

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**NEW DELHI****TA(AT) (COMPETITION) NO.01 OF 2017****(OLD APPEAL NO.82 OF 2015)****In the matter of:**

Verifone India Sales Pvt Ltd

Appellant

Vs

CCI & Atos Worldline India Pvt Ltd

Respondents

For Appellant: Mr Rajshekhar Rao, Mr Ritwik Bhattacharya and Ms Chandni Anand, Advocates.

For Respondents: Mr. Pallav Shishodia, Senior Advocate alongwith Mr Febin M Varghese, Advocate for Respondent No.1-CCI

Mr. Ravisekhar Nair, Mr. Sahil Khanna and Ms Tanaya Sethi, Advocates for Respondent No.2.

With

TA(AT) (COMPETITION) NO.02 OF 2017**(OLD APPEAL NO.83 OF 2015)****In the matter of:**

Verifone India Sales Pvt Ltd

Appellant

Vs

CCI & Three D Integrated Solutions Ltd

Respondents

For Appellant: Mr Rajshekhar Rao, Mr. Naval Satarawal Chopra, Mr Ritwik Bhattacharya, Mr Gauru Purv, Mr Sagar Parekh, and Ms Chandni Anand, Advocates.

For Respondents: Mr. Pallav Shishodia, Senior Advocate alongwith Mr Febin M Varghese, Mr Robin David and Mr Dhiraj Philip Advocate for Respondent No.1-CCI, Mr. Navdeep Singh Suhag, Dy. Director CCI

Mr. Ravisekhar Nair, Mr. Sahil Khanna and Ms Tanaya Sethi, Advocates for Respondent No.2.

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J**

M/s Atos Worldline India Pvt Limited ('Informant') filed information under Section 19(1)(a) of the Competition Act, 2002 against M/s Verifone TA(AT)(Competition)No.1 and 2 of 2017 (Old Appeals No.82 and 83 of 2015)

India Sales Pvt Ltd (Opposite Party No.1/Verifone herein) and M/s Verifone System Inc (Opposite Party No.2) alleging contravention of the provisions of Section 4 of the Act. The Commission instituted it as Case No.56/2012.

2. M/s Three D Integrated Solutions Ltd (another 'Informant') had also filed information under Section 19(1)(a) of the Competition Act, 2002 against M/s Verifone India Sales Pvt Ltd (Opposite party/appellant herein) inter alia alleging contravention of provisions of Section 3 and 4 of the Act. It was registered as Case No.13/2013.

Case of M/s Atos Worldline India Pvt Ltd

3. The Informant, M/s Atos Worldline India Pvt Ltd is owned by Atos, a global information technology services company operating in the areas of hi-tech transactional services and system integration and management services. It was informed that the Opposite Party No.1 i.e. appellant is leading supplier of Point of Sale (hereinafter referred to as 'POS') Terminals in India having control over nearly 70% to 80% of the market. It had acquired several other players in the POS Terminal marketing in India such as Lipman Electronic India Pvt Ltd in 2006, Hypercom India and Gemalto in 2011.

4. It is stated that appellant supplies POS Terminals along with core POS Terminal applications (i.e. Operating System and Kernels) and Software Development Kits (hereinafter SDKs) to enable the basis 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 third party processor (TPPs) such as Informant who act on

behalf of acquiring banks and also render Value Added Services (VAS) to develop and integrate applications into POS Terminals

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 standards industry practice, core POS Terminal applications and SDKs are provided alongwith the POS Terminals and the costs of the same are built into the price paid for the POS Terminals.

6. The Information stated that between September, 2010 and December, 2011, the appellant continued to provide SDKs to the Informant alongwith the POS Terminals and core terminal applications without any restrictions on the use of SDKs. Appellant also used to provide training to the Informant's engineers to enable the Informant to render VAS to its customers.

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 terminals 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.

8. It is submitted that after acquisition of Venture Infotek by the Informant in August, 2010, the appellant 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. Informant stated that despite issue of the said termination letter, the appellant continued to supply POS Terminals along with its core applications, SDKs and training to its engineers for the use of SDKs.

9. It is averred that in January, 2012 the appellant 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 alleged that through the said draft SDK agreement the appellant sought to impose certain restrictive conditions on it.

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 appellant to carry out such drastic changes in the said draft SDK agreement. It is alleged that the restrictions contained in the draft SDEK agreement foreclose the VAS market.

11. The Informant averred that since early January, 2012, the appellant 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 appellant made repeated attempts to force the Informant to agree to the terms and conditions as set out in the draft SDK agreement. Further the appellant issued several

reminders to the Informant to complete the formality of signing the draft SDK agreement, failing which the appellant 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 appellant 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 appellant on the restrictive conditions of the draft SDK agreement, it issued a termination letter dated 01.08.2010.

12. It is alleged in the information that the appellant 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 appellant'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.

13. It is alleged 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 appellant 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.

14. Citing RBI's Payment System Vision Document, 2012-156, 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 appellant exercises significant control over the supply of hardware and software solutions.

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 appellant's interest by eliminating competition in the market. The Informant has alleged that appellant by imposing restrictions in the draft SDK agreement, is aiming to strengthen its position in the VAS market.

16. Based on the above submissions, the informant has alleged that the appellant, 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) and (ii) of the Act. The appellant by imposing severally 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 contravention of section 4(2)(b)(i) and (ii) of the Act. IT is also alleged that the appellant has sought to deny market access to VAS providers in contravention of section 4(2)(c) of the Act. Further the appellant allegedly

intended to use its dominant position in POS Terminals market to dominate VAS market in contravention of section 4(2)(e) of the Act.

17. Based on the above submission, the Informant inter alia prayed to the Commission to direct the appellant 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 appellant for abuse of dominant position and grant such other reliefs as the Commission may deem appropriate in the facts and circumstances of the case.

18. The Commission referred the matter for investigation by Director General (DG). After receipt of investigation report filed by the DG, notices to the appellant was issued and the objections/replies from the appellant was received in response to the DG Report. By impugned order dated 10th April, 2015 the Commission held that it has come to the conclusion that the conduct of the appellant is abusive in terms of Section 4 of the Act. The Commission is of the considered opinion that through the SDK agreement the appellant has imposed unfair conditions on VAS/TPP service providers which is in contravention of Section 4(2)(a)(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 Section 4(2)(b)(i) and (ii) of the Act. The Commission also held that the conduct of the appellant with respect to seeking disclosure of sensitive business information from the customer is the downstream market

in order to enable to enter into the downstream market of VAS services in in contravention of the provisions of Section 4(2)(e) of the Act.

19. The Commission also directed the appellant (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 and imposed penalty under Section 27 of the Act at the rate of 5% of its turnover based on the financial statements filed by the appellant herein i.e. Rs.4,48,40,236/-

Case of M/s Three D Integrated Solutions Ltd

20. M/s Three D Integrated Solutions Ltd is engaged in the business of video broadcasting, audio broadcasting. The appellant (Opposite Party No.1) is wholly owned subsidiary of M/s Verifone System Inc headquartered in USA. It has been engaged in the business of manufacturing, development and selling of hardware and software solutions such as mobile Electronic Ticketing Machines (hereinafter ETMs) Point of Sale (POS) terminals and related services and expertise that enable electronic payment transactions at POS terminals.

21. Informant stated that Ministry of Urban Development (MOUD) Govt of India launched a National Programme for Standardised Automatic Fare Collection System (hereinafter AFCS) in eighty cities with a National Common Mobility Card (hereinafter NCMC) for passengers. The MOUD award the project of launching an all India common mobility card along with AFCS to UTI Infrastructure Technology Services Ltd (UTIITSL) and its consortium partner across India. UTIITSL floated a Request for Proposal for implementation of Integrated Transport Management System (TIMS) with a TA(AT)(Competition)No.1 and 2 of 2017 (Old Appeals No.82 and 83 of 2015)

NCCM for Jaipur City Transport Services Ltd (JCTSL) in Jaipur. The said bid was awarded to M/s Efkon India Pvt Ltd Hereinafter EFKON) who in turn sub-contracted to the Informant for supply, installation and maintenance and handheld payment device for mobile use with wireless connectivity, security certifications etc to be used in buses for the aforesaid project.

22. Informant had placed a purchase order dated 5.4.2012 for Rs, 45,00,342/- with the appellant for the supply of 275 nos of Vx680 fully functional mobile ETMs for ITMS project in the city of Jaipur. The appellant was required to supply fully functional ETMs and relevant accessories on which the Informant was supposed to load independent application software and operate from its infrastructure. Informant alleged that the appellant was well aware of the requirements, methodology, end use and the project plan for which ETMs were procured but did not communicate to the Informant about any restrictive conditions in its offer.

23. After securing and accepting the purchase order dated 5.4.2012 the appellant informed the Informant regarding the restrictive use of the ETMs i.e. requirement of a Software Development Kit (SDK) to achieve full functionality of ETMs. Informant alleged that the appellant, a major player in the hardware market for ETMs, wanted to attain a similar position in the market for software loaded in the ETMs. Informant alleged that such conduct of the appellant clearly indicates its malicious intent and motive to circumvent the Informant's business and sets the grounds for its monopolistic opportunity in the nascent transportation automation sector. The Information alleged that the appellant was under legal and moral obligation

to disclose the complete material information regarding the device including the fact that the device cannot work without purchasing its proprietary SDK before selling the same to the Informant. Having no choice left, the Informant purchased the SDK from the appellant for Rs.3,65,615/-

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

25. It is alleged that SDK which was delivered by the appellant on 30.6.2010 was locked by a security key i.e. File Signing Tools (hereinafter FST) which was an integral part of SDK and that the appellant illegally withheld the security key. Further the said SDK was an incompatible version and not appropriate for ETMs delivered and also some of the critical components were also not supplied. It is stated that due to short supply and incompatible SDK, the supplied ETMs became useless for the Informant and it was fully dependent on the appellant for functioning of ETMs. This caused delay in the development process and the Informant had to suffer not only in terms of monetary loss but also in terms of reputation in the market.

26. Informant alleged that by not delivering the FST on time, the appellant restricted it from making use of ETMs. It is alleged that the intention of the appellant was to delay the project so that the end users are frustrated thereby projecting the informant in bad light. Further to achieve its malafide intention, the appellant made flimsy excuses of protection of IPR for the SDKs and also illegally started to inspect the software submitted by the Informant to pilfer the business model of the Informant.

27. Informant alleged that the appellant even approached the end user itself i.e M/s Efkon on 17.8.2012, bypassing the Informant and made a commercial offer on the basis of knowledge gained from pilferage of the Informant's software given to the appellant for trial. The informant alleged that such conduct fully confirmed the hidden motive, unfair trade practices and desire of the appellant in creating step by step restrictions and delays leading to the circumvention of the Informant and setting the ground for its monopolistic control.

28. Informant alleged that he had served two legal notices to the appellant on 21.8.2012 and 29.09.2012 for its alleged wrong doings. However, the appellant gave an evasive reply stating that the contentions in the notices were frivolous, wrong, incorrect, mischievous and baseless.

29. Informant also alleged that the appellant took undue advantage of its dominant position in the market in view of the fact that the consumers were completely dependent upon it and there was no choice with the consumers. Informant alleged that the appellant has entered into an anti-competitive agreement i.e. the exclusive supply agreement which has appreciable adverse

effect on competition in India and has the effect of restricting the dealing in any goods other than those of the appellant and therefore, amounts to violation of Section 3 of the Act.

30. Informant, seeing the said abusive conduct of the appellant, prayed before the Commission to cause an enquiry against the appellant for the alleged contravention of Sections 3 and 4 of the Act, and direct the appellant to cease and desist from abuse of its dominant position and to comply with its purchase order dated 5.4.2012.

31. The Commission after considering the material available on record and having informed that prima facie case is made out, directed the Director General (DG) to conduct investigation into the matter under Section 26(1) of the Act. The DG had investigated the matter and submitted its report, on which notices were issued to appellant herein/opposite party. The Commission, upon hearing the parties and perusal of evidence arrived at the conclusion that the licence restriction clause to “not use the licensed software to develop any payment software that directly or indirectly interacts with any acquiring bank” seems to be unfair and restrictive. The SDK license agreement of the appellant does not allow a third party to write a payment application in India which is contrary to the practice followed by the appellant elsewhere across the globe as is evidenced from the statement made in its website i.e. “Verifone offers a selection of developer tools and drivers to help programmers design and develop efficient, professional payment applications that complement our payment systems”. Further, by restricting the development of payment softwares for any payment association and not

disclosing the said clause to the large buyers in India who would require customized payment softwares to run on the POS terminals bought by them, the appellant has restricted the availability of substitutable payment solutions thereby restricting the choice for the buyers. Thus, the restrictions imposed by the appellant on development of payment software by the third parties appear to be anti-competitive.

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

33. 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 licensee intends to create using the licensed software. It may be noted that the appellant is a POS terminal manufacturer and is also engaged in the development of VAS applications. It appears that by way of these restrictions, the appellant 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 appellant about the VAS developed by the Informant amounts to imposition of unfair condition on the Informant as well as limits the provision of VAS service. Further seeking information on the VAS services which the Informant intends to develop is

likely to prejudice the business activities of the Informant as the appellant is developing into a major competitor for the Informant in the VAS/TPP market in India. Such restriction appears to restrict technical or scientific development relating to VAS services for POS terminals in India. Since the appellant is large player (in terms of market share of POS terminals managed by banks in India) and it itself is a manufacturer of POS terminals, its conduct with respect to seeking disclosure of sensitive business information from its customers in the downstream market with a view to protect/enhance its presence in the downstream market of VAS services is abusive in terms of Section 4 of the Act.

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

35. The Commission accordingly issued impugned order dated 10th April, 2015 under Section 27(b) of the Act and not imposed penalty but took lenient

view in imposing the penalty in view of the penalty imposed in the earlier case as referred to above (Case No.56/2012) wherein penalty of Rs.4,48,40,236/- has been imposed on the opposite party (appellant herein) at the rate of 5% of its average turnover for the last three financial years.

36. So far as individual liability of the officials of the appellant in terms of provisions of Section 48 of the Act is concerned, the Commission directed them to file their income statements/Income Tax Returns and decided to pass an order separately in respect of them.

37. It is in the aforesaid background both the cases were heard together and disposed off by this common judgement.

38. Learned counsel for the appellant, M/s Verifone India Sales P:vt Ltd, almost made similar submission in both the appeals. In respect of Atos Worldline India Pvt Ltd an additional plea was taken that the impugned agreement was a draft agreement and its terms were being negotiated at the time of filing of the complaint. However, we are not inclined to accept the submission in view of the language of the agreement, which shows that the Verifone practically asked the Atos Worldline India Pvt Ltd to sign on the agreement within the dotted line of the Agreement.

39. Once it is held that the appellant is a dominant player of POS Terminal in the relevant market then asking Atos Worldline India Pvt Ltd to sign within the dotted line of the agreement will also amount to abuse of dominant position in violation of Section 4(2)(a)(i), 4(2)(b)(i), 4(2)(b)(ii) and 4(2)(e) of the Act, 2002.

40. Learned counsel for the appellant submitted that the relevant period to be considered while assessing the relevant market and alleged dominance should be 2012 onwards. According to him market for POS Terminals in India cannot be held within relevant market. According to appellant the purpose of defining a relevant market is to determine the competitive constraints on the enterprise under investigation. Accordingly all reasonably foreseeable constraints, such as, technologies at use elsewhere or imminently entering the market must be included in the definition of the relevant market. It was submitted that as all electronic payment devices perform the same function, with the same end use, i.e. to process electronic payments at the merchant's location, the relevant market should be considered as the "market for electronic payments in India". However, without prejudice to the above, it was submitted that at the very least, the relevant market should be defined as the market for POS and mobile POS terminals in India.

41. Section 2(t) and 19(7) of the Act provide that while defining the relevant market, the Commission is required to consider the substitutability between the various products based on factors such as end use, characteristics, price and consumer preferences. It was submitted that Mobile-POS terminals and POS terminals are virtually the same product, with similar characteristics, price and intended use. Both devices are used to swipe the user's card at the merchant's location to process payments, and the methodology of functioning of both devices is also the same, from swiping of the card to final processing of payments. Additionally, the stakeholders involved for both devices (i.e. banks, TPPS and VAS providers) are largely the same, and similar VAS can (and is) developed on both machines by VAS developers. It was submitted

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that the only discernible difference between the two devices is that Mobile POS machines are more compact and portable in nature than POS terminals. A diagrammatic representation of both products has been enclosed.

42. It was submitted that the Commission has altogether failed to consider evidence on record which clearly establishes that owing to the similarity of POS and Mobile POS terminals, consumers (including large banks such as SBI, Axis Bank, Citibank and companies such as Reliance) treated POS and Mobile POS as substitutable even in 2012. This was further corroborated by the PwC Report on Electronic Payments Market in India, 2014.

43. Counsel for the appellant submits that there is no analysis by the Commission under Section 2(t) and 19(7). It was submitted that while defining the relevant market, the Commission has not undertaken an analysis of any of the factors provided under Sections 2(t) and 19(7) of the Competition Act (end use, characteristics, price and consumer preferences). The Commission has summarily agreed with the DG's Report, which had itself also not undertaken any analysis of the relevant factors.

44. Relying on the decision of this Appellate Tribunal in *Hyundai Motor India Pvt Vs. Competition Commission of India & Ors, Competition Appeal (AT) No.06/2017*, it was submitted that the aforesaid approach undertaken by the Commission have been held to be incorrect. It was contended that Verifone is not in a dominant position even in the narrow POS terminal market. Without prejudice to the submission above that the relevant market should not be considered as narrow as the market of POS terminals, it is submitted

that even in the narrow relevant market for POS terminals, Verifone is not in a dominant position.

45. According to counsel for the appellant that even during the relevant period of 2012-13, Ingenico had a market share of 57% while Verifone had a market share of only 40% in the market for POS terminals in India. Learned counsel for the appellant submitted that these figures are from the Pwc Report, which is based on Government data. Learned counsel for the appellant submitted that the Commission has relied on incorrect market share figures in its analysis, and has inflated Verifone's sales by (a) including all POS terminals sold by Verifone since its inception, including those which were defunct/non-functioning at the relevant time (b) including POS terminals sold by Verifone competitors prior to them even being acquired by Verifone, and (c) not considering data of certain select banks/TPPs who had procured more terminals from Verifone's competitors demonstrating cherry picking of evidenced and data. The patent errors in the computation had been highlighted to the Commission. The Commission failed to consider and address these submissions.

46. It was further submitted that the Commission and the DG have disregarded the basis test of dominance provided under Explanation (a) to Section 4 of the Act i.e. the ability to operate independently of competitive forces or affect consumers/competitors in the relevant market in its favour. Verifone does not have this ability as it is significantly constrained at two levels. Verifone is dependent on banks for access to the market. Verifone is neither able to access customers, nor will its terminals be functional without

connectivity to banks. Therefore, Verifone cannot act independently in the market.

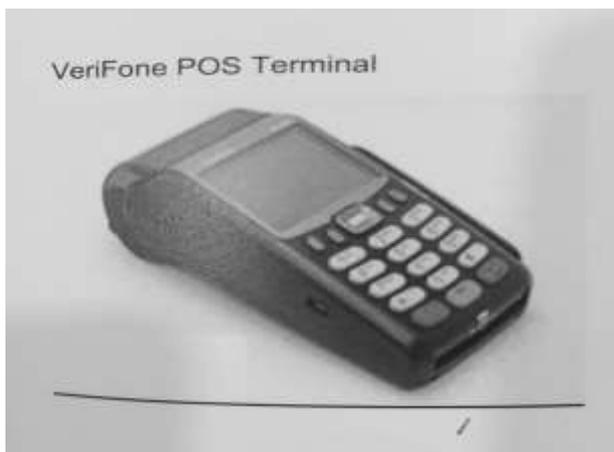
47. Counsel submitted that due to their powerful position, banks impose highly onerous terms in their commercial dealings with Verifone. Banks typically adopt a two vendor policy, wherein they purchase POS terminals from at least two vendors. Therefore, banks are not dependent on Verifone and most banks deal with other players like Ingenico and during the investigation when banks and TPPs were approached for their comments, banks/TPPs have stated that they have not come across any abusive conduct by Verifone. However, the Commission has altogether failed to consider this evidence on record and has cherry picked the evidence it seeks to rely on.

48. A TPP must certify the terminals before it can be sold to a bank. As Atos is the largest TPP in India with ties to more than 15 banks, Verifone significantly depends on Atos for their certification. Interestingly, Atos is also one of the largest global POS vendor and had also started POS operations in India at the relevant time. The dependence on Atos is evidenced by the fact that Verifone is forced to accept unfair terms in its operations with Atos. Atos charges an exorbitant price of 8 lakhs and is the only TPP to impose this charge due to its dominant position in the market.

49. Similar plea has been taken in the case of Three D Integrated Solutions Ltd by the appellant. It is submitted that the relevant market in this case cannot be held to be POS terminal in India as the supply of ETMs by Verifone to Three D Integrated Solutions Ltd (Informant) does not relate to supply of POS terminals by Verifone.

50. The counsel for the appellant submitted that Jaipur RFP, which is central to the present dispute, itself distinguished between ETMs and POS terminals and treated them as separate products. Therefore, according to the learned counsel for the appellant no reliance can be placed on the cost of Atos Worldline India Pvt Ltd for determination of relevant market. Learned counsel for the appellant submitted that POS terminals and ETMs being two different products that serve different end users, have different characteristics and different customers and producers. The products cannot be treated as substitutable simply because Verifone uses the same basic hardware for both the products.

51. The Commission has dealt with the relevant market and noticed that the Verifone uses the same hardware for both the products. The hardware is common, it will be evident from the product itself, picture of it is re-produced below::



52. Learned counsel for the appellant produced and relied on other Verifone terminals to compare with the Ingonic terminals. The other Verifone terminals of recent days like mobile, is reproduced as under:-



53. In the present case we are concerned with instrument. In the said instrument which is being produced by Verifone and the present company(Atos Worldline India Pvt Ltd) purchase the instrument only from Verifone. The first instrument, as shown above was available in the year 2012-13, the relevant point of time. The second instrument which is like mobile as shown above has come later on and cannot be taken into consideration to determine the dominant position of the 2012-13. It is the Verifone which puts the first App in it and if it is purchased by the Bank, it puts its own additional App therein. The DG investigation in the case of Atos Wordline India Pvt Ltd is dated 20th March, 2014. The relevant period of investigation is between the year 2009-10 to September, 2012.

54. The relevant market of POS terminals has been found to be in India as the instrument can be used as POS terminal for depositing the money or collecting money through Card anywhere in India.

55. The DG rightly held that new technology such as EasyTap or Mswipe cannot be considered as substitute of the POS terminals. There is no alternative/substitute to POS terminals.

56. Thus it is clear that the relevant geographic market of POS terminals is India. It is apparent that the Verifone held a position of strength in the relevant market during the period of investigation by inter alia on account of its market share, size, resources and economic power, dependence of consumers on the appellant. Appellant and its acquired companies as noticed above had a market share of approximately 80%.

57. The clauses of SDK agreement were not as per the prevailing industry practice. The DG compared similar SDK agreement entered by other players in the market including Ingenico and Pax. The SDK agreement was non-negotiable and intent of the appellant was found to exploit the VAS market by either restricting the VAS providers or sharing the revenue from them. The email dated 18.1.2012, 3.2.2012, 5.3.2012, 20.4.2012 supports the allegation of exploitation on the VAS market by restricting the VAS provider.

58. VAS providers like Pine Labs and FSS also imposed with similar restrictive clauses by the appellant. The clauses in SDK agreement were restricted and therefore, it was found to be in violation of Section 4(2)(a)(i), 4(2)(b)(i) and 4(2)(b)(ii) and 4(2)(e) of the Act.

59. The Commission after considering the DG report, objections/reply filed by the appellant and the informant and other evidence by impugned order dated 10th April, 2015 found the appellant was abusing its dominant position

under Section 4 of the Act and imposed punishment on the appellant in the case of Atos Worldline India Pvt Ltd.

60. We have noticed that the instrument is the factor for the purpose of dominance and not the app i.e. the end use ETM distinct characteristics or POS terminals. If the dominance is made because of the instrument, the same principle will be applicable also in the case of Three D Integrated Solution Ltd for determination of dominance.

61. So far as abuse of dominance in the case of Three D Integrated Solutions Ltd , the DG in its report dated 30.5.2014 after investigation for the period 2009-10 to September 2012 came to a definite conclusion that the relevant product in question is not ETMs as the machines provided by the appellant were not only capable of providing electronic record/printed receipts but also capable of providing electronic payment through credit/debit cards. Copy of the purchase order 5.4.2012 also mentions the product as a POS terminal, therefore, it is clear that ETMs were Europay, Mastercard and Visa and PCI (Payment card industry) certified. The purpose of EMV and PCI certification is for transfer of payment only.

62. The reply from Ingenico, another POS vendors, confirms that POS terminals can be converted into ETM without the knowledge of the sellers and there is no difference between the hardware of the two devices. New technologies such as Easy Tap or Mswipe cannot be considered as substitute of the POS terminals. There is no alternative/substitute to POS terminals.

63. The relevant market for POS terminal is in India under Section 2(t) of the Act. Relevant geographic market is under Section 2(r) of the Act. We hold TA(AT)(Competition)No.1 and 2 of 2017 (Old Appeals No.82 and 83 of 2015)

that the relevant market for the ETM is also India under Section 2(t) of the Act, The relevant geographical market of ETM is also India under Section 2(r) of the Act. The appellant was having a dominant position in the relevant market of POS/ETMs in particular the instrument in question, held a position of strength in the relevant market during the period of investigation and allegations inter alia on account of its market share, size, resources and economic power, dependence of consumers were on the appellant.

64. In the aforesaid facts corroborated with evidence and accepted by DG as well as enquiry by the Commission, we find no case is made out to interfere in the judgement both dated 10.04.2015 in both the cases. The appellants were entitled to be penalised but we find that the Commission has taken a lenient view by imposing penal cost in one case and no penal cost in the other case. In absence of any merit the appeals are dismissed. No costs.

**[Justice S.J. Mukhopadhaya]
Chairperson**

**[Justice Bansi Lal Bhat]
Member (Judicial)**

NEW DELHI

13-3-2020

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