



**COMPETITION COMMISSION OF INDIA**

**Case No. 15 of 2018**

**In Re:**

**Tamil Nadu Consumer Products Distributors Association  
No. 2/3, 4<sup>th</sup> Street, Judge Colony,  
Tambaram Sanatorium, Chennai- 600 047  
Tamil Nadu.**

**Informant**

**And**

**1. Fangs Technology Private Limited  
Old Door No. 68, New Door No. 156 & 157,  
Valluvarkottam High Road, Nungambakkam,  
Chennai – 600 034  
Tamil Nadu.**

**Opposite Party No. 1**

**2. Vivo Communication Technology Company  
Plot No. 54, Third Floor, Delta Tower,  
Sector 44, Gurugram – 122 003  
Haryana.**

**Opposite Party No. 2**

**CORAM**

**Mr. Sudhir Mital  
Chairperson**

**Mr. Augustine Peter  
Member**

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



**Appearance:** For Informant – Mr. G. Balaji, Advocate; Mr. P. M. Ganeshram, President, TNCPDA and Mr. Babu, Vice-President, TNCPDA.

For OP-1 – Mr. Vaibhav Gaggar, Advocate; Ms. Neha Mishra, Advocate; Ms. Aayushi Sharma, Advocate and Mr. Gopalakrishnan, Sales Head.

For OP-2 – None.

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

1. The present information has been filed by Tamil Nadu Consumer Products Distributors Association ('**Informant**') under Section 19(1) (a) of the Competition Act, 2002 (the '**Act**') alleging contravention of the provisions of Sections 3 and 4 of the Act by Fangs Technology Private Limited ('**OP- 1**') and Vivo Communication Technology Company ('**OP-2**') (collectively referred to as the '**OPs**').
2. The Informant is an association registered under the Tamil Nadu Society Registration Act, 1975. Its stated objective is to protect the interest of the distributors from unfair trade practices and stringent conditions imposed by the manufacturers of consumer products.
3. OP-1 is engaged in the business of trading and distribution of mobile handsets under the brand name 'VIVO' and also provide marketing support to promote its products.
4. OP-2 is a leading Chinese company which designs, develops and manufactures smartphones, smartphone accessories and connected softwares. It has been averred in the information that majority (99%) shares of OP-1 is held by OP-2.
5. The Informant has stated that the OP-1 entered into a VIVO Distributorship Agreement ('**Distributorship Agreement**') dated 01.04.2017 with its distributors, who are members of the Informant. It is also stated that OP-1 has reserved the right to add, delete, amend or alter any of the clauses of the Distributorship Agreement, which would be binding on the distributors even if the distributors are not agreeable to the same. This enables OP-1 to impose unreasonable and unfair conditions on distributors.



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6. The Informant has submitted that distributors are not allowed to give any discount to the retailers and are forced to strictly comply with the pricing of OP-1, which is disclosed to the distributors from time to time. It is further alleged that the distributors are not allowed to directly appoint retailers in their respective designated territory and have to seek the prior approval of OP-1 for appointing newly authorised retailers.
7. The Informant has also submitted that the distributors are not allowed to sell mobile phones /smartphones directly to corporate customers and have to seek the prior intimation / written consent from OP-1 to undertake such sales.
8. The Informant has alleged that the Distributorship Agreement prohibits the distributors from doing business in *Oppo* and *Honor* brand of mobile phones, not only within the designated territory but also elsewhere. It is also alleged that while OP-1 does not extend any credit facility to its distributors, the distributors are compelled by OP-1 to extend credit facility of 21 days to the retailers.
9. The Informant has stated that the distributors, in order to enter into the Distributorship Agreement, have to make a lot of investment as per OP-1's specification but the said agreement is valid for one year thereby requiring the Distributorship Agreement to be renewed annually which is at the sole discretion of OP-1. Further, OP-1 has been threatening to terminate the Distributorship Agreement with the members of the Informant on flimsy grounds. Therefore, the Informant has averred that the members of the Informant are insecure about their return on investment.
10. The Informant has also alleged that while sales of OP-1 has grown by 100 crores in a period of 2 years, the commission shared with the distributors has been reduced by 33%.
11. Apart from above allegations, the Informant has also submitted that if a demo phone, displayed at the retailer shop, is damaged then penalty has to be borne by the distributors. Further, OP-1 had terminated the Distributorship Agreement entered into with certain distributors who are the members of the Informant when the latter expressed their grievances with the President of the Informant. Lastly, it is alleged that OP-1 has been



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punishing the distributors by raising debit note for failing to achieve various performance parameters fixed by it.

12. Based on the above submissions, the Informant has alleged that various clauses in the Distributorship Agreement are causing appreciable adverse effect on competition, resulting in foreclosure of competition by creating barrier to new entrant. Thus, as per the Informant, the conduct of the OPs have contravened the provisions of Section 3 (4) and Section 4 of the Act.
13. The Informant *inter alia* has prayed to direct OP-1 to remove the clauses in the Distributorship Agreement which are anti-competitive.
14. The Commission held a preliminary conference with the Informant and OP-1 on 10.07.2018 and heard their respective learned counsel at length. Based on their averments, the Commission directed OP-1 to submit information on: (i) ownership pattern / names of the shareholders; (ii) relationship between OP-1 and other Chinese competitors such as *Oppo* and *Honor*; and (iii) model Distributorship Agreement of other smartphone companies / brands.
15. Subsequently on 17.07.2018, the Informant submitted a synopsis of the arguments made during the preliminary conference and OP-1 submitted the requisite information as sought by the Commission along with its written submissions.
16. The Commission has carefully perused the information, written submissions of the Informant and OP-1, arguments made by them during the preliminary conference and considered other material available on record.
17. Before examining the allegations, it is appropriate to examine the role of OP-2 in the matter. It is observed that the Informant has stated in the information that 99% of the shareholding in OP-1 is held by OP-2 and remaining 1% is held by Indian Counterpart of *Vivo*. This was disputed by the counsel of OP-1 who contended that OP-1 is not a subsidiary of OP-2 and that 99% of the share in OP-1 are held by Health Vivo Limited and the remaining 1% of the share is held by Mr. Sun Shoujun. The said contention of OP-1 was not disputed by the Informant during the hearing before the Commission.



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Thus, from the submission of OP-1, it is clear that OP-2 has no role to play with respect to the Distributorship Agreement.

18. With regard to the allegations made under Section 4 of the Act, the first step in the examination of the allegation of abuse of dominance is to delineate the relevant market. Thereafter, dominance of OP-1 needs to be assessed in the delineated relevant market. Only when dominance is established, the Commission would proceed to examine the impugned conduct of OP-1 for any abuse(s) therein.
19. The Commission observes that the Informant has not suggested any relevant market in the matter. From the facts and circumstances, it is evident that the main grievances of the Informant relates to various clauses in the Distributorship Agreement entered into by the members of the Informant with OP-1. It is observed that OP-1 is engaged in the business of trading and distribution of mobile handsets. A smartphone is an integrated portable device that facilitates communication, data storage and access to the internet. The features embedded in smartphones have replaced certain functionality provided by other devices such as desktop computers, cameras and landline phones. Taking into account the distinct characteristic of the product such as storage capacity, processor speed, availability of multi home apps, point-of-sale terminal for paying goods or services, determining users exact location utilising global positioning system, playing games, video chat sending and receiving email, the Commission is of the view that market for smartphones constitute a separate relevant product market.
20. As regards relevant geographic market, conditions of competition for sale of smartphones appear to be homogeneous across India. In the absence of any material on record brought by the Informant to suggest any heterogeneity in the conditions of competition across India, the whole of India is considered as the relevant geographic market.
21. Based on the above, the Commission is of the considered view that the relevant market in the instant case is the '*market for smartphones in India*'.



22. Having delineated the relevant market, the Commission proceeds to analyse the dominance of the OP-1 in the above delineated relevant market. Based on the figures available in the GFK report<sup>1</sup> for the year 2017-18, relied by the parties, it is observed that the market for smartphones in India is highly competitive with the presence of several competitors. There are several smartphone manufacturers such as *Samsung, Micromax, Intex, Redmi, Lava, Oppo, Gionee, Lenovo, Motorola, Apple, HTC, Microsoft / Nokia, Sony / Sony Ericsson, LG, Huawei / Honor, and Xiaomi / MI etc.* operating in the aforesaid relevant market. On perusal of the brand shares as provided in the GFK report for the period of May 2017-May 2018, it is noted that the brand share of *Vivo* in Indian market declined from 14.4% to 12.1% during the period and was less than other competitors such as *Samsung* and *Xiaomi* who held close to 33% and 16.6% of the market, respectively. Given the presence of such large number of players in the relevant market along with reputed foreign brands, there is enough competitive constraints upon the OP-1 in the relevant market. Accordingly, OP-1 does not seem to have the ability to operate independently in the aforesaid relevant market and therefore, OP-1 does not seem to be dominant in the relevant market as delineated above. In the absence of dominance, no case of contravention of Section 4 of the Act is made out against OP-1.
23. With regard to the allegation of resale price maintenance (RPM) under provisions of Section 3(4) of the Act, the Commission observes that the Informant has not submitted any evidence to prove that OP-1 has imposed RPM on the members of the Informant. The Commission observes that the market share of OP-1 has declined from 14.4% to 12.1% during the period 2017 to 2018. The turnover of OP-1 seems to be lower when compared to its competitors. Further, the presence of many smartphone brands in the relevant market defined *supra* indicates that the degree of inter-brand competition is intense. Taking into account the above mentioned aspects, OP-1 does not seem to possess significant market power in order to impose competitive restraints vertically. Therefore, the Commission does not find any merit in the allegations of the Informant that OP-1 has contravened the provisions of Section 3(4)(e) of the Act.

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<sup>1</sup>www.gfk.com - GfK SE is Germany's largest market research institute



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24. On the issue of restriction imposed on its distributors in doing business with *Oppo* and *Honor*, OP-1 has submitted that this clause has been included in the Distributorship Agreement to avoid leakage of intellectual property and technical know-how of *Vivo*. OP-1 has also stated that the said restriction has been put only against the two aforesaid brands as these brands are familiar with the know-how and functioning of *Vivo* and they are its competitors not only in China but also at the global level. Further, OP-1 has submitted that its distributors are free to do business with other competing brands and that several distributors engaged by the OP-1 are dealing in other competing brands. In view of the said submission of OP-1, the Commission is of the view that the conduct of OP-1 does not appear to be anti-competitive. Therefore, the allegation of violation of the provisions of Section 3(4)(b) of the Act does not stand established.
25. With respect to the allegation that prior approval of the OP-1 is required for appointment of a retailer by a distributor, OP-1 has submitted that the rationale for this clause is to ensure that only entities with adequate infrastructure are appointed as its retailers. Further, no evidence has been adduced by the Informant to demonstrate that OP-1 had refused appointment of any retailer.
26. With respect to clause 1.5.5 of the Distributorship Agreement, which permits a distributor to perform corporate sales only after prior intimation / written consent of OP-1, it has been submitted that its purpose is to ensure genuineness of the corporate sale and not to prevent corporate sale altogether. Furthermore, it is observed that the Informant has not adduced any documentary evidence indicating any instance of refusal of corporate sales by any distributor.
27. With regard to the allegation on reduction of distributor's commission by nearly 33%, the Commission is of the view that the issue appears more to be a case of business arrangement between the OP-1 and its distributors rather than being a competition issue. This was accepted by the counsel of the Informant and OP-1 during the hearing before the Commission on 10.07.2018. The counsel of OP-1 has also submitted that the distributors are also seeking remedy at appropriate forum by way of invoking arbitration proceedings against OP-1.



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28. Regarding other allegations such as no credit facility given to the distributors, the Commission observes that no supporting evidence has been furnished by the Informant to substantiate such allegations. Further, the Informant has failed to show that the clauses of the Distributorship Agreement have anti-competitive effects in the market.
29. Based on the above analysis, the Commission holds that no contravention of either Section 3 or Section 4 of the Act is made out against the OP-1 in the instant matter.
30. In view of the foregoing, the matter is ordered to be closed forthwith in terms of the provisions of Section 26(2) of the Act.
31. The Secretary is directed to communicate the order to the parties, accordingly.

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

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

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

**Date: 04 / 10 / 2018**  
**New Delhi**