



सत्यमेव जयते



Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 03 of 2017

In Re:

Bharti Airtel Limited
Bharti Crescent,
1, Nelson Mandela Road,
Vasant Kunj, Phase-II,
New Delhi-110 070

Informant

And

Reliance Industries Limited
Maker Chambers- IV,
Nariman Point, Mumbai-400 021

Opposite Party No. 1

Reliance Jio Infocomm Limited
9th floor, Maker Chambers- IV,
Nariman Point, Mumbai-400 021

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

Mr. Justice G. P. Mittal
Member



सत्यमेव जयते



Appearance during the preliminary conference held on 20th March, 2017:

For the Informant:

Mr. Gopal Jain, Senior Advocate
Mr. Duaris J. Khambata, Senior Advocate
Mr. Vijay Kumar Aggarwal, Advocate
Mr. Sameer Chugh, Director (Legal)
Mr. Atul Dua, Advocate
Mr. Niraj Barkakati, Executive
Mr. Ankush Walia, Advocate
Mr. Param Tandon, Advocate
Ms. Kriti Awasthi, Advocate
Mr. Harsh Kaushik, Advocate
Ms. Prashanti, Advocate

For Opposite Party No. 1:

Mr. Amit Sibal, Senior Advocate
Mr. Hiten Sampat, Advocate
Mr. Sasi Prabhu, Advocate
Mr. Susmit Pushkar, Advocate
Mr. Dhruv Rajain, Advocate
Ms. Sakshi Aggarwal, Advocate
Mr. Ritin Rai, Advocate
Mr. Rajagopal Venkat Krishnan, Sr. VP (Legal)
Mr. Srijan Sinha, Advocate

For Opposite Party No. 2:

Mr. Ramji Srinivasan, Senior Advocate
Mr. Hiten Sampat, Advocate
Ms. Shelly Saluja, Advocate
Mr. Sunil Gupta, VP
Mr. Srijan Sinha, Advocate
Mr. Aabhas Kshetarpal, Advocate
Mr. Bhavun Agarwal, Advocate

Order under Section 26(2) of the Act

1. The information in the present case has been filed by Bharti Airtel Limited (hereinafter referred to as the '**Informant**') under Section 19(1) (a) of the Competition Act, 2002 (hereinafter referred to as the "**Act**") against Reliance Industries Limited (hereinafter referred to as '**OP-1**'/'**RIL**') and Reliance Jio



सत्यमेव जयते



Infocomm Limited (hereinafter referred to as 'OP-2'/'RJIL') alleging contravention of the provisions of Sections 3 and 4 of the Act.

2. The Informant is a global telecommunications company with operations in 18 countries across Asia and Africa. It provides 4G services in 21 telecommunication circles across India. The Informant is stated to be amongst the top three mobile service providers globally in terms of the number of subscribers. It offers 2nd Generation (2G), 3rd Generation (3G) and 4th Generation (4G) wireless telecommunication services, amongst other services. The Informant is also the first operator to roll out 4G Long Term Evolution (LTE) wireless telecommunication services in India.

4. OP-1 is stated to be one of the biggest private companies in India in terms of its size, revenue, assets and value, leading it to be one of the financially strongest companies in the country. OP-1 is engaged in several businesses such as exploration and production of oil and gas; petroleum refining and marketing; manufacture and sale of petrochemicals comprising polymers, polymer and fibre intermediates, textiles, retail; *etc.* It has been claimed that OP-1 has the largest market share in polyester fibre and yarn industry and petroleum products industry not only in India but also globally. OP-1 is also stated to be India's first private sector company to feature in the Fortune Global 500 list of 'World's Largest Corporations'.

5. As per the information, one Infotel Broadband Services Private Limited (hereinafter referred to as 'IBSL') won the spectrum auction in 2300 MHz band category on pan India basis in 2010. Subsequently, OP-1 acquired majority stake *i.e.* around 96 per cent in IBSL, which was later on re-named as Reliance Jio Infocomm Limited (*i.e.* OP-2). At present, OP-1 is stated to hold 99.44 per cent stake in OP-2. OP-2 was initially holding internet services



सत्यमेव जयते



provider (ISP) licence. Subsequently, it applied for migration of its ISP license to Unified License, which was granted by the Department of Telecommunications (hereinafter ‘DoT’) on 21st October, 2013 enabling it to provide the complete bouquet of telecom services including voice call services in all the 22 service areas across the country. The Informant has submitted that OP-1 has invested approximately Rs. 1,60,000 crore in OP-2 for setting up of the infrastructure for providing telecom services on pan India basis.

Facts and Allegations presented in the information:

6. The primary concern of the Informant relates to the free services being offered by OP-2 since the inception of its business *i.e.* from 5th September, 2016 under one offer or the other. This according to the Informant amounts to predatory pricing, in contravention of the provisions of Section 4(2)(a)(ii) of the Act. Further, OP-1 is alleged to be in contravention of Section 4(2)(e) of the Act as it has allegedly used its financial strength in other markets to enter into the telecom market through OP-2. Brief details of the facts and allegations presented in the information in these regards are as under:

- 6.1. Based on the characteristics of service offered, price and intended use, “*providing 4G LTE services of telecommunication*”/ “*providing 4G-LTE services using 4G technology*” is the relevant product market in the present case. OP-2 is providing mainly 4G-LTE services of telecommunication in 20 circles/ telecommunication service areas in the country and, therefore, the relevant geographic market is “*whole of India*”. Accordingly, the relevant market in the present case is the market for “*providing 4G LTE services of telecommunication in India*”.



- 6.2. OP-2 has deployed the largest amount of spectrum for 4G LTE services in India. OP-2 has also entered into network and spectrum sharing arrangements with Reliance Communications Limited (hereinafter, “RCOM”). As per media reports, RCOM itself has announced that it has virtually merged with OP-2. OP-2 has an overall spectrum holding of 1107.8 MHz across all 4G-LTE bands and in all the bands, OP-2 is holding the largest spectrum *i.e.* 50 per cent in 2300MHz band, 56 per cent in 800MHz band (shared with RCOM) and 28 per cent in 1800MHz band. OP-2 is offering seamless 4G services using LTE technology in 800MHz, 1800MHz and 2300MHz bands through an integrated ecosystem. These bands are the most efficient bands for offering LTE services in any part of the world. Further, the telecom network of OP-2 comprises of approximately 2.43 lacs Base Transceiver Stations (BTS), which is approximately 18 per cent of the total BTSs installed by the entire industry and 66 per cent of the overall 4G LTE BTS in the country. OP-2 also owns and holds the largest Optical Fibre Cables (OFC) network in the country. Based on the press release dated 16th January, 2017 of OP-2, it is evident that it has a subscriber base of 72.4 million as on 31st December, 2016, which makes it India’s top carrier by mobile broadband user base, surpassing the Informant and all other telecommunication service providers in the country. These facts demonstrate the dominant position enjoyed by OP-2 in the relevant market.
- 6.3. Upon roll out of its services, OP-2 announced ‘*Jio Welcome Offer*’ under which data, voice, video and the full bouquet of Jio applications and content was available to the subscribers absolutely free, commencing from 5th September, 2016 and ending on 31st December,



2016. Telecom Regulatory Authority of India (TRAI) curtailed the period of the said offer till 3rd December, 2016. However, OP-2 continued the same till 31st December, 2016 in complete disregard of the directions of TRAI. Subsequently, OP-2 launched a new offer for its subscribers viz. ‘Happy New Year Offer’, whereby it gave all its users unlimited data, voice calls and messages until 31st March, 2017. OP-2 also provides an exclusive offer for iPhone users viz. ‘Jio iPhone offer’ offering unlimited local, STD, and national roaming on voice calls on any network in India, 20 GB of 4G data per month, unlimited 4G data during night, 40 GB Wi-Fi data and unlimited Short Message Service (SMS) from 1st January, 2017 to 31st December, 2017.

- 6.4. OP-2 is the only telecom operator in the Indian market to have announced and committed free services in respect of voice calls (both within and outside its network), SMS and roaming irrespective of the volume of usage. Such free services are offered notwithstanding the regulatory requirement of “calling party pays”, whereunder OP-2 is required to pay interconnection charge of 14 paisa per minute for calls by its subscribers to customers of other network. ‘Jio Welcome Offer’ and ‘Happy New Year Offer’ of OP-2 amounts to zero pricing as well as ‘free voice calls for life’. These clearly demonstrate that OP-2 is providing telecom services below its average variable cost with the sole intention of eliminating competitors. Offers of OP-2 cannot be regarded as measures to meet competition as no other telecommunication operator in the Indian market is offering services free of cost or below cost or free unlimited voice calling on the networks of other operators. Further, none of the other operators are offering free voice calls to any of their customers given TRAI’s direction that predatory pricing is prohibited.



सत्यमेव जयते



- 6.5. Such conduct of OP-2 amounts to predatory pricing in contravention of Section 4(2)(a)(ii) of the Act. OP-2 has been able to indulge in predatory pricing because of the funds provided to it by OP-1. Thus, OP-1 is using its financial strength in other markets to enter into the telecom market through OP-2, in contravention of Section 4(2)(e) of the Act.
- 6.6. To support the allegation of predatory pricing, reliance has been placed on the decisions of the Commission and the Competition Appellate Tribunal in the case filed by MCX Stock Exchange Limited alleging predatory pricing by National Stock Exchange of India Limited (Case No. 13/2009), judgment of the High Court of Ontario, Canada in *Regina v. Hoffmann-La Roche Limited* (30 O.R. (2d) 461), decision of the European Court of Justice in the matter of *France Telecom SA v. Commission of the European Communities* (Case C-202/07 P) and the Guidance on the European Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).
7. In addition to the above, the Informant has alleged that OP-1 and OP-2 have entered into an agreement whereby OP-1, being in position of holding unlimited fund and resources, has allowed unfettered access of its funds to OP-2 so as to cause and likely to continue to cause an appreciable adverse effect on competition within the relevant market. It has been stated that under the said agreement, it seems that OP-2 can continue to provide services below cost, and charge tariffs which are predatory in nature with the intent of eliminating competition, such that the subscribers of OP-2 are not charged a penny until OP-2 creates a monopoly or near monopoly in the market.



According to the Informant, such agreement/ arrangement between the Opposite Parties causes appreciable adverse effect on competition and squarely falls within the scope of mischief prohibited under Section 3(1) of the Act.

Preliminary conference with the parties:

8. The Commission considered the information in its ordinary meeting held on 23rd February, 2017 and also had a preliminary conference with the parties. The Commission has gone through the averments made in the information, the documents filed by the parties and perused the record.

9. During the preliminary conference, the learned senior counsel appearing for the Informant reiterated the facts and allegations presented in the information. On the other hand, the learned senior counsel for OP-2 contended that: (a) OP-2 is a new entrant in the telecom market facing competition from entrenched players like the Informant, Vodafone and Idea; (b) It is not appropriate to confine the relevant product market to 4G LTE services, rather the relevant market should be defined as the bouquet of all telecommunication services offered by different telecom operators; (c) 4G services could also be offered using the most efficient band of spectrum *i.e.* 1800 MHz, which is largely held by the Informant and used for offering 2G services; (d) If the whole of 1800 MHz spectrum is taken into consideration for the purpose of providing 4G services, the spectrum holding of the Informant will substantially increase and OP-2 would not emerge as holding the largest 4G compatible spectrum so as to make it a dominant enterprise; (e) It is evident from the recent annual report of the Informant that it does not distinguish between the telecommunication services provided through 4G technology and other technologies such as 2G and 3G; (f) The aggregate of investments made by the Informant into the



सत्यमेव जयते



telecommunication market is much more than that of the Opposite Parties and thus, the funds raised by OP-2 from OP-1 cannot be regarded as any market power possessed by them; and (g) Considering the subscriber base, size, resources and economic power of other players in the telecom market, it is not appropriate to attribute dominant position to OP-2, who is a new entrant in the market and its offers are only in the nature of promotion and penetration to show its existence to the customers.

10. The learned senior counsel for OP-1 submitted that the Informant has made implausible submissions regarding leverage of dominant position and anti-competitive agreement by OP-1. Merely making investments into a telecom start-up could neither be construed as leverage of dominant position nor an anti-competitive agreement.
11. In response to the contentions of the Opposite Parties, the learned senior counsel for the Informant submitted that the unique characteristics of 4G LTE technology such as speedy downloads, elevated voice excellence, advanced infrastructure requirement and the need for customers to have 4G compatible mobile instruments, make it different from 2G and 3G services. To its support, reliance was placed on the decisions of the Commission in *Shree Gajanana Motor Transport Company Limited v. Karnataka State Road Transport Corporation* (Case No. 85 of 2016), *Exclusive Motors Private Limited v. Automobili Lamborghini S. P. A.* (Case No. 52 of 2012), *Jeetender Gupta v. BMW India Limited* (Case No. 104 of 2013) and *Ravi Beriwal v. Lexus Motors Limited and Another* (Case no. 79 of 2016) to suggest that 4G LTE services as a product market can be differentiated from 2G and 3G services. Reference was also made to the decision of the European Commission in the matter of *Wanadoo Interactive* (COMP/38.233) where high-speed and low-speed internet access were differentiated and the market for high-speed



internet access for residential customers was taken as an independent relevant market. As regards the alleged dominance of OP-2, it was contended that no player other than the Opposite Parties has ever made such huge investment in telecom sector in such a short span of time and managed to garner such huge subscriber base in such less time.

***Prima facie* Analysis of the facts and allegations:**

12. The Commission has carefully considered the material on record and the oral submissions made on behalf of the parties during the preliminary conference.
13. The gravamen of the allegations of the Informant concerns free services provided by OP-2 since the inception of its business *i.e.* from 5th September 2016 under one offer or the other. This has been alleged as contravention of the provisions of Section 4(2)(a)(ii) of the Act by OP-2. In order to examine the impugned free services under the provisions of Section 4 of the Act, it needs to be ascertained whether OP-2 enjoys a dominant position in any relevant market. Only when such a position is established as being enjoyed by OP-2, it will be imperative to examine as to whether its impugned conduct amounts to an abuse or not.
14. On the question of relevant market, the Commission notes that wireless telecommunication services is the focal service in the instant case. While the Informant claims 4G LTE telecommunication services as the relevant product market, OP-2 has contended that there is no difference between the telecom services offered using 4G, 3G and 2G technologies. To its support, OP-2 has referred to various portions of the recent Annual Report of the Informant to suggest that it itself does not differentiate between telecom services provided using different technologies.



15. Telecom service providers offer voice and data services (such as access to email services or general internet services) together as a bundled tariff plan. With the emergence of smartphones, a wide variety of data intensive applications have been developed for mobile handsets. However, data consumption can also take place on a standalone basis, separate from voice services, through various devices such as mobile broadband dongles, 3G/4G enabled tablets or mobile 3G/4G routers. While voice and mobile broadband services for smartphones are sold/bought together in a bundled form and are used in the same mobile handset, mobile broadband over data-only devices is purchased and consumed independent of any voice services. However, all the telecommunication service providers are similarly placed to offer a variety of services designed for data-only device users and voice-enabled device users. Thus, distinction between the said services has not been found necessary in the facts and circumstances of the case. Accordingly, the relevant product/service appears to be wireless telecommunication services.
16. The Commission is cognizant of the fact that 4G technology is superior to 3G technology in certain aspects and will be operative only in 4G compatible mobile instruments. It will not be operative in a 3G compatible handset. However, a 3G network will be operative in a 4G compatible handset. This implies that the ongoing technology evolution is backward compatible *i.e.* between a new generation handset and an old generation network. Although consumers may have to incur additional cost towards buying new mobile instrument to avail 4G telecommunication services, considering the relatively lesser life span of mobile handsets and ongoing technological innovation, constant migration of existing subscribers to upgraded ecosystem is natural and inevitable over a period of time. From the supply side, any new entrant in the telecom market is likely to adopt the technology available at that time and



सत्यमेव जयते



later upgrade its network from time to time to migrate or additionally offer services based on newer technologies. In this ongoing process of evolution, it is not appropriate to differentiate wireless telecommunication services based on technologies used for providing such services. More importantly, the cost of 3G and 4G compatible mobile handsets and the tariff for 3G and 4G telecommunication services appear to be largely similar. It may also be relevant to point out that DoT grants uniform and same licence to all telecommunication service providers *i.e.* Unified Access Licence and it does not differentiate between service providers based on the technology deployed by them. The Commission notes that the decisions relied upon by the Informant regarding relevant market are specific to the facts and circumstances of the concerned cases and the same are of no relevance to the wireless telecommunication services impugned herein. In any case, relevant market is an economic reality to be determined based on facts and circumstances of each case. In view of the foregoing discussion, the Commission is of the view that the relevant product market in the facts and circumstances of the present case is the market for *'provision of wireless telecommunication services to end users'*.

17. As regards the relevant geographic market, it is noted that a consumer located in a particular place is not likely to avail telecommunication services from any other territory. He is likely to choose amongst the different options available in his locality. Further, a subscriber calling another subscriber located within the same telecommunication circle, irrespective of the physical distance between the two, is treated as a local call and any call terminating in other service areas is a long-distance call *viz.* Subscriber Trunk Dialling(STD). On the supply side, spectrum is the primary input required for offering wireless mobile communication services and the same is allocated to service providers through an auction process. India has been divided into 22 circles for such



सत्यमेव जयते



purpose and separate auction has been conducted for each circle. It further appears that telecommunication service providers determine circle wise tariff. In view of these factors, each of the said circles appear to constitute distinct and separate geographic market. Thus, the relevant geographic market in the instant case appears to be *'each of the 22 telecommunication circles in India'*.

18. Accordingly, the relevant market in the instant case is the market for *'provision of wireless telecommunication services to end users in each of the 22 circles in India'*.
19. Coming to the assessment of dominant position, the Commission notes that after the opening up of telecommunication market to private players, this market has witnessed entry of a number of players competing with each other resulting in decrease of tariffs and constant improvements in quality and variety of services. As per the TRAI press release dated 17th February, 2017, the wireless subscriber base of private telecommunication players at pan-India level constitutes 91.09% as against 8.91% held by public sector undertakings. The market is led by the Informant with a market share of 23.5% followed by Vodafone (18.1%), Idea (16.9%), BSNL (8.6%), Aircel (8%), RCOM (7.6%), OP-2 (6.4%), Telenor (4.83%), Tata (4.70), Sistema (0.52%), MTNL (0.32%) and Quadrant (0.27%). Further, in none of the 22 telecommunication circles, the Opposite Party has a market share higher than 7%. As may be seen, the market is characterised by the presence of several players ranging from established foreign telecom operators to prominent domestic business houses like TATA. Many of these players are comparable in terms of economic resources, technical capabilities and access to capital. Further, the market is characterised by the presence of several players resulting in sufficient choice to consumers who can shift from one service provider to another and that too with ease. This implies that dependence of consumers on any single telecom



सत्यमेव जयते



operator is not of any significant extent. Against this background, it is difficult to construe dominant position being possessed by OP-2 with 6.4% market share, which presupposes an ability to operate independently of the market forces to affect its consumers or competitors.

20. The Informant has alleged that OP-2 is dominant on account of its large spectrum holding in the most premier bands, which are compatible for offering 4G LTE services. It has been submitted that OP-2 holds 50 per cent of the spectrum in 2300 MHz band and 28 per cent of 1800 MHz band deployed for LTE network. Further, pursuant to the network and spectrum sharing arrangement with RCOM, OP-2 has access to 35 per cent of 800MHz band as well. On the other hand, the learned senior counsel for OP-2 contended that such estimation is biased as the Informant holds the maximum spectrum in 1800 MHz band, which is the most efficient band amongst others. In this regard, it is observed that the extant regulatory requirements of DoT appear to cap the overall and band-wise spectrum holding by telecom operators, which to a large extent takes care of undesirable concentration of spectrum in the hands of few operators.



21. During the preliminary conference, the learned senior counsel for the Informant argued that OP-2 has unfettered access to the funds of OP-1, which is the largest private sector company in the country. The learned counsel for OP-2 referred to various portions of the recent Annual Report of the Informant to suggest that the Informant has also made huge investments in telecom market and is in a financially sound position. The Commission notes that financial strength is relevant but not the sole factor to determine dominant position of an enterprise. Considering comparable investments and financial strengths of competitors, the success of OP-2 in managing large scale investments does not suggest dominant position being enjoyed by OP-2. The Commission does not find it appropriate to hold OP-2 dominant in a scenario



सत्यमेव जयते



where its customers constitute less than 7 per cent of the total subscriber base at pan-India level, various functions of telecom service providers are regulated and entrenched players have been in existence for more than a decade with sound business presence, comparable financial position, technical capabilities and reputation. Even if one were to consider 4G LTE services as the relevant product market, OP-2 is not likely to hold dominant position in such market on account of the presence of the Informant, Vodafone, Idea, etc., who derive commercial and technical advantages due to their sustained and sound business presence in other telecom services. It needs to be appreciated that OP-2 is a new entrant, who has commenced its business recently *i.e.* from 5th September, 2016.

22. In the absence of any dominant position being enjoyed by OP-2 in the relevant market, the question of examining the alleged abuse does not arise. Notwithstanding this, the offers of OP-2 do not appear to raise any competition concern at this stage. All through the preliminary conference, the learned senior counsel for the Informant alleged that the impugned offers of OP-2 amount to below-cost pricing and has resulted in OP-2 gaining a huge subscriber base of around 72 million in a period of just 4 months. This, according to the Informant amounts to predatory pricing. However, the Informant has not demonstrated reduction of competition or elimination of any competitor nor has any intent to that effect is demonstrated. The Commission notes that providing free services cannot by itself raise competition concerns unless the same is offered by a dominant enterprise and shown to be tainted with an anti-competitive objective of excluding competition/ competitors, which does not seem to be the case in the instant matter as the relevant market is characterised by the presence of entrenched players with sustained business presence and financial strength. In a competitive market scenario, where there are already big players operating in the market, it would not be anti-competitive for an entrant to incentivise customers towards its own services



सत्यमेव जयते



by giving attractive offers and schemes. Such short-term business strategy of an entrant to penetrate the market and establish its identity cannot be considered to be anti-competitive in nature and as such cannot be a subject matter of investigation under the Act.

23. In view of the foregoing discussion, the Commission is of the considered view that no *prima facie* case of contravention of Section 4(2)(a)(ii) of the Act is made out against OP-2.
24. The Informant has also made contradictory submissions of the impugned free services of OP-2 as being an outcome of leverage of dominant position by OP-1 as well as an outcome of alleged anti-competitive agreement between OP-1 and OP-2. The Informant has not given any plausible explanation as to how the impugned free services is an outcome of unilateral conduct of OP-1 as well as an anti-competitive agreement between OP-1 and OP-2. The Commission notes that no agreement of the nature prohibited under Section 3 of the Act is discernible from the facts and allegations levelled by the Informant. As noted earlier, the impugned conduct of OP-2 has not been found as *prima facie* contravening the provisions of the Act prohibiting unfair pricing including predatory pricing. In the absence of any finding of anti-competitive conduct by OP-2, OP-1 cannot be held to be in contravention of Section 4(2)(e) of the Act just because it has made huge investments in OP-2. Mere investments cannot be regarded as leverage of dominant position, particularly when OP-1 itself is not engaged in business of providing telecom services or any activities incidental thereto. If one were to construe such investment as anti-competitive, the same would deter entry and/or expansion and limit the growth of markets. In view of the above, no *prima facie* case of contravention of Section 3(1) or Section 4(2)(e) of the Act is made out against the Opposite Parties.
25. The Commission, therefore, is of the view that no *prima facie* case of contravention of the provisions of Sections 3 or 4 of the Act is made out against



सत्यमेव जयते



the Opposite Parties. Accordingly, the matter is ordered to be closed in terms of the provisions of Section 26(2) of the Act.

26. The Secretary is directed to inform all concerned accordingly.

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

Sd/-
(Justice G. P. Mittal)
Member

New Delhi
Date: 09/06/2017