



सत्यमेव जयते



Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 56 of 2012

In Re:

M/s Atos Worldline India Pvt. Ltd.

701, Interface 11, Malad (West), Mumbai - 400064

Informant

And

M/s Verifone India Sales Pvt. Ltd.

B – 1, First Floor, Sector 4, Noida- 201301

Opposite Party No. 1

M/s Verifone System Inc.

2009 Gateway Place, Suite 600

San Jose, CA 95110, USA

Opposite Party No. 2

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:** (i) Shri Suhail Nathani, Advocate
(ii) Shri Ravishekar Nair, Advocate
(iii) Shri Arjun Khera, Advocate
(iv) Shri Srijan Sinha, Advocate
(v) Shri Mehruz Mullah, Advocate

- For the Opposite Party:** (i) Shri Ramji Srinivasan, Senior Advocate
(ii) Shri Naval Chopra, Advocate
(iii) Shri Abjeet Sinha, Advocate
(iv) Shri Ritwik Bhattacharya, Advocate
(v) Shri Dinoo Mutappa, Advocate
(vi) Shri Vinayak Prasad
(vii) Shri James
(viii) Shri Anil Gupta

Order under Section 27 of the Competition Act, 2002

The present information has been filed by M/s. Atos Worldline India Private Limited (hereinafter, the '**Informant**') under section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') against M/s. Verifone India Sales Pvt. Ltd. (hereinafter, the '**Opposite Party No. 1**'/'**Verifone**') and M/s. Verifone System Inc. (hereinafter, the '**Opposite Party No. 2**') [collectively hereinafter, the '**Opposite Parties**'], *inter alia*, alleging contravention of the provisions of section 4 of the Act.

1. Facts, in Brief

- 1.1 As per the information, the Informant, a company incorporated under the Companies Act, 1956, is owned by Atos, a global information technology



सत्यमेव जयते



services company operating in the areas of hi-tech transactional services, consulting and technology services and system integration and management services. The Informant is stated to be engaged in the provision of services such as software development including Value Added Services (hereinafter, 'VAS'), maintenance, implementation, upgradation, applications management and infrastructure management. It delivers end-to-end service in industries of public sector, healthcare, transport and financial services and also operates as a third party processor (hereinafter, 'TPP'). As a TPP, it tracks the flow of intervening events between a card holder swiping his card and finally receiving a printed charge slip at the Point of Sale (hereinafter, 'POS') Terminals on the premises of a merchant from whom the card holder buys products/ services. As a VAS provider, the Informant develops applications such as loyalty, gift card, bill payment, top-up, money transfer, dynamic currency conversion, *etc.* for integration into POS Terminals. The customers of the Informant such as banks and financial institutions use its services for customising, commissioning, installing and maintaining POS Terminals at merchant locations.

1.2 The Opposite Party No. 1, a company incorporated under the Companies Act, 1956, is a wholly owned subsidiary of the Opposite Party No. 2 which is a NASDAQ listed public company and a global leader in secure electronic payment technologies for the provision of hardware solutions such as POS Terminals, services and expertise to enable electronic payment transactions at the POS Terminals.

1.3 As per the information, the Opposite Party No. 1 is a leading supplier of POS Terminals in India having control over nearly 70% to 80% of the market. It has acquired several other players in the POS Terminals market in India such as Lipman Electronic India Private Limited in 2006, Hypercom India and Gemalto in 2011.



- 1.4 As per the Informant, the Opposite Party No. 1 supplies POS Terminals along with core POS Terminal applications (i.e., Operating System and Kernels) and Software Development Kits (hereinafter, ‘**SDKs**’) to enable the basic functionality of the POS Terminals. It is submitted that POS Terminals along with its core applications are either sold directly to the customers like banks and retail outlets or to the TPPs such as the Informant who act on behalf of acquiring banks and also render VAS to develop and integrate applications into POS Terminals.
- 1.5 It is averred that for the provision of VAS, it is extremely important for the Informant to have access to the core POS Terminal applications and their crucial enhancements/updates along with SDKs. Withholding of such enhancements/updates and SDKs by the POS Terminal manufacturers will negatively impact the growth of the TPP and VAS markets. It is stated that, as per standard industry practice, core POS Terminal applications and SDKs are provided along with the POS Terminals and the costs of the same are built into the price paid for the POS Terminals.
- 1.6 The Informant submitted that between September, 2010 and December 2011, the Opposite Party No. 1 continued to provide SDKs to the Informant along with the POS Terminals and core terminal applications without any restrictions on the use of SDKs. The Opposite Party No. 1 also used to provide training to the Informant’s engineers to enable the Informant to render VAS to its customers.
- 1.7 The Informant stated that cost of core applications and SDKs were always included in the purchase orders for the purchase of the POS Terminals. In relation to enhancements and updates to core terminal applications, the purchase orders contained clauses stipulating the terms and conditions. It is stated that in practice such enhancements and updates were provided at no extra cost, other than the price paid at the time of procurement of POS Terminals.



- 1.8 It is submitted that after acquisition of Venture Infotek by the Informant in August, 2010, the Opposite Party No. 1 issued a termination letter to the Informant in September, 2010 alleging breach of Source Code License Agreement (hereinafter, 'SCLA') which was signed between them in July, 2009 for a particular model of a POS Terminal. As per the Informant, despite issue of the said termination letter, the Opposite Party No. 1 continued to supply POS Terminals along with its core applications, SDKs and training to its engineers for the use of SDKs.
- 1.9 It is averred that, in January 2012, the Opposite Party No. 1 sent a proposed draft SDK agreement to the Informant stating that the same is not open to any negotiations, amendments or changes and that the Informant has to insert certain details in the said draft SDK agreement and to counter-sign it. The Informant has alleged that through the said draft SDK agreement the Opposite Party No. 1 sought to impose certain restrictive conditions on it.
- 1.10 The Informant stated that the terms of the said draft SDK agreement and the restrictions contained therein were a complete departure from the business practice that had existed in the industry for several years. Moreover, no legitimate business reasons were provided by the Opposite Party No. 1 to carry out such drastic changes in the said draft SDK agreement. It is alleged that the restrictions contained in the draft SDK agreement foreclose the VAS market.
- 1.11 The Informant averred that since early January, 2012, the Opposite Party No. 1 has adopted a very unreasonable position and there was an unprecedented delay in the supply of kernels which caused heavy revenue loss to it. It is alleged that between January, 2012 and July, 2012, the Opposite Party No. 1 made repeated attempts to force the Informant to agree to the terms and conditions as set out in the draft SDK agreement. Further, the Opposite Party No. 1 issued several reminders to the Informant to complete the formality of signing the draft SDK agreement, failing which



the Opposite Party No. 1 threatened to withdraw the SDK support for the Informant's business. It is averred that the Informant was constrained to issue several letters to the Opposite Party No. 1 highlighting the unreasonable nature of the restrictions set out in the draft SDK agreement. It is the case of the Informant that despite repeated attempts to engage in constructive discussion with the Opposite Party No. 1 on the restrictive conditions of the draft SDK agreement, it issued a termination letter dated 01.08.2012.

- 1.12 It is alleged in the information that the Opposite Party No. 1 over the past few years also made in-roads into the VAS market and operates as a direct competitor to the Informant and other entities operating in the VAS market. It is alleged that on account of the Opposite Party No. 1's dominant position in the POS Terminals market and its presence in the VAS market, it resorted to the conduct and practices which directly impair not only the ability of VAS providers from operating in the market but appropriate the Informant's IPR in the VAS market.
- 1.13 It is stated that at a global level the Informant and Verifone are competitors in the provision of hardware and software solutions to the payment industry. But, in India the Informant is operating in the TPP and VAS spheres only whereas the Opposite Party No. 1 is not only dominant in the POS Terminals market but also active in the VAS market where it primarily operates in the non-financial applications and is now leveraging its strength to compete in the financial services market.
- 1.14 Citing Reserve Bank of India's 'Payment System Vision Document, 2012-15', the Informant stated that in the POS Terminal manufacturing industry in India, Verifone and Ingenico are the two prominent players. By virtue of being almost an exclusive supplier of POS Terminals in India, the Opposite Party No. 1 exercises significant control over the supply of hardware and software solutions.



1.15 The Informant has also stated that there appears to be no objective justification for imposing unreasonable and unfair terms in the draft SDK agreement. These terms would effectively eliminate the Informant from the downstream market and would support the Opposite Party No. 1's interests by eliminating competition in the market. The Informant has alleged that Opposite Party No. 1, by imposing restrictions in the draft SDK agreement, is aiming to strengthen its position in the VAS market.

1.16 Based on the above submissions, the Informant has alleged that the Opposite Party No. 1, through the 2012 draft SDK agreement, has sought to impose unfair and unreasonable conditions and prices on the Informant which is in contravention of 4(2)(a)(i) & (ii) of the Act. As per the Informant, the Opposite Party No. 1 by imposing severely restrictive terms and conditions on the usage of SDKs and by demanding payment of unfair prices for provision of service has sought to limit and restrict provision of services and technical development in the market which is in contravention of section 4(2)(b)(i) & (ii) of the Act. It is also alleged that the Opposite Party No. 1 has sought to deny market access to VAS providers in contravention of section 4(2)(c) of the Act. Further, the Opposite Party No. 1 allegedly intended to use its dominant position in POS Terminal market to dominate VAS market in contravention of section 4(2)(e) of the Act.

1.17 Based on above submissions, the Informant, *inter-alia*, prayed to the Commission to direct the Opposite Party No. 1 to cease and desist from indulging in abusive conduct; discontinue from imposing unfair, restrictive and discriminatory conditions in relation to use of SDKs and enhancements to core applications; not to give effect to the 2012 Termination Letter; impose appropriate penalty on the Opposite Party No. 1 for abuse of dominant position and grant such other reliefs as the Commission may deem appropriate in the facts and circumstances of the case.



सत्यमेव जयते



2. The Commission after giving thoughtful consideration to the facts of the case found that, *prima facie*, the conduct of the Opposite Party No. 1 was in violation of the provisions of section 4 of the Act. Accordingly, *vide* its order dated 31.12.2012, under section 26(1) of the Act, the Commission directed the Director General (hereinafter, ‘DG’) to conduct an investigation into the matter.

3. **Brief of the DG’s Investigation**

3.1 The DG submitted his investigation report to the Commission on 20.03.2014.

3.2 Pursuant to the directions of the Commission, the DG has essentially investigated the alleged infraction of the provisions of section 4 of the Act *i.e.*, abuse of dominant position by the Opposite Party No. 1.

3.3 For the purpose of investigation, the DG has considered ‘the market for POS Terminals’ as the relevant product market. As per the DG report, there are no reasonable alternative/substitutable devices available in the market to which merchants can switch over in place of POS Terminals. It is reported that new technologies such as Easytap, MSwipe *etc.*, cannot be considered as a substitute of the POS Terminals. Moreover, the demand side substitutability of POS Terminals does not exist. The DG has considered the territory of India as the relevant geographic market because POS Terminals are capable of being traded throughout India with almost similar conditions. Thus, ‘the market for POS Terminals in India’ has been considered as the relevant market by the DG in the instant case.

3.4 To ascertain the position of dominance of the Opposite Party No. 1, the DG has analysed the factors mentioned under section 19(4) of the Act and concluded that the Opposite Party No. 1 is a dominant enterprise in the relevant market defined *supra*. It is reported that during the period of investigation *i.e.*, from 2009-10 to the date of filing information in 2012, there



सत्यमेव जयते



were mainly two players in the relevant market *i.e.*, the Opposite Party No. 1 and Ingenico, and the market share of the Opposite Party No. 1 was much higher compared to Ingenico in terms of numbers of POS Terminals sold to the customers. DG has reported that in terms of size and resources, sales data, number of terminals operational in the country and the network, *etc.*, the Opposite Party No. 1 has a clear advantage over its competitors and the consumers are dependent on it. Also, the Opposite Party No. 1 can operate independently of competitive forces and affect the market in its favour because of its wide presence and large share in the POS Terminals market.

3.5 On the alleged abusive conduct of the Opposite Party No. 1, the DG has found that the clauses of the SDK license agreements are unfair. The DG noted that the 'Purpose Clause' under which the licensee can develop VAS and use the same only on the licensor's products and the restrictive clauses prohibiting TPP to assist or develop the applications were found to be in violation of section 4(2)(a)(i), 4(2)(b)(i), 4(2)(b)(ii) and 4(2)(e) of the Act. The DG reported that the claim of the Opposite Party No. 1 that the restrictive clauses of the SDK agreement are meant for the purpose of protecting its IPRs was found to be untenable and none of the other POS Terminals vendors have incorporated such restrictive clauses in their SDK agreement. The DG found that the clauses of SDK agreement are limiting and restricting the technical or scientific development relating to the prejudice of consumers. The DG noted that the intent of the restrictive clauses in regard to licensing, selling or otherwise transferring any software that licensee develops was to not allow them its further use. Thus, the DG observed that in the name of IPR safety the Opposite Party No. 1 was restricting the VAS developer to exploit the same. Further, the DG noted that by imposing the condition of disclosing the software, the Opposite Party No. 1 gets access to the commercial rights of the developer without any obligation. The DG noted that VAS providers cannot be forced to pre intimate the details of the products they are developing to the Opposite Party No. 1.



सत्यमेव जयते



3.6 The DG also identified the key officials of the Opposite Party No. 1 who were responsible for the said anti-competitive conduct for the purpose of individual liability under section 48 of the Act.

4. **Replies/objections of the Opposite Party No. 1 in response to the DG Report**

4.1 The Opposite Party No. 1 has submitted that the findings of the DG are false, baseless and deserve to be dismissed outright for want of evidence and non-application of mind. It has been submitted that the DG has arrived at the conclusions with only a cursory analysis of the evidence and issues at hand, a selective reliance/cherry picking of statements made by few interested parties and that the report contains several methodological, procedural and analytical errors and inconsistencies, including findings contrary to the records of the case.

4.2 The Opposite Party No. 1 has submitted that the Informant has deliberately avoided any meaningful or constructive dialogue with it on the terms of any potential licensing arrangement and has intentionally sought to delay the execution of an SDK license agreement, despite the Opposite Party No. 1 meeting almost all of the Informant's claims.

4.3 It has been submitted that the case appears to be motivated by the Informant's desire to replace the Opposite Party No. 1 as a popular vendor of POS Terminals to banks in India. Further, the Informant through its sister company 'Banksys International' is already selling POS Terminals around the world and it is understood that the Informant has already started selling Mobile POS (hereinafter, 'MPOS') Terminals in India. It is also submitted that as banks heavily rely on the Informant for providing backend processing and maintenance services, the Informant enjoys a unique position in the electronic payment market.



सत्यमेव जयते



4.4 The Opposite Party No. 1 has submitted that the DG had contacted various third parties such as banks and VAS providers and specific query had been posed whether they had come across any abusive conduct by a POS vendor. In response, all the major banks such as SBI and HDFC have stated that they had not come across any abusive conduct by POS vendors in the market. Further, all major VAS providers such as Prizim Payments Services Private Limited, Tarang Software Technologies Limited, Innoviti Embedded Solutions Private Limited and ICICI Merchant Services Private Limited had unanimously stated that they had not come across any anti-competitive conduct by POS Terminal providers.

4.5 As per the Opposite Party No. 1, the subject matter forming the basis of this information is a draft SDK agreement circulated by it to the Informant for negotiation. This draft SDK agreement was initially circulated post infringement of its intellectual property right by the Informant and MRL Posnet. It is submitted that immediately prior to the filing of information, the Opposite Party No. 1 was about to close negotiations over the SDK license agreement with the Informant agreeing to nearly all its demands. However, the Informant preferred filing the information.

4.6 The Opposite Party No. 1 has submitted that the DG's analysis and the finding that the relevant market is limited to POS Terminals is misconceived, flawed and contradictory to the actual market realities of the electronic payment industry. The DG has altogether failed to apply section 2(r) of the Act while delineating the relevant market in the case. In addition to disregarding the basic requisites of defining the relevant market under the provisions of the Act, the DG has disregarded and failed to examine the inherent substitutability between different technologies in the electronic payment industry that act as substitutes to POS Terminals.

4.7 The Opposite Party No. 1 has submitted that the DG has failed to take into account the new products being developed and deployed in this sector on



सत्यमेव जयते



account of the technology driven nature of the industry. It is submitted that the electronic payment industry as a whole is witnessing rapid technological change and progress. Relying upon a RBI publication, it is stated that the payment system initiatives taken over the last three years viz. from 2009 to 2012 have resulted in deeper acceptance and penetration of modern electronic payment systems in the country. The electronic payment industry is rapidly growing in India with various modes of electronic payment emerging and constraining the sales of POS Terminals. The Opposite Party No. 1 has relied upon the M/s Pricewaterhouse Coopers (hereinafter, 'PwC') Report on Electronic Payment Market in India which states that "technology advancements have given rise to a new platform of POS Terminals referred to as MPOS, which has opened an affordable channel for merchants of all sizes. It requires less upfront investment and its maintenance is more economical than POS Terminals.

4.8 The Opposite Party No. 1 has submitted that MPOS are severely constraining and acting as an effective substitute to POS Terminals. MPOS devices include Ezetap's Mobile solutions card reader, MSwipe's USB/dongle mobile Point of Sale, and MobiSwipe products. The Opposite Party No. 1 has submitted that MSwipe is adding around 1500 merchants per month and is planning to reach 50,000 merchants by the end of 2014. It has also been submitted that SBI has recently teamed up with Ezetap to set up 5, 00,000 MPOS Terminals over the next five years.

4.9 The Opposite Party No. 1 has submitted that First Data, a sister entity of ICICI Bank Merchant Services Limited, plans to aggressively market its new product to a large number of merchants across India including retailers and e-retailers, radio taxis, *etc.* and it has over 2 lakh customers in India and the survey showed that around 39 percent of the merchants are willing to adopt this product.



सत्यमेव जयते



4.10 As per the Opposite Party No. 1, MPOS are easier to use and more cost effective and fast replacing the POS Terminals. Further, in India acquirer banks are continuously seeking ways to migrate to cheaper modes of transacting e-payment systems. These new technologies which can be 'attached' to mobile phones to process transactions not only result in upfront investment by the bank but also reduce the monthly maintenance expense of the banks. Such devices perform comparable functions with a POS Terminal and provide the same end use *i.e.*, facilitation of electronic payment. Further, MPOS are Europay, Mastercard and Visa (hereinafter, 'EMV') Level 2 certified so they have the ability to process debit/credit cards and process electronic payments just like POS Terminals.

4.11 In addition to MPOS, there are other technologies such as mobile wallets and pre-paid instruments that severely constrain the POS Terminal sales and are substitutable to POS Terminals. As per the Opposite Party No. 1, the DG has grossly erred by not accurately examining these technologies. It is submitted that since the electronic payment industry is highly technology driven, the relevant product market definition must be broad enough to include new and innovative products which compete and constrain the sales of POS Terminals.

4.12 It has been submitted that both POS Terminals and other POS devices including MPOS such as Ezetap and Mswipe achieve the same end result *i.e.*, the processing of electronic payment transactions. Banks and merchants who wish to obtain a device for processing a credit/debit card are equally able to choose between a POS Terminals and other POS devices that process electronic payments. Further, the consumers prefer these emerging technologies over POS Terminals due to cost effectiveness and relative ease in use. Thus, as per the Opposite Party No. 1, all such devices are interchangeable and substitutable with each other and therefore are part of the same relevant market. Accordingly, the relevant market to be considered in this case should be "*the market for electronic payment devices*"



4.13 As regards the relevant geographic market, the Opposite Party No. 1 has submitted that the relevant geographic market definition of 'India' as set out in the DG report may be accepted but such relevant market should also include imports of electronic payment devices, including POS Terminals into the country.

4.14 It is submitted that the DG's finding that Verifone holds a dominant position in the POS market has no basis and DG has disregarded the basic tests of dominance contained in Explanation (a) to section 4 of the Act. Further, the determination of market shares by the DG is flawed and contradictory to the data contained in various market study reports.

4.15 The Opposite Party No. 1 has submitted that, given the number of competing devices and players, it cannot be in a dominant position in the relevant market. Without prejudice to the submissions on the correct relevant market definition, even in the narrower relevant market defined by the DG *i.e.*, '*market for POS Terminals in India*', the Opposite Party No. 1 is not a dominant player. It is submitted that Ingenico holds a higher market share than Verifone in the POS Terminals market and the market share of Verifone is further declining which shows that it does not have position of strength to act independently of competitors, consumers or the market.

4.16 As per Opposite Party No. 1, section 19(4) is not a standalone provision; it has to be seen contextually as an aid to section 4. This has been affirmed by the COMPAT in the case of National Stock Exchange vs. Competition Commission of India wherein the Hon'ble COMPAT observed that "Shri Sibal is undoubtedly right when he argues that while applying the factors listed in section 19(4) of the Act, a 'check the box' approach should not be followed and the factors in that section should only be considered as an aid in assessing dominance". Thus, even if an enterprise is a leader in terms of factors set out under section 19(4) of the Act, such an enterprise can be considered as dominant only if these factors confer upon the enterprise a



सत्यमेव जयते



position of strength in the relevant market which enable it to operate independently or affect competitors or consumers or the relevant market in its favour. It has been submitted that the DG failed to analyse the POS Terminals market and various competitive constraints exercised on the Opposite Party No. 1 which demonstrate that it is unable to operate independently of competitive forces or affect competitors or consumers or the relevant market in its favour. The Opposite Party No. 1 has submitted that the POS Terminals market is highly competitive and the players in the industry (including customers of the Opposite Party No. 1, whether banks, TPPs or VAS providers) substantially constrain the Opposite Party No. 1's activities.

4.17 It is submitted that the POS Terminals market is a 'buyers' market with customers especially banks dictating the terms and conditions. As per the Opposite Party No. 1, banks considerably constrain its operations as they are the primary customers. In fact, banks adopt a (minimum of) two-vendor policy and source their requirements from more than one POS Terminal supplier in India and are well aware of the other available alternatives.

4.18 As per the Opposite Party No. 1, the banks have the ability to choose its competitors over it and therefore, are free to shift their purchases to competitors. The Opposite Party No. 1 has also submitted that its commercial operations are highly dependent on third party processors such as the Informant.

4.19 It has been submitted that the Informant mandates various '*specification requirements*' which include a variety of functionalities that must be adhered to, apart from just the certification of the core payment applications. If a POS Terminal is not certified by the Informant, banks refuse to place orders for it. The Informant's White Paper on Certification of Terminal Applications explicitly states "*banks shall only deploy/advise to deploy those terminals whose applications have been credited by Venture Infotek.... Banks shall advise any prospective terminal before deployment*" (emphasis added). The



paper also states “*terminal Vendors shall comply with the testing and certification process of Venture Infotek*” (emphasis added). As per the Opposite Party No. 1, the Informant charges a significant amount of approximately Rs. 8, 00,000 as fees for certifying payment applications on its terminals whereas no other TPP in India charges such exorbitant certification fees.

4.20 It has been submitted that the Informant is also operational in the POS Terminals market globally under the brand name ‘Banksys’ and can easily customize these terminals to meet Indian market requirements and align them to the standards in India. This is evidenced by the fact that the Informant has also started to service the MPOS segment of the market and further may launch its own terminals in India.

4.21 The Opposite Party No. 1 has submitted that the Informant, in its White Paper on Certification of Terminal Applications states “*Venture Infotek provides the ubiquitous infrastructure for POS Terminals and payment card transactions to be processed to over 15 acquiring banks in India*”. In fact, the Informant is the only TPP in India which mandates that it will be the exclusive TPP to acquiring banks, demonstrating Informant’s significance as a TPP to banks and its dominant position of strength as a TPP in India. The ability of the Informant, as a dominant TPP service provider, does not allow the Opposite Party No. 1 to ‘affect its competitors’ or ‘operate independently’ of market forces.

4.22 As per the Opposite Party No. 1, it is significantly constrained by various players including its customers. The players in this industry such as Indigo and the Future Group, and banks such as Axis bank, HDFC bank, SBI are much larger than it and can exercise significant countervailing buyer power on it in the POS Terminals market.



सत्यमेव जयते



4.23 It is submitted that the Opposite Party No. 1 does not hold highest market share rather, Ingenico holds the highest market share in the POS Terminal market in India. In support of its lower market share, the Opposite Party No. 1 cited the DG report which states that *“if we take only the share of Opposite Party No. 1 and exclude the machines sold by Gemalto (acquired by Opposite Party No. 1 in 2011) the market share of Opposite Party No. 1 is about 45% as it had sold about 2.8 lacs terminals by 31-03-2012”* (emphasis added). This calculation of market share has been arrived at by collating the sales of POS Terminals by the Opposite Party No. 1 for the last three years and without aggregating the sales of its acquired companies in previous years.

4.24 The Opposite Party No. 1 has submitted that the POS Terminals it acquired from Lipman in 2006-2007, Gemalto in 2011 and Hypercom in 2012 (hereinafter, **‘Legacy Terminals’**) are near obsolete and the acquired POS Terminals have not raised its sales rather facilitated additional opportunities for its competitors. It is submitted that since the acquired POS Terminals do not provide any commercial advantage, either at present or in the future, such terminals should not be included while computing the market share of the Opposite Party No. 1.

4.25 Further, as a result of the new RBI guidelines, ‘legacy terminals’ are rendered redundant because of requirement of a ‘PIN’ at the time of swiping a debit/credit card on a POS Terminal. Since banks have sought to replace many POS Terminals with GPRS enabled terminals, it renders ‘legacy terminals’ useless. The DG has failed to examine this aspect.

4.26 The Opposite Party No. 1 has submitted that, in the light of above, a more accurate estimate of its market share would be approximately 45% (and it is further declining) as opposed to 70% to 80% alleged by the Informant. It is submitted that a market share of 45% cannot, in itself, lead to a conclusion that the Opposite Party No. 1 holds a dominant position especially, when one of its competitors has a higher market share.



4.27 As per the Opposite Party No. 1, its competitor Linkwell Telesystems Pvt. Ltd. in its response to the DG date 25 October 2013, has submitted that “[t]here are a number of POS machine vendors in India such as Verifone, Ingenico, Gemalto, Sagem, PAX, MPOS, Specra Tech, Exadigm, who import their machines into India. Among the local vendors are Geodesic, Evolute, Analogics, Sands, Balaji, Quantum, MicroFX, Palmtech, Smartlans, etc. There are a number of small regional vendors as well”. The DG however has failed to obtain the number of POS Terminals sold by these players and has failed to include such players in market share analysis.

4.28 It is submitted that the Commission has recognised that falling market share is an indication that the enterprise is not in a dominant position in the relevant market in the case of M/s. HNG Float Glass Ltd. vs. M/s. Saint Gobain Glass India Ltd. where the Commission held that “the erosion of market shares for established players like SGGIL, AIS point out the competitive constraints exercised by a new firm on the old experienced firms”. Further, in the case of Hoffman La Roche V. Commission, the ECJ held that “[a]n undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for....is by virtue of that share in a position of strength”(emphasis added). This is also recognized by the OECD report which states , “[t]o distinguish between instances of “normal, everyday” non-substantial market power and the type of market power that should trigger heightened scrutiny under single-firm conduct provisions, it is important to determine whether market power is durable i.e., whether it can be maintained for a considerable period of time”(emphasis added).

4.29 In this regard, it is submitted that the Opposite Party No. 1’s revenues and profits have been facing a steady decline over the last year. Its profits which were Rs. 6.9 crore in financial year 2011-12, were reduced to a mere Rs. 65.75 lakhs in financial year 2012-13. Further, in financial year 2011-12 the Opposite Party No. 1’s revenues were Rs. 118.15 crore and were reduced



सत्यमेव जयते



significantly to Rs. 96.57 crore in the financial year 2012-13. Further, its market shares have also fallen from 57% to 43% in the past 5 years. It is submitted that significant drop in revenues, profits and market share indicate that the Opposite Party No. 1 does not hold any dominant position in the relevant market.

4.30 It is submitted that the DG has wrongly compared the data relating to POS Terminals sold to the banks by the Opposite Party No. 1 and Ingenico. It is stated that the DG has not taken into account the POS Terminals acquired by SBI. It is stated that SBI has purchased 67,000 terminals from Ingenico as compared to only 2000 terminals and 4000 PIN pads from the Opposite Party No. 1. In choosing to analyse the sales figures of only the largest three POS Terminal acquiring banks, the DG has failed to account for POS Terminals purchased by all other banks in India such as IDBI bank which has 14,844 POS Terminals, Corporation bank which has 14063 POS Terminals, American Express Banking Company which has 17652 POS Terminals, Citibank which has 9800 POS Terminals, *etc.*

4.31 It is further submitted that the DG has failed to account for Linkwell's sales of POS Terminals in India. Linkwell has sold a total of 78,860 POS Terminals over last three years. It is submitted that the market share of the Opposite Party No. 1 in the POS Terminals market clearly indicates that it does not enjoy a dominant position. Ingenico is the market leader with a market share of 54% whilst the Opposite Party No. 1's market share has fallen by 14%.

4.32 Further, it is submitted that the DG has also failed to effectively examine the competitive strength enjoyed by the competitors of the Opposite Party No. 1 which are large multi-national corporations such as Ingenico and PAX and local players such as Linkwell or Visiontek and Advanced Micronic Devices Ltd. (AMD L). Threat of new entry from globally established POS Terminal



सत्यमेव जयते



suppliers also prevents the Opposite Party No. 1 from operating independently of competitive forces prevailing in the relevant market.

4.33 It is submitted that Ingenico is the world's largest supplier of POS Terminals and it holds 'No. 1' position in Asia. In April 2014, Ingenico was adjudged as the highest ranking POS Terminal vendor globally by ABI Research's POS Terminal Vendor Competitive Assessment. This leading position is also corroborated by the Nilson Report (a leading publication covering payment system worldwide and it provides up-to-date information on companies, products, and services from all areas of the payments industry infrastructure) on POS Terminal shipments in 2011.

4.34 Citing PwC Report, it is submitted that Ingenico is the largest player in India. Ingenico has deployed approximately 300,000 POS Terminals across six hundred cities, village and metros in India and it claims to be selling 20,000 POS Terminals every month and has expanded its presence by providing MPOS and online payment gateways as well. According to financial statement of Ingenico filed with the Ministry of Corporate Affairs, its sales in India since its incorporation have increased nearly by 10 fold *i.e.*, from Rs. 81.83 million in the financial year 2009 to Rs. 799.93 million in the financial year 2013.

4.35 As per the Opposite Party No. 1, given the global presence, size and importance of competitors, including potential competitors such as the Informant, it cannot be said to hold a dominant position in the POS Terminals market in India. As per the Opposite Party No. 1, it is not dominant in any market relevant to this case, including the relevant market defined by the DG thus, it cannot be found to have abused its dominant position.

4.36 The Opposite Party No. 1 has submitted that DG's conclusion on its abusive conduct is not reflected by any actual anti-competitive effects. Though DG has received the details of VAS provided by the Informant and FSS and VAS



सत्यमेव जयते



revenues of the Informant, the DG has failed to examine whether their statements on the Opposite Party No. 1's abusive conduct is true and actually reflected in falling VAS revenues of these companies or by any other anti-competitive effects whatsoever.

4.37 It is submitted that DG has found that the Opposite Party No. 1 has violated the provisions of section 4 of the Act on the basis of a draft SDK agreement which has not been executed or implemented. As per the Opposite Party No. 1, the DG has completely failed to consider that presently there cannot be 'imposition' of any unfair term or condition on the Informant and accordingly there is no breach of section 4(2)(a)(i) of the Act. The DG has also failed to give evidence of any actual foreclosure or anti-competitive effect caused by the Opposite Party No. 1's conduct. Thus, the DG's conclusions of abuse are mere subjective statements which fail to correlate with any market reality.

4.38 It is submitted that based on a bald comparison of selectively compared clauses from other SDK license agreements to the clauses contained in Verifone's 2012 draft SDK license agreement such as 'Purpose Clause' and restriction of development of VAS on managed Terminals; restriction on development of payment applications; restriction on sub-licensing or appointing third-parties for development of VAS; restriction relating to disclosure of VAS to be created or intended to be created; and restriction on the commercial exploitation of VAS the DG concludes that the 2012 draft SDK license agreement was not in line with prevailing industry practices in the Indian and global POS Terminals market.

4.39 The Opposite Party No. 1 has submitted that DG's findings ought to be rejected outright as it failed to appreciate the different business models adopted by different POS Terminal suppliers and has also completely misrepresented certain SDK license agreements evaluated. The Opposite Party No. 1 has stated that a bald comparison of clauses set out in a draft agreement, being negotiated between parties, both prior to and after the filing



of the information, cannot amount to the ‘imposition’ of any unfair term or conditions and cannot amount to abuse of dominance in violation of section 4 of the Act.

4.40 It has been submitted that 2012 draft SDK license agreement imposes far less stringent terms and conditions when compared to SDK license agreements in the smart phone industry. Clauses under the 2012 draft SDK license agreement cannot be said to be restrictive as it is standard business practice.

4.41 As regards the ‘Purpose Clause’, the Opposite Party No. 1 has submitted that the DG has merely looked at the language, without analysing its effects and implications. It is submitted that the Opposite Party No. 1’s position has always been to permit VAS development on managed terminals, subject to a prior disclosure and permission requirement. That there is no evidence to show that the Opposite Party No. 1 has unreasonably withheld permission from allowing the Informant or other VAS providers from developing VAS applications on managed terminals. It is stated that Verifone does not unreasonably restrict the development of VAS on managed terminals.

4.42 It has been submitted that the Opposite Party No. 1 permits development of VAS on managed terminals and the same is evidenced by the fact that numerous VAS applications such as DCC, PUNGRAIN, Asian Paints Loyalty *etc.* have been developed on the Opposite Party No. 1’s managed terminals in the past. Where a VAS provider wishes to develop VAS on managed terminals, the permission and disclosure requirement is effected merely by way of updating “Exhibit C” of the 2012 draft SDK license agreement.

4.43 The Opposite Party No. 1 has submitted that this minimal disclosure cannot amount to an abuse of dominance. The Opposite Party No. 1’s terminals have been purchased by customers such as the Future Group and the Opposite Party No. 1 is liable under warranty to its customers for the POS Terminals purchased from it. Given the immense risk that the Opposite Party No. 1



incurs in the provision of warranty services to its customers, the Opposite Party No. 1 requires a simple list of the customer, the name of the VAS and the terminal models on which the VAS functions under 'Exhibit C'.

4.44 In cases of VAS applications developed on managed terminals, the Opposite Party No. 1 remains liable under warranty to its customers. The 2012 draft SDK license agreement provides such a mechanism. This had been submitted to the DG who has completely failed to acknowledge or even address any of its submission. The Opposite Party No. 1 has submitted that a mere permission and limited disclosure requirement is not a 'restriction', and the DG has failed to provide even a single instance where it has refused to provide such permission.

4.45 The Opposite Party No. 1 has objected the DG's finding that once a terminal is sold, customers cannot be restricted to develop any new application to enhance the utility of POS Terminals and payment applications are required to be modified/upgraded or developed as per the needs of buyers. It is submitted that the DG has absolutely failed to understand the basic functioning of a POS Terminal, including the operation of payment application.

4.46 It is also submitted that a POS Terminal is sold with its hardware (POS Terminal) and software (POS application) which processes the electronic payment. *Sans* a payment application, a POS Terminal is of no or little utility and would be simply empty shell. A POS Terminal can be compared to a Blackberry mobile phone where the phone hardware and the operating system are essentially one product.

4.47 It is submitted that the DG has fundamentally failed to comprehend what a payment application is and has not understood its primacy to the functioning of a POS Terminal. Given that a functional POS Terminal is provided by the Opposite Party No. 1, any modifications/ upgrades can only be provided by



it. Since the payment application is already functioning on a POS Terminal, there is no question of any ‘new’ application for processing payments on the terminal.

4.48 The Opposite Party No. 1 has submitted that the market itself demands a device that facilitates electronic payment which is catered to by a POS Terminal with a functioning payment application. The Opposite Party No. 1 therefore adopts a business model that caters to what the market and customers demand. The DG however, without any analysis of market functioning or responses of banks, has concluded that *“Opposite Party No.1 had not disclosed its terms and conditions of SDK license agreement to the buyers at the time of sales of POS Terminals. Thus, the buyers who purchased huge number of terminals were clearly under the impression that the SDK shall be provided as per the industry practices”*. This stands in stark contrast to its submission above that banks/customers themselves demand for a POS Terminal along with a payment application. The demand for POS Terminals in India is of a functional product that processes electronic payment and the Opposite Party No. 1 is engaged in the sale of such a functional electronic payment device.

4.49 Further, it is submitted that since this industry involves payments, potential faults may have catastrophic effects. Therefore, in order to ensure that electronic operations of banks/merchants function smoothly and also to protect its reputation. Given the immense risk of potential fraud and misuse in the electronic payment industry in India, it is absolutely necessary that payment applications are developed, installed and tested by the Opposite Party No. 1.

4.50 It is submitted that the Opposite Party No. 1’s business model in India is not comparable to SDL licensing arrangements in other parts of the world and cannot be compared to the Opposite Party No. 2’s and Banksys application development agreements around the world. The security and safety concerns



surrounding the electronic payment industry in India are significantly higher as compared to mature jurisdictions overseas. The Opposite Party No. 1 has submitted that the DG's simplistic comparison of payment application development globally to that in India, without assessing the safety and security concerns of electronic payments in India, should be rejected.

4.51 As per the Opposite Party No. 1, modification/developments cannot be made to the core functionality of devices and the same is evident from the SDK license agreements for smart phones which show that 'app' developers are not permitted to tamper with the calling, emailing, or other mobile communication services. These agreements do not permit 'app' developers to develop/modify the core functions of email and phone functionality.

4.52 It is submitted that the DG has compared Ingenico's SDK license agreement to the 2012 SDK license agreement of the Opposite Party No. 1 and finds that Ingenico permits third party development of payment application and none of the other players are imposing such restrictions. However, the DG has failed to observe that Ingenico's SDK license agreement and 2012 draft SDK license agreement operate on completely different business models.

4.53 The Opposite Party No. 1 submitted that a consumer is at liberty to choose POS Terminals from any of the players and is not constrained in any way. If a customer does not wish to procure the Opposite Party No. 1's terminals as it does not like Opposite Party No. 1's business model, it can purchase from Ingenico, PAX etc. Further, it is stated that the Opposite Party No. 1 does not sub-contract the payment application development to other third-parties like Ingenico or third-party payment application development because if there is any fault in the payment application resulting in a merchant not being able to process transactions or processing a transaction incorrectly, this would adversely impact its business and reputation. Accordingly, the 2012 draft SDK license agreement does not allow a third-party to write the payment application for its POS Terminals. In this regard, the Opposite Party No. 1



submitted that, a company, as a matter of right should be free to adopt any business model of its choice.

4.54 It has been submitted that the SDK, the underlying software, the source code, *etc.*, are the IPR of the Opposite Party No. 1. Restriction on sub-licensing to 'third parties' in a license agreement cannot be considered unreasonable, since the very essence of an IP right is the right to determine to whom the IP and the manner in which it is licensed. In cases of third party use of its IP, the Opposite Party No. 1 requires such third party to enter into an SDK license agreement with it since, if a third party were to steal/misappropriate its IP, the Opposite Party No. 1 would have no recourse to contractually enforce its IP rights over the third party or cure the breach. Only if there is an executed SDK license agreement between the Opposite Party No. 1 and the third party, the Opposite Party No. 1 would be able to directly enforce its IP rights vesting in its SDK.

4.55 It has been submitted that the Opposite Party No. 1 has not imposed any restrictions, its conduct has not constrained its customers or competitors in any manner and it has acted in a reasonable and responsible manner. The DG has merely found that a third-party would not be able to develop VAS on 'Managed terminals' (under the 'Purpose Clause') and has held that this prevents POS Terminal customers from outsourcing or engaging third-parties for VAS development. This conclusion is not supported by any evidence. The Opposite Party No. 1 does not unreasonably withhold third-party access to its SDK, as is evident in the case of FSS. FSS was supplied with the Opposite Party No. 1's SDK, despite FSS not having purchased any POS Terminals with the Opposite Party No. 1. The Opposite Party No. 1 provided its SDK to FSS and also provided training on its SDK to FSS in July 2011.

4.56 As per the Opposite Party No. 1, the DG's conclusion that Ingenico permits third-party for development of applications on its SDK is incorrect, because Ingenico's SDK license agreement provides that 'third party allowed if



nominated by contractor and accepted by Ingenico'. Thus, Ingenico's SDK license agreement envisages a prior permission requirement. Further, the DG has also failed to note that the purpose clause of the Opposite Party No. 2's MX9 DTK agreement provides "[s]ubject to the terms of this agreement, for each license purchase by you, you are granted a limited, non-exclusive, revocable, non-sub-licensable and non-transferable license to install and use the MX9 DTK within the territory on a single computer for use by a single user..."(emphasis added). On a review of the MX9 DTK agreement, it is revealed that Clause 3(c)(iv) does not permit a licensee to "disclose to any third party or permit any third party to have access to, use, execute, alter, modify, customize or improve the MX9 DTK, or any part thereof, or any alteration, modification, customization or improvement of the MX9 DTK (including any Integrated Software)". Accordingly, the DG's conclusion that other POS Terminal vendors allow sub-licensing is flawed and is liable to be rejected.

4.57 It is submitted that the DG's comparison of the SDK license agreements of other suppliers to the 2012 draft SDK license agreement is a cursory analysis of the issues at hand, ignores material and relevant evidence on record including the SDK license terms of other POS vendors and deserves to be rejected. It is also submitted that a review of SDK license agreements in other industries such as smartphones demonstrate that similar SDK agreements contain the same restrictions on sub-licensing or impose restrictions on sub-licensors.

4.58 It is submitted that the Opposite Party No. 1 does not restrict third-parties from using the SDK. Any third-party is free to develop VAS using the SDK upon the execution of an SDK license agreement with the Opposite Party No. 1. Further, a restriction on sub-licensing to third-parties cannot be considered unreasonable since the very essence of an IP right is the right to determine to whom the IP and the manner in which it is licensed. In the absence of an executed SDK license agreement between the Opposite Party No. 1 and such



सत्यमेव जयते



third-parties, the Opposite Party No. 1 would be unable to directly enforce its IP rights vesting in its SDK and would be unable to directly govern/prevent misuse. Accordingly, it is submitted that the restriction on permitting third-parties from using the SDK contained in the 2012 draft SDK license agreement is not abusive and does not amount to a violation of section 4 of the Act.

4.59 As per the Opposite Party No. 1, information required to be disclosed by the Informant under the draft SDK license agreement does not extend to any commercially sensitive information. The DG's conclusion in this regard is premature and has been reached without taking into account the limited nature of the information that is required to be disclosed under Exhibit C. Exhibit C under the 2012 draft SDK license agreement does not require any 'confidential', 'commercially sensitive information' or 'IP rights of the developer'. The only information required under the 2012 draft SDK license agreement is disclosure on (a) terminal numbers; (b) name of the customers; and (c) name of the VAS. It is submitted that both the Informant and the DG have failed to provide a single instance where the Opposite Party No. 1 has used information provided under Exhibit C to further its own VAS business or has developed competing VAS by using the information provided by SDK licensees.

4.60 It is submitted that the limited disclosure requirement under 'Exhibit C' of the 2012 draft SDK license agreement has always been to ensure the smooth functioning of a POS Terminal, including the VAS that operates on the terminal. The only reason behind this is to ensure that the POS Terminal can function seamlessly with the VAS applications created/intended to be created on terminals. If a terminal malfunctions, the Opposite Party No. 1 is entitled to be aware of whether such fault is attributable to VAS applications developed by VAS providers.



4.61 The Opposite Party No. 1 has stated that preventing VAS developers' from 'licensing, selling or otherwise transferring any software' does not amount to restricting the commercial exploitation of VAS that is developed by a VAS provider. This is because SDK licensees are free to develop VAS on all its POS Terminals in the electronic payment industry/POS Terminal market. The only terminals on which VAS providers can technically exploit their VAS are either: (i) directly purchased the Opposite Party No. 1 terminals or (ii) managed terminals. Since the 2012 draft SDK license agreement allows licensees to develop VAS on directly purchased terminals (subject to disclosure) and managed terminals (subject to disclosure and prior permission), there is, in effect, no restriction on 'commercial exploitation' of VAS.

4.62 The Opposite Party No. 1 has submitted that it is because of technological barriers that commercial exploitation of VAS is restricted *inter se* amongst different brands of terminals or among different ranges of the same brand of a POS Terminal. This is because SDKs that are provided for POS Terminals of one brand cannot be used for POS Terminals of another brand. Further, SDKs provided for one range of terminals of a brand cannot be used for a different range of terminals of the same brand.

5. **Replies/objections of the Informant**

5.1 The Informant has submitted that it agrees with the findings recorded in the DG report. As per the Informant, data and evidence collected by the DG during the course of investigation clearly confirms its contentions and submissions. It is submitted that the findings recorded by the DG in the report should be upheld by the Commission.

5.2 The Informant has submitted that the DG has confirmed its submission pertaining to the relevant market, viz, "*the market for POS Terminals in India*" for the purpose of investigation. As per the Informant, the DG has clearly



सत्यमेव जयते



examined the factors set out in sections 2(r), 2(s) read with sections 19(6) and 19(7) to determine the overall competitive conditions and existing demand and supply situation pertaining to POS Terminals in India to determine the relevant market.

5.3 The Informant has agreed with the DG's assessment and observations with respect to dominance of the Opposite Party No. 1 and has submitted that the DG has closely examined the crucial factors contained in section 19(4) of the Act to establish the Opposite Party No. 1's dominant position in the relevant market.

5.4 The Informant has agreed with the findings of the DG as regards Verifone's dominant position in the relevant market and abuse of such dominant position in contravention of section 4(2)(a)(i), 4(2)(b)(i), 4(2)(b)(ii) and 4(2)(e) of the Act. In absence of any specific findings of the DG in relation to contravention of section 4(2)(a) (ii) and 4(2)(c), the Informant has submitted that this is a fit case for determining contraventions under section 4(2)(a)(ii) and 4(2)(c) of the Act.

5.5 The Informant has submitted rejoinder to the submissions of the Opposite Party No. 1 in response to the DG investigation report with the contentions as stated in the subsequent paragraphs.

5.6 As per the Informant, for the purpose of the present case, the relevant market relates only to countertop POS Terminals and there are no reasonable alternative payment devices to countertop POS Terminals available to which merchants could turn in order to defeat a 5% price increase by a hypothetical monopolist. This is because purchasers of countertop POS Terminals would not switch to other types of payment systems in sufficient numbers to render unprofitable a price increase imposed by a hypothetical monopolist in the sale of countertop POS Terminals.



सत्यमेव जयते



5.7 It is submitted that many MPOS Terminals have limited features in comparison to conventional POS Terminals and these are amplified when implemented by large department stores. Consumer-grade smart phones and tablets are not built with strong security features and transactions made through such devices can leave the customer vulnerable to fraudulent activity. Processing payments over a volatile wireless network can also prove to be problematic as well.

5.8 As per the Informant, the PwC report relied upon by the Opposite Party No. 1 appears to calculate market share data on the basis of imports. It is an accepted position that countertop POS Terminals have an average life of 4-6 years. Import data showing an increase in imports during the years 2013-2014 would only show a spurt in procured terminals and not deployed terminals in the absence of anything to show that there has been a spurt in demand for countertop POS in the relevant year. It is submitted that the Opposite Party No. 1 has a whopping market share of 80% even as per information submitted by the NPCI (National Payments Corporation of India).

5.9 It is submitted that the Opposite Party No. 1 has accepted and admitted market share of 70% during the period of contravention. Merely because the market share of the Opposite Party No. 1 has allegedly decreased after the period of contravention, the same does not dilute the actual commission of contravention of section 4 of the Act. It is submitted that the DG has rightfully identified the period of investigation and contravention as between 2009 and December 2012, a period during which the Opposite Party No. 1 was indisputably dominant.

5.10 It is contended by the Informant that during the last three financial year 2010-2013, ICICI procured 24,400 terminals of the Opposite Party No. 1 as against a miniscule 3600 terminals of Ingenico, HDFC procured 1, 23,300 terminals of the Opposite Party No. 1 as against a miniscule 30,200



सत्यमेव जयते



terminals of Ingenico, AXIS Bank procured 2, 07,889 terminals of the Opposite Party No. 1 as against a minisucle 15,990 terminals of Ingenico.

5.11 The Informant has submitted that the DG has correctly calculated the market share of the Opposite Party No. 1 on 'installed base' of terminals. The DG has even considered the sales data offered by the Opposite Party No. 1 to arrive at a conclusion on market shares. The Opposite Party No. 1 nowhere disputed that using the 'installed base' method to calculate market shares is erroneous or that this has caused them any prejudice.

5.12 It is submitted that alleged reduction in market shares outside the period of investigation does not dilute the conduct of an enterprise which has persistently abused its dominant position during the period of investigation. Accordingly, to suggest that the Opposite Party No. 1 cannot be dominant in any market share lends no credence to its submissions.

5.13 As per the Informant, the DG has rightly relied on sales data which has been submitted by Ingenico and the Opposite Party No. 1 themselves amongst other sources. It is submitted that the alleged data submitted by the Opposite Party No. 1 in relation to the POS Terminal acquisitions of various banks and sales by alleged competitors is not backed by any evidence and ought to be rejected outright.

5.14 The Informant has submitted that the Opposite Party No. 1 is misleading the Commission by making comparisons between the agreements related to the computer software and the mobile application licensing agreements. Notwithstanding that these devices and applications relate to completely different markets with different market dynamics, it is submitted that the DG has correctly drawn out cogent comparisons from within the market.

5.15 It has denied that the POS Terminals market is a 'buyers' market with customers, especially banks dictating terms and conditions of supply of



terminals. It is submitted that there is ample evidence in the form of responses submitted by banks which suggest that banks are dependent on the Opposite Party No. 1 for after sales service, VAS deployment etc.

5.16 The Informant has submitted that the DG has correctly delineated the relevant market as the market for POS Terminals in India wherein the Opposite Party No. 1 is dominant. It is submitted that the Opposite Party No. 1 was and even presently is dominant in the relevant market and has abused its dominant position in contravention of the Act.

5.17 The Informant denied the objections, analysis and submissions of Verifone in relation to the Purpose Clause of the 2012 SDK agreement as they are devoid of logic and reflect yet another attempt on the part of the Opposite Party No. 1 to mislead the Commission. It is submitted that as a direct result of the directions passed by the Commission directing the investigation into the issues in the present matter, Verifone has sought to amend the restrictive conditions and clauses contained in the 2012 SDK agreement. The contents of the objections raised by the Opposite Party No. 1 clearly point towards a belated attempt on its part to avoid liability for the abusive conduct which it maintained throughout the relevant investigation period.

5.18 The Informant agrees with the findings of DG as regards the Opposite Party No. 1's dominant position in the relevant market and the abuse of such dominant position in contravention of section 4(2)(a)(i), 4(2)(b)(i), 4(2)(b)(ii) and 4(2)(e) of the Act flowing from the 'Purpose Clause' of the 2012 SDK agreement. A careful analysis of the terms and conditions contained in the SDK agreements entered into by the Opposite Party No. 1 and other players with their customers clearly demonstrate that the DG's findings corroborate the position presented by the Informant before the Hon'ble Commission as well as the DG.

5.19 It is submitted that the Opposite Party No. 1's assertion that it does not restrict VAS developer from developing VAS applications on POS



सत्यमेव जयते



Terminals ‘managed’ by such VAS developers is incorrect. It is submitted that the disclosure and prior permission requirement set out in the 2012 SDK agreement has to be understood and analyzed in the context of the Opposite Party No. 1’s presence in the VAS market and not simply as a POS vendor. The Opposite Party No. 1’s assertion that the disclosure and prior permission requirement flows from the warranty obligations that it assumes for POS Terminals sold by it and that such a disclosure and permission requirement enables it to ensure the integrity of electronic payments cannot be viewed as being in the nature of a minimal disclosure because the details required to be included in Exhibit C of the 2012 SDK agreement are likely to be confidential business information of the VAS developer.

5.20 The Informant has submitted that the ability of VAS developers to undertake application development and for that matter the process of VAS development by *inter alia* the Informant (for e.g., DCC) has never been based on any system of receiving prior permission or authorization from the Opposite Party No. 1. The assertion that the Opposite Party No. 1 permits development of such VAS application on ‘managed terminals’ is misplaced and without logic inasmuch as the VAS development process was and continues to be independently undertaken by the Informant.

5.21 It is submitted that the DG’s findings that the restrictions imposed upon VAS developers from development of payment applications fall foul of section 4(2)(a)(i) and section 4(2)(b) are correct. The restrictions imposed under the 2012 SDK agreement which prohibits the Informant from developing payment applications should be considered in the context of the ability of VAS developers such as the Informant to fully exploit existing and potential business opportunities.

5.22 As set out in the submissions made by the NPCI before the DG during the course of the investigation that except the Opposite Party No. 1, none of the other POS Terminal vendors sought to impose any conditions with respect to



सत्यमेव जयते



carrying out suitable modifications on the POS Terminals so that they could run the RuPay application. NPCI further clarified that the Opposite Party No. 1, with an approximate market share of 80% of deployed POS Terminals insisted on imposing unreasonable costs for carrying out the requisite modifications. Not only did this lead to a delay in the development and roll-out of the RuPay application, but NPCI was also forced to approach banks and leave it to them to determine the most appropriate manner in which the application could be developed and deployed on their respective POS Terminals.

5.23 The Informant also submitted that the Opposite Party No. 1's assertion that different POS Terminal vendors have adopted different business models to provide electronic payment solution and the POS Terminal vendors must be free to do so is fallacious and one-sided in as much as the very freedom (to develop applications) which the Opposite Party No. 1 seeks for itself is what it is denying to VAS developers by way of the restriction set out in the 2012 SDK agreement.

5.24 It is submitted that the 2012 SDK agreement contained a blanket restriction which provided that the licensee shall not use any third party to develop or assist in developing any software that it develops or attempts to develop using the licensed software.

5.25 It is submitted that the Opposite Party No. 1 is attempting to mislead the Commission by painting the disclosure requirement as being 'minimum' and consistent with existing practice across several industries. It may be noted that from the perspective of a pure hardware or a pure software entity, suitable disclosure requirement may be required. However, the disclosure requirement under the 2012 SDK agreement should be understood in the context of the Opposite Party No. 1's presence in the downstream VAS market where it is seeking to expand its domination to financial services



market and foreclosing the market by restricting the use of its SDK and imposing unfair terms for access to its SDK.

5.26 As per the Informant, the Opposite Party No. 1's attempt to present justifications for the disclosure requirements set out in the 2012 SDK agreement falls flat when examined in the context of its role in the VAS market where it competes with other VAS developers such as the Informant. The Opposite Party No. 1's assertion that the disclosure requirement is essential for the smooth functioning of the POS Terminal and such disclosure is consistent with standard business practice is misleading and devoid of logic.

5.27 The Informant denied that it infringed any IP rights of the Opposite Party No. 1. It is submitted that the termination of the 2009 SCLA by the Opposite Party No. 1 was not occasioned by any breach of IP rights by the Informant. Rather, upon receipt of the termination letter in 2009, it was the Informant who immediately reached out to Verifone and requested for details of any breach of its IP rights that may have taken place.

5.28 It is submitted that the Opposite Party No. 1 has deliberately concealed the fact that the 2009 SCLA pertained to a single model of POS Terminal *i.e.*, Verix Vx 510 and as a matter of standard business practice, the cost of SDK license was always embedded within the purchase orders of individual POS Terminals. It is submitted that the very nature and purpose of source code and SDK are quite different and as such all negotiations and dealings with respect to SCLA and SDK license agreement are quite distinct and independent.

5.29 It is submitted that the issue at hand is the deliberate attempt of the Opposite Party No. 1 to arm-twist the VAS players into accepting onerous terms and conditions. As per the Informant, the contention of the Opposite Party No. 1 that its intention behind the 2012 Draft SDK license agreement was to



‘introduce an effective IP protection mechanism’ is completely baseless and deliberate attempt to mislead the Commission. It is submitted that the DG has also gone through all relevant internal communications of the Opposite Party No. 1 and have come to the conclusion that the purpose of such SDK agreement was to have control over SDK and to earn revenue from the business of development of application for the Opposite Party No. 1 Terminals.

5.30 It is submitted that the Opposite Party No. 1 desires to extract additional revenue over and above the price of the POS Terminal (when the cost of the SDK is already embedded in the price of the POS Terminal) is a clear indication of imposition of unfair price of goods and services.

6. **Issues and Analysis**

6.1 The Commission has carefully perused the information, the report of the DG and the replies/ objections/ submissions/ rejoinders filed by the Informant and the Opposite Parties and other material available on record. The Commission also heard the arguments put forth by the learned advocates appearing on the behalf of the Informant and the Opposite Party No. 1.

6.2 The Commission feels that in order to arrive at a decision in the matter, the only issue at hand is to determine whether the Opposite Party No. 1 has infringed any of provisions of section 4 of the Act. However, determination of the said issue requires delineation of relevant market, assessment of the position of dominance of the Opposite Party No. 1 in the relevant market and examination of its alleged abusive conduct in terms of section 4 of the Act in case the Opposite Party No. 1 is found to be in a dominant position in the relevant market. Each of the above sub-issues is dealt with separately in the subsequent paragraphs.



सत्यमेव जयते



Determination of Relevant Market

6.3 For examination of the matter under the provisions of section 4 of the Act, the Commission is required to delineate the relevant market in terms of section 2(r) of the Act. The relevant market is to be determined with reference to the relevant product market as defined under the provisions of section 2(t) of the Act and the relevant geographic market as defined under the provisions of section 2(s) of the Act. As per the Act, relevant product market means 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 and the relevant geographic market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas.

6.4 However, the Commission while determining the relevant product market has to give due regard to all or any of the factors such as physical characteristics or end-use, price, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products as provided under section 19(7) of the Act; and while determining the relevant geographic market has to give due regard to all or any of the factors such as regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services as provided under section 19(6) of the Act.

6.5 The DG has considered the relevant product market as 'the market for POS Terminals'. While delineating the relevant market the DG distinguished the upstream POS Terminals (along with upgrading tools such as Kernel, Operating System, Source Code, SDK, *etc.*) market from the downstream market of terminal management service, VAS, repairs and maintenance. As



per the DG report, POS Terminal is a distinct product and new technologies such as Easytap, MSwipe *etc.*, cannot be considered as a substitute of POS Terminals and there are no reasonable alternative devices available in the market to which the consumers *i.e.*, banks, *etc.* can switch over. The territory of India is considered as the relevant geographic market by the DG as POS Terminals can be marketed throughout India with almost similar conditions. Accordingly, 'the market for POS Terminals in India' is considered as the relevant market in the DG report.

6.6 However, the Opposite Party No. 1, not agreeing with the definition of relevant product market of DG, has stated that the DG has not considered the substitutes of POS Terminal available in the market and the universe of interconnected electronic payment systems that act as substitutes to POS Terminals. As per the Opposite Party No. 1, since the electronic payment industry is highly technology driven, the relevant product market definition must be broad enough to effectively include new and innovative products which are being developed and constrain the sales of POS Terminals. It is contended that MPOS devices such as Ezetap's mobile solutions card reader, MSwipe's USB/ dongle MPOS, and MobiSwipe are used as substitute of POS Terminals by the merchants as an MPOS Terminal requires less upfront investment and maintenance expenditure compared to a POS Terminal. As per the Opposite Party No. 1, digital and mobile wallets, prepaid instruments, online payment *etc.* are also substitutable with POS Terminals. In regards to the relevant geographic market, the Opposite Party No. 1 agrees with the DG report that it should be the territory of India however, it is suggested to include the imports of electronic payment devices including POS Terminals into the country in the relevant geographic market. Thus, the Opposite Party No. 1 has contended that '*the market for electronic payment devices in India*' is the appropriate relevant market in this case.

6.7 Contrary to the contention of the Opposite Party No. 1 as regards to relevant product market definition, the Informant has stated that the DG has correctly



सत्यमेव जयते



defined the relevant market as the market for POS Terminals in India. The Informant agrees with the DG that POS Terminal is not interchangeable with MPOS such as Ezetap's mobile solutions card reader, MSwipe's USB/dongle MPOS and MobiSwipe. It is contended that in terms of features POS Terminals are different from MPOS Terminals; MPOS Terminals have limited features compared to POS Terminals. On digital and mobile wallets, prepaid instruments, online payment, *etc.* the Informant has contended that transactions made through such devices can leave the customer vulnerable to fraudulent activity because of lack of security measures and processing payments over a volatile wireless network can also prove to be problematic. On the aspect of the relevant geographic market, the Informant agrees with the DG report that the territory of India is the relevant market in the instant case.

6.8 The Commission perused the DG report, submissions of the Opposite Party No. 1 and the Informant in regards to the relevant market definition. Since the dispute in question relates to the abusive conduct of the Opposite Party No. 1 in supply of POS Terminals to the Informant, the relevant product in question is POS Terminals. However, it is to be seen whether other similar products available in the market can be considered as a substitute of POS Terminals by the end users such as banks.

6.9 The Commission observes that POS Terminals can operate either on 'standalone basis' known as 'counter top terminals' or need to be connected to an electronic cash register or similar device as part of an integrated POS system known as 'multi-lane terminals'. From the end use, features, functionality, price, *etc.* point of view counter top terminal and multi-lane terminal are different product and they cannot substitute to each other. There are different set of end consumers for the said two products. Usually small retailers used the counter top terminal whereas multi-lane machines are part of a larger integrated point sale system used by big retail organization. Further, from the functionality point of view counter top terminals are connected to payment networks by standard telephone lines or by wireless internet protocol



technology whereas multi-lane terminals are connected to electronic cash register or similar devices as a part of integrated POS system.

6.10 Further, it is to be determined whether POS Terminals along with its core applications and subsequent services related to terminal management, VAS, repairs and maintenance, *etc.* are to be considered as the same relevant product market and whether other related devices available in the market can be considered as substitute of POS Terminals by the end users.

6.11 It may be noted that the DG has segregated the upstream market for POS Terminals which also includes core applications such as Kernel, Operating System, Source Code and SDK and the downstream market like TPP (terminal management services), VAS (application development services) and after sales services (repairs and maintenance), *etc.* The Commission is of the same view as that of the DG in this regard that upstream market for POS Terminals as stated above is different from the downstream market of VAS and after sales services. It is so because POS Terminals require services such as terminal management, application development, repairs and maintenance, *etc.* in order to meet requirements of the customers such as each bank, *etc.* for which many specialized firms such as the Informant are engaged. These services are required throughout the life of POS Terminals on an ongoing basis. It may be noted that the nature of both the products are different as well as the players in both the markets are different. The Opposite Party No. 1 is a player in the upstream market whereas the Informant operates in the downstream market.

6.12 The Opposite Party No. 1 has contended that MPOS devices such as Ezetap's mobile solutions card reader, MSwipe's USB/dongle MPOS and MobiSwipe as well as digital and mobile wallets, prepaid instruments, online payment, *etc.* and POS Terminal are part of the same relevant market because all such devices process electronic payment transactions and for the end users POS Terminal and MPOS devices are substitutable. However, the



सत्यमेव जयते



DG has reported that MPOS devices and online payments, *etc.* cannot be considered as substitute of POS Terminals. The Commission agrees with DG that POS Terminals market is a separate relevant market and same cannot be considered as substitute of MPOS devices because of absence of demand side substitutability between the two among the end users. Also, MPOS Terminals have limited features compared to POS Terminals. The Commission is also of the view that digital and mobile wallets, prepaid instruments, online payment *etc.*, as contended by the Opposite Party No. 1, cannot be considered as the substitute of POS Terminals because of difference in product characteristics, end use and consumer preferences. Hence, the Commission, in consonance with the DG report, determines the relevant product market as the 'market for POS Terminals'.

6.13 On the relevant geographic market, DG has reported that the territory as India is to be considered as the relevant geographic market in this case because the condition of competition in POS Terminals market throughout India is similar. The Opposite Party No. 1 and the Informant have accepted the relevant geographic definition provided by the DG however, the Opposite Party No. 1 contended that the imported POS Terminals in the relevant geographic market must be included. The Commission concurs with the DG in this regard that 'the territory of India' is the relevant geographic market to be considered in this matter. It is so because the conditions of competition for POS Terminals throughout India are homogeneous. Accordingly, 'the market for POS Terminals in India' is considered as the relevant market in this case.

Determination of the position of dominance of the Opposite Party No. 1

6.14 Let us determine whether the Opposite Party No. 1 is a dominant entity or not in the relevant market stated *supra*. As per the Act, dominant position means a position of strength, enjoyed by an enterprise in the relevant market to: (a) operate independently of competitive forces or (b) affect its



सत्यमेव जयते



competitors or consumers or the relevant market in its favor. To determine whether the Opposite Party No. 1 is in dominant position in the relevant market or not, the Commission is required to give due regard to all or any of the factors enumerated under section 19(4) of the Act. Such factors include market share of the Opposite Party No. 1; its size and resources; size and importance of the competitors of the Opposite Party No. 1; economic power of the Opposite Party No. 1 including commercial advantages over its competitors; vertical integration of the Opposite Party No. 1 or sale or service network of the Opposite Party No. 1; dependence of consumers on the Opposite Party No. 1; whether monopoly or dominant position acquired by the Opposite Party No. 1 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.

6.15 The DG has considered the above factors and concluded that the Opposite Party No. 1 is a dominant enterprise in the relevant market of POS Terminals in India. The DG has reported that during the period of investigation *i.e.*, during 2009-10 to the date of filing of information in 07.09.2012, there were mainly two players in the relevant market, the Opposite Party No. 1 and Ingenico. In terms of the number sale of POS Terminals, the market share of the Opposite Party No. 1 is 57% compared to 43% of its nearest competitors. It is observed the DG report that in terms of size, resources and economic strength the Opposite Party No. 1 is in advantageous position compared to its competitors in the relevant market. Further, the DG has stated that because of market strength enjoyed by the Opposite Party No. 1, the consumers are dependent on it. It is also reported



सत्यमेव जयते



that there exist entry barriers in the relevant market and vertical integration of upstream POS Terminal market with the downstream service provider market enables the Opposite Party No. 1 to act independent of its competitors.

6.16 The Opposite Party No. 1 has submitted that the DG has assessed its dominant position in the relevant market which is not correct rather, the market for electronic payment solutions in India should be considered as the relevant market for the purpose of assessing its dominance. It is submitted that in the electronic payment solutions market the Opposite Party No. 1 is not in a dominant position. As per Opposite Party No. 1, even in the POS Terminals market it is not a dominant player as its competitor Ingenico holds more market share (54%) compared to the Opposite Party No. 1 (43%) which is further declining. The Opposite Party No. 1 has stated that its revenues and profits have been declining. Its profit was Rs. 6.9 crore in financial year 2011-12 which reduced to Rs. 65.75 lakhs in financial year 2012-13. Similarly, its revenue was reduced to Rs. 96.57 crore in the year 2012-13 from Rs. 118.15 crore in the financial year 2011-12. It is submitted that Opposite Party No. 1's market share also reduced from 57% to 43% in the past 5 years. It is submitted that large multi-national corporations such as Ingenico and PAX, as well as local players in India such as Linkwell or Visiontek and Advanced Micronic Devices Ltd. (AMD) are the competitors of the Opposite Party No. 1 in the POS Terminals market in India. The Opposite Party No. 1 has stated that Ingenico is the world's largest supplier of POS Terminals and it holds the "no. 1 position in Asia". Further, in April 2014, Ingenico was adjudged the highest ranking POS Terminal vendor globally by ABI Research's POS Terminal Vendor Competitive Assessment.

6.17 Citing the PwC Report, the Opposite Party No. 1 has stated that, with market share of 54% in the POS Terminal market, Ingenico is the largest player in India. It is stated that Ingenico has deployed approximately 300,000 POS



सत्यमेव जयते



Terminals in India and claimed to be selling 20,000 POS Terminals every month. As per the Opposite Party No. 1, Ingenico sales in India have increased from Rs. 81.83 million in the financial year 2009 to Rs. 799.93 million in the financial year 2013. It is submitted that given the global presence, size and importance of the competitors of the Opposite Party No. 1 including potential competitors such as the Informant, the Opposite Party No. 1 cannot be said to hold a dominant position in the POS Terminal market in India.

6.18 The Informant on the other hand endorsed the DG's conclusion in regards to the position of dominance of the Opposite Party No. 1 in the relevant market and stated that the DG appropriately analysed the factors of section 19(4) of the Act to determine the position of dominance of the Opposite Party No. 1 in the POS Terminals market in India. The Informant endorsed the DG findings that 'installed base' of POS Terminals is the appropriate method of calculation of market share. Relying on the NCPI submission, the Informant stated that with 80% market share the Opposite Party No. 1 is in a dominant position. The Informant has contended that the Opposite Party No. 1 has accepted its market share as 70% during the period of contravention *i.e.*, during 2009-10 to the date of filing of information in 07.09.2012. With such huge market share and other advantageous position of the Opposite Party No. 1 as analysed by the DG, the Informant stated that the Opposite Party No. 1 is in dominant position in POS Terminals market in India.

6.19 Having considered the contention of the Informant and the Opposite Party No. 1 and the findings of the DG report in this regard, the Commission concurs with the findings of the DG that the Opposite Party No. 1 is in a dominant position in the relevant market of POS Terminals in India. Based on the RBI data it is reported by the DG that during the period of investigation *i.e.*, 2009-10 to the date of filing of information in 2012, banks procured about 5.8 lakhs of POS Terminals which belong to the Opposite Party No. 1 and its acquired companies like Gemalto and procured only



सत्यमेव जयते



50,000 POS Terminals from Ingenico. Accordingly, the market share of the Opposite Party No. 1 in terms of sale of POS Terminals to banks is estimated around 70% *vis-à-vis* 30% of Ingenico. Further, it is revealed from the DG report that in terms of size, resources and economic power the Opposite Party No. 1 is in an advantageous position compared to Ingenico, its nearest competitor. It is observed that presence of the Opposite Party No. 1 across the country, its capabilities in terms of hardware and software and the number of machines presently in use makes the consumers dependant on it. The Commission also notes that in the POS Terminal market there exist vertical integration of upstream hardware market with the downstream service provision market which enables the enterprise to act independent of others. The Commission also takes note of the submissions of NCPI wherein it stated that the Opposite Party No. 1 has substantial (80%) market share. Thus, based on the above, the Commission is of the opinion that there is no reason to deviate from the conclusion drawn by the DG in regards to position of dominance of the Opposite Party No. 1 in the relevant market. The contention of the Opposite Party No. 1 in this regard is devoid of merit and is rejected. Thus, the Commission holds that the Opposite Party No. 1 is in dominant position in the market of POS Terminals in India.

Examination of the alleged abusive conduct of the Opposite Party No. 1

- 6.20 Having determined that the Opposite Party No. 1 is in a dominant position in the relevant market of POS Terminals in India, now the Commission proceeds to examine the alleged abusive conduct of the Opposite Party No. 1 in terms of the provisions of section 4 of the Act.
- 6.21 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



सत्यमेव जयते



goods or service; or (b) limits or restricts- (i) production of goods or provision of services or market thereof; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or (c) indulges in practice or practices resulting in denial of market access in any manner; or (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

6.22 The Informant has alleged that the Opposite Party No. 1 has abused its dominant position through restrictive and unfair conditions in the draft SDK agreement in contravention of the provisions of sections 4(2)(a)(i) &(ii), 4(2)(b)(i) & (ii), 4(2)(c) and 4 (2)(e) of the Act.

6.23 The DG has examined the conduct of the Opposite Party No. 1 *vis-a-vis* the allegations posed by the Informant and found that the Opposite Party No. 1, through the unfair and restrictive clauses in the 2012 draft SDK agreement, has imposed unfair and discriminatory conditions on the Informant in contravention of section 4(2)(a)(i) of the Act, has limited the provisions of professional services thereby amounting to violation of section 4(2)(b)(i) of the Act. Further, the DG has found that due to the abusive conduct of the Opposite Party No. 1, the technical and scientific development in the downstream market is likely to be adversely affected leading to infringement of section 4(2)(b)(ii) of the Act. The DG also found that the Opposite Party No. 1 used its dominance in the upstream market of POS Terminals to enhance its presence in the downstream relevant market amounting to violation of section 4(2)(e) of the Act.

6.24 However, the Opposite Party No. 1 has opposed the above findings of the DG on the grounds, *inter alia*, that the terms and conditions of 2012 draft SDK license agreement are less stringent compared to SDK license



सत्यमेव जयते



agreements in the smart phone industry and it is a standard business practice; it does not unreasonably restrict the development on VAS on managed Terminals; minimal disclosure under 'Exhibit C' of the draft SDK agreement cannot amount to an abuse of dominance and limited disclosure requirement is not a restriction; its business model in India is not comparable to SDK licensing arrangements in other parts of the world; modification/developments cannot be made to the core functionality of devices as in the SDK license agreements for smart phones; Ingenico's SDK license agreement and its 2012 draft SDK license agreement operate on completely different business models hence are not comparable; and the SDK, the underlying software, the source code, *etc.*, are its intellectual property rights, *etc.*

6.25 The Informant on the contrary contended, *inter alia*, that the some terms and conditions of the SDK agreements are abusive in contravention of the provisions of section 4 the Act, as revealed from the DG investigation. As per the Informant, the condition relating to minimum disclosure and prior permission requirement under 'Purpose Clause' likely to disclose confidential business information of the VAS developer like it and blanket restriction imposed under the 2012 SDK agreement prohibits it from developing payment applications. As per the Informant, under the veil of disclosure requirement under the 2012 SDK agreement the Opposite Party No. 1 is foreclosing the market for VAS services.

6.26 The Commission has perused the findings of DG and the rival submissions in regards to the alleged abusive conduct of the Opposite Party No. 1. It is observed that the core issue in this case relates to supply of SDK to VAS providers for development of software on the POS Terminals. From the DG investigation it is revealed that no other POS Terminal vendor in India or outside India has been found to be imposing any restrictions on development of applications or other restrictive clauses similar to SDK agreement of the Opposite Party No. 1. The intent of the Opposite Party No. 1 seems to be to



सत्यमेव जयते



exploit the VAS players by either restricting them or sharing the revenue with them because VAS market is highly profitable and has recurring benefits. Being in a dominant position in the relevant market, the Opposite Party No. 1 is strengthening its position in the downstream market by imposing restrictive clause in the SDK agreement and by refusing the VAS providers to allow access to development tools like SDK on reasonable terms and conditions.

6.27 The Commission also perused the clauses of SDK license agreement *vis-a-vis* the provisions of section 4(2) of the Act. It is observed that through the ‘Purpose Clause’ which provides that there is a restriction on the licensee to use any third party for development of application, the Opposite Party No. 1 imposes restrictions that development of VAS to be used only on the POS Terminals that licensee has purchased directly from the Opposite Party No. 1. Even though the Opposite Party No. 1 contended that it does not restrict the VAS providers but the clauses of SDK agreement do not reflect this version. The Commission observes that the purpose clause relating to allowing licensee to develop the value added software and using the same on only those of the licensor’s products that licensee has purchased directly from the licensor mentioned in Exhibit A of the SDK agreement is clearly restrictive and anti-competitive.

6.28 Further, the license restriction clause *i.e.*, “not use the licensed software to develop any payment software that directly or indirectly interacts with any acquiring bank” seems to be unfair and restrictive. The SDK license agreement of the Opposite Party No. 1 does not allow the third party to write a payment application in India which is contrary to the practice followed by the Opposite Party No. 1 elsewhere across the globe as is evidenced from the statement made in its website *i.e.*, “*Verifone offers a selection of developer tools and drivers to help programmers design and develop efficient, professional payment applications that complement our payment systems*”. Further, by restricting the development of payment softwares for any



payment association and non-disclosing the said clause to the large buyers (Banks) in India who would require customized payment softwares to run on the POS Terminals bought by them, the Opposite Party No. 1 has restricted the availability of substitutable payment solutions thereby restricting the choice for the buyers. Thus, the restrictions imposed by the Opposite Party No. 1 on development of payment software by the third parties are anti-competitive.

6.29 The Commission observes that the restriction placed on the Informant not to use the licensed software to develop any payment software that directly or indirectly interacts with any acquiring bank appears to be unfair as it limits/ controls the provision of VAS services and limits/ restricts the technical and scientific development of VAS services used in POS Terminals in India. It is pertinent to note that the Informant being the lawful owner of the proprietary rights in the VAS is neither allowed to exploit it for its own purpose nor for its customers. Further, the above mentioned restrictive clause acts as a disincentive for the Informant to continue investing in development and innovation of VAS services as its business would be adversely affected by such restrictive clauses.

6.30 It is further observed that the license restriction clause relating to disclosure mentioned in the SDK license agreement imposes three different disclosure requirements namely; a) disclose to licensor from time to time the activities relating to licensed software; b) what value added software it has created; and c) what it intends to create using the licensed software. It may be noted that the Opposite Party No. 1 is a POS Terminal manufacturer and is also engaged in the development of VAS applications. By way of this restriction, the Opposite Party No. 1 was trying to get access to confidential commercial information from the VAS providers and to exploit the lucrative VAS market. The requirement of prior disclosure to the Opposite Party No. 1 about the VAS developed by the Informant amounts to imposition of unfair condition on the Informant and it limits the provision of VAS services.



सत्यमेव जयते



Further, by seeking information such as business secrets/ commercially sensitive information on the VAS services which the Informant intends to develop is likely to prejudice the business activities of the Informant as the Opposite Party No. 1 is developing into a major competitor for the Informant in the VAS/TPP market in India. Such restriction restricts technical/ scientific development relating to VAS services for POS Terminals in India. Since the Opposite Party No. 1 has a larger presence in terms of POS Terminals managed by banks in India and is itself a manufacturer of POS Terminals, its conduct with respect to seeking disclosure of sensitive business information from its customers in the downstream market is unfair as it enables the Opposite Party No. 1 to protect the downstream market of VAS services.

6.31 Based on the above analysis the Commission comes to the conclusion that the conduct of the Opposite Party No. 1 is abusive in terms of section 4 of the Act. The Commission is of the considered opinion that through the SDK agreement the Opposite Party No. 1 has imposed unfair conditions on VAS/TPP service providers which is in contravention of section 4(2)(a)(i) of the Act; restricted the provision of VAS services as well as limited/restricted the technical and scientific development of VAS services used in POS Terminals market in India which is in contravention of 4(2)(b)(i) and (ii) of the Act. Also, the conduct of the Opposite Party No. 1 with respect to seeking disclosure of sensitive business information from its customers in the downstream market in order to enable to enter into the downstream market of VAS services is in contravention of the provisions of section 4(2)(e) of the Act.

6.32 In view of the above findings, the Commission directs the Opposite Party No. 1 to cease and desist from indulging in the activities which have been found to be in contravention of the provisions of section 4 of the Act. Furthermore, in terms of the provisions contained in section 27(b) of the Act, the Commission may impose such penalty upon the contravening



parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse. It may be noted that the Opposite Party No. 1 has not brought to the notice of the Commission any mitigating factor for the above enumerated contravention during the course of hearing and have only preferred to justify their conduct on various grounds.

6.33 On the aspect of penalty under section 27 of the Act, the Commission is of the view that the said anti-competitive conducts require to be penalized to cause deterrence in future among the erring entities engaged in such activities. Accordingly, it is required that the degree of punishment is scaled to the severity of the violation. No mitigating factor is shown by the Opposite Party No. 1 and none is borne out from the records.

6.34 Having regard to the above, the Commission decides to impose a penalty on the Opposite Party No. 1 at the rate of 5% of its turnover based on the financial statements filed by the Opposite Party No. 1. The amount of penalty on the Opposite Party No. 1 is calculated as under:

| S. No | Name of the Party | Turnover /receipts during the year ended on 31.03.2011 (Rs.) | Turnover/receipts during the year ended on 31.03.2012 (Rs.) | Turnover /receipts during the year ended on 31.03.2013 (Rs.) | Average Turnover /receipts (Rs. in crore) | 5% of Average turnover (Rs.) |
|-------|------------------------------------|--|---|--|---|------------------------------|
| 1 | M/s VeriFone India Sales Pvt. Ltd. | 54,31,23,374 | 118,15,65,984 | 96,57,24,796 | 89,68,04,718 | 4,48,40,236 |

6.35 The Opposite Party No. 1 is directed to deposit the amount of penalty within 60 days of the receipt of this order.

6.36 It is noted from the DG investigation that the DG has identified persons who were in charge and responsible to the Opposite Party No. 1 for the conduct



of its business during the time when the alleged act of contravention was committed for the purpose of determining liability under section 48 of the Act. So far as the individual liability of the officials of the Opposite Party No. 1 in terms of the provisions of section 48 of the Act is concerned, the Commission, on consideration of the investigation report, forwarded the copies of the DG report to the parties including the identified officials for filing their respective reply/ objections. The Commission also directed them to file their income statements/ Income Tax Returns of the last 3 financial years. However, the Commission decides to pass an order separately in this regard after the proceedings are completed in respect of the persons so identified.

6.37 Secretary is directed to send a copy of this order to the concerned parties for compliance immediately.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

New Delhi
Dated: 10/04/2015

Sd/-
(U. C. Nahta)
Member