cheque of sufficient amount for Annual Maintenance Contract (AMC) for the said machine, the Opposite Party No. 1 refused to



enter into AMC with the Informant citing the reason that the Informant has started doing business with “Patanjali”.

2.6 It is alleged by the Informant that the Opposite Party Nos. 1 to 3 have abused their dominant position by imposing unfair or discriminatory conditions on the Informant in the provision of printing services to its customers. Such conditions are imposed by the Opposite Party Nos. 1 to 3 in connivance with the Opposite Party No. 4 with a view to fix price of printing by Nilpeter machine in Northern India.

2.7 The Informant has alleged that due to non-availability of services and spare parts support from the Opposite Party Nos. 1 to 3 and because of the bad conditions of the said machine, it could not perform and complete the printing orders of ‘Patanjali’, one of its customers, because of which the latter withdrew its Order Nos. 489, 495 and 546, amounting to Rs 30, 07,000/- and also stopped giving further orders to the Informant. Another customer of the Informant, ‘Staywell’ also withdrew its Order No. 1356 on 06.01.2013 as well as many other companies withdrew their orders placed with the Informant. The Informant stated that due to withdrawal of the above said orders it suffered a loss of Rs 5,00,000/- and is continuously suffering loss of profit to the extent of Rs 1,00,000/- per month. The Informant has also been suffering loss of lakhs of rupees per month towards the interest for the loan taken to purchase the said machine besides, the cost towards the salary of its staff, power, basic amenities, depreciation and loss of goodwill.

2.8 The Informant has alleged that the Opposite Party Nos. 1 to 3 have entered into an agreement with the Opposite Party No. 4 whereby the former have refused to deal with the Informant and by doing so, the Opposite Party Nos. 1 to 4 are directly or indirectly determining the price of the printing by Nilpeter machine in Northern India and in printing industry.



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3. The Commission after considering the entire materials available on record, *vide* its order dated 12.12.2013 passed under section 26(1) of the Act, directed the Director General ('DG') to cause an investigation into the matter. The DG, after receiving the directions from the Commission, investigated the matter and submitted the investigation report on 28.07.2014.

4. DG Investigation

4.1. The following issues have been addressed in the DG investigation report: (i) examination of the alleged abusive conduct of the Opposite Party No. 1 in denying support to the Informant in terms of service, spares and equipment sales in respect of Nilpeter Printing Machine, *etc.* after expiry of the warranty period in contravention of the provisions of section 4 of the Act, and (ii) examination of the alleged vertical anti-competitive agreement between the Opposite Party No. 1 and the Opposite Party No. 4 in contravention of the provisions of section 3 (4) of the Act.

4.2. To examine the alleged abusive conduct of the Opposite Party No. 1, DG delineated the relevant market in terms of the provisions of section 2 (r) of the Act. As per the DG report, the market of "the servicing of Nilpeter FB 3300 Servo Flexo Printing Machine in the territory of India" is the relevant market in the present case. Further, it is concluded in the DG report that, in terms of explanation (a) to section 4 read with section 19 (4) of the Act, in the said relevant market the Opposite Party No. 1 is a dominant enterprise.

4.3. The DG investigation also concluded that the conduct of the Opposite Party No. 1 in denying its service support to the Informant amounted to abuse of dominant position as per section 4(2) (a) (i) which *inter alia* includes directly or indirectly imposing unfair/discriminatory conditions in sale of service.



- 4.4. In regard to the alleged vertical anti-competitive agreement between the Opposite Party No. 1 and the Opposite Party No. 4, it is concluded by the DG that the Opposite Party No. 1 and the Opposite Party No. 4 are enterprises operating at different stages or levels of the production chain in different markets and the agreement between the Opposite Party No. 1 and the Opposite Party No. 4 is a vertical agreement in terms of the provisions of section 3(4) (d) of the Act *i.e.*, refusal to deal. It is so because the Opposite Party No. 1 is a manufacturing company of label printing machines and the Opposite Party No. 4 is a procurer/user of the said machine and the Opposite Party No. 1 is denying service support and spare part support to the Informant on complaint of the Opposite Party No. 4. Further, the DG investigation concluded that the said action of the Opposite Party No. 1 and the Opposite Party No. 4 is causing appreciable adverse effect on competition in India. Thus, the DG has concluded that the Opposite Party No. 1 and the Opposite Party No. 4 are responsible for contravening the provisions of section 3(4)(d) of the Act.
- 4.5. DG has identified the following persons/officials of the Opposite Party No. 1 and the Opposite Party No. 4 who are responsible for the said anti-competitive conduct the Opposite Party No. 1 and the Opposite Party No. 4:
- (i) Mr. Alan Barretto, Managing Director of the Opposite Party No. 1
 - (ii) Mr. Manish Kapoor, Sales Manager of the Opposite Party No. 1
 - (iii) Mr. Harish Gupta, Director of the Opposite Party No. 4
5. The Commission in its ordinary meeting held on 12.08.2014 considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their replies/objections thereto. The Commission also directed the parties to appear for oral hearing.



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6. On being noticed, the parties filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions.
7. The Informant in its written submissions reiterated the allegations besides supporting the conclusions drawn by the DG and as such it is not necessary to refer the same in any great detail.

8. **Replies/Objections of the Opposite Parties**

8.1 The Opposite Parties in their written submissions pointed out that the label printing machine (FB 3300 Servo Flexo Label Printing Machine) uses flexography technology and is comparable to label printers manufactured by competitors like Mark Andy P5, Callus ECS240, Omet X flex and MPS EB. It was also pointed out that the manufacturing process of the machines produced by the Opposite Party No. 1 consists of procuring parts from Original Equipment Manufacturers (OEMs) and assembling the same at its factory in Chennai. All of the 2556 components used in the Opposite Party No. 1's machine are stated to be procured from OEMs by the Opposite Party No. 1. It was also stated that the Opposite Party No. 1 neither manufactures nor holds a patent over any of the components used in the machine.

8.2 It was argued that the DG has incorrectly delineated the relevant product market. It was pointed out that the replies of the customers of the Opposite Party No. 1 clearly reveal that the customers are able to substitute competing aftermarket products with the aftermarket products provided by the Opposite Party No. 1 without incurring switching costs. Besides, it was contended that spare parts of the machine are easily available in the open market and customers also have the option to procure the spare parts directly from the OEMs, if needed. Moreover, it was stated that the machine can also be serviced by any competent freelance engineer/Independent Service Provider (ISP) as ascertained from the replies of the parties.



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- 8.3 It was also contended that there is healthy competition existing in the aftermarket for servicing label printing machines and ISPs effectively impede any anti-competitive behaviour by the Opposite Party No. 1. Replies of Synergy Packaging Pvt. Ltd. and Ajanta Packaging Ltd. were sought to be relied upon to evidence competition to the Opposite Party No. 1 by ISPs.
- 8.4 Further, it was argued that the market in the present case be determined as "unified market" because customers of the Opposite Party No. 1 are sophisticated customers (who run enterprises of their own) and therefore engage in whole life costing. Besides, it was suggested that reputation is crucial in this industry to get repeat orders of label printing machine and if the Opposite Party No. 1 engages in opportunism in the aftermarket, it risks alienating its customers and damaging its reputation and credibility. Thus, it was sought to be canvassed that loss of reputation will adversely affect the future sales of label printing machine by the Opposite Party No. 1.
- 8.5 It was further contended that the Opposite Party No. 1's label printing machines are substitutable with the machines manufactured by its competitors by virtue of physical characteristics, price and intended usage. The machines are classified as narrow web printing machines and use flexography technology to print self-adhesive labels. The fact that the customers of the Opposite Party No. 1 find the machines manufactured by the Opposite Party No. 1 to be substitutable with that manufactured by its competitors can be ascertained by studying the replies of the customers of the Opposite Party No. 1. Further, reliance was also placed on the reply of a competitor of the Opposite Party No. 1 *i.e.*, Flexo Image Graphics in this regard.
- 8.6 In light of the above submissions, it was prayed by the Opposite Parties that the relevant product market may be defined as the "sale (and service) of narrow web label printing machines". The Opposite Parties, however, did not dispute the DG's finding that the relevant geographic market is India.



- 8.7 Accordingly, the Opposite Parties submitted that relevant market may be determined as "sale (and service) of narrow web label printing machines in India".
- 8.8 The Opposite Party No. 1 also disputed the finding of dominance as recorded by the DG against it by contending that it is not dominant in the aftermarket for maintenance services or spare parts. It was reiterated that none of the spare parts used in the machine are manufactured by itself as the same are procured from OEMs. There are numerous freelance engineers/ISPs operating in the market which provide maintenance services for label printing machines.
- 8.9 In this regard, it was pointed out that the Opposite Party No. 1's label printing machine is an assembly of 2556 components, procured from open market and put together by the Opposite Party No. 1 to deliver an outcome of printing. Further, it was highlighted that even before the Opposite Party No. 1 began operations in 2008, many Indian customers were using second hand Nilpeter machines imported from different sources and maintaining it with locally available spares.
- 8.10 It was further reiterated that the replies of the Opposite Party No. 1's customers clearly reveal that the machines can be easily serviced by any freelance engineer/ISPs. Also, the spare parts of the machine are freely available in the local market. There is healthy competition existing in the aftermarket for servicing label printing machines and ISPs effectively impede any anti-competitive behaviour by the Opposite Party No. 1.
- 8.11 It was specifically pointed out that Nilpeter's flexo graphic printing machines use flexography technology which is similar to the technologies used by competitors to manufacture their machines.



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- 8.12 It was further argued that the Opposite Party No. 1 has 10% market share in product market of narrow web label printing machines in India. The Opposite Party No. 1 has an actual manufacturing capacity of 6 machines *per annum*, even though the installed capacity is 12 machines *per annum*. Further, it was stated that the Opposite Party No. 1 is a late entrant in the market for narrow web label printing machine, having entered the market in 2008. Since commencing operations in India, the Opposite Party No. 1 has sold 15 machines. It was also pointed out that the Opposite Party No. 1 suffered losses of INR 95,88,884/- for the financial year 2010-2011 and profit of INR 1,06,72,545/- for the financial year 2011-2012.
- 8.13 It was also submitted that the customers of the Opposite Party No. 1 have substantial countervailing buying power *vis-a-vis* the Opposite Party No. 1. In this connection, it was stated that it stands established that the decision to stop extending AMC to the Informant arose out of the threat of the Opposite Party No. 4 to cancel the order for a new machine. This was sought to be suggestive of *prima facie* evidence of buying power of the customer. Lastly, it was submitted that nine out of fifteen customers availed of AMC from the Opposite Party No. 1 is evidence of satisfactory services provided by the Opposite Party No. 1 and that six out of the fifteen customers of the Opposite Party No. 1 did not avail of AMC is evidence of the fact that services can be easily availed from sources other than the Opposite Party No. 1.
- 8.14 On the alleged abusive conduct, it was argued that the dispute agitated by the Informant before the Commission is essentially an individual consumer dispute and it was submitted that refusal to supply AMC to the Informant does not constitute an abuse of dominant position. Freedom of contract is a general principle of common law and an exception to this freedom must be very clearly circumscribed, clearly defined and must benefit final consumers. Reference was made to a decision of the Hon'ble US Supreme Court in *United*



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States v. Colgate & Co [250 US 300 (1919)], to contend that a company has a right to choose with whom to do business.

- 8.15 It has been also pointed out that the Informant is a habitual defaulter who regularly defaulted in its payment obligations to the Opposite Party No. 1. It was reiterated that the present dispute is an individual consumer feud as other customers of the Opposite Party No. 1 are happy with the services provided by the Opposite Party No. 1 and have not reported unsatisfactory services by the Opposite Party No. 1. It was averred that individual consumer disputes are outside the purview of the jurisdiction of the Commission and appropriate remedy lies with the consumer forum.
- 8.16 Lastly, it was argued that there is no violation of section 3(4) of the Act in the present case since it covers agreements amongst enterprises or persons at different levels of production chain indifferent markets in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services. In the present case, it was pointed out that the Opposite Party No. 1 is the manufacturer of label printing machines and the Opposite Party No. 4 is the consumer of the Opposite Party No. 1. It was thus submitted that the Opposite Party No. 4 being the end consumer of the Opposite Party No. 1's products, they are not at a different stage of the "production chain" in the relevant market. Reliance was also placed upon the decisions of the Commission to contend that manufacturer and consumer cannot be said to be part of any "production" chain or even operating in "different markets" because a consumer does not participate in production and at the same time, the market for any good or service must include the producer and the consumer.
- 8.17 Further, the Opposite Parties contended that even if an agreement of the nature of section 3(4) of the Act is presumed, it is of no significance and has no potential to cause Appreciable Adverse Effect on Competition (AAEC) as the



present agreement pertains to only one customer of the Opposite Party No. 1 and to buttress the submissions reliance was placed upon the orders of the Commission in *Automobiles Dealers Association, Hathras v. Global Automobiles Limited & Pooja Expo India Pvt. Ltd.*, Case No. 33 of 2011 and *Rahul S Sudhev. Dr. Batra's Positive Health Clinic*, Case No. 96 of 2013.

9. **Decision of the Commission**

9.1 The Commission has perused the entire material available on record besides hearing the counsel for the parties. On a careful perusal of the informations, the report of the DG and the replies/ objections/ submissions/ rejoinders filed/ made by the parties and other materials available on record, the following issues arise for consideration and determination in the matter:

(i) **Whether the Opposite Parties have contravened the provisions of section 4 of the Act?**

(ii) **Whether the Opposite Parties have contravened the provisions of section 3(4) of the Act?**

Determination of Issue No. 1: Whether the Opposite Parties have contravened the provisions of section 4 of the Act?

9.2 The Informant is essentially aggrieved of the alleged refusal by the Opposite Party No. 1 to the Informant in extending service, spares and equipment sales in respect of Nilpeter Machine after expiry of the warranty period based on a complaint sent by one of the Opposite Party No. 1's customer *i.e.* the Opposite Party No. 4.

9.3 As per the allegations, when the warranty period of Nilpeter FB 3300 Servo Flexo machine purchased by the Informant was about to expire, the Informant



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sent a signed copy of AMC with required amount of cheque to the Opposite Party No. 1 whereupon the Opposite Party No. 1 conveyed to the Informant that it has taken a decision to stop extending support to it in terms of service, spares and equipment sales. It was also conveyed that this action has been taken based on a complaint sent by one of the Opposite Party No. 1's customer *i.e.*, the Opposite Party No. 4.

9.4 To determine the alleged contraventions, it is necessary to decide the following issues:

- a) What is the relevant market in the present case?
- b) Whether the opposite parties are dominant in the said relevant market?
- c) If finding on the issue No. (b) is in the affirmative, whether the opposite parties have abused their dominant position in the relevant market?

Relevant Market

9.5 From the report of the DG, it appears that Nilpeter FB 3300 Servo Flexo Label Printing Machine is largely a combination of mechanical, electrical and electronic components with integrated technology using a software licensed by the Opposite Party No. 1 from Bosch Company that holds the patent. A Label Printing machine can have upto 2000 different parts, although for the purposes of meeting different customer requirement upto 3000 to 4000 parts may be manufactured to cover the variations possible in anyone model. Also, the price of the Nilpeter machine was noted as Rs. 2 crore (approx.).

9.6 It was noted from the data submitted by the Opposite Party No. 1 that out of twelve customers of the Opposite Party No. 1 for Nilpeter FB 3300 Servo Flexo Printing Machine, nine customers have preferred/opted for AMC and



one was found to be under warranty. The other two customers stated before the DG that they called the engineers of the Opposite Party No. 1 on need basis and the Opposite Party No. 1 never denied its service support/spare parts support to them. Accordingly, it was inferred by the DG that customers of the Opposite Party No. 1 have very limited option and there is no authorized service provider/independent service provider for the said machine who can provide service support without taking any assistance from the Opposite Party No. 1.

- 9.7 It was noted by the DG that the services for the said machine are not provided by any other authorized service provider/independent service provider in India without taking any assistance from the Opposite Party No. 1. Though, it was noted that some spare parts are available in the market through OEMs or are available in localized market. It was also noted that if Nilpeter India Pvt. Ltd. denied its service support/spare parts to any of its customers, they cannot get the service/spare parts needed through normal commercial channel.
- 9.8 Based on the replies furnished by the competitors of the Opposite Party No. 1, reflecting their limited knowledge of Nilpeter machines and reluctance to extend their services to the customers of such machines, it was deduced by the DG that no sufficient degree of interchangeability for providing services to the Nilpeter FB 3300 Servo Flexo printing machine was present.
- 9.9 The DG opined that the customers of the Opposite Party No. 1 have very limited option and there is neither any authorized service provider for the said machine nor any independent service provider for the said machine who can provide service support/spare parts support without any assistance from the Opposite Party No. 1. Thus, it was noted that there is non-substitutability of the provisions of servicing for Nilpeter machine and the customers of the Opposite Party No. 1 are heavily dependent upon it.



- 9.10 Further, owing to the high cost of Nilpeter machine which is Rs. around 2 crore and the machine being fast depreciating in nature, the DG noted that the switching cost for the buyer would be extremely high. It was also noted that this prohibitively high switching cost made the buyer of Nilpeter a “locked-in” customer who is dependent on the Opposite Party No. 1 only, to continue to use the existing machine.
- 9.11 Considering the non-substitutability (insufficient degree of substitutability) of provision for servicing of Nilpeter FB 3300 Servo Flexo machine, the DG concluded that the relevant product market would be "servicing of Nilpeter FB 3300 Servo Flexo Printing Machine". As the conditions for providing services to Nilpeter FB 3300 Servo Flexo machine are homogenous throughout India, the relevant geographic market in the present case was taken as the territory of India. Accordingly, the DG determined that servicing of Nilpeter FB 3300 Servo Flexo Printing Machine in the territory of India is the relevant market.
- 9.12 The Commission notes that 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. Furthermore, to determine the ‘relevant product market’, the Commission is to have due regard to all or any of the following factors *viz.* physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products, in terms of the provisions contained in section 19 (7) of the Act.
- 9.13 Further, it may be noted that "relevant geographic market" has been defined in section 2(s) of the Act meaning as a market comprising the area in which the conditions of competition for supply of goods or provision of services or



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demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. To determine the 'relevant geographic market', the Commission is to have 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, in terms of the provisions contained in section 19 (6) of the Act.

9.14 So far as the issue of delineation of relevant geographic market is concerned, the same poses no difficulty in as much as the conditions for providing services to such machines are homogenous throughout India and therefore the relevant geographic market in the present case may be considered as the territory of India. The Opposite Parties also did not dispute determination of such relevant geographic market.

9.15 With respect to the relevant product market in the present case, the Commission notes that the label printing machine which is subject matter of the present dispute appears comparable to the label printers manufactured by the competitors of the Opposite Party No. 1, as submitted by the counsel for the Opposite Parties. In fact, the DG Report notes the presence of "competitors" of the Opposite Party No. 1 such as Gallus India Private Limited; Flexo Image Graphics Pvt. Ltd.- representative of Mark Andy, USA; Reifenhauer (India) Marketing Ltd.- representative of Nuova Gidue SRL, Italy; Weldon Celloplast Limited- representative of Omet (Italy); and Genius Flexo Machinery Pvt. Ltd.

9.16 In view of the presence of such competitors, it is difficult to confine the market in terms of a particular model of the product of the Opposite Party No. 1 only. Accordingly, there appears to be merit in the submissions of the counsel for the Opposite Parties that the Opposite Party No. 1's label printing machines



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are substitutable with the machines manufactured by its competitors by virtue of physical characteristics, price and intended usage. The machines are classified as narrow web printing machines and use flexography technology to print self-adhesive labels. Further, the submission of the counsel appearing for the Opposite Parties to the effect that the customers of the Opposite Party No. 1 find the machines manufactured by the Opposite Party No. 1 to be substitutable with that manufactured by its competitors are also relevant. In support of this submission, the Opposite Party No. 1 has relied on the replies of the customers of the Opposite Party No. 1 viz. Ajanta Packaging, Homemade Baker's (India) Limited, NITAI Press CAMP Pvt. Ltd. summarized at pages 31, 34 and 38 of the submissions of the Opposite Parties. It would be apposite to notice such replies there from for the sake of ready reference:

Reply of Ajanta Packaging (pp. 923-924 of the DG Report, Volume II)

(x) Whether the label printing machine purchased by you is a unique product? Is it possible to get the said product serviced from independent service Providers apart from Nilpeter India Pvt. Ltd? Please furnish your comments in this regard.

Reply:

“Not in our thinking. We also have other brands of flexo label machines and Nilpeter uses the same or similar technology as them. It should be possible to get the machine services by any label engineer if we so desire. We say this because many of the problems are attended to by our own in-house operators and engineers without involving Nilpeter, so we do not see any reason as to why any other competent engineer cannot attend to it...”



Reply of Homemade Baker's (India) Limited (p. 948 of the DG Report, Volume II)

(10) Whether the label printing machine purchased by you is a unique product? Is it possible to get the said product serviced from independent service party?

Reply:

“We have purchased flexo printing machine from Nilpeter. There are many Indian and foreign companies which manufacture similar flexo printing, machine. The spare parts such as Valves, Drives, Pipes, Analogs, Print Cylinder, Die, Bearing etc. are easily available in the open market”.

Reply of NITAI Press CAMP Pvt. Ltd. (p.1012 of the DG Report, Volume II)

(x) Whether the label printing machine purchased by you is a unique product? Is it possible to get the said product serviced from independent service party?

Reply:

“No it is not a unique product as we also have MARK ANDY 2200 since last 7 years and from our angle/view neither MARK ANDY nor NILPETER are unique machines as we are maintaining MARK ANDY on our own and we are sure of maintaining NILPETER the same way. They may be unique by name but not by nature as both the machines are flexo machines...”



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9.17 Further, the reply of a competitor of the Opposite Party No. 1 i.e., Flexo Image Graphics excerpted at page 53 of the submissions of the Opposite Parties may be noticed as follows:

Reply of Flexo Image Graphics (p.668 of the DG Report, Volume II)

(x) Whether the label printing machine manufactured by you is unique product? Is it possible to get it serviced from independent service providers apart from you? Please furnish your comments in this regard.

Reply:

“Sir, we do not understand the meaning of Unique products. We promote Mark Andy flexo graphic converting system. Our competitors also do so with a different brand name”.

9.18 In view of the above, the Commission is of considered opinion that the relevant product in the market in the present case may not be limited to servicing of Nilpeter FB 3300 Servo Flexo Printing Machines alone. However, the conduct under examination relates to the alleged abusive conduct of the Opposite Party No. 1 in denying support to the Informant in terms of service, spares and equipment sales in respect of Nilpeter Printing Machine, etc. after expiry of the warranty period in contravention of the provisions of section 4 of the Act. The Commission is of the considered opinion that, given the facts of the present case, the market structure and number of providers in the servicing market etc., as discussed in the following paras, not much turns upon whether the product is taken as Nilpeter FB 3300 Servo Flexo Printing Machines or narrow web label printing machines.

9.19 Further, as the DG has defined the relevant market narrowly by confining its analysis to servicing of Nilpeter FB 3300 Servo Flexo Printing Machines, the entire exercise conducted by the DG on the issue of dominance also remained



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confined to such machines. Be that as it may, the Commission proceeds to examine the dominant position of the Opposite Party no. 1 in the servicing market from the material available on record.

Dominant Position

9.20 On the issue of dominance, in the investigation, it was found that as far as the servicing of Nilpeter FB 3300 Servo Flexo Printing Machine in the territory of India is concerned, no authorized service provider was found for the same. It was noted from the information available on record that some non-crucial spare parts were available in the market that may be from OEMs or from localized market but availability of all the parts needed for the said machine did not appear to be present. The main/crucial parts, electronic components and operating software are to be supplied by the Opposite Party No. 1 alone. There are three operating software used in the machines which were licensed by the Opposite Party No. 1 from Bosch Rexroth (two software) and Omron (one software). It was also noted in the report that there was no authorized service provider of the Opposite Party No. 1 in India and either the Opposite Party No. 1 could take care of the service issues or the customers itself took care of the same, if there were small issues. Thus, the Opposite Party No. 1 was found to have a monopoly in providing services to its FB 3300 Servo Flexo Printing Machine in the territory of India.

9.21 The DG also recorded that 75% of the customers of Nilpeter India Pvt. Ltd have opted for AMC, which showed that there was very high consumers' preference to take AMC. Out of twelve customers of the Opposite Party No. 1, nine customers have opted for AMC and one was in warranty. Other two customers stated that they used to call the engineers of the Opposite Party No. 1 on need basis and the Opposite Party No. 1 has never denied its service support/ spare parts support to them. Thus, the DG concluded that hundred per cent of the customers of the Opposite Party No. 1 are taking service



support/spare parts support. The customers of the Opposite Party No. 1 have very limited option and there is no authorized service provider for the said machine. Further, there is no independent service provider for the said machine who can provide service support/spare parts support without any assistance from the Opposite Party No. 1. Thus, the investigation found that the customers of the Opposite Party No. 1 are heavily dependent upon it.

9.22 After taking into consideration market share, absence of any authorized service provider/independent service provider, dependence of consumers *etc.*, the DG concluded that the Opposite Party No. 1 is holding a dominant position in the relevant market determined by him.

9.23 The Commission observes that by virtue of explanation (a) to section 4 of the Act, 'dominant position' means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or to affect its competitors or consumers or the relevant market in its favour.

9.24 Further, the Commission, while inquiring whether an enterprise enjoys a dominant position or not under section 4 of the Act, is required to have due regard to all or any of the following factors as mentioned in section 19 (4) of the Act *viz.* 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 of the enterprises or sale or service network of such enterprises; dependence of consumers on the enterprise; monopoly or dominant position whether 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;



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market structure and size of market; social obligations and social costs; relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; and any other factor which the Commission may consider relevant for the inquiry.

9.25 It may be observed from the submissions of the Opposite Parties that none of the spare parts used in the machine are manufactured by the Opposite Party No. 1 itself and the same are procured from OEMs. The Commission has also taken note of the submissions of the Opposite Parties that there are numerous freelance engineers/ISPs operating in the market which provide maintenance services for label printing machines. The Opposite Party No. 1's label printing machine is an assembly of 2556 components, procured from open market and put together to deliver an outcome of printing. That even before the Opposite Party No. 1 began operations in 2008, many Indian customers were using second hand Nilpeter machines imported from different sources and maintaining it with locally available spares.

9.26 In this connection, it may be noticed from the submissions of the Opposite Parties that the machines can be easily serviced by any freelance engineer/ISPs and the spare parts of the machine are freely available in the local market, reflecting healthy competition in the aftermarket for servicing label printing machines and ISPs effectively countervail any anti-competitive behaviour of the Opposite Party No. 1. These submissions derive sustenance from the replies of the Opposite Party No. 1's customers and for felicity of reference, the same may be noticed herein below from the submissions/replies of the Opposite Parties:

Reply of Synergy Packaging Pvt. Ltd (pp. 989-990 of the DG Report, Volume-II)



(14) What percentage of spare parts/services needed for the said companies can be acquired from Nilpeter India Pvt. Ltd. only and what percentage from other sources?

Reply:

“It is difficult in percentage terms. But at the time whenever we are in need of spares we do explore various vendors out there in the market. Then we zero-in on the appropriate vendor for the supply. The order is placed on Nilpeter if their pricing and availability is in line with our expectations. If our expectations are not met then we resort to other sources for spare parts”.

Ajanta Packaging Ltd. (p. 924 of the DG Report, Volume-II)

(xii) What percentage of spare parts/services needed for the said companies can be acquired from Nilpeter India Pvt. Ltd. only and what percentage from other sources?

Reply:

“We are not competent to comment on this. All we can say is that in our six year relationship with Nilpeter we have not found any instance of a part that we could not have sourced outside of Nilpeter if we so desired to. We also ascertain the best value for money and lead times of supply by comparing prices and delivery terms before buying the parts required”.

9.27 Thus, it could be seen that even in the relevant market of servicing of Nilpeter machines, there are freelance engineers/ ISPs present who can easily service such machines and as such the dominance of the Opposite Party No. 1 even



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in this narrow compass is not established and the issue of the Opposite Party No. 1 being dominant in the said relevant market does not arise.

9.28 Further, on this aspect, the contention of the Opposite Parties to the effect that six out of the fifteen customers of the Opposite Party No. 1 did not avail of AMC is indicative of the fact that services can be easily availed from sources other than the Opposite Party No. 1 also assumes significance.

9.29 In view of the above, it is evident that such machines can be serviced by freelance engineers/ ISPs and service parts are also appear to be available in the local market. In view of such market construct, the issue of dominance of the Opposite Party No. 1 in the relevant market does not appear to be established. Furthermore, the submissions made by the Opposite Parties to contend that the Opposite Party No. 1 has an actual manufacturing capacity of six machines *per annum* even though the installed capacity is twelve machines *per annum*; the Opposite Party No. 1 is a late entrant in the market for narrow web label printing machine, having entered the market in 2008; since commencing operations in India the Opposite Party No. 1 has sold fifteen machines only; the Opposite Party No. 1 suffered losses of INR 95,88,884/- for the Financial Year 2010-2011 and profit of INR 1,06,72,545/- for the Financial Year 2011-2012 also cannot be altogether ignored.

9.30 In view of the aforesaid discussion, the Commission is of opinion that the Opposite Party No. 1 cannot be said to be in a dominant position in the relevant market even as defined by the DG and the issue of abuse of dominant position does not arise.

9.31 Resultantly, the Commission is of opinion that no case of contravention of the provisions of section 4 of the Act is made out against any of the Opposite Parties.



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Determination of Issue No. 2: Whether the Opposite Parties have contravened the provisions of section 3(4) of the Act?

9.32 So far as the finding of the DG recording contravention of the provisions of section 3(4) (d) of the Act is concerned (after finding the purported concerted action between the Opposite Party No. 1 and the Opposite Party No. 4 as vertical agreement), the Commission notes that the same is plainly untenable in law. By virtue of the provisions contained in section 3(4) of the Act 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 an appreciable adverse effect on competition in India. In the present case, the Opposite Party No. 4 being a buyer/ consumer is not part of any *production chain* and as such the provisions of section 3(4) of the Act are not attracted.

9.33 In view of the above discussion, the Commission is of opinion that no case of contravention of the provisions of either section 3 or 4 of the Act is made out against any of the Opposite Parties and the matter is ordered to be closed forthwith.

9.34 The Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Chawla)
Chairperson



**Sd/-
(S. L. Bunker)
Member**

**Sd/-
(Sudhir Mital)
Member**

**Sd/-
(Augustine Peter)
Member**

**Sd/-
(U. C. Nahta)
Member**

**New Delhi
Date: 02.12.2014**