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**COMPETITION COMMISSION OF INDIA**

**Case No. 09 of 2016**

**In Re:**

**House of Diagnostics LLP**

**Informant**

**And**

**1. Esaote S.p.A**

**Opposite Party No. 1**

**2. Esaote Asia Pacific Diagnostic Pvt. Ltd.**

**Opposite Party No. 2**

**CORAM**

**Mr. Sudhir Mital**  
**Chairperson**

**Mr. Augustine Peter**  
**Member**

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

**Present:**

For the Informant

None

For the Opposite

Mr. Samir Gandhi, Ms. Aditi Gopalakrishnan, Mr.

Parties

Shashank Sharma, Mr. Nitin Nair and Mr. Karan

Sood, Advocates for the Opposite Parties.

**Order under Section 27 of the Competition Act, 2002**

1. The present information has been filed by M/s House of Diagnostics LLP ('the Informant') under Section 19(1)(a) of the Competition Act, 2002



(‘the Act’) against Esaote S.p.A. (‘Opposite Party No.1’/ OP-1) and Esaote Asia Pacific Diagnostic Pvt. Ltd. (‘Opposite Party No.2’/ OP-2) [collectively, “Esaote”] alleging contravention of the provisions of Sections 3 and 4 of the Act.

### **Facts**

2. The Informant *i.e.* M/s House of Diagnostics LLP is engaged in the business of medical diagnostics and diagnostic imaging services having multiple centres and serving patients and some charitable institutions at affordable rates. It is stated in the Information that the Informant has installed dedicated standing/ tilting MRI machines, which were purchased from OPs, at its 3 out of 7 sites.
3. OP-1 is one of the leading manufacturers of medical diagnostic systems and is internationally acknowledged to be the world leader in dedicated Magnetic Resonance Imaging (MRI). OP-1 is ranked among the top ten groups in the world, engaged in the field of diagnostic imaging and has developed a ‘Dedicated Standing/ Tilting MRI machine’. It is selling ‘Dedicated Standing/ Tilting MRI machines’ under the brand name of G-Scan (now called ‘G-Scan Brio’) and exclusively holds the patent and know-how for the technology used in G-Scans. Headquartered in Genoa (Italy), Esaote S.p.A. has manufacturing and R&D facilities in various countries around the world. OP-2 is a step-down subsidiary of OP-1 in India, and deals exclusively with the machines manufactured by OP-1 including marketing and after-sale services in India.
4. The allegations of the Informant related to the purchase of three ‘Dedicated Standing/ Tilting MRI machine’ (‘G-Scan machines’) manufactured by OP-1 for its diagnostics centres. As per the Informant, the total consideration of the said machines was agreed to be Rs. 6,15,00,000/- which included the charges for installation and commissioning of the machines together with light weight ‘Perforated See Through Cage’ (PTC) at all three places, a complete warranty of five years, annual maintenance contract for a period of five years and supply of



Head Coils as well as two Mylab70XV ultrasound machines.

5. It was alleged by the Informant that the machines supplied by OPs to the Informant were not brand new rather they had already been manufactured and imported to India before the Purchase Order was signed, and these machines were having manufacturing and other defects. The image quality of the scans done on the said machines was also poor which resulted in incomplete MRI results and consequential loss to the Informant.
6. The Informant further alleged that, as per the terms and conditions of Purchase Order, OPs had agreed to provide light weight PTC along with G-Scans for all the three sites of the Informant where G-Scans were to be installed, but OPs had refused to provide the same. It was further alleged that the PTC was to be manufactured by OP-1 itself. However, without taking any consent from the Informant, it was outsourced to ETS Lindgren, which did not have the know-how of manufacturing PTC. The OPs, as per the Informant, failed to provide 'Head Coils' for each of the G-Scan machines as agreed by them in the Purchase Order and thereby unilaterally altered the terms and conditions of the contract to the detriment of the Informant.
7. The Informant is also aggrieved by the fact that OP-1 had given exclusive right to OP-2 for servicing G-Scan machines and for providing after sales services. It is because of this exclusive right given to OP-2 that OP-1 has created a monopoly in providing services for the upkeep of the 'Dedicated Standing/ Tilting MRI machines' and as a result of this, consumers are being exploited and are compelled to spend huge amount of money for spares and services of these machines. OP-2 is extorting huge sum of money for annual contracts and demanding payment for services and supply of spares to which consumers have no option but to accept the same.
8. It was alleged that the OPs are abusing their dominant position by charging huge sum of money for supplying spare parts and by refusing



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to perform their obligations under the contract even though substantial sum of money from the contract has already been paid. It was further alleged that the essential terms of the contract had been unilaterally changed which had affected the Informant adversely. It was also stated that since OPs are the only seller and service provider of '*Dedicated Standing/ Tilting MRI machines*' in India, it has 100% market share and by virtue of this, they are able to extract huge amounts from the consumers and could unilaterally alter the terms and conditions of comprehensive maintenance contract to the detriment of the Informant and other consumers.

9. The Informant further stated that after selling '*Dedicated Standing/ Tilting MRI machines*' to the Informant, OPs entered into an arrangement with another diagnostic centre in New Delhi *i.e.* Star Imaging and Path Labs (P) Ltd. to supply the same machines 'free of cost' and 'free of maintenance cost'. It was alleged that the said machines were running on a revenue sharing basis between OPs and Star Imaging and Path Labs (P) Ltd. As per the Informant, once the manufacturer of the said machines enters the market of providing MRI scans in weight bearing positions to the patients, it becomes difficult for the Informant to compete in this market with the OPs, as the latter, in collusion with third party, can provide the same services to the patients at lower prices.
10. Based on the above averments and allegations, the Informant filed the instant information against OPs alleging contravention of the provisions of Section 3 and 4 of the Act

#### **Directions to the DG**

11. The Commission, after considering the material available on record and hearing the counsel for the parties *vide* its order dated 23.08.2016 passed under Section 26(1) of the Act opined that *prima facie* a case of contravention of provisions of Section 4 of the Act by OPs was made out.



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The Commission, however, observed that no contravention of the provisions of Section 3 of the Act is made out in the present case. Accordingly, the Director General (DG) was directed to cause an investigation to be made into the matter and submit a report.

12. The DG, after receiving the directions from the Commission, investigated the matter and after seeking extensions submitted the Investigation Report on 27.11.2017.

### **Investigation by the DG**

13. Pursuant to the order of the Commission under Section 26(1) of the Act, the DG conducted investigation where the information and evidences collected were considered. Besides collecting information and evidences from other sources, third parties were also requisitioned and examined. These were confronted with OPs and replies furnished were duly considered. Probe letters were issued to the Informant, OPs and to third parties after which the DG Report was submitted.
14. To examine the allegations, the DG identified three major issues in the instant matter. The same along with findings of the DG thereon are noted below:

- I. Whether '*Dedicated Standing/ Tilting MRI*' machine is a distinct product, different from other diagnostic tools especially conventional MRI machine, and what is the 'relevant market' in this case?

### **Finding(s)**

The investigation found the relevant market in the instant case to be the market for '*Dedicated Standing/ Tilting MRI machines in India*' which is a distinct market as the conventional MRI machines are not substitutable with G-Scan machines, since G-Scan MRI machine scans human body in weight bearing positions *i.e.* the amount of weight a person puts on his legs, is not considered by its consumers *i.e.*



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diagnostic centres as interchangeable with conventional MRI machines. Therefore, in light of the definition of the relevant product market as given in Section 2(t), read with factors given in Section 19(7) of the Act, like physical characteristics or end-use of the product, consumer preferences *etc.*, the relevant product market in the instant case was delineated as market for '*Dedicated Standing/ Tilting MRI machines in India*'.

- II. Whether the OP Group has a dominant position in the relevant market so delineated?

Finding(s)

The Investigation came to the conclusion that the OPs being the only seller and service provider of '*Dedicated Standing/ Tilting MRI machines*' in India are in dominant position in the aforesaid relevant market.

- III. Whether the OP Group is abusing its dominant position in the relevant market and have thereby violated provisions of Section 4 of the Act?

If yes, then:

- (a) Whether OP-2 has not acted as per the agreed terms of the sales contract and altered the terms & conditions of Sales Contract unilaterally to the detriment of the Informant?

Finding(s)

- (i) It was found by the DG that the OPs have not acted as per the agreed terms of the contract and unilaterally altered the terms and conditions mentioned in the sale contract to the detriment of the Informant as consumers in India. Further, the OPs had failed to supply brand new and defect free G-Scan MRI machine to the Informant.



- (ii) It was also concluded that OPs had unilaterally altered the agreed terms of the sale contract to the detriment of the Informant and had refused to supply 'Perforated See Through RF Cage' and 'Head Coils' with each of the G-Scan Machine to the Informant and in process has made undue gains.
- (b) Whether the OP Group has failed to provide the after sales service as per the Comprehensive Maintenance Contract (CMC) to the Informant, disregarding terms and conditions of the CMC and abused its position as sole service provider of the G-Scans (Dedicated Standing/ Tilting MRI machines) supplied to the Informant?

Finding(s)

- (i) While analysing the Purchase Order dated 22.09.2011, the investigation came to the conclusion that the OPs are acting on their own whims and fancies and arbitrarily demanding three times the price for CMC than the price of CMC originally agreed to.
- (ii) Also after analysing the e-mail exchange which happened in the year 2013 between Dr. Amit Maniar and Mr. Massimo Guerra & Mr Dheeraj Nasa and statement submitted by OSL Healthcare Pvt Ltd., the investigation concluded that OP-2 has exploited and abused its dominant position in the area of providing after sales services.
- (c) Whether by not allowing third parties as service providers, OP-1 has limited the entry of competitors in the market?

Finding(s)

- (i) On basis of 'Distribution Agreement' dated 09.02.2011 and the submissions dated 30.10.2017 made by OPs, the investigation concluded that OP-1 has entered into an agreement with OP-2 giving



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exclusive rights to OP-2 for supply of spare parts and to provide after sales services to the consumers of the G-Scan MRI machines.

- (ii) After analysing the revenue sharing agreement entered between Star Imaging and Path Lab (P) Ltd. and the OPs, the DG found that the allegation of the Informant that OPs had utilised their dominant position in one relevant market to enter into another market by entering into revenue sharing agreement with Star Imaging and Path Lab (P) Ltd. was not correct.

15. In view of the above, the investigation concluded that the OPs have unilaterally modified the terms and conditions of the Purchase Order dated 22.09.2011 initially agreed with the Informant and that the subsequent actions of the OPs, being abusive, were in contravention of the provisions of Sections 4(2)(a)(i) and 4(2)(a) (ii) of the Act.

#### **Consideration of the DG report by the Commission**

16. The Commission in its ordinary meeting held on 28.06.2018 considered the Investigation Report submitted by the DG and decided to forward copies thereof to the parties for filing their respective replies/ objections thereto. Thereafter, the Commission heard the arguments of the OPs on 12.09.2018 and decided to pass an appropriate order in due course after conclusion of the arguments. None appeared on behalf of the Informant during oral hearing.

#### **Replies/ Objections/ Submissions of the Parties**

17. The Opposite Parties filed a letter dated 20.08.2018 stating therein that no specific response to the DG Report is required. However, the OPs denied each finding of infringement against them as contained in the DG Report. It was also stated that both the market definition and the assessment of dominant position contained in the DG Report were entirely incorrect. Relying upon the submissions made before the DG, it was stated that the relevant market is as broad as “market for supply of all MRI machines in



India” and the OPs do not enjoy a dominant position therein. It was also stated that no conduct of the OPs could be construed as an abuse of dominant position within the meaning of Section 4 of the Act. It was further pointed out that the erroneous definition of relevant market and the incorrect finding of dominance by the DG were based upon flawed analysis which was characterized by misplaced reliance on cherry-picked statements of third parties and the Informant.

18. The Informant did not file any response to the DG Report. However, the Informant filed a letter dated 27.02.2018 stating therein that pursuant to arbitration proceedings and a settlement agreement between it and the OP-2, the contractual dispute arising out of the use of diagnostic equipment purchased from the OP-2 have been settled to its full satisfaction.

### ANALYSIS

19. The Informant is engaged in the business of medical diagnostics and diagnostic imaging services in India and is primarily aggrieved by the conduct of OP-1 for not supplying brand new ‘Dedicated Standing/ Tilting MRI Machine’ (G-Scan) and further that OP-1 has given exclusive servicing and after sales service rights to OP-2 who is abusing its dominant position. Further, as per the Informant, OP-2 also breached the condition of Purchase Order of the contract to the detriment of the Informant as light weight ‘Perforated See through Cage’ (PTC) and Head Coils as promised along with the machine were not installed. In fact, PTC which was installed with G-Scan was not manufactured by OPs but outsourced from another company *i.e.* ETS Lindgren. It was alleged that the OPs in collusion with a third party *i.e.* Star Imaging and Path Labs (P) Ltd. entered the ‘MRI scan market in weight bearing position’ of India and thus impeded the entry of new players.
20. The DG identified various issues for the purposes of investigation. The same have already been noted alongwith the findings of the DG thereon.



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### Relevant Market

21. To delineate the relevant market, the DG examined the distinctiveness of the product in question. For this, the DG took into account the opinion of various diagnostic centres, doctors and hospitals. The gist of the replies submitted by various diagnostic centres can be summarized as follows:

(i) Diagnostic centres opined that conventional supine MRI Machines are powerful 3T MRI machines capable of performing MRI of all body regions/ parts, but, only in lying down position. On the contrary, the dedicated standing/ tilting MRI machine are 0.25 T MRI machines, optimized to do detailed study of the joints and spine (except dorsal spine) in both lying down and standing/ weight bearing position when the weight on the bones and joints alters the conditions of these regions in study. Since they are optimized to study these joints, the picture quality is quite good and suitable for medical diagnostics.

(ii) All diseases where weight of the body alters the disease or intensifies it, such as diseases of the joints and spines, MRI performed in the weight bearing position is the ideal way of diagnosis and gives the best results. Hence, it has advantage over conventional MRI machines.

(iii) The market for dedicated standing/ tilting MRI machine is different from that of conventional supine MRI machines.

(iv) Dedicated MRI cannot be substituted for the conventional MRI machines for the reason that the conventional MRI machines are not capable of doing MRI in weight bearing position.

(v) G-Scan machines MRI can effectively diagnose the ailments pertaining to weight bearing position of the body.

22. The DG also took into account the scientific evidences based on literature and the claim of the OP Group in their website claiming advantage of their G-Scan machines over conventional MRI machines. Thus, based on



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scientific evidence, claim of the OP Group, statement of doctors, radiologists, diagnostic centres who are the consumers in this case, the DG came to the conclusion that the G-Scan machine has technological advantages over conventional MRI machines where it can read the effect of gravity on certain regions of human body.

23. The DG in this regard came to the conclusion that G-Scan machines have distinctive characteristics like facility to rotate the patient up to 90 degrees, open low field magnet of around 2 Tesla *etc.* besides their intended use is also quite different from other diagnostic tools including conventional MRI machines.
24. The DG, thus, concluded that since the G-Scan MRI machine which is capable of scanning human body in weight bearing positions is not considered by its consumers *i.e.* diagnostic centres as interchangeable with conventional MRI machines, therefore, it can be said in light of the definition of the relevant product market given in Section 2(t) read with factors given in Section 19(7) of the Act *i.e.* like physical characteristics or end-use of the product, consumer preferences that the relevant product market in the instant case will be market for “*Dedicated Standing/ Tilting MRI machines*”. It was noted by the DG that potential consumers of G-Scan machines are scattered in different parts of the country and seller of these machines has the distribution network and infrastructure not only to sell and supply the Dedicated Standing/ Tilting MRI machines in entire India but to provide after sales service, spare parts and other support, the relevant geographic market in the instant case as per Section 2(s) read with Section 19(6) of the Act will be the whole of India.
25. Thus, in light of above analysis, the DG delineated the relevant market as ‘*market for standing/ tilting MRI machines in India*’.
26. The learned counsel appearing on behalf of the OPs challenged the relevant market as delineated by the DG. It was contended that the purchasers (hospitals and diagnostic clinics) of diagnostic imaging



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equipments have a wide range of alternatives available to them and dedicated or weight bearing MRI scanners are only one of the potentially different options of diagnostic tools available in the market. To buttress the submissions, the OP cited two examples to demonstrate that dedicated MRI machines are substitutable with full body MRI machines and ultra-sound machines. In the first example, it was highlighted that DY Patil Medical College in 2013 after detailed negotiations which resulted into reduced price offer and favourable conditions from the OP Group, opted to purchase 1.5 Tesla, full body MRI machines supplied by Siemens. This was sought to be suggestive of the fact that dedicated MRI machines are substitutable with full body MRI machines. In the second instance, it was pointed out that in 2013, Delta MRI and Scan Centre, Patiala, despite favourable offer from the OP Group chose high-end ultra-sound machine supplied by GE. This, as per OP, was again indicative of dedicated MRI machines being substitutable with ultra-sound machines.

27. Further, it was argued by the learned counsel that there is no distinct demand for weight bearing MRI machines. It was also argued that a single product definition of the relevant market was not supported by any evidence as there was no material to suggest that a separate relevant market existed for such weight bearing MRI scanners. It was pointed out that differences in terms of product technology are not sufficient basis for identification of a separate product market where the differences are not taken into account by a prospective purchaser as a decisive factor. Hence, it was argued that different features of a product do not make different markets.
28. Objection was also taken to the fact that the Commission relied upon the opinion given by AIIMS to delineate the relevant market in passing its order under Section 26(1) of the Act. It was argued that AIIMS is not qualified to opine on the subject as it did not have a weight bearing MRI machine.
29. The Commission has examined the relevant market as defined by the DG



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and objections taken by the OPs thereto. It is observed that this case pertains to G-Scan/ dedicated standing/ tilting MRI machine which is capable of scanning the body of a person in weight bearing position. The DG has rightly pointed out that this device is unique in itself as it is meant for some specific portion of the body and for this very reason it is termed as dedicated standing/ tilting MRI machine. It has following advantages over conventional MRI machines, viz.:

(i) It can image the changes that occur in brain, CSF, Spine and Joints when the patient is in standing position with effect of gravity on these structures.

(ii) It is less claustrophobic.

(iii) Diagnosis of ailments of such specific portions of body (joints or spine, etc.) by standing/ tilting MRI machines pertaining to weight bearing posture of the body is effective and accurate in comparison to diagnosis done by Supine MRI machines.

30. Thus, going by the statutory requirement of delineation of relevant product market where the same is based on the physical characteristics, end-use and price, it is clear that G-Scan standing/ tilting machine forms a market distinct from the conventional MRI machines. This is because, firstly, G-Scan standing/ tilting MRI machine is an open MRI machine that can tilt the patient up to 90 degrees which is not possible in conventional supine MRI machines that can scan a patient in 180 degree position only. Secondly, the conventional MRI machines can scan the whole body of a patient whereas the dedicated standing/ tilting MRI is meant specifically for joint and spines. Moreover, doctors prefer G-Scan images for certain type of diagnosis. Further, the very fact that certain diagnostic centres have both the type of MRI machines indicate the fact that both the products are distinct and form part of two separate relevant market.



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31. Further, on the issue of relevant geographic market, the Commission agrees that potential consumers of G-Scan machines are scattered in different parts of the country. Also, the seller of these machines has the distribution network and infrastructure not only to sell and supply the Dedicated Standing/ Tilting MRI in entire India but also to provide after sales service, spare parts and other support. This makes the relevant geographic market in the instant case as the whole of India.
32. In view of the above, the Commission is of the considered opinion that the relevant market in the instant case is “*market for dedicated Standing/ Tilting MRI machines in India*”.

#### Dominant Position

33. The DG made a comprehensive analysis of issue of dominance of the OP Group in the afore-delineated relevant market.
34. Based on the submission of the parties, the DG came to the conclusion that dedicated standing/ tilting MRI machines are a unique product and have a market which is distinct from conventional MRI machines. It was also found that other two manufacturers of such machines *i.e.* Fonar Corporation Ltd. and Paramed Medical Systems Ltd. do not operate in India. This fact is further affirmed by the submissions of third party *i.e.* Indian Radiological and Imaging Association to the effect that there are no other manufacturers or suppliers of dedicated standing/ tilting MRI machines other than the OP Group in India. As such, taking these factors into account, the investigation concluded that the OP Group is the sole manufacturer and supplier of dedicated standing/ tilting MRI machines in India.
35. It was also found that the OP Group is among the leading players in the world for the provision of medical diagnostic services. Major portion of its sales occur outside the country of its origin. It has many R&D and manufacturing plants in different countries. This depicts a strong resource base of OP. These aspects further strengthen the dominance of OP in the



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relevant market.

36. In conclusion, the DG stated that the consumers *i.e.* hospitals and diagnostic clinics are wholly dependent on G-Scan MRI machine of the OP Group as diagnosis of joint related ailments of the musculoskeletal system can only be done by G-Scan MRI machine of the OP Group and not by conventional MRI machine. Also, there is no viable substitute to dedicated standing/tilting MRI machines which locks the consumers with the product *i.e.* G-Scan MRI machine of the OP Group. Thus, the OP Group, being the sole manufacturer and supplier of dedicated standing/tilting MRI machine in India, is not constrained by global manufacturers of MRI machines, such as GE, Philips, Siemens, Hitachi and Toshiba in terms of competition and in fact the OP Group has no competitors in the market for dedicated standing/tilting MRI machines in India.
37. The learned counsel appearing on behalf of the OPs challenged the finding of the DG holding the OP Group to be in a dominant position in the defined relevant market. It was argued that sales of G-Scan MRI machines by the OP Group in comparison to the total estimated value of sales of MRI machines in India is negligible. It was also argued that the OP Group is constrained by global manufacturers of MRI machines such as GE, Phillips, Siemens, Hitachi and Toshiba. The low level of its sales of dedicated standing/tilting MRI machines and the efforts required by the OP Group to sell these machines in India, were sought to suggest that it does not have any market power in respect of supply of such machines. It was also argued that the OP Group's pricing strategy is to price its dedicated standing/tilting MRI machines at a discount to full-body, closed-bore MRI machines. It was also argued that global manufacturers of dedicated standing/tilting MRI machines can also enter Indian market after paying the applicable duties and, therefore, it was sought to be canvassed that there are no entry barriers in the market.
38. Having considered the matter, the Commission, at the outset, notes that OP-2 is a 100% subsidiary of OP-1 through Esaote International N. V.



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Thus, OP-1 and OP-2 belong to the same Group and their dominance as a Group has to be determined. In this regard, the Commission notes that the OP Group has patent rights over the technology of G-Scan machines. Further, there are only two other manufacturers of dedicated standing/tilting MRI machine *i.e.* Paramed Ltd. and Fonar Ltd. who do not operate in India. This position was also not disputed by the learned counsel appearing on behalf of the OPs. Hence, absence of other two players who manufacture such machines in Indian market, offers the OPs an opportunity to operate independently of competitive forces. The OP Group, being the sole manufacturer/ supplier of dedicated standing/ tilting MRI machines in India, is able to affect the consumer or the relevant market in its favor.

39. In view of the above, the Commission has no hesitation in holding that the OP Group commands a virtual monopoly *i.e.* 100% market share in the market for dedicated standing/ tilting MRI Machines in India.

Abuse of dominant position

40. The DG examined as to whether OP-2 has not acted as per the agreed terms of the sales contract and altered the terms & conditions of Sales Contract unilaterally to the detriment of the Informant. This allegation was found to be true in the Investigation for the following reason:
- (i) After analyzing the manufacturing, supply log, Invoices, dispatch papers and shipping documents of the machines supplied to various consumers in India, the DG came to the conclusion that OP Group has failed to supply brand new and defect free G-Scan MRI machine to the Informant.
- (ii) It was also concluded that the OP Group has unilaterally altered the agreed terms of the sale contract to the detriment of the Informant and has refused to supply 'Perforated See Through RF Cage' and 'Head



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Coils' with each of the G-Scan Machine to the Informant and in the process has made undue gains.

41. The DG next examined as to whether the OP Group has failed to provide the after sales service as per the Comprehensive Maintenance Contract (CMC) to the Informant, disregarding terms and conditions of the CMC and abused its position as sole service provider of the G-Scans machines supplied to the Informant.
42. In this regard, while investigating this aspect, the DG analysed the Purchase Order dated 22.09.2011 and came to the conclusion that the OP Group was acting on its own whims and caprices besides arbitrarily demanding three times the price for CMC than the price which was originally agreed to.
43. Further, the DG examined as to whether by not allowing third parties as service providers, OP-1 has limited the entry of competitors in the market.
44. On this count, the DG on the basis of Distribution Agreement dated 09.02.2011 and the submissions dated 30.10.2017 made by OP Group concluded that OP-1 has entered into in an agreement with OP-2 giving exclusive rights to OP-2 in the area of supply of spare parts and in providing after sales services to the consumers of the G-Scan MRI machines.
45. The DG also analyzed the revenue sharing agreement entered between Star Imaging and Path Lab (P) Ltd. and OP Group. However, the DG found that the allegation of the Informant that OP Group leveraged its dominant position in one relevant market to enter into another market by entering in to revenue sharing agreement with Star Imaging and Path Lab (P) Ltd. was not correct.
46. Adverting to the abusive conduct of OP Group examined by the DG, the Commission notes that so far as the finding of the DG that OP Group has



failed to supply brand new and defect free G-Scan MRI machine to the Informant is concerned, the learned counsel appearing on behalf of OP Group, except for arguing that the entire facts of the case were nothing but a contractual dispute and as such was not amenable within the jurisdiction of the Commission, did not specifically refute the allegations made by the Informant and the finding of the DG recorded thereon in this regard.

47. The Commission has examined the DG Report and the evidences collected by the DG. From the Purchase Order dated 22.09.2011 placed by the Informant upon OP-2, it appears that the Informant had ordered three new G-Scan machines as mentioned in the subject of the Purchase Order itself. It is, however, evident that two G-Scan machines were invoiced in the name of OP-2 by OP-1 on 20.09.2011 and were packed and ready for dispatch on 15.09.2011 itself as can be seen from packing and weight lists dated 15.09.2011 having dispatch numbers 502108 and 502109 respectively issued by OP-1 in favour of OP-2 for two G-Scan Machines *i.e.* the two G-Scan MRI machines were ready and packed one week before the Purchase Order dated 22.09.2011 which shows that the OP Group had supplied the G-Scan machines to the Informant which were not brand new and were not manufactured as mentioned in the Purchase Order. Further, it is also observed that the third G-Scan MRI machine was also invoiced in the name of OP-2 by OP-1 on 30.09.2011 and was packed and ready for dispatch by OP-1 from Italy on 30.09.2011 itself as per packing and weight list issued in favour of OP-2 by OP-1 having dispatch number 502274 *i.e.* within one week of the signing of the Purchase Order.
48. Thus, from perusal of Invoices and Packing & Dispatch lists, it is evident that all the three G-Scan MRI machines were manufactured before placing of the Purchase Order by the Informant. The G-Scan MRI machines could not, by any chance, have been packed on 15.09.2011 & 30.09.2011 especially when it takes minimum 12 weeks to manufacture one new G-Scan MRI machine as informed by Mr. Massimo Guerra, Global Marketing Director of OP-1 during investigation.



49. Further, to find out the correct date of manufacturing of these machines, the DG asked OP-1 to submit Manufacturing Log and Supply Log. From examination of these documents, it is evident that all the three G-Scan MRI machines supplied to the Informant were manufactured in the year 2010. The two G-Scan MRI machines having machine numbers 5117 & 5120 were manufactured on 18.10.2010 & 28.10.2010 respectively, whereas the third G-Scan having machine number 5124 was produced on 23.12.2010.
50. At this stage, it is also pertinent to note that the DG examined the Supply Log along with the Invoices of the consumers of G-Scan MRI Machines in India as provided by OP-1. On analysis of such details, it emerged that, in general, machines produced in particular month has been supplied to the customer either in the same month or a month or two thereafter. However, the G-Scan MRI machines supplied to the Informant, though manufactured in October 2010 and December 2010, were lying with OP-1 and were supplied to the Informant after one year in September 2011. No reasonable justification was provided by the learned counsel appearing on behalf of the OPs to explain such a deviation, who instead of providing any justification for such conduct kept on harping that such disputes are contractual in nature and do not raise any competition issue. As rightly pointed out by the DG, in the normal and prudent business practice, it would have been expected of a manufacturer to clear its stock on "*first produced first out basis*".
51. At this stage, it is also crucial to note an e-mail of Mr. Dheeraj Nasa of OP-2 to the Informant on 27.09.2011 which was also copied to Mr. Massimo Guerra, Global Marketing Director of OP-1. In this e-mail, it was assured by OP-2 to the Informant that as per the discussion, fast production of three G-Scan machines was going on as per information supplied to him by his production team.
52. For ready reference, the relevant part of the said e-mail is excerpted below:



*Tue, Sep 27, 2011 at 5:17 PM*

*To: SOGANI HEALTH CARE <soganihealthcare@gmail.com>*

*Cc: Massimo Guerra <massimo.guerra@esaote.com>*

*Dear Sirs,*

*We confirm the acceptance of your kind order and as discussed with you that production has already confirmed us the fast production of 3 G-Scan and will be ready to ship in 3 weeks' time from the date of opening of the LC. Xerox copy of acceptance with sign and stamp has been sent to you on your corp. office address. Congratulations once again!!*

*--*

*Dheeraj Nasa*

*National Sales Director,*

*Esaote Asia Pacific Diagnostics Pvt. Ltd.*

53. From the above e-mail, it is abundantly clear that not only the Purchase Order mentioned about three new G-Scan MRI machines, the Informant was further given an impression by the OP Group that the newly manufactured G-Scan MRI machines would be supplied to the Informant whereas, as pointed out earlier, the supplied machines were already lying with OP Group for more than a year. In these circumstances, the Commission cannot rule out the apprehension and allegation of the Informant that the machines installed at the sites of the Informant were perhaps sold to some other purchaser and on having been rejected by them, the same were dumped on the Informant.
54. This is further exemplified by the fact that the supplied G-Scan MRI machines broke down quite frequently and as per the data provided by the Informant, it is reflected that the machines installed at its sites in Hargovind Enclave and Apollo Hospital remained unutilized on 58% (unutilized on 829 days out of total 1430 days) and 76.1% (unutilized on 951 days out of total 1249 days) occasions, respectively.



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55. In view of the above discussion, the Commission is of the considered opinion that the OP Group, not only supplied G-Scan machines to the Informant which were not performing to the level as assured by OP Group, but also misled the Informant that new machines were being supplied to it whereas the Informant was thrust upon with machines which were more than a year old. Such a conduct, clearly contravenes the provisions of Section 4(2)(a)(i) of the Act being an unfair business practice.
56. The Commission next examines the allegations of the Informant that OP Group unilaterally altered the agreed terms of the sale contract to the detriment of the Informant by refusing to supply 'Perforated See Through RF Cage' with the G-Scan Machines supplied to the Informant.
57. The Informant alleged that in the month of August, 2011, Mr. Massimo Guerra, Global Marketing Director of OP-1 along with Mr. Dheeraj Nasa, National Sales Director of OP-2 met the Informant and offered brand new G-Scan MRI machines along with a state-of-the-art new generation "Perforated See Through RF Cage" (PTC) for the three sites of the Informant. The presence of PTC instead of regular opaque faraday cage would have allowed the patients to see their relatives, attendants and *vice versa*, while the MRI scans were in progress. It was stated by the Informant that before accepting or finalizing the final offer, OP-1 and OP-2 were made aware of the three sites and their experts had already visited all the said three sites for the installation of equipments. They found all the three sites suitable for installation of G-Scans MRI machines along with the Perforated See Through Light Weight RF Cage. In fact, the Informant averred that the "See Through RF Cage" was specifically insisted and negotiated after one such installation had been shown to the Informant in working condition, installed by the OP Group at Dr. Kohli MRI Centre in East of Kailash, New Delhi. It was alleged that the OP Group had expressly agreed to provide state-of-the-art light weight Perforated See Through Cage for all the three sites in the Purchase Order dated 22.09.2011, which was duly signed and accepted by both the



Informant as well as the OP Group.

58. In this regard, it is observed that the DG found OP Group to have abused its dominant position in the relevant market by refusing to supply the 'See Through Perforated RF Cage' despite agreeing to supply the same in contravention of the provisions of Section 4(2)(a)(i) of the Act. The DG also noted that the OP Group imposed unfair prices on the Informant by supplying lesser priced opaque cage in place of 'See Through Perforated RF Cage' and thereby further violated Section 4(2)(a)(ii) of the Act.
59. The learned counsel appearing on behalf of the OPs challenged the aforesaid conclusion of the DG and denied that the OP Group had ever agreed to supply See Through Perforated Cage (PTC) alongwith the three G-Scan MRI machines which were to be supplied to the Informant. The learned counsel appearing for the OPs invited attention of the Commission to the Purchase Order dated 22.09.2011 to contend that no stipulation for See Through Perforated Cage was provided therein:

*"Project Includes:*

*Gsacn Price + custom Duty and Custom Clearance + SEE Thru RF Cage Cost + Transportation & Installation of G-Scan Italy to End user destination+ Calibration of the cage and Magnet + 1Week Application Training from Gurgaon."*

60. Having examined the material and evidence on record, the Commission is of the considered opinion that the contention raised by the learned counsel appearing on behalf of the OPs, is not only flawed but is contrary to undisputed documents available on record.
61. In this regard, the Commission notes from the letter dated 17.07.2012 written by Mr. Dheeraj Nasa, National Sales Director of the OP-2 to the Informant wherein it has been categorically stated that the OP Group had assured to supply state-of-the-art 'See Thru Perforated RF Cage' to the Informant as per the terms agreed in the Purchase Order dated 22.09.2011. For ready reference, the relevant part of the letter is excerpted



below:

*“Date: 17.07.2012*

*----*

*Dear Sir,*

*This is to confirm to you that as per your request, we shall be shifting the 3rd G-Scan MRI Machine to a warehouse, as your site at Apollo Hospital, New Delhi is not ready for installation. As mentioned in the Purchase Order we shall be happy in providing you with the state of the art thru perforated cage for this site if the site survey conditions suggest that the cage to be of between 50db to 70 db. Also the second Ultrasound Machine is in our custody which we shall be installing at the site as specified by you once you obtain the PNDT Certification and give us clearance for its installation.”*

(emphasis ours)

62. The aforesaid letter has not been disputed by the learned counsel appearing on behalf of the OPs.
63. The Commission notes that in a commercial contract, the intention of the parties has to be gathered from the contract and other contemporaneous correspondence exchanged between the parties. Viewed in this backdrop, the Commission notes that the Purchase Order, as quoted above, categorically mentioned that the project included “see through RF cage” that necessarily required perforation to make it ‘see through’. If any doubt remained, the same also stood dispelled from the letter dated 17.07.2012 written by National Sales Director of OP-2 to the Informant, as noted *supra*. Not only this, the OP Group, instead, supplied lesser priced opaque cage and thereby also imposed unfair prices upon the Informant.
64. In view of the above, the Commission is of the firm opinion that the OP Group abused its dominant position in the relevant market by refusing to supply ‘See through Perforated RF Cage’ despite the same being part of the project. Further, instead of supplying perforated cage, the OP Group supplied lesser priced opaque cage and thereby imposed unfair prices also



upon the Informant. Such conduct is clearly an unfair business behavior and falls foul of the provisions of Section 4(2)(a)(i) & (ii) of the Act.

65. Further, the DG opined that the OP Group unilaterally altered the agreed terms of the sale contract to the detriment of the Informant by refusing to supply 'Head Coils' with each of the G-Scan Machine to the Informant.
66. The Informant alleged that OP Group offered to supply two Head Coils (which were under development) with no additional costs to the Informant as the same were already built-in into the purchase price of G-Scan MRI machines. On the other hand, OP Group denied that it ever agreed to supply Head Coils with the machines. It was contended that the supply of the Head Coil was not linked to the Purchase Order dated 22.09.2011 signed by OP Group with the Informant as the Head Coils were under development at that time. Moreover, as per the OP Group, if the Informant had any grievance regarding non-supply of Head Coils then the Informant should have pointed out that the same while receiving the G-Scan machines. It was argued that the Informant should have refused to acknowledge that G-Scan machines were received in good condition.
67. To appreciate the issue, it would be appropriate to first note the relevant part of the Purchase Order and the same is quoted below:

*“Special Term: It is mutually understood that the G-Scan does not come with Head Coil and this Purchase Order will not be linked to this matter. However, Dr. S K Sogani will visit Esaote SPA after the placement of confirmed order and evaluate the Prototype Head Coil. If mutually agreed the Prototype Head Coil will be provided as R&D work is in progress. However, upon the launch of the Head Coil which is CE approved, the same shall be provided/ replaced with the prototype coil for all the G-Scan machines supplied at no additional costs.*”



*It was mutually understood by Seller and Customer that EAPD/ Esaote will not be held liable at any time for the quality/ performance of the prototype goods supplied.”*

68. On a bare perusal of the Special Term as incorporated in the Purchase Order, it is evident that normally the G-scan machines did not include the Head Coils. However, as per the Special Term of the Purchase Order, once the placement of the order was confirmed and the prototype Head Coil was evaluated by Dr. S. K. Sogani (Partner, House of Diagnostics LLP), the prototype Head Coil was to be provided. This arrangement, as per the Special Term, was subject to the condition that the supply of prototype Head Coils was to be mutually agreed upon. Thus, the OP Group could have refused to supply the prototype Head Coils by not consenting to the transaction. This, however, does not detract from the liability of the Informant to provide CE approved Head Coils which were to be provided under the agreed terms which is evidenced from the use of verb “shall” as contained in the Special Term of the Purchase Order noted above.
69. The Commission also observes that the OP Group committed itself to supply Head Coils to the Informant which is further corroborated from the e-mail dated 13.09.2013 of Mr. Massimo Guerra, Global Marketing Director of OP-1 sent to the Informant. The same is noted below:

*“Dear Dr. Shubham,*

*Thanks for your kind mail.*

*As you are aware the PO committed to deliver the units with the current coils available.*

*The Head Coil is a very interesting opportunity for us and we would really appreciate your inputs and support to sustain this request in front of our R&D.*

*As a matter of fact the visit of Dr. S. K. Sogani to Italy was really helpful to move in this direction.*

*It will be my personal commitment to keep on sustaining this request.*



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*I will get back to you as soon as possible with some updates on the matter.*

*Thanks*

*Best Regards,*

*Massimo Guerra”*

70. At this stage, it is apposite to refer to the endorsement made at the foot of the Special Term of the Confirmed Performa Offer which reads as “+ IPP (Investment Protection Programme)” which was signed by Mr. Massimo Guerra of OP-1. As the Offer did not explain the meaning of IPP, the DG referred to dictionary to understand the meaning thereof. In this regard, it was noted by the DG that ‘Investment’ which is the first word is followed by two more words ‘Protection’ and ‘Programme’. It was further pointed out that the word ‘Investment’ is a Noun, the dictionary (Merriam-Webster) meaning of which is ‘the outlay of money usually for income or profit’ and the meaning of the word ‘Protection’ is ‘the act of protecting’. The word ‘Programme’ refers to ‘a planned series of future events or performances’.
71. On a holistic reading of these words, it emerges that IPP refers to a commitment by the OPs that the capital invested by the Informant will be protected by the OP Group. This was also found to be corroborated by the DG by the fact that IPP was written after Special Term of providing CE approved Head coils with ‘+’ sign. Accordingly, the DG construed the meaning of the term as a commitment given by OP Group to the Informant to develop and provide the Head Coils so that the Informant could maximize its return on investment of purchasing the three G-Scan MRI machines. This understanding was also noted to be in harmony with the commitment given by OP-1 to its prospective customers through its website of guaranteeing the hardware and software upgrades under the programme called ‘EVOlution’.
72. In view of the above discussion, the Commission is of the considered opinion that the OP Group ought to have delivered the CE approved Head



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Coils to the Informant and the submission of the OP Group that IPP only referred to the terms of the offer given to the Informant such as five year warranty and option of 42 months deferred payments, is not only misconceived but is also an attempt to wriggle out of the contractual obligations with the benefit of hindsight.

73. Accordingly, the Commission holds that the OP Group acted unfairly and thereby abused its dominant position by refusing to provide Head Coils with the machines to the Informant in contravention of the provisions of Section 4(2)(a)(i) of the Act.
74. Further, the DG examined yet another allegation levelled by the Informant against the OP Group. It was alleged that the OP Group unilaterally changed the price of Comprehensive Maintenance Contract (CMC) in respect of G-Scan MRI machines supplied to the Informant from Rs. 6.5 lakh per year for three G-Scan machines to Rs. 6.5 Lakh per year for each G-Scan machine after the expiry of warranty period (5 years) *i.e.* for a period starting from 6<sup>th</sup> year to 10<sup>th</sup> year of installation of the machine.
75. The Commission notes that the issue is confined in a very narrow compass and can be decided in light of the contractual obligation agreed upon by the parties under the Purchase Order dated 22.09.2011. The DG reproduced the pages of the Purchase Order in a sequential manner at pp.252 to 255 of the DG Report. The relevant portion of the Purchase Order is noted below:

*“Warranty*

- 5 years comprehensive warranty from the date of installation*
- CMC Rupees 6.5 lakhs/annum from 6-10 years (inclusive of taxes)”*

76. On the one hand, the Informant stated that CMC of Rs. 6.5 lakhs per annum was in respect of all the three G-Scan MRI machines whereas the



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OP Group argued that this price of CMC, which was to be charged after expiry of the warranty, was for the period starting from 6<sup>th</sup> year to 10<sup>th</sup> year, was per machine per annum and not for all the three machines.

77. Having perused the Purchase Order, it is evident that the contention urged by the OPs is not only flawed but also does not seem to be borne out of the plain tenor of the Purchase Order. It is evident that the Purchase Order from the beginning itself categorically mentions that it is meant for procuring the three G- Scan MRI machines. Further, while mentioning the items which a G-Scan consists of, it also mentions the total price of the three G- Scans leaving no doubt that the Purchase Order was a cumulative document for all the three G-Scans. As such, there can be no doubt that the other obligations/ conditions as incorporated in the Purchase Order have to be read in respect of all the three G-Scan MRI machines. The contention of the OP Group that the relevant portion of the Purchase Order which is the subject matter of contention has to be read for each G-Scan machine is based on selective reading of the document. Accordingly, the Commission holds that the OP Group has demanded arbitrary charges in clear derogation of its contractual obligations by abusing its dominant position. Such conduct is clearly hit by the provision of Section 4(2)(a)(ii) of the Act which prohibits a dominant undertaking from imposing unfair prices. The consumers of the OP Group are further placed at a disadvantageous position due to the fact that OP-1 has given exclusive rights to OP-2 for providing after sale services for G-Scan machines and for supply of spare-parts in respect thereof. On perusal of 'Distribution Agreement' dated 09.02.2011 which OP-1 has entered into with OP-2, it is clear that exclusive rights have been given to OP-2 for supply of spare parts and for providing after sales services to the consumers of the G-Scan MRI machines in India. Such exclusivity not only limits the provision of services in after sale market but also denies market access to third party service providers. Hence, such conduct also contravenes the provision of Sections 4(2)(b) & (c) of the Act.



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78. Lastly, the DG examined the allegation made by the Informant that the OP Group, by entering into a revenue sharing arrangement with another diagnostic centre in Delhi *i.e.* Star Imaging and Path Labs (P) Ltd. (Star), has used its dominant position in one relevant market of selling and servicing the ‘G-Scans’ to enter into another relevant market of providing MRI scans in weight bearing positions to the patients in Delhi.
79. The Informant alleged that after selling the machines for full cost to the Informant, OP Group entered into a revenue sharing arrangement with Star and Path Labs (P) Ltd. which resulted in *de facto* situation of G-Scan MRI machine being supplied to Star, “free of cost” and also “free of maintenance cost”. By virtue of this arrangement with Star, the OP Group was running the same machine (G-Scan MRI machine) and was providing the same services *i.e.* the MRI scans in weight bearing positions to patients which the Informant was providing after purchasing the G-Scan MRI machines from the OP Group. The Informant stated that as a consequence of the said arrangement, the OP Group became competitor of the Informant in the market of providing weight bearing MRI scans to the patients. As a competitor, the OP Group was seeking to finish the competitors like the Informant by applying predatory pricing. It was stated that once the manufacturer itself becomes a service provider by commercially using the machines, there was no way that a person who purchased the machines for full value could compete with the manufacturer. The services provided by the Informant were same as the services being provided by the OP Group in collaboration with Star. Since there was a revenue sharing arrangement of the OP Group with the competitor of the Informant, the OP Group has financial interest in ensuring that no services are provided to the Informant and the machines purchased by the Informant become unusable, thereby killing the competition which otherwise could have been there.
80. The DG analyzed the revenue sharing agreement entered into between the OP Group and Star Imaging dated 01.11.2013. On perusal of the terms



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and conditions contained therein, it emerged that the MoU was entered into between Star and OP-2 to facilitate the recovery of the outstanding amount in respect of G-Scan MRI machine sold by OP-2 to Star.

81. The DG, however, pointed out the discriminatory behaviour of the OP Group on the basis of generous after-sales service agreement offered by the OP Group to Star in comparison to very poor and overpriced after sales service provided to the Informant. In this regard, the DG pointed out that the OP Group had guaranteed 95% uptime of G-Scan MRI machine installed with Star without charging any extra amount apart from the price originally agreed upon. Moreover, for any downtime greater than 5% (any period greater than 18.25 days), OP-2 had agreed to compensate Star by Rs. 7000/- per day for the downtime. If this was contrasted with the allegations made by the Informant, which were also found to be established by the DG that the OP Group was charging exorbitantly for the supply of spare parts and had taken no responsibility for frequent breakdowns of the G-Scan machines installed with the Informant, it is evident that OP Group was indulging in discriminatory market practices. As pointed out by the DG, in a fair competitive world, the Informant, being the largest purchaser of the G-Scan MRI machines at least in India through a single order as per available data, should have got better terms and conditions in after sales service deal than Star which was defaulter in payment to the OP Group.
82. In this regard, it is also revealed from the DG Report that the OP Group had not assured either any uptime or downtime restrictions to the Informant. Such conduct is clearly discriminatory and is violative of the provisions of Section 4(2)(a)(i) of the Act.
83. However, on analyzing the revenue sharing agreement entered between the OP Group and Star, the Commission is of opinion that the allegation of the Informant that OP Group had utilized its dominant position in one relevant market to enter into another market by entering into revenue sharing agreement with Star is not made out. Nor is there any material to



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suggest that OP Group in association with Star was using predatory pricing to kill competition in the market of provision of weight bearing MRI scans.

### Conclusion

84. In view of the above discussion, the Commission is of the considered view that OP Group has violated the provisions of Section 4(2)(a)(i), 4(2)(a)(ii), 4(2)(b) and 4(2)(c) of the Act, as detailed hereinabove, by abusing its dominant position in the relevant market.
85. Accordingly, OP Group is directed to cease and desist from indulging in such conduct that has been found to be in contravention of the provisions of the Act, as noted above.
86. So far as imposition of monetary penalty is concerned, it would be apposite to refer to a recent decision of the Hon'ble Supreme Court of India in *Excel Crop Care Limited v. Competition Commission of India & Anr.*, Civil Appeal No. 2480 of 2014 decided on 08.05.2017. One of the issues which fell for consideration before the Hon'ble Supreme Court in this case was as to whether penalty under Section 27(b) of the Act should be imposed on total/ entire turnover of the offending company or only on "relevant turnover" *i.e.* relating to the product in question?
87. After referring to the statutory scheme as engrafted in Section 27 of the Act and analyzing the case law at length, the Hon'ble Supreme Court opined that adopting the criteria of 'relevant turnover' for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties. While reaching this conclusion, the Hon'ble Supreme Court recorded the following reasons:

*When the agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section*



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*3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the 'maximum penalty' imposed in all cases be prescribed on the basis of 'all the products' and the 'total turnover' of the enterprise. It would be more so when total turnover of an enterprise may involve activities besides production and sale of products, like rendering of services etc. It, therefore, leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of 'relevant turnover'.*

88. Thus, the starting point of determination of appropriate penalty should be to determine relevant turnover and thereafter, to calculate appropriate percentage of penalty based on facts and circumstances of the case.
89. Coming to the facts of the present case, the Commission notes that the infringing anti-competitive conduct of the parties pertained to sale of dedicated standing/ tilting MRI G-Scan machines in India and as such, for the purposes of determining the relevant turnover for this infringement, revenue from sale of such machines alone has to be taken into account.
90. The Commission now proceeds to decide the appropriate quantum of penalty.
91. It may be noted that the twin objectives behind imposition of penalties are: (a) to reflect the seriousness of the infringement; and (b) to ensure that the threat of penalties will deter the infringing undertakings. Therefore, the quantum of penalties imposed must correspond with the gravity of the offence and the same must be determined after having due regard to the mitigating and aggravating circumstances of the case. The Commission is also guided by the judgment of the Hon'ble Supreme Court of India in *Excel Crop case (supra)* which enunciates the principle of proportionality. Proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in



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not suffering the punishment which may be disproportionate to the seriousness of the Act on the other.

92. On a careful consideration of the nature of the contraventions, the Commission decides to impose penalty on the OPs at the rate of 10 % of their average relevant turnover of the preceding three financial years arising out of sale of dedicated standing/ tilting MRI G-Scan machines in India. Taking the aforesaid factors into consideration, the total amount of penalty is worked out as follows:

(Rs.) (In lac)

Relevant Turnover for 2015-16	Relevant Turnover for 2016-17	Relevant Turnover for 2017-18	Average Relevant Turnover for Three Years	Penalty @ 10 % of average Relevant Turnover
0	280	0	93.33	9.33 (rounded off)

93. Accordingly, the Commission imposes a penalty of Rs. 9.33 lac on the OPs for the impugned conduct which has been found to be in contravention of the provisions of Section 4 of the Act, as detailed in the order.
94. The Commission directs the OPs to deposit the penalty amount within 60 days from the receipt of this order.
95. The Secretary is directed to communicate to the parties, accordingly.

Sd/-  
(Augustine Peter)  
Member

Sd/-  
(U. C. Nahta)  
Member

New Delhi  
Date: 27/09/2018

[Dissent Note by Chairperson at pp. 34-39]



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## DISSENT NOTE

### PER

**Mr. Sudhir Mital**  
**Chairperson**

1. I have perused the order proposed to be delivered by Members Mr. Augustine Peter and Mr. U. C. Nahta. For the reasons given below, I am unable to persuade myself to agree with the finding of contravention recorded against OP Group by the above Hon'ble Members.
2. As the facts and conclusions of the DG have been set out in detail in the Majority Order and therefore, I refrain from reproducing the same in great detail save and except the facts which are necessary for the present purposes.
3. The Informant is engaged in the business of medical diagnostics and diagnostic imaging services in India and is primarily aggrieved by the conduct of OP-1 for not supplying brand new 'Dedicated Standing/ Tilting MRI Machine' (G-Scan) and further that OP-1 has given exclusive servicing and after sales service rights to OP-2 who is abusing its dominant position. Further, as per the Informant, OP-2 also breached the condition of Purchase Order of the contract to the detriment of the Informant as light weight 'Perforated See through Cage' (PTC) and Head Coils, as promised along with the machines, were not installed. It was also alleged that the OPs entered into an arrangement with another diagnostic centre *i.e.* Star Imaging and Path Labs (P) Ltd. to supply the said machines, which made it difficult for the Informant to compete in this market.
4. For investigating into the abusive conduct, the DG first delineated the relevant market. After analyzing the evidences collected during investigation in light of the statutory provisions, the DG concluded that since G-Scan MRI machine which is capable of scanning human body in



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weight bearing positions is not considered by its consumers *i.e.* diagnostic centres as interchangeable with conventional MRI machines, the relevant product market in the instant case will be market for “Dedicated Standing/ Tilting MRI machines”. It was further noted by the DG that potential consumers of G-Scan machines are scattered in different parts of the country and seller of these machines has the distribution network and infrastructure not only to sell and supply the Dedicated Standing/ Tilting MRI in entire India but to provide after sales service, spare parts and other support, and as such, the relevant geographic market in the instant case would be the whole of India.

5. Accordingly, the DG delineated the relevant market as ‘market for standing/ tilting MRI machines in India’.
6. In this relevant market, the DG found the OP Group to command dominant position by noting *inter alia* that the other two manufacturers of such machines *i.e.* Fonar Corporation Ltd. and Paramed Medical Systems Ltd. did not operate in India. The investigation, thus, concluded that OP Group is the sole manufacturer and supplier of dedicated standing/ tilting MRI machines in India.
7. The Majority Order has agreed to the aforesaid conclusion of the DG holding OP Group to be in a dominant position in the afore-delineated relevant market.
8. In this regard, it is observed that a hospital/ clinic will consider various factors while making a decision to acquire diagnostic imaging equipment. The paramount consideration in this context would be whether needs of the patients would be effectively diagnosed so that hospitals/ clinics can manage and treat patients properly. Hence, for consumers *i.e.* hospitals/ clinics, dedicated or weight bearing MRI Scanners is only one of the potentially different options of diagnostic tools available in the market. From the perspective of consumers *i.e.* hospitals or clinics, there is sufficient inter-changeability between different types of diagnostic



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equipments, particularly between different types of MRI machines as there is no single factor that determines the solution for which a consumer opts. As per OP-2, in choosing a diagnostic tool/ MRI machine, the key factor considered by a consumer is which machine will make the best use of available resources taking into account contribution to effective diagnosis, cost and other factors.

9. It is observed that frequency of demand for a specific feature of a machine in the relevant patient population is likely to be an important factor shaping customer choice. The learned counsel appearing for OP Group has pointed out that demand for weight bearing MRI scans, is just about negligible. As such, there does not appear to be distinct demand for weight bearing MRI machines in India.
10. There also does not appear to be sufficient literature and evidence to suggest that a separate relevant market exists for standing/ tilting weight bearing MRI scanners. From the submissions made by the OP Group, it appears that its open G-Scan tilting MRI machines face competitive constraints from other types of MRI machines as well as other diagnostic equipments. No doubt, MRI machines may have a variety of different technological features relating to architecture, application, field strength, functionality, cost, space constraints and installation requirements; yet such technological features and functionalities do not make a separate product market. It is evident from the minuscule demand of such products that prospective purchasers do not take into account such add-ons as decisive factor while making their purchasing decision.
11. Undisputably, majority of the MRI scanners installed in India today are full-body, closed MRI scanners. Such scanners have essentially the same diagnostic function as dedicated MRI scanners.
12. In my considered opinion, the DG erred in defining the relevant market as the market for “dedicated Standing/Tilting MRI machines in India.” The weight bearing feature of Standing/Tilting MRI machines (like Esaote’s



G-Scan) is one of many features of MRI machines such as better image resolution, ‘open v. closed’ MRI machines, varying noise-levels, *etc.* Moreover, as pointed out by OP Group, the weight bearing functionality is by no means unique to the G-Scan. All MRI machines can have weight bearing functionality with the aid of a compression device, which can be added at a fraction of the cost of a dedicated tilting MRI machine. Regardless of functionalities, the ultimate purpose of the scans undertaken by an MRI machine is to provide a clear image for the purpose of diagnosing the problem suffered by a patient.

13. It also cannot be disputed that customers of MRI machines are sophisticated/ knowledgeable hospitals and diagnostic centers who consider a number of factors (with the ‘weight bearing’ functionality being one such factor among many) when making the purchasing decision of an MRI machines.
14. Further, as pointed out earlier, there is low frequency of demand of standing/ tilting MRI machines. This is evidenced from the submissions made by the OPs to the effect that Esaote had sold only 10 G-Scan (*i.e.* weight bearing dedicated MRI) machines in India in 11 years of its operations. This clearly indicates that on an average not even one machine was sold annually. If the scan results of such MRI machines are supposedly so dramatically different from conventional MRI machines in order to offer better patient outcomes, then the question which arises is as to why these machines are not being preferred by their customers. Thus, the customers had revealed their preference towards conventional MRIs over standing/ tilting MRI machines. Further, in order to sell these machines, the OP had to make considerable efforts and do negotiations. Had the features and functionality of the dedicated Standing/Tilting MRI machines in India been so distinct it should have resulted in more sales. The small size of the market indicates substitutability between the dedicated Standing/Tilting MRI machines and the other MRI machines. In such a scenario, it is difficult to construct a relevant market merely on the



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basis of some additional technical characteristics.

15. Also, OP has quoted two instances where DY Patil Medical college and Delta MRI and Scan center despite favorable offers from OP group on G-Scan machines chose to buy conventional MRI and ultrasound machines from other manufacturers. This shows there exists demand side substitutability of dedicated MRI.
16. Even if it is considered that the Standing/Tilting MRI machine constitutes a separate market when analyzed from the factors such as a difference in price and physical/technical characteristics, the boundary gets blurred when viewed from the perspective of intended use. The difference between the two kinds of MRI machines, if any, is not reflected in the preferences revealed by the customers given that the sales volume of the Standing/Tilting MRI machines is abysmally low. The fluidity of the boundary between the “two distinct” relevant product markets as recognized by the majority is therefore nebulous as the demand is being satisfied by both kinds of MRI machines. Rather, the preference is heavily for conventional MRI machines. Hence, the issue of dominance and abuse doesn't hold. Further, the market is too small to provide any incentive to monopolize and abuse the monopolistic power.
17. The negligible sales by the OP and the existence of demand side substitutability show that the OP faces strong countervailing buying power. It also shows that the demand for dedicated MRI machines is highly elastic in nature. Moreover, the negligible sales by OP over the years and the absence of other manufacturers of dedicated standing/tilting MRI namely Paramed and Fonar, in the Indian market shows that the demand for such machines is very low and the market does not exist. This shows that the diagnosis for musculoskeletal disorders is done with the help of other diagnostic tools not necessarily involving dedicated standing/tilting MRI.
18. In view of the above, I am of the considered opinion that the relevant



market cannot be narrowed to standing/ tilting MRI machines alone as any market delineation would have to necessarily include all MRI machines irrespective of some additional features or functionalities. Once the market is defined in this manner, the behavior of the OPs stands constrained by the presence of many other players such as GE, Philips Healthcare, Siemens, Hitachi and Toshiba, and the OP Group is a small player in such market of MRI machines.

19. For the aforesaid reasons, OP Group cannot be said to enjoy any market power in the market for MRI machines in India and in the absence of dominance, the question of abuse of market power does not arise. Accordingly, I disagree with the Majority Order and would dismiss the information.

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

New Delhi  
Date: 27/09/2018