LAW1002 PROJECT REPORT

Case Study: Shri Sonam Sharma vs Apple Inc. Usa & Ors on 19 March, 2013

LAW1002:E+TE Slot
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Informant:
Shri Sonam Sharma

Opposite Parties (OPs):

- **Apple Inc. USA (OP1)**
- **Apple India Pvt. Limited (OP2)**
- **Vodafone Essar Limited (OP3)**
- **Bharat Airtel Limited (OP4)**

INTRODUCTION

The instant information filed on 30.05.2011 under section 19(1)(a) of the Competition Act 2007 (Act), having been taken on record by the Commission relates to allegations of anti-competitive agreements entered into by the OPs as also abuse of dominant position by them, in violation of various provisions of the Act.

Information

1. As submitted by the Informant, OP1 is an American multinational corporation that designs and markets consumer electronics, computer software and personal computers, best known for hardware products like Macintosh line of computers, iPod, iPhone and iPad. OP2 is the Indian subsidiary of OP1 through which it markets its products in India. OP3 and OP4 are leading mobile service providers in India, jointly having more than 30 crore Indian subscribers that account for almost 52% market share in the GSM market.

World wide sale of Iphone was 73.5 million .The Informant has further averred, on account of its unique features, iPhones cannot be substituted by any other smartphones available in the market. .

According to the Informant, OP1 and OP2 entered into some secret exclusive contracts / agreements with OP3 and OP4 for sale of iPhone in India, even prior to its launch; as a result of which OP3 and OP4 got exclusive selling rights for undisclosed number of years. The iPhones sold by OP3 and OP4 were compulsorily locked, thereby meaning that the handset purchased from either of them shall work only on their respective networks and none other.

Vodafone - Changed internet improvements bcz of that the iphones became no longer usable and they launched iPhone-specific plans.Vodafone and Airtel, the iPhone-specific internet plans were costly than normal internet plans, thus compelling not only existing customers to pay extra for using internet on their iPhone but also prospective iPhone purchasers to leave their respective network providers and to compulsorily opt for expensive mobile telephony services.

It has also been submitted that OP1 and OP2 permit iPhone users only those applications on their iPhones that have been approved by them and available

through their own online application store namely 'App Store'. If a purchaser of iPhone unlocks it to use the network service of other cellular service provider, or 'jailbreaks' it to use any unapproved third party applications, the purchaser loses all warranties on the handset. Further, no other third party applications can be run on iPhone unless the same has been approved by Apple. If, however, operating system of jailbroken iPhone is upgraded, the iPhone gets re-locked and all third party applications are deleted by the servers of OP1 and OP2 permanently. Informant has further alleged that OP 3 & 4 refuse to accept any iPhone for repairs at their authorized service centers if the same is not purchased from them.

The Informant has submitted that OP3 and OP4 have abused their dominant position by imposing unfair conditions on the purchasers of Apple iPhones by offering expensive subscription services and compulsorily locking the handsets to their respective networks and by threatening to void the warranty terms of such iPhones that have been unlocked and/or jailbroken by the users in order to use the same on the networks of their GSM competitors or to use unapproved third party applications on their iPhones. Also, OP3 and OP4 have used their dominant position in the GSM market to enter and control the iPhone market in India.

ALLEGATIONS

For the purposes of allegation pertaining to abuse of dominance (AoD), the Informant has claimed that OP1 enjoys a dominant position in the relevant market for the smartphones both in India as well as internationally, iPhone being largest selling smartphone in the world. The Informant has also averred that OP3 and OP4 jointly enjoy dominant position in the relevant market for GSM mobile telephony services in India, as they have almost 52% market share therein.

[GSM- Global System for Mobile Communications]

It has further been submitted that OP1 and OP2 have also abused their dominant position by imposing discriminatory conditions on such persons who have purchased their Apple iPhones from a source other than OP3 and OP4 by:
(i) refusal to accept the said handsets for repair in its authorized service centers;

(ii) refusal to allow access to Apple's App Store for the purchase and download of new applications to such iPhone users;

(iii) by denying to such users the latest upgraded operating software;

(iv) compulsorily relocking and disabling such handsets and permanently deleting all unapproved third party applications installed on such handsets whenever such users try to upgrade the operating software on their handsets; and

(v) limiting/restricting the relevant Market of iPhones as well as iPhone Applications in India.

This led to violation of Section 4(2)(a), (b), (c), (d) & (e) of the Act

Prima facie view of the Commission - Commission to pass speaking orders while passing directions and orders dealing with the rights of the parties in its adjudicatory and determinative capacity.

.The matter was considered in several meetings of the Commission. On the basis of written as well as oral submission by the Informant and information available in the public domain, the Commission was of prima facie view that there existed a case for DG to investigate in the matter and accordingly, vide its Order dated 30.08.2011, directed the Director General to cause an investigation under Section 26 (1) of the Act and submit a report thereon.

Director General of Police - DGP Sanjeev Dayal

DG INVESTIGATION REPORT

.Given the nature of allegations as highlighted by the Informant, DG has identified following concerns in the present case to carry forward the investigation:

• Did Apple enter into an exclusive arrangement with any cellular service provider for sale of its iPhone? If yes, did the practice have any adverse effect on business of other cellular service providers or limit the supply of iPhones?

• Were iPhones sold during 2008-2010 locked to the network of cellular service provider through which they were sold? Did the practice amount to tie-in arrangement between Apple and cellular service providers?

• Were iPhone users required to use only specific data plans? If yes, how these plans compared with other plans at that point of time? Did the practice amount to tying users of apple iPhone to the cellular service provider? Did it result in Appreciable Adverse effect on competition in the cellular service market in India?
• Were there conditions stipulated by Apple for development and downloading of applications on iPhones? If yes, did the practice lead to any appreciable adverse effect on competition?

• Was Apple India, Apple US dominant in the defined relevant market? If yes, did their conduct / practice amount to abuse of dominance in the relevant market?

• Were Airtel and Vodafone dominant in the defined relevant market? If yes did their conduct / practices amount to abuse of dominance in the relevant market?

• What are the best international practices and developments in the other jurisdictions?

PRELIMINARY OBJECTIONS

AIRTEL:

The prima facie order fails to consider that any dispute in relation to a telecommunication service is actionable under Telecom Regulatory Authority of India Act, 1997 and the Competition Act, 2002 cannot be invoked.

The Telecom Regulatory Authority of India Act, 1997
Competition Act 2002
TRAI - Telecom Regulatory Authority of India

A **network lock**, known by many names including SIM **lock**, simlock, or subsidy **lock**, is a technology that wireless communications carriers use to prevent the mobile phones they sell from **being** used on another **network**. Cell phones can be **locked** to a particular country, **network**, or subscriber identity module (SIM) card.

Apple iPhone 3GS is being sold from June, 2011 without its network being locked. For this reason, the issue raised in the information filed by MrSonam Sharma is academic and infructuous. The practice of locking the network on to the Apple iPhone though in accordance with international practice has been discontinued in India. (she made complaint then they banned in india)

Before the agreement the setting between apple and vodafone and airtel expired. The iPhone agreement expired much earlier than the date of prima

facie order and even the information as a result of which there is no subsisting agreement between Vodafone and Apple in relation to distribution of iPhone in India.

VODAFONE:

Additionally, the informant has not purchased any iPhone from Vodafone store nor is there any evidence on record to establish that the informant was charged a tariff which was discriminatory and higher than the normal tariff plans for the telecom services offered by Vodafone. The entire information is based on conjecture and surmises.

The Contract of Adherence (COA) was effective for a period of two years with effect from 16.4.2008 and the same is no longer in existence.

The arrangement was non-exclusive with Apple reserving its rights to sell the iPhone directly or indirectly to any other person. o The carrier (i.e, Vodafone) was required to give best telecom service plans (i.e, tariffs to its customers) o The carrier (i.e, Vodafone) was to allow the customers to use the unlocked iPhones on its network.

In relation to all three points highlighted above, as the agreement was nonexclusive, iPhones were available in India through a number of other distributors/channels and Vodafone being a telecom service provider provided the best tariff plans to its customers and Vodafone never imposed any restriction on its customers with respect to using unlocked phones. Therefore, there can be no violation. (VOdafone is saying that no restriction [unlocked or locked] phones)

The tariff plans as were provided to iPhone customers were the same and if not, even better than the normal plans offered to other subscribers. Further, the tariff plans, as approved by Apple were filed with the TRAI in August 2008 and were in full compliance with the TRAI regulations.Additionally, it is important to note that even if an iPhone specific plan was published, the customers always had complete freedom to choose from other plans which were not iPhone specific and rather the customer were spoilt for choice, given the range of plans available to them. Therefore, there is no question of Vodafone being able to discriminate with iPhone customers' vis-à-vis its other customers.

Additionally, MNP guidelines issued by TRAI that allow customers to move freely between various service providers do not leave any room for restricting customers from moving (to other service providers). Any issues in relations to restriction on movement of customers between telecom service providers would also clearly fall within the purview of the TRAI and or TDSAT.

The concept of "collective dominance" is not recognized under section 4 of the Competition Act. Both Airtel and Vodafone are separate legal entities with no structural links and with completely different board of directors and management. Therefore the question of "collective dominance" does not arise.

The iPhone agreement is no longer in existence and therefore, the investigation in so far as Vodafone is concerned is not going to lead to any plausible conclusion nor can any relief be granted against Vodafone, assuming but without admitting, that the alleged conduct is considered to be anticompetitive. Therefore, there is no continuing conduct of the alleged infringement.

iPhones are easily available in the open market and without any network locking. More importantly even the iPhones bought through Vodafone channels were unlocked as and when a request was made after following the due process. Further the TRAI's MNP regulations allow a customer to move from one service provider to another freely and consequently, the same customer can unlock his phone without any hassle. These facts clearly indicate that the allegations in the information are mere speculations and should be dismissed outright.

The investigation is limited to iphone agreement and tariffs associated with it.

There are no merits to the allegations raised by the informant. It is a well known fact that the Indian Telecom sector is highly competitive with a large number of service providers fiercely competing for market presence. As a result, the charges for the usage of telecom services in India are one of the lowest in the world. Further, the market for mobile phone in India is also highly competitive, dynamic and continues to see a large number of new entrants, which have displaced erstwhile stalwart players in the market.

iPhone agreement expired much earlier than the date of the Prima Facie Order and even the Information as a result of which there is no subsisting agreement between Vodafone and Apple in relation to distribution of iPhones in India. Any sale of iPhones through Vodafone channels (or its affiliated company) after the expiry of the agreement was purely a commercial decision to clear the existing unsold inventory.

Vodafone is a service provider of voice and data services, including internet connectivity to its customers and hence they do not control or restrict its customers from downloading applications which may or may not be authorized by Apple.

After the expiration of the iPhone agreement, there can not even be any continuing conduct by Vodafone pursuant to any infringing agreement as sought to be alleged by the informant.

DG investigation started - Moving Towards Conclusion

Airtel and vodafone are telling that the informant had not purchased the iphone from them in India. But DG is telling that the informant has purchased them in India and availed those cellular networks.

Apple entered into distribution arrangement with Airtel on 17.03.2008 and with Vodafone on 16.04.2008. DG has found that upon expiration, the agreement entered by Vodafone was not renewed, while agreement with Airtel was renewed with certain amendments. An agreement with Aircel was entered by Apple on 11.03.2011. DG has also submitted that Apple had approached other network operators like Reliance Communications, Idea Cellular, Tata DoCoMo to enter into a distribution agreement for selling iPhone but it did not materialize. It has also been submitted by DG that the agreement entered by Apple in India with various MNOs were for a specified period of two-three years at a given point of time. In view of the foregoing, DG has concluded that the agreement of Apple India and Apple Inc with Airtel and Vodafone for distribution and sale of 3G and 3GS models of iPhones was neither exclusive nor for very long / undisclosed duration. Accordingly, these agreements do not breach provisions of Section 3(4)(c) of the Act.

(The agreement btw apple and vodafone and airtel was real and valid it didn't broke the law)

Accordingly, DG has held that there is no appreciable adverse effect of the tie-in arrangement of Apple with Airtel and Vodafone on competition in the GSM cellular service market in terms of Section 19(3) of the Act.

DG has observed that in terms of the agreements, both Airtel and Vodafone were required to offer iPhone specific internet plans on the same or better terms than those offered to other customers. DG has stated that analysis of various internet plans offered by OP3 and OP4 did not reveal any indication of iPhone specific internet plans of Airtel being more expensive than other data plans. As regards Vodafone, DG has found that on account of the technical specifications stipulated in APN settings, only iPhone specific plans of Vodafone could have been used on iPhones till September 2010.

As regards allegations pertaining to restrictions imposed by Apple for downloading third party applications, DG has submitted that investigation did not reveal any evidence to indicate anti-competitive effect of the practice of Apple allowing downloading of those applications which are based on its operating system. In this context, DG has observed that while there are other alternate online application stores such as Google play etc. from where stores undertake some monitoring to deal with threats from malware, virus etc. Hence DG did not consider it appropriate to make a case in this regard.

Based on above findings, DG has concluded that Apple did not enter into any exclusive agreement with Airtel and Vodafone for sale and distribution of iPhones in India. By selling locked iPhones to the network of the distributing MNO, Apple entered into tie-in arrangement with Airtel and Vodafone in terms Section 3(4)(a) of the Act. However, analysis of various data and facts gathered during the investigation did not reveal any appreciable adverse effect on competition in the cellular service market in India, in terms of Section 19(3) of the Act. Investigation did not reveal any infringement on account of practices regarding use of only authorized applications on iPhones. Hence, no case for violation of Section 3 of the Act has been made. Since, Apple has not found to be dominant in the relevant market of smartphones in India and also neither Airtel nor Vodafone are found to be dominant in the relevant market of GSM cellular service providers in

India, therefore, no case has been made out against them for infringement of Section 4 of the Act.

The allegations in the present case relate to Section 3 on the anti-competitive agreements and to Section 4 on abuse of dominant position of the opposite parties. The specific competition issues that arise from these allegations are:

i. Appreciable adverse affect arising from such agreements;
ii. Abuse of dominance by the opposite parties by:
a) Imposing unfair conditions in the purchase of Apple iPhones
b) Imposing discriminatory conditions on users who had purchased their Apple iPhones from a source other than OP 3 and OP 4
c) Indulging in such concerted practices under the agreements/ understandings between them, which results in denial of access, to the other GSM network providers
d) Concluding contracts for the sale of iPhones subject to acceptance by other parties of supplementary obligations
e) OP 3 &OP4 using their dominant position in the GSM market to enter and control the iPhone market in India.

The Commission does not find any evidence to show that entry-barriers have been created for new entrants in the markets i.e. smartphone market and mobile services market by any of the impugned parties. Similarly, nothing has been brought to the notice of the Commission to reveal that existing competitors have been driven out from the market or that the market itself has been foreclosed.

Dec 2012, figures show that the Vodafone and Airtel has a dominant in terms of market share in the relevant market.

An issue has been raised by the informant that both Vodafone and Airtel hold more than 50% of GSM market, thereby making them dominant in the market, thereby making them dominant in the market. Also the commission notes that there is no indication of any sort of agreement between (V and A) that could be deemed anti-competitive. Therefore, it is not relevant to take cognizance of this piece of info in the given context, more so when they are competitors in the market. So no case of dominance under section 4 act.

According to Section 3 of the Act, "No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India".Section 3(4) of the Act highlights anti-competitive agreements between vertically related enterprise as "Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including--

(a) tie-in arrangement;
(b) exclusive supply agreement;
(c) exclusive distribution agreement;
(d) refusal to deal;

CONCLUSION

FINAL ORDER

On the basis of investigation and examination of the data the Commission does not find the OPs in a dominant position in their respective relevant market to establish violation of Section 4(2),(a),(b),(c),(d) and (e). No appreciable adverse effect on competition in the market of smart-phones and/or mobile service has been established, there is no contravention of Section 3 (4) of the Act. Accordingly, the case is ordered to be closed.