

Justickets Pvt. Ltd vs Big Tree Entertainment Pvt. Ltd. & Other on 10 March, 2017

COMPETITION COMMISSION OF INDIA

Case No. 08 of 2016

Justickets Pvt. Ltd.
No. 42, Dr. Ranga Road, Mylapore,
Chennai-600004, Tamil Nadu, India.

Informant

And

Big Tree Entertainment Pvt. Ltd.
Wadeja House, Ground Floor,
Gulmohar Cross Road 7,
Near Tian Restaurant, Juhu Scheme,
Mumbai-400049, Maharashtra, India

Opposite Party No. 1

Vista Entertainment Solutions Ltd.
Level -3, 60 Khyber Pass Road, Newton,
Auckland, New Zealand.

Opposite Party No. 2

CORAM
Mr. Devender Kumar Sikri
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

Justice G. P. Mittal
Member

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

1. M/s Justickets Pvt. Ltd. ('Informant') has filed the present information under Section 19(1)(a) of the Competition Act, 2002 ('Act') against M/s Big Tree Entertainment Private Limited ('OP-1') and M/s Vista Entertainment Solutions Limited ('OP-2') alleging contravention of the provisions of Section 3 and 4 of the Act.

2. As per the information, the Informant (formerly known as Digital Box Office India Pvt. Ltd.), is engaged in the business of online movie ticketing since December 2013 mainly in the states of Andhra Pradesh and Telangana, through its website <https://www.justickets.in>. It also has a box office software called 'QuickTickets' that is provided to movie theatres free of cost, for selling tickets at the counter and also for the purpose of interfacing with the Justickets website or with any other movie ticketing website.

3. OP-1 is a company incorporated in India and is inter alia engaged in the provision of online movie ticketing through its website "BookMyShow.com"

(BMS). It earns revenue through its online movie ticketing business by charging a convenience fee on the tickets sold through its website. OP-2 is a company incorporated in New Zealand. It is a global leader in box office ticketing solutions and supplies box office ticketing software "Vista", which can be synchronized with the online ticketing websites through an Application Programme Interface (API). API enables the online ticketing platform to integrate with the Vista software for seamless data and information flow between the ticketing website/ application and the Vista software at specific sites/ screens. OP-1 is the only distributor for Vista box office software in India.

4. It is averred that OP-1 through BMS has been operating in the online movie ticketing space since 2007 and is a prominent player having a market share of approximately 90%. In the financial year 2014-15, out of 4 billion movie tickets sold in India for approximately 10,000 screens, BMS sold 50 million tickets in its addressable market of 500 million tickets for 2,700 screens. Recently, it also acquired Ticketgreen.com, a movie ticketing portal with a box office solution that carries out operations in the southern part of India having tie-ups with more than 100 cinemas for online ticket sales. OP-2, who is the supplier of Vista box office software, is stated to have 68% of market share in India. It is submitted that approximately 95% of the theatres across India (including multiplexes) using Vista are on the BMS portal. Also, most of the leading multiplex chains in India such as PVR, Cinapolis and Inox, utilise the BMS portal. The only multiplex chain that currently does not use the BMS portal is SPI Cinemas, which has its own online ticketing portal.

5. It is stated that in the financial year 2014-15, OP-1 sold approximately 50 million tickets earning revenue of INR 76.56 crore, while its major competitors such as Ticketnew.com and Informant sold 7 million and 3 million tickets and reported revenues of INR 9 crore and INR 1.88 crore respectively, for the same period. Thus, the combined market share of the competitors of OP-1 was less than 10% in the market for online movie ticket sales.

6. Further, it is averred that OP-1 is funded by prominent investors like Network 18, a media entertainment network. Even international investors like SAIF Partners and Accel Partners have funded OP-1 to the tune of around INR 300 crore through multiple rounds of funding. As BMS is the only online ticketing portal available to customers in most parts of India, therefore, consumers have a certain level of dependency on OP-1.

7. It is averred that OP-2 having a market share of 38% globally and approximately 68% in the Indian market, is a dominant player in the market for box office ticketing solutions, in relation to multiplexes and large cinema chains. Majority of theatres such as PVR, Cinepolis, Wave Cinemas, Fun Cinemas and Miraj Entertainment use Vista box office ticketing software.

8. In view of the above facts, it is alleged that OP-1 and OP-2 are dominant in the market for online movie ticketing portals in India and market for box office ticketing solutions in India, respectively. Further, it is alleged that since OP-1 is the exclusive distributor of OP-2 for the distribution of Vista in India, therefore, OP-1 through OP-2 is also dominant in the market for box office ticketing solutions.

9. It is alleged that OP-1 is abusing its dominant position by creating barriers for online movie ticketing portals from getting access to Vista API. In this regard, the Informant has submitted that OP-1 is leveraging its strong market position in box office ticketing software (acquired through exclusive distributorship agreement with OP-2) to protect the market position of BMS in the market for online movie ticketing portals in India by ensuring that OP-2 does not enter into agreements with Informant for Vista API. Further, OP-2's conduct of adopting an arbitrary policy of not granting access to Vista API to other online ticketing portals is also alleged to be abusive. Thus, the Informant has alleged abuse of dominance by each of the OPs in violation of Sections 4(2)(c) and 4(2)(e) of the Act.

10. In addition to the above, the Informant has alleged that as Vista is used for movie ticket bookings in a majority of multi-screen cinema theatres in India, it is an essential facility for the growth and expansion of online movie ticketing portals. In the facts of the case, the Informant has averred that OPs are not allowing Justickets access to Vista API for specific theatres, despite such theatres wanting to be on Justickets platform and having arrived at a commercial arrangement with it. Resultantly, the conduct of OP-1 and OP-2 in refusing to provide Vista API to the Informant or providing the same on case to case basis but with much delay, is alleged to amount to refusal to deal in violation of Section 3(4)(d) of the Act.

11. The Commission has perused the information, responses of the opposite parties and all material available on record. Also, the parties were heard on 14.09.2016.

12. From the information, it is apparent that the Informant has alleged dominance of OP-1 and OP-2 in the two relevant markets i.e., (i) Market for online movie ticketing portals in India and (ii) Market for box office ticketing solutions in India, respectively. Further, dominance of OP-1 through OP-2 in the market for box office ticketing solutions in India is also alleged.

13. So far as the first relevant market is concerned, OP-1 has contended that the same has been incorrectly defined as there is no difference between the online and offline market which are merely two different channels of distribution. Further, it is argued that there is no distinction between market for single screen and multiplex screen cinemas as ticketing portals operate for both multiplexes and single screens. Thus, the relevant market in the present case is the market for sale of movie tickets in India. OP-2 has stated that since it is a provider of comprehensive software to cinemas, there is no reason to define the relevant market for Vista to be the market for online ticketing solutions. At best relevant market in the present case would be the market for box office software provided to cinemas in India.

14. On dominance, OP-1 has submitted that it cannot be dominant in the market for the sale of movie tickets in India as for the purpose of assessment of dominance, both single screen and multiplex screens have to be taken into consideration. In such a market, OP-1's market share based on the number of screens for which it provides tickets would at most be < 25%. This estimated market share would be significantly diluted if it is considered that all sale of movie tickets for these cinemas is not through BMS portal and these screens use alternate online and offline methods for sale of movie tickets as well. It has been further argued that, notwithstanding the market share, OP-1 still cannot operate independently of the market forces as ultimately the sale of tickets is controlled by cinemas which exert significant countervailing buying power and also because the market is extremely dynamic with multiple players constantly entering the market. Further, OP-1 has contended that it cannot be dominant in the relevant market for box office ticketing solutions because it is only a non-exclusive distributor of the Vista Software and does not own the software or the API.

15. In the context of alleged dominance, OP-2 has denied the submission of the Informant that it is a global leader in box office ticketing software. It has submitted that 38% market share does not make Vista a market leader and that there are other players in the global market for box office ticketing software. Further, Vista software is not exclusive to movie theatres and can be installed by other entities. In any case, OP-2 has stated that dominance needs to be established in the relevant geographic market which is India. OP-2 has submitted that the data provided by the Informant which shows that it has a market share of 68% on the basis of multiplex screens is incorrect even at face value and does not establish Vista's dominance. It is submitted that in order to assess Vista's market share the notion of addressable market on which such market share has been computed is not correct as Vista software is provided to all types of cinemas - including multiplex and single screens. In such a market scenario, the total market size would include all screens in India. Assuming the same to be approximately 10000 screens, it would imply that Vista has an approximate share of 15-20%. Considering this and the fact that the cinema theatres can easily switch from one software to another with minimal cost and effort, Vista cannot be deemed to be dominant.

16. It is noted that with respect to alleged abuse by the OPs, the Informant has stated that, generally, box office ticketing solution providers provide APIs easily to the online ticketing portals for all cinemas for which they have an agreement with. However, OP-1 has categorically refused to grant access to Vista API to the Informant by acting in concert with OP-2. Further, even if there is no

outright refusal to provide access, OP-1 creates unnecessary hurdles for the Informant by delaying the entire process unreasonably. It is alleged that the practice adopted by OP-1 to provide access to Vista API only on a case to case basis, with significant delay at each opportunity, has caused significant opportunity losses to the Informant.

17. In response to this, OP-1 has stated that it is not a box office solution provider and does not own or control the distribution of Vista Software or Vista API. It is denied that OP-1 restricted market access of its competitors or leveraged its dominant position in the market for box office ticketing solutions to protect its online ticketing business. It is averred that there is no denial of any kind as Vista API has been provided to all cinemas mentioned in the information and to at least 20 other entities including online platforms. Further, the Informant himself has admittedly acknowledged that OP-1 has provided it with the requisite API to enable integration with the Vista software. It is stated that in 2015 when Justickets approached Vista seeking API access to interface with three cinemas viz. SPI cinemas, Miraj and Cinopolis, the same was provided after ensuring that Vista's confidential information is not used for any other purposes.

18. OP-1 has explained that once Vista software is licensed to a cinema, the cinema owns the API. When a third party, like the Informant wants access to the API, it needs to enter into a Non-Disclosure Agreement (NDA) with Vista to ensure that Vista's Intellectual Property Right (IPR) is protected. If API access is sought by an entity who has a competing box office software, Vista takes some cautious steps while granting access to API. This is because an entity providing competing software typically possesses technical capabilities to reverse engineer the API provided to it and gain access to confidential trade information of Vista or proprietary information of other vendors of the movie tickets. Thus, to avoid the possibility of API access unwittingly operating as a platform for information exchange and an enabler of IPR infringement, Vista takes a cautious approach when granting access to Vista API to such entities. Since Informant is also providing box-office software to cinemas in addition to operating an online ticketing platform for sale of movie tickets, similar cautious approach was taken with respect to the Informant also. OP-2, therefore, in order to implement an effective and appropriate mechanism to minimise the risk of dissemination of confidential and sensitive information of Vista and other entities, took some time in providing such API access. However, access was provided for all cinemas with, at most, a time lag of six months. It is also pointed out that such safeguards were put in place even with respect to OP-1. Further, it is submitted that as per the distribution agreement, OP-1 is obligated to ensure that OP-2's confidential information is protected. In this regard, similar contentions as of OP-1 have been made by OP-2 in its submissions.

19. Further, OP-2 has also denied that it is restricting access to other players in the market and has stated that there is no absolute bar in providing API access to ticketing portals. It is pointed out that the fact that the Informant is currently selling movie tickets of Miraj cinemas on its website clearly establishes that there is no denial. Further, the Informant itself has admitted that access has been provided to both SPI and Cinopolis cinemas. It is averred that the delay, if any, on account of plausible business justifications, viz. minimising the imminent threat of reverse engineering cannot be considered abusive, as every entity has a right to protect its own commercial interests.

20. With respect to the Informant's allegation that OP-1 and OP-2 have collectively abused their dominant position, OP-1 has stated that two distinct entities cannot be considered as a single economic entity for the purpose of the definition of 'enterprise' under the Act. Further, there is no concept of collective dominance under the Act. Even the Hon'ble Commission has held in several cases that there is no concept of collective dominance in the Act. Thus, OP-1 and OP-2 cannot jointly abuse their dominance. In this regard, OP-2 has submitted that the allegations pertaining to collective dominance by OP-1 and OP-2 are untenable, because they have no structural links nor are they part of the same group. OP-2 has also clarified that OP-1 operates only as a distributor of Vista in India; they operate in a vertical chain on principal to principal basis. Both are separate economic entities. OP-2 provides Vista software to all types of cinemas including multiplexes and single screens. OP-2 has stated that the Informant has simply attempted to abuse the legal process by filing the information

21. On the Informant's allegation of refusal to deal, OP-1 has submitted that the information fails to establish a contravention of Section 3(4) of the Act as even if there is a vertical agreement between the two entities, it cannot be considered to be a refusal to deal (vertical agreement) as defined under Section 3(4)(d) of the Act. Since cinemas have the option of simultaneously listing their theatres on multiple online platforms such as that of the Informant and BMS, therefore, it cannot be said that presence of BMS is precluding the possibility of the Informant to operate in the same market with the same cinemas. Thus, the possibility of foreclosure and the resultant AAEC is implausible. Further, OP-2 has submitted that box office software cannot under any circumstance be construed as an essential facility as it is a facility for which there are numerous providers. In fact, the Informant itself provides such facility. Also, in any case, irrespective of the fact whether it is an essential facility, Vista has not denied access to other players in the relevant market.

22. Having considered the aforesaid submissions of the OPs and also the Informant, the Commission notes that the primarily allegation of abuse by the Informant is denial of market access and leveraging of dominant position in one relevant market to protect the other relevant market by OPs in contravention of Sections 4(2)(c) and Section 4(2)(e) of the Act. This grievance emanates from three instances where the Informant had arrived at a commercial agreement with three cinemas to sell their movie tickets on its portal; however, its ability to sync its online platform with the cinema's back-end box office system was obstructed by the OPs. According to the information, when the Informant tried to enter into an arrangement with Miraj Group to sell their movie tickets on its portal, OP-1 blatantly refused to grant access to and integration with Vista to the Informant stating that no access can be provided to it as it has its own box-office ticketing solution, which competes with Vista. In a similar instance, when the Informant tried to enter into an arrangement with SPI cinemas, OP-2 asked OP-1 to allow access to the Informant; however, OP-1 delayed the process though it eventually allowed SPI cinemas to enter into an agreement granting access to the Informant. In another instance, though after considerable insistence by Cinapolis, OP-1 signed a tri-partite NDA; however, post the execution of the NDA, it released the API documents only with respect to the software layer owned by it and not Vista API which would have enabled the Informant to integrate directly with Cinapolis Vista server. Thus, it is submitted by the Informant that though it was able to secure APIs for two Vista using cinemas, it was only after facing high-handedness and continuous problems from OPs.

23. The Commission notes that, notwithstanding the above contentions raised by the Informant, the present position appears to be that the OPs have provided the Informant access to Vista API. From the material on record, it is apparent that the Informant is selling tickets of Miraj cinemas on its website and also has access to API for selling tickets of Cinopolis on its online ticketing platform. Further, the Commission notes that in the instance of SPI cinemas, the Informant has been granted access but has alleged delay by five months. In this regard, OPs had pointed out during the hearing and it is also borne out from the record that the Informant itself took around 3 months to respond to the email of OP-2. An e-mail annexed to the Information shows that OP had asked the Informant to complete and return a Non-disclosure Agreement ('NDA') vide email dated 11.02.2015 to which the Informant responded only vide email dated 05.05.2015. Subsequently, OP-2 allowed access to the Informant on 21.07.2015. Given these facts, it is apparent that the entire delay in the case cannot be attributed to OPs and that the Informant itself is also to blame for the delay in grant of access.

24. Having considered the facts of the case in totality, the Commission is of the view that though the OPs may have taken some time in granting access to API to the Informant, the access has neither been denied nor there is a refusal to deal. Further, the rationale given by OPs for the time taken in providing access to Vista API software to the Informant also seems a plausible explanation.

25. Thus, in light of above, the Commission is of the opinion that no prima facie case of contravention of Section 4 of the Act arises in the facts and circumstances of the case. In the absence of abuse, the Commission also does not find the need to get into the aspect of defining the relevant market and assessing the dominance of the Opposite Parties. Also, no case of contravention of provisions of Section 3(4) is found in the case. Accordingly, the matter is closed forthwith in terms of the provisions of Section 26 (2) of the Act.

26. The Secretary is directed to communicate to the parties accordingly.

Sd/-

(Devender Kumar Sikri) Chairperson Sd/-

(S. L. Bunker) Member Sd/-

(Sudhir Mital) Member Sd/-

(U. C. Nahta) Member Sd/-

(Justice G. P. Mittal) Member New Delhi Dated: 10/ 03/ 2017 Order under section 26(1) of the Competition Act, 2002 Per: Augustine Peter, Member

1) I do not concur with the reasoning set out by the rest of the Members in the majority order. This requires me to write a separate order. As the facts and other details relating to the case have already been set out in the majority order, I shall elaborate only on those which are deemed necessary for the purpose of my writing the same.

2) The case emanates out of an information filed by Justickets Pvt Ltd. (hereinafter called the 'Informant') on 27/01/2016 under section 19(1)

(a) of the Competition Act (hereinafter called as the 'Act') before the Competition Commission of India (hereinafter called the 'Commission') against Big Tree Entertainment Pvt Ltd (hereinafter called 'OP1') and Vista Entertainment Solutions Ltd (hereinafter called 'OP2') alleging violation of section 3 and 4.

3) As per the Information, the Informant, formerly known as Digital Box Office India Pvt Ltd, is a company incorporated under the Companies Act 1956 and is in the business of providing on-line ticketing and box office services since 04/12/2013 in respect of cinema theatres in the State of Andhra Pradesh and Telangana through a movie ticketing website 'http: //www.justickets.in' and claims to be a new entrant in the business of online movie ticketing. The Informant also has a box office software called 'QuickTickets' (hereinafter called as 'QT') which is provided to the theatres at no cost, for selling tickets at the counter and also for the purpose of interfacing with movie ticketing websites. It is stated in the information that QT has limited features in comparison to Vista and is primarily used by single screens or stand-alone multiplexes.

4) OP1, it is stated, is also engaged in the provision of online movie ticketing through its website 'bookmyshow.com' (hereinafter referred to 'BMS'). As per the Informant, OP1 is largely funded by media and entertainment groups such as Network 18, and private equity funds such as SAIF Partners and Accel Partners. As per the Informant, OP1 is expanding its presence in the country and is the market leader in the online movie ticketing space with a market share of approximately 90%, earning revenue by charging a convenience fee on tickets sold through the portal.

5) OP2, as per the information, is a company incorporated in New Zealand supplying a box office ticketing software (hereinafter called 'Vista') since 2007 used by almost all major theatre chains in India. It is stated that OP2 is a dominant player in the market for box office ticketing solutions having 68 % market share with respect to multiplexes and large cinemas in India and 38% global market share.

6) It is stated that approximately 95% of the theatres across India (including multiplexes like PVR, Cinepolis and Inox) that use Vista are on the portal of OP1. Further, the Informant states OP1 to have acquired Ticketgreen.com, a movie ticketing portal with a box office solution that has been focussing on the southern part of India and has tie ups with more than 100 cinemas for online ticket sales which is offered to theatres along with Vista belonging to OP2. Vista syncs with online ticketing sites by the issue of an Application Programme Interface (hereinafter called an 'API') to the on-line ticketing platform, whereby the online ticketing platform can integrate with Vista for a seamless data and information flow between the ticketing websites/application and Vista at specific sites/screens.

7) It is alleged by the Informant that OP1, as the sole exclusive distributor of Vista in India, is leveraging its strong market position to protect the market position of OP1 by ensuring that OP2 does not enter into agreements with the Informant for the Vista API and is thereby hindering the

Informant from having theatres using Vista on its platform which is needed by it in order to compete effectively in the market. This, as per the Informant, is in violation of section 4(2)(e) of the Act.

8) It is also the case of the Informant that OP2 has refused to deal with the Informant and does not allow the Informant access to Vista for specific theatres, despite such theatres wanting to be on the Informant's platform thereby contravening section 3(4)(d) of the Act.

9) Furthermore, the Informant alleges that OP1 acting in concert with OP2, has refused to provide the Informant access to Vista and the same was communicated to the business partners of the Informant called Miraj Cinemas. As per the Informant, this finds place in the Non-Disclosure Agreement (hereinafter called as 'NDA') between OP1 and Miraj Cinemas which states that the latter shall integrate with BMS Vista API of OP2 only and not with any third party.

10) Thus, the Informant alleges refusal to deal under section 3(4)(d), denial of market access under section 4(2)(c); and use of dominant position in one relevant market to enter into or protect the other relevant market under section 4(2)(e) of the Act by OP1 and OP2

11) On the basis of the above the Informant prays for the following reliefs:

a) Direct the Director General to investigate the matter;

b) In the interim, direct OP1 and OP2 to grant Vista API to the Informant for each theatre in respect of which the Informant has arrived at a commercial understanding with the cinema owners;

c) Ultimately hold the conduct of the OP1 and OP2 as violative of section 3 and 4 of the Act and consequently issue cease and desist orders and impose maximum possible penalty under section 27 of the Act; and

d) Pass any other orders as may be appropriate under the Act.

12) I have perused the information, allegations and all the material available on record. The Commission, by majority, have closed the matter in terms of provisions of section 26(2) and have held that no prima facie case of contravention of section 4 and section 3(4) of the Act arise in the facts and circumstances of the case. The Majority while coming to the above said conclusion notes that:

"...notwithstanding the above contentions raised by the Informant, the present position appears to be that the OPs have provided the Informant access to Vista API. For the material on record, it is apparent that the Informant is selling tickets of Miraj Cinemas on its website and also has access to API for selling tickets for Cinapolis on its online ticketing platform. Further, the Commission notes that in the instance of SPI cinemas, the Informant has been granted access but has alleged delay by five

months. As regards, OPs had pointed out during the hearing, and it is also borne out from the record, that the Informant itself took around 3 months to respond to the e-mail from OP2. An email annexed to the Information shows that OP had asked the informant to complete and return a Non-Disclosure Agreement 'NDA') vide email dated 11.02.2015 to which the Informant responded only vide email dated 05.05.2015. Subsequently, OP2 allowed access to the Informant on 21.07.2015. Given these facts, it is apparent that the entire delay in the case cannot be attributed to OPs and that the Informant itself is also to blame for the delay in grant of access. (para 23) "Having considered the facts of the case in totality, the Commission is of the view that though the OPs may have taken some time in granting access to API to the Informant, the access has neither been denied nor there is a refusal to deal. Further, the rationale given by the OPs for the time taken in providing access to Vista API software to the Informant also seems a plausible explanation." (para 24)

13) The Informant, essentially, appears to be aggrieved by the obstruction to access Vista API, predominantly used by cinema theatres having online ticketing facility, due to which he is not in a position to deal with a very large number of cinema theatres using Vista software. The Informant attributes the non-grant of Vista API to the dominant position of both OP1 and OP2 (collectively) and stresses that the OPs are abusing their dominant position in their respective markets by:

- a) Refusing to deal with the Informant by OP1 and OP2 in violation of section 3(4)(d)
- b) Denying market access to competitors of BMS by OP1 and OP2 by way of capitalizing on the exclusive distribution arrangement between the two OPs in violation of section 4(2)(c).
- c) Leveraging the dominant position in the market for box office ticketing solutions, to protect the online ticketing business of BMS by OP1 in violation of section 4(2)(e).

14) An analysis of the contravention of provisions of section 4, even though at a prima facie stage, starts with the OP qualifying to be an enterprise under the Act. It is nobody's case that the OPs are not enterprises under the Act. There is no doubt whatsoever that they are enterprises as defined under section 2(h).

15) The next step in the analysis of abuse of dominant position cases, is delineation of the relevant market. In delineating the relevant market in this case it is important to look at the nature of the market and to ascertain whether the parties are operating in the same relevant market or in different relevant markets. The Informant operates in the market of online movie ticketing through its website www.justickets.in and also possesses a box office software QT (provided to movie theatres for selling tickets over the counter and for interfacing with its website) which is claimed to have limited features in comparison to Vista, the comprehensive box office software of OP2. OP1 is in the market of online movie ticketing through its website www.bookmyshow.com

(BMS). Though OP1 sells tickets even for live events, plays etc. on their platforms, major share of its revenue is derived from sale of movie tickets. As far as OP2 is concerned, it supplies the box office software, Vista, which syncs with online ticketing sites by the issue of an API to the online ticketing platform providing seamless data and information flow between the ticketing website/application and Vista at specific screens.

16) To understand whether the Informant and OP2 are operating in the same relevant market or in two different markets, it is relevant to understand the functions and modus operandi of Vista as submitted in the response of OP2 dated 26/07/2016 (page 15 and 16, public version). As per OP2, "... Vista provides a comprehensive box office solutions to cinema theatres. Vista software provides various modules to a cinema theatre to manage various functions from managing food and beverages to handling movie ticketing..." (Page 15) "A box office software (including Vista software) also enables a cinema to integrate with its various vendors. Predictably, a box office software needs to communicate and integrate with other platforms who provide additional services and products. For instance, food and beverages, ticketing services etc. are often outsourced by cinemas. This integration is facilitated through an API." (Page 16) (Emphasis Supplied)

17) Moreover, the official website of Vista states that:

"Vista Entertainment Solutions (Vista) is the world's leading supplier of cinema management software, providing a comprehensive, interconnected suite of products that delivers a total enterprise solution for optimizing cinema management.

Currently, Vista has 38% of the global market in the large circuit segment (cinema exhibitors with more than 20 screens). With customers in over 60 countries, Vista is used by a wide range of cinema exhibitors, including some of the world's largest circuits. In excess of a billion cinema tickets are processed every year through Vista's cinema software..." (Emphasis supplied)

18) It is clear from the above extracts and other information available on record that the Informant is not a competitor of OP2 in the market of box office softwares as the software of the former, QT, is confined to the purpose of booking tickets and some other limited activities as compared to Vista which is much more comprehensive and is not only used for booking tickets but acts as total cinema solutions, managing various functions like food and beverages, communication with vendors etc (para 16 and 17 above). In other words, the software of OP2 provides a bouquet of solutions for the cinema theatres forming a cluster market.

Accessed from <http://www.vista.co/media/174928/ves-company-profile.pdf>, accessed on 24/01/2017 Cinema theatres tend to choose a set of box office solutions from the software providers in preference to software providers like the informant who have limited solutions. Thus while the

Informant and OP1 compete in the market for online movie ticketing, OP2 and the Informant are not, prima facie, competitors in the market for box office software as such as the latter has a relatively limited purpose box office software in comparison to the former.

19) As far as OP1 and OP2 are concerned, the former primarily operates in the market of online ticketing and the latter in the market for box office software. To proceed further in understanding the issues raised by the informant, the use of a box office software in the overall functioning of an online ticketing portal needs to be ascertained. While the online ticketing portals form part of the marketing/sales strategy of cinemas, a simple box office software assists cinema theatres in booking tickets by showing the availability of seats.

20) OP1, as per the material available on record, is the only distributor of Vista in India and provides customization and modification services to the cinemas which include providing an API to facilitate integration with other software. OP2 provides its API for Vista pursuant to certain modifications and layering which is undertaken at the behest of the cinema theatres. OP2 submits that the control over API ultimately rests with the cinema theatre concerned who is the licensee of the software and the decision to use API in its original form (i.e. as provided by Vista) or to use a slightly layered API, customized as per requirement, vests with the cinema theatres. Thus, the services of OP2, though distinct and separate from that of OP1 complement the services provided by the latter.

21) Proceeding to the issue of delineation of the relevant market, the Informant, delineates two distinct and separate relevant product markets, viz, the market for online movie ticketing portals; and the market for box office ticketing solutions. As far as the geographic market is concerned, the Informant submits that geographic market cannot be constrained to any single territory and must be viewed as encompassing the whole territory of India. It is the argument of the Informant that even though the effective pricing of the two mediums, i.e. online sales and retail sales are different (on account of additional convenience fees payable for the former), there is sufficient demand for online sales establishing that online sales form a distinct market serving a distinct consumer need of added convenience and certainty.

22) As against this, OP1 contends that there is no difference between online and offline markets as the two are just different channels of distribution of movie tickets and that at the narrowest level the relevant product market is the market for sale of movie tickets. OP 2 in its response delineates the relevant market as market for box office software provided to cinemas in India.

23) I am not convinced with the argument of OP1 that online sale of movie tickets is just an alternative distribution channel to sell tickets to the end consumer and that it cannot be considered as a separate relevant product market. From a consumer's perspective, online ticketing platforms provide a service that is distinct from the point of view of comfort and convenience of the consumer in as much as the ticket booking can be done from home or from workplace and is not substitutable with retail sales over the counter where long queues and uncertainty of availability of tickets are faced by the consumers. Online sales, additionally, entail an added cost incurred by the consumers in the form of fee, convenience fee or commissions, as the case may be, which makes it clear that the argument of OP1 that the two (online sales and over the counter sales) fall within the same relevant

market deserves rejection.

24) Having regard to the primary allegations of the Informant and having elaborated on the inter relationship between the products of OP1 on OP2, I am of the considered view that there are two separate though complementary relevant markets. With respect to OP1, the relevant market is the market for online movie ticketing as it is in that market that barriers are placed for the Informant to effectively compete with OP1. With respect to OP2, it is clear that it operates in the market for box office software. The relevant market with respect to OP2 is the market for Box office solutions. Therefore the relevant market for the purpose of the case consists of two separate but complementary markets, namely, the market for online movie ticketing; and the market for box office solutions. The relevant geographic market is the territory of India.

25) Before determining the prima facie dominance of the OPs in the relevant market, it is pertinent to touch upon the working relationship between the two OPs. Even though the agreement dated 01/07/2002 signed between OP1 and OP2 appointing OP1 as the distributor of Vista in India describes OP1 as 'non-exclusive distributor' of OP2, it is necessary to go behind the façade and to see the real working relationship between the parties. The actual nature and extent of relationship between the OPs is evident from the extract of the communication from OP2 placed on record by the Informant in his submissions dated 23/12/2015 which states:

"... With regard to us discussing things with Bigtree, I am not sure whether the relationship we have with Bigtree is clear to you. Bigtree is our partner in India and has been since 2001. I consider them essentially to be 'Vista India'. There would never be any business decision that we would make concerning India that we would make without appropriate discussion with Bigtree. So if you do not allow us to discuss things with Bigtree then you will considerably lengthen the time to make a decision on this matter...

...But if we are to progress in this matter, it is impossible for me to imagine how we can do that without ourselves discussing this matter with Bigtree..." (Emphasis Supplied)

26) The concern of competition law is not with competitors as such. The *raison d'être* of competition law is not to resolve the disputes between the parties as such but to restore competition when distorted in the market and that is the precise reason why competition related matters are 'enforced' rather than 'adjudicated' as the latter essentially refers to adjudication between two or more parties while enforcement involves correcting behaviour or conduct. In cases where the conduct of a player appears to be leading to distortion of the market it is necessary to dive deep into the factual context rather than to simply rely on plain words forming part of the agreement which is essentially the role of a civil court in contractual matters.

27) The Commission cannot be blindly led by what is superficially visible but rather is mandated to look carefully into the relationship between enterprises and probe the

nuanced nature of the relevant market and identify if the conduct of enterprise(s) in the market results in denial of market access, restriction of entry, market foreclosure etc. and consequent consumer harm to competition, competitors or consumers.

28) Thus, even though OP2 has entered into a 'non-exclusive distributorship agreement' with OP1, it has arranged the state of affairs in such a manner that OP1 has been assigned a crucial and indispensable role in the decision making of OP2 to grant/to refuse to grant access of the API of OP2's software to competitors of OP1. This, coupled with the fact that there is no other distributor of Vista in India, which is the software used by the vast majority of theatres which have online ticketing facility, raises OP1 to the status of a 'exclusive distributor' of Vista in India by whatever name described in the agreement (vide statement of OP2 quoted in para 25 above) and bestows upon it a commanding position to intervene in and on behalf of the business of OP2 in India.

29) It is important to look at how various clauses of the Software Distributorship Agreement entered into by OP1 and OP2, treat the position of OP1. By virtue of Clause 16.1 (Distribution), OP1, is mandated as follows:

16. DISTRIBUTION 16.1 ...

- (a) Market the Licensed Programme to potential customers by demonstration;
- (b) Distributing the Licensed Programme pursuant to an End User License Agreement; and
- (c) Installing the Licensed Program at the End User's premises.

30) Additionally, Clause 5.1 provides:

"the Distributor is not a partner or an agent of the Supplier and does not have any power or authority, directly or indirectly or through its servant or agents, to bind the Supplier to any agreement with a customer or other party or otherwise to contract, negotiate, or enter into a binding relationship for or on behalf of the Supplier, except as provided by this agreement...."

(Emphasis supplied)

31) A bare reading of the above clauses of the agreement makes it, prima facie, evident that OP1 has the power or authority to enter into legally binding relationships on behalf of OP2 as far as customers/third parties are concerned for the purposes mentioned in the agreement. It is noted that as per the agreement, distribution, which further consists of marketing, distribution and installing of the licensed product, is one such basic obligation of OP1 which has the effect of binding OP2 into legal relationships with customers/third parties. This makes OP1 assume the position of an agent of OP2 in India for the limited purposes mentioned in the agreement. It is to be noted that even though

the licensed version of the program software is provided by OP2, it is distributed and installed at the premises of the end users by OP1. Hence, the role of OP1 in the entire process of making available the licensed version of the software appears crucial and indispensable. In fact, it is OP2's own version about its relation with OP1 in the Indian market that it considers OP1 as 'Vista India' (para 25). Thus, the relationship between OP1 and OP2, as described in the agreement, for all practical purposes is that of a 'principal' and 'agent' in India in the market for box office software.

32) Let us see how this 'principal' and 'agent' relationship is treated in the other jurisdictions. In *Suiker Unie UA and others v Commission of the European Communities* [1975 ECR 1663] it was observed:

"in fact, if an agent works for the benefit of his principal he may in principle be treated as an auxiliary organ forming an integral part of the latter's undertaking, who must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking" (Para 480)

33) Moreover in *Minoan Lines SA v Commission of the European Communities* (2003) ECR II -5515 "The case-law shows that this sort of situation arises not only in cases where the relationship between the companies in question is that of parent and subsidiary. It may also occur, in certain circumstances, in relationships between a company and its commercial representative or between a principal and his agent.

In so far as application of Articles 85 and 86 of the Treaty is concerned, the question whether a principal and his agent or 'commercial representative' form a single economic entity, the agent being an auxiliary body forming part of the principal's undertaking, is an important one for the purposes of establishing whether given conduct falls within the scope of one or other of those provisions..." (para 125) "In the case of companies having a vertical relationship, such as a principal and its agent or intermediary, two factors have been taken to be the main parameters for determining whether there is a single economic unit: first, whether the intermediary takes on any economic risk and, secondly, whether the services provided by the intermediary are exclusive". (para 126) "In so far as concerns the question whether the services provided by the agent are exclusive, the Court has held that it tends not to suggest economic unity if, at the same time as it conducts business for the account of its principal, an agent undertakes, as an independent dealer, a very considerable amount of business for its own account on the market for the product or service in question (*Suiker Unie and Others v Commission*, cited above, paragraph

544)" (para 128) "It is clear from the documents before the Court that the criteria used in earlier cases to establish whether or not an agent and its principal form a single economic unit are satisfied in the present case because ETA did business on the market only in the name of and for the account of Minoan, it took on no financial risk in connection with that business and, lastly, the two companies were perceived by third parties and on the market as forming one and the same economic entity, namely Minoan."

(para 129) (Emphasis supplied)

34) Further in DaimlerChrysler AG v Commission of the European Communities (Case T- 325/01 (2005) ECR II- 3319: it was reiterated that:

"The case-law shows that this sort of situation arises not only in cases where the relationship between the companies in question is that of parent and subsidiary. It may also occur, in certain circumstances, in relationships between a company and its commercial representative or between a principal and its agent..." (para 86) (Emphasis supplied)

35) In yet another case, Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA (Case C- 217/05 (2006) ECR I - 11997 "In certain circumstances, the relationship between a principal and his agent may be characterised by such economic unity"

(para 39) (Emphasis supplied)

36) It is clear from the ratio of the above cases pertaining to EU that in certain circumstances the relationship between a principal and agent may be taken to be as possessing characteristics of 'single economic entity' (hereinafter called as 'SEE'). Applying the same to the case in hand, where the software licensing entity is so closely knitted with its sole software distributing and installing entity in India, it is natural that the cinema theatres and movie ticketing portals will view OP1 and OP2 as one entity for the purpose of granting licence and access to Vista API rather than two distinct entities even though they are neither structurally nor legally related to each other. Hence there is sufficient reason to prime facie conclude that OP1 and OP2 act as 'SEE' for the limited purpose of providing access to the license of the box office solutions of OP2 to online ticketing entities. The same would also be in consonance with the practice found in other jurisdictions like EU, Singapore etc.

37) Thus, when it comes to matters of abuse of dominant position and where either the 'principal' or 'agent' is dominant in the relevant market it is natural to treat them as 'SEE' for the purpose of inquiring into the alleged abuse of dominance. In many foreign jurisdictions, 'SEE' is exempt from the purview of anti-competitive agreements and by the same logic they are subjected to the rigours of the provisions related to abuse of dominant position. Prima facie both the 'principal' (OP2) and 'agent' (OP1) are dominant in their respective but complementary relevant markets and in that capacity, OP1 and OP2, as 'SEE', prima facie, are seen to deny/delay access to the software of OP2 with a view to restraining entry or expansion of competitors of OP1 to the market for online movie ticketing.

38) As regards dominance of the OPs, the information indicates that OP1 commands approximately 90% of the market share in the market for online movie ticketing and has sold approximately 50 million tickets reporting a total revenue of INR 76,56,00,000/- (Rupees seventy six crores and fifty six lakhs only) in the year 2014-15 as compared to Ticketnew.com, and the Informant which sold 7 million (INR 9,00,00,000/-) (Rupees nine crores only), and 3 million (INR 1,88,01,870/-) (Rupees one crore eighty eight lakh one thousand eight hundred and seventy only) respectively. As per the

Informant, the combined market share of the competitors of OP1 account for just above 10% in the market for online ticketing.

39) As far as OP2 is concerned, the information states that in the Indian market for box office ticketing solutions OP2 enjoys a market share of approximately 68% in relation to multiplexes and large cinema chains which provides for online ticketing. As per the Informant, OP2 provides box office software to approximately 1726 screens in the addressable market out of a total of 2700 screens which comes to 64%. In terms of multiplexes alone OP2's share is 68% as it provides the box office software of 1228 screen out of a total of 1814 screens. This share of OP2 would be larger in case market is narrowed further. In fact the box office software of OP2 provides a comprehensive software and is, in fact, an bouquet of services and the Informant is prima facie not in the same market as OP2 due to the fact that his box office software is of a limited purpose., while OP2 provides a cluster of services.

40) From the perusal of the information containing the allegations and the documents on record filed by the Informant it is, prima facie, evident, that OP1 and OP2 are dominant in their respective relevant but complementary markets. While market share is not the only factor for determining dominance, it is the starting point and in most cases the most crucial determinant. OP1 commands a market share of 90% in the market of online movie ticketing and the combined market share of its competitors too insignificant as compared to it. The de facto exclusive distributorship and the 'principal' 'agent' relationship that OP1 has with OP2 makes the dominance of OP1 all the more explicit and relevant for the case. OP2, in the market for box office ticketing software, possesses a market share of 68% in terms of multiplexes and large cinema chains in India. Thus, I, prima facie, hold OP1 and OP2 to be dominant in the market for online movie ticketing in India and in the market for box office solutions in India respectively.

41) Proceeding further to the analysis of abuse of dominant position, the Informant is primarily aggrieved by the conduct of OP1 and OP2 by denying it access to Vista API of OP2 which, as per the Informant, is violative of section 3(4)(d), 4(2)(c), and 4(2)(e) of the Act. To support his case, the Informant has quoted three instances where, after a commercial agreement was arrived at by the Informant with cinema owners to sell tickets on the portal of the informant, OP1 and OP2 have obstructed the same. In the first instance, after entering into an arrangement with Miraj Group to sell tickets, OP1 refused to grant access to and integration with Vista to the Informant citing the reason that under its arrangement with OP2, no access can be provided to the Informant as it has its own box office software competing with Vista. The Informant also placed a copy of the correspondence dated 21/09/2015 between Miraj Group and OP1 which reads:

"...As per the clause in the NDA, tie up with JustTickets would not be possible since they have their own ticketing application."

42) In the second instance, the Informant placed on record a correspondence dated 17/06/2015 between OP2 and SPI cinemas alleging that after entering into an arrangement with SPI cinemas, the Informant was granted access by OP 2 after a delay of 5 months. As per the Informant, the correspondence depicts that OP1 attempted to hinder the arrangement between the Informant and

SPI Cinemas by delaying the execution of the NDA between the two entities and thereby withholding access to the Vista API. The correspondence reads:

"... I am still waiting on a confirmation that the BT guys are okay with you doing the JustTickets integration..."

43) In the third incident, after considerable insistence by the Informant and Cinepolis, OP1 signed a tripartite non-disclosure agreement. However post the execution of NDA, OP1 released the API documents of a software layer owned by OP1 and not Vista API which would have allowed the Informant to integrate directly with Cinepolis Vista Server.

44) On a close look at the allegations and the material on record, OP1, is alleged to be abusing its exclusive arrangement with OP2 is trying to deprive the Informant of the opportunity to expand itself in the market for online movie ticketing by denying access to and integration with Vista API. This conduct of OP1, prima facie, amounts to denial of market access which could not only cause significant detriment to the business of the Informant but also diminish the scope of activity of other competitors of OP1 in the market for online movie ticketing portals. The harm suffered by the informant is apparent from the fact that due to the conduct of OP1 it is being restrained from performing the agreements it has entered into with various cinema houses such as Miraj. Moreover, the conduct of OP1 is also, prima facie, detrimental to the customers and/or consumers and competition at large as the customers and cinemas both appear deprived of choice in the market for online movie ticketing portals and such unrestrained reliance of customers on OP 1 is likely to enable it to exploit them further. Thus, the conduct of OP1, prima facie, constitutes denial of market access to the Informant in violation of section 4(2)(c). It is also prima facie evident that OP1 has used its position as a de facto exclusive distributor and agent of OP2, and thus acting as a 'SEE' with OP2 has protected its business of online movie ticketing using the strength of dominance in the market for box office software, for apparently shielding its business of online movie ticketing from competition. While the concept of collective dominance is not recognized in section 4 of the Act there is prima facie reason to believe that the de facto exclusive arrangement between OP1 and OP2 and the 'principal' and 'agent' relationship between the two read with the statement of OP2 as quoted in para 25 above, both together constitute a SEE, exposing itself to the rigours of the provisions of section 4.

45) Further, the conduct of OP2, prima facie, is not only in contravention of section 3(4)(d) and 4(2)(e) but also of 4(2)(c). Section 4(2)(c) is wide which is evident from the plain words of section 4(2)(c) which reads:

'indulges in practice or practices resulting in denial of market access in any manner'. I am of the prima facie view that not only has OP2 indulged in practices of not giving access of Vista API directly without undue delay and dithering to the Informant, but also appears to have denied market access to the Informant indirectly by allowing OP1 to flex uninhibited muscle power in the form of deciding to grant or not to grant access to API, in contravention of section 4(2)(c).

46) Therefore, in my view, the three instances placed on record by the Informant, are sufficient to hold a prima facie case against the OPs, which necessitates investigation.

47) The Majority is of the view that the rationale given by the OPs is a plausible explanation for the delay in providing access to Vista API. I am unable to accept this conclusion. One or two instances of providing access after protracted delay cannot be treated as argument sufficient to conclusively contradict the allegation of 'denial of market access in any manner' by dominant player. Further, access delayed for months and/or being granted after a lingering delay is as good as access denied.

Moreover, an order under section 26(2) is a final order which cannot finally determine the rights and obligations of parties on the basis of mere plausibility as projected by the OPs notwithstanding that the conclusiveness of conduct cannot be tested at this stage.

48) Therefore, the alleged conduct of OP1 in creating hindrance for other online ticketing portals getting access to Vista API by using its de facto position as an exclusive distributor and also as an agent of OP2 this action as a 'SEE', and the conduct of OP2 of adopting an apparently arbitrary policy of not granting Vista access to other online ticketing portals amounts, prima facie, to abuse of dominant position by each OPs in their respective relevant but complementary markets. The conduct of OP1, prima facie, is in violation of Section 4(2)(c) and 4(2)(e) and that of OP2 is, prima facie, in contravention of section 3(4)(d) and 4(2)(c) of the Act warranting an investigation by the Director General (hereinafter called as the 'DG'). Besides OP1 and OP2 acting as a 'SEE', being in 'principal' and 'agent' relationship has, prima facie, used the dominant position in the market for box office software to protect and further OP1s dominance in the market for online ticketing in India. Investigation by the DG is warranted in this regard to bring out the nature of relationship between OP1 and OP2 which, prima facie, is one of 'SEE'.

49) Accordingly, the DG is directed to cause an investigation into the above matter thoroughly, looking into all allegations made by the Informant and bringing out the violations of Competition Act within a period of 60 days. In case the DG finds sufficient evidence against either or both the OPs in contravention of the provision of the Act, it shall also investigate the role of the persons, who at the time of such contravention, were in charge of and responsible for the conduct of the business of OPs involved so as to fix responsibility of such persons under section 48 of the Act. DG shall give opportunity of hearing to such persons in terms of section 48 of the Act.

50) Nothing stated in this order shall tantamount to a final expression of opinion on merit of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.

51) The Secretary is directed to inform the DG accordingly.

Sd/-

(Augustine Peter) Member New Delhi Date: 10/ 03/ 2017